Tennessee Journal of Law and Policy

Volume 1
Issue 3 *Spring 2005*

Article 2

January 2005

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First, do no harm.[1] *He who seeks to regulate everything by law is more likely to arouse vices than to reform them.*[2] *It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.*[3] *It is clear after all these many years that our federal government does not have the right answers. It is time for other, more local governments to retake command.*[4]

I. Introduction

On June 28, 2004, the Supreme Court granted review in *Gonzales v. Raich*,[5] one of the California medical marijuana cases.[6] Oral argument was heard

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[1] Hippocrates, c. 420 B.C.

[2] Benedict de Spinoza, Freedom of Thought and Speech, *reprinted in* CHIEF WORKS OF BENEDICT DE SPINOZA, at 261 (R.H.M. Elwes, trans. 1936).

[3] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[4] JAMES GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 15 (2001).

[5] *See* Transcript of Oral Argument, Nov. 29, 2004, *Ashcroft v. Raich*, No. 03-1454 (hereinafter, *Oral Arg.*) Since Alberto Gonzales replaced John Ashcroft as U.S. Attorney General on February 3, 2005, the Supreme Court's ruling will be titled *Gonzales v. Raich.*

[6] *See, e.g.*, United States v. Oakland Cannabis Buyers' Coop.,

on November 29, 2004, and a ruling is expected by June, 2005.[7] *Raich* presents the Court an historic opportunity to enable sensible drug law reform at the State level.[8]

A. Legal Context

Raich arises at the nexus of three sources of law. It began as a conflict, brewing for some time,[9] between state and federal legislation. The state law is Proposition 215. It was enacted by a California ballot initiative in 1996 and codified as the

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532 U.S. 483 (2001); Conant v. Walters, 309 F.3d 629 (9th Cir. 2002); Women's Alliance for Med. Marijuana v. United States, No. 02-MC-7012 JF (N.D. Cal. 2002); County of Santa Cruz v. Ashcroft, 279 F. Supp. 2d 1192 (N.D. Cal. 2003).

[7] *See* Charles Lane, *High Court Not Receptive to Marijuana Case*, WASH. POST, Nov. 30, 2004, at A03, and David Savage, *Justices Take on Medical Pot Law*, L.A. TIMES, Nov. 30, 2004, at A1.

[8] It is fortunate that the Court has granted review at a relatively early stage in the litigation. As we shall see, the case came up in the remedial context, i.e., whether the District Court properly denied appellants' request for a preliminary injunction, pending trial, against enforcement of the CSA. Had the Supreme Court waited until the District Court, on remand, had granted the preliminary injunction and proceeded to trial, followed by an appeal from a final judgment in that case, any guidance the Court could provide on this urgent issue might have been postponed for years. When we consider that Judge Beam, dissenting in the Ninth Circuit opinion, would have remanded to the District Court for hearings on justiciability issues of standing and ripeness, *see Raich v. Ashcroft*, 352 F.3d 1222, 1237 (8th Circuit, 2003), the unlikelihood of this opportunity seems even clearer.

[9] As the Mayor of Santa Cruz observed two years ago, "Clearly, state law and federal law are on a collision course." Christopher Krohn, *Why I'm Fighting Federal Drug Laws from City Hall*, N.Y. TIMES, Sep. 21, 2002, at A15.

Compassionate Use Act (CUA).[10] The appellants in *Raich* possessed and used marijuana under the CUA, which is intended to ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes. Medical use is deemed appropriate once a physician determines that the person's health would benefit from the use of marijuana in the treatment of the following

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[10] Cal. Health & Safety Code § 11362.5. For background on Proposition 215, *see* ALAN BOCK, WAITING TO EXHALE: THE POLITICS OF MEDICAL MARIJUANA (2000); ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES, 378-380 (2001) (Rand Studies in Policy Analysis) (hereinafter, "RAND"); and ED ROSENTHAL & STEVE KUBBY, WHY MARIJUANA SHOULD BE ILLEGAL 94-101 (2003).

On federal and state responses to medical marijuana generally, *see* RUDOLPH. J. GERBER, LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS chs. 1-3; 5-7 (2004); Lauryn Gouldin, *Cannabis, Compassionate Use and the Commerce Clause: Why Developments in California May Limit the Constitutional Reach of the Federal Drug Laws*, 1999 ANN. SURV. AM. L. 471, 475-82 (1999); Alistair Newbern, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After* United States v. Lopez, 88 CAL. L. REV. 1575, 1586-89 (2000); Erik R. Neusch, *Medical Marijuana's Fate in the Aftermath of the Supreme Court's New Commerce Clause Jurisprudence*, 72 U. COLO. L. REV. 201 (2001); Dennis Newitt, *The Medical Use of Marijuana: State Legislation, Judicial Interpretation and Federal Drug Laws*, 4 J. LEGAL ADVOC. & PRAC. 156, 158-68 (2002); Alex Kreit, *The Future of Medical Marijuana: Should the States Grow Their Own?* 151 U. PA. L. REV. 1787, 1793-1800 (2003). Every state that has voted on medical marijuana has legalized it. *See* Ethan Nadelmann, *Going to Pot: The Growing Movement Toward Ending America's Irrational Marijuana Prohibition*, NAT'L REVIEW, July 12, 2004, at 30.

medical conditions: cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana has shown to provide relief.[11]

The federal law, enacted in 1970, is the Comprehensive Drug Prevention and Control Act, popularly called the Controlled Substances Act (CSA).[12] The CSA classifies marijuana as a Schedule I controlled substance, which means that in Congress' view, it has a high potential for abuse, no officially accepted medicinal uses, and no safe level of use under medical supervision.[13] Except for rare controlled experiments, federal law flatly prohibits the possession or use of even small quantities of marijuana.[14]

Under the Supremacy Clause of Article VI,[15] federal law preempts contrary state law.[16] At the same time, Congress can act only within its constitutional powers. Among the most important of these is the power "[t]o regulate Commerce . . . among the several States . . . ,"[17] on which it expressly relied when enacting the CSA.[18] For 60 years, such reliance would almost certainly have ensured federal power to enact the law in

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[11] Cal. Health & Safety Code § 11362.5(b)(1)(A).
[12] 21 U.S.C. § 801 et. seq. (2002).
[13] 21 U.S.C. § 812(b)(1). On the rest of the CSA scheduling system, *see* Gouldin, *supra* note 10, at 477-78, and Bock, *supra* note 10, at 223-224.
[14] In *Oakland Cannabis*, the Supreme Court ruled that there is no medical necessity exception to enforcement of the CSA. 532 U.S. at 497-99.
[15] U.S. CONST. art. VI, § 2.
[16] *See, e.g.*, New York v. United States, 505 U.S. 144 (1992); *Conant,* 309 F.3d at 645-46 (Kozinski, J., concurring).
[17] U.S. CONST. art. I, § 8, cl. 3.
[18] *See Raich*, 352 F.3d at 1227; 21 U.S.C.S. § 801 (2002).

question.[19] Since 1995, however, the High Court has established precedent[20] striking down certain federal laws as beyond the power of Congress under the Commerce Clause. Though federal law may preempt contrary state law, it can do so only if the federal law is within Congress' power in the first place.[21] Constitutional law, specifically Commerce Clause jurisprudence, is thus the third and overarching source of law within which *Raich* must be resolved.

In Part II, I argue that Judge Harry Pregerson's 9th Circuit opinion in *Raich* is correct: appellants' possession and use of marijuana under the authority of the CUA is beyond Congress' commerce power, and the CSA is unconstitutional as applied to them.[22] Notwithstanding Judge Arlen Beam's

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[19] *See* Neusch, *supra* note 10, at 221-23; Newbern, *supra* note 10, at 1600-05; *and* Glenn Reynolds & Brandon Denning, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1257 (2003).

[20] *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000); Jones v. United States, 529 U.S. 848 (2000).

[21] As the court notes in *Raich*, in *Oakland Cannabis* the Supreme Court expressly reserved the question whether the CSA exceeds Congress' power under the Commerce Clause. 352 F.3d at 1227.

[22] The activity at issue in *Raich* is distinct from that for which other possible regimes of state law might provide, like the regulated cultivation and distribution of medical marijuana under controlled circumstances. *See, e.g.*, Kreit, *supra* note 10; Newitt, *supra* note 10; Gouldin, *supra* note 10; J. GRAY, *supra* note 4, at 222-29; DIRK CHASE ELDREDGE, ENDING THE WAR ON DRUGS (1998); Eric Sterling, *Principles and Proposals for Managing the Drug Problem, in* HOW TO LEGALIZE DRUGS, 523-24 (Jefferson Fish ed., 1998). Regarding attempted bills at the state level, *see* Stanley Neustadter, *Legalization Legislation: Confronting the Details of Policy Choices*, in

spirited dissent and the Ninth Circuit's reputation for frequent reversal,[23] I shall argue that the Court

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HOW TO LEGALIZE DRUGS (Jefferson Fish, ed., 1998). Though many such regimes are defensible policy, they do not seem promising insofar as distribution, particularly where money changes hands, is commerce that could constitutionally be regulated under the CSA. By contrast, appellants' activity in *Raich* is the private, personal cultivation, possession and (medical) use of marijuana.

The political branches of the federal government might seem best suited to provide drug policy reform. *See* ELDREDGE, *supra* note 22, at 165-66. The Bush Administration's appeal in *Raich* indicates the low likelihood of reform through the executive branch. As for Congress, Neusch observed that "[t]he most logical solution to the problem, rescheduling marijuana from a Schedule I to a Schedule II category, is not politically viable." Neusch, *supra* note 10, at 211. Indeed, shortly after Proposition 215 was enacted, Congress passed a "sense of the Congress" resolution in opposition to medical marijuana. Statement of National Antidrug Policy, Pub. L. No. 105-277, 112 Stat. 2681, 2757-61. As Uelman adds, "Ultimately, the final resolution of the medical marijuana issue will not come until Congress is ready to reclassify marijuana, removing it from Schedule I of the Controlled Substances Act. That's not likely to happen in the Congress elected on November 5, 2002." Gerald Uelman, *Marijuana: Federal Authorities Can't Distinguish Medical Use from Recreational Use, But Voters Can, at* http://jurist.law.pitt.edu/forum/forumnew83.php (Jan. 8, 2003). Most recently, Congress even rejected a bill directing the DEA not to enforce the CSA contrary to state laws allowing medical marijuana. *See Viewpoint*, ROLL CALL, July 13, 2004; *For the Record*, WASH. POST, Jul. 11, 2004, at T11. Neustadter opines that that the states can do nothing in this area until federal policy changes. *See* Neustadter, *supra* note 22, at 389-90. *Raich,* however, provides an opening for reform even assuming Congress' continued intransigence.

[23] The Ninth Circuit has a reputation for being overruled, even unanimously, more often than any other federal appellate court. *See* Adam Liptak, *Court That Ruled on Pledge Often Runs Afoul of Justices,* N.Y. TIMES, Jun. 30, 2002, at 1.

should affirm Judge Pregerson's opinion on the merits.

While the Ninth Circuit should be affirmed, we shall see in Part III that there is a fundamental oversight in the opinion that Acting Solicitor General Paul Clement predictably mentioned both in his brief and at oral argument. Pregerson repeatedly suggests that a key reason for his ruling is that appellants' use of marijuana is for *medicinal* purposes. While we shall see that this emphasis on the medicinal character of appellants' use is understandable, Mr. Clement suggested that this purpose is irrelevant to the constitutional issue at stake:[24] if the private possession and use of marijuana by adults is beyond Congress' commerce power, then that is so whether or not the consumption is for medicinal purposes, for the activity that Congress seeks to regulate is identical either way. Accordingly, the argument would run, a vote to affirm Pregerson is a vote for a slippery slope into a nightmare scenario in which states will be free to legalize the use of any Schedule One drug for recreational purposes.

Activities involving commerce are usually reachable by Congress, and Mr. Clement understood that no state would enact most of the noncommercial regimes he might have predicted. Had he had the time to develop his argument, however, he could plausibly have insisted that some states might seriously consider enacting what I shall call the Personal Cultivation Initiative (PCI). The PCI would allow any adult to cultivate and possess a limited number of marijuana plants within his

[24] See Brief for Petitioners, *Ashcroft v. Raich*, No. 03-1354 (Aug. 2004) at 40, and *Oral Arg.*, at 15.

domicile strictly for personal consumption, not sale or trade, solely by adults within that domicile.

Commerce Clause merits aside, then, the refined policy question in *Raich* is whether a State could rationally enact the PCI. I shall answer this question in the affirmative, arguing that even if the Justices are concerned about the policy implications of upholding Judge Pregerson, on reflection they could conclude that a State could rationally enact the PCI.[25]

On this basis, I conclude that the Court should affirm Judge Pregerson with a broad ruling clearly acknowledging, or at least not denying, that State level reformers would not be wasting resources working to enact the PCI. As an empirical matter, however, any majority that could be formed to uphold Judge Pregerson would likely do so only on narrow grounds. Assuming this is correct, and that the medicinal/recreational distinction is irrelevant to the Commerce Clause question, I conclude by offering 1) an alternative basis for a narrow ruling upholding Judge Pregerson, and 2) some thoughts on the implications of a reversal of Judge Pregerson.

II. The Ninth Circuit Ruling

A. Factual and Procedural Background

Judge Pregerson succinctly presented the facts and procedure in *Raich*:

[25] As this discussion suggests, *Raich* involves an interesting confluence of liberal social policy and conservative constitutional interpretation. I shall return to this point.

Appellants Angel McClary Raich and Diane Monson (the "patient-appellants") are California citizens who currently use marijuana as a medical treatment. Appellant Raich has been diagnosed with more than ten serious medical conditions, including an inoperable brain tumor, life-threatening weight loss, a seizure disorder, nausea, and several chronic pain disorders. Appellant Monson suffers from severe chronic back pain and constant, painful muscle spasms. Her doctor states that these symptoms are caused by a degenerative disease of the spine.

Raich has been using marijuana as a medication for over five years, every two waking hours of every day. Her doctor contends that Raich has tried essentially all other legal alternatives and all are either ineffective or result in intolerable side effects; her doctor has provided a list of thirty-five medications that fall into the latter category alone. Raich's doctor states that foregoing marijuana treatment may be fatal. Monson has been using marijuana as a medication since 1999. Monson's doctor also contends that alternative medications have been tried and are either ineffective or produce intolerable side effects. As the district court put it: "Traditional medicine has utterly failed these women . . . ."

