

# *Gonzales v. Raich: Wickard v. Filburn Displaced*

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## **I. Introduction**

Over the last decade, the Supreme Court gave the impression that Congress' power "[t]o regulate Commerce . . . among the several States"<sup>1</sup> was not unlimited. In its 1995 *Lopez*<sup>2</sup> and 2000 *Morrison*<sup>3</sup> decisions, the Court made an attempt to re-establish a link between the Constitution and modern "constitutional law." The Court said "to here, but no further." In *Lopez*, for example, Chief Justice William Rehnquist recurred to James Madison's observation in *Federalist No. 45* that "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which remain in the State governments are numerous and indefinite."<sup>4</sup> The powers remaining in the state governments are still indefinite, but after *Gonzales v. Raich*<sup>5</sup> they are also less numerous.

*Raich* involved a challenge not to the federal Controlled Substances Act (CSA)<sup>6</sup> itself but to the application of the Act to those Californians who by state law<sup>7</sup> are authorized to use marijuana under a doctor's care for relief of symptoms that do not respond to conventional medicines.<sup>8</sup> Even though the marijuana provided was grown entirely

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<sup>1</sup>U.S. Const. art. I, § 8, cl. 3.

<sup>2</sup>*United States v. Lopez*, 514 U.S. 549 (1995).

<sup>3</sup>*United States v. Morrison*, 529 U.S. 598 (2000).

<sup>4</sup>*Lopez*, 514 U.S. at 552 (quoting *The Federalist No. 45*, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>5</sup>*Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

<sup>6</sup>Controlled Substances Act, 21 U.S.C. § 801 et seq. (hereinafter "CSA").

<sup>7</sup>The California law is not displaced or preempted by the decision in *Raich*, but the state law does not preclude federal prosecution.

<sup>8</sup>*Raich*, 125 S. Ct. at 2219.

within California and was provided to patients without being bought, sold, or bartered, six members of the Court upheld the application of the CSA to such patients as a valid exercise of Congress' regulatory power over interstate commerce. Writing for the Court's majority, Justice John Paul Stevens relied heavily on *Wickard v. Filburn*,<sup>9</sup> a 1942 decision, which, by the Court's own characterization, pressed the outer limits of federal power.<sup>10</sup> In *Raich*, the Court extended federal power even beyond those limits by holding that Congress could prevent a woman with a brain tumor from using a homegrown substance to survive.<sup>11</sup>

Harsh? Yes. Unconstitutional? Apparently not to six members of the Court. Congress itself made no findings about the effect of medicinal marijuana use on federal efforts to control the recreational use of marijuana. Unnecessary, said Justice Stevens. The Court need only conclude that Congress could have so concluded, even if it didn't and even if no actual proof was offered that it could. It was enough to suppose that Congress could have believed that allowing individual medical uses of marijuana would complicate enforcement of the CSA.<sup>12</sup> As explained more fully below, the majority claimed that it was not overruling *Lopez* and *Morrison*.<sup>13</sup> Those cases, said the Court, involved facial challenges to freestanding statutes—statutes that reached beyond regulating interstate commerce in all their applications—whereas here the CSA was conceded to be a *facially* valid comprehensive law prohibiting the purchase and sale of certain covered drugs; the CSA was only alleged to have been unconstitutionally *applied*. For the Court majority, it was beside the point that the litigation centered on a discrete class of medicinal use that had nothing to do with interstate commerce.<sup>14</sup>

<sup>9</sup>*Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding a federal law that limited the amount of wheat a farmer could grow on his own farm for his own family's consumption on the theory that any wheat so self-reliantly produced reduced the need for wheat in the commercial market and by the law of supply and demand also reduced the market price for wheat).

<sup>10</sup>The *Lopez* Court characterized *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." See *United States v. Lopez*, 514 U.S. 549, 560 (1995).

<sup>11</sup>*Raich*, 125 S. Ct. at 2206–07.

<sup>12</sup>*Id.* at 2211–12.

<sup>13</sup>*Id.* at 2209–11; see *infra* notes 82–85 and accompanying text.

<sup>14</sup>125 S. Ct. at 2211.

Justice Antonin Scalia, who has argued powerfully for the interpretation of the Constitution by means of discerning its “original understanding,”<sup>15</sup> concurred in the judgment. Justice Scalia wrote separately, offering what he said was a more “nuanced” opinion. Unfortunately, it does not rely on original understanding, and it is not nuanced.<sup>16</sup> In a nutshell, Scalia concedes that intrastate, noncommercial medicinal drug use is not interstate commerce, but then proceeds to argue that intrastate noncommercial activities can be regulated under the Constitution’s Necessary and Proper Clause in order to make the regulation of interstate commerce effective.<sup>17</sup> For years, Justice Clarence Thomas, from a similar originalist perspective, has argued that the modern “substantial effects” test, made explicit in *Wickard*, has no constitutional basis. Scalia’s opinion addresses that problem in an unexpected way. For him, it seems that the substantial effects test, far from *overstating* Congress’ authority, actually *understates* it. “Where necessary to make a regulation of interstate commerce effective,” Scalia writes, “Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”<sup>18</sup> In Scalia’s view “purely local” activities can be reached by Congress if Congress reasonably believes they must be reached to vindicate its “comprehensive scheme.”<sup>19</sup> More on Scalia’s argument below. Suffice it to say here that it is a far cry from the Madison of *Federalist No. 45*.<sup>20</sup> It arguably goes beyond even Justice Stephen Breyer, who in dissent in *Lopez* wrote: “[T]he specific question . . . is not whether the ‘regulated activity sufficiently affected interstate commerce,’ but, rather, whether Congress could have had ‘a rational basis’ for so concluding.”<sup>21</sup>

Justice Sandra Day O’Connor dissented in *Raich* for herself, Chief Justice Rehnquist, and Justice Thomas,<sup>22</sup> arguing that both the majority and Scalia ignored each of the factors articulated in *Lopez* and

<sup>15</sup>See generally Antonin Scalia, *A Matter of Interpretation* (1997).

<sup>16</sup>125 S. Ct. at 2215 (Scalia, J., concurring).

<sup>17</sup>*Id.* at 2215–20; see also *infra* notes 45–49, 90–96 and accompanying text.

<sup>18</sup>125 S. Ct. at 2216.

<sup>19</sup>*Id.* at 2218.

<sup>20</sup>See *supra* note 4.

<sup>21</sup>*United States v. Lopez*, 514 U.S. 549, 617 (1995) (Breyer, J., dissenting).

<sup>22</sup>125 S. Ct. at 2220–29 (O’Connor, J., dissenting).

