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RAICH V. GONZALES:
Ramifications on Future Commerce Clause Jurisprudence and Congressional Regulation

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INTRODUCTION

Imagine waking up one morning to find yourself with classic symptoms of the common cold—a sore throat, a headache, and a runny nose—what would you do? In most cases, you would simply head to your medicine cabinet or the local pharmacy for some medication to relieve your discomfort. Now, imagine if you woke up *every* morning with an inoperable brain tumor, a life-threatening eating disorder, seizures, or other serious ailments, with no legal medication to provide effective relief. What would you do? This was the situation facing Angel McClary Raich and Diane Monson. This article will explore how a recent ruling by the United State Supreme Court left Raich and Monson without any way to legally alleviate their pain using doctor-prescribed medical marijuana.

In order to demonstrate inconsistencies in the Supreme Court's ruling in *Raich*, this article will also present the background of the *Raich* case and federal regulation of marijuana, as well as an overview of recent case precedents interpreting the reach of the Commerce Clause. The various aspects of the *Raich* decision will then be examined, culminating in this author's argument that the Federal Controlled Substances Act's prohibition of the cultivation and possession of medical marijuana did *not* exceed the power of Congress, despite California's efforts to legalize medicinal usage. The Court was correct in striking down the California medical marijuana law; however, the reasoning employed by the various voting blocks on the Court appears inconsistent and contradictory when compared with prior case precedents.

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Inconsistency of this type is dangerous in a common law legal system. Although the Court ultimately reached a proper holding on the case, the means by which the Court reached that decision has paved the way for future confusion in this important area of constitutional law.

BACKGROUND

Raich, Monson and the Conflict between State and Federal Laws

Angel Raich and Diane Monson, both California residents, suffered from a myriad of incurable health problems. Raich was afflicted with an inoperable brain tumor, a life-threatening eating disorder, seizures, nausea, and chronic pain disorders, while Monson had severe chronic back pain and excruciating muscle spasms most likely caused by a degenerative spinal disease. Raich had used marijuana for five years as a medication to alleviate her pain. She obtained it from her two caregivers, who grew the marijuana using materials found solely within California.[1] Monson cultivated her own marijuana. Both Raich and Monson turned to marijuana after trying numerous other medications to no avail. All other medications had either been ineffective in curing the pain or caused even more painful effects.[2] Raich's physician believed that discontinuing her use of marijuana would result in excruciating pain, and likely death.[3]

On August 18, 2002, Federal Drug Enforcement Agency (DEA) agents came to Monson's home, seizing and destroying all six of her marijuana plants. The federal agents had determined that regardless of California law, the possession of marijuana plants was illegal under the Federal CSA.[4] On October 9, 2002, Raich and Monson (Plaintiffs) filed suit in the District Court for the Northern District of California against former Attorney General John Ashcroft and DEA Administrator Asa Hutchinson. They sought injunctive relief from the enforcement of the CSA and alleged that the CSA exceeded the power granted to Congress by the Commerce Clause.[5]

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[1] *Raich v. Ashcroft*, 352 F.3d 1222, 1225 (9th Cir. 2003).

[2] *Id*.

[3] *Raich v. Gonzales*, 125 S.Ct. 2195, 2200 (2005).

[4] *Raich*, 352 F.3d at 1225-26.

[5] *Id*. at 1224.

On March 5, 2003, the district court denied Plaintiffs' motion for injunction. On appeal, the Ninth Circuit reversed the district court's decision, ruling that Plaintiffs had "demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA was an unconstitutional exercise of Congress' Commerce Clause authority."[6]

The Supreme Court then granted certiorari and ultimately reinstated the district court's ruling in favor of the federal government. In doing so, as further explained in this article, the Court ruled that the Federal Controlled Substances Act, which trumped California's attempt to legalize local medicinal marijuana, was *not* an unconstitutional application of the Commerce Clause.

The Commerce Clause of the United States Constitution

The third clause of Article I, section 8 of the United States Constitution gives Congress the power to "regulate Commerce with foreign Nations, and among the several States…."[7] In exercising this power, Congress might go so far as to regulate local, *intrastate* production or consumption of particular goods. The courts are often asked to consider whether such a practice actually exceeds the scope of the Commerce Clause, meaning that such regulation has exceeded federal power.

The Federal Controlled Substances Act (CSA)

In 1969, President Nixon declared a federal "War on Drugs." To further the War on Drugs, Congress attempted to enact legislation consolidating existing drug laws, providing regulation of legitimate drugs, and strengthening enforcement against the trafficking of illegal drugs.[8] In 1970, the Comprehensive Drug Abuse Prevention and Control Act of 1970 (CDAPC) was passed. This broad scheme of federal legislative dealt with the trafficking and possession of "controlled substances" in a number of ways.

[6] *Id*. at 1227.

[7] U.S. CONST. art. I, § 8, cl. 3.

[8] *Raich*, 125 S.Ct. at 2201.

Title II of the CDAPC, referred to as the "Controlled Substances Act (CSA)," was intended to eliminate drug abuse while regulating the legal and illegal trafficking of controlled substances.[9] To accomplish its objectives, Congress created a system prohibiting any effort to "manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance.[10]

[9] The Controlled Substances Act provides:

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

21 U.S.C. § 801(1)-(6) (2005) (emphasis added).

[10] 21 U.S.C. 841(a)(1) (2005).