Appellant Monson cultivates her own marijuana. Raich is unable to cultivate her own. Instead, her two caregivers, appellants John Doe Number One and

John Doe Number Two, grow it for her. These caregivers provide Raich with her marijuana free of charge. They have sued anonymously in order to protect Raich's supply of medical marijuana. In growing marijuana for Raich, they allegedly use only soil, water, nutrients, growing equipment, supplies and lumber originating from or manufactured within California. Although these caregivers cultivate marijuana for Raich, she processes some of the marijuana into cannabis oils, balm, and foods.

On August 15, 2002, deputies from the Butte County Sheriff's Department and agents from the Drug Enforcement Agency ("DEA") came to Monson's home. The sheriff's deputies concluded that Monson's use of marijuana was legal under the Compassionate Use Act. However, after a three-hour standoff involving the Butte County District Attorney and the United States Attorney for the Eastern District of California, the DEA agents seized and destroyed Monson's six cannabis plants.[26]

Fearing raids in the future and the prospect of being deprived of medicinal marijuana, the appellants sued the United States Attorney General John Ashcroft and the Administrator of the DEA Asa

[26] As Schlosser notes, Ashcroft had "vowed to 'escalate the war on drugs.'" ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 67 (2004).

> Hutchison on October 9, 2002. Their suit seeks declaratory relief and preliminary and permanent injunctive relief. They seek a declaration that the CSA is unconstitutional to the extent it purports to prevent them from possessing, obtaining, manufacturing, or providing cannabis for medical use. The appellants also seek a declaration that the doctrine of medical necessity precludes enforcement of the CSA to prevent Raich and Monson from possessing, obtaining, or manufacturing cannabis for their personal medical use.[27]
>
> On March 5, 2003, the district court denied the appellants' motion for a preliminary injunction. The district court found that "despite the gravity of plaintiffs' need for medical cannabis, and despite the concrete interest of California to provide it for individuals like them," the appellants had not established the required "'irreducible minimum' of a likelihood of success on the merits under the law of this Circuit . . . ."[28]

B. The Commerce Clause Merits

As this background indicates, though *Raich* centers on the *substantive* domain of the Commerce

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[27] Since the Ninth Circuit ruled for appellants on the Commerce Clause issue, it did not address their other arguments, including the medical necessity claim. *See Raich*, 352 F.3d at 1227.

[28] *Id.* at 1225-26.

Clause, the case came to the Ninth Circuit in the *remedial* context of a request for a preliminary injunction. The questions are fused, however, since the substantive question must be addressed in order to resolve the remedial issue. As Judge Pregerson explains, "[T]he traditional test for granting preliminary injunctive relief requires the applicant to demonstrate: (1) a likelihood of success on the *merits*; (2) a significant threat of irreparable injury; (3) that the balance of hardships favors the applicant; and (4) whether any public interest favors granting the injunction."[29] Pregerson gives the merits prong of this test, which embodies the Commerce Clause analysis, the lengthiest treatment. In this analysis, three cases are central: *Wickard v. Filburn*,[30] *United States v. Lopez*,[31] and *United States v. Morrison*.[32]

1. *Wickard, Lopez,* and *Morrison*

Wickard involved amendments to the 1938 Agricultural Adjustment Act. In order to stimulate trade, Congress sought to stabilize the national price of wheat by regulating the volume of wheat in interstate commerce. The Act thus provided for a national acreage allotment of wheat, which was subdivided into quotas for individual farmers. Roscoe Filburn owned a small farm in Ohio, and was allotted 11.1 acres for his 1941 wheat crop. He

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[29] *Id.* at 1227. (emphasis added). While Pregerson mentions an alternative test, he notes the two "are not inconsistent," and, indeed, "likelihood of success on the merits" is a key factor in both. *Id.*

[30] 317 U.S. 111 (1942).

[31] 514 U.S. 549 (1995).

[32] 529 U.S. 598 (2000).

grew 23 acres of wheat, intending to keep the excess crop for his own consumption. Filburn was fined under the Act, but he refused to pay the fine and filed suit, challenging the law's application to him under the Commerce Clause.

Writing for a unanimous Court, Justice Robert Jackson upheld the law as applied to Mr. Filburn. Rejecting the formalist distinctions of earlier cases,[33] Jackson wrote:

> [I]t is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in . . . . It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions.[34]

How could a single wheat farmer have had such an influence? *Wickard* established the *aggregation principle*: "[A]ppellee's own contribution to the demand for wheat may be trivial by itself, [but it] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[35] Moreover, even "if we assume that [the wheat] is

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[33] *See Wickard*, 317 U.S. at 123-25.

[34] *Id.* at 128.

[35] *Id.* at 127-28. As Newbern notes, "*Wickard* stands for the proposition that no matter how personalized or local an economic actor's conduct might be, if her conduct, multiplied, would affect interstate commerce, it may fall under Congress' regulatory control." Newbern, *supra* note 10, at 1601.

never marketed, it supplies the needs of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce . . . ."[36] Establishing "perhaps the most far-reaching example of Commerce Clause authority over intrastate activity,"[37] Jackson held that "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 . . . ."[38]

Issued more than 50 years after *Wickard*, *Lopez* was a landmark ruling.[39] Section 922(q) of

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[36] *Wickard*, 315 U.S. at 128.

[37] *Lopez*, 514 U.S. at 560.

[38] *Wickard*, 317 U.S. at 125.

[39] It has been described as the opening shot in a Commerce Clause revolution. *See* Newbern, *supra* note 10, at 1632; Reynolds & Denning, *supra* note 19 at 1257-62. Newbern notes that "[w]ithin eight months of Lopez's decision, more than eighty challenges to federal Commerce Clause based criminal statutes were filed in district courts. Four years after *Lopez* was handed down, that number had grown to 566 cases filed in federal courts." Newbern, *supra* note 10, at 1607-08. As Marcus Green thus observes, "[T]he *Lopez* decision is central to the 'new federalism revival' (consisting of) three interrelated lines of cases (those involving the Tenth Amendment, Eleventh Amendment, and the Commerce Clause)." Marcus Green, *Guns, Drugs, and Federalism: Rethinking Commerce-Enabled Regulation of Mere Possession*, 72 FORDHAM L. REV. 2543, 2545-46 (2004). In Calabresi's view, "perhaps the most striking feature of the Rehnquist Court's jurisprudence has been the revival over the last 5-10 years of doctrines of constitutional federalism." Steven Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SCI. 24, 25 (2001). For a nuanced view in which "there is both less and more to the federalism revolution than generally meets the

the Gun-Free Zones Act (GFZA) created a federal crime "for any individual knowingly to possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone," i.e., on or within 1000 feet of a public or private school.[40] Though Lopez was arrested and charged under the state counterpart of the GFZA, those charges were dropped when federal agents charged him with a violation of § 922(q).[41] Upon conviction, Lopez appealed, challenging § 922(q) as beyond Congress' commerce power.

Writing for a five-four majority, Chief Justice Rehnquist upheld the Fifth Circuit's reversal of Lopez's conviction. Though the Court did not directly overrule *Wickard*, "it carefully limited the reach of *Wickard* . . . ."[42] Beginning with "first principles,"[43] and embracing a dual, rather than cooperative, model of federalism,[44] Rehnquist

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eye," see Richard Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 493 (2002).

Linda Greenhouse recently opined that "the Rehnquist Court's federalism revolution ... appeared this term to stall in its tracks," but she relies primarily on an Eleventh Amendment case, *Tennessee v. Lane*, 54 U.S. 509 (2004), for this assertion. Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N. Y. Times, Jul. 3, 2004 at A1. On the Eleventh Amendment, *see* Newbern, *supra* note 10, at 1614-17.

[40] 18 U.S.C. § 922 (q)(1)(A).

[41] *See Lopez*, 514 U.S. at 551.

[42] United States v. McCoy, 823 F.3d 1114, 1120 (9th Cir. 2003).

[43] Newbern, *supra* note 10, at 1618 ("foreshadow[ing] the tone of the originalist argument to follow").

[44] *See* CRAIG DUCAT, CONSTITUTIONAL INTERPRETATION: POWERS OF GOVERNMENT 271-76 (7th ed., 2000). In an influential article, Irving Kristol argued that federalism is one of four major pillars of our constitutional system, the others

quoted Madison's proposition: "[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[45] Citing John Marshall, he observed that "the federal government is acknowledged by all to be one of enumerated powers."[46] Regarding the Commerce Clause, Rehnquist wrote, "*Gibbons* . . . acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause . . . . enumeration presupposes something not enumerated."[47] In other words, if the power to

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being democracy, republicanism, and capitalism. *See* Irving Kristol, *On the Character of the American Political Order, in* TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL POLITICAL ISSUES 4-10 (George McKenna & Stanley Feingold eds., 12th ed. 2001).

As an analogue, in spite of the powerful links between education on the one hand and the success of liberal republican democracy (via the exercise of fundamental rights like free speech and voting) on the other, the Court properly ruled in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), that education is not a fundamental interest for Equal Protection purposes. Among other reasons, principles of both federalism and separation of powers render the federal courts the last branch and level of government that should oversee the operation of public education. *See generally,* MARTIN D. CARCIERI, DEMOCRACY AND EDUCATION IN CLASSICAL ATHENS AND THE AMERICAN FOUNDING (2002).

[45] *Lopez*, 514 U.S. at 552 (quoting The FEDERALIST NO. 45 (James Madison), 292-93 (C. Rossiter, ed., 1961)).

[46] *Id.* at 566 (quoting McCulloch v. Maryland, 17 U.S. 316, 405 (1819)).

[47] *Id.* at 553. In the words of Marshall, one of the staunchest and most influential Federalists ever, "[I]t is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and

regulate interstate commerce is to have any coherent meaning, there must be activity that is not interstate commerce, i.e., that is intrastate and/or noncommercial.

The Court thus established firm limits on the meaning of "commerce" for Commerce Clause purposes. Drawing a line between commercial and noncommercial activity,[48] the Supreme Court wrote:

> [S]ection 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is 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 possession of a gun in a local school zone is in no sense an economic activity . . . .[49]

In concurrence, Justices Kennedy and O'Connor added:

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which does not extend to or affect other states." Gibbons v. Ogden, 22 U.S. 1 (1824).

[48] As Justices Kennedy and O'Connor wrote, "we cannot avoid the obligation to draw lines, often close and difficult lines, in adjudicating constitutional rights." *Lopez*, 514 U.S. at 579.

[49] *Id.* at 561, 567. Thus, though the Court upheld the federal loansharking law (Title II of the Consumer Credit Protection Act) in Perez v. United States, 402 U.S. 146 (1971), money changes hands by definition in such transactions. Because this is commercial as well as criminal activity, *Perez* is distinguishable from *Raich*.

> [H]ere neither the actors nor their conduct have a commercial character and neither the purposes nor the design of the statute have an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. . . . [A]nd it does so by regulating *an activity beyond the realm of commerce in the ordinary and usual sense of that term*[50] (emphasis added).

In dissent, Justice Breyer powerfully argued that gun violence greatly impacts public education and thus interstate commerce.[51] Yet this seamless substantive argument failed to meet the minimum requirements of any coherent theory of the balance of power that is necessarily imposed by federalism. As Kennedy and O'Connor replied:

> In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.[52]

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[50] *Id.* at 580, 583 (Kennedy and O'Connor, JJ., concurring) (emphasis added).
[51] *Id.* at 615-31 (Breyer, Stevens, Souter and Ginsberg, JJ., dissenting).
[52] *Id.* at 580 (Kennedy and O'Connor, JJ., concurring).

In other words, the limit imposed on congressional powers by the enumeration of those powers is reinforced by the fact that, in our system, states alone have a police power.[53] As the Chief Justice wrote, "Under our federal system, the States possess primary authority for defining and enforcing the criminal law."[54]

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[53] The police power is defined as "an authority conferred by the American constitutional system in the Tenth Amendment upon the individual states .... The power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity." BLACK'S LAW DICTIONARY 1041 (5th ed. 1979). *See* Newbern, *supra* note 10, at 1617-18 (on the Tenth Amendment). *See Lopez*, 514 U.S. at 567 (stating that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

[54] *Lopez,* 514 U.S. at 561 n.3, 564 (stating that "areas such as criminal law enforcement" are areas "where the States historically have been sovereign"). As Hamilton wrote, "[t]here is one transcendent advantage belonging to the province of the State governments . . . the ordinary administration of criminal and civil justice." The FEDERALIST NO. 17 (Alexander Hamilton), 120 (C. Rossiter, ed., 1961). *See Lopez*, 514 U.S. at 583 (Kennedy and O'Connor, JJ., concurring) (writing that "the statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise"). It is noteworthy that for most of American history, marijuana was regulated by colonial or state law. A 1619 Virginia statute even *required* every household to grow hemp. *See* Schlosser, *supra* note 26, 19-25; EDWARD BLOOMQUIST, MARIJUANA: THE SECOND TRIP 27-28 (1971).

See Newbern, *supra* note 10, 1581-85, 1627 (discussing explosion of federalization of crime since 1970 and noting the

Morrison involved a provision of the federal Violence Against Women Act (VAWA) that provided a civil remedy for gender-motivated violence.[55] Christy Brzonkala, a student at Virginia Tech, claimed that another student raped her and made statements showing a gender motivation for the attack. She sued him under the VAWA, and the District Court dismissed the action, partly on grounds that the civil remedy was beyond Congress' commerce power. The Fourth Circuit affirmed, as did the Supreme Court. Speaking for the same five-four majority as in *Lopez*, the Chief Justice wrote, "[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. . . . Gender motivated crimes of violence are not, in any sense of the phrase, economic activity."[56] Rehnquist also indicated that the Court was serious about enforcing the "noninfinity principle,"[57] by skeptically regarding any interpretation that would in effect convert the commerce power into a general police power.[58]

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majority of federal drug arrests are for minor street crimes). *See also id.* at 1607 (stating that "[a]fter over half a century of allowing Congress to exercise [a general police power of the sort retained by the States], the Court finally said 'no' and decided to rein in the 'Hey, you-can-do-whatever-you-feel-like-Clause'").

[55] 42 U.S.C. § 13981 (2004).

[56] *Lopez*, 514 U.S. at 610, 613. As the Court wrote, "(i)ndeed, we can think of no better example of the police power, which the Founders denied the Federal Government and reposed in the States, than the suppression of violent crime and vindication of its victims"). *Id.* at 618.

[57] *See* Reynolds and Denning, *supra* note 19, at 1260.

[58] Though *Morrison* figures prominently in our analysis, it is distinct from *Lopez* and *Raich* in that 42 U.S.C. § 13981 did not seek to regulate possession, but rather physical violence.

