GONZALES v. RAICH: THE "STATES AS LABORATORIES" PRINCIPLE OF FEDERALISM SUPPORTS PROLONGING CALIFORNIA'S EXPERIMENT

INTRODUCTION

In 1996 the California legislature enacted a law popularly known as the Compassionate Use Act.[1] The legislature wanted 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."[2] The physician's prescription of marijuana was to palliate the intractable pain attendant to a number of severe illnesses for which other drugs prove ineffective.[3] The California legislature was careful to note that the Compassionate Use Act did not change the legal status of marijuana generally; it was still illegal for any non-medical purposes.[4]

However, in 1970 Congress had enacted the Controlled Substances Act[5] (CSA) as part of the federal government's comprehensive war against drugs. The CSA was designed to combat the growing threat of drug use by "providing authority for increased efforts in drug abuse prevention and rehabilitation of users . . . providing more effective means for law enforcement aspects of drug abuse prevention and control and . . . providing for an overall balanced scheme of criminal penalties for offenses involving drugs."[6] As part of this regulatory scheme, Congress instituted five "schedules" of drugs, where drugs were ranked from Schedule I, those with the highest potential for abuse, no accepted medical use, and no information as to safety, to Schedule V, those with a low potential for abuse, a valid medical use, and only a limited danger of chemical dependence.[7] Congress listed marijuana as a Schedule I drug, thus certifying that it had no valid medical uses.[8] Over the intervening years numerous advocacy groups have petitioned to get marijuana reclassified as a Schedule II

1. CAL. HEALTH & SAFETY CODE § 11362.5(a) (West 2006).
2. *Id.* § 11362.5(b)(1)(A).
3. *See id.* § 11362.5(b)(1)(A).
4. *Id.* § 11362.5(b)(1)(C)(2).
5. 21 U.S.C. §§ 801–904 (2000).
6. H.R. REP. No. 91-1444, at 4567 (1970).
7. 21 U.S.C. § 812(b) (2000).
8. *Id.* § 812(c).

drug that recognizes an accepted medical use, but their attempts have thus far been rebuffed.[9]

When the California State Legislature enacted the Compassionate Use Act, it carved an exception out of the federal CSA. This set up a conflict between the existing federal scheme and the new state regulation. The conflict was brought before the courts in *Gonzales v. Raich*.[10]

The respondents in *Gonzales v. Raich* were two California women named Angel Raich and Diane Monson.[11] Both women suffered from intractable pain stemming from multiple severe medical problems.[12] When no other pain-relief treatment was effective, they both sought and received prescriptions from their primary care physicians for medicinal marijuana under California's Compassionate Use Act.[13] The women's use of marijuana allowed them to function in everyday life to the point that Raich's doctor believed removing her from the cannabis treatment would cause her severe pain and could potentially be deadly.[14] Both women either grew their own marijuana or received a locally grown product from a caregiver.[15]

Federal Drug Enforcement Administration agents and county deputy sheriffs came to Monson's home on August 15, 2002.[16] The county deputies determined that Monson's use of marijuana was protected under California law, but the federal agents still seized and destroyed all of her cannabis plants after a three hour confrontation.[17] The respondents then filed suit against Attorney General John Ashcroft seeking a preliminary injunction that would stop the government from applying the provisions of the CSA against them.[18] The district court denied their request, holding that while the women showed the balance of harms weighed in their favor, they failed to satisfy the requirement that they were likely to prevail on the merits.[19]

The Ninth Circuit Court of Appeals reversed and remanded on appeal.[20] In so doing the court held that the women did show a strong likelihood of success on the merits, and as such, the CSA as applied to them exceeded Congress's Commerce Clause authority.[21] In making this determination, the court applied

9. *See, e.g.*, Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131 (D.C. Cir. 1994).

10. 545 U.S. 1 (2005).

11. *Id.* at 6.

12. *Id.* at 6–7.

13. *Id.* at 7.

14. *Id.*

15. *Raich*, 545 U.S. at 7.

16. *Id.*

17. *Id.*

18. Raich v. Ashcroft, 248 F. Supp. 2d 918, 920 (N.D. Cal. 2003).

19. *Id.* at 931.

20. Raich v. Ashcroft, 352 F.3d 1222, 1235 (9th Cir. 2003).

21. *Id.* at 1227.

the four factor test governing when regulated activity substantially affects interstate commerce as set out by the Supreme Court in *United States v. Morrison*.[22] Following this decision the Attorney General successfully sought certiorari from the Supreme Court to decide whether Congress exceeded its Commerce Clause authority in applying the CSA to the states.[23]

Part I of this Note will contain a historical analysis of the Commerce Clause issues raised in *Raich*. This necessarily brief overview will primarily focus on three seminal Supreme Court cases that bracket a period where the Supreme Court steadily allowed congressional Commerce Clause authority to expand before enforcing meaningful limitations on the commerce power.

Part II of this Note will carefully lay out the Supreme Court's reasoning in deciding *Raich*. This Part will cover the analysis applied by the majority and the lone concurrence, as well as a study of the rationale that compelled the dissents to disagree.

Part III will suggest a method of analyzing cases like *Raich*, where Congress is alleged to have abused its authority under the Commerce Clause. This Part posits that using the "states as laboratories"[24] concept can lead to a clearer understanding of the issues involved and a more consistent method of resolving them. Namely, that the laboratory function of states should be given prominence in areas of traditional state responsibility, and thus serve to limit Congress's power when it begins to encroach on one of these areas.

Finally, Part IV of this note will apply the "states as laboratories" framework to the context of Raich. This application will highlight why the Court would have better served the principles of federalism, and simultaneously calmed its turbulent Commerce Clause jurisprudence, by respecting the role that states play in developing innovative solutions to serious problems.

22. *Id*. at 1229. The court stated the four factors as:

> (1) whether the statute regulates commerce or any sort of economic enterprise; (2) whether the statute contains any "express jurisdictional element that might limit its reach to a discrete set" of cases; (3) whether the statute or its legislative history contains "express congressional findings" regarding the effects of the regulated activity upon interstate commerce; and (4) whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated."

Id.; *see infra* Part I.B. (discussing *Morrison*).

23. Gonzales v. Raich, 545 U.S. 1 (2005).

24. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

I. HISTORICAL DEVELOPMENT OF THE COMMERCE CLAUSE DOCTRINE

A. The Expansion of Congressional Power

The Commerce Clause is perhaps the most far-reaching power given to Congress by the Constitution.[25] Beginning in 1937 with cases upholding various New Deal programs,[26] the Supreme Court gave Congress practically unrestricted power to legislate under the Commerce Clause. The Court enforced no constitutional limits on Congress's exercise of the commerce power and did not invalidate a congressional action under the commerce power for approximately sixty years.[27] One of these initial cases upholding New Deal programs, *Wickard v. Filburn*,[28] requires a closer examination, as the Supreme Court in *Raich* supported several of its arguments by comparing the two cases.

