The Power to Regulate Commerce: Limits on Congressional Power

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December 28, 2010

Congressional Research Service
7-5700
www.crs.gov
RL32844

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

The Commerce Clause of the United States Constitution provides that the Congress shall have the power to regulate interstate and foreign commerce. The plain meaning of this language might indicate a limited power to regulate commercial trade between persons in one state and persons outside of that state. However, the Commerce Clause has never been construed quite so narrowly. Rather, the clause, along with the economy of the United States, has grown and become more complex. In addition, when Congress began to address national social problems, the Commerce Clause was often cited as the constitutional basis for such legislation. As a result, the Commerce Clause has become the constitutional basis for a significant portion of the laws passed by Congress over the last 50 years, and it currently represents one of the broadest bases for the exercise of congressional powers. The reliance of Congress on the Commerce Clause, however, has been controversial, as was the case with the passage of the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148). For a discussion of constitutional issues associated with PPACA, see CRS Report R40725, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, by Jennifer Staman et al.

An examination of the United States Code shows that over 700 statutory provisions, covering a range of issues, explicitly refer to either "interstate" or "foreign" commerce. Over the last decade, however, the Supreme Court in *United States v. Lopez* and *United States v. Morrison* has brought into question the breadth of the Commerce Clause. While these cases have resulted in the overturning of a few federal laws, their overall effect has so far been relatively modest in scope. A recently decided Supreme Court case, *Gonzales v. Raich*, seems to confirm that the effect of these previous cases will be limited.

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Background

The Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution provides that the Congress shall have the power to regulate interstate and foreign commerce. The plain meaning of this language might indicate a limited power to regulate commercial trade between persons in one state and persons outside of that state. However, the Commerce Clause has never been construed quite so narrowly. Rather, the clause, along with the economy of the United States, has grown and become more complex. In addition, when Congress began to address national social problems, the Commerce Clause was often cited as the constitutional basis for such legislation. As a result, the Commerce Clause has become the constitutional basis for a significant portion of the laws passed by Congress over the last 50 years, and it currently represents one of the broadest bases for the exercise of congressional powers. The reliance of Congress on the Commerce Clause, however, has been controversial, as was the case with the passage of the Patient Protection and Affordable Care Act (PPACA).[1] For a discussion of constitutional issues associated with PPACA, see CRS Report R40725, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, by Jennifer Staman et al.

An examination of the United States Code shows that more than 700 statutory provisions explicitly refer to either "interstate" or "foreign" commerce, covering a significant number of issues. These issues include agriculture,[2] banking,[3] antitrust,[4] securities,[5] business regulation,[6] energy regulation,[7] hazardous substances,[8] consumer credit,[9] sports regulation,[10] the Internet,[11] endangered species,[12] civil rights,[13] child support,[14] child pornography,[15] abortion,[16] criminal

[1] P.L. 111-148.

[2] *See, e.g.*, 7 U.S.C. § 6a (2005)(prohibition on excessive commodity speculation); 7 U.S.C. § 6b (2005)(prohibition on fraud, false reporting, or deception in commodities).

[3] *See, e.g.*, 12 U.S.C. § 95 (2005)(regulation of the banking business; powers and duties of national banks); 12 U.S.C. § 2501 (2005)(disposition of abandoned money orders and traveler's checks).

[4] *See, e.g.*, 15 U.S.C. § 26b (2005) (application of the antitrust laws to professional major league baseball).

[5] *See, e.g.*, 15 U.S.C. § 77e (2005)(domestic securities; prohibitions relating to interstate commerce and the mails); 15 U.S.C. § 77l (2005)(civil liabilities arising in connection with prospectuses and communications.

[6] 15 U.S.C. § 79h (2005)(public utility holding companies; acquiring interest in electric and gas companies serving same territory); 15 U.S.C. § 79i (2005)(public utility holding companies; acquisition of securities and utility assets and other interests).

[7] *See, e.g.*, §15 U.S.C. § 715b (2005)(interstate transportation of petroleum products; interstate transportation of contraband oil forbidden);15 U.S.C. § 717 (2005)(natural gas; regulation of natural gas companies); 16 U.S.C. § 813 (power entering into interstate commerce; regulation of rates, charges).

[8] *See, e.g.*, 15 U.S.C. § 1263 (2005)(hazardous substances; prohibited acts); 15 U.S.C. § 1265 (2005)(hazardous substances; seizures); 15 U.S.C. § 1270 (2005)(hazardous substances; examinations and investigations); 15 U.S.C. § 1271 (2005)(hazardous substances; records of interstate shipment).

[9] *See, e.g.*, 15 U.S.C. § 1644 (2005)(consumer credit protection; fraudulent use of credit cards; penalties); 15 U.S.C. § 1679a (2005)(consumer credit protection; credit repair organizations).

[10] *See, e.g.*, 15 U.S.C. § 6307b (2005)(professional boxing safety; protection from coercive contracts).

[11] *See, e.g.*, 15 U.S.C. § 7704 (2005)(non-solicited pornography and marketing; protections for users of commercial electronic mail).

[12] 16 U.S.C. § 1538 (2005)(endangered species; prohibited acts).

[13] *See, e.g.*, 18 U.S.C. § 245 (2005)(civil rights; federally protected activities); 42 U.S.C. § 2000a (2005)(civil rights; prohibition against discrimination or segregation in places of public accommodation).

[14] 18 U.S.C. § 228 (failure to pay legal child support obligations).

[15] 18 U.S.C. § 2251 (sexual exploitation of children).

law,[17] controlled substances,[18] food,[19] firearms control,[20] terrorism,[21] obscenity,[22] gambling devices,[23] labor,[24] industrial safety,[25] pensions,[26] environmental law,[27] fish and wildlife,[28] medical products,[29] water pollution,[30] atomic energy,[31] shipping,[32] motor vehicle safety,[33] airplanes,[34] and tort litigation.[35]

Since the 1990s, however, Supreme Court case law has brought the limits of the Commerce Clause into question.[36] While these cases have resulted in the overturning of federal laws, their overall effect has so far been relatively modest in scope. A 2005 Supreme Court case, *Gonzales v. Raich*,[37] seems to confirm that the effect of these previous cases will be limited.