In this system, all controlled substances are placed into five categories called "schedules." Which group the drugs based on their accepted medical uses, their potential for abuse, as well as their psychological and physical effects on the human body.[11]

Based on this categorization, each schedule of controlled substances is federally regulated by a set of controls for the manufacture, distribution, and use of such substances. Congress classified marijuana as a "Schedule I" drug, essentially characterizing it as having high potential for abuse, no accepted medical use in treatment, and no safe method for use under medical supervision.[12] Under the Schedule I classification, production, possession, distribution, or use of marijuana anywhere in the United States is categorically *prohibited*, regardless of medicinal status.[13]

The California Compassionate Use Act (CUA)

Over time, the medicinal use of marijuana had gained significant support in some areas of the country, despite the Congressional finding that it had no acceptable medical use. In 1996, California voters passed Proposition 215, which resulted in the codification of the "Compassionate Use Act of 1996 (CUA)," making California the first state to authorize the limited use of marijuana for medicinal purposes.[14] The CUA protected the patients who had been prescribed marijuana for medical use, the doctors who had prescribed medical marijuana, and the caregivers of the patients who had grown or obtained the marijuana for legitimate medical use.

The CUA exempted these parties from criminal prosecution under state or federal laws.[15] In other words, the CUA applied *only* to those who were

[11] 21 U.S.C. § 812 (2005).

[12] *Id*. § 812(b)(1).

[13] *Id*.

[14] *Raich*, 125 S.Ct. at 2199.

[15] "The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

> "(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of

involved in the use of marijuana that had been prescribed specifically for *medicinal* purposes. The CUA did not disturb California's other laws prohibiting the *recreational* consumption, production, and sale of marijuana.[16]

Within the category of medical marijuana usage, the CUA posed a potential conflict with the federal CSA. Even the medical marijuana used, cultivated or prescribed within California still fell within the Category I prohibited classification under the CSA. Although the CUA spoke of immunity from prosecution from both state and *federal* charges, Congress had not acquiesced to this immunity. Thus, the federal law – if it was constitutional as applied to these California patients – would trump the California law, and immunity from federal prosecution would be lost. The only way patients like Raich and Monson could enjoy immunity from prosecution would be if they could convince the courts that the federal CSA was unconstitutional as applied to purely *intrastate* cultivation and use of medical marijuana.

LEGAL STANDARD

General Legal Standard

As previously mentioned, the legal standard for this case originates from Article I, section 8, clause 3 of the United States Constitution. Under the Commerce Clause, Congress has the power to "regulate Commerce with foreign Nations, and among the several States…."[17]

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cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

> *"(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.*
>
> "(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana."

Cal. Health & Safety Code § 11362.5 (West Supp. 2005) (emphasis added).

[16] *Id*. §§ 11357-11362 (West Supp. 2005) (emphasis added).

[17] U.S. CONST. art. I, § 8, cl. 3.

The legal question at hand is whether it is within Congressional authority under the Commerce Clause of the Constitution to regulate interstate markets for controlled substances by regulating even local production and consumption.[18] The extent of this federal power has been a topic of debate throughout the history of American jurisprudence. The push and pull relationship between the scope of federal and state power has hinged upon the Supreme Court's interpretation of the limits of the Commerce Clause.

Early in the Nation's history, the Supreme Court devised an "effect test" for analyzing such cases. Some federal laws passed this test even though they regulated *intrastate* behavior *if* that activity had a "substantial economic effect on interstate commerce."[19] The determination as to which "effects" met this standard was often the subject of legal dispute. Several aspects of the phrase "substantial economic effect on interstate commerce" have given courts cause for concern:

- How much effect rises to the level of "substantial"?
- What is the meaning of an "economic" effect on "commerce"?[20]
- How closely must a local effect be linked to "interstate" commerce?

Each of these questions could be answered narrowly or expansively. In the 1930s, for example, several federal laws meant to respond to the Great Depression were struck down by the Supreme Court. The Court was concerned that all local behavior might have distant repercussions in other states; however, most of the justices did not believe that the Commerce Clause was intended to give Congress such vast regulatory power. Thus, the Court only upheld laws regulating local behavior if the regulation had a "direct" impact in other states (as opposed to an "indirect" effect through a chain of other events).[21]

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[18] *Raich*, 125 S.Ct. at 2201.

[19] *Gibbons* v. *Ogden*, 22 U.S. 1 (1824).

[20] As discussed in detail, *infra,* interpretation of the "economic nature" of the regulated behavior was brought back into the spotlight with the 1995 *Lopez* decision.

[21] In the early part of the 20th Century, a "direct effect" on interstate commerce was required. Local behavior could not be regulated by the federal government if the regulated activity only "indirectly" affected commerce in another state. See, *e.g., Schechter Poultry Corp. v United States,* 295 U.S. 495 (1935) (Congress could *not* regulate activities of local businesses that had been obtained poultry from a middleman, who had in turn obtained the poultry from another state).

The "effect test" reached its most liberal application with the Supreme Court's landmark ruling in *Wickard v. Filburn* in 1942.[22] With this case, the Court determined that Congress could regulate behavior with nothing more than a "trivial" effect on the national market because such activity, when taken in the aggregate, would have a "far from trivial" effect on interstate commerce.[23]

The Court also determined that any previous distinction between "direct" and "indirect" effect on commerce in other states was unwarranted.[24] Thus, a federal law that prohibited Filburn from producing and consuming a small amount of excess wheat was found constitutional, because the aggregate effect of that excess wheat production could impact the Depression-era interstate wheat market.[25] This expansive interpretation of the Commerce Clause continued until the mid-1990s.[26]

[22] *Wickard v. Filburn,* 317 U.S. 111 (1942).

[23] *Id.* at 127-28.

[24] Filburn argued that his individual production of wheat for personal use was not enough to substantially affect interstate commerce. However, the Court reasoned that even if the excess wheat was consumed solely at home, there would be a substantial effect on interstate commerce because the grower would no longer need to purchase that wheat on the open market. In determining these affects, it was felt by the majority that while individual instances of this violation may have seemed to have an insignificant affect on interstate commerce, when taken in the aggregate with other similar violations, the impact on the national economy would be substantial. *Wickard,* 317 U.S. at 119, 124, 127-28.