In *Wickard*, a wheat farmer sought to protect himself from a penalty levied against him when he grew a quantity of wheat that exceeded the amount he was allotted.[29] The quotas were promulgated by the Secretary of Agriculture in accordance with the Agricultural Adjustment Act of 1938.[30] The farmer argued that the excess wheat was for consumption by his family at home and thus was beyond the reach of Congress's commerce power because the activities were "local in character, and their effects upon interstate commerce [were] at most 'indirect.'"[31] The Supreme Court responded in sweeping language by asserting that even activity that is local in nature may be regulated by Congress if the activity exerts a substantial economic effect on interstate commerce.[32] Whether or not the effect of the activity is direct or indirect is of little consequence.[33]

Furthermore, the Court introduced the aggregation principle, which dictates that the proper test does not require an examination of the individual activity in question, but rather an examination of the activity generalized

25. U.S. CONST, art. I, § 8, cl. 3 ("The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").

26. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937). In upholding a comprehensive federal system that regulated labor/management relations and allowed for collective bargaining, the Court held that "[a]lthough activities may be intrastate in character when separately considered," Congress still may regulate them "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce." *Id*. at 37; *see* United States v. Darby, 312 U.S. 100, 125 (1941) (upholding the wage and hour provisions of the Fair Labor Standards Act of 1938).

27. Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since* Lopez*: A Survey*, 32 CAP. U. L. REV. 671, 683 (2004).

28. 317 U.S. 111 (1942).

29. *Id*. at 113.

30. *Id*.

31. *Id*. at 119.

32. *Id.* at 125.

33. *Wickard*, 317 U.S. at 125.

across every actor similarly situated in order to determine if the activity significantly affects interstate commerce.[34] As a result of this analysis,[35] the Supreme Court upheld the penalty assessed as part of a valid exercise of congressional interstate commercial regulation.[36]

As previously noted, following *Wickard* the Supreme Court refused to invalidate any action under Congress's Commerce Clause authority, despite hearing numerous cases in which the issue arose.[37] This trend continued for decades.[38] It was not until 1995 that the Supreme Court appeared to resurrect the idea of constitutional limitations upon Congress's Commerce Clause power in *United States v. Lopez*.[39]

B. Limitations on the Commerce Clause

In *Lopez*, the defendant appealed his conviction under the Gun Free School Zones Act of 1990,[40] a section of the Crime Control Act of 1990,[41] on the grounds that it violated the Commerce Clause authority given to Congress.[42] This statute created a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[43] The Court held that this statute was, by its terms, a criminal statute with no relationship to interstate commerce, no matter how

34. *Id*. at 127–28.

35. The Court utilized this analysis again in *Maryland v. Wirtz* where it enforced the "enterprise concept" of the Commerce Clause. 392 U.S. 183, 188 (1968). The Court held that Congress could find that some enterprises so affected interstate commerce that any employees engaged in that enterprise were protected by the Fair Labor Standards Act, rather than the Act's previous requirement that the employee must be engaged in interstate commerce. *Id*.

36. *Wickard*, 317 U.S. at 112.

37. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981) (reemphasizing *Katzenbach*'s holding that "the court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding"); Perez v. United States, 402 U.S. 146, 146–47 (1971) (holding that the part of the Consumer Credit Protection Act that prohibits 'loan-sharking' falls under Congress's Commerce Clause authority because it is an activity that substantially affects interstate commerce); Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (asserting that Congress only had to have a rational basis to find that racial discrimination at restaurants that received a large portion of their food from out of state had a direct and negative effect on interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (upholding the public accommodations provisions of the Civil Rights Act of 1964 under the Commerce Clause because discrimination in hotels inhibits interstate travel, thereby affecting interstate commerce).

38. Mark, *supra* note 27, at 683.

39. 514 U.S. 549 (1995).

40. Pub. L. No. 101-647, 104 Stat. 4844 (1990).

41. Pub. L. No. 101-647, 104 Stat. 4789 (1990) (codified in various sections of the U.S.C.).

42. *Lopez*, 514 U.S. at 552.

43. 18 U.S.C. § 922 (q)(1)(A) (1994).

broadly it was construed.[44] Possession of a gun in a school zone is not an economic activity that might through repetition substantially affect interstate commerce in the aggregate.[45]

In reaching this conclusion, the Court highlighted three categories of activities in which Congress may regulate by using its Commerce Clause power.[46] The first category that Congress can regulate is "the use of the channels of interstate commerce."[47] The second category of regulated activities includes "the instrumentalities of interstate commerce, or persons or things in interstate commerce."[48] Finally, Congress can regulate "those activities having a substantial relation to interstate commerce" or "those activities that substantially affect interstate commerce."[49]

While applying these categories, the Court stated that when Congress intrudes upon an area of traditional state concern, scrutiny of that action will be increased past the deferential rational basis test to the stricter "substantial affects" test.[50] Furthermore, there is significance to the distinction between commercial and non-commercial activity.[51] If the activity in question is non-commercial, then the Court will more closely scrutinize whether the activity substantially affects interstate commerce.[52]

Several years later the Supreme Court continued this trend of limiting Congress's authority under the Commerce Clause in *United States v. Morrison*.[53] In that case the Court affirmed the Fourth Circuit[54] in striking down the federal civil remedy portion of the Violence Against Women Act.[55] The Court agreed with the Fourth Circuit's reasoning that Congress's power under the Commerce Clause did not extend far enough to enable Congress to create the civil remedy in the Violence Against Women Act.[56] The Court held that gender motivated crimes are not economic activity.[57] Significantly, the Court added that it would apply the aggregation principle to the effects of intrastate activity only if that activity is economic in nature.[58]

44. *Lopez*, 514 U.S. at 561.
45. *Id*.
46. *Id*. at 558.
47. *Id*.
48. *Id*.
49. *Lopez*, 514 U.S. at 558–59.
50. *See id*. at 559, 564.
51. *Id*. at 583 (Kennedy, J., concurring).
52. *Id*.
53. 529 U.S. 598 (2000).
54. *Id*. at 601–02.
55. Pub. L. No. 103-322, 108 Stat. 1902 (codified at 42 U.S.C. § 13981).
56. *Morrison*, 529 U.S. at 601–02.
57. *Id*. at 613.
58. *Id*.

After discounting the possibility of aggregating the effects of non-economic activity, the Court observed that the Violence Against Women Act contained no "jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."[59] If Congress had included such a jurisdictional hook that limited the statute's reach, it would lend greater credence to the argument that the statute is adequately connected with interstate commerce.[60] Instead, Congress exerted its power over a broader intrastate concern, and the Court rebuffed the overreach.[61]

The Court noted that Congress had propounded legislative findings in support of the Violence Against Women Act's constitutionality as Commerce Clause legislation.[62] The Court reaffirmed its position from *Lopez* that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."[63] The Court concluded "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[64]

So at the beginning of the new millennium it appeared that the Supreme Court had finally begun to reaffirm the existence of constitutional limits on the ability of Congress to legislate pursuant to the Commerce Clause. After an almost sixty-year period of deference to Congress,[65] the Court in *Lopez* elucidated categories into which valid Commerce Clause legislation must fall. Then, the Court applied those categories in *Morrison*, finding Congress's action unconstitutional in both instances. It seemed that the Court was moving its Commerce Clause jurisprudence in a new direction, more mindful of the limits on federal power.