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[16] 18 U.S.C. § 1531 (partial-birth abortions prohibited).

[17] There are over a hundred criminal laws which use the term "interstate commerce." *See, e.g.*, 18 U.S.C. § 1033 (2005)(fraud and false statements; crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce); 18 U.S.C.§ 33 (destruction of motor vehicles or motor vehicle facilities); 18 U.S.C. § 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises); 18 U.S.C. § 1958 (use of interstate commerce facilities in the commission of murder-for-hire).

[18] *See, e.g.*, 21 U.S.C. § 801 (2005)(drug abuse prevention and control; congressional findings and declarations); 21 U.S.C. § 863 (2005)(drug abuse prevention and control; drug paraphernalia).

[19] *See, e.g.*, 21 U.S.C. § 602 (meat inspection; congressional statement of findings).

[20] *See, e.g.*, 26 U.S.C. § 5861 (2005)(machine guns, destructive devices, and certain other firearms; prohibited acts).

[21] *See, e.g.*,18 U.S.C. § 2332a (use of weapons of mass destruction).

[22] 18 U.S.C. § 1462 (importation or transportation of obscene matter).

[23] *See, e.g.*, 15 U.S.C. § 1172 (2005)(transportation of gambling devices as unlawful; exceptions; authority of Federal Trade Commission).

[24] *See, e.g.*, 29 U.S.C. § 207 (2005)(fair labor standards; maximum hours).

[25] *See, e.g.*, 29 U.S.C. § 651 (2005)(occupational safety and health; congressional statement of findings and declaration of purpose and policy).

[26] *See, e.g.*, 29 U.S.C. § 1001 (2005)(employee retirement income security program; congressional findings); 29 U.S.C. § 1001a (2005)(employee retirement income security program; additional findings).

[27] *See, e.g.*, 33 U.S.C. § 1322 (2005)(water pollution prevention and control; marine sanitation devices); 42 U.S.C. § 7671d (2005)(stratospheric ozone protection; phase-out of production and consumption of class II substances).

[28] 16 U.S.C. § 3372 (2005)(fish and wildlife; prohibited acts).

[29] *See, e.g.*, 42 U.S.C. § 262 (2005)(licensing of biological products and clinical laboratories; regulation of biological products).

[30] *See, e.g.*, 42 U.S.C. § 300j-23 (2005)(safety of public water systems; drinking water coolers containing lead).

[31] *See, e.g.*, 42 U.S.C. § 2012 (2005)(atomic energy; findings); 42 U.S.C. § 2019 (2005)(atomic energy: applicability of federal power act); 42 U.S.C. § 2073 (2005)(special nuclear material; domestic distribution of special nuclear material).

[32] *See, e.g.*, 46 U.S.C. § 4307 (2005)(recreational vessels; prohibited acts); 46 U.S.C. § 4311 (2005)(recreational vessels; penalties and injunctions); 46 U.S.C. appendix § 801 (2005)(shipping act; definitions).

[33] *See, e.g.*, 49 U.S.C. § 30101 (2005)(motor vehicle safety; purpose and policy); 49 U.S.C. § 30112 (2005)(motor vehicle safety; prohibitions on manufacturing, selling, and importing noncomplying motor vehicles and equipment); 49 U.S.C. § 30123 (2005)(motor vehicle safety; tires).

[34] *See, e.g.*, 49 U.S.C. § 40116 (2005)(air commerce and safety; state taxation).

[35] P.L. 109-2 (Class Action Fairness Act of 2005).

[36] United States v. Lopez, 514 U.S. 549, 561 (1995); United States v. Morrison, 529 U.S. 598 (2000).

[37] 545 U.S. 1 (2005).

Textual Analysis

The Commerce Clause provides that "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The word "commerce" appears to have the same primary meaning today as it did in 1789—"an interchange of goods or commodities between different countries or between areas of the same country" or in other words "trade."[38] However, commentators have argued that a secondary meaning of commerce which was understood at the time of the drafting of the Constitution includes all productive activity which relates to commerce, such as manufacturing and agriculture.[39]

A further question is then raised whether Congress's power to regulate commerce is significantly limited by the phrase "with foreign Nations, and among the several states, and with the Indian Tribes." For instance, the phrase "among the several States" could either be interpreted as "between people of different states" or more broadly as "between people who live in the various states." Some have argued that the broader definition, which would cover commerce between people of the same state, would render the phrase "among the several States" superfluous.[40] This question, generally characterized as whether the power to regulate "interstate commerce" extends to "intrastate" commerce, has been mostly settled by case law, and most "intrastate" commercial transactions are vulnerable to some form of federal regulation.[41]

Drafting and Ratification

The integration of commercial activities in the United States was a central theme of the Constitutional Convention of 1787.[42] It appears, however, that the parameters of the Commerce Clause were not of particular concern to the framers of the Constitution.[43] The commentary contemporary to the Constitution on the power did not concern itself with the federalism implications of managing interstate economic transactions, but rather focused on the issue of foreign trade.[44] The primary purpose of the clause appears to have been raising federal revenue by the nationalization of the states' power to impose import tariffs,[45] while a secondary purpose was

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[38] Grant Nelson and Robert 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, 101 n 478 (2001). As will be discussed later, a requirement that the thing to be regulated be "commercial" or "mercantile," has, to some extent, been used by the Supreme Court to limit the commerce power to "commercial" activities. See United States v. Lopez, 514 U.S. 549, 561 (1995); United States v. Morrison, 529 U.S. 598, 617 (2000).

[39] Grant Nelson and Robert Pushaw, Jr., *supra* footnote 38, at 14-15.

[40] Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 132 (2001).

