
Chapter 2

The Federal Legislative Power

B. The Commerce Power

4. 1990s-???: Narrowing of the Commerce Power and Revival of the Tenth Amendment as a Constraint on Congress

a. What Is Congress's Authority to Regulate "Commerce Among the States"? (casebook, p. 153)

In *Gonzales v. Raich*, excerpted below, the Supreme Court considered the constitutionality of whether Congress, pursuant to its commerce power, can criminally prohibit and punish cultivation and possession of small amounts of marijuana for medical purposes. In upholding the law at issue here, Justice Stevens's majority opinion argues that the ruling is consistent with earlier decisions such as *Wickard v. Filburn*, *United States v. Lopez*, and *United States v. Morrison*. In appraising *Gonzales v. Raich*, it is important to consider whether this decision is consistent with these precedents, or whether there is tension between it and especially *Lopez* and *Morrison*, which narrowed the scope of Congress's commerce power.

GONZALES v. RAICH 545 U.S. 1 (2005)

Justice STEVENS delivered the opinion of the Court.

California is one of at least nine States that authorize the use of marijuana for medicinal purposes. The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

I

California has been a pioneer in the regulation of marijuana. In 1913, California was one of the first States to prohibit the sale and possession of marijuana, and at

the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes. In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996. The proposition was designed to ensure that "seriously ill" residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need. The Act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician.

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants. Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA) to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use.

The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case. We accordingly vacate the judgment of the Court of Appeals.

II

Shortly after taking office in 1969, President Nixon declared a national "war on drugs." As the first campaign of that war, Congress set out to enact legislation

that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs. That effort culminated in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

[Subsequently, Congress enacted the CSA and] Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. The CSA categorizes all controlled substances into five schedules. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping.

In enacting the CSA, Congress classified marijuana as a Schedule I drug. Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment.

III

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. 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 interstate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.

In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation. As charted in considerable detail in *United States v. Lopez*, our understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time. Cases decided during that "new era," which now spans more than a century, have identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce. Only the third category is implicated in the case at hand.

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. See, e.g., *Wickard v. Filburn* (1942). As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." We have never required Congress to legislate with scientific exactitude. When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. In this vein, we have reiterated that when "a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."

Our decision in *Wickard* is of particular relevance. In *Wickard*, we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. *Wickard* thus 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.

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . ." and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving homeconsumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel 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. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because

production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.¹

Nonetheless, respondents suggest that *Wickard* differs from this case in three respects: (1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) *Wickard* involved a "quintessential economic activity"—a commercial farm—whereas respondents do not sell marijuana; and (3) the *Wickard* record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices. Those differences, though factually accurate, do not diminish the precedential force of this Court's reasoning. The fact that *Wickard*'s own impact on the market was "trivial by itself" was not a sufficient reason for removing him from the scope of federal regulation. That the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the Court's analysis. Moreover, even though *Wickard* was indeed a commercial farmer, the activity he was engaged in—the cultivation of wheat for home consumption—was not treated by the Court as part of his commercial farming operation. And while it is true that the record in the *Wickard* case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect.

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, we have no difficulty concluding 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. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

1. To be sure, the wheat market is a lawful market that Congress sought to protect and stabilize, whereas the marijuana market is an unlawful market that Congress sought to eradicate. This difference, however, is of no constitutional import. It has long been settled that Congress' power to regulate commerce includes the power to prohibit commerce in a particular commodity. [Footnote by the Court.]

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly. Those two cases, of course, are *United States v. Lopez* (1995) and *United States v. Morrison* (2000). As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary (1966). 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.

Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases. We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress.

Justice SCALIA, concurring in the judgment.

I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.

Since *Perez v. United States* (1971), our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories:

(1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is misleading because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. And the category of "activities that substantially affect interstate commerce" is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. 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.

Today's principal dissent objects that, by permitting Congress to regulate activities necessary to effective interstate regulation, the Court reduces *Lopez* and *Morrison* to "little more than a drafting guide." I think that criticism unjustified. Unlike the power to regulate activities that have a substantial effect on interstate commerce, 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 the measures necessary to make the interstate regulation effective. As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could . . . undercut" its regulation of interstate commerce. This is not a power that threatens to obliterate the line between "what is truly national and what is truly local."

Lopez and *Morrison* affirm that Congress may not regulate certain "purely local" activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the

Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation.

To dismiss this distinction as "superficial and formalistic," (O'Connor, J., dissenting), is to misunderstand the nature of the Necessary and Proper Clause, which empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation. See *McCulloch v. Maryland* (1819). And there are other restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCulloch v. Maryland*, even when the end is constitutional and legitimate, the means must be "appropriate" and "plainly adapted" to that end. Moreover, they may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution." These phrases are not merely hortatory.