*Morrison*: whether the regulation involves economic activity; whether the statute has a jurisdictional element requiring proof of a connection to interstate commerce; whether Congress made express legislative findings enabling the Court to understand the substantial effect of the regulated activity on interstate commerce; and whether in all events the purported regulatory authority was based on more than a mere inference that the national economy might be adversely affected. None of those factors were adequately addressed, said O'Connor.<sup>23</sup> In response to Scalia, she observed that

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. . . . [S]omething more than mere assertion is required when Congress purports to have power over local activity whose connection to an int[er]state market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation.<sup>24</sup>

Justice Thomas dissented separately, thinking it useful to bolster O'Connor's precedent-based dissent with direct reference to constitutional text and history.<sup>25</sup> He supplies the historical definition of "commerce" as related to "trade or exchange—not all economic or gainful activity";<sup>26</sup> urges that the Necessary and Proper Clause not be seen as a license to either overstate or understate federal enumerated power; and suggests that there must be an "'obvious, simple, and direct relation' between the intrastate ban and the regulation of interstate commerce."<sup>27</sup> Here, he says, "Congress presented no evidence in support of its conclusions, which are not so much findings

<sup>23</sup>*Id.* at 2221 (O'Connor, J., dissenting) (noting the *Raich* majority opinion is "irreconcilable" with the reasoning of *Lopez* and *Morrison*).

<sup>24</sup>*Id.* at 2226 (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting)); see also *infra* notes 97–103 and accompanying text.

<sup>25</sup>125 S. Ct. at 2229–39 (Thomas, J., dissenting).

<sup>26</sup>*Id.* at 2230.

<sup>27</sup>*Id.* at 2231 (quoting *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring)).

of fact as assertions of power. Congress cannot define the scope of its own power merely by declaring the necessity of its enactments.’<sup>28</sup>

Before more fully exploring the interplay among the justices in *Raich*, it is useful to canvass some of the Court’s earlier efforts at interpreting the federal commerce power. It is a meandering course, resulting in ever expanding power.

## II. Background: Original Motivation

### A. Early Bright Lines

Congress did not truly exercise its affirmative commerce power until it passed the Interstate Commerce Act (ICA) in 1887<sup>29</sup> and the Sherman Antitrust Act in 1890.<sup>30</sup> Before passage of those acts, “interstate commerce” primarily involved removing artificial trade barriers among the states, a task most often addressed by the courts, without benefit of federal legislation. Toward the end of the nineteenth century, however, federal legislation was motivated by the rise of private trusts, concentrating the economic activities of local firms for the purpose of monopoly. Justice John Marshall Harlan, a conservative Republican, would remark: “The conviction [became] universal that the country was in real danger from another kind of slavery . . . that would result from the aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country.’<sup>31</sup>

The Interstate Commerce and Sherman Acts were intended to meet that concern. The ICA required railroads traveling through more than one state to charge a “just and reasonable” rate. The Sherman Act, which will be discussed shortly, was aimed at “restraints in trade” among the several states and efforts or attempts to monopolize. To the extent that the ICA sought to limit the power of the railways as natural monopolies, it was economically defensible and consistent with the original understanding of the commerce

<sup>28</sup>*Id.* at 2233.

<sup>29</sup>Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

<sup>30</sup>Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified, as amended, at 15 U.S.C. § 2 et seq.).

<sup>31</sup>*Standard Oil of New Jersey v. United States*, 221 U.S. 1, 83–84 (1911) (Harlan, J., concurring and dissenting in part).

power as a power to remove artificial barriers to trade among the states. And while claims of natural monopoly can be overstated by regulators, during this period the rail companies could and did set rates to exclude competitors, especially regarding short distances. This was particularly irksome to local farmers who lacked the volume to command competitive rates, and the Granger Movement of the late nineteenth century convinced more than a few states to attempt to prevent discrimination between long and short haul shipment rates.<sup>32</sup> States, however, were incompetent to regulate beyond their borders, a point the Supreme Court made in invalidating Illinois' attempted regulation of long and short hauls that crossed state lines in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*.<sup>33</sup>

The ease with which the *Wabash* Court differentiated intrastate from interstate commerce in 1886 is worth noting. The Court opined:

It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State which is not subject to the constitutional provision; and the distinction between commerce among the States and the other class of commerce between the citizens of a single State, and conducted within its limits exclusively, is one which has been fully recognized in this court . . . .<sup>34</sup>

Thus, the Court in *Wabash* held that rates wholly within Illinois, between Alton and Chicago for example, would be subject to the state's authority.<sup>35</sup> However, the federal government could regulate rail service originating or terminating *external* to the prairie state. The Court at that time did not rely on any theory about internal commercial activity "affecting" interstate commerce since a legion of cases had already disclaimed federal authority over such local commercial endeavors. For example, wharves and warehouses that facilitated interstate commerce, but were within a single state, were the regulatory province of that state. To drive home that point, the Court in *Wabash* observed:

<sup>32</sup>For a discussion of the background and economic rationale of the ICA, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1413–14 (1989).

<sup>33</sup>118 U.S. 557, 565 (1886).

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* at 577.

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It was very properly said, in the case of the *State Tax on Railway Gross Receipts* . . . that “it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution.” The warehouses of these plaintiffs in error are situated, and their business carried on, exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so.<sup>36</sup>

The Interstate Commerce and Sherman Acts likewise did not depend on an “affecting commerce” rationale, but on the reality of commercial activity that in fact involved more states than one being impeded by local rule. The *Wabash* decision, rendered a few months prior to the passage of the ICA, drew an analogy to commerce on the Mississippi.<sup>37</sup> The Court wrote:

The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules; and on the other, another. Commerce cannot flourish in the midst of such embarrassments.

The applicability of this language to the case now under consideration, *of a continuous transportation of goods* from New York to central Illinois, or from the latter to New York, is obvious, and it is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which this

<sup>36</sup>*Id.* at 566 (quoting *Munn v. Illinois*, 94 U.S. 113, 135 (1876)).

<sup>37</sup>*Id.* at 572–73.

transportation from the one point to the other is effected, *it is but one voyage*—as much so as that of the steam-boat on the Mississippi river.<sup>38</sup>

### B. Early Confusion

It was with *United States v. E.C. Knight Co.*<sup>39</sup> that matters started to get confused. In *Knight*, the Court refused to apply the Sherman Act to a wholly intrastate stock acquisition that resulted in a monopoly on sugar refining.<sup>40</sup> *Knight* is often understood to have drawn a distinction between manufacturing and commerce, with the former outside federal power and the latter within it.<sup>41</sup> This is a misreading of *Knight*.

The disagreement between the majority and the dissent in *Knight* was not over whether manufacturing and commerce both fell under federal power, but over whether the combinations sought to be regulated by the Sherman Act related to buying and selling among the states *post-manufacture*. Thus, Justice Harlan, who would have upheld the application of the Act, states his disagreement with the *Knight* majority as follows:

It is said that manufacture precedes commerce, and is not a part of it. But it is equally true that when manufacture ends, that which has been manufactured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed . . . and are as much commercial intercourse, where articles are bought to be carried from one state to another, as is the manual transportation of such articles after they have been so purchased.<sup>42</sup>

Harlan reminds the *Knight* majority that it is committing error when it fails to understand why Chief Justice John Marshall included navigation as part of the federal commerce power in the seminal

<sup>38</sup>*Id.* (quoting *Hall v. DeCuir*, 95 U.S. 485 (1877) (emphasis added)).

<sup>39</sup>*United States v. E.C. Knight Co.* 156 U.S. 1 (1895).

<sup>40</sup>*Id.* at 18.

<sup>41</sup>For example, this is how Justice Anthony Kennedy reads the case in his *Lopez* concurrence before he proceeds to disavow the distinction. See *United States v. Lopez*, 514 U.S. 549, 570 (1995) (Kennedy, J., concurring).