[41] *See* "Case Law Development," *infra.*

[42] Virginia and Maryland had just finished a compact regarding the navigation and jurisdiction of the Chesapeake Bay and the Potomac. The commissioners who had negotiated this treaty called for a general trade convention, and various other states responded by appointing delegates to this convention. Only when it became clear that this convention might address other issues did the Continental Congress approve of it. J. Story, Commentaries on the Constitution of the United States 252-54.

[43] Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 443-44 (1941); Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VANDERBILT LAW REVIEW 1019, 1022-24 (1988).

[44] Those materials which do address congressional control over commerce focus on the necessity of uniformity in matters of foreign commerce, although the drafters clearly intended domestic commerce to be regulated as well. P. Kurland & R. Lerner, THE FOUNDER'S CONSTITUTION 477-528 (1987).

[45] Alexander Hamilton, CONTINENTALIST, No. 5, 18 Apr. 1782 (Paper 3:75-82) as reprinted in P. Kurland & R. Lerner, (continued...)

apparently to allow Congress to regulate and restrict foreign commerce to advance American interests.[46]

The argument has been made that while regulating free and fair trade between states was the principal motivation for adopting various other provisions of the Constitution,[47] it may not have been a strong motivation for the drafting of the Commerce Clause. This is because state restrictions on trade between states were already prohibited under the Articles of Confederation, and the states generally complied with these restrictions.[48] Consequently, commentary contemporary to the ratification of the Constitution indicating that the Commerce Clause was intended to limit state restrictions on interstate commerce was minimal.

Case Law Development

In *Gibbons v. Ogden*, the Supreme Court, in an opinion by Chief Justice Marshall, considered a challenge to a monopoly on the operation of steam-propelled vessels in New York waters. This monopoly was challenged by Gibbons, who transported passengers from New Jersey to New York under an act of Congress. The Chief Justice, in striking down the monopoly, wrote that "the power over commerce ... is vested in Congress as absolutely as it would be in a single government ..." and that "the influence which their constituents possess at elections, are ... the sole restraints" on this power.[49]

The Chief Justice went on to write that "[t]he counsel for the appellee would limit [the term commerce] to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse," which the Court found easily included the issue of navigation. Marshall did qualify the word "intercourse" with the word "commercial," thus retaining the element of monetary transactions.

The Court did not soon revisit this expansive view of the Commerce Clause. Instead, over the next several decades, the Court considered the boundaries of the "dormant Commerce Clause"

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supra footnote 44 ("The vesting of the power of regulating trade ought to have been a principal object of the confederation for a variety of reasons. It is as necessary for the purposes of commerce as of revenue.") For instance, the state of New York imposed a 2% impost on imports that moved through the New York Harbor. Calvin Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL OF RIGHTS JOURNAL 8 (2004). Efforts under the Articles of Confederation to impose a federal impost on imports had been blocked by New York. *Id.* at 11-12. Granting Congress the power to raise revenue in this manner was seen as an important way to pay off Revolutionary War debts. *Id.* at 8-11.

[46] For instance, the prospect of excluding British ships from American waters, while never realized, was contemplated as a retaliation for the exclusion of American ships from the British West Indies. Calvin Johnson, *supra* footnote 45, at 35-36.

[47] Such provisions include the limitation on state duties and imposts on imports and exports, U.S. CONST. Article I, § 10, cl. 2, as such duties had favored states with deep harbors over neighbor states; the Port Preference Clause, U.S. CONST., Art. I, § 9, cl. 6, limiting the federal government from imposing preferences for the ports of one state over another; and the prohibition on states issuing paper money, U.S. CONST., Art. I, § 10, cl. 1, the issuance of which had allowed states to require the acceptance of devalued money by out-of-state creditors. *Id.* at 46-48.

[48] *Id.* at 42-42.

[49] Gibbons v. Odgen, 22 U.S. (9 Wheat.) 1, 197-98 (1824).

doctrine—the implied limitation of the Commerce Clause on a state's ability to regulate commerce.[50] This, combined with the relatively cautious exercise of the power by the early Congresses, meant that the Supreme Court did not have occasion to consider the limits of Congress's power under this doctrine for almost 60 years.

When the Court again revisited Congress's power under the clause, it generally approved of statutes regulating the interstate movement of goods or persons, such as lottery tickets,[51] adulterated food,[52] or prostitutes.[53] But, during the early 1900s, the Supreme Court was confronted with statutes which went beyond regulation of trade, and addressed other related economic activities. Consequently, the Court struck down a series of federal statutes which attempted to extend commerce regulation to activities such as "production," "manufacturing"[54] or "mining."[55]

Starting in 1937, however, with the decision in *NLRB v. Jones & Laughlin Steel Corporation*,[56] the Supreme Court held that Congress has the ability to protect interstate commerce from burdens and obstructions which "affect" commercial transactions. In the *NLRB* case, the Court upheld the National Labor Relations Act, finding that by controlling industrial labor strife, Congress was preventing burdens from being placed on interstate commerce.[57] Thus, the Court rejected previous distinctions between the economic activities (such as manufacturing) which led up to interstate economic transactions, and the interstate transactions themselves. By allowing Congress to regulate activities which were in the "stream" of commerce, the Court also set the stage for the regulation of a variety of other activities which "affect" commerce.

Subsequent Court decisions found that Congress had considerable discretion in regulating activities which "affect" interstate commerce, as long as the legislation was "reasonably" related to achieving its goals of regulating interstate commerce.[58] Thus the Court found that in some cases, events of purely local commerce (such as local working conditions) might, because of market forces, negatively affect interstate commerce, and thus would be susceptible to regulation.[59] The Court has also held that an activity which in itself does not affect interstate commerce could be regulated if all such activities taken together in the aggregate did affect interstate commerce.[60] Under the reasoning of these cases, the Court has upheld many diverse laws, including laws regulating production of wheat on farms,[61] racial discrimination by businesses,[62] and loan-sharking.[63]

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[50] For a discussion of this case law, see Martin Redish and Shane Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987).

[51] Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903).

[52] Hippolite Egg Co. v. United States, 220 U.S. 45 (1911).

[53] Hoke v. United States, 227 U.S. 308 (1913).

[54] United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).