In *Lopez* and *Morrison*,[59] the Court identified three broad categories of activity that Congress may regulate under its commerce power—the use of the *channels* of interstate commerce, the use of the *instrumentalities* of interstate commerce, and those activities that *substantially affect* interstate commerce.[60] Judge Beam, who dissented in the Ninth Circuit *Raich* opinion, does not dispute Judge Pregerson's claim that *Raich* falls within the third category,[61] and so we turn to the test developed in *Lopez*, and refined in *Morrison*, for evaluating whether a regulated activity "substantially affects" interstate commerce.[62] In Pregerson's words, the test is:

> (1) whether the statute regulates commerce or any sort of economic enterprise; (2) whether the statute contains any "express jurisdictional element that might limit its reach to a discrete set" of cases; (3) whether the statute or its legislative history contains "express congressional findings" regarding the effects of the regulated activity upon interstate commerce; and (4) whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated."[63]

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[59] *See Jones*, 529 U.S. 848. *See also* Reynolds and Denning, *supra* note 19, at 1261 (*Jones* decided same day as *Morrison*, and it "shores up some of the supporting timbers of *Lopez*").
[60] *See Lopez*, 514 U.S. at 558-59; *Morrison* 529 U.S. at 608-09.
[61] *See Raich*, 352 F.3d at 1229.
[62] *See Morrison*, 529 U.S. at 609-13.
[63] *Raich*, 352 F.3d at 1229 (citations omitted).

Citing *United States v. McCoy*,[64] Pregerson observes, "[T]he first and the fourth factors are the most important."[65]

2. Judge Beam's Thesis

Although the *Lopez/Morrison* test has been criticized as lacking clarity and the force of precedent,[66] these cases embody the law in this area

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[64] *McCoy*, 323 F.3d 1114, 1115. In this case, a mother who possessed a photograph of herself and her ten year old daughter "partially unclothed, posed side by side for the camera, with their genital areas exposed," was convicted under a federal law prohibiting the possession of child pornography. The Ninth Circuit invalidated the conviction on grounds that the photograph had "not been mailed, shipped, or transported interstate and [was] not intended for interstate distribution, or for any economic or commercial use . . . ." *Raich*, 352 F.3d at 1228 (citing *McCoy* at 1115).

[65] *See Raich*, 353 F.3d at 1229 (quoting *Morrison*, at 610-12, and *McCoy*, 823 F.3d at 1119, 1129). As for the second factor, Judge Pregerson observed that "no ... jurisdictional hook exists in relevant portions of the CSA," *Raich*, 352 F.3d at 1231. As far as the third factor, the Court in *Lopez* and *Morrison* downplayed the force of congressional findings where Congress otherwise appears to have exceeded its commerce power.

[66] *See* Kreit, *supra* note 10, at 1808 (stating that "while striking, the Court's revival of the Commerce Clause doctrine has also come without expressly overturning old law, or announcing new law. This has led to a great deal of confusion about the reach of the new Commerce Clause"). *See also* Reynolds and Denning, *supra* note 19, at 1258. As Gouldin observes of *Lopez* and *Morrison*:

> [T]he precedential value of these cases should not be overstated. The interpretation of the leanings of the Justices and application of the holding to future cases is an inherently

and are the proper basis for evaluating and responding to Judge Beam's core thesis. Judge Beam asserts that the facts in *Raich* are indistinguishable from those in *Wickard*[67] and that *Lopez* and *Morrison* "expressly affirm the continuing validity of *Wickard*."[68] There are two fatal flaws with Beam's argument, however: first, *Raich* is *indistinguishable* from *Lopez* for Commerce Clause purposes; second, *Raich* is *distinguishable* from *Wickard* for Commerce Clause purposes.[69]

(a) Raich is indistinguishable from *Lopez* for Commerce Clause purposes

To lay the foundation for applying the first *Morrison* factor, Pregerson defined the "class of activities" in which appellants are engaged as the "intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes."[70] He conceded that the Ninth Circuit upheld the CSA's application in past Commerce

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> speculative undertaking . . . . The highly charged political and moral debate over drug policy in the United States makes it more difficult to predict how the Court would decide a case that threatened to upset the federal drug control scheme.

Gouldin, *supra* note 10, at 512-13.

[67] *Raich*, 352 F.3d at 1235, 1243 (Beam, J., dissenting).

[68] *Id.* at 1239 (Beam, J., dissenting).

[69] My two replies partly converge, insofar as *Lopez* struck down § 922(q), notwithstanding the holding in *Wickard*. If Pregerson is correct that *Raich* is indistinguishable from *Lopez*, then the reach of the CSA attempted in *Raich* is likewise properly invalidated, notwithstanding the holding in *Wickard*.

[70] *Raich*, 352 F.3d at 1228-29.

Clause challenges.[71] However, he justified his narrow definition of the class of activities by citing to *McCoy*.[72] He further noted that none of the Ninth Circuit cases presented the Commerce Clause issue that exists in *Raich* in pure form. He wrote:

> . . . [N]one of the cases in which the Ninth Circuit has upheld the CSA on Commerce Clause grounds involved the use, possession, or cultivation of marijuana for medical purposes. [By contrast] . . . here the appellants are not only claiming that their activities do not have the same effect on interstate commerce as activities in other cases where the CSA has been upheld. Rather, they contend that, whereas the earlier cases concerned drug

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[71] *See* United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996); United States v. Tisor, 96 F.3d 370 (9th Cir., 1996); United States v. Kim, 94 F.3d 1247 (9th Cir. 1996); United States v. Visman, 919 F.2d 1390 (9th Cir. 1990).

[72] *Raich*, 352 F.3d at 1228-29 (stating that "[a] narrow categorization of the appellants' activity is supported by our recent decision in . . . *McCoy* . . .", and continuing:

> [U]nder *McCoy*, the class of activities at issue in this case can properly be defined as the intrastate, noncommercial cultivation, possession, and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law. This class of activities does not involve sale, exchange, or distribution.)

See also Gouldin, *supra* note 10 at 517-18; Susan Klein, *A Colloquium on Community Policing: Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1590 (2002).

> *trafficking*, the appellants' conduct constitutes *a separate and distinct class of activities: the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law.*[73]

Having defined the class of activities, Pregerson next addressed the first *Morrison* factor: whether the statute regulates commerce or any sort

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[73] *Raich*, 352 F.3d at 1227-28 (emphasis added). Indeed, post-*Lopez* lower federal court rejections of Commerce Clause challenges to CSA § 841(a)(1), as applied, have virtually never involved the narrow question of whether Congress can regulate mere intrastate possession and personal medicinal use of marijuana. These cases have involved one or more of the following: (a) another substance, usually cocaine or methamphetamine, (b) use of a firearm while engaged in a drug transaction, (c) possession of a controlled substance within 1000 feet of a school, (d) conspiracy, or (e) drug trafficking. *See, e.g.*, United States v. Davis, 288 F.3d 359 (8th Cir. 2002); United States v. Koons, 300 F.3d 985 (8th Cir. 2002); United States v. Walker, 142 F.3d 103 (2d Cir. 1998); United States v. Patterson, 140 F.3d 767 (8th Cir. 1998); United States v. Westbrook, 125 F.3d 996 (7th Cir. 1997); Proyect v. United States, 101 F.3d 11 (2d Cir. 1996); United States v. Zorilla, 93 F.3d 7 (1st Cir., 1996); United States v. Smith, 920 F.Supp. 245 (D. Me. 1996). *See generally*, Neusch, *supra* note 10, at 235-43. The last of the Ninth Circuit cases cited above, *U.S. v. Visman*, was pre-*Lopez*, and so provides no guidance in resolving *Raich*.
For an assessment of lower courts' compliance with *Lopez* and *Morrison* in a variety of Commerce Clause contexts, see Reynolds and Denning, *supra* note 19, at 1297-99. Whatever problems there may be with lower court applications of *Lopez* and *Morrison*, they are irrelevant for our purposes since we are concerned only with what the Supreme Court should do in this case.

of economic enterprise. Both this inquiry and that concerning the class of activities concern, *inter alia,* whether or not the activity in question is "commercial." Thus, Pregerson wrote:

> As applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise. 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. *Lacking sale, exchange, or distribution, the activity does not possess the essential elements of commerce.*[74]

Accordingly, in light of key precedent, the private possession and use of marijuana cannot be considered "commerce" regulable by federal law. Although the seeds, soil, planters, and lights required to produce a marijuana plant could have moved in interstate commerce, *Lopez* drew a crucial line, rooted in the balance of power which federalism demands. Mere possession, without more, is not economic activity under the Commerce Clause. If possession of a gun, as in *Lopez*, and

[74] *Raich*, 352 U.S. at 1229-30 n.3 (emphasis added) (adding further that "although the Doe appellants are providing marijuana to Raich, there is no "exchange" sufficient to make such activity commercial in character"). Though *Oakland Cannabis* also involved the CUA, the activity regulated in that case was sale and distribution, which is clearly commercial activity. 532 U.S. 483. Even if the Court had reached the Commerce Clause issue in that case, its ruling would be irrelevant where, as here, there is no economic activity.

commission of *malum in se* physical violence, as in *Morrison*,[75] do not qualify as economic activity, then Pregerson was correct that the peaceful, private, merely *malum prohibitum* possession and medicinal use of marijuana also does not qualify.[76]

In response, Judge Beam, analogizing to *Wickard*, noted that Raich's marijuana *could be sold* in the marketplace.[77] He asserted that appellants "ignore the fungible economic nature of the substance at issue – marijuana plants – for which there is a well-established and variable interstate market."[78] Under the same rationale, Mr. Lopez

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[75] *Morrison*, 529 U.S. at 617 (rejecting the argument "that Congress may regulate noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce").

[76] *See* RAND, *supra* note 10, at 64 (describing marijuana use as merely *malum prohibitum*). *See Raich*, 352 F.3d at 1230 (holding that Raich's activity was not commerce and that the *Wickard* "aggregation principle" is simply inapplicable). Under these circumstances, there is simply nothing to aggregate. One billion times zero still equals zero.

Judge Beam tries to bootstrap Angel Raich's supplier's act of giving her marijuana into a commercial transaction by observing that "the consideration the caregivers receive is knowing that Ms. Raich is purportedly in less pain because of their efforts." *Raich*, 352 F.3d at 1240 n.6 (Beam, J., dissenting). Such sleight of hand, however, cannot transform a mere gift into a commercial transaction and thus a legally enforceable contract. Consideration is defined as "[s]ome right, interest, profit, or benefit accruing to one party, or some forebearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." BLACK'S LAW DICTIONARY 277 (5th ed., 1979). The psychic gratification that Judge Beam suggests does not rise to this level. Even if it did, Beam can make no such claim against Diane Monson, who grows her own marijuana. This distinction, we shall see, may provide an opening for rational reform.

[77] *Raich*, 352 F.3d at 1239, 1242 (Beam, J., dissenting).

[78] *Id.* at 1239.

could also have found a purchaser for his gun. That possibility, however, did not transform possession of that gun into commerce.[79] Indeed, the implications of a legal principle under which the possibility of an event is equated with that event are staggering—both Orwellian[80] and Kafkaesque.[81] Under this principle, if a person *could* commit a crime, we can assume for legal purposes that the person has. Beam was on particularly weak ground in relying on such a principle.[82]

Having dealt with the first Morrison factor, Judge Pregerson then addressed the second *Morrison* factor: whether the link between the regulated activity and its substantial effect on interstate commerce is attenuated. He asserted that this is the case in *Raich*, observing that "[a]s the photograph in *McCoy* stood in contrast to the commercial nature of the larger child pornography industry, so does the medical marijuana at issue in

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[79] Though Judge Reinhardt in *McCoy* argues that the photograph in question was not fungible, *see McCoy*, 823 F.3d 1122, it is by no means clear that buyers for such an object could not be found.

[80] *See generally*, GEORGE ORWELL, 1984.

[81] *See generally*, FRANZ KAFKA, THE TRIAL.

[82] Ignoring another key distinction, Beam argues that Pregerson's attempt to distinguish *Raich* from *Proyect v. United States*, 101 F.3d 11 (2d Cir. 1996), fails. *Proyect* involved over 100 marijuana plants, thus establishing a reasonable inference of intent to traffic. *See Proyect*, 101 F.3d at 13. Though the DEA seized only six plants from Diane Monson, Beam writes that "[o]ver time it is likely that many times over 100 plants will be consumed by [Raich and Monson] alone." *Raich*, 352 F.3d at 1239 n. 5 (Beam, J., dissenting). In other words, for constitutional purposes, possession for merely personal use can simply be equated with possession with intent to traffic. Such an attempt to paper over a key distinction cuts directly against the thrust of *Lopez*.

this case stand in contrast to the larger illicit drug trafficking industry."[83] In response, Judge Beam quoted a Fourth Circuit ruling that "*Lopez* expressly reaffirmed the principle that 'where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances is of no consequence'."[84]

There are at least two problems with this reply. First, the above quote is taken out of context. Far from reaffirming the principle cited by Judge Beam, the *Lopez* Court's thrust was in the opposite direction. The full quote was:

> [T]he [*Maryland v.*] *Wirtz* Court had held that "neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities . . . ." *Rather, "the Court has said only that* where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.[85]

Secondly, even beyond this contextual problem, the statement on which Beam relies seems to be legerdemain. As we have seen, it is the *activity* that Congress seeks to regulate that must bear a substantial relation to interstate commerce. If it does not, then one cannot simply assert that the

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[83] *Raich*, 352 F.3d at 1230.

[84] *Id.* at 1240 (quoting United States v. Leshuk, 65 F. 3d 1105, 1112 (4th Cir. 1995)).

[85] *Lopez*, 514 U.S. at 558 (emphasis added) (citations omitted).

statute bears such a relation.[86] If the activity Congress seeks to regulate is not commerce, then by definition the statute bears no relation to commerce.

On these bases alone, I submit that Judge Pregerson was correct on the merits. Neither of the two key factors developed in *Lopez* and refined in *Morrison* was met, and so application of the CSA to appellants is beyond Congress' commerce power. The Supreme Court justifiably drew a line in *Lopez* that it reinforced in *Morrison*, and Pregerson is correct that appellants' activity in *Raich* falls on the same side of that line as did the activity reached by the laws in those cases.

Yet, there is a third problem with Judge Beam's argument that *Raich* satisfies the second *Morrison* factor. It concerns the meaning of the words "*effect on interstate commerce.*" As we saw, *Wickard* held that "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* . . . ."[87] To understand more fully the weakness of Judge Beam's position, we now turn to his analysis of *Wickard.*

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[86] The same is true of the activity in *Raich*: the CSA is a criminal regulation and not an economic one. Therefore, marijuana grown and used at home could be deregulated without undercutting the rest of the CSA.