[25] The case involved a farmer, Filburn, who was penalized under the Agricultural Adjustment Act of 1938 (AAA). The AAA was a federal statute that prohibited excess wheat from being produced on farms in order to avoid fluctuations in the price of wheat normally caused by surpluses and shortages. *Wickard,* 317 U.S. at 114-15.

[26] See, *e.g., Katzenbach v. McClung*, 379 U.S. 294 (1964) (racial discrimination in a local restaurant *could* be regulated by Congress due to aggregation of local effect on sale of meat that had been obtained from a middleman, who had in turn obtained the meat from another state). This case demonstrates that the "direct" versus "indirect" test was no longer used, and it also demonstrates that a very small local effect would be viewed in the "aggregate" by imagining what would happen if other parties behaved in a similar manner. This approach leads to a very liberal interpretation of the "effect" test.

Modern Evolution of the Legal Standard

The year 1995 marked a controversial Commerce Clause opinion by Chief Justice William Rehnquist. While several cases since *Wickard* had tested the link between local behavior and an "effect" in other states, Justice Rehnquist reinvigorated examination of the "economic/commercial" aspect of the effect test. Despite vigorous dissent by four members of the Court, the message was clear. For the first time in over fifty years, federal laws might once again come under close Commerce Clause scrutiny by the Court.

United States v. Lopez (1995)

Alfonso Lopez, a twelfth-grade student, was found carrying a gun near his school which violated the federal Gun-Free School Zones Act of 1990 (GFSZA).[27] The GFSZA made it a federal offense for any individual to knowingly possess a firearm in a school zone.[28] Lopez was convicted of violating the GFSZA, but appealed the ruling based on the contention that the GFSZA exceeded the power of Congress to regulate local activity under the Commerce Clause. The Supreme Court Majority agreed with Lopez and ruled that because the GFSZA "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce ... the Act exceed[ed] the authority of Congress" under the Commerce Clause.[29] Therefore, the Court struck down the federal law.

In *United States v. Lopez*, the Supreme Court narrowed the scope of Congressional regulatory power under the Commerce Clause to activity that is economic "in nature," rather than merely economic in "impact." This was an important distinction made by the Court. Under this new interpretation, Congress would arguably have much less freedom to regulate than it did under prior interpretation of the clause. A closer look at both the majority and dissenting opinions by various members of the Court demonstrates the points of contention in this ruling.

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[27] *United States v. Lopez*, 514 U.S. 549, 551 (1995).

[28] The GFSZA provided that it shall be "unlawful for any individual to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. 922(q)(2)(A).

[29] *Lopez*, 514 U.S. at 551.

The *Lopez* Majority, which consisted of Chief Justice Rehnquist, along with Justices O'Connor, Scalia, Kennedy, and Thomas, found that the federal GFSZA could not be justified under the Commerce Clause. Chief Justice Rehnquist stated that local activity could not be regulated by the federal government under the Commerce Clause unless that activity was "economic in nature."[30] Because the Majority did not view gun possession near schools as activity that was economic in nature, the GFSZA did not pass this interpretation of the effect test. In response to dissenting members of the Court, Rehnquist argued that the other federal laws upheld in recent decades – even those regulating social issues such as racial discrimination – had been upheld as applied in commercial (rather than educational) settings.[31]

Chief Justice Rehnquist further stated that since the GFSZA was not part of a larger scheme regulating economic activity, it could not have been held constitutional based on prior Commerce Clause cases. A few vague sentences within his opinion raised the possibility that if the GFSZA had been part of a larger scheme which regulated economic activity, it might have been constitutional.[32] However, the language was not definitive. Rehnquist

[30] *Id*. at 567-68.

[31] According to Justice Rehnquist: "First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining, … intrastate extortionate credit transactions, … restaurants utilizing substantial interstate supplies, … inns and hotels catering to interstate guests, … and production and consumption of homegrown wheat.… These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id*. at 559-60 (internal citations omitted).

[32] In *Lopez*, the Court made it clear that the activity regulated must be economic in nature:

> "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. *Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction,* which viewed in the aggregate, substantially affects interstate commerce." *Id*. at 561 (emphasis added).

admitted that this passing reference did not apply in the case at hand; therefore, it should be treated as *dicta*. The direct holding of the case rested upon the Court's emphasis that the effect test can only be used to justify federal laws when the regulated activity is "economic in nature."

The Supreme Court dissenters in *Lopez* included Justices Souter, Ginsberg, Stevens and Breyer. Justice Stevens argued that guns "are both articles of commerce and articles that can be used to restrain commerce."[33] Therefore, the need to regulate the possession and use of hand guns in a particular market such as "school age children" should be well within Congressional power because of the "potentially harmful use" of these weapons.[34]

In other words, Justice Stevens saw a significant commercial *impact* (i.e., effect) of gun possession. However, because Chief Justice Rehnquist had articulated the effect test differently, the Majority did not view "economic *impact*" as a sufficient justification for federal intervention.

Concurring with Chief Justice Rehnquist's opinion, Justices Kennedy and O'Connor expressed the opinion that the GFSZA encroached on an area of power which was generally left under the authority of the states.[35] Their policy concern was that Congress was disrupting the balance of power between the states and the federal government. These Justices believed that it was their obligation to maintain the balance of power built into the Constitution.[36]

Writing a separate dissent on the policy issue, Justice Breyer argued that the Majority's ruling contradicted other modern Supreme Court cases. He felt that those cases had upheld congressional actions despite the fact that their

[33] *Id*. at 602 (Stevens, J., dissenting).

[34] *Id*. at 603 (Stevens, J., dissenting).

[35] *Id*. at 569.