[55] Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936).

[56] 301 U.S. 1 (1937).

[57] 301 U.S. at 41.

[58] United States v. Darby, 312 U.S. 100 (1941)(approving legislation relating to working conditions).

[59] 312 U.S. at 121.

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

[61] *Id.*

[62] Heart of Atlanta Motel v. United States, 370 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 241 (1964).

In the 1995 case of *United States v. Lopez*,[64] however, the Supreme Court brought into question the extent to which Congress can rely on the Commerce Clause as a basis for federal jurisdiction. Under the Gun-Free School Zone Act of 1990, Congress made it a federal offense 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."[65] In *Lopez*, the Court held that, because the act neither regulated a commercial activity nor contained a requirement that the possession was connected to interstate commerce, the act exceeded the authority of Congress under the Commerce Clause. Although the Court did not explicitly overrule any previous rulings upholding federal statutes passed under the authority of the Commerce Clause, the decision would appear to suggest new limits to Congress's legislative authority.

The *Lopez* case was significant in that it was the first time since 1937 that the Supreme Court struck down a federal statute purely based on a finding that Congress had exceeded it powers under the Commerce Clause.[66] In doing so, the Court revisited its prior cases, sorted the commerce power into three categories, and asserted that Congress could not go beyond these three categories: (1) regulation of channels of commerce; (2) regulation of instrumentalities of commerce; and (3) regulation of economic activities which "affect" commerce.[67]

Within the third category of activities which "affect commerce," the Court determined that the power to regulate commerce applies to intrastate activities only when they "substantially" affect commerce.[68] Still, the Court in *Lopez* spoke approvingly of earlier cases upholding laws which regulated intrastate credit transactions, restaurants utilizing interstate supplies, and hotels catering to interstate guests. The Court also recognized that while some intrastate activities may by themselves have a trivial effect on commerce, regulation of these activities may be constitutional if their regulation is an essential part of a larger economic regulatory scheme. Thus, the Court even approved what has been perceived as one of its most expansive rulings, *Wickard v. Filburn*, which allowed the regulation of the production of wheat for home consumption.[69]

The Court in *Lopez* found, however, that the Gun Free School Zones Act fell into none of the three categories set out above. It held that it was not a regulation of channels of commerce, nor did it protect an instrumentality of commerce. Finally, its effect on interstate commerce was found to be too removed to be "substantial." The Court noted that the activity regulated, the possession of a gun in a school zone, neither by itself nor in the aggregate affected commercial

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[63] Perez v. United States, 402 U.S. 146 (1971).

[64] 514 U.S. 549 (1995).

[65] 18 U.S.C. §922(q)(1)A).

[66] Herman Schwartz, *Court Tries to Patrol a Political Line,* Legal Times 25 (May 8, 1995).

[67] The Court failed to note that to some extent, the three categories are intertwined. For instance, the first category, the regulation of "streams" or "channels" of commerce, allows regulation of the creation, movement, sale and consumption of merchandise or services. But the initial extension of the "streams" of commerce analysis by the Court to intrastate trade was justified by the "effect" of these other activities on commerce. See NLRB v. Jones & Laughlin, 301 U.S. 1, 31 (1936). Similarly, the second category, which allows the regulation of such instrumentalities of commerce as planes, trains or trucks, is also based on the theory that a threat to these instrumentalities "affects" commerce, even if the effect is local in nature. Southern Railway Company v. United States, 222 U.S. 21, 26-27 (1911)(regulation of intrastate rail traffic has a substantial effect on interstate rail traffic). Thus, the final category identified by the Court appears to be a catch-all for all other activities which "substantially affect" commerce.

[68] 514 U.S. at 559.

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

transactions.[70] Further, the statute contained no requirement that interstate commerce be affected, such as that the gun had been previously transported in interstate commerce.[71] Nor was the criminalization of possession of a gun near a school part of a larger regulatory scheme which did regulate commerce.[72] Finally, the Court indicated that criminal law enforcement is an area of law traditionally reserved to the states.[73] Consequently, the Court found that Congress did not have the authority to pass the Gun Free School Zone Act.

The Court also discussed the absence of legislative findings with respect to the statute's effect on interstate commerce.[74] While noting that Congress is not formally required to make such findings, the Court nevertheless held that "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."[75]

Although the Supreme Court has confirmed the dictates of *Lopez* in the case of *United States v. Morrison*,[76] discussed *infra*, both of these decisions dealt primarily with the issue of "substantial impact" on commerce. However, as noted, the Court has identified two other categories of power that Congress has under the Commerce Clause—regulation of channels of commerce and regulation of instrumentalities of commerce—that have been interpreted almost as broadly. Thus, an evaluation of the impact of these cases requires an examination of all three categories of power.

The Three Categories of Commerce Clause Jurisprudence

Channels of Commerce

The channels of commerce doctrine has been interpreted so as to represent a broad power to regulate. To begin with, this category is the basis for a variety of statutes that directly regulate the movement of persons or goods across state lines. For instance, the United States Code contains extensive references to mailing or shipping material in interstate commerce, including regulations

[70] 514 U.S. at 564. The Court rejected arguments that possession of guns in school zones affected the national economy by its negative impact on education. *Id.*

[71] 514 U.S. at 561.

[72] 514 U.S. at 560.

[73] 514 U.S. at 580 (Kennedy, J., concurring).

[74] *Id.*

[75] *Id.* at 563.

[76] 529 U.S. 598 (2000).

or bans on shipping biological agents,[77] counterfeit documents,[78] explosives,[79] or threatening communications.[80]

Of more significance is that the Court has not required that any nexus exist between the time that a person crosses a state border and the time they engage in a prohibited activity. For instance, in *United States v. Sullivan*,[81] the Court addressed the application of § 301k of the Federal Food, Drug and Cosmetic Act to a local pharmacist. The section prohibits the "doing of any ... act with respect to, a ... drug ... if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded." The pharmacist was charged with "misbranding" sulfathiazole by not providing sufficient information regarding dosage and usage.