II. THE COURT'S ABOUT-FACE IN *RAICH*

The circumstances of *Raich* seemed to present an ideal opportunity for the Court to begin to refine its recent shift toward a stricter review of Congress's use of its Commerce Clause authority. The considerations at issue were compelling, and the Court could have used them to give a detailed analysis of the scope of the constitutional limits on the Commerce Clause power that it

59. *Id*.

60. *Id*.

61. *Morrison*, 529 U.S. at 613.

62. *Id*. at 614.

63. *Id*. (quoting United States v. Lopez, 514 U.S. 549, 557 (1995)).

64. *Id*. (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (Black, J., concurring)).

65. The Court decided *NLRB v. Jones & Laughlin Steel Corporation* in 1937 and *United Staes v. Lopez* in 1995, a difference of fifty-eight years.

had recently rediscovered and enforced. However, in reality the Court made a confusing change of direction. The opinion that resulted almost appeared to flow from a pre-*Lopez* viewpoint, and it consequently left the jurisprudential waters of Commerce Clause doctrine muddied. This Part will present a detailed review of the Court's majority opinion, the supporting concurrence, and the two important dissents that it inspired.

A. The Majority Opinion

Justice Stevens, writing for the Court, began his analysis by noting that although the circumstances of the case and respondents' painful conditions are emotionally compelling, he believed the law was clear as to the proper resolution of the case.[66] He defined the issue before the Court as "not whether it is wise to enforce the statute in these circumstances; rather [the issue] 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."[67] As such, of the three categories[68] in which it is permissible for Congress to employ its Commerce Clause power, the third category—Congress's power to regulate activities that substantially affect commerce—was the one central to the resolution of the case.[69]

As Justice Stevens began to examine whether the facts at issue fell into the "substantially affects" category, he asserted that there are practically conclusive similarities between the case at bar and *Wickard*.[70] The principle from *Wickard* that most directly applies is Congress's ability to regulate intrastate activity that is not "commercial"[71] if Congress "concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[72]

The Court in *Wickard* found that a rational basis existed for Congress to conclude that an individual growing wheat at home for personal use could, when aggregated, come to have a serious affect on Congress's intended regulatory scheme codified in the Agricultural Adjustment Act.[73] Justice Stevens saw a direct correlation here, where the Court found that a similar rational basis existed for Congress to decide that homegrown marijuana

66. Gonzales v. Raich, 545 U.S. 1, 9 (2005).

67. *Id*.

68. The three categories are the channels of interstate commerce, the instrumentalities of interstate commerce and persons or things in interstate commerce, and activities that substantially affect interstate commerce. *Id*. at 16–17.

69. *Id.* at 17.

70. *Id*. at 17–18.

71. Justice Stevens' opinion indicates that his definition of "commercial" is apparently limited to activity that is "produced for sale." *Raich*, 545 U.S. at 18.

72. *Id*.

73. *Id*. at 18–19.

intended solely for personal use could affect price and market conditions and thus have a negative impact on the federal regulatory policy of the CSA.[74] Specifically, the 1938 Court feared that without allowing homegrown wheat to fall under the Agricultural Adjustment Act it would be drawn into the market and lower the market price.[75] Similarly, the inclusion of marijuana in the CSA was intended to stave off the possibility that high demand would draw marijuana intended for personal use into the interstate market.[76]

The respondents in *Raich* disputed these parallels between their situation and *Wickard* in three main arguments.[77] First, they asserted that the Agricultural Adjustment Act exempted small farming enterprises, whereas the CSA does not.[78] Second, they believed there was a clear difference between *Wickard*, which concerned a commercial farm, "a quintessential economic activity," and themselves who did not sell marijuana.[79] Finally, in *Wickard* there was clear factual evidence that producing wheat solely to be used on farms did have a substantial effect on the market price.[80] Here, the respondents maintained that Congress's exercise of power was unconstitutional because it did not make any specific findings that personal cultivation of marijuana pursuant to a doctor's prescription substantially affected the interstate drug market.[81]

Justice Stevens admitted that these distinctions were accurate, but they did not change the controlling influence of the decision in *Wickard*.[82] He quickly addressed all three contentions in one paragraph.[83] As to respondents' first distinction, the farmer's personal impact itself was so miniscule that it alone did not affect the market, so the fact that the Secretary of Agriculture exempted smaller farms made no difference to the analysis.[84] Justice Stevens was underlining that the aggregation principle produced the holding of *Wickard*, not the individual circumstance.

In response to respondents' second argument, Justice Stevens pointed out that "even though [Filburn] 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."[85]

74. *Id*. at 19.
75. *Id.* at 20.
76. *Raich*, 545 U.S. at 19.
77. *Id.* at 20.
78. *Id*.
79. *Id*.
80. *Id*.
81. *Raich*, 545 U.S. at 21.
82. *Id*.
83. *Id*.
84. *Id*. at 20.
85. *Id*.

Finally, in answer to the third distinction that respondents drew between themselves and *Wickard*, Justice Stevens affirmed that while the record itself "established the causal connection between the production for local use and the national market" in *Wickard*, here there were a number of congressional findings that fulfilled the same function of sufficiently asserting a causal connection.[86] Additionally, the Supreme Court does not force Congress to present particularized findings to justify a piece of legislation unless a "special concern," like the protection of free speech, is at issue.[87] Justice Stevens closed this part of the analysis by stating that "the absence of particularized findings does not call into question Congress' authority to legislate."[88]

The majority opinion then turned to a clarification of the proper test to apply when analyzing the scope of Congress's ability to legislate pursuant to the Commerce Clause. The Court only had to find that there was a rational basis for concluding that respondents' activity, when aggregated, substantially affected interstate commerce.[89] The Court did not need to find that respondents' aggregated activity *in fact* substantially affected interstate commerce.[90] The Court barely elaborated on this point. The opinion merely stated that the Court had no trouble finding a rational basis for regulating marijuana as part of a comprehensive regulatory scheme.[91] The Court asserted that not including marijuana as part of this comprehensive regulatory scheme would threaten the integrity of the CSA as a whole.[92]

The Court then strongly stated that it would not redact individual instances of purely intrastate activity from their place in a valid, comprehensive statutory scheme.[93] In *Lopez* and *Morrison*, the Court struck down the statutory provisions because the parties argued that they were completely beyond Congress's Commerce Clause power.[94] The Court found that this was a key distinction because "where 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."[95]

Another point that Justice Stevens was sure to bring out was that another important difference between *Lopez* and *Morrison* and the present case was that the statutes at issue in both *Lopez* and *Morrison* were held to be unconstitutional because they did not regulate activity that was economic in

86. *Raich*, 545 U.S. at 20.
87. *Id.* at 21.
88. *Id.*
89. *Id.* at 22.
90. *Id.*
91. *Raich*, 545 U.S. at 22.
92. *Id.*
93. *Id.*
94. *Id.* at 23.
95. *Id.* (quoting Perez v. U.S., 402 U.S. 146, 154 (1971)).