[87] *Wickard*, 317 U.S. at 125.

(b) Raich is distinguishable from *Wickard* for Commerce Clause Purposes

Judge Beam claims that *Raich* is indistinguishable from *Wickard.* To be sure, marijuana grown at home for personal consumption seems like wheat grown at home for personal consumption. As Beam notes, quoting *Wickard*, "[I]t supplies a need of the man who grew it which would otherwise be reflected by purchases on the open market."[88] Further, *Wickard* held that intrastate, noncommercial activity is still sometimes reachable under the commerce power.[89] There are, however, two problems with Beam's comparison of *Raich* with *Wickard.*

The first problem is evident in Beam's claim that "as with the wheat consumed by the Filburns [in *Wickard*], plaintiffs are supplying their own needs, here symptom-relieving drugs, without having to resort to the outside marketplace. This deportment obviously has an *effect* on interstate commerce."[90]

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[88] *Raich*, 352 F.3d at 1239 (Beam, J., dissenting) (quoting *Wickard*, 317 U.S. at 111).

[89] *Wickard*, 317 U.S. at 125.

[90] *Raich*, 352 F.3d at 1240. The same confusion is evident in Beam's observation that Congressional findings in the CSA included the finding that "local distribution and possession of controlled substances contribute to *swelling* the interstate traffic in such substances." *Id.* at 1241-42 (Beam, J., dissenting) (emphasis added).

Regarding the third *Morrison* factor, the existence of congressional findings, Beam observes that "Congress contemplated individual growers, possessors, and users when it made its findings regarding the CSA." *Id.* at 1242 (Beam, J., dissenting) (citing 21 U.S.C. § 801(4)). Pregerson, however, notes:

In the aggregate, to be sure, an individual's cultivation, possession and personal use of marijuana will likely have an "effect on interstate commerce." That "effect," however, is a *decrease* rather than an *increase* in the volume of the interstate market, an inescapably vital distinction for Commerce Clause purposes. Where activity decreases the volume of illicit interstate marijuana traffic, Congress lacks even a legitimate, and certainly not compelling, interest in addressing the "problem." Far from undermining any rational congressional goals, the activity advances them.[91]

> [T]hese findings are primarily concerned with the trafficking or distribution of controlled substances .... [Further,] there is no indication that Congress was considering anything like the class of activities at issue here when it made its findings. The findings are not specific to marijuana, much less intrastate medicinal use of marijuana that is not bought or sold and the use of which is based on the recommendation of a physician .... [Moreover,] Morrison counsels courts to take congressional findings with a grain of salt.

Id. at 1232.

This seems correct, as it is untenable that Congress can regulate anything it wants simply by issuing "findings." As the court in *Lopez* notes, "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Lopez,* 514 U.S. at 557 (quoting Hodel v. Virginia Surface Mining and Reclamation Assn., Inc., 452 U.S. 264, 311 (Rehnquist, J., concurring)). On this point, *see* Neusch, *supra* note 10, at 248.

[91] Along these lines, relying on *Lopez'* distinction of § 922(q) from any "essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated," *Lopez*, 514 U.S. at 561, Beam suggests that making appellants' activity a federal crime is "an essential part of the regulation of some

In contrast to *Wickard*, there is not a problem that Congress needs to remedy.[92] Raich's lack of need to buy marijuana is simply not a concern of Congress that justifies its power to make her mere possession and use of it a federal crime. The cited "effect on interstate commerce" is but a pretext for Congress to regulate activity properly addressed by the states, if necessary, under their police power.[93]

The second problem with Beam's thesis is that the laws by which Congress sought to reach the two activities serve very different functions. As Rehnquist wrote in *Lopez*:

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commercial activity," *Raich*, 352 F.3d at 1240 (Beam, J., dissenting). As indicated, however, Congress' purposes are *advanced* where appellants and others in their position need not purchase marijuana.

[92] The same confusion is evident in *Proyect*. *See Proyect*, 101 F.3d at 14, n.1. As Gouldin notes, "[T]he problem for Congress is lessened. If everyone grew their own marijuana, the interstate market would disappear, and current congresssional justifications for regulation would likewise evaporate." Gouldin, *supra* note 10, at 519. Justices Scalia and Stevens conceded this point at oral argument. *See Oral Arg.*, at 6-8, as well as Neusch, *supra* note 10, at 251, and Newbern, *supra* note 10, at 1623.

[93] Granted, Rehnquist uses the word "affect" with respect to interstate commerce, *Lopez*, 514 U.S. at 567, yet his point is that Lopez' gun possession *neither increased nor decreased* the volume of interstate commerce. It is interesting that Judge Beam even admits that he does not "believe that the commodity involved in *Wickard* was composed of any parts that had ever moved in interstate commerce." *Raich*, 352 F.3d at 1243 (Beam, J. dissenting). Yet, because "the grain was still deemed by the Supreme Court to be the proper subject of congressional regulation through the commerce power," *id.*, he woodenly, and in flat defiance of the thrust of *Lopez*, insists that *Wickard* controls.

> [E]ven *Wickard*, perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not . . . . [T]he Agricultural Adjustment Act of 1938 . . . was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages.[94]

As this suggests, the Agricultural Adjustment Act was part of Congress' New Deal efforts to *stabilize* the price of wheat during the depression by *regulating* the volume of wheat in interstate commerce. The CSA, by contrast, seeks to *destroy* an interstate market by *criminalizing* the activity in question.[95] Indeed, Beam simply repeats the words "open market" used in *Wickard*; yet, there is no "open market" for marijuana similar to the legal market in which Filburn could have purchased wheat for personal consumption.[96] Beam simply

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[94] *Lopez*, 514 U.S. at 560. As Justices Kennedy and O'Connor add, "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Id.* at 574 (Kennedy and O'Connor, JJ., concurring).

[95] As we saw, *Lopez*'s distinction between economic and criminal activity was heightened in *Morrison*. *See* Newbern, *supra* note 10, at 1620. As Kreit observes, "[T]he CSA does not seek to control the price of marijuana but rather to prevent its interstate distribution entirely." Kreit, *supra* note 10, at 1824.

[96] As Gouldin notes, the "analogy between growing marijuana for personal use and the cultivation of wheat for household use . . . ignores the critical differences between effects on a legitimate market and on a black market." Gouldin, *supra* note 10, at 514.

equates, for Commerce Clause purposes, economic regulation and criminal prohibition. Yet, given the *Lopez* Court's twin emphases on the limits of Congress' powers and the states' traditional responsibility for administering criminal law under their exclusive police power,[97] what is permissible for Commerce Clause purposes in one situation cannot simply be assumed permissible in the other. That case must be made, and Beam did not make it.[98]

To conclude, Judge Pregerson had the better argument. Where the activity in question is purely intrastate, noncommercial, and not an essential part of a larger regulatory scheme, as in *Lopez* and

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[97] Beam tries to smuggle in another basis for Congress' regulation of the activity in question by noting that in *United States v. Visman,* 919 F.2d 1390 (9th Cir. 1990), the court deferred to Congress' findings on the public health impact of intrastate drug activities. *See Raich*, 352 F.3d at 1240. Health policy, however, is also traditionally left to the States under the police power. *See* Kreit, *supra* note 10, at 1820-21.

[98] Contrary to Beam's claim, thus, just as Judge Reinhardt held *McCoy* distinguishable from *Wickard*, *see McCoy*, 823 F.3d at 1122-23, *Raich* is also distinguishable from *Wickard.*

In passing, let us observe that in his attempt to ignore recent precedents in favor of exclusive reliance on *Wickard*, a 60 year old case, Beam nowhere addressed the fundamental structural reason for the necessity of clear limits, under our federalism, on Congress' permissible reach under its commerce power, as articulated in *Lopez* and *Morrison.* He thus overlooks the balance that must exist in any viable, stable human institution, including a political constitution. The legislative and the executive powers are thus like two human legs that necessarily work together and cannot be clearly understood without the other. Given the dangers of concentrated power, there must be substantial balance between two power centers, whether they are different branches of the same level of government, or different levels of government, as in federalism.

McCoy, it is beyond Congress' commerce power.[99] Therefore, the Supreme Court should affirm the Ninth Circuit's ruling that the CSA is unconstitutional as applied to appellants. By upholding Judge Pregerson's decision, the Court would provide much needed coherence and continuity to its Commerce Clause jurisprudence.[100]

III. Solicitor General Clement's Reply and its Implications

A. The Irrelevance of Medicinal Use to the Commerce Clause Merits

At this point, we must note something about Pregerson's opinion that Mr. Clement has predictably tried to use to his advantage. Whenever Pregerson describes appellants' activity in relation to the commerce power, he emphasizes key features, e.g., that it is "instrastate," "personal use," "noncommercial," and "under a valid state law." At every opportunity, however, he also mentions, and usually elaborates upon, the *medicinal* purpose of

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[99] As Herman writes, "[W]hen one examines the CSA under the heightened standards the Court set forth in *Lopez* and *Morrison*, it becomes clear that the Act, as applied to the wholly intrastate cultivation, possession, and use of medical marijuana is highly constitutionally suspect, if not wholly unconstitutional." Caroline Herman, *Whatever Happened to Federalism? United States v. Oakland Cannabis Buyers' Cooperative,* 93 J. CRIM. L. & CRIMINOLOGY 121, 122 (2002).

[100] As Justices Kennedy and O'Connor note, "[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point." *Lopez*, 514 U.S. at 574 (Kennedy and O'Connor, JJ., concurring).

appellants' activity and its use under a physician's recommendation.[101]

In presenting the facts, for example, Pregerson underscores that Raich suffered from ten serious medical conditions and that she had tried dozens of alternative, legal medicines that failed her.[102] In defining appellants' "class of activities," he thrice mentions that it was "for medical purposes."[103] When contrasting *Raich* to *Proyect v. United States*, he notes that "while *Proyect* argued that the marijuana was only for his personal consumption, he did not allege that it was for medicinal purposes."[104] Finally, with respect to congressional findings supporting the CSA, Pregerson writes that "the findings are not specific to marijuana, much less intrastate medicinal use of marijuana that is not bought or sold and the use of which is based on the recommendation of a physician."[105]

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[101] In speaking to this precise point in *Conant*, it bears noting, Pregerson's Ninth Circuit colleague Judge Kozinski does the same thing. *Conant*, 309 F.3d at 647 (Kozinski, J., concurring).

[102] *See Raich*, 352 F.3d at 1225.

[103] *Id.* at 1227-28.

[104] *Id.* at 1230, n.4.

[105] *Id.* at 1232. To illustrate further, consider the following passage from Pregerson's opinion:

> Clearly, the way in which the activity or class of activities is defined is critical. We find that the appellants' class of activities—the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician—is, in fact, different in kind from drug trafficking. For instance, concern regarding users' health and safety is significantly different in the medicinal marijuana context, where the use is pursuant to a physician's recommendation. Further, the limited medicinal

To be sure, Pregerson's emphasis on the medicinal purpose of appellants' marijuana use is understandable. For one thing, such a purpose ensures that the plaintiffs' activities are within the scope of a valid state law, which is essential to their position's legitimacy. Secondly, describing the "class of activities" as narrowly as possible seems to bolster Pregerson's holding that appellant's activities are beyond the reach of the CSA. Third, whether marijuana use is for medicinal rather than recreational purposes is a key policy issue. Polls suggest that many who support legalizing medical marijuana draw the line at recreational use,[106] and

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> use of marijuana as recommended by a physician arguably does not raise the same policy concerns regarding the spread of drug abuse. Moreover, this limited use is clearly distinct from the broader illicit drug market—as well as any broader commercial market for medicinal marijuana—insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce.

Id. at 1228.

Here, Pregerson claims to give three reasons that appellants' activities are distinct from drug trafficking for Commerce Clause purposes, but only the third is relevant to the constitutional issue. The first two reasons are concerns properly left to the states where the activity in question is otherwise not federally regulable under the Commerce Clause. The first reason, "concern regarding users' health and safety," is, by definition, within the state's police power, and Pregerson expressly labels the second one a policy concern. The third reason, by contrast, while relevant to the Commerce Clause issue, would be true of some regimes of legalized recreational marijuana use.

[106] A TIME/CNN poll found that 80 percent of Americans favor legalizing marijuana for medical use, and 72 percent believe those arrested for possessing small amounts of marijuana should be fined, not jailed. *See* Joel Stein, *The New Politics of Pot*, TIME, Nov. 4, 2002, at 57-8.

although 12 states have legalized medical marijuana to date,[107] none currently legalize it for recreational purposes.

While Pregerson's emphasis on appellants' medicinal purposes is understandable, the Bush administration argued that it obscures a key problem. *Where a State legalizes the private, personal possession and use of marijuana, it is categorically irrelevant to the Commerce Clause issue whether that use is for medicinal rather than recreational purposes.* As the Solicitor General wrote, "for purposes of defining Congress's power under the Commerce Clause in enacting the CSA . . . , there is no basis for distinguishing marijuana production, distribution, or use for purported medicinal purposes, as opposed to recreational (or any other) purpose."[108] As he added at oral argument, "if Respondents are right on their Commerce Clause theory, . . . then I think their analysis would extend to recreational use of marijuana, as well as medical use of marijuana. . . ."[109]

In response, Justice Souter suggested that medicinal use can be distinguished from recreational use based on doctors' claims of the medical benefits of smoked marijuana for sick patients.[110] This overlooks, however, that from a constitutional perspective all that matters is whether

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[107] *See* David Savage, *Justices Take on Medical Pot Law*, L.A. TIMES, Nov. 30, 2004, at A1.

[108] Brief for the Petitioners, *Ashcroft v. Raich*, *supra* note 24, at 40. While he thus raised the issue in his brief, Mr. Clement did not draw out its implications, rather simply declaring that the CSA reaches the medicinal use of cannabis. *Id.*

[109] *Oral Arg.*, at 15.

[110] See *id.*, at 23-25.

the *activity* Congress seeks to criminalize constitutes interstate commerce. Whatever *motive* different people may have in engaging in the activity, or benefits they may derive therefrom, the activity itself - in this case, the private, personal adult possession and use of marijuana - remains the same.[111] The possession and consumption in question have as little or as much impact on interstate commerce either way. Judge Pregerson nowhere addresses this problem, and neither his intentions nor his repetitions make it disappear. That the medicinal/recreational distinction has great policy moment does not bestow constitutional significance. A wish is not a fact.[112]

Mr. Clement could thus have argued that if the Court upholds the Ninth Circuit ruling that appellants' private possession and use of marijuana for medicinal purposes are beyond Congress' reach, this immunity exists regardless of whether that use is medicinal. Such a ruling, he could have argued, will unavoidably enable States to legalize the possession and use of marijuana, *and indeed any Schedule I drug*, purely for recreational purposes.