The Court in *Sullivan* relied on previous precedent finding that Congress has not only the power to regulate commerce among the states, but also the power to "keep the channels of such commerce free from the transportation of illicit or harmful articles."[82] The fact that the defendant here had bought the item after it had passed over state lines was not found to be of constitutional significance.[83] Thus, the Court appears to require only that the criminal activity in question has some relation to the crossing of state lines.

Consistent with this line of reasoning, there are laws, such as criminal prohibitions on mail fraud,[84] where the material is regulated not because it is by nature harmful, but rather because it relates to other behavior which is criminal. Or, there are laws prohibiting crimes based on a person crossing the state line with the intent to commit the sexual abuse of minors, where it is the activity engaged in after the line is crossed that is criminal.[85] Finally, there are laws that regulate activities which utilize materials after they have been shipped in interstate commerce, even if the materials were perfectly legal when they were transported.[86]

Ultimately, based on cases such as *Sullivan*, it would appear that statutes that would otherwise be in violation of the limitations of *Lopez* could be approved by courts because of the presence of the jurisdictional element that an item related to the crime had crossed a state line. Under this reasoning, the gun possession law struck down in *Lopez*, which has since been amended to require that the gun had previously been shipped in interstate commerce,[87] would be upheld.[88] Thus, an expansive reading of the channels of commerce doctrine would appear to stand in the way of a limited interpretation of the Commerce Clause.

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[77] 18 U.S.C. § 175b.

[78] 18 U.S.C. § 514.

[79] 18 U.S.C. § 842.

[80] 18 U.S.C. § 876.

[81] 332 U.S. 689 (1948).

[82] McDermott v. Wisconsin, 228 U.S. 115, 128 (1913).

[83] 332 U.S. at 697-98.

[84] 18 U.S.C. § 1341.

[85] 18 U.S.C. § 2241.

[86] 18 U.S.C. § 2252(a)(4)(B)(distributing child pornography where materials used have traveled in interstate commerce).

[87] 18 U.S.C. § 922(q)(2)(see Historical Notes).

[88] *But see* United States v. McCoy, 323 F.3d 1114, 1124- 1126 (9th Cir. 2003) (reversing a conviction for possession of child pornography where jurisdiction was based on movement of photographic materials over state lines).

Instrumentalities of Interstate Commerce

Under the "instrumentalities of commerce" category, Congress may properly make whatever regulations it sees fit for the safety, efficiency, and accessibility of the nationwide transportation and communications networks. For instance, in *Preseault v. I.C.C.*,[89] the Court considered whether Congress could prevent the reversion of railroad rights-of-way to property owners after abandonment in order to create recreational trails. The I.C.C. argued that turning the right-of-ways into recreation trails was preserving the rail corridors for future railroad use. Despite arguments that the preservation argument was a pretext, the Court held that it must defer to a congressional finding that a regulated activity affects interstate commerce "if there is any rational basis for such a finding."[90]

The instrumentalities of commerce category represents yet another significant basis for expansive congressional authority. As noted previously, federal mail and wire fraud statutes make it a crime to engage in fraud while using the telephone or the mails. By analogy, Congress could reach many other activities that utilize these networks or similar networks such as railroads, interstate highways, and even the Internet. While this category has not been fully occupied by Congress, it would appear that a significant amount of federal power could be exercised in this manner, regardless of whether the matter regulated involved non-economic activity.[91] The Court has not yet indicated whether the *Lopez* requirement that regulated activities have some connection to a commercial activity would be applicable in this category.

Substantial Impact on Interstate Commerce

Wickard v. Filburn

The third prong of Congress's power to regulate under the Commerce Clause involves those activities that have a substantial impact or effect on interstate commerce. To fully understand the scope and reach of this power, it is important to begin with an examination of the Court's 1942 decision in *Wickard v. Filburn*,[92] which led to the expansive view of the Commerce Clause that Congress operated under until 1995. In *Wickard*, the Court was asked to determine whether, under the Commerce Clause, amendments to the Agricultural Adjustment Act of 1938 implementing a quota system to restrict the amount of wheat that could be harvested and sold applied to individuals who produced and consumed homegrown bushels of wheat.[93]

In upholding the statute as constitutional, the Court held that economic activities, regardless of their nature, could be regulated by Congress if the activity "asserts a substantial impact on interstate commerce...."[94] The Court reasoned that the growing of wheat, even if only for a family's personal consumption, provided an alternative to the marketplace that was both viable

[89] 494 U.S. 1 (1990).

[90] 494 U.S. at 17, *citing* Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276 (1981).

[91] See Jesse Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend*, 55 ARK. L. REV. 731, 761-762 (2003).

[92] Wickard v. Filburn, 317 U.S. 111, 113-114 (1942).

[93] In 1941, Mr. Filburn harvested an excess amount of 239 bushels for which he was fined $117.11 pursuant to amendments to the Agricultural Adjustment Act of 1938. *Id.* at 114.

[94] *Id.* at 125.

and competitive.[95] Although the Court admitted that one family's production alone would likely have a negligible impact on the overall price of wheat, if combined with other personal producers the effect would be substantial enough to make the activity subject to congressional regulation.[96] The rationale of combining individual effects to find substantial impacts on interstate commerce has become known as the "aggregation theory," and arguably represents the most far reaching example of Congress's authority to regulate under the Commerce Clause.[97]

Lopez and *Morrison*

After *Wickard*, the Court consistently held that a "rational basis" existed for Congress to enact laws under the theory that the regulated behavior substantially affected interstate commerce.[98] Despite the consistency of these decisions, it was not always clear whether the activity in question met the "substantially affects" test. Then in 1995, when the Court decided the *Lopez* case, as discussed previously, it explored the limits of the "substantially affects" test.