[36] Justice Kennedy wrote in his concurring opinion: "Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers. Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances." *Id*. at 575 (Kennedy, J., concurring).

connections to interstate or foreign commerce were arguably less significant.[37] While commenting on this concern, Chief Justice Rehnquist argued that under an excessively liberal interpretation of the effect test, "any activity [could] be looked upon as commercial."[38] Rehnquist reasoned that if guns affected the learning environment and were considered economic, then Congress could go as far as enforcing a federal curriculum, thereby obliterating the constitutional limit to what the federal government could control or regulate.

The *Lopez* decision clearly divided the Court. Ultimately, Chief Justice Rehnquist had enough support, by a very narrow margin, to reexamine the "economic/commercial" element of the effect test. Following the *Lopez* ruling, the majority of the Court appeared to be looking specifically at whether the regulated behavior was economic in *nature*, as opposed to merely economic in *impact*.

United States v. Morrison (2000)

Five years later in *United States v. Morrison*, the Supreme Court looked to the *Lopez* reasoning and reaffirmed that congressionally regulated activity must be economic in nature. In *Morrison*, football players at the Virginia Polytechnic Institute were accused of sexual assault and sued under the Violence Against Women Act (VAWA), the federal statute providing a civil remedy for victims of gender-motivated violence.[39] As was the case in *Lopez*, the Court was divided along the same lines in the majority and the dissenting opinions.

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[37] While giving examples of less significant effects that were regulated under Commerce Clause and still found constitutional, Justice Breyer argued: "In *Perez v. United States*, the Court held that the Commerce Clause authorized a federal statute that makes it a crime to engage in loan sharking ('extortionate credit transactions') at a local level.… In *Katzenbach v. McClung*, this Court upheld, as within the commerce power, a statute prohibiting racial discrimination at local restaurants, in part because that discrimination discouraged travel by African Americans and in part because that discrimination affected purchases of food and restaurant supplies from other States … In *Daniel v. Paul*, this Court found an effect on commerce caused by an amusement park located several miles down a country road in the middle of Alabama because some customers (the Court assumed), some food, 15 paddleboats, and a juke box had come from out of state." *Lopez*, 514 U.S. at 625-26 (Breyer, J., dissenting).

[38] *Id*. at 565.

[39] 42 U.S.C. § 13981.

The *Morrison* Majority consisted of Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy and Thomas. Again writing for the majority, Chief Justice Rehnquist further clarified that in order for an activity to be regulated by Congress under the Commerce Clause, it must be economic in nature:

> With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity [and] thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.[40]

Since the VAWA regulated social behavior (gender-motivated violence) rather than economic activity, the *Morrison* Majority ruled that it was unconstitutional.

The *Morrison* Majority also noted that although some gender-motivated violence might take place in an economic establishment, the VAWA contained no language limiting its scope to such situations.[41] Chief Justice Rehnquist emphatically reiterated the need for a distinction between "what is truly national and what is truly local." His opinion also stated that the balance between federal and state power was best served by leaving regulation of gender-motivated violence to the states.[42]

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[40] *United States v. Morrison*, 529 U.S. 598, 613 (2000).

[41] In determining the constitutionality of the VAWA, the court reasoned: "Like the Gun-Free School Zones Act at issue in *Lopez,* § 13981contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime." *Id*.

[42] The Court eventually decided to "reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. … In recognizing this fact we preserve one of the few principles that has been consistent since the [Commerce Clause] was adopted. The regulation and punishment of intrastate violence has always been the province of the States." *Id*. at 617-18.

Similar to *Lopez*, Justices Souter, Ginsberg, Stevens and Breyer again dissented. Justice Souter argued that the *Morrison* case should have been differentiated from *Lopez* because Congress had a rational basis for enacting the VAWA; he cited large amounts of evidence that had been compiled by Congress demonstrating gender-motivated violence's economic *impact* on interstate commerce.[43]

As was the case with Justice Breyer's dissent in *Lopez*, Chief Justice Rehnquist countered by arguing that allowing Congress' findings to justify the VAWA would give Congress a broad police power traditionally reserved to the individual states. Rehnquist reasoned that Souter's logic would give Congress the authority "to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effect on employment, production, transit, or consumption."[44] Rehnquist believed that such an outcome would put more regulatory control in the hands of the federal government than the Constitution allowed.

Like *Lopez,* the *Morrison* decision continued to divide the Court. Chief Justice Rehnquist still had enough support, by a margin of one vote, to emphasize the "economic/commercial" element of the effect test. Once again, the majority of the Court looked at whether the regulated behavior was economic in *nature*, as opposed to merely economic in *impact*.

[43] Dissenting, Justice Souter argued, "One obvious difference from *United States v. Lopez* … is the mountain of data assembled by Congress, here showing the effect of violence against women on interstate commerce. Passage of the Act in 1994 was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business. The record includes reports on gender bias from task forces in 21 States, and its committees over the long course leading to enactment." *Id*. at 628-31 (Souter, J., dissenting).

[44] Similar to his position on Breyer's dissent in Lopez, Chief Justice Rehnquist argued that although "Congress found that gender-motivated violence affects interstate commerce 'by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business and in places involved in interstate commerce; … by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.' … if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence." *Id*. at 615.

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APPLICATION OF THE LEGAL STANDARD IN *RAICH*

By the year 2000, it seemed as if the Supreme Court had firmly ingrained its narrow interpretation of the Commerce Clause as exemplified in *Lopez* and *Morrison*. However, with the 2005 *Raich* decision, the debate regarding the scope of Congress' regulatory power over interstate commerce re-emerged. In *Raich v. Gonzales*, the Supreme Court held that the CSA's prohibition on the production and possession of marijuana, as applied to local production and possession for medical purposes in California, *was* constitutional under the Commerce Clause.[45] Both the application of the legal standard and the voting positions of two justices seemed to evolve once again.