We should not assume that Mr. Clement would have overplayed his hand with this point. To be sure, he might have been tempted to warn that upholding the Ninth Circuit would yield a nightmare scenario in which States legalize

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[111] Even where motive can plausibly determine whether an activity is commercial or not, monetary gain is the prime motive in neither medicinal nor recreational use, and so this line of argument is unavailable.

[112] As it turns out, like many lower federal court §841(a)(1) rulings, *Raich* does not present the Commerce Clause issue in pure form. Stripped of the constitutionally irrelevant dimension of "medicinal purpose," the question is laid bare.

marijuana for minors, cocaine and heroin for adults, cocaine and heroin for minors, Amsterdam-style "cafes," public opium dens, and "Needle Parks."[113] Yet he knows that some such regimes would impact interstate commerce in a way reachable by Congress. Even among those that would not, further, it is virtually impossible as a practical matter that any State would enact some of them.

As for minors, for example, special protections and disabilities for minors are strewn throughout U.S. law for reasons well understood,[114] and there is no good reason to assume things would be different with the legalization of certain drugs. As for cocaine and heroin, notwithstanding the DEA's representations to the contrary,[115] Americans understand that these substances are far more

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[113] *See* RAND, *supra* note 10, at 281-86. *See also* U.S. Department of Justice, Drug Enforcement Administration, *Speaking Out Against Drug Legalization*, Mar. 2003, *at* http://www.dea.gov, at 3 (hereinafter DEA) (last visited June 12, 2005).

[114] See RAND, *supra* note 10, at 63. All states impose age limits for the purchase of alcohol. Beyond this, a contract with a minor is voidable at the option of that minor. In First Amendment law, time, place and manner restrictions may be imposed on otherwise protected speech in the interest of protecting minors. In the law of negligence, standards of the duty of care differ depending on the defendant's age. Finally, in family law, the welfare of the child is a primary criterion for the resolution of custody disputes.

[115] Both the DEA and ONDCP websites refer in many places simply to "drug use" and "drug addiction" without distinguishing between marijuana on the one hand and cocaine and heroin on the other. *See generally* the Office of National Drug Control Policy (hereinafter ONDCP), *at* http://www.whitehousedrugpolicy.gov/ (last visited September 4, 2005); DEA, *supra* note 113.

dangerous and addictive than marijuana.[116] Indeed, even private adult recreational use of marijuana goes too far for many Americans.[117] Any suggestion that States would legalize everything under the sun is unsupported by what we know of actual behavior.

1. The Personal Cultivation Initiative

Yet let us give Mr. Clement his due. Let us concede that, given the chance, some states would seriously consider legalizing the private cultivation, possession and use of marijuana for recreational

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[116] As MacCoun and Reuter note, "[f]or purposes of the legalization debate, marijuana is the cutting edge drug, the only politically plausible candidate for major legal change." RAND, *supra* note 10, at 341. Even James Q. Wilson distinguishes marijuana for these purposes. See J.Q. Wilson, *Against the Legalization of Drugs*, COMMENTARY, Feb., 1990, at 21, 23.

That the distinction between marijuana and the harder drugs is well and widely understood is reflected in the fact that "[t]here are two major categories of bills: marijuana-only bills, and the omnibus legalization bills that would legalize the sale and possession of virtually all nonmedical substances." Neustadter, *supra* note 22, at 390. The basis for this distinction consists largely of two key ways in which marijuana differs from these other substances: it has (1) a much higher safety margin and (2) a much lower dependence potential. *See* Robert Gable, *Not All Drugs are Created Equal*, *in* FISH, *supra* note 22, at 414.

In passing, I do not claim that decriminializing the private possession of small amounts of other drugs would constitute insanity, given the well documented, multilevel costs of the War on Drugs. That vast subject, however, is beyond the scope of this article. In any case, since few if any States, given the option, would legalize or decriminalize cocaine or heroin, it is a moot point for our purposes.

[117] *See* Stein, *supra* note 106, at 61.

purposes by adults. Imagine, for instance, that a state contemplates enacting the following law: *It shall not be unlawful for an adult to cultivate within his domicile up to X cannabis plants per adult legally residing in that domicile for consumption solely by adults within that domicile, not for sale or trade.* [118]

Let us call this imaginary law, a variation on regimes tried or suggested before,[119] the Personal Cultivation Initiative (PCI). Though the PCI

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[118] So long as this is roughly the substance of the law, it matters not whether a state enacts it by legislation or constitutional amendment. Since none of the medical marijuana laws recently enacted have been enacted by state legislation, however, the citizen's initiative process would seem the more likely avenue for such reform. For a defense of the legitimacy of the initiative process in the context of the medical marijuana debate, see Newbern, *supra* note 10, at 1631-32.

[119] Several regimes introduced as bills or adopted as law by States in the 1980's allowed home growing for personal use. *See* RAND, *supra* note 10, at 364-66, and Neustadter, *supra* note 22, at 390-91. As one drug advisory council suggested, "the elimination, as an offense, of personal possession and use of marijuana. . . . Growing up to five plants per household for personal use would also no longer be an offense. This would apply to a normal residence, but should not apply to schools, colleges, or private institutions." *Drugs and Our Community: Report of the Premiere's Drug Advisory Council* (1996) *in Government & Private Commissions Supporting Marijuana Law Reform, at* http://www.norml.org/index. Further, as Schlosser notes, "[i]n 1972, the National Commission on Marijuana and Drug Abuse . . . unanimously agreed that possessing small amounts of marijuana in the home should no longer be a crime. Growing or selling marijuana for profit, using it in public, or driving under the influence would remain strictly forbidden." SCHLOSSER, *supra* note 26, at 23. As Sterling adds, "[s]ince marijuana is easily grown, cultivation for personal or family use should be allowed without registration or taxation." Sterling, *supra* note 22, at 524.

legalizes a narrowly circumscribes zone of cannabis use, it would function in effect like *decriminalization.*[120] Though the PCI legalizes a narrowly circumscribed zone of cannabis use, it would, in effect, function like decriminalization.[121] Further, since it bans the sale or exchange of marijuana (unlike some proposals for regulated distribution) otherwise legitimate concerns about the *commercialization* of legal marijuana would not

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[120] Several regimes introduced as bills or adopted as law by states in the 1980's allowed home growing for personal use. *See* RAND, *supra* note 10, at 364-66, and Neustadter, *supra* note 22, at 390-91. One drug advisory council has suggested "the elimination, as an offense, of personal possession and use of marijuana . . . . Growing up to five plants per household for personal use would also no longer be an offense. This would apply to a normal residence, but should not apply to schools, colleges, or private institutions." *Drugs and Our Community: Report of the Premiere's Drug Advisory Council* (1996) *in Government & Private Commissions Supporting Marijuana Law Reform, at* http://www.norml.org/index. Further, as Schlosser notes, "In 1972, the National Commission on Marijuana and Drug Abuse . . . unanimously agreed that possessing small amounts of marijuana in the home should no longer be a crime. Growing or selling marijuana for profit, using it in public, or driving under the influence would remain strictly forbidden." SCHLOSSER, *supra* note 26, at 23. As Sterling adds, "Since marijuana is easily grown, cultivation for personal or family use should be allowed without registration or taxation." Sterling, *supra* note 22, at 524.

[121] Judge Gray describes decriminalization as follows: "[T]he possession, use, and sale of street drugs are still illegal. But as long as people stay within certain well-known guidelines, and do not otherwise commit any crimes, the police will 'look the other way' and not enforce the drug laws." J. GRAY, *supra* note 4, at 218. The bottom line is the same: keep it discrete, and there will be no trouble. For further analysis, see Richard Evans, *What Is "Legalization"? What Are "Drugs"? in* Fish, *supra* note 24, at 369-75.

arise.[122] Because the PCI would have as little effect on commerce as would the activity in Raich, it would be as immune from the reach of Congress' commerce power as Pregerson has shown appellants' activity under the CUA to be, and for the same reasons. *If anything, the activity protected by the PCI is even further from interstate commerce than Raich's activity under the CUA.* The latter requires a person wishing to use marijuana to obtain a physician's written recommendation, and a doctor's visit is virtually always a commercial transaction. The act of obtaining the doctor's note is thus quite plausibly "connected with a commercial transaction."[123] The same can hardly be said of an adult who decides to grow a cannabis plant next to the tomatoes and carrots in his garden for his personal home consumption.

B. The Refined Issue

Any hesitation the Justices might have before issuing the broad ruling I advocate would likely be a matter of policy preference. While conscientious jurists try to separate their policy preferences from their constitutional interpretation, we know that they are not always successful. Taking the policy question head one, then, the issue for the Court is whether a state could rationally enact the PCI.[124] Weighing the risks of the PCI against the costs of

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[122] *See* RAND, *supra* note 10, at 326-27, 362-63.

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

[124] Since the United States Constitution, as we have seen, reserves the police power to the states alone, then where they are acting within the police power to regulate noneconomic activity, a presumption of constitutionality is appropriate, such that their action need only pass the rational basis test.

the current regime of absolute cannabis prohibition, could states rationally conclude that the latter outweigh the former? There are barriers to clear thinking on drug law reform, to be sure,[125] yet if the Justices can honestly say that a state could rationally enact the PCI, then given the strength of Pregerson's constitutional argument, they should rule that the states can decide this for themselves.[126]

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[125] *See* RAND, *supra* note 10, at 371-409; James Ostrowski, *Drug Prohibition Muddles Along: How a Failure of Persuasion Has Left Us with a Failed Policy*, *in* Fish, *supra* note 24, at 363-67.

[126] At this point, Mr. Clement might suggest that in the modern era, notwithstanding *Lopez* and *Morrison*, the Court should always defer to Congress in Commerce Clause cases, as it did in response to challenges to the 1964 Civil Rights Act. *See* Heart of Atlanta Hotel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). In those cases, after all, it was Congress, not the states, that had it right on the policy merits: because an individual's race is categorically irrelevant to his character, intelligence, ability, or any other proper basis of treatment by the private or public sector (particularly at the core of civil society, as in public accommodations and public university admissions), state policies to the contrary were properly prohibited.

Beyond the amusing absurdity of such a conservative administration making this argument, racial nondiscrimination is now passé as a policy goal. *Heart of Atlanta* and *McClung* involved Title II of the 1964 Act, which bans race discrimination in public accommodations. While Title VI, which expressly forbids race discrimination by institutions accepting federal funds, may seem just as sounds, this is now wrong. With the Court's recent blessing, public institutions like the University of Michigan, which receive millions annually in federal funding, may openly engage in racial discrimination if they claim that it advances "diversity." *See* Grutter v. Bollinger, 139 U.S. 306 (2003). Since *Grutter* flatly contradicts the racial nondiscrimination standard expressly imposed by Title VI, Congress is apparently now obliged to repeal Title VI as bad policy, replacing the racial nondiscrimination standard with a "racial discrimination if

An exhaustive consideration of the PCI's policy merits would, of course, require a lengthy discussion that is necessarily beyond our present scope. For present purposes, I need only show that the Court could conclude that enactment of the PCI would not be irrational.

1. The Risks of the Personal Cultivation Initiative

Let us begin by acknowledging Mr. Clement's likely claim that the PCI is not without risks. Four common, related concerns are: (1) the impact of legalization on minors,[127] (2) that marijuana is a "gateway" to harder drugs,[128] (3) that legalization of cannabis will increase its use, and (4) that today's marijuana has a much higher potency than that of a generation or two ago. While these concerns are not completely unfounded, the Justices could find that States contemplating the PCI would be justified in concluding that these risks are greatly exaggerated. Even granting that they remain, we must still consider whether those risks are nonetheless outweighed by the costs of the present regime.

As for minors, let us concede that it is generally better for minors not to consume marijuana (or alcohol, tobacco, or fatty foods).

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experts have good reasons" standard. I predict that will happen the same week Congress reclassifies marijuana under the CSA.

[127] As the DEA tells us, "The Legalization Lobby claims that the United States has wasted billions of dollars in its anti-drug efforts. But for those kids saved from drug addiction, this is hardly wasted dollars." DEA, *supra* note 113, at 2.

[128] *See, e.g.*, ONDCP, *supra* note 115, at 9.

While the DEA assures us that "almost two-thirds of teens say their schools are drug-free,"[129] Judge Gray observes:

> [O]ur current system is completely unable to keep illicit drugs out of our communities and away from our children . . . . Ask your local high school or junior college students and they will tell you . . . that it is easier for our children and underage adults to get illicit drugs than it is for them to get alcohol.[130]

As Rosenthal, et al., notes:

> [Parent groups] regularly complain to authorities that marijuana is more available than alcohol to their junior high and high school children. Laws forbid storeowners to sell alcohol or tobacco to minors, so teenagers need to use phony IDs or find an adult willing to buy liquor or cigarettes for them. However, marijuana may be only a phone call or bicycle ride away.[131]

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[129] DEA, *supra* note 113, at 4.

[130] J. GRAY, *supra* note 4, at 50-51.

[131] ROSENTHAL ET AL., *supra* note 10, at 75-76. As Mike Gray notes, a University of Maryland survey of high school students found that the hardest drug to obtain is not marijuana, but alcohol. *See* MIKE GRAY, DRUG CRAZY: HOW WE GOT INTO THIS MESS AND HOW WE CAN GET OUT OF IT 188, 191 (1998) (citing University of Maryland, Center for Substance Abuse Research, *Cesar Fax* 5:42, Oct. 28, 1996). *See also* SCHLOSSER, *supra* note 26, at 71; HUSAK, *infra* note 144, at 71-72; ELDREDGE, *supra* note 22, at 176-77; and Anita

As for the "gateway theory," even if most cocaine and heroin addicts previously smoked marijuana, a one-way correlation does not prove that marijuana use is either necessary or sufficient for later addiction to harder drugs. As Mike Gray observes:

> [T]he fallback line for cannabis prohibition, the moat around the castle, has always been the idea that marijuana is a stepping stone to harder drugs. But here again the actual experience of the [baby] boomers did not mesh properly with the official line. Of the seventy million Americans who smoked the weed, 98% didn't wind up on anything harder than martinis. Only a tiny fraction went on to become heroin or cocaine addicts, and the cause-effect connection to reefer for this group was no more evident than was the connection to coffee.[132]

Hamilton, *This Bud's For the U.S.,* TIME, Aug. 23, 2004, at 36-37. Concededly, the PCI might provide some minors an additional avenue of access to cannabis they would not otherwise have had, i.e., their parents' plants. Just as a liquor cabinet can be locked, however, it would not be difficult to secure such plants. *See* STERLING, *supra* note 22, at 517.