<sup>42</sup>*E.C. Knight Co.*, 156 U.S. at 35–36 (Harlan, J., dissenting).



case of *Gibbons v. Ogden*.<sup>43</sup> Commerce included navigation in *Gibbons*, not because it was buying, selling, or bartering. Navigation is not that. Rather, the point of the federal power asserted and sustained in *Gibbons* was the facilitation of buying, selling, or bartering of goods across state lines. Harlan saw the Sherman Act in *Knight* as doing the same. If Congress can prevent New York from issuing exclusive navigational licenses in *Gibbons*, then it can prevent a stock purchase in a single state from sheltering an exclusive (monopolistic) combination of sugar refining. Consistent with the Court's earlier Mississippi River analogy made a few years before the passage of the Sherman Act, Harlan writes:

Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one state to another, may be reached by Congress under its authority to regulate commerce among the states. The exercise of that authority so as to make trade among the states in all recognized articles of commerce absolutely free from unreasonable or illegal restrictions imposed by combinations is justified by an express grant of power to Congress, and would redound to the welfare of the whole country. I am unable to perceive that any such result would imperil the autonomy of the States, especially as that result cannot be attained through the action of any one State.<sup>44</sup>

Note well what Harlan did not do by this remark: he did not claim that manufacturing and commerce were the same; he did not extend Congress' power beyond that dealing with commerce (buying, selling, bartering); he did not disregard the need to limit federal authority to commercial activity involving more states than one. He did, of course, insist that Congress could reach an intrastate commercial activity if it was a "necessary and proper" means to advance interstate commerce.

<sup>43</sup>*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (finding a federal law licensing ships to engage in the "coasting trade," under which *Gibbons* operated, to preempt a New York law granting a 30-year monopoly to *Ogden* to ply the waters between New York and New Jersey. Before the Court acted, the effect of New York's monopoly grant was to preclude *Gibbons* from operating under his federal license.).

<sup>44</sup>*E.C. Knight Co.*, 156 U.S. at 37.

C. *Early Confusion Begets Later Confusion—Only Worse*

There is more of the history of the commerce power to tell, but it is worthwhile at this point to pause in order to compare Harlan's dissent in *Knight* with Scalia's far broader "necessary and proper" claims in his concurrence in *Raich*. Scalia writes:

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.<sup>45</sup>

Scalia's assertion is way beyond the Mississippi River analogy and far broader than Harlan's reasoning in *Knight*, even as Harlan was urging a broad conception of federal power to sustain the application of the Sherman Act to the formation of a sugar refining monopoly in a single state.

Harlan noted that the Constitution, in granting the commerce power, avoided defining the specific means for placing this legitimate authority into effect. On this, Harlan and Scalia would surely agree. However, nowhere does Harlan make the argument that congressional freedom over *means* (subject to their being "necessary and proper") confers freedom over *ends*. To the contrary, Harlan's dissent recurs to the sound instruction from John Marshall: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."<sup>46</sup> It was thus pivotal to Harlan's claim for the application of federal antitrust power to establish that "[t]he end proposed to be accomplished by the act of 1890 is the

<sup>45</sup>*Gonzales v. Raich*, 125 S. Ct. 2195, 2216 (2005) (Scalia, J., concurring) (emphasis in original) (citations omitted).

<sup>46</sup>*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

protection of trade and commerce among the States against unlawful restraints."<sup>47</sup> There was no one in Court disputing that monopolies restrain interstate trade. There was no one in Court denying that the sugar being refined was destined for a national market and that sugar was a commercial product being actively bought and sold. In *Raich*, by contrast, it was beyond dispute that the medicinal marijuana in issue was *not* a commercial product; and it was vigorously disputed whether noncommercial, medicinal use of marijuana had any effect on commercial marijuana being illegally bought and sold outside California.

Harlan could easily step on the necessary and proper platform to defend the use of a federal cause of action as a means to diminish "combinations, conspiracies, and monopolies which, by their inevitable and admitted tendency, improperly restrain trade and commerce among the States."<sup>48</sup> By comparison, Scalia's journey is not a step but a leap, transforming the constitutional authorization of necessary and proper means into a defense of unconstitutional ends. To make the point as plainly as possible, simply substitute the *Raich* facts into Harlan's rhetorical conclusion: "Who can say that [federally prosecuting individuals who are not undertaking any commercial activity and who are acting wholly intrastate pursuant to state authority] is not appropriate to attain the end of [limiting the illegal interstate commercial market in drugs]?" Such a prosecution is neither necessary nor proper to that end. How is arresting and prosecuting a discrete class of sick people necessary to win the "war on drugs," when law enforcement, itself, disclaims this as a necessity?<sup>49</sup>

As unfortunate as *E.C. Knight's* misstep of not understanding the true commercial nature of the Sherman Act's application in that case, it did not do great harm to John Marshall's reasoning in *Gibbons*. Unlike Scalia's *Raich* concurrence, the focus of federal power remained wholly upon commerce. Even if there was disagreement

<sup>47</sup>*E.C. Knight Co.*, 156 U.S. at 39 (Harlan, J., dissenting).

<sup>48</sup>*Id.*

<sup>49</sup>Responding to the decision in *Raich*, federal drug authorities seemed to disclaim that which had been pleaded by the acting solicitor general: "We have never targeted the sick and dying, but rather criminals engaged in drug trafficking," Drug Enforcement Administration spokesman Bill Grant said. See Crackdown on Medical Marijuana Users Unlikely, Associated Press (June 7, 2005), available at <http://www.msnbc.msn.com/id/8118123> (last visited August 15, 2005).

in *Knight* about what intrastate activity could be reached by federal law, both the majority and dissent in *Knight* agreed that for an activity to be federally regulated that activity still had to be clearly established as part of a larger interstate commercial universe. Moreover, within a decade much of the *Knight* disagreement was resolved. For example, in *Swift & Co. v. United States*,<sup>50</sup> the Court coined a “stream of commerce” or “current of commerce” metaphor that returned the Court to the Mississippi River analogy and allowed Congress to regulate the slaughterhouse business in Chicago.<sup>51</sup> Looked at formally, the slaughterhouse business in Chicago was completely *intrastate* and, under the *Knight* majority, might have been thought to be beyond the reach of Congress. But the Court took note of the fact that the slaughterhouse business was just one way station in an interstate industry that encompassed everything from ranching to the retailing of beef.<sup>52</sup>

The *Shreveport Rate Cases*<sup>53</sup> confirmed and slightly expanded Congress’ power by expressly inviting the national legislature to contemplate the *effect* of *intrastate* rate setting on *interstate* rates—but again, the focus was solely on commerce. Of course, it was conceded that Congress, via the Interstate Commerce Commission (ICC), could set minimum rail cargo transportation rates for trains that actually moved in interstate commerce. But that was not the problem. *Wabash* involved price discrimination between intrastate and interstate components of a single interstate journey. In *Shreveport*, the ICC’s desired regulation sought to address local shipping rates for hauls that were not part of an interstate journey. By staying in Texas, shippers adjacent to the Louisiana state line could ship their goods more inexpensively to markets across Texas than to closer Louisiana markets. That disparity in rates had a substantial economic *effect* on interstate commerce, and the Court held that Congress could reach into the purely intrastate rail traffic in Texas in order to impose its higher minimum federal rate schedule on that traffic as well.<sup>54</sup> That was an

<sup>50</sup>196 U.S. 375 (1905) (Holmes, J.).