III

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce "extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it." To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances—both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress's authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish "controlled substances manufactured and distributed intrastate" from "controlled substances manufactured and distributed interstate," but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State. Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for "medical" marijuana and the more general marijuana market.

I thus agree with the Court that, however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market "could be undercut" if those activities were excepted from its general scheme of regulation. That is sufficient to authorize the application of the CSA to respondents.

Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice THOMAS join as to all but Part III, dissenting.

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. *United States v. Lopez* (1995). One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann* (1932) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions in *Lopez* and *Morrison*. Accordingly I dissent.

The Court's principal means of distinguishing *Lopez* from this case is to observe that the Gun-Free School Zones Act of 1990 was a "brief, single-subject statute," whereas the CSA is "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'" Thus, according to the Court, it was possible in *Lopez* to evaluate in isolation the constitutionality of criminalizing local activity (there gun possession in school zones), whereas the local activity that the CSA targets (in this case cultivation and possession of marijuana for personal medicinal use) cannot be separated from the general drug control scheme of which it is a part.

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 (and the Court appears to equate "essential" with "necessary") to the interstate regulatory scheme. Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones was "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," the Court appears to reason that the placement of local activity in a comprehensive

scheme confirms that it is essential to that scheme. If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation"—thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones. Furthermore, today's decision suggests 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. If so, the Court invites increased federal regulation of local activity even if, as it suggests, Congress would not enact a new interstate scheme exclusively for the sake of reaching intrastate activity. I cannot agree that our decision in *Lopez* contemplated such evasive or overbroad legislative strategies with approval. Until today, such arguments have been made only in dissent.

Lopez and *Morrison* did not indicate that the constitutionality of federal regulation depends on superficial and formalistic distinctions. Likewise I did not understand our discussion of the role of courts in enforcing outer limits of the Commerce Clause for the sake of maintaining the federalist balance our Constitution requires as a signal to Congress to enact legislation that is more extensive and more intrusive into the domain of state power. If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers.

The hard work for courts, then, is to identify objective markers for confining the analysis in Commerce Clause cases. Here, respondents challenge the constitutionality of the CSA as applied to them and those similarly situated. I agree with the Court that we must look beyond respondents' own activities. Otherwise, individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious—that their personal activities do not have a substantial effect on interstate commerce. The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis). The analysis may not be the same in every case, for it depends on the regulatory scheme at issue and the federalism concerns implicated.

A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation—including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation—recognize that medical and nonmedical (i.e., recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently. Respondents challenge only the application of the CSA to medicinal use of marijuana. Moreover, because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where "States lay claim by right of history and expertise." Under our precedents, the conduct is economic and, in the aggregate, substantially

affects interstate commerce. Even if intrastate cultivation and possession of marijuana for one's own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects interstate commerce. Similarly, it is neither self-evident nor demonstrated that regulating such activity is necessary to the interstate drug control scheme.

The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market. Putting to one side the problem endemic to the Court's opinion—the shift in focus from the activity at issue in this case to the entirety of what the CSA regulates—the Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. Whatever the specific theory of "substantial effects" at issue (i.e., whether the activity substantially affects interstate commerce, whether its regulation is necessary to an interstate regulatory scheme, or both), a concern for dual sovereignty requires that Congress' excursion into the traditional domain of States be justified.

That is why characterizing this as a case about the Necessary and Proper Clause does not change the analysis significantly. Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. Likewise, that authority must be used in a manner consistent with the notion of enumerated powers—a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command. Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an interstate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation. Indeed, if it were enough in "substantial effects" cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in *Lopez* that guns in school zones are "never more than an instant from the interstate market" in guns already subject to extensive federal regulation, recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun-Free School Zones Act of 1990.

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let

alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime.

The Government has not overcome empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime. Nor has it shown that Compassionate Use Act marijuana users have been or are realistically likely to be responsible for the drug's seeping into the market in a significant way. The Government does cite one estimate that there were over 100,000 Compassionate Use Act users in California in 2004, but does not explain, in terms of proportions, what their presence means for the national illicit drug market.

Relying on Congress' abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.

Justice THOMAS, dissenting.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.

I

Respondents' local cultivation and consumption of marijuana is not "Commerce . . . among the several States." By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution's limits on federal power. The majority supports this conclusion by invoking, without explanation, the Necessary and Proper Clause. Regulating respondents' conduct, however, is not "necessary and proper for carrying into Execution" Congress' restrictions on the interstate drug trade. Thus, neither the Commerce Clause nor the Necessary and Proper Clause grants Congress the power to regulate respondents' conduct.

As I explained at length in *United States v. Lopez* (1995), the Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines. The Clause's text, structure, and history all indicate that, at the time of the founding, the term "'commerce' consisted of

selling, buying, and bartering, as well as transporting for these purposes." Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture.