[132] M. GRAY, *supra* note 131, at 187. Satirist George Carlin once observed that "mother's milk leads to everything," and as Sullivan has elaborated:

> [T]he tired argument that pot is a 'gateway' drug to more serious narcotics is a fallacy. Sure, if you ask hardened drug addicts whether they started with pot, they usually say yet. But I doubt many of them are teetotalers, either. Why wasn't their first beer a gateway drug? And if you ask a bunch of white-collar

The RAND report sums up the matter: "[W]e believe that there is little evidence that expanding marijuana use does increase the use of other, more harmful drugs . . . . [Cannabis] depenalization has no consequence for the prevalence of cannabis use. Moreover, it will not increase the use of other drugs for several reasons."[133]

As for the claim that legalization of marijuana will cause its increased use,[134] the RAND report notes that "[t]he effects of drug laws on drug use are considerably more uncertain and complex than is generally acknowledged by advocates on either side of the drug policy debate . . . . There are too many unknowns to predict the effects of drug legalization with any specificity."[135] As one study found, however, "[T]here is little evidence that decriminalization of marijuana use necessarily leads to a substantial increase in marijuana use."[136] Another observed:

> professionals in their fifties whether they have ever smoked marijuana, they'd probably say yes as well.

Andrew Sullivan, *Enjoy*, NEW REPUBLIC, May 28, 2001, at 6.

[133] RAND, *supra* note 10, at 346, 358. Putting the issue into broader perspective, Martinez adds that "the vast majority of caffeine, tobacco, and alcohol, or marijuana users do not advance to stronger drugs." MARTIN MARTINEZ, THE NEW PRESCRIPTION: MARIJUANA AS MEDICINE 65 (2000).

[134] As the DEA says, for example, "[I]f the relatively modest outlays of federal dollars ($19 billion in 2002) were not made, drug abuse and the attendant social costs . . . would be far greater." DEA, *supra* note 113, at 12-13.

[135] RAND, *supra* note 10, at 100.

[136] INSTITUTE OF MEDICINE, *Marijuana and Medicine: Assessing the Scientific Base* 326 (Janet E. Jay et al. eds., 1999).

> Between 1973 and 1978, possession of marijuana was reduced to a misdemeanor in twelve states, but the predicted explosion in cannabis use failed to materialize. The University of Michigan's annual high school survey . . . showed the seniors in these dozen states reported no more marijuana use than their counterparts in the other states.[137]

Further, although the Dutch decriminalized cannabis, "Dutch national rates [of cannabis usage] now are somewhat lower than those in the United States . . . . [T]hroughout two decades of the 1976 policy, Dutch [cannabis] use levels have remained at or below those in the United States."[138]

As for the alleged higher potency of today's marijuana,[139] finally, this is seriously contested. As a European Union drug monitoring agency recently reported:

> [s]tatements in the popular media that the potency of cannabis has increased by ten times or more in recent decades are not supported by the limited data that are available from either the USA or Europe. The greatest long-term changes in potency appear to have occurred in the USA. It should be noted here that before 1980

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[137] L.D. Johnston et al, *Marijuana Decriminalization: The Impact on Youth 1975-1980 in* UNIVERSITY OF MICHIGAN, INSTITUTE FOR SOCIAL RESEARCH, MONITORING THE FUTURE, OCCASIONAL PAPER 13.

[138] RAND, *supra* note 10, at 256, 263.

[139] See DEA, *supra* note 113, at 9, and ONDCP, *supra* note 115, at 4.

> herbal cannabis potency in the USA was very low by European standards.... The natural variation in the THC content between and within samples of herbal cannabis or cannabis resin at any one time and place far exceeds any long-term changes that may have occurred either in Europe or the USA.[140]

Even putting this report aside, however, and assuming for the sake of argument that cannabis

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[140] European Union Monitoring Centre on Drugs and Drug Addiction, *Overview of Cannabis Potency, 2004* , *at* http://www.csdp.org/research/insights6web.pdf. As Mike Gray adds:

> [D]rug Czar William Bennett was among the first to break the bad news: the children of the boomers were facing a far more powerful form of cannabis than the stuff their parents experimented with in the sixties . . . . But once again, close inspection revealed a flaw in the official tale. It seems the baseline samples from the 1970's were not properly preserved, so there's really no way to tell what their original THC content was. On top of that, the government's own long-term study of marijuana potency at the University of Mississippi undermined Bennett's argument. The official numbers showed an average THC content in marijuana seized by the police since 1981 ranging between 2.3 and 3.8 percent. In the 1970s on the other hand, independent analysts found THC averaging 2 to 5 percent with some samples as high as 14 percent. As one authority put it, "If parents want to know what their kids are smoking today, they need only recall their own experience."

M. GRAY, *supra* note 131, at 186-87. *See also* Hamilton, *supra* note 131, at 37.

potency in the USA has greatly increased in the last generation, two things are notable. First, as Judge Gerber explains, this increase may be directly traceable to market responses to the U.S government's efforts in the 1970's and 1980's to eradicate marijuana smuggled from Mexico.[141] Second, even if one who buys cannabis illegally can likely not know its potency, that risk is eliminated if he allowed to grow his own cannabis from the seeds of plants he has already consumed.

While the PCI poses risks, then, they are often exaggerated and plausibly minimal. Even conceding some risk, however, this is only part of a State's basis for rational policymaking in this area. To complete our assessment of whether the Court could find that States could rationally enact the PCI, thus, we turn to the costs of the current regime.

2. The Costs of the Current Regime

Two stark facts in particular would give states contemplating the PCI considerable pause before rejecting it. First, while American law completely *prohibits* marijuana, to which not a single death has ever been attributed,[142] it properly *regulates* substances far more dangerous than marijuana, like

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[141] *See* Gerber, *supra* note 10, at 145-46. This dynamic seems to parallel that of alcohol bootleggers during Prohibition who recognized that greater profits could be realized at the same level of risk by smuggling hard liquor instead of beer and wine. *See* RAND, *supra* note 10, at 161.

[142] As Harvard Medical Professor Lester Grinspoon has observed, "[D]espite its use by millions of people over thousands of years, cannabis has never caused a death." Lester Grinspoon, *Cannabis, the Wonder Drug*, in THE DRUG LEGALIZATION DEBATE 101-02 (James A. Inciardi, ed., 1999). *See also* ROSENTHAL ET AL., *supra* note 10, at 40.

alcohol, tobacco,[143] firearms, and explosives.[144] Second, by completely prohibiting marijuana, the

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[143] Alcohol and tobacco in particular have often been singled out in this connection. A study recently commissioned by the U.S. government concluded that "users of marijuana are less likely to become dependent on the drug in comparison to alcohol and nicotine." INSTITUTE OF MEDICINE, *supra* note 136, at 98. As for harms beyond dependence, alcohol related deaths total more than 100,000 per year, and tobacco causes more than 400,000 U.S. deaths each year. *See* ROSENTHAL ET AL., *supra* note 10, at 40-41, 103.

Several authorities and leading studies thus declare that marijuana is far less harmful than alcohol and tobacco. In the words of two reports cited, "An objective consideration of marijuana shows that it is responsible for less damage to the individual and society than are alcohol and cigarettes." CALIFORNIA RESEARCH ADVISORY PANEL, *Twentieth Annual Report of the Research Advisory Panel* (1989), *at* http://www.norml.org. According to an article in The Lancet, a leading British medical journal, "The smoking of cannabis, even long-term, is not harmful to health . . . . It would be reasonable to judge cannabis as less of a threat . . . than alcohol or tobacco." *Deglamorising Cannabis*, 346 THE LANCET1241 (Nov. 14, 1998). *See also* ERIC GOODE, BETWEEN POLITICS AND REASON: THE DRUG LEGALIZATION DEBATE 155 (1997); SCHLOSSER, *supra* note 26, at 74; and Stein, *supra* note 106, at 61. As MacCoun and Reuter sum things up:

> [T]hough cannabis use is not without harm, especially for adolescents, as a source of danger it is certainly trumped by alcohol, tobacco, reckless driving, criminality, and unsafe sexual behavior . . . . *[Nonetheless] there are enormous political obstacles to prohibition of these substances; alcohol and tobacco have much larger and better organized constituencies than do(es) cannabis . . . . This begs the question: why not remove the inconsistency by changing the pot laws?*

RAND, *supra* note 10, at 345, 358 (emphasis added).

Notwithstanding these authorities, the DEA simply declares in sweeping terms that "[d]rug use can be deadly, far more deadly than alcohol . . . . [D]rugs are far more addictive than alcohol." DEA, *supra* note 113, at 8, 18. The most astonishing claim, however, may be the following: "Legalization proponents claim . . . that many people can use drugs in moderation and that many would choose not to use drugs, just as many abstain from alcohol and tobacco now. Yet how much misery can be attributed to alcoholism and smoking? Is the answer to just add more misery and addiction?" *Id.* at 14. This claim, it will be noticed, does not simply equate the effects of marijuana with the misery and addiction of alcohol and nicotine, which is patently false, but it does so in the service of blatant paternalism, which is antithetical to a free society. If free adults can be trusted to decide whether to risk the devastation of alcoholism and tobacco addiction, it is absurd to say they can not be trusted to decide whether to use marijuana, which is unquestionably far safer.

[144] Two other substances are noteworthy in this connection: fatty foods and caffeine. As for the former, though access to fattening foods is not regulated, "in March, the Centers for Disease Control and Prevention predicted that obesity will overtake smoking as the leading cause of preventable deaths in the United States by next year if current trends continue." Rashad & Michael Grossman, *The Economics of Obesity*, 156 THE PUBLIC INTEREST 104. As Husak observes, "[P]eople overeat and grow obese, their health suffers, they may die prematurely. None of this is good . . . . What should be done about it? What about criminalizing it? . . . This is crazy . . . . The problem is not large enough to warrant such extreme infringements of liberty." DOUGLAS HUSAK, LEGALIZE THIS! THE CASE FOR LEGALIZING DRUGS vii-viii (2002). As for caffeine:

> [T]he risks of caffeine are greater than THC in every way . . . . Caffeine is physically addicting (with headache as the most often cited symptom) and can cause unnecessary stress, lightheadedness, breathlessness, and an irregular heartbeat or much worse in larger-than-average doses. Marijuana isn't even

United States stands firmly against the recent tide of practice in other leading western democracies.[145]

These facts standing alone may not sway rational people on this matter. They should, however, lead them to inquire into and seriously reflect upon the actual costs of our current regime. While this is a vast subject that cannot be fully treated here, we can at least summarize some of the

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> remotely as dangerous—no deaths by overdose, no physical addiction, and minimal health risks . . . ."

Gable, *supra* note 116, at 406 (quoting D. Larsen).

Still, I assert that these substances that are far more dangerous and addicting than cannabis are *properly* regulated without a blanket prohibition. We know how prohibition of alcohol worked. As for nicotine (equaled in addictive power only by heroin) prohibition of cigarettes would create a truly nightmarish black market. *See* Fish, *supra* note 22, at 346. In light of these contrasts, the United States government's claims of concern for health risks, *see* ONDCP, *supra* note 115, at 2; DEA, *supra* note 113, at 8-9, and lost productivity, *see* DEA, *supra* note 113, at 11, are exposed as blatant hypocrisy, which states can be trusted to put into perspective when contemplating the PCI.

[145] This includes several European countries and Canada. *See, e.g.*, J.F.O. McAllister, *Europe Goes to Pot*, TIME, Aug. 20, 2001, at 60-61; *European Drug Policy: Analysis and Case Studies*, *at* http://www.norml.org/index. As Hamilton observes, "[A]t the popular New Amsterdam Café in downtown Vancouver, customers openly smoke marijuana . . . . If passed within the year, as seems likely, new Canadian legislation would decriminalize possession of less than 15 grams of marijuana, meaning that offenders would given the equivalent of a traffic ticket." Hamilton, *supra* note 131, at 37. MacCoun and Reuter conclude that "this reluctance (of political candidates to advocate change in U.S. marijuana law) is particularly a pity because major changes in the United States would be consistent with a general international trend toward less aggressive use of the criminal sanction against marijuana." RAND, *supra* note 10, at 376.

economic and social costs of complete marijuana prohibition. [146] These costs are multidimensional, largely inextricable, and staggering.

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[146] As for the constitutional costs of the war on marijuana, an account of these could fill volumes. *See, e.g.*, ROSENTHAL ET AL., *supra* note 10, at ch. 1; ELDREDGE, *supra* note 22, at chs. 5-6; Newbern, *supra* note 10, at 1590-94; JOEL MILLER, BAD TRIP: HOW THE WAR AGAINST DRUGS IS DESTROYING AMERICA ch. 8 (2004), at chs. 5-6; J. GRAY, *supra* note 4, at ch. 3; Robert Sweet & Edward Harris, *Moral and Constitutional Considerations in Support of the Decriminalization of Drugs, in* Fish, *supra* note 22, at 430-84. This war threatens several fundamental constitutional interests, including those arising under the First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments, as well as the Tenth Amendment and the Commerce Clause. Some of these problems largely overlap with the economic and social costs we shall consider, however, and they can be expressed as technical legal objections, as well as "costs." I shall thus underscore a single way in which our government's propaganda in this war casually disregards fundamental Fourteenth Amendment values.

The ONDCP asks, "[W]hy legalize marijuana and add a third drug to the current list of licit threats?" ONDCP, *supra* note 115, at 8. *See also* DEA, *supra* note 113, at 18-19. The answer is that it is blatantly arbitrary simply to decree that the ravages of alcohol and tobacco, but not the demonstrably lesser evils of marijuana, will be tolerated simply because the former are currently legal and have powerful lobbies. The degree of actual harm a substance causes must be at least a major criterion for determining whether it will be regulated rather than completely prohibited. Where it is not, both due process and equal protection are deeply offended. As Justice Jackson wrote:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary

a. Economic Costs

The DEA declares that "legalization [of marijuana] would result in skyrocketing costs that would be paid by American taxpayers and consumers."[147] The current prohibition regime, however, includes a range of steep costs, both direct and indirect. The criminal justice process, of course, accounts for many of the *direct* economic costs. There are approximately seven hundred thousand marijuana arrests in the United States each year,[148] and the annual bill for prosecution, defense, incarceration, and court supervision of such nonviolent offenders is in the tens of billions of dollars.[149] As the RAND report notes, "[R]eductions

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> action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

R. Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949).

