AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Powers of the National Government

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

*The Controlled Substances Act of 1970 (CSA, or Title II of the Comprehensive Drug Abuse Prevention and Control Act) consolidated and expanded federal regulation of narcotics. Marijuana is regulated as a “Schedule I” drug under the CSA, with a high potential for abuse and little or no medicinal value. Its manufacture, distribution, or possession is a federal criminal offense, except when preapproved by the federal Food and Drug Administration for a research study.*

*In 1996, the voters of California approved the Compassionate Use Act which gave “seriously ill Californians” a “right to obtain and use marijuana for medical purposes” and to provide legal protections to doctors who recommend marijuana to such patients and to patients and primary caregivers who cultivate or possess marijuana for such use. The California statute and the litigation challenged the assumption of the federal law that marijuana was of no medicinal value.*

*Angel Raich and Diane Monson provided a test case for the conflict between these two laws. Both used marijuana for their own medical conditions, though only Monson was physically able to cultivate the plants herself. In 2002, both county deputies and federal Drug Enforcement Agents came to Monson’s home. The county determined that Monson was operating within the terms of the Compassionate Use Act. The DEA found her in violation of the Controlled Substances Act and destroyed six marijuana plants. Raich and Monson then filed suit against the United States attorney general seeking an injunction against further enforcement of the CSA and a declaration that CSA was unconstitutional as applied to them. Although the district court initially denied the motion, a divided Ninth Circuit court ruled in favor of Raich and Monson in light of the Supreme Court’s recent decisions in* Lopez *and* Morrison*. Unlike the conservative Fifth Circuit that decided the original* Lopez *case from Texas, the Ninth Circuit that decided the* Raich *case from California was a liberal court, suggesting the strange political bedfellows that the federalism cases could make.*

*The* Raich *case was closely watched. Unlike the Gun-Free School Zones Act, the Controlled Substances Act was a central piece of social policy. Invalidating it, even on narrow grounds, would have real policy consequences. The case also pitted the libertarian value of small government against the war on drugs dear to many social conservatives, testing the political and constitutional commitments of the conservative justices. The Supreme Court reversed the Ninth Circuit, and upheld the CSA, on a 6–3 vote, with Justices Kennedy and Scalia switching sides to rule in favor of the federal government and its authority under the commerce clause in this case. As you read this case, consider whether Scalia is persuasive in distinguishing* Raich *from the earlier cases. Does* Raich *signal the repudiation of* Lopez*?*

JUSTICE STEVENS delivered the opinion of the Court.

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

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Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress’ commerce power. . . . Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents’ challenge is actually quite limited; they argue that the CSA’s categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress’ authority under the Commerce Clause.

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Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic “class of activities” that have a substantial effect on interstate commerce. . . . As we stated in Wickard (1942), “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” . . . We have never required Congress to legislate with scientific exactitude. When Congress decides that the “ ‘total incidence’ ” of a practice poses a threat to a national market, it may regulate the entire class.

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Wickard . . . establishes that Congress can regulate purely intrastate activity that is not itself “commercial,” in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and Wickard are striking. Like the farmer in Wickard, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed “to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . . ” and consequently control the market price, . . . a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. . . .

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In assessing the scope of Congress’ authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a “rational basis” exists for so concluding. . . . Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, . . . and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. . . .

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. . . .

Those two cases, of course, are Lopez (1995) . . . and Morrison (2000). As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both Lopez and Morrison, the parties asserted that a particular statute or provision fell outside Congress’ commerce power in its entirety. This distinction is pivotal for we have often reiterated that “[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.” . . .

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Unlike those at issue in Lopez and Morrison, the activities regulated by the CSA are quintessentially economic. “Economics” refers to “the production, distribution, and consumption of commodities.” . . . The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. . . .

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 . . . More fundamentally, if, as the principal dissent contends, the personal cultivation, possession, and use of marijuana for medicinal purposes is beyond the “ ‘outer limits’ of Congress’ Commerce Clause authority,” . . . it must also be true that such personal use of marijuana (or any other homegrown drug) for recreational purposes is also beyond those “ ‘outer limits,’ ” whether or not a State elects to authorize or even regulate such use. Justice Thomas’ separate dissent suffers from the same sweeping implications. That is, the dissenters’ rationale logically extends to place 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’ Commerce Clause authority. One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but “visible to the naked eye,” . . . under any commonsense appraisal of the probable consequences of such an open-ended exemption.

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JUSTICE SCALIA, concurring.

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As we implicitly acknowledged in Lopez, Congress’s authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in Lopez was not economic, the Court nevertheless recognized that it could be regulated as “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” . . .