nature.[96] The Court saw this as a key difference because the CSA governs activities that are "quintessentially economic."[97] To provide their definition of "economics," the Court utilized Webster's Dictionary, which defines "economics" as "the production, distribution, and consumption of commodities."[98] The Court believed that the production, distribution, and consumption of commodities is exactly what the CSA regulates; therefore it regulates economic activity.[99]

The Court of Appeals was able to find the application of the CSA to respondents to be unconstitutional by separating out a distinct class of activities—that of a person cultivating and using marijuana in accordance with a doctor's prescription under California's Compassionate Use Act.[100] In so doing, it held that this specific and distinct class of activities "does not involve sale, exchange, or distribution."[101] Since this class of activities was regulated by state law and intended for health care and pain management purposes, the Court of Appeals held that it was "different in kind from drug trafficking," which was Congress's concern when it enacted the CSA.[102]

The Supreme Court majority opinion disagreed and stated that Congress had a rational basis for finding that none of the characteristics of this class compelled its exemption from the legislative scheme.[103] Furthermore, the Court saw this "class" of activities as an integral part of the overall regulatory scheme, so it would not consider excising it.[104] The Court supported this holding by asserting that the mere fact that the marijuana at issue was used for medicinal purposes and used pursuant to a doctor's prescription "cannot itself serve as a distinguishing factor."[105] Most of the drugs itemized under the CSA have been found to produce a valid medical benefit.[106] However, drugs categorized in Schedule I[107] have been placed there specifically because they do not have any medical purpose.[108]

The Court stated that even if respondents were correct about marijuana's valid medical uses, the Controlled Substances Act places boundaries beyond that of California state law.[109] The Drug Enforcement Administration is

96. *Raich*, 545 U.S. at 23–24.
97. *Id*. at 25.
98. *Id*.
99. *Id*. at 26.
100. Raich v. Ashcroft, 352 F.3d 1222, 1229 (9th Cir. 2003).
101. *Id*.
102. *Id*. at 1228.
103. Gonzales v. Raich, 545 U.S. 1, 26 (2005).
104. *Id*.
105. *Id*. at 27.
106. *Id*. at 28.
107. Again, marijuana has thus far been listed in Schedule I. *See* 21 U.S.C. § 812(c) (2000).
108. *Raich*, 545 U.S. at 27.
109. *Id*.

responsible for categorizing pharmaceuticals into the appropriate schedules.[110] Consequently, when new drugs become available, the federal government must certify their safety even if doctors already support their use.[111] As a result of this arrangement, "the mere fact that marijuana—like virtually every other controlled substance regulated by the CSA—is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA."[112]

Here, the Court also admitted that respondents had propounded evidence that indicated marijuana does serve a number of valid medical uses.[113] However, even if true, the proper course of action would be for respondents to instigate another attempt to persuade the Drug Enforcement Administration to reclassify marijuana at a lower Schedule.[114] Regardless, any possible future reclassification of marijuana had no bearing here.[115] The Court went so far as to say the outcome that respondents advocated would place any homegrown medical substances beyond the regulatory reach of Congress.[116]

To further buttress the reasons why the Supreme Court overruled the Court of Appeals, Justice Stevens argued the fact that the marijuana use was compliant with state laws did not make it an activity beyond congressional reach.[117] He articulated that the federal power over commerce is superior to any concomitant state assertion of power.[118] The states are well within their rights when they enact legislation to promote the health and welfare of their citizens.[119] But according to Justice Stevens, when this power conflicts with a valid federal exercise of the commerce power, there is no question that the federal law trumps because of the mandate of the Supremacy Clause.[120]

Justice Stevens finally turned to the question of whether California's legalization of medical marijuana was likely to have an effect on the interstate drug market.[121] He argued that California's exemption from prosecution for doctors prescribing marijuana gave unscrupulous doctors an economic incentive to prescribe marijuana for patients.[122] Unlike the prescriptions for most currently legal drugs, California's Compassionate Use Act placed no

110. *See id.*
111. *Id.*
112. *Id.* at 28.
113. *Raich*, 545 U.S. at 28 n.37.
114. *Id.* at 33.
115. *Id.* at 28 n.37.
116. *Id.*
117. *Id.* at 29.
118. *Raich*, 545 U.S. at 29.
119. *Id.*
120. *Id.*
121. *Id.* at 29–33.
122. *Id.* at 31.

limitations on the appropriate dosage or duration of a marijuana prescription.[123] Justice Stevens believed that this open-ended language would even allow doctors to conclude that some recreational use might prove to be medically beneficial in certain instances.[124] This led Justice Stevens to voice the fear that "[some of the Supreme Court's] cases have taught us that there are some unscrupulous physicians who overprescribe when it is sufficiently profitable to do so."[125]

Another reason that Justice Stevens offered for how the marijuana legalized under the Compassionate Use Act was likely to eventually affect the interstate illicit drug market was that the Compassionate Use Act did not possess sufficient controls for ending the patient's personal cultivation of marijuana.[126] Justice Stevens said, "The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious."[127] As a result of this conclusion, he asserted that the California legislation would substantially affect interstate commerce by allowing supposedly "legal" marijuana to be diverted to the illicit drug market, thereby compromising the integrity of the CSA's over-arching regulatory scheme.[128]

After this analysis Justice Stevens concluded the Court's opinion by returning to its starting point—a comparison of the present case to *Wickard*.[129] The intrastate cultivation and personal use of marijuana was deemed as analogous to the intrastate cultivation and personal consumption of wheat.[130] Justice Stevens added, "Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose [the respondent's] claim."[131] This holding led Justice Stevens to advise the respondents that their best hope for relief was to seek administrative reclassification of the drug or to encourage the "voices of voters" to be heard "in the halls of Congress."[132] However, the two strong dissents argued that the judicial avenue of relief should not be closed down so quickly.

123. *Raich*, 545 U.S. at 31.
124. *Id*. at 32.
125. *Id*. at 31.
126. *Id*. at 31–32.
127. *Id*. at 32.
128. *Raich*, 545 U.S. at 32.
129. *Id*. at 33.
130. *Id*. at 32–33.
131. *Id*. at 33.
132. *Id*.

B. Justice Scalia's Concurrence

Justice Scalia wrote a short concurring opinion, only some of which is applicable here.[133] Justice Scalia argued that in order to make the regulation of interstate commerce effective, Congress can regulate some intrastate activity that does not "substantially affect" interstate commerce.[134] He agreed that the holding of *Lopez* does not allow Congress to regulate non-economic activity "based solely on the effect that it may have on interstate commerce through a remote chain of inferences."[135] However, Justice Scalia found a major difference between the present case and both *Lopez* and *Morrison* because neither *Lopez* nor *Morrison* involved a situation where Congress was controlling intrastate activities in connection with a comprehensive regulatory scheme.[136] Justice Scalia asserted that the fact that simple possession of marijuana is a non-economic activity was immaterial to whether or not it could be prohibited as an essential part of a larger regulatory scheme.[137] Partly as a result of this Commerce Clause based analysis, Justice Scalia believed that the Court is justified in overruling state actions that are at odds with the CSA.