Majority Position

The *Raich* Majority opinion was delivered by Justice Stevens and joined by Justices Kennedy, Souter, Ginsburg, and Breyer. In other words, the four dissenters from *Lopez* and *Morrison* were joined by Justice Kennedy to form a majority block in this case. Recall that the question before the Court was whether the federal CSA was justifiable under the Commerce Clause, even though it prohibited the local production and consumption of medical marijuana in all states, including California.[46] California's attempt to legalize medical marijuana would be defeated if the CSA was found constitutional.

The Majority ruled that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would … affect price and market conditions."[47] As such, the law was found constitutional.

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[45] *Raich*, 125 S.Ct. at 2207.

[46] The Court was careful to point out that the *Raich* case only involved a limited challenge to the CSA: "Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Brief for Respondents 22, 38. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause." *Id.* at 2204-05.

[47] *Raich*, 125 S.Ct. at 2207.

The *Raich* Majority believed that production of medicinal marijuana for local use would have a substantial effect on the interstate market for non-medicinal marijuana; they also found that high nation-wide demand for illegal marijuana could draw the California medicinal marijuana into the interstate market.[48]

This 'aggregate-effect-on-the-national-marketplace' reasoning was reminiscent of the reasoning found in the 1942 *Wickard* decision. The *Wickard* Court had also determined that the local production and consumption of wheat could be regulated at the federal level.[49] The *Raich* Majority acknowledged that, as in *Wickard*, even if the regulated activity was local and insubstantial on its own, Congress could still regulate the behavior if – in the aggregate – it could have a substantial economic effect on interstate commerce.[50]

One view of this opinion is that this block of justices had undone the evolution of the legal standard crafted by Justice Rehnquist in *Lopez* and *Morrison*. In other words, the economic *impact* of medicinal marijuana use in California was at issue, even if medicinal usage of home-grown marijuana was not deemed economic in *nature.* Justices Stevens, Souter, Ginsburg, and Breyer had never really supported the *Lopez/Morrison* formulation of the "economic in nature" test; therefore, refusal to decide the case on that basis would not come as a surprise. Justice Kennedy, however, had been part of the Rehnquist Majority in *Lopez* and *Morrison*; if he was changing position on the "economic in nature" test, that change was not explained.[51]

Another interpretation of the *Raich* Majority opinion may be that the justices *did* find that medicinal use of home-grown marijuana was economic in *nature.* By referring to Webster's Dictionary, the Majority defined "economics" as "the production, distribution, and consumption of commodities."[52] Based on this reasoning, the Majority stated that the "activities regulated by the CSA are quintessentially economic,"[53] and found this relevant to the analysis of the case:

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[48] *Id*.

[49] *Id*. at 2206-08.

[50] *Wickard v. Filburn,* 317 U.S. at 124.

[51] Justice Kennedy did not write separately in *Raich*; he simply joined Justice Stevens' majority opinion.

[52] *Raich*, 125 S.Ct. at 2211 (citing Webster's Third New International Dictionary 720 (1966)).

[53] *Id*. at 2211.

> The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. *Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.* Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.[54]

This aspect of the decision made it seem that the Majority *did* find that medicinal marijuana usage was economic in nature (thereby satisfying the Rehnquist test). Although this theme was not consistently incorporated throughout the Majority opinion, its inclusion might explain the reason Justice Kennedy was willing to join the Majority.

A third interpretation of the Majority opinion could be that the justices found a separate source of authority for the CSA by looking beyond its specific application to marijuana usage. The Majority stated that when Congress decides the "'total incidence' of a practice poses a threat to a national market, it may regulate the entire class [of behavior]."[55] In referring back to the *Wickard* case, the Majority explained:

> *Wickard* … establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.[56]

The Majority viewed the CSA as "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession" of controlled substances such as marijuana.[57]

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[54] *Id*. (emphasis added) (footnote omitted).

[55] *Id*. at 2206.

[56] *Id*.

[57] *Id*.

In addition, the Majority viewed the CSA as part of the Comprehensive Drug Abuse Prevention and Control Act (CDAPC), a greater regulatory scheme.[58] As such, the prohibition against any form of non-economic marijuana usage or possession was still part of the CDAPC's broader regulation over "commercial" activity. Under this interpretation of the decision, it appears that the Majority was pulling from Justice Rehnquist's dicta in *Lopez* – the Majority looked at the larger body of activity regulated by the CDAPC in order to justify the CSA sub-component. Justice Rehnquist's *Lopez* dicta was even cited by the Court.

Concurring with the Majority, Justice Scalia looked beyond the Commerce Clause to justify federal regulation of local marijuana usage; he stated that the Necessary and Proper Clause was relevant as well.[59] In his view, "Congress' regulatory authority over intrastate activities that are not themselves part of interstate commerce … derives from the Necessary and Proper Clause."[60] This clause holds that Congress has the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers [such as regulation of interstate commerce], and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."[61] Justice Scalia went so far as to assert that the Necessary and Proper Clause was a *separate* source of authority from the effect test:

> Although this power 'to make … regulation effective' commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are *distinct*. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does *not* itself 'substantially affect' interstate commerce. Moreover … Congress may regulate even *noneconomic* local activity if that regulation is a necessary part of a more general regulation of interstate commerce. ...

[58] *Id*. at 2210.

[59] *Id*. at 2215-16 (Scalia, J., concurring).

[60] *Id*. at 2216.

[61] U.S. CONST. art. I, § 8.

> The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power.[62]

Ultimately, Justice Scalia felt that the CSA – even as applied to *noneconomic,* local, medicinal marijuana – was a 'necessary' and 'proper' aspect of the CDAPC's larger, 'constitutional' regulation of the interstate marijuana market.[63]

Dissenters

Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas dissented in *Raich,* and would have found that the CSA could *not* constitutionally block California's effort to legalize medical marijuana. They did not believe that regulation of local, medical marijuana satisfied Justice Rehnquist's recent articulation of the effect test.