Subsequently, in *United States v. Morrison*,[99] the Court invalidated a portion of the Violence Against Women Act, which specifically created a private right of action against anyone who committed such a crime, allowing an injured party to obtain damages and other compensatory relief.[100] Applying its holding in *Lopez*, the Court concluded that the activity regulated by the act could not be classified as "economic activity," and therefore the aggregation principle established by *Wickard* did not apply. The Court, however, stopped short of establishing a rule that all non-economic activity cannot be aggregated.[101] In addition, the Court concluded that the act contained no jurisdictional element connecting the creation of a federal cause of action for gender-motivated violence to Congress's power to regulate interstate commerce.[102]

Further, while in *Morrison*, unlike in *Lopez*, there were numerous congressional findings, the Court stressed that although findings by the legislative branch can serve to illuminate the relationship between the regulation and interstate commerce, constitutionality ultimately turns on the legal aspects of the substantial effects doctrine, and therefore, is for the Court to decide.[103] In this case, the Court found that the legislative findings detailing the effects on interstate commerce

[95] *Id.* at 128.

[96] *Id.*

[97] *See* United States v. Lopez, 514 U.S. 549, 560 (1995).

[98] *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276-280 (1981); Perez v. United States, 402 U.S. 146, 155-156 (1971); Katzenbach v. McClung, 379 U.S. 294, 299-301 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-253 (1964).

[99] United States v. Morrison, 529 U.S. 598 (2000).

[100] 42 U.S.C. § 13981 (2000). In *Morrison*, a female plaintiff brought suit under the act against two men who had allegedly assaulted and raped her. The plaintiff asserted that her right to be free from gender associated violence had been violated, and therefore, she was entitled to monetary damages. *See Morrison*, 529 U.S. at 599 (2000).

[101] *Id.* (stating that "while we need not adopt a categorical rule against aggregating the effects of any non-economic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of interstate activity only where that activity is economic in nature.").

[102] *Id.* (holding that because of the lack of jurisdictional element, "Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime").

[103] *Id.*

by gender motivated violence were based in large part on the "costs of crime," which was nearly identical to the reasoning expressly rejected by the Court in *Lopez*.[104]

Finally, the Court considered the level of attenuation between the regulated activity and its effect on interstate commerce. In this case, the Court concluded that the regulation of gender-motivated violent crime was not directed at the instrumentalities, channels or goods involved in interstate commerce, and was therefore beyond the scope of Congress's authority.[105]

In sum, after *Lopez* and *Morrison*, the test to determine whether a regulation has a substantial effect on interstate commerce requires reviewing courts to consider the following four factors: (1) whether the regulated activity is commercial or economic in nature; (2) whether an express jurisdictional element is provided in the statute to limit its reach; (3) whether Congress made express findings about the effects of the proscribed activity on interstate commerce; and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated.[106]

Gonzales v. Raich

After the decision in *Lopez* and *Morrison*, the question arose as to whether these cases were a harbinger of future restrictions on Congress's power to legislate. Arguably, the Court had intended *Lopez* and *Morrison* to have a limited effect, as the Court specifically reaffirmed much of its previous Commerce Clause case law. Further, the statutory provisions challenged in *Lopez* (criminal penalties for gun possession in or near schools) and *Morrison* (civil suits for gender-motivated crime) were relatively unusual for statutes based on the commerce clause in that they did not contain a specific requirement that the activities be related to commerce. In addition, while broad economic regulation may have noneconomic elements (e.g., record-keeping requirements), the provisions in question were activities were not associated with such larger schemes.

Accordingly, when provisions contained in broader regulatory schemes were challenged after *Lopez* and *Morrison*, the lower courts generally upheld these under a "broader scheme" doctrine.[107] This doctrine is largely derived from language in *Lopez* that arguably permits congressional regulation of noneconomic activity if the regulation is "an essential part of a larger

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[104] *Id.* at 615 (stating that the reasoning of Congress would supply it with the power to "regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption.").

[105] *Id.* at 618 (holding that "the regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.").

[106] United States v. Stewart, 348 F.3d 1132, 1136-37 (9th Cir. 2003)(citing *Morrison*, 529 U.S. at 610-12).

[107] For example, numerous federal circuit courts have upheld the constitutionality of federal child pornography statutes that criminalize intrastate possession by finding the activity sufficiently connected to Congress's broader scheme of regulating the interstate commercial market for child pornography. *See, e.g.*, United States v. Adams, 343 F.3d 1024, 1034 (9th Cir. 2003); *see also* United States v. Hampton, 260 F.3d 832 (8th Cir. 2001); United States v. Corp, 236 F.3d 325 (6th Cir. 2001); United States v. Kallestad, 236 F.3d 225 (5th Cir. 2000); United States v. Angle, 234 F.3d 326 (7th Cir. 2000); United States v. Rodia, 194 F.3d 465 (3d Cir. 1999); United States v. Robinson, 137 F.3d 652 (1st Cir. 1998); United States v. Buculei, 262 F.3d 322 (4th Cir. 2001); United States v. Galo, 239 F.3d 572 (3d Cir. 2001); United States v. Bausch, 140 F.3d 739 (8th Cir. 1998); *but see* United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003); United States v. Corp, 236 F.3d 325 (6th Cir. 2001).

regulatory scheme, in which the regulatory scheme would be undercut unless the intrastate activity was regulated."[108]

Nonetheless, it was suggested by some commentators that certain non-economic provisions of larger regulatory schemes might also be successfully challenged. These challenges were generally characterized as "as applied" challenges. Generally, a court reviewing the constitutionality of a federal statute may declare the statute unconstitutional either as invalid on its face,[109] or "as applied" to a particular set of circumstances.[110] Utilizing an "as applied" standard, various lower courts struck down particular applications of broader statutory schemes.[111]

When presented with an "as applied" challenge, these courts initially attempted to define the relevant "class of activity" presented by the facts of the specific case. For instance, in the Ninth Circuit case of *Ashcroft v. Raich*, the court considered a challenge to the Controlled Substances Act. The challenging parties were seriously ill California residents who had obtained marijuana consistent with California's Compassionate Use Act[112] but in violation of the federal Controlled Substances Act (CSA).[113] The Ninth Circuit found the class of activity to be the "intrastate,

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[108] *Lopez*, 514 U.S. at 561.