<sup>51</sup>*Id.* at 399.

<sup>52</sup>*Id.* at 398–99.

<sup>53</sup>*Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914) (hereinafter the “Shreveport Rate Cases”).

<sup>54</sup>*Id.* at 353–54.

incremental increase in federal authority, but *Shreveport*, like *Swift*, kept Congress' power focused on commercial activity, thereby arguably vindicating the constitutional text, while not permitting state lines to be asserted in a formalistic way that would balkanize the national market.

*D. Taking the Commerce Power Beyond Commerce*

*Champion v. Ames*<sup>55</sup> took the commerce power beyond commerce, by permitting it to be employed to prohibit sending lottery tickets across state lines, not because doing so restricted or burdened interstate commerce, but because lotteries were perceived as morally evil. Here too, as with the *Knight* case, the modern version of *Champion* suffers from revisionism. Thus, writing for the *Raich* majority, Stevens notes that, "[i]n the *Lottery Case* [*Champion v. Ames*], the Court rejected the argument that Congress lacked [the] power to prohibit the interstate movement of lottery tickets because it had power only to regulate, not to prohibit."<sup>56</sup> Scalia echoes that characterization of *Champion* in his *Raich* concurrence.<sup>57</sup> Yet the real significance of *Champion* was not its distinction between regulatory promotion or restriction but an unfortunate acceptance of judicial abdication—the notion that the Court had no duty to inquire whether either means, promotion, or restriction, was legitimately aimed at the subject matter of interstate commerce.

By this judicial complacency, the commerce power was extended to non-commerce purposes in the early twentieth century. Mistakenly, the constitutionality of the question became popularly inseparable from the underlying policy issues. Thus, for example, the federal regulation of child labor was disavowed in 1918 in *Hammer v. Dagenhart*;<sup>58</sup> yet by the time of the New Deal it was found constitutional in *United States v. Darby*,<sup>59</sup> which overruled *Hammer* on its way toward sustaining federal minimum wage and maximum hour laws. Arguing from text alone, the *Hammer* majority reasoned that working conditions

<sup>55</sup>188 U.S. 321 (1903).

<sup>56</sup>*Gonzales v. Raich*, 125 S. Ct. 2195, 2207 n.29 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 571 (1995) (Kennedy, J., concurring) (third alteration in original)).

<sup>57</sup>*Id.* at 2219 (Scalia, J., concurring).

<sup>58</sup>247 U.S. 251 (1918).

<sup>59</sup>312 U.S. 100 (1941).

could not be regulated by Congress because they were not “commerce”—that is, buying and selling or trade. Working conditions were matters of health, safety, and morals—the province of the states. As Justice William Day wrote for the *Hammer* majority, Congress’ power over interstate commerce “was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture. The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.”<sup>60</sup>

In his dissent in *Hammer*, Justice Oliver Wendell Holmes elides the non-commerce nature of the regulation by suggesting that “[t]he act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights.”<sup>61</sup> Keeping children out of sweatshops is a salutary policy objective, but it cannot fairly be said to relate to the act of buying, selling, or bartering. Holmes tries to escape this textual boundary by declaring that no single state has authority over the national market, while Congress does. But again, with the exception of *Champion*, Congress was thought to have this authority as it related to buying, selling, or bartering, not generally with respect to bad acts.<sup>62</sup> *Champion* weakened that supposition, but the case was seen by the *Hammer* majority as merely keeping an evil thing (a lottery ticket) out of a national market, not as a wholesale invitation to regulate working conditions that did not directly implicate buying, selling, or bartering and that had until then been under the supervision of the states. Holmes countered sweepingly: “[Congress] may carry out its views of public policy whatever indirect effect they may have upon the activities of the States.”<sup>63</sup>

<sup>60</sup>*Hammer*, 247 U.S. at 273–74.

<sup>61</sup>*Id.* at 281 (Holmes, J., dissenting).

<sup>62</sup>Compare, for example, Harlan’s reasoning in *Knight* that the intrastate monopoly dampened the sale of sugar outside the single state where the monopoly was secured by stock acquisition; likewise, the finding that intrastate rate setting undermined interstate rates in the *Shreveport Rate Cases* arguably established a necessary linkage between intrastate practice and the capacity to buy, sell, or barter that was missing in *Hammer*. The chief justice would revive this inquiry in *Lopez* by insisting that there be a logical stopping point, rather than the obfuscation of what is national and what is local by the piling up of inference upon inference.

<sup>63</sup>*Id.*

With the onset of the Great Depression, Holmes' view became the law of the land. Notably, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,<sup>64</sup> the Supreme Court voted five to four to sustain federal labor legislation regulating management and union activity at manufacturing plants. After that, the Court would no longer make any serious effort to keep the commerce power focused on commerce, and the interstate limitation would soon disappear. As briefly noted earlier, the Court in *Wickard*<sup>65</sup> was concerned with the restrictions imposed by the Agricultural Adjustment Act on the activities of farmer Filburn. The idea behind the Act's acreage restrictions was to keep farm prices up by limiting supply. When Filburn grew on more acreage than his quota allowed, intending the surplus for his noncommercial home consumption, the Court sustained the Act.<sup>66</sup> It did not matter that Filburn's activity was local and not regarded as commerce. It could be reached if Congress could rationally believe it exerted a substantial economic effect on interstate commerce. It did not matter if the effect was "direct" or "indirect" or if Filburn's surplus was insubstantial in terms of the overall wheat market. Congress could consider the similar activity of thousands of "Farmer Filburns" across the country in its assessment of the economic effects of that activity on interstate commerce. In other words, a principle of aggregation was built into the "substantial economic effects" test.

And what remained of state authority? State powers were no longer "numerous," as Madison promised, but the ever diminishing residue of the federal regulatory enterprise. Ignoring the very point of the Tenth Amendment—to secure the Constitution's premise of delegated, enumerated, and thus limited powers—the *Darby* Court said the Amendment stated "but a truism."<sup>67</sup> That rather meaningless truism persisted unassailed until the mid-1990s.

### III. The Tide Turns? *Lopez* and *Morrison* after *Raich*

In 1995, in *United States v. Lopez*,<sup>68</sup> the Court put a brake on its nearly sixty years of Commerce Clause deference to Congress. *Lopez*

<sup>64</sup>301 U.S. 1 (1937).

<sup>65</sup>*Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>66</sup>*Id.* at 113–17 (summarizing facts); *id.* at 128–29 (holding).

<sup>67</sup>*United States v. Darby*, 312 U.S. 100, 124 (1941).