Justice O'Connor also strongly objected to the use of the broader CDAPC in order to justify the unconstitutional enforcement of the CSA sub-component:

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[62] *Raich*, 125 S.Ct. at 2217 (Scalia, J., concurring) (footnotes and citations omitted). According to Justice Scalia: "*Wickard* v. *Filburn*, 317 U.S. 111 (1942), presented such a case. Because the unregulated production of wheat for personal consumption diminished demand in the regulated wheat market, the Court said, it carried with it the potential to disrupt Congress's price regulation by driving down prices in the market. *Id*. at 127-129. This potential disruption of Congress's interstate regulation, and not only the effect that personal consumption of wheat had on interstate commerce, justified Congress's regulation of that conduct. *Id.* at 128-129."

This view of the *Wickard* case does not, however, take into account the argument that local wheat consumption was found constitutional in *Wickard* simply on the basis of its potential *aggregate* effect on the interstate wheat market (i.e., substantial economic effect on interstate commerce), rather than any independent consideration of the Necessary and Proper Clause.

[63] The Majority seemed to agree somewhat with this reasoning, but did not state as clearly that the Necessary and Proper Clause should be viewed as a *separate* and distinct source of authority without any need for combined application with the effect test.

> Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential … to the interstate regulatory scheme. Seizing upon our [brief] language in *Lopez* that the statute prohibiting gun possession in school zones was 'not an essential part of a larger regulation of economic activity' … the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to the scheme.[64]

Justice O'Connor believed that the Majority mischaracterized the dicta found in the *Lopez* opinion in order to give Congress broader power under the Commerce Clause.[65]

Justice Thomas, writing separately, was also vehement in his criticism of the Majority's approach:

> The majority's rewriting of the Commerce Clause seems to be rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively. … *If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States.* This makes a mockery of Madison's assurance to the people of New York that the 'powers delegated' to the Federal Government are 'few and defined,' while those of the States are 'numerous and indefinite.'[66]

In essence, the dissenters echoed the same concern about the balance between federal and state power that they had articulated in prior cases. However, with the loss of support from Justices Kennedy and Scalia, Justices O'Connor, Rehnquist and Thomas no longer had a majority position for their views.

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[64] *Raich*, 125 S.Ct. at 2222.

[65] *Id*. at 2222-23.

[66] *Id*. at 2236 (Thomas, J., dissenting) (citing, in part, The Federalist No. 45, at 313 (J. Madison) (emphasis added)).

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ANALYSIS

After examining the Commerce Clause precedents in detail, it is not difficult to understand why the Court's ruling in *Raich* was polarizing, both within the Court, and throughout the legal community at large. For decades, it had appeared that *Wickard's* liberal interpretation of the effect test would immunize almost any federal law from constitutional attack. With the more conservative decisions in *Lopez* and *Morrison* at the end of the 20th Century, that liberal standard seemed to have been replaced with the shift in focus to the "economic nature" of the regulated activity, and several federal laws appeared vulnerable. However, the *Raich* decision brought about a change in both the voting blocks on the Court and the articulation of the effect test.

Although the outcome of the *Raich* case was appropriate, the majority opinion leaves room for a great deal of confusion in future cases. Further examination of the *Raich* decision is necessary to determine whether the Court departed from the "economic in nature" interpretation of the effect test, redefined the term "economic," carved out an exception to the economic nature standard, or decided the case without use of the effect test at all.

Effect Test: Possible Departure from the "Economic Nature" Standard

In approaching the *Raich* case, the Justices of the Supreme Court were faced with the recent *Lopez* and *Morrison* precedents. In *Lopez*, the Court ruled in a five-to-four decision that the GFSZA did not fall within the jurisdiction of Congress because the regulated behavior (gun possession near schools) was not economic in "nature." Chief Justice Rehnquist was joined in this decision by Justices' O'Connor, Thomas, Kennedy, and Scalia. These Justices took the same position in the *Morrison* case, and reasoned that the civil rights remedy within the VAWA was unconstitutional because the regulated behavior (gender-motivated violence) was not economic in "nature." These justices were not willing to substitute economic "impact" as a justification for federal intervention, because if so, they would be "hard pressed to posit any activity by an individual that Congress is without power to regulate."[67]

Court-watchers expected these Justices to take the same position with regard to possession and consumption of home-grown medical marijuana,

[67] *Lopez*, 514 U.S. at 564.

finding that it was beyond the jurisdiction of Congress. Chief Justice Rehnquist, Justice O'Connor and Justice Thomas did, in fact, take such a position.

Justices Stevens, Ginsburg, Souter, and Breyer took a dissenting position in *Lopez* and *Morrison*. They found sufficient economic *impact* flowing from school-zone gun possession and gender-motivated violence to demonstrate a "substantial effect on interstate commerce." Rather than focus on the economic "nature" of the regulated behavior, they would have found that its "impact" was equally relevant. With the VAWA in particular, Congress had documented extensive ties between gender-motivated violence and economic repercussions in society.[68] Thus, it came as no surprise that these justices also found sufficient impact on interstate commerce to support federal regulation of marijuana under the CSA, wherein Congress had provided a similar list of findings.[69]

The scales were tipped in the *Raich* case, however, when Justices Scalia and Kennedy distinguished the CSA from the two previous laws at issue. They each joined the previous *Lopez* and *Morrison* dissenters, ruling that the CSA *was* a constitutional exercise of federal power under the Commerce Clause. This gave the former dissenters a majority position in *Raich*, and even if local production and consumption of medical marijuana was not deemed economic in "nature," this new majority upheld the federal law anyway. Justice Scalia gave an independent reason for his ruling (separate from the effect test), as discussed below.