C. Justice O'Connor's Dissent

In her dissenting opinion,[138] Justice O'Connor contested several of the main conclusions reached by the majority of the Court. She believed that careful limits must be imposed on Congress's use of the commerce power in order to protect the areas in which states have traditionally been the primary actors.[139] Otherwise, the basic federalism principles on which the American system of government is built could begin to lose their vitality.[140] One of federalism's most attractive features is the opportunity for states to act as laboratories to fashion innovative new solutions to difficult problems.[141] Justice O'Connor voiced a fear that the Court was prematurely ending a needed "experiment" without adequate proof that it offended the interplay of power between the state and federal government.[142]

Justice O'Connor set up her analysis by noting the four main considerations that the Court used in *Lopez* to find that the statute at issue in

133. This is so because much of Justice Scalia's opinion focuses on the Necessary and Proper Clause, which is not within the scope of this Note.

134. Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring).

135. *Id*. at 36.

136. *Id*. at 37.

137. *Id*. at 39–40.

138. Justice O'Connor's dissent was joined by Chief Justice Rehnquist and Justice Thomas.

139. *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting).

140. *Id*. at 43.

141. *Id*. at 42 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

142. *Id*. at 42–43.

that case went too far under the Commerce Clause.[143] The first factor was that the statute at issue in *Lopez* was a criminal statute and had no relation to commerce or any type of economic enterprise.[144] The second consideration was that the statute had no express jurisdictional hook that established its nexus with interstate commerce.[145] The third relevant factor was the lack of any legislative findings that concerned the regulated activity's impact on interstate commerce.[146] The final consideration was that the government's argument in *Lopez* about how the regulated activity had an adverse effect on interstate commerce was too attenuated to be realistically accepted.[147] Justice O'Connor asserted that these same four considerations also played an influential role in the Court's decision in *Morrison*.[148] She found that with respect to these considerations, the current case was "materially indistinguishable" from *Lopez* and *Morrison*.[149]

Justice O'Connor took issue with the Court's characterization of the activity at issue here.[150] She believed that the Court improperly deferred to Congress's definition of the relevant considerations and applied the four factors lifted from *Lopez* to the CSA as a whole.[151] She worried that this approach was dangerous because "allowing Congress to set the terms of the constitutional debate in this way, *i.e.*, by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause."[152] In her view, the outcome that the Court reached granted Congress unlimited freedom to enact legislation governing intrastate activity so long as Congress asserts that the intrastate regulation is an integral part of the larger scheme.[153] Justice O'Connor made an interesting note that previously, this type of approach allowing intrastate regulation contained within a broader piece of regulatory legislation had only been advocated in dissenting opinions to Supreme Court decisions.[154]

Justice O'Connor believed that the problem before the Court should lead it to find "objective markers" to guide its analysis when examining Commerce

143. *Id*. at 44–45.

144. *Raich*, 545 U.S. at 44.

145. *Id*.

146. *Id*. Justice O'Connor noted that while these types of congressional findings are not required, they are frequently very helpful in deciding whether the regulated activity does in fact substantially affect interstate commerce. *Id.*

147. *Id*. at 44–45.

148. *Id*.

149. *Raich*, 545 U.S. at 45.

150. *Id*. at 45–46.

151. *Id*.

152. *Id*. at 45.

153. *Id.* at 46.

154. *Raich*, 545 U.S. at 47.

Clause cases.[155] The Court cannot look solely to the individual instances at issue because they will never affect interstate commerce; but at the same time the Court cannot completely defer to Congress's characterization of the issues.[156]

In keeping with her understanding, Justice O'Connor found what she believed were two such "objective markers" that could be applied in the present case to "confine the scope of constitutional review."[157] The first was that different uses of the drug, whether medical or non-medical,[158] are "realistically distinct and can be segregated" and thus can be regulated in different ways.[159] This is an obvious fact that was recognized by all of the legislation at issue here, both federal and state.[160]

Justice O'Connor's second "objective marker" was that the conduct at the core of this case falls into what is a traditional area of state concern—the regulation of health and safety through criminal law and social policies.[161] In this case, there was a tension between the methods and policies of the state government and the federal government.[162] However, the states usually have control of these areas because they "lay claim by right of history and expertise."[163]

When structuring an analysis using these markers as guides, Justice O'Connor believed that to decide the constitutionality of Congress's action the proper focus should be on the "personal cultivation, possession, and use of marijuana for medicinal purposes."[164] Using this conduct as the proper focus, there were two questions that the Court should answer.[165] The first question was whether "the conduct is economic and, in the aggregate, substantially affects interstate commerce."[166] The second question was whether the "regulat[ion of] such activity is necessary to the interstate drug control scheme."[167]

Justice O'Connor stated that the Supreme Court made a key shift of focus from the activity at issue here to all of what the CSA regulates.[168] She argued

155. *Id*.
156. *Id*.
157. *Id*. at 48.
158. "Non-medical" is here used as a euphemism for "recreational."
159. *Raich*, 545 U.S. at 48 (O'Connor, J., dissenting).
160. *Id*.
161. *Id*.
162. *Id*.
163. *Id*. (quoting United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring)).
164. *Raich*, 545 U.S. at 48.
165. *Id*. at 49.
166. *Id*.
167. *Id*.
168. *Id*.

that, while changing the focus, the Court also used a far too expansive definition of "economics."[169] Justice O'Connor asserted that "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."[170] This broad definition allowed the Court to avoid facing the real problem of making an actual distinction between activity that is national and activity that is local.[171] Instead, the Court's view of "economics" essentially posited that everything is economic.[172]

In distinction, Justice O'Connor recalled that the decisions in *Lopez* and *Morrison* advised that in most instances "economic activity usually relates directly to commercial activity."[173] Here, the Court was faced with a situation in which the marijuana was grown at home and had no "apparent commercial character."[174] Therefore, Justice O'Connor had trouble understanding how this activity could be held to be economic, since the marijuana never flowed in the stream of commerce,[175] and there was simply no evidence that patients who obtained marijuana under the Compassionate Use Act were likely to be responsible for any marijuana making its way to the interstate market.[176] Furthermore, *Lopez* unambiguously held that "possession is not itself commercial activity."[177]

Finally, Justice O'Connor turned to a consideration of the Court's method of reasoning by analogy between the present case and *Wickard*. She began by reiterating that *Wickard* is "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."[178] Justice O'Connor believed that a careful reading of *Wickard* led to the conclusion that it did not hold "that small-scale production of commodities is always economic, and automatically within Congress' reach."[179] Therefore, she argued that whenever Congress exercises its power in a traditionally state-controlled area, that exercise of power must be justified.[180]

In *Raich*, though, Justice O'Connor found no evidence that Congress had sufficiently justified its imposition of control over a traditional area of state responsibility.[181] She stated that "[t]here is simply no evidence that

169. *Raich*, 545 U.S. at 49.
170. *Id.*
171. *Id.*
172. *Id.* at 50.
173. *Id.*
174. *Raich*, 545 U.S. at 50.
175. *Id.*
176. *Id.* at 56.
177. *Id.* at 50.
178. *Id.* (quoting United States v. Lopez, 514 U.S. 549, 560 (1995)).
179. *Raich*, 545 U.S. at 51.
180. *Id.*
181. *Id.* at 52.