Even the majority does not argue that respondents' conduct is itself "Commerce among the several States." Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California—it never crosses state lines, much less as part of a commercial transaction. Certainly no evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.

More difficult, however, is whether the CSA is a valid exercise of Congress' power to enact laws that are "necessary and proper for carrying into Execution" its power to regulate interstate commerce. The Necessary and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power. Nor is it, however, a command to Congress to enact only laws that are absolutely indispensable to the exercise of an enumerated power.

On its face, a ban on the intrastate cultivation, possession and distribution of marijuana may be plainly adapted to stopping the interstate flow of marijuana. Unregulated local growers and users could swell both the supply and the demand sides of the interstate marijuana market, making the market more difficult to regulate. But respondents do not challenge the CSA on its face. Instead, they challenge it as applied to their conduct. The question is thus whether the intrastate ban is "necessary and proper" as applied to medical marijuana users like respondents.

Respondents are not regulable simply because they belong to a large class (local growers and users of marijuana) that Congress might need to reach, if they also belong to a distinct and separable subclass (local growers and users of state-authorized, medical marijuana) that does not undermine the CSA's interstate ban. California's Compassionate Use Act sets respondents' conduct apart from other intrastate producers and users of marijuana.

In sum, neither in enacting the CSA nor in defending its application to respondents has the Government offered any obvious reason why banning medical marijuana use is necessary to stem the tide of interstate drug trafficking. Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress' aim is really to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana.

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern." The majority's rush to embrace federal power "is especially unfortunate given

the importance of showing respect for the sovereign States that comprise our Federal Union." Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals.

Two high profile cases raised potentially important issues concerning the scope of Congress's commerce clause authority, but each was decided on statutory interpretation grounds without reaching the constitutional issues. In *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), the Court considered the legality of an interpretive rule issued by Attorney General John Ashcroft that physicians who assist with suicide of terminally ill patients pursuant to the Oregon Death With Dignity Act would be violating the federal Controlled Substances Act and could thereby lose the ability to issue prescriptions. The Court, in a 6-3 decision with Justice Kennedy writing for the majority, held that the interpretive rule did not fit within the scope of the Attorney General's authority under the Controlled Substances Act and thus was invalid.

There was no discussion of the Constitution or federalism, except for the following paragraph: "Just as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power. It is unnecessary even to consider the application of clear statement requirements, or presumptions against pre-emption, to reach this commonsense conclusion. For all these reasons, we conclude the CSA's prescription requirement does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct."

The other case that potentially raised commerce clause issues was *Rapanos v. United States*, 126 S.Ct. 2208 (2006), in which the Court considered whether the federal Clean Water Act (CWA) could be applied to intrastate wetlands. Justice Scalia, writing for a plurality of four, gave a narrow construction to the statute and said that the term "navigable waters," under CWA, includes only relatively permanent, standing or flowing bodies of water, not intermittent or ephemeral flows of water, and only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right are adjacent to such waters and covered by the CWA. Again, the plurality opinion was based on statutory interpretation and not on the commerce clause.

However, at the conclusion of the plurality opinion, Justice Scalia invoked the Constitution: "Even if the phrase 'the waters of the United States' were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible. As we noted in [*Solid Waste Agency of Northern Cook County v. United States Army*

Corps of Engineers (SWANCC)], the Government's expansive interpretation would "result in a significant impingement of the States' traditional and primary power over land and water use." Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. We ordinarily expect a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase "the waters of the United States" hardly qualifies.

Likewise, just as we noted in *SWANCC*, the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power. Even if the term "the waters of the United States" were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.

Justice Kennedy concurred in the judgment, and said that the Water Pollution Control Act applies to intrastate waters that have a "significant nexus" to interstate waters. He disagreed with the plurality's approach and said its that reading of the Act "is inconsistent with its text, structure, and purpose." Justice Kennedy said that the significant nexus test he urged also would meet the requirements under the commerce clause.

Justices Stevens, Souter, Ginsburg, and Breyer would have upheld that federal regulation of the intrastate wetlands. As a result, since Justice Kennedy's vote was the narrowest ground upon which a majority agreed, his "significant nexus" test is now to be followed for the application of the CWA.

E. Congress's Power to Authorize Suits Against State Governments

1. Background on the Eleventh Amendment and Sovereign Immunity (casebook, p. 222)

In *Central Virginia Community College v. Katz*, 546 U.S. 346 (2006), the Court ruled that sovereign immunity does not apply in bankruptcy courts. Justice Stevens, writing for the Court in a 5-4 decision, stated: "Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally in rem jurisdiction. In bankruptcy, 'the court's jurisdiction is premised on the debtor and his estate, and not on the creditors.' As such, its exercise does not, in the usual case, interfere with state sovereignty even when States' interests are affected.