<sup>68</sup>514 U.S. 549 (1995).

arose when a twelfth-grade student carried a concealed handgun into his high school, and was subsequently charged with violating the federal Gun-Free School Zones Act of 1990, which forbids “any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone.”<sup>69</sup> A five to four Court, per Chief Justice Rehnquist, found that, in passing the Act, Congress had exceeded its power under the Commerce Clause. Reverting to the constitutional text, the Court said that possession of a gun in a local school zone was in no sense an economic activity.<sup>70</sup> Seeming to limit the aggregation principle in *Wickard*, the Court resolved that even through repetition of the activity elsewhere, school gun possession would not have a substantial effect on interstate commerce.<sup>71</sup> Nor had Congress made any effort to limit the scope of the statute by incorporating a jurisdictional element, which would ensure, through case-by-case inquiry, that the firearms possession in question had the requisite factual nexus with interstate commerce.<sup>72</sup> There were indeed no facts to indicate that the student had recently moved in interstate commerce or that he had come into possession of the firearm via interstate commerce.<sup>73</sup> While those defending the Act speculated about higher insurance costs and lower educational achievement, the Court called this piling “inference upon inference,” all in a manner calculated to transform the Commerce Clause into a general police power, which it is not.<sup>74</sup>

Five years later the Court decided *United States v. Morrison*,<sup>75</sup> a challenge to a section of the Violence Against Women Act (VAWA),<sup>76</sup> which provided a federal civil remedy for victims of gender-motivated violence. Echoing its *Lopez* considerations, a five to four Court again held the statute to be beyond Congress’ authority under the Commerce Clause. The regulated activity was not commercial

<sup>69</sup>Gun-Free School Zones Act, 18 U.S.C. § 922(q)(2)(A) (1990).

<sup>70</sup>514 U.S. at 561, 567.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* at 561–62.

<sup>73</sup>*Id.* at 567.

<sup>74</sup>*Id.* at 567–68.

<sup>75</sup>*United States v. Morrison*, 529 U.S. 598 (2000).

<sup>76</sup>Violence Against Women Act, 42 U.S.C. § 13981.



or economic.<sup>77</sup> The statute contained no jurisdictional element limiting its application to certain factual circumstances involving interstate commerce.<sup>78</sup> The only difference between *Morrison* and *Lopez* was that Congress had held hearings that attempted to document a “but-for” causal chain from the initial occurrence of violent crime to its attenuated effects on interstate commerce.<sup>79</sup> But the Court saw that evidence as without a meaningful stopping point or limiting principle since, were it accepted, the reasoning would allow Congress to regulate any crime whose nationwide, aggregated impact had substantial effects on employment, production, transit, or consumption. Proclaiming that it was important to separate what is local from what is national, the Court did not see how it could sustain the Act without also inviting and approving federal displacement of state law over marriage, family law, and child rearing, all of which could likewise be said to have, in the aggregate, effects on the national economy.<sup>80</sup> In the end, the Court concluded that Congress may not regulate intrastate, noneconomic, criminal conduct based solely on the conduct’s aggregate effect on interstate commerce.<sup>81</sup> After *Raich*, that conclusion is open to considerable question. Here is why.

A. *Do Lopez and Morrison Survive Raich?*

As a formal matter, Justice Stevens, writing for the *Raich* majority, distinguishes but does not overrule *Lopez* and *Morrison*. Specifically, he notes that “in both *Lopez* and *Morrison* the parties asserted that a particular statute or provision fell outside Congress’ commerce power in its entirety.”<sup>82</sup> Here, *Raich* and other seriously ill patients without another effective medicinal remedy asked merely to excise an individual application of the Controlled Substance Act to their unique circumstance—namely, to patients under a doctor’s care who, with explicit state approval, were being given marijuana that all agreed had never traveled interstate or been part of a commercial transaction. To save *Lopez* and *Morrison*, the majority had to argue

<sup>77</sup>529 U.S. at 611–12.

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* at 612.

<sup>80</sup>*Id.* at 615–16.

<sup>81</sup>*Id.* at 617.

<sup>82</sup>*Gonzales v. Raich*, 125 S. Ct. 2195, 2197 (2005).

that Raich's "as applied" challenge failed, unlike the facial challenges mounted in *Lopez* and *Morrison*. Indeed, the distinction, said Justice Stevens, was "pivotal."<sup>83</sup>

It may be rhetorically pivotal, but it is constitutionally perverse. It would be far more respectful of the delicate balance between the federal and state governments to invalidate isolated, excessive applications of otherwise legitimate federal power than to invalidate whole statutes wholesale. Nevertheless, Stevens attempts to justify the distinction doctrinally as a part of commerce power precedent going back to *Wickard*, holding 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."<sup>84</sup> That statement may be faithful to pre-*Lopez* and pre-*Morrison* case law, but it is unfaithful to the Court's structural obligation to separate local from national activities.

The Court's refusal to consider Raich's as-applied challenge is especially puzzling since it obviously anticipated doing as-applied analyses when it complained in both *Lopez* and *Morrison* about the absence of jurisdictional elements that would make as-applied case-by-case examination possible.<sup>85</sup> Nor can the *Raich* opinion be explained by invoking the judicial restraint that gives deference to policy choices made by political branches, for there are two such branches in play here. After all, not just Congress but the people of California and the California Assembly made policy choices, too. A restrained judicial posture is not the same as a policy of federal deference, which prompts the ultimate question—to which government does the Constitution assign the policy choice? Only Thomas addresses that question directly, looking at original understanding as he does so.

#### *B. Was it Economic? Was it Commerce? Did it Matter?*

Stevens also attempts to distinguish *Lopez* and *Morrison* by noting that neither dealt with an economic transaction, whereas *Raich* involves activities that are "quintessentially economic."<sup>86</sup> It is hard

<sup>83</sup>*Id.*

<sup>84</sup>*Id.* at 2197–98 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)).

<sup>85</sup>*United States v. Lopez*, 514 U.S. 549, 561 (1995); *United States v. Morrison*, 529 U.S. 598, 609–13 (2000).

<sup>86</sup>*Raich*, 125 S. Ct. at 2211.

to take that argument seriously on a record that establishes only medicinal use, coupled with a total absence of buying, selling, or bartering. If donative transactions were commercial, the argument might work, but then large bodies of common law would have to be rewritten.

The majority's definition of what is "economic," which it finds in a modern dictionary, is quite broad: "'Economics' refers to 'the production, distribution, and consumption of commodities,'"<sup>87</sup> Stevens writes. In her dissent, O'Connor finds the definition to be so broad that nothing is left out:

[I]t will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic.<sup>88</sup>

Thomas, in turn, thinks the whole exercise is off-point. The constitutional text speaks of commerce, not economics, and the meaning of that term at the founding was "selling, buying, and bartering, as well as transporting for these purposes,"<sup>89</sup> none of which is involved in the present case. Remarkably, however, Scalia thinks the economic/noneconomic distinction unimportant. He would allow Congress to regulate even noneconomic activities if doing so were necessary and proper for the regulation of interstate commerce.

*C. Does the Judiciary Have Any Role in Deciding What Is Local and What Is National?*

The majority sustains the federal law's application by invoking a deferential, rational basis standard—i.e., Congress could have rationally believed, without any showing of evidence other than its litigation pleading, that intrastate medicinal use would harm the federal

<sup>87</sup>*Id.* (quoting Webster's Third International Dictionary 720 (1996)).

<sup>88</sup>*Id.* at 2225 (O'Connor, J., dissenting).