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."[182] Justice O'Connor emphasized that the record before the Court was incomparable to *Wickard* and insufficient to justify Congress' action.[183] The mere assertions by Congress that a particular activity substantially affects interstate commerce are not enough to justify Congress's general use of power, especially since Justice O'Connor noted that Congress's simple declarations were not necessarily true and were not even specific to marijuana.[184] This was a fatal flaw according to Justice O'Connor since California only "carved out a limited class of activity for distinct regulation."[185]

As Justice O'Connor summed up her argument, she invoked the language of *Wirtz*,[186] stating that Congress may not use "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."[187] She stated that the findings that accompany the CSA are unsubstantiated conclusory statements.[188] She noted that the Court's act of "[p]iling assertion upon assertion does not, in my view, satisfy the substantiality test of *Lopez* and *Morrison*."[189]

D. Justice Thomas' Dissent

The dissenting opinion of Justice Thomas reiterated some of the concerns that Justice O'Connor voiced in her dissenting opinion and presented additional arguments, not all of which need be discussed here.[190] Initially, Justice Thomas argued that the scope of the Commerce Clause should be limited by the understanding of the term "commerce" as it was used throughout the era in which the Commerce Clause was written.[191] The clearest understanding of "commerce" that can be gleaned from writings of that era is "trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange."[192]

182. *Id.* at 53.
183. *Id.*
184. *Raich*, 545 U.S. at 55.
185. *Id.*
186. Maryland v. Wirtz, 392 U.S. 183 (1968).
187. *Raich*, 545 U.S. at 56 (O'Connor, J., dissenting) (quoting *Wirtz*, 392 U.S. at 196 n.27).
188. *Id.* at 56–57.
189. *Id.* at 57.
190. Specifically, Justice Thomas embarked on a more detailed argument against the Court's holding, which looked to the Necessary and Proper Clause for its support. *Id.* at 57–65 (Thomas, J., dissenting). Since this Note is focused on the implications for Commerce Clause jurisprudence, most of Justice Thomas' dissent that concerns the Necessary and Proper Clause is beyond the scope of this Note.
191. *Id.* at 58.
192. *Raich*, 545 U.S. at 58.

As a result, Justice Thomas took issue with the Court defining "economic" in what he considered to be the "broadest possible terms."[193] Justice Thomas posited that the Court specifically used this definition because so much activity falls under it.[194] He stated that this was the Court's way to avoid the precedent that "[t]his Court has never held that Congress can regulate non-economic activity that substantially affects interstate commerce."[195] Basically, Justice Thomas believed that the majority rewrote the Commerce Clause because the challengers' activity fell under no reasonable definition of "commerce."[196]

Justice Thomas also attacked the Court's reasoning that medical marijuana users under the Compassionate Use Act substantially affect interstate commerce.[197] He pointed to safeguards that the California legislature codified in the Compassionate Use Act that exist specifically to ensure that no marijuana allowed under the Act is diverted to the illicit drug market.[198] Justice Thomas saw no evidence before the Court that these controls were ineffective for their purpose.[199] In fact, he found "[t]he scant evidence that exists suggests that few people—the vast majority of whom are aged 40 or older—register to use medical marijuana."[200] As a result, law enforcement officials reported that, "the introduction of medical marijuana laws has not affected their law enforcement efforts."[201]

Justice Thomas found it unlikely that the mammoth interstate illicit drug market would be affected at all, let alone "substantially," even if some marijuana intended for medical purposes were to be diverted.[202] He argued that any diversion of medical marijuana would not affect the market so much that it would make "regulating intrastate medical marijuana obviously essential to controlling the interstate drug market."[203] Therefore, Justice Thomas believed that the federal CSA and California's Compassionate Use Act could coexist.[204]

193. *Id*. at 69.
194. *Id*.
195. *Id.* at 69.
196. *Id*. at 69–70.
197. *Raich*, 545 U.S. at 62–63.
198. *Id*. at 62.
199. *Id*.
200. *Id.* at 63.
201. *Id.* at 63.
202. *Raich*, 545 U.S. at 64.
203. *Id*.
204. *Id*. at 62. Especially since, Justice Thomas points out, Congress expressly provided for the severability of any of the Controlled Substances Act's sections if they are found invalid in one of their applications. *Id*. at 72.

III. THE IMPORTANCE OF THE "STATES AS LABORATORIES" PARADIGM

A. What Does "Commerce" Mean?

The Supreme Court's decision in *Raich* reversed what appeared to be an emerging trend of limiting Congress's Commerce Clause powers. This turn has brought a renewed life and urgency to the debate surrounding the proper extent of Congress's regulatory authority under the Commerce Clause. The debate can be processed and understood by applying the underlying policies of the "states as laboratories" paradigm.

To understand how to most accurately apply the "states as laboratories" paradigm, it is necessary to begin by examining what Congress's regulatory power over commerce really means. Professor Richard Epstein has noted, "The commerce power is not a comprehensive grant of federal power."[205] The clear view of the Supreme Court, at least until *Lopez*, held that "commerce" implies a broad power that can include the regulation of manufacturing and other productive activities that occur entirely within a state.[206] However, if this were the case, it would be at odds with the principle that the Constitution should be interpreted in a way to avoid redundancies.[207]

There is little sense in carefully drafting specific and narrow powers for the federal government throughout the Constitution and then bestowing a comprehensively broad power in the Commerce Clause that subsumes those narrow grants. The federal government's power is absolute in the areas under its control.[208] In return, these areas were clearly enumerated to ensure the federal government did not come to dominate the states.[209] Therefore, when examining the term "commerce," it becomes clear that a more narrow definition of commerce that focuses on the idea of trade is in keeping with the general policies of the Constitution.[210]

B. Problems With A Broad Construction of Commerce Clause Authority

The broad grant of power under the Commerce Clause that the Supreme Court afforded Congress prior to *Lopez* strains the principles of federalism. Congress has enacted legislation by attaching a jurisdictional hook regarding

205. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987).

206. *Id*. at 1393.

207. *Id*.; *see also* Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217, 226–27 (1996).

208. Epstein, *supra* note 205, at 1396.

209. *Id*.

210. *Id*. at 1393–95. Also, when "commerce" is used elsewhere in the Constitution, the term is used in a more narrow sense that implies trade rather than all of economic activity. *See id*. at 1395. For example, Article 1, Section 9 states, "No preference shall be given by any Regulation of Commerce or Revenue to the Parts of one State over those of another." *See id*.

the regulated activity's effect on interstate commerce while showing little concern with whether the activity truly does affect interstate commerce.[211] The result is more "political grandstanding" than a careful use of the federal government's power.[212]

Allowing Congress to exert its authority too broadly introduces a number of related concerns that affect the integrity of the system of federalism. Congress, while consisting of representatives from the states, does not represent "the states' interests in local autonomy" sufficiently well.[213] Most members of Congress are the targets of lobbying from large national interests, which tends to make them identify less with the interests of the state from which they came.[214] By its very nature, Congress focuses itself more on national concerns, leaving it an ineffective guardian of states' autonomy.