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Today’s principal dissent objects that, by permitting Congress to regulate activities necessary to effective interstate regulation, the Court reduces Lopez and Morrison to “little more than a drafting guide.” . . . I think that criticism unjustified. Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. . . .

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The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. . . . That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress’s authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish “controlled substances manufactured and distributed intrastate” from “controlled substances manufactured and distributed interstate,” but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State. . . . Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for “medical” marijuana and the more general marijuana market. . . . “To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.” . . .

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JUSTICE O’CONNOR, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join in part, dissenting.

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

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Today’s decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential (and the Court appears to equate “essential” with “necessary”) to the interstate regulatory scheme. Seizing upon our language in Lopez that the statute prohibiting gun possession in school zones was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated,” . . . the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. If the Court is right, then Lopez stands for nothing more than a drafting guide: Congress should have described the relevant crime as “transfer or possession of a firearm anywhere in the nation”—thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones.

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The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between “what is national and what is local.” It 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. We have already rejected the result that would follow—a federal police power. . . .

In Lopez and Morrison, we suggested that economic activity usually relates directly to commercial activity. . . . The homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it. . . . Lopez makes clear that possession is not itself commercial activity. . . . And respondents have not come into possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value. . . .

The Court suggests that Wickard, which we have identified as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” . . . established federal regulatory power over any home consumption of a commodity for which a national market exists. I disagree. Wickard involved a challenge to the Agricultural Adjustment Act of 1938 (AAA), which directed the Secretary of Agriculture to set national quotas on wheat production, and penalties for excess production. . . . The AAA itself confirmed that Congress made an explicit choice not to reach—and thus the Court could not possibly have approved of federal control over—small-scale, noncommercial wheat farming. In contrast to the CSA’s limitless assertion of power, Congress provided an exemption within the AAA for small producers. When Filburn planted the wheat at issue in Wickard, the statute exempted plantings less than 200 bushels (about six tons), and when he harvested his wheat it exempted plantings less than six acres. . . . Wickard, then, did not extend Commerce Clause authority to something as modest as the home cook’s herb garden. This is not to say that Congress may never regulate small quantities of commodities possessed or produced for personal use, or to deny that it sometimes needs to enact a zero tolerance regime for such commodities. It is merely to say that Wickard did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress’ reach.

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime. . . .

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JUSTICE THOMAS, dissenting.

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

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 . . . [I]in order to be “necessary,” the intrastate ban must be more than “a reasonable means [of] effectuat[ing] the regulation of interstate commerce.” . . . It must be “plainly adapted” to regulating interstate marijuana trafficking—in other words, there must be an “obvious, simple, and direct relation” between the intrastate ban and the regulation of interstate commerce. . . . McCulloch v. Maryland (1819).

 . . . [E]ven assuming Congress has “obvious” and “plain” reasons why regulating intrastate cultivation and possession is necessary to regulating the interstate drug trade, none of those reasons applies to medical marijuana patients like Monson and Raich.

California’s Compassionate Use Act sets respondents’ conduct apart from other intrastate producers and users of marijuana. The Act channels marijuana use to “seriously ill Californians,” . . . and prohibits “the diversion of marijuana for nonmedical purposes.” . . . California strictly controls the cultivation and possession of marijuana for medical purposes. . . .

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Even assuming the CSA’s ban on locally cultivated and consumed marijuana is “necessary,” that does not mean it is also “proper.” The means selected by Congress to regulate interstate commerce cannot be “prohibited” by, or inconsistent with the “letter and spirit” of, the Constitution. . . .

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Here, Congress has encroached on States’ traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. . . . Further, the Government’s rationale—that it may regulate the production or possession of any commodity for which there is an interstate market—threatens to remove the remaining vestiges of States’ traditional police powers.

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 . . . [E]ven a Court interested more in the modern than the original understanding of the Constitution ought to resolve cases based on the meaning of words that are actually in the document. Congress is authorized to regulate “Commerce,” and respondents’ conduct does not qualify under any definition of that term. The majority’s opinion only illustrates the steady drift away from the text of the Commerce Clause. . . . Federal power expands, but never contracts, with each new locution. The majority is not interpreting the Commerce Clause, but rewriting it.

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One searches the Court’s opinion in vain for any hint of what aspect of American life is reserved to the States. Yet this Court knows that “ ‘[t]he Constitution created a Federal Government of limited powers.’ ” . . . That is why today’s decision will add no measure of stability to our Commerce Clause jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter. If stability is possible, it is only by discarding the stand-alone substantial effects test and revisiting our definition of “Commerce among the several States.” Congress may regulate interstate commerce—not things that affect it, even when summed together, unless truly “necessary and proper” to regulating interstate commerce.

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