Justice Kennedy did not write separately; instead, he simply joined Justice Stevens' majority opinion in *Raich*. While Justice Scalia invoked another portion of the Constitution in order to justify his change of approach to the case, Justice Kennedy's change is a bit of mystery. It may be that he shifted position and became comfortable with the economic *impact* approach. This would mean that a majority of the modern Court is now interpreting the effect test in a more liberal manner. However, such a change in position by Kennedy would be surprising, given his previous statements in recent cases. In voting to strike down the GFSZA in *Lopez,* Kennedy pointed out that "neither the actors nor their conduct have a commercial character, and neither the purposes nor the

[68] *See, e.g., Morrison*, 529 U.S. at 631-33 ("Three-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason").

[69] *Raich*, 125 S.Ct. at 2203.

design of the statue have an evident commercial nexus."[70] He continued, "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin and consequence, but we have not yet said the commerce power may reach so far."[71] This language suggests that the "economic nature" of the regulated activity may still be relevant to Justice Kennedy.

Effect Test: Possible Redefinition of "Economic Nature"

If Justice Kennedy was, indeed, continuing to apply the "economic nature" standard to the CSA, then he must have found something in the *Raich* Majority opinion that supported the economic nature of medical marijuana use. In fact, portions of the Majority opinion do refer to the "economic" nature of the regulated behavior, referring to it as "quintessentially economic."[72] More specifically, the Majority defined "economics" as "the production, distribution, and consumption of commodities" and referred to the CSA as a statute that regulated all three of these activities in the "established, and lucrative, interstate [marijuana] market"[73] In doing so, the Majority used this definition of "economics" from the Webster's Third New International Dictionary.[74] However, this definition is overly broad for legal purposes, especially taking into account its ramifications as a legal standard. In determining the scope of Congress' regulatory power under the Commerce Clause, the *Raich* Majority essentially designated all activity as economic.

Justice O'Connor's dissent illustrates the danger in the Majority's determination that personal cultivation and consumption of marijuana is economic in nature. For O'Connor, this case is exactly like *Lopez* and *Morrison*, and she expressed disappointment in the Majority's decision. Her main concerns were the definition of economics and the impact on state sovereignty. Justice O'Connor explained:

> The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. … The Court's

[70] *Lopez*, 514 U.S. at 580.
[71] *Id.*
[72] *Raich*, 125 S.Ct. at 2211.
[73] *Id.*
[74] *Id.*

> definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.[75]

Justice O'Connor was greatly concerned that rather than articulating a clear standard for future cases, the Majority "[drew] no line at all, and [declared] everything economic."[76] This would result in what she referred to as a "federal police power," which showed no respect for the constitutional division between federal and state sovereignty.[77]

It appears that the *Raich* Majority did mean to raise the possibility that local cultivation *and consumption* of medical marijuana should be viewed as an "economic" activity. In the process, the Majority blurred the boundaries of Congress' regulatory power under the Commerce Clause. As a result, it will become even more difficult for future courts to reconcile the application of the "economic in nature" standard in the *Lopez, Morrison* and *Raich* decisions.

Effect Test: Possible Exception to "Economic Nature" Standard

In *Lopez*, the Court ruled that the Gun-Free School Zones Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[78] In a passing reference, Chief Justice Rehnquist added that the GFSZA did not play a part in the larger scope of the regulation of economic activity.[79] As previously discussed, this reference was incredibly brief, buried within a lengthy opinion, and admittedly did not apply to the facts of the case at hand. As such, it should be viewed as dicta rather than part of the case holding.

By referencing this dicta, the *Raich* Majority reasoned that even non-economic intrastate activity could be regulated by Congress under the Commerce Clause if: (a) it was "part of a larger regulation of economic activity," and (b) that larger scheme would be undercut if the local activity was

[75] *Id.* at 2224.
[76] *Id.* at 2225.
[77] *Id.*
[78] *Lopez,* 514 U.S. at 549.
[79] *Lopez*, 514 U.S. at 561.

not regulated as well.[80] In *Raich*, the Majority used this argument in differentiating the CSA from the statutes held unconstitutional in *Lopez* and *Morrison.* The GFSZA at issue in *Lopez* and the civil rights remedy from the VAWA at issue in *Morrison* were viewed by the Court as stand-alone statutes. The CSA, on the other hand, was enacted in 1970 as part of the more extensive Comprehensive Drug Abuse Prevention and Control Act (CDAPC). Therefore, according to the Majority's reasoning, the *Raich* case differed significantly from *Lopez* and *Morrison.* The broader CDAPC regulated activity that was economic in nature, such as the manufacture and distribution of controlled substances, and the *Raich* Majority viewed the CSA as an integral component of the CDAPC's larger regulatory scheme. Therefore, the Majority viewed the CSA as a legitimate exercise of Congress' power under the Commerce Clause, even in its regulation of the local manufacture and possession of marijuana.[81]

In his concurring opinion, Justice Scalia also referenced this dicta. He quoted the language in his concurrence, taking it as support for the proposition that Congress "may regulate even non-economic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."[82] Although Chief Justice Rehnquist had not clearly articulated this as an exception to the "economic in nature" test in *Lopez*, Justice Scalia, like the Majority, treated it that way in *Raich.*

It is indisputable that the CSA is a part of a larger regulatory scheme that regulates interstate commerce. However, the Court erred in treating this *Lopez* dicta as a clearly articulated exception to Chief Justice Rehnquist's "economic in nature" standard. If Chief Justice Rehnquist knew that this language might be used in such a manner in future cases, he probably would have removed it from his *Lopez* opinion. Chief Justice Rehnquist dissented in *Raich*, clearly indicating that he did not believe the fact that the CSA was part of a larger regulatory scheme could save it from being unconstitutional. It appears that armed with the *Raich* majority's extremely broad definition of the word "economic" and the use of the *Lopez* dicta as an alternative method to justify federal regulation of non-economic intrastate activity, Congress could very well have the "federal police power" feared by Chief Justice Rehnquist in

[80] *Id.*

[81] *Raich*, 125 S.Ct. at 2210.