On the liberty due process argument in the context of *Raich*, further, see Julie M. Carpenter, *Yes, Federal Power is Limited*, LEGAL TIMES, Nov. 29, 2004, at 34.

[147] DEA, *supra* note 113, at 11.

[148] In 2002, there were 697,082 marijuana arrests, and 6.5 million U.S. marijuana arrests since 1993. *Crime in the United States,* FBI Uniform Crime Reports (1993-2002, reported annually).

[149] *See* FAS Drug Policy Analysis Bulletin, *at* http://www.mpp.org/arrests/fas61699 1; *Still Crazy After All These Years: Marijuana Prohibition 1937-1997 at* http://norml.org; FBI's combined Uniform Crime Reports: Crime in the United States (1990-2000), *at* http://www.norml.org/index; and ROSENTHAL ET AL., *supra* note 10, at 82. *See generally*, MILLER, *supra* note 146; ELDREDGE, *supra* note 22, ch. 7; ROSENTHAL ET AL., *supra* note 10, ch. 3.

in criminal sanctioning, almost by definition, produce significant reductions in the criminal justice costs and burdens, as well as the intrusiveness associated with those sanctions."[150]

The *indirect* economic costs of complete prohibition are also staggering. Persons imprisoned for marijuana offenses generate numerous losses, such as "loss of income, potential welfare costs for dependents, and loss of productivity to society,"[151] as well as loss of tax revenues that these prisoners and marijuana suppliers would generate if legally employed. It is a fundamental law of economics that criminalizing a substance greatly increases its

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[150] RAND, *supra* note 10, at 326. As Fish writes:

> [L]egalizing marijuana, and releasing from prison those who are there solely for its possession, would instantly save huge amounts of money, end the shortage of prison space, free up funds for drug treatment, and raise the possibility that consumers seeking intoxication might choose it in preference to the much more dangerous alcohol.

Fish, *supra* note 22, at 542.

Rosenthal adds that "if marijuana were legal or civilly regulated, there would be five percent fewer cops, cop cars, criminal court cases, and prisoners. The change in policy would result in a direct saving of $16 billion a year." ROSENTHAL ET AL., *supra* note 10, at 88. It has been estimated that marijuana decriminalization saves California $100 million in enforcement costs each year. *See* Michael Aldrich & Tod Mikuriya, *Savings in California Marijuana Law Enforcement Costs Attributable to the Moscone Act of 1976 – A Summary*, 20 J. OF PSYCHOACTIVE DRUGS at 75-81 (Jan.–Mar. 1988).

[151] ROSENTHAL ET AL., *supra* note 10, at 29.

price,[152] yet criminalizing marijuana does not appear to decrease its use.[153] Under the PCI, then, the $10.6 billion that the ONDCP estimates that Americans annually spend on cannabis, at prices dictated by its illegal status, would be spent or invested elsewhere in the U.S. economy (rather than the Canadian).

In passing, marijuana suppliers who become multimillionaires under the current regime[154] must

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[152] As Goode observes, "[B]ecause drugs are illegal, they are expensive and hence, they are hugely profitable to sell." GOODE, *supra* note 143, at 152. As the RAND report adds, "[C]annabis . . . is extraordinarily expensive relative to its production cost or what it might cost if legal." RAND, *supra* note 10, at 344. As Miller explains, "What appear to be absurdly high prices are simply the way the market rations supply and encourages new supplies in response to demand." MILLER, *supra* note 146, at 18.

[153] According to a 2001 study sponsored by the United States government, "Existing research seems to indicate there is little apparent relationship between the severity of sanctions prescribed for drug use and prevalence or frequency of use, and that perceived legal risk explains very little in the variance of individual drug use." Nat'l Research Council, *Informing America's Policy on Illegal Drugs: What We Don't Know Keeps Hurting Us*, Nat'l Acad. Press 192-93 (2001). As one commentator notes:

> Between 1988 and 1998, British arrests for marijuana nearly quadrupled, reaching almost 100,000 a year. As many as 5600 marijuana offenders were annually imprisoned. And yet British marijuana use during that period continued to rise. *Despite having the most punitive marijuana laws in Europe, Great Britain soon had the highest rate of marijuana use among young people.*

SCHLOSSER, *supra* note 26, at 69-70 (emphasis added).

[154] *See* MILLER, *supra* note 146, at 15-18; ELDREDGE, *supra* note 22, ch. 3.

be understood as economic actors responding rationally to a market in which the profit potential exceeds the risks.[155] The PCI would inevitably destroy most of the illicit market. Since the PCI prohibits the sale of marijuana, a person buying marijuana rather than growing it would not only risk imprisonment, but would have to pay the inflated price associated with an illegal market.[156] Judge Gray notes that "[a] black market of some kind will always be with us, but it can be severely diminished

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[155] As Miller observes, "These high prices lure entrepreneurs into the illegal drug markets like honey draws flies." MILLER, *supra* note 146, at 16. Mike Gray notes, "[T]he black market is the purest form of unfettered free-market capitalism. The rules are Darwinian – survival of the fittest – and no matter what you do, the pirates will always be a step ahead . . . . [Thus,] the only way to destroy the black market is to underbid it." M. GRAY, *supra* note 131, at 191. According to the RAND report:

> Depenalization [of cannabis] along with removal of sanctions for home production and gifts [within quantity limits – the model used in South Australia] should substantially weaken the black market and generate a much greater reduction in criminal justice costs, with at most a small effect on prevalence and intensity of use.

RAND, *supra* note 10, at 11.

[156] As the DEA writes, "[O]nly about 5 percent of inmates in federal prison are there because of simple possession. Most drug criminals are in jail – even on possession charges – because they have plea-bargained down from major trafficking offenses . . . . In New York, . . . it is estimated that 97% of drug felons sentenced to prison were charged with sale or intent to sell, not simply possession." DEA, *supra* note 113, at 3, 23. By destroying most of the adult market for marijuana, the PCI would give potential marijuana suppliers much less opportunity to become "drug felons" whom we must imprison.

in size and power."[157] Thus, a state could rationally conclude that the PCI would severely diminish the size and power of the illicit marijuana market. If the demand for marijuana is here to stay,[158] and subject to inexorable economic laws, states could quite sensibly decide to take advantage of those laws, rather than be taken advantage of by them. Given the ongoing costs of homeland security and the war in Iraq, as well as massive federal budget deficits and widespread state budget shortfalls, the Supreme Court could conclude on economic grounds alone that a state could rationally enact the PCI.

b. Social Costs

The DEA underscores the social costs of "drug abuse,"[159] yet nowhere does it speak to the devastating social costs of marijuana prohibition. For one, the current regime drains billions of dollars that would enable *honest* law enforcement officials to combat serious, violent crime, which greatly affects law-abiding citizens' quality of life.[160] Beyond this, marijuana prohibition creates

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[157] J. GRAY, *supra* note 4, at 243.

[158] *See* ELDREDGE, *supra* note 22, at 160. As Hamilton observes, "[T]he U.S. seized more than 48,000 lbs. of marijuana along the Canadian border last year, nearly double the 26,000 lbs. it retrieved in 2002." Hamilton, *supra* note 131, at 36-37.

[159] DEA, *supra* note 113, at 11.

[160] Notwithstanding our government's claims that using marijuana causes one to be violent, *see* ONDCP, *supra* note 115, at 5, it is marijuana's illegality that causes the violence that unavoidably attends the competition for huge profits where a widespread activity is criminalized. *See* Hamilton, *supra* note 131, at 37.

incentives for *dishonest* public officials, especially given their typically modest salaries, to cooperate with the illicit drug markets[161] and to make budgetary ends meet through draconian forfeiture laws.[162] Not only does the present regime undermine respect for and cooperation with law enforcement,[163] it also disproportionately burdens racial minorities and the poor,[164] exacerbating race

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[161] *See generally* MILLER, *supra* note 146, ch. 2; ELDREDGE, *supra* note 22, at 54-57; J. GRAY, supra note 4, at 67-77. As Rosenthal explains:

> As with other banned substances from time immemorial, agencies charged with enforcing marijuana laws also have to deal with official corruption. Because of the high risk of the marijuana basis, those involved in marijuana sales on a large basis often try to bribe police officers and other agents. Given the huge sums of money involved, some portion of the law enforcement community will always be seduced.

ROSENTHAL ET AL., *supra* note 10, at 20. As Mike Gray thus writes, "Honest cops everywhere are watching in dismay as their departments are sucked under by payoffs at every level." M. GRAY, *supra* note 131, at 190.

[162] *See* SCHLOSSER, *supra* note 26, at 61-62. *See generally* MILLER, who notes that "by linking police budgets to law enforcement, forfeiture laws induce police and prosecutors to neglect other, more pressing, crime problems . . . . [F]orfeiture laws create . . . a great temptation for state and local police departments to target assets rather than criminal activity." MILLER, *supra* note 146, at 133 (citations omitted).

[163] *See, e.g.,* ROSENTHAL ET AL., *supra* note 10, at 14, 71-72. In the words of the RAND report, "Depenalization of cannabis . . . should significantly enhance the perceived legitimacy and credibility of the government's control efforts against other illicit drugs." RAND, *supra* note 10, at 358-59.

[164] *See, e.g.,* Steven Jonas, *Why the Drug War Will Never End, in* THE DRUG LEGALIZATION DEBATE 132-36 (James Inciardi ed., 1999); ELDREDGE, *supra* note 22, ch. 8; SCHLOSSER,

and class antagonisms. In addition, drug pushers become millionaires and are viewed as heroes,[165] which is hardly a message we want to send to youth. Perhaps most importantly, the CSA's flat prohibition of marijuana devastates countless families and individual lives through unnecessary imprisonment. We considered the economic costs of the incarceration of tens of thousands of nonviolent marijuana offenders, but the social costs of this regime extend to the effects of thrusting a nonviolent marijuana user into a world of prison gangs, sexual violence, hard drugs, and learned criminality.[166] These problems are exacerbated by prison overcrowding, which also may require the early release of violent offenders to make room for nonviolent ones.[167] As the RAND report concludes:

> Like President Carter our judgment is that at present the primary harms of

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supra note 26, at 51-52; M. GRAY, *supra* note 131, at 189; ROSENTHAL ET AL., *supra* note 10, at 77-78; RAND, *supra* note 10, at 2, 5, 38. As former San Jose Police Chief Joseph McNamara observes, "Ninety million Americans have tried marijuana. When you look at who's going to jail, it is overwhelmingly disproportionate – it's Latinos and Blacks." Stein, *supra* note 106, at 61. As Ostrowski concludes, "It is difficult to resist the temptation to call the war on drugs a war on blacks." Ostrowski, *supra* note 125, at 354.

[165] *See* MILLER, *supra* note 146, at 18; ELDREDGE, *supra* note 22, at 105-06.

[166] *See* MILLER, *supra* note 146, at 173-78; ROSENTHAL ET AL., *supra* note 10, at 75, 77; SCHLOSSER, *supra* note 26, at 57.

[167] As Miller notes, part of the overcrowding problem is traceable to mandatory minimum sentences for drug convictions. MILLER, *supra* note 146, at 164-68. *See* J. GRAY, *supra* note 4, at 36. The very recent case of United States v. Booker, 125 S.Ct. 738 (2005) may provide some relief regarding this problem.

> marijuana use . . . . come from criminalization, expensive and intrusive enforcement, inequity, shock to the conscience from disproportionate sentence, and a substantial [though generally nonviolent] black market. *This is not to ignore that the drug itself causes damage . . . . But the adverse consequences of criminalization, with current U.S. enforcement, seem more substantial.*[168]

c. The Imperative of Harm Reduction

This brief overview of some risks associated with the PCI, along with the costs of the current regime, should be enough to establish that a state could rationally enact the PCI. It also brings us back to the fact that the current United States regime of complete cannabis prohibition runs counter to the recent trend of other western democracies.[169] These countries have embraced the

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[168] RAND, *supra* note 10, at 356-57 (emphasis added).

[169] In *Grutter*, Justices Ginsberg and Souter rested their concurrence in part on the use of race preferences in other countries. While it is debatable whether this is appropriate, this inclination to take international developments into account should lead them to seriously consider the results of the European experience in harm reduction. Indeed, even *Lawrence*, authored by Justice Kennedy and joined by Justice O'Connor, relied on recent international legal trends in more than one place. Lawrence v. Texas, 539 U.S. 558, 572, 576, (2003). McAllister writes, "[A]s Europe is learning, it may be easier to knock down rogue missiles than to beat back a consensus among allies and neighbors who think it is smarter to live with cannabis than to fight it." McAllister, *supra* note 145, at 61.

goal of harm *reduction*[170] by asking the question: In the cold light of concrete experience, which does *more* harm to the individual and society—the use of marijuana or the enforcement of a regime of complete marijuana prohibition?[171] For all these reasons, the Supreme Court should find that states could rationally decide that the PCI would yield far less harm than does the current regime.[172]

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[170] Hippocrates wrote, "First, do no harm." Of course, with respect to marijuana law reform, this is impossible because there are risks or harms no matter what. A logical corollary of the ancient wisdom, however, must be that, where harm can not be avoided, it must be minimized.

[171] Our government assures us that "European experiments with drug legalization have failed." DEA, *supra* note 113, at 15. Such a sweeping condemnation, however, gratuitously oversimplifies a complex phenomenon, implying that Dutch cannabis reform, for example, has had the same success as the Swiss "Needle Park" experiment. As the RAND report sums up, however, "The Dutch have significantly reduced the monetary and human costs of incarcerating cannabis offenders with no apparent effect on levels of use." RAND, *supra* note 10, at 261. *See also* Mary Cleveland, *Downsizing the Drug War and Considering "Legalization," in* Fish, *supra* note 22, at 547, 570. For this reason, among others we have seen, states considering enacting the PCI and investigating the facts for themselves could conclude that our federal government is misleading us, if not lying to us, about this matter.

[172] Both liberals and conservatives on the Court will likely have reservations about ruling as I have advocated. Newbern refers to the following:

> The "liberal paradox" – the odd position in which liberal advocates of state-legalized medical marijuana use are placed in arguing for a reduced role for the federal government against a history that equates such arguments with a time in which states clung to their autonomy as means of preserving a racist past.

Newbern, *supra* note 10, at 1590.

The Court's liberals, however, should recognize that marijuana policy is categorically distinct from race policy. Marijuana legalization, be it for medicinal or recreational purposes, can simply not be equated with an attempt to resurrect Jim Crow. If anything, States are now trying to discriminate in favor of racial minorities, not against them, as in *Grutter*.