<sup>89</sup>*Id.* at 2230 (Thomas, J., dissenting) (citing Lopez, 514 U.S. at 586–69 (Thomas, J., concurring)).

regulatory program in the sense of having a “substantial effect” on interstate commerce. Scalia seems to accept that deferential understanding of “substantial effect,” but then adds a separate basis for sustaining federal control that is unrelated to the substantial effect inquiry. Specifically, he thinks noncommercial, noneconomic, wholly intrastate activity can be federally regulated, with or without substantial effect, if that regulation is a reasonable means to accomplishing some federal interest. “[T]he means chosen [simply must be] ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.”<sup>90</sup>

Scalia references the venerable precedent of *McCulloch v. Maryland*,<sup>91</sup> but it is far from evident that he follows it. *McCulloch* reminds us that even when the end is constitutional and legitimate, the means must be “appropriate” and “plainly adapted” to it. Moreover, those means must not be “otherwise prohibited” and must be “consistent with the letter and spirit of the constitution.”<sup>92</sup> Those phrases—Scalia says they are not “merely hortatory”<sup>93</sup>—suggest that a fairly rigorous standard of review is called for. Yet no such rigorous review is evident in Scalia’s opinion. Nor is the majority’s review rigorous. It is satisfied not by evidence but by assertion. The federal government asserted that marijuana was fungible and that some would inevitably find its way to the national market. On that mere assertion, the Court sustained a non-textual exercise of federal authority over a noncommercial, intrastate activity. In dissent, Thomas articulates a far more demanding standard for interpreting the Necessary and Proper Clause. “In order to be ‘necessary,’” said Thomas, “the intrastate ban must be more than ‘a reasonable means [of] effectuating the regulation of interstate commerce.’ It must be ‘plainly adapted’ to regulating interstate marijuana trafficking—in other words, there

<sup>90</sup>*Id.* at 2217 (Scalia, J., concurring). Thus, he contends that in *Darby* the imposition of a federal minimum wage is sustained, under the Commerce Clause, because intrastate wages substantially affect the interstate market, whereas intrastate federal record keeping requirements are sustained not because of that effect but, under the Necessary and Proper Clause, as reasonable means to accomplish the regulatory end of the federal control of wages and hours. *Id.* at 2217–18.

<sup>91</sup>17 U.S. (4 Wheat.) 316 (1819).

<sup>92</sup>Raich, 125 S. Ct. at 2218–19 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421–22).

<sup>93</sup>*Id.* at 2219.

must be an ‘obvious, simple, and direct relation’ between the intrastate ban and the regulation of interstate commerce.’<sup>94</sup>

To be sure, Scalia exhibits some residual sympathy for the federal commerce power being “otherwise limited,” citing the opinions in *Printz v. United States*<sup>95</sup> and *New York v. United States*,<sup>96</sup> which held that Congress cannot order states to undertake the administration of federally enacted programs or to legislate as the federal government wishes. Those limits are traced to the Tenth Amendment; they stand for the Constitution’s limiting principle of “state sovereignty.” The three dissenters in *Raich* would agree, but they believe the federal-state balance is to be maintained not just when the Tenth Amendment is interpreted but when the scope of the federal commerce power is discerned as well. It is fair to say that the majority, and Scalia in concurrence, divide from the dissent on this specific and very important point: *the majority and Scalia think it is not up to the Court to be cognizant of state sovereignty in its interpretation of the federal commerce power, whereas the dissenters see this as a matter of judicial duty.*

#### *D. The Camel’s Nose—Medicine or Legalization?*

The majority’s strongest rhetorical flourish is in the claim that if states can regulate the intrastate medicinal use of marijuana, they will soon assert the power to regulate intrastate recreational use as well. O’Connor responds in dissent that medical and nonmedical (i.e., recreational) uses of drugs are realistically distinct and can be segregated for purposes of regulation.<sup>97</sup> This is a factual claim, which the federal government disputes. Assuming the dispute, O’Connor’s dissent notes that all the parties in this litigation agree that only medicinal use is at issue in this as-applied challenge, and the Court has always understood itself obligated to speak only as broadly as necessary.<sup>98</sup> But just as good arguments hang together, so too do bad ones: here, the majority’s perverse and rather selective preference for

<sup>94</sup>*Id.* at 2231 (Thomas, J., dissenting) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421, and *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring)).

<sup>95</sup>521 U.S. 898 (1997).

<sup>96</sup>505 U.S. 144 (1992).

<sup>97</sup>125 S. Ct. at 2223–24 (O’Connor, J., dissenting).

<sup>98</sup>*Id.* at 2224.

wholesale invalidation over as-applied adjudication<sup>99</sup> aligns with its unwillingness to examine the facts as they actually exist.

Defining the scope of the commerce power has always been an indirect means of preserving traditional state functions. Shortly before Kennedy and Scalia took their seats, the Court had tried but then gave up defining what those functions were directly.<sup>100</sup> Rehnquist and O'Connor vowed that the Court would one day return to the effort.<sup>101</sup> Yet the *Raich* majority, including Kennedy and Justice Scalia by concurrence, has now abandoned the effort to revive enumerated powers federalism even by indirect means. Ignoring both the limits on federal power and the state interest in protecting the health and safety of its citizens—to which the “States lay claim by right of history and expertise”<sup>102</sup>—the Court rests supine. For the majority and Scalia, federal power over interstate commerce marijuana is without limit, even if the state has identified a discrete subpart (noncommercial, medicinal uses) over which federal power is not appropriate. It is hard to understand why it believes this to be the case. As the dissent noted, in *Wickard v. Filburn*, previously identified by the Court as the outer limit of federal power, the statute at issue had exempted small quantities of wheat. Thus, as a matter of law, “*Wickard* did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress’ reach.”<sup>103</sup>

#### E. Can Justice Thomas Be Serious?

The Thomas dissent goes deeper than that of O'Connor and Rehnquist. Thomas repeats his consistent criticism of the non-originalist nature of the “substantial effects” test.<sup>104</sup> He calls the test “rootless”

<sup>99</sup>Cf. *United States v. Raines*, 362 U.S. 17, 20–22 (1960) (describing the Court’s preference for as-applied rather than facial challenges).

<sup>100</sup>Compare *National League of Cities v. Usery*, 426 U.S. 833 (1976), with *Garcia v. San Antonio Municipal Transit Authority*, 469 U.S. 528 (1985).

<sup>101</sup>See *Garcia*, 469 U.S. at 570–77 (Powell, J., joined by Rehnquist and O'Connor, JJ., dissenting).

<sup>102</sup>*Raich*, 125 S. Ct. at 2224 (O'Connor, J., dissenting) (quoting *United States v. Lopez*, 514 U.S. 549, 583 (1995)).

<sup>103</sup>*Id.* at 2225–26 (O'Connor, J., dissenting).