[82] *Raich*, 125 S.Ct. at 2217 (Scalia, J., dissenting).

his Majority opinion in *Morrison* and Justice O'Connor in her dissenting opinion in *Raich*.[83]

Possible Alternative to "Effect Test" Altogether

In his concurring opinion, Justice Scalia appeared to concede that the local cultivation and consumption of medical marijuana is not economic in nature. At first blush, it might appear that he was completely withdrawing his support for the Rehnquist "economic in nature" test that he had supported in *Lopez* and *Morrison.* However, he then distinguished the *Raich* case by stating: "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce."[84] In other words, he was not using the "effect test" at all. Instead, he had a separate, independent reason for upholding the CSA.

Instead of analyzing the CSA under the "effect test" – no matter how that test is interpreted – Justice Scalia found that the Necessary and Proper Clause provided a separate source of authority for federal control over non-economic behavior. Again taking into account the broad reach of the CDAPC, Justice Scalia reasoned that it was 'necessary' and 'proper' for Congress to enforce the CSA in order to achieve the CDAPC's broader objective.[85] In other words, although the CSA might not have been constitutional as a stand-alone statute, Justice Scalia took an 'end justifies the means' approach. He viewed the CSA as an acceptable tool to regulate the national market for controlled substances, even if the desires of the California voters were ignored in the process.

The "Necessary and Proper Clause" of the Constitution states that Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers enumerated in Article I, Section 8 of the Constitution, including the power to regulate commerce between the States.[86] By arguing that "Congress' regulatory authority over intrastate activities that are not themselves part of interstate commerce … derives from

[83] *Morrison*, 529 U.S. at 615.

[84] *Id.* at 2216.

[85] *Raich*, 125 S.Ct. at 2215 (Scalia, J., dissenting).

[86] U.S. CONST. art I, § 8.

the Necessary and Proper Clause,"[87] Scalia descends down a slippery slope. Chief Justice Rehnquist had worked hard in 1995 and 2000 to ensure that the Commerce Clause power was not applied so liberally that the division between federal and state sovereignty was obliterated. Justice Scalia, among others, had supported this effort. However, Scalia's shift to a vague standard that allows for unconstitutional regulation whenever 'necessary' to support a broader federal objective gives far too much power to Congress. Rather than continuing as a supporter of the effort to narrow the reach of the Commerce Clause, Justice Scalia opened a new doorway that might lead to the type of broad, unchecked federal police power feared by his former allies, Justices Rehnquist, O'Connor and Thomas.

CONCLUSION

Angel Raich and Diane Monson had long suffered from incurable disorders that caused them great pain. After trying conventional prescription medicines to no avail, they turned to using medicinal marijuana, which clearly aided them in easing their pain. The use of medicinal marijuana, legal under California's Compassionate Use Act, is categorically prohibited by the federal Controlled Substances Act. The *Raich* case challenged the application of the CSA to home-grown, locally-consumed, medicinal marijuana that had never entered the interstate market.

Departing somewhat from the voting blocks in recent cases like *Lopez* and *Morrison*, six justices voted to uphold the CSA as a constitutional exercise of the federal Commerce Clause power as applied to the facts of this case. It may be that this "new majority" of the Court (including Justices Stevens, Souter, Ginsburg and Breyer, now joined by Justice Kennedy) meant to do away with Rehnquist's "economic in nature" test and replace it with the "economic impact" test. If so, Justice Kennedy's departure from the concerns he articulated in *Lopez* is unexplained. Alternatively, it may be that this new majority simply meant to define the word "economic" more expansively than Justices Rehnquist, O'Connor and Thomas would have done. If this is the case, then Justice O'Connor has raised important concerns about the overbreadth of the Court's new definition. Finally, it may be that the new majority chose to solidify the idea that a non-economic law can be justified under the Commerce

[87] *Raich*, 125 S.Ct. at 2216 (Scalia, J., dissenting).

Clause if it is part of a larger, economic, regulatory scheme. In this case, Chief Justice Rehnquist's brief dicta from the *Lopez* decision was used in a manner that he clearly did not support in *Raich*.

Unfortunately, the *Raich* Majority opinion is so lengthy and complex that future courts will struggle to determine its specific meaning. In fact, it is possible that Justices Stevens, Souter, Ginsburg, Breyer and Kennedy upheld the CSA for differing reasons, as did Justice Scalia, making this case even more confusing as precedent for the future.

Ultimately, the Court should have attempted to consolidate the various considerations involved in deciding the *Raich* case. The Majority was undoubtedly aware of the controversy that their decision would create in light of recent Commerce Clause cases, and yet they were still unable to create a precedent that would be useful in determining future Commerce Clause cases. Instead, the Majority seems to have tried to reconcile and incorporate the *Wickard v. Filburn* and *U.S. v. Lopez* precedents with its own views on the effects test, even though these principles are arguably at odds with one another.

In the end, the "new" *Raich* Majority could have best served the law if they agreed that they wanted to do away with Rehnquist's "economic in nature" test in favor of the "economic in impact" test. Although the "economic in impact" test is more liberal in giving regulatory power to Congress, the need for clear legal standards cannot be ignored. If the Supreme Court issues an unclear opinion, then lower courts are left without guidelines to decide future Commerce Clause cases. In order to avoid potential conflicting lower court opinions in the future, it would have been better for the Majority to clarify exactly which test they wanted future courts to use, rather than forcing Congress and the lower courts to guess as to where our Commerce Clause jurisprudence currently stands.