[109] According to the Supreme Court, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances* exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987) (holding that the Bail Reform Act of 1984 is not facially invalid) (emphasis added).

[110] An "as applied" challenge is less difficult to sustain than a facial challenge because the challenger has to establish only that the statute is invalid when applied to the specific set of factual circumstances presented. Thus, some scholars had posited that since Lopez and Morrison were decided, "as applied" challenges to federal statutes for violation of the Commerce Clause would be more successful than have facial challenges *See* Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1262 (2003) [hereinafter Denning & Reynolds] (noting that a review of lower court decisions between 2000 and 2003 indicates that while only one statute has been found facially unconstitutional, there had been multiple decisions handed down holding that federal statutes are unconstitutional as applied to their specific facts).

[111] Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), *rev'd, sub nom.* Gonzales v. Raich, 545 U.S. 1 (2005)(holding that possession of marijuana for medicinal purposes consistent with California state law did not substantially impact commerce, and thus was outside of Congress' authority to regulate)*;* United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003) (reversing a possession of an illegal machine-gun conviction because the statute failed to satisfy the *Lopez/Morrison* standard); United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003) (reversing a conviction for possession of child pornography because the statute failed to provide the necessary relationship to interstate commerce to justify Congress's power); *United States v. Lynch*, 265 F.3d 758 (9th Cir. 2001) (vacating a Hobbs Act conviction and remanding to district court for determination of whether the robbery of an individual is within scope of statute); United States v. Odom, 252 F.3d 1289 (11th Cir. 2001) (reversing convictions under federal arson statute where subject of arson was a church); United States v. Johnson, 246 F.3d 749 (5th Cir. 2001) (refusing to reconsider prior decision vacating guilty plea of defendant for burning down one-story church building under federal arson statute); United States v. Peterson, 236 F.3d 848 (7th Cir. 2001) (granting reversal of Hobbs Act conviction because there was no evidence of connection with interstate commerce as required by the statute); United States v. Corp, 236 F.3d 325 (6th Cir. 2001) (reversing conviction under federal child pornography statute based on interstate movement of photographic materials where it was conceded that defendant kept pictures for personal use and did not intend to sell or trade pictures); United States v. Ryan, 227 F.3d 1058 (8th Cir. 2000) (reversing and remanding a conviction under federal arson statute for arson of vacant fitness center); United States v. Wang, 222 F.3d 234 (6th Cir. 2000) (reversing a Hobbs Act conviction and noting attenuated connection to interstate commerce where criminal act directed toward individual as opposed to business); United States v. Ramey, 217 F.3d 842 (4th Cir. 2000) (vacating sentence under federal arson statute in light of Jones v. United States, 529 U.S. 848 (2000)); United States v. Rayborn, 138 F. Supp. 2d 1029 (W.D. Tenn. 2001) (discussing motion to reconsider dismissal of indictment for arson and finding that the church was not actively used in interstate commerce and that none of its activities affects interstate commerce).

[112] Cal. Health & Safety Code § 11362.5 (1996) (allowing the use of marijuana for medical purposes upon the recommendation of a licensed physician).

[113] 21 U.S.C. § 841(a)(1) (2003) (classifying marijuana as a "Schedule I" controlled substance and as such making it (continued...)

noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law."[114] Having defined the relevant class of activity, the court proceeded to apply the four factor *Morrison* test.

With respect to the first factor—whether or not the activity is commercial or economic in nature—the court concluded that the narrow class of activity in this case could not be considered commercial or economic in nature.[115] The court next considered whether the CSA contains an express jurisdictional element that would limit its reach to those cases that substantially affect interstate commerce. With no stated analysis, and apparently persuaded by the reasoning of a district court opinion, the court concluded that "[n]o such jurisdictional hook exists in the relevant portions of the CSA."[116]

With respect to whether the legislative history contains congressional findings regarding the effects on interstate commerce, the court was able to cite findings relating to the effect that intrastate drug trafficking activity would have on interstate commerce.[117] While admitting that the legislative history lends support to the constitutionality of the statute under the Commerce Clause, the court proceeded to diminish the importance of these findings by arguing that they were not specific to either marijuana or the medicinal use of marijuana, but rather related to the general effects of drug trafficking on interstate commerce.[118] In addition, the court referred to language in *Morrison*, discussing the limited role of congressional findings.[119] Moreover, the court referenced Ninth Circuit precedent concluding that the first and fourth prongs of the *Morrison* test—whether the statute regulates an economic enterprise and whether the link is attenuated—are the most significant factors to the analysis.[120]

Finally, with respect to whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated, the court expressed doubt that the interstate effect of homegrown medical marijuana is substantial. Citing authority questioning the validity of the federal government's claim of an effect on interstate commerce,[121] the court concluded that "this factor favors a finding that the CSA cannot constitutionally be applied to the class of activities at issue in this case."[122]

(...continued)

illegal to "manufacture, distribute or dispense, or possess with the intent to manufacture, distribute, or dispense a controlled substance" unless provided for in the statute).

[114] *Id.* at 1229.

[115] *Raich*, 352 F.3d at 1230 (stating that the "cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity").

[116] *Id.* at 1231 (*citing County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1209 (N.D. Cal. 2003)).

[117] *Id.* at 1232 (*citing* 21 U.S.C. § 801, which states that "federal control of intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents such as traffic.").

[118] *Id.* at 1232.

[119] *Id.* (*citing Morrison*, 529 U.S. at 614).

[120] *Id.* at 1232-33 (*citing United States v. McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003)).

[121] *Id.* at 1233 (*quoting Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (stating that "[m]edical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce. Federal efforts to regulate it considerably blur the distinction between what is national and what is local.") (Kozinski, J., concurring)).