<sup>104</sup>*Id.* at 2235–37 (Thomas, J., dissenting); see also *Lopez*, 514 U.S. at 584 (Thomas, J., concurring), and *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

because it is tethered to neither the Commerce nor the Necessary and Proper Clause. “Under the Commerce Clause, Congress may regulate interstate commerce, not activities that substantially affect interstate commerce,”<sup>105</sup> he writes. And, as noted earlier, he employs a narrower, more originalist definition of commerce—“selling, buying, and bartering, as well as transporting for these purposes.”<sup>106</sup> That definition is resisted because it implicates the basis for federal environmental laws, wage and hour laws, and the like. Civil rights laws premised on Congress’ commerce power would be similarly vulnerable.<sup>107</sup>

In his *Raich* dissent, Thomas does not discuss how he would reconcile the commerce power, properly limited, and the modern regulatory state, but he clearly indicates that if a satisfactory answer is to be found, it is best guided by original understanding.<sup>108</sup> An

<sup>105</sup>*Raich*, 125 S. Ct. at 2235 (Thomas, J., dissenting).

<sup>106</sup>*Id.* at 2230 (quoting Lopez, 514 U.S. at 585).

<sup>107</sup>The concern for civil rights legislation might be avoided by re-anchoring the authority for such to the Thirteenth or Fourteenth Amendments. See generally Douglas W. Kmiec, Stephen B. Presser, John C. Eastman & Raymond B. Marcin, *The American Constitutional Order* 602 (2d ed. 2004). Cf. Richard A. Epstein, *Forbidden Grounds* 10 (1992) (“So great were the abuses of political power before 1964 that, knowing what I know today, if given an all-or-nothing choice, I should still have voted in favor of the Civil Rights Act in order to allow federal power to break the stranglehold of local government on race relations.”).

<sup>108</sup>A satisfactory answer becomes less elusive with candid acknowledgment that some problems are national. As discussed more fully in the Cato Institute’s amicus brief in *Gonzales v. Raich*, interpreting the commerce power in light of its original understanding (in particular, with reference to the Virginia Resolution) better delimits the scope of federal power, for it helps reveal when, for example, trans-boundary air and water resources must be protected on a national level. The federal government has that power so long as Congress sufficiently identifies that its legislative interest is in this type of migratory resource—which is inherently plagued by conflicting state regulatory schemes. Cf. *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (finding the federal interest not precisely identified, but suggesting it could be). Air and water resources rarely inhabit one state. It is the common nature of the resource that makes these environmental questions, absent a national solution, collapse into a costly and wealth-minimizing regulatory war between conflicting state jurisdictions. Similarly, Congress’ power to reach private discrimination on the basis of race is not contradicted by purposive reliance on the Virginia Resolution. Federal laws banning discrimination at public accommodations, such as motels and restaurants, vindicate a constitutional interest (racial nondiscrimination) legally held by the nation as a whole. A national interest of this magnitude need not rest upon awkward inquiries into the quantities of goods and services held in trade. Cf. *Heart*

originalist would assume that the Constitution's text is the locus of interpretative effort, and other short-hand doctrinal rubrics ("channels," "instrumentalities," "substantial effects") ought to be understood in a way that is faithful to that text. "[T]he Framers could have drafted a Constitution that contained a 'substantially affects interstate commerce' Clause had that been their objective."<sup>109</sup> They did not. Instead, the Framers drafted a Constitution that gave Congress the power "to regulate Commerce . . . among the several States . . ."<sup>110</sup> The textual meaning of that grant of power is crystallized only when the clause is interpreted in harmony with its *purpose*. That underlying purpose is revealed by examining John Marshall's seminal opinion in *Gibbons v. Ogden*;<sup>111</sup> Daniel Webster's oral argument in that case; and the Virginia Resolution, which was the genesis of the Commerce Clause. Looking at each, here is what can be found.

In *Gibbons*, we are given the following rule of construction: "If . . . there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given . . . should have great influence in the construction."<sup>112</sup> And similarly, "We know of no rule for construing the extent of such powers [as the commerce power], other than is given by the language of the instrument which confers them, taken in connexion [sic] *with the purposes* for which they were conferred."<sup>113</sup> Substantively, Marshall's opinion in *Gibbons* rather quickly deduced that the federal commerce power included authority not just over the buying and selling of goods but also over navigation. That is an analytical jump not resolvable by text alone.<sup>114</sup> If it is to be explained, we must dig deeper.

of *Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>109</sup>Lopez, 514 U.S. at 588 (Thomas, J., concurring).

<sup>110</sup>U.S. Const. art. I, § 8, cl. 3.

<sup>111</sup>*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>112</sup>*Id.* at 188–89.

<sup>113</sup>*Id.* at 189 (emphasis added).

<sup>114</sup>As scholars have pointed out, Marshall short-cuts the analysis. See Roger Pilon, *Freedom, Responsibility, and the Constitution*, 68 *Notre Dame L. Rev.* 507, 533–37 (1993). Rather than elaborating the complete inquiry, he rather quickly reaches the conclusion that "commerce" includes navigation, not mere "traffic" or the interchange of commodities. He is correct, of course, but the closest he comes to overtly identifying the functional account of the Commerce Clause is to say that "[t]he power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government. . . ." *Gibbons*, 22 U.S. (9 Wheat.) at 190. That



Not surprisingly, it turns out that Webster highlighted the problems of conflicting navigational licenses issued by the federal government and the states. Webster spent little time trying to do what the majority and concurrence belabor in *Raich*, namely, asserting that something is “commerce,” or an activity that substantially affects it. Webster termed it vain to look for a precise or exact definition of commerce.<sup>115</sup> That, he said, was not the way the Constitution proceeded. Instead, the extent of the power was to be measured by its object.

And what was the object or prevailing purpose of the commerce power? To rescue (Webster’s word) the general Union from “the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law.”<sup>116</sup> Webster did not envision a commerce power

is true, and important, but it doesn’t fully disclose the functional account; for Marshall’s use of “objects” here anticipates, but only suggests—without full elaboration—why federal regulation of navigation coincides with the constitutional purpose of the commerce power. Nevertheless, it is obvious that to reach his result, Marshall employed both the text and the purpose underlying the text to fairly consider both the federal *and* state sides of the commerce power. As discussed below, the underlying purpose or object of the Commerce Clause is informed by the Virginia Resolution, and recourse to it reveals how Marshall was able to so quickly ascertain the scope of federal power in *Gibbons* and how that outcome coincided with Madison’s own proposition that the national government was to have “complete authority in all cases which require uniformity.” Letter from James Madison to George Washington (Apr. 16, 1787), reprinted in 2 *The Writings of James Madison* 344–45 (1900–1910). Under the Virginia Resolution, “among the several states” can be understood as a synonym for power directed at either vindicating a national commercial interest—that is, one held by the nation as a whole like interstate movement and transportation, communication, or national defense, or a commercial subject that cannot be addressed by an individual state without undermining the policies of other states.

<sup>115</sup>The tangled academic debates over the word “commerce,” in isolation, tend to wax and wane, depending on one’s ideology, between plenary power and the limited power that is strictly necessary to manage the concerns of the eighteenth century. See generally Arthur B. Mark III, *Currents in Commerce Clause Scholarship*, 32 *Cap. U. L. Rev.* 671 (2004); see also Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 *Iowa L. Rev.* 1 (1999); and Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. Chi. L. Rev.* 101 (2001). Professor Barnett splendidly argued on behalf of *Raich* before the Supreme Court and his historical research was singled out for special reliance by Justice Thomas. 125 *S. Ct.* 2195, 2230 (2005) (Thomas, J., dissenting).