Another problem inherent in the overbroad use of congressional power is the negative impact it has on the effectiveness and accountability of the states.[215] Congress's recent history of reaching into areas that are constitutionally under state control leaves state authorities with little incentive to act to correct problems.[216] Instead, they will become increasingly likely to wait and allow the federal government to deal with the difficulty.[217] This can distort each government's sphere of authority and cause political accountability to become a chimera.[218]

Leaving Congress with the ability to exert its commerce power over such a broad range of activity also leads to the conclusion "that there is no logical stopping point to the scope of congressional power under the Commerce Clause."[219] The very nature of the political process means that, in most instances, once Congress has enacted a piece of legislation, it is very difficult to repeal.[220] Thus, allowing Congress to legislate so broadly under the Commerce Clause practically means that Congress will wield a steadily increasing power because of its "underdeveloped capacity for self-restraint."[221]

211. McAllister, *supra* note 207, at 225.

212. *Id*. McAllister cites examples such as statutes criminalizing domestic violence, arson, the liberation of research animals, and wetlands destruction. *Id.*

213. *Id*. at 230.

214. *Id*.

215. *Id*. at 232.

216. McAllister, *supra* note 207, at 232.

217. *Id*.

218. United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).

219. McAllister, *supra* note 207, at 232.

220. *Id*. at 233.

221. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

Finally, in continuing to federalize crime, Congress is assuming one of the key areas of governmental concern that is traditionally left to the states.[222] Not only does the federalization of crime infringe upon what the Framers saw as a traditional state responsibility, but it has also created a huge burden that is beginning to overwhelm the federal courts.[223] Moreover, the greater role that federal law enforcement agents play in the states can lead residents to perceive their local law enforcement as ineffectual and to refuse to rely on them.[224] In turn, the residents then distrust the federal agents because they are not directly accountable to the local community.[225]

C. A Paradigm for Limiting Congress's Commerce Power Overreach

A democratic government is at its best when it is in a position of maximum accountability to the people that it serves. State governments are closely connected with their citizens and, therefore, have a more direct accountability to them.[226] As such, state governments should be reinstated to the role that the Constitution grants them as the primary governor of their citizens' daily lives.[227] This approach has the added benefit of avoiding the conflict that results when the federal government tries to implement a national solution to a problem that is more effectively resolved at the local level.[228] The federal government would then be free to focus on those issues that truly are of national importance.[229]

This leads to the metaphor that Justice Brandeis utilized in his dissent in *New State Ice Co. v. Liebmann*.[230] Justice Brandeis wrote:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system 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.[231]

The concept of "states as laboratories" can be a helpful guide when trying to determine the proper extent of Congress's power in general and of its

222. Alistair E. Newbern, Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After* United States v. Lopez, 88 CAL. L. REV. 1575, 1582 (2000).

223. *Id*. at 1583; McAllister, *supra* note 207, at 233–34.

224. Newbern, *supra* note 222, at 1584.

225. *Id*.

226. *Id*. at 1632.

227. *Id*.

228. *Id*.

229. Newbern, *supra* note 222, at 1632.

230. 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

231. *Id*. at 311.

commerce power specifically. The laboratory function of states should be given prominence in areas of traditional state responsibility, and thus serve to limit Congress's power when it begins to encroach on one of these areas.

Crime and health care are two of the main areas of governmental concern that have traditionally been the responsibility of the states.[232] Allowing states to regulate in these areas is practical because there can be very different region-specific problems that require vastly different foci, depending on the region in question.[233] Since there is such diversity of need concerning crime and health issues among the states, allowing the states to respond to their particular problems in specialized ways makes logical sense.[234] In these areas of local concern, the states can be extremely effective operating as laboratories when responding to problems particular to their situation.[235] Their successes can be extended to others in need, and damages caused by their failures will be limited in degree.[236] After a reasonable trial period, the individual states would be able to examine each other's solutions and modify their various programs to reflect the most successful characteristics of the programs that were implemented.

If Congress were to more prominently remember the states' role as laboratories,[237] then its use of the commerce power would correspondingly begin to be more reasonable. Congress would be less likely to legislate so broadly by merely inserting jurisdictional hooks into legislation that practically has no relation to commerce. Congress's use of the Commerce Clause would be constricted to acts of buying and selling goods and services for money taking place in more than one state.[238] Congress would still be able to enact legislation controlling non-economic crimes and torts that impede properly regulable commerce.[239]

Under this formulation "[c]ongressional power would fail only where it has been aimed at social or moral problems that have virtually no commercial component, as with certain federal criminal statutes."[240] Thus, Congress would be in a position to focus its energies on those problems, economic and otherwise, that can be effectively met only with a concerted national effort.[241]

232. Newbern, *supra* note 222, at 1611.

233. *See* Alreen Hussein, *The Growing Debate on Medical Marijuana: Federal Power vs. States Rights*, 37 CAL. W. L. REV. 369, 381 (2001).

234. *Id*.

235. *See New State Ice Co.*, 285 U.S. at 311.

236. *Id*.

237. Realistically, this would likely require the Court to "help" Congress remember.

238. Grant S. Nelson, *A Commerce Clause Standard for the New Millennium: "Yes" to Broad Congressional Control Over Commercial Transactions; "No" to Federal Legislation on Social and Cultural Issues*, 55 ARK. L. REV. 1213, 1216 (2003).

239. *Id*. at 1217.

240. *Id*. at 1218.

241. *Id*. at 1239.

This focus would help Congress to avoid "the temptation to legislate uniformity on cultural and social issues" that are the primary province of state governments.[242]

When states are allowed to operate as laboratories in areas of traditional state responsibility, they are operating most effectively for the benefit of their citizens and the potential benefit of the rest of the country. Simultaneously, this paradigm will serve to limit Congress's abuse of its Commerce Clause authority and encourage Congress to only use the commerce power in appropriate areas. Allocating the power to states that they are entitled to receive and employ is the best way to protect liberty and guard against the improper imposition of a federal uniformity.[243]

IV. APPLYING THE "STATES AS LABORATORIES" ANALYSIS TO RAICH

A. The Propriety of a State Medical Marijuana Experiment

Using the "states as laboratories" paradigm to analyze the Supreme Court's decision in *Raich* can lead to a characterization of the issues that calls into question the majority's reasoning. The facts of *Raich* directly implicate crime and health care policy, which are two of the areas that are most obviously a traditional state concern.[244] This is so because "[u]nlike *Wickard*, Congress through the [CSA] is not making an effort to control the price of drugs; it is merely passing a criminal law, and crime control has been traditionally left in the hands of the States."[245] Therefore, it is instructive to apply the "states as laboratories" policy, and its concurrent limitation on Congress's use of the commerce power.