[122] *Id.*

The United States Supreme Court granted *certiorari* specifically on the question of whether the power vested in Congress by both the "Necessary and Proper Clause," and the "Commerce Clause" of Article I includes the power to prohibit the local growth, possession, and use of marijuana permissible as a result of California's law.[123] Justice Stevens, writing for the majority in the now-entitled *Gonzales v. Raich*, reversed the Ninth Circuit's decision and held that Congress's power to regulate commerce extends to purely local activities that are "part of an economic class of activities that have a substantial effect on interstate commerce."[124]

In reaching its conclusions, the Court relied heavily on its 1942 decision in *Wickard v. Filburn*, which held that the Agricultural Adjustment Act's federal quota system applied to bushels of wheat that were homegrown and personally consumed. *Wickard* stands for the proposition that Congress can rationally combine the effects that individual producers have on a commercial market to find substantial impacts on interstate commerce.[125] The Court pointed to numerous similarities between the facts presented in *Raich* and those in *Wickard*. Initially, the Court noted that because the commodities being cultivated in both cases are fungible and that well-established interstate markets exist, both markets are susceptible to fluctuations in supply and demand based on production intended for home consumption being introduced into the national market.[126]

According to the Court, just as there was no difference between the wheat Mr. Wickard produced for personal consumption and the wheat cultivated for sale on the open market, there is no discernable difference between personal home-grown medicinal marijuana and marijuana grown for the express purpose of being sold in the interstate market.[127] Thus, the Court concluded that Congress had a rational basis for concluding that "leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."[128]

Respondents argued that *Wickard* was distinguishable because in the case of wheat the activity involved was purely commercial, and the evidence clearly established that the aggregate production of wheat had a significant effect on the interstate market. Conversely, respondents claimed that the activity at issue in *Raich* is non-commercial—the respondents had never attempted to sell their marijuana—and Congress had made no finding that the personal cultivation and use of medicinal marijuana has a substantial effect on the interstate marijuana market.[129] The

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[123] *Gonzales v. Raich*, 545 U.S. 1 (2005).

[124] *Id.* at 16 (*citing Perez v. United States*, 402 U.S. 146, 151 (1970)). The final outcome was 6-3 with Justice Stevens writing for himself and Justices Souter, Kennedy, Breyer, and Ginsburg. Justice Scalia, via a separate opinion, concurred only in the Court's judgment. *See id.* at 33. Justice O'Connor dissented and filed an opinion that both Chief Justice Rehnquist and Justice Thomas joined in part. *See id.* at 42. In addition, Justice Thomas filed his own dissenting opinion. *See id.* at 57.

[125] *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that, economic activity, regardless of its nature, can be regulated by Congress if the activity "asserts a substantial impact on interstate commerce ...").

[126] *Raich*, 545 U.S. at 19, n. 29. The Court noted that the while the marijuana market is an illegal or illicit market, this fact appears to be of no legal or constitutional significance as Congress's power arguably encompasses both lawful and unlawful interstate markets. *See id.* (*citing Lopez*, 514 U.S. at 571, (Kennedy, J., concurring) (stating that "[i]n the *Lottery Case*, 188 U.S. 321 (1903), 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.").

[127] *Raich*, 545 U.S. at 19.

[128] *Id.* (stating that "we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.") (internal citations omitted).

[129] *Id.*

Court, however, noted that the standard for assessing the scope of Congress's power under the Commerce Clause is not whether the activity at issue, when aggregated, substantially affects interstate commerce; but rather, whether there exists a "rational basis" for Congress to have concluded as such.[130] The Court, applying this deferential standard, concluded that "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."[131] Moreover, the Court affirmed that "Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce ... among the several States.'"[132]

Despite having concluded that under the "rational basis test" Congress had acted within its constitutional authority when it enacted the CSA and applied it to intrastate possession of marijuana, the Court nevertheless had to distinguish *Lopez* and *Morrison*, the Court's more recent Commerce Clause decisions. The Court concluded that the CSA, unlike the statutes in either *Lopez* (Gun Free School Zones Act) or *Morrison* (Violence Against Women Act), regulated activity that is "quintessentially economic," therefore, neither *Lopez* or *Morrison* cast any doubts on the constitutionality of the statute.[133] The Court specifically rejected the reasoning used by the Ninth Circuit, concluding that "Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court of Appeals was an essential part of the larger regulatory scheme."[134]

In supporting its conclusions, the Court noted that, by characterizing marijuana as a "Schedule I" narcotic, Congress was implicitly finding that it had no medicinal value at all. In addition, the Court returned to the fact that medicinal marijuana was a fungible good, thus making it indistinguishable from the recreational versions that Congress had clearly intended to regulate. According to the Court, to carve out medicinal use as a distinct class of activity, as the Ninth Circuit had done, would effectively make "*any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the 'outer limits' of Congress'[s] Commerce Clause authority."[135] Moreover, the Court held that California's state law permitting the use of marijuana for medicinal purposes cannot be the basis for placing the respondent's class of activity beyond the reach of the federal government, due to the Supremacy Clause, which requires that, in the event of a conflict between state and federal law, the federal law shall prevail.[136]

Finally, the Court responded to the respondent's argument that its activities are not an "essential part of a larger regulatory scheme" because they are both isolated and policed by the State of California and they are completely separate and distinct from the interstate market.[137] The Court held that not only could Congress have rationally rejected this argument, but also that it "seem[ed] obvious" that doctors, patients, and caregivers will increase the supply and demand for

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[130] *Id.* at 21 (*citing Lopez*, 514 U.S. at 557; *see also Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Perez*, 402 U.S. at 155-156).

[131] *See Raich*, 545 U.S. at 21.

[132] *Id.*

[133] *Id.* at 25-26.

[134] *Id.* at 26-27.

[135] *Id.* at 28 (emphasis in original).

[136] *Id.*

[137] *Id.* at 30.

the substance on the open market.[138] In sum, the Court concluded that the case for exemption can be distilled down to an argument that a locally grown product used domestically is immune from federal regulation, which has already been precluded by the Court's decision in *Wickard v. Filburn*.[139]

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[138] *Id.* at 30-31 (stating that "[i]ndeed that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just 'plausible' as the principal dissent concedes, ... it is readily apparent").

[139] *Id.* at 32-33.