<sup>116</sup>*Gibbons*, 22 U.S. (9 Wheat.) at 11 (syllabus) (summary of Daniel Webster’s arguments for the plaintiff). Notice how similar Webster’s argument is to the Mississippi River analogy that would still be guiding the Court in *Wabash* over eighty years later.

without limit. Indeed, the commerce power was not to consume the state's separate sovereignty; rather, the Court was to interpret the power to keep the interests of the two governments "as distinct as possible," said Webster. "The general government should not seek to operate where the states can operate with more advantage to the community; nor should the states encroach on ground, which the public good, as well as the constitution, refers to the exclusive control of Congress."<sup>117</sup> The rule of thumb from Webster is that federal commercial power is to apply where the general interests of the union would otherwise be jeopardized by conflicting state regulation, *but* state regulation is to be preferred where that is not true and states have the better vantage from which to address a public problem. Is this simply advocacy, or does it have constitutional root?

Webster's argument, and Marshall's acceptance of it in *Gibbons*, flows directly from the Virginia Resolution underlying the commerce power. The Sixth Virginia Resolution of 1787 (Virginia Resolution) provides:

[T]hat the National Legislature ought to possess the Legislative Rights vested in Congress by the Confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.<sup>118</sup>

That Resolution was sent to the Committee on Detail. What emerged was the enumerated federal commerce power. It was not intended to change the resolution's meaning. As Robert L. Stern has commented:

Significantly, the Convention did not at any time challenge the radical change made by the committee [of detail] . . . . It accepted *without discussion* the enumeration of powers made by the committee which had been directed to prepare a constitution based upon the general propositions that the federal government was "to legislate in all cases for the general

<sup>117</sup>*Id.* at 17.

<sup>118</sup>Records of the Debates in the Federal Convention of 1787 as Reported by James Madison 389 (Charles C. Tansill ed., Legal Classics Library 1989) (1927); also found in Notes of Debates in the Federal Convention of 1787 Reported by James Madison 380 (W.W. Norton & Co. ed., 1966).

interests of the Union . . . and in those to which the states are separately incompetent.” . . . This absence of objection to or comment upon the change is susceptible of only one explanation — that the Convention believed that the enumeration conformed to the standard previously approved, and that the powers enumerated comprehended those matters as to which the states were separately incompetent and in which national legislation was essential.<sup>119</sup>

Does this assist the Court, or just substitute new words? At a minimum, it clarifies why Marshall could so easily construe commerce to include navigation, which on its face seems a non sequitur. The obscurity drops away when navigation is linked not to commercial activity *per se*, but to an interest that must be held by the union of the states in order to avoid imperiling national interests. Indeed, Marshall’s decisional words in *Gibbons* directly connect the concerns of the Virginia Resolution to the scope of the commerce power, and in so doing they state a faithful constitutional understanding of *both* the federal *and* state sides of the commerce power. He wrote:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.<sup>120</sup>

If navigation across state lines or even navigation that is internal to a state is to be treated as “commerce” when it “affects the States generally,” is the noncommercial medicinal use of marijuana to be so treated? It strains credulity to conclude that such use is of national interest—or that it “affects the States generally” in comparison to, say, preventing racial distinctions from impeding commercial action.

<sup>119</sup>Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 *Harv. L. Rev.* 1335, 1340 (1934); see also Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 *Pepp. L. Rev.* 547, 560–62 (2001).

<sup>120</sup>*Gibbons*, 22 U.S. (9 Wheat.) at 195.

“National interest” is not synonymous with a “very important political topic.” Reliance on the modern cumulative or substantial effects tests alone obscures that. To ask whether an individual action “substantially affects” interstate commerce, without reference to the purpose of the granted power, is to ask an incomplete question. By contrast, a principled inquiry seeks to identify the presence or absence of an interest that can be claimed only by the nation as a whole or that must be addressed nationally because of demonstrated state incapacity. And demonstrated state incapacity must be theoretically as well as *practically* grounded, not merely rhetorically asserted. Incapacity should mean that an individual state’s regulatory activity would actually be defeated by the competing regulatory policies of other states.

#### IV. Implications and Conclusion

A majority of the present Court finds no judicially enforceable limit on the federal commerce power. It is enough that Congress could rationally believe that regulating the activity (whether wholly local or not, and whether commercial or not) was part of a comprehensive regulatory scheme or, in *Congress’ sole judgment*, was necessary to make interstate regulation effective. Those “tests” are without teeth. Now, only where Congress makes the “drafting mistake” of regulating a local, noncommercial subject on a freestanding basis is there a slight chance that a majority of the Court will honor the *Lopez* and *Morrison* precedents to question and, possibly, invalidate that isolated exercise of power. The *Raich* majority’s deferential posture is inconsistent with those precedents and in tension with the Court’s recent efforts to revive federalism generally.

Kennedy, the author of an ambivalent concurrence in *Lopez*, returned to the federal fold when he joined the *Raich* majority in silence. In *Lopez* he had said that he was influenced by an often identified chief virtue of federalism, that it promotes innovation: “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.”<sup>121</sup> Apparently he now prefers uniformity to diversity.

<sup>121</sup>New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Unlike Kennedy, Scalia openly separated himself from the federalist structure of the Constitution without any inquiry into the original understanding of the commerce power and with an understanding of the Necessary and Proper Clause that begs the essential question about where power had actually been assigned. It is often appropriate for the Court to be restrained and to give deference to legislative judgments about how best to implement policy; that deference is unwarranted, however, if the Court has not first satisfied itself that the right sovereign has acted. But for that to be more than a meaningless inquiry, there must be a richer understanding of the Commerce and Necessary and Proper Clauses than was demonstrated by the *Raich* majority or the Scalia concurrence.

To conclude let me compliment the majority and dissent. Federalism is frequently labeled a doctrine of convenience, but it cannot be assailed here that the Court elevated politics over principle. In deciding against state authority, Stevens expresses sympathy for the state's policy allowing medicinal marijuana use; in writing her dissent in support of state authority, O'Connor observes that she would not have favored its policy.<sup>122</sup> Of course, this makes it all the more regrettable (if not ironic) that it was a mistaken conception of constitutional principle that kept Stevens and the majority from allowing California to extend compassion to seriously ill neighbors. In truth, California's medicinal use exception was highly limited and respectful of federal interests, especially as state law otherwise dovetailed and reinforced the federal regulation of controlled substances. The subsidiarity and federalism values of allowing individual states to meet the unique needs of its citizens did not impress

<sup>122</sup>Wrote Justice Stevens: "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." *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005). By comparison, Justice O'Connor commented: "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." *Id.* at 2229 (O'Connor, J., dissenting).

the majority and Justice Scalia. For them, federal power cannot be contingent on the happenstance of state concurrence. Perhaps not, but federal power had been thought to be contingent on constitutional text as originally understood at the time of its ratification.<sup>123</sup> Only Thomas paid direct attention to the Constitution's words and the well-documented purpose of the Commerce Clause.

In short, *Wickard v. Filburn* has been displaced as the "outer limit" of federal power.

<sup>123</sup>Antonin Scalia, *A Matter of Interpretation* (1997).