The personal, medical use of marijuana that the Compassionate Use Act allows is not the kind of commercial economic activity sufficient to enable Congress to regulate it with the commerce power.[246] Similar to the Court's decision in *Morrison*,[247] the use of marijuana exempted by the Compassionate Use Act is so narrowly defined and carefully limited that it stretches credulity to allow Congress to claim that it is economic activity that can substantially affect interstate commerce.[248] Even some scholars who support an extremely

242. *Id*.

243. James A. Gardner, *The "States-As-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 487 (1996).

244. Newbern, *supra* note 222, at 1611.

245. Hussein, *supra* note 233, at 388.

246. James D. Abrams, *A Missed Opportunity: Medical Use of Marijuana is Legally Defensible: Case Note:* United States v. Oakland Cannabis Buyers' Coop., *No. 00–151, 2001 Lexis 3518 (2001)*, 31 CAP. U. L. REV. 883, 912 (2003).

247. *See* notes 53–64 and accompanying text.

248. Abrams, *supra* note 246, at 912–13; *see also* Craig M. Bradley, *What Ever Happened to Federalism?*, TRIAL, Aug. 2005, at 52, 54.

broad interpretation of the Commerce Clause would "exempt from federal control 'purely social' matters such as personal drug use."[249]

Similarly, the district court in *Conant v. McCaffrey*[250] stated that "[i]t is unreasonable to believe that use of medical marijuana by this discrete population for this limited purpose will create a significant drug problem."[251] In *People v. Peron*,[252] the California Court of Appeals held that the Compassionate Use Act does not purport to legalize the sale or possession with intent to sell marijuana.[253] The CSA validly regulates that. Instead, the Compassionate Use Act exempts only simple cultivation and possession in compliance with a doctor's prescription.[254]

The Court in *Raich* recognized that a number of states have decriminalized marijuana for medical purposes.[255] That ten out of fifty states have decriminalized medical marijuana[256] should indicate that it is an ideal area of concern for states to experiment with novel programs to find a workable solution. This should especially be apparent since Congress's intent to fight a war on drugs on a purely national level is not producing the desired results.[257] In the meantime, those states that have legalized medical marijuana have shown that they can still successfully penalize people that insist on using the drug for purely recreational purposes.[258] What Justice Scalia once wrote concerning abortion applies equally forcefully here:

> [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.[259]

249. Mark, *supra* note 27, at 758.

250. 172 F.R.D. 681 (N.D. Cal. 1997) (holding that plaintiffs are entitled to an injunction to stop the federal government from preventing doctors and patients from discussing the benefits of medical marijuana under the Compassionate Use Act).

251. *Id.* at 694 n.5.

252. 70 Cal. Rptr. 2d 20 (Cal. Ct. App. 1997).

253. *Id.* at 25–28.

254. *Id.* at 26.

255. Besides California, there are at least nine others—Alaska, Colorado, Hawaii, Maine, Nevada, Oregon, Vermont, Washington, and Arizona. Gonzales v. Raich, 545 U.S. 1, 5 n.1 (2005).

256. Again, this falls in an area of traditional state responsibility.

257. Newbern, *supra* note 222, at 1627.

258. Hussein, *supra* note 233, at 393.

259. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

B. Future Trends

In a recent decision, *Gonzales v. Oregon*, the Supreme Court upheld an Oregon law that authorizes physician-assisted suicide.[260] The Oregon act allows a state resident to request prescription medication to end his or her life, but a physician may not personally administer the drug.[261] When hearing the initial appeal, the Ninth Circuit held that there was no indication in the CSA that Congress intended to "ban medical practices that are legal under state law and not related to drug trafficking or abuse."[262]

In upholding the law, the Supreme Court noted that the CSA "manifests no intent to control the practice of medicine."[263] The Court stated that this "silence is understandable given the structure and limitations of federalism, which allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."[264] While quoting the CSA,[265] the Court also held that without a positive conflict the CSA's provisions should not be "construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State."[266]

In *Gonzales* the Court gave its endorsement to Oregon for the state's willingness to act as a laboratory in responding to the controversial issue of physician-assisted suicide. If the policies underlying the *Gonzales* decision had been similarly applied in *Raich*, the outcome of that case may have been different. The Court in *Raich* rejected a state's attempt to act as a laboratory for the legalization of medical marijuana, while in *Gonzales* it upheld a similar attempt concerning physician-assisted suicide. The differences are especially confusing considering the different degrees of acceptance for the activities at issue—that medical marijuana has been legalized in ten states[267] while only Oregon has legalized physician-assisted suicide.[268]

The alternating amount of deference shown to the states' role as laboratories in *Raich* and *Gonzales* are emblematic of the associated variation in the Court's approach to limiting Congress's commerce power. Unquestionably, the two policies are related since the more the states are allowed to embody their roles as laboratories, the more the Court must require Congress to refrain from exerting an overly broad and intrusive commerce

260. Gonzales v. Oregon, 126 S. Ct. 904, 925 (2006).
261. George F. Will, *About Those Categories . . .*, NEWSWEEK, Jan. 30, 2006, at 68.
262. *Id*.
263. *Gonzales*, 126 S. Ct. at 923.
264. *Id*. (internal citations omitted).
265. 21 U.S.C. § 903 (2000).
266. *Gonzales*, 126 S. Ct. at 923.
267. *See supra* note 255 and accompanying text.
268. Will, *supra* note 261.

power. However, it appears unlikely that this relationship, which is key in a federal system of government, will become less turbulent any time soon. The Court has rotated from strictly limiting Congress's Commerce Clause authority before the New Deal, to not invalidating a piece of Commerce Clause legislation for almost sixty years, to the appearance of firm limits in *Lopez* and *Morrison*, to, finally, what seems to be a repudiation of any meaningful checks on that power in *Raich*. If nothing else, it appears that the frequency with which the Court changes its mind on this issue is increasing, something that can only lead to the likelihood of many more surprises in the future.

CONCLUSION

Gonzales v. Raich showcases an example of Congress superficially using its power under the Commerce Clause to regulate an activity that does not readily fit into a rational definition of commerce. When analyzing these conflicts that are inherent in a federal system, the Supreme Court should instead view the problem through the lens of the "states as laboratories" conception. This laboratory function of states should be especially respected in areas that have traditionally been left to the control of the state governments. Honoring the "states as laboratories" paradigm would serve to limit the excesses of Congress when it begins to encroach on one of these areas.

Currently, the jurisprudence surrounding reasonable limits on Congress's use of the commerce power is in a state of flux. Employing the "states as laboratories" theory would help to impose a semblance of order and predictability on the Supreme Court's decisions in this area. More specifically, it would likely lead to a curtailment of Congress's attempts to assert control over areas of crime, health, and safety, which are the traditional responsibility of the states. Therefore, the Supreme Court should use this paradigm to enforce practical limits on Congress's carefree use of the Commerce Clause, and thus, enable the states to help each other and themselves by becoming laboratories that analyze and solve the difficult issues that lay within the traditional responsibility of state government.

DAVID C. MANGAN*

* J.D. Candidate 2007, Saint Louis University School of Law; B.A., Political Science, Saint Louis University. I would like to thank my wife Alicia, my parents, and my sisters for their love, encouragement, and support throughout my time in law school.