Under these circumstances, the liberals on a "pragmatic" Court, *see* Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N. Y. Times, July 3, 2004, at 3, would be inclined to be sympathetic toward the CUA and even the PCI and should finally be willing to concede that *Lopez* and *Morrison* drew a valid line rooted in a division of power for which the Constitution clearly provides. They should be willing, that is, to accept what another great liberal Justice wrote long ago: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The Court's conservatives, by contrast, will struggle with the unpleasant fact that their federalism revolution may enable liberal social policy like the CUA and PCI. While authoritarian conservatives like Justices Scalia, Thomas, and Rehnquist may sufficiently support the war on marijuana and will argue Judge Pregerson misapplied *Lopez* and *Morrison*, the libertarian inclinations of Justices Kennedy and O'Connor might lead them to rule as I have advocated. To illustrate, consider *Lawrence*, in which the Court struck down a State law criminalizing private consensual homosexual sodomy by adults as a violation of the right of privacy, which is rooted in Fourteenth Amendment liberty due process. 539 U.S. 572. Implicitly relying on Mill's "harm principle," *see* J.S. MILL, ON LIBERTY 68 (G. Himmelfarb, ed. 1975), and the distinction between self regarding and other regarding behavior, *see* RAND, *supra* note 10, at 58-59, Kennedy and O'Connor held that the activity of adults in the privacy of their home is beyond the regulatory reach of government. As Kennedy wrote, "The present case does not involve minors. It does not involve persons who might be injured or coerced who are situated in relationships where consent might not easily be

IV. Conclusion

Gonzales v. Raich provides the Supreme Court with an historic opportunity to enable much needed reform. The Court should affirm the Ninth Circuit's ruling that the Controlled Substances Act is unconstitutional on Commerce Clause grounds, as it applies to the appellants. The Court should issue a broad rather than narrow ruling, acknowledging that the medicinal purpose of state-legalized marijuana use is irrelevant to whether it is beyond the reach of Congress' commerce power, and affirming, or at least not denying, that states could constitutionally enact the Personal Cultivation Initiative.

The Personal Cultivation Initiative would displace but a small corner of the CSA, legalizing only (1) the cultivation, possession and use, not sale or trade, of (2) marijuana (3) by adults, (4) in the home. Further, in ruling as I have advocated, the Court would not be making substantive policy. Rather, it would give expression to a coherent understanding of federalism by leaving the policy decision to the discretion of states under their police power. In the process, the Court would provide continuity and coherence in our Commerce Clause jurisprudence.

As suggested at the outset, however, the Court seems unlikely to issue the broad ruling I have advocated. It may instead rule narrowly for the respondents, although I have argued that it would

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refused. It does not involve public conduct . . . ." *Lawrence*, 539 U.S. at 578. This substantially describes the activity protected by the PCI, and the right of privacy recognized in *Lawrence* takes on even added force when a State seeks to *protect* it, as under the PCI, rather than *violate* it, as did the Texas statute.

err by trying to rest such a narrow ruling on the medicinal/recreational distinction, irrelevant as it is to the Commerce Clause question. If the Court is not prepared to acknowledge that irrelevance, I submit that it should remain silent on the issue, allowing lower courts to forge a consensus as this area of law develops. The crux of a workable alternative basis for a narrow ruling in respondents' favor might look like the following:

1) Unlike the federal laws in Lopez *and* Morrison, *the CSA as applied in* Raich *neither complements nor cooperates with State law. To the contrary, it completely undermines it.*

2) The State law in Raich *functions to reduce the volume of a market that federal law seeks to destroy.*

Therefore, Congress has no rational basis to criminalize the activity protected by the State law in Raich, *and so it is beyond its commerce power.*

Whatever the merits of this formulation, we must recognize that the Court may rule against the respondents. Some have reported that the Court was skeptical of Raich and Monson's position at oral argument,[173] and comments by Justices Breyer[174]

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[173] *See, e.g.*, *High Court Appears Hesitant to Endorse Medical Marijuana*, N.Y. TIMES, Nov. 29, 2004, *at* http://www.nytimes.com/aponline/national/AP-Scotus-Medical-Marijuana; Tony Mauro, *U.S. High Court not High on Medical Pot*, THE RECORDER, Nov. 30, 2004, at 1; Gail Gibson, *Medical Marijuana: Justices Skeptical over Patients' Use,* BALT. SUN, Nov. 30, 2004, at A1; and Linda Greenhouse, *States' Rights Defense Falters in Medical Marijuana Case,* N.Y. TIMES, Nov. 30, *at* http://www.nytimes.com/2004/11/30/politics/30scotus. As one observer wrote, "a majority of the justices made comments suggesting they thought that even small amounts of ostensibly medical marijuana, obtained for free, were part of a national

market for licit and illicit drugs – and thus subject to Congress's constitutional power over trade among the states." Charles Lane, *High Court Not Receptive to Marijuana Case*, WASH. POST, Nov. 30, 2004, at A03.

[174] Justice Breyer, of course, penned powerful dissents in *Lopez* and *Morrison*. As Savage writes, "(a) former Senate staffer, Breyer has consistently urged the Court to uphold acts of Congress." Savage, *supra* note 7, at A1. At oral argument, accordingly, Breyer did two things.

First, in response to Barnett's claim that respondents' activity is noneconomic, Breyer responded that "it's non-economic and it affects the economic." *Oral Arg.* at 33. This echoes Breyer's rejection of the economic/noneconomic distinction, see *Morrison*, 529 U.S. at 656-658, and reminds us why the Chief Justice observed in *Lopez* that "although Justice Breyer argues that acceptance of the government's rationales would not authorize a federal police power, he is unable to identify any activity that the States may regulate but Congress may not." *Lopez*, 514 U.S. at 564. For the commerce power to have any coherent meaning, we have seen, there must be something that is not interstate commerce. As Pregerson amply demonstrates, the activity at issue in this case qualifies. Second, Breyer suggested that the proper way for activists to secure a change in federal cannabis law on medicinal grounds is to request federal regulators at the FDA take it off the list of schedule I drugs. See *Oral Arg.*, at 50. This is consistent with the doctrine of exhaustion of administrative remedies, yet Barnett directed the Court's attention to those *amicus curiae* briefs documenting the federal government's obstruction of scientific research as well as those studies commissioned by the national government which have shown the medical benefits of cannabis. See *id.* at 51. One hopes that Breyer's reflection on such obstruction may finally yield a crack in his "beltway mentality," i.e., the assumption that all wisdom resides in Washington D.C., regardless of what the States or other western liberal democracies are doing. It can also only be hoped that Breyer will acknowledge the fundamental distinction between *Raich* and *Morrison*, the latter in which he dissented partly based on his description of § 13981 as "an instance not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem." *Morrison*, 529 U.S. at 662.

and Scalia[175] strongly suggest that they will rule for Congress. A majority ruling to this effect would seem at first glance a victory for the U.S. government. Beyond securing Washington's power to raid, prosecute, and imprison the likes of Angel Raich and Diane Monson, for example, it could slow the momentum of state cannabis law reform.

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[175] Unlike Breyer, Scalia wrote nothing in *Lopez* and *Morrison*. Yet also unlike Breyer, he joined the majority in both opinions. His remark to Clement that "it seems rather ironic to appeal to the fact that home-grown marijuana would reduce the interstate commerce that you don't want to occur in order to regulate it," *Oral Arg.*, at 7, was thus no surprise. Nonetheless, Scalia pressed Barnett on two points.

He noted first that, relying on its commerce power, Congress has legitimately criminalized the mere possession of articles like ivory and eagle feathers. *Id.*, at 26-27. However, not only are such articles not medicine in the eyes of a substantial portion of the American medical community, but the criminalization of their possession is necessary for the protection of endangered species. As Barnett thus noted, "they're an essential part of a larger regulatory scheme that would be undercut unless those activities are reached," *id.* at 27, and so are well within a workable exception to *Lopez* and *Morrison*.

Expressing concern about the proper definition of the class of activities at issue in *Raich*, secondly, Scalia noted that he had heard "that there are communes that grow marijuana for the medical use of all the members of the commune." *Id.* at 28. Presumably not impressed by the fact that the CUA requires all members of such a commune to have valid doctor's notes, this line of challenge may suggest that his cultural conservatism, perhaps including support for the war on marijuana, will compel him to vote to reverse the Ninth Circuit. Indeed, though we can not know whether he was serious, he expressly opined that *Raich* "looks like *Wickard* to me." *Id.* at 40. As I have argued, however, making that case, as well as distinguishing *Lopez* and *Morrison*, may prove so difficult that any opinion Scalia writes will convince none but the drug warrior faithful.

Given the U.S. government's broader interests, however, a ruling against these women could backfire in several ways.

To begin, since it would only establish that the U.S. government has power under federal law to go after medical cannabis patients, such a ruling could underscore Washington's considerable irrelevance on this issue. Though states could not prevent the federal raids and prosecutions, that is, they would be required neither to assist in those raids nor to enforce the CSA's rigid federal prohibition in their courts, where the vast majority of cannabis prosecutions take place under state law. Since states with medical cannabis laws would be free to continue enforcing those laws, then, public authorities and medical cannabis patients in those states would likely find a ruling in Congress' favor simply irrelevant to how they operate on a daily basis. Indeed, just as *Roe v. Wade*[176] energized its opponents, such a ruling would likely have a similar effect. Although many in Washington are still gripped by the "reefer madness" hysteria of the 1930's, this issue is one of life and death for many people, and organizations like NORML and the Marijuana Policy Project would certainly ensure that reformers in every state are aware of the limits of such a ruling.

Beyond its reflection on the U.S. government generally, a ruling against Raich and Monson could leave the President, Congress, and the Court each with egg on their faces.

As for the President, the Constitution requires that the Chief Executive "shall take Care that the

[176] 410 U.S. 113 (1973).

Laws be faithfully executed."[177] If the Court clears the way for Raich and Monson's prosecution, then, Mr. Bush would seem duty bound to direct Mr. Gonzales to ensure that these women are convicted and imprisoned as the "drug felons" that U.S. law and propaganda declare them to be. The DEA, after all, found the courage to break down a sick woman's door and destroy what state law and her doctor deemed medicine. The least Mr. Bush could do is order that these dangerous women be put on trial. His ratings are at an all time low,[178] to be sure, but he can certainly face down any fears that in a country where 80% of adults support legalized medicinal cannabis, a jury faced with imprisoning these women might resort to jury nullification, with the bad publicity that would generate.

If the Court rules for Congress, it might try to soften the blow by chanting the D word – not diversity, but democracy, something like "if change is to come, it must come through the democratic process, and so reformers should focus their efforts on Congress." Though perhaps predictable, this would be a mockery of sick patients like Angel Raich and Diane Monson. Not only has the democratic process in twelve states already spoken, but there is no reason to expect courage from Congress on the medical cannabis issue any time soon. Indeed, like those of the President, Congress' ratings are as low as they have been for some

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[177] U.S. CONST. art. II, § 3.

[178] "President Bush's approval ratings have continued to slide, with a Gallup/USA Today/CNN poll this week recording the highest negatives of his presidency." David Ignatius, *A New Beginning?* WASH. POST, May 25, 2005, at A27.

time,[179] and for good reason. It is, for example, the one body that could have prevented our disastrous military invasion of Iraq, e.g., by threatening the President with impeachment and removal absent clear proof of weapons of mass destruction and links between Iraq and Al Qaeda. Having failed to act with the stakes this high, most members of Congress could hardly be expected to stand up to cultural conservatives and in favor of a few people who may not even live to vote against them in the next election. The scientific consensus that smoked cannabis provides relief for a range of ailments, based largely on studies commissioned by the U.S. government,[180] will thus continue to be ignored.

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[179] As Ignatius observed, "a Pew Research Center Poll this month found that only 35 percent of the public approved of the Republican leadership in Congress." *Id.* See also Donald Lambro, *Public Mood Swings*, WASH. TIMES, May 12, 2005, at A20. (In recent polls, "Congress' scores dropped significantly.")

[180] As Congressman Pete Stark said on the House floor in 1999:

> Mr. Speaker, I rise today in strong support of H.R. 912, The Medical Use of Marijuana Act, introduced by Representative Barney Frank. This bill would move marijuana from Schedule I of the Controlled Substances Act to Schedule II of the Act, allowing physicians to prescribe marijuana to patients with a clear medical need for the drug.
>
> Institute of Medicine studies have shown that components of marijuana relieve symptoms associated with terrible diseases such as AIDS, cancer, glaucoma, and epilepsy. The New England Journal of Medicine also supports the medical use of marijuana in relieving the symptoms linked with these illnesses. As an appetite stimulant, marijuana can help prevent the weight loss associated with cancer and AIDS. It can alleviate the nausea and vomiting associated with cancer chemotherapy. Marijuana has also been proven to

provide some relief to patients with glaucoma and epilepsy. Additionally, marijuana can provide pain relief to millions of patients suffering from conditions ranging from post- surgery pain to chronic muscle spasms. Often the alternative pain relief options for these conditions have serious side effects such as liver and kidney damage, stomach bleeding, and ulcers. Marijuana has never been shown to cause death or serious illnesses such as these.

Opposition to medical marijuana use has often focused on the belief that legalizing the drug for medical use will lead to an increase in its recreational use. I do not condone recreational use of marijuana, nor does H.R. 912 seek to increase illicit use. This bill is simply meant to treat marijuana as we treat drugs such as morphine. It would only be available to those with a doctor's prescription.

A recent Institute of Medicine report entitled 'Medicine and Health Flash' concluded that there is no convincing data to support the belief that the medical use of marijuana will lead to an increase in its illicit use. The point of making marijuana a Schedule II drug is so that it can be regulated as closely as other prescription drug with the potential for abuse. As we have learned in the failing 'War on Drugs', treating marijuana as an illicit drug in all circumstances not only fails to curb its recreational use, it eliminates a potential treatment for some of the most painful and terrible diseases. Treating marijuana as a prescription drug will give doctors more alternatives for alleviating the pain and suffering of their patients.

H.R. 912 would allow for the use and possession of marijuana by those who have been prescribed the drug by a physician. Passage of this bill will succeed in opening the door to increased research into the ways marijuana can be of a medicinal value. We must not eliminate the drug as a potential tool for alleviating the suffering of millions of Americans. I urge my colleagues to support the Medical Use of Marijuana Act.
145 CONG. REC. 50 (1999).

Beyond this, cannabis' therapeutic potential has been recognized for millenia throughout the world. In the U.S.,

This, even though the U.S. government itself acknowledged this scientific consensus in the late 1970's when it established the compassionate investigative new drug (IND) program. Though it stopped admitting patients in the early 1990's in response to the AIDS epidemic, the U.S. government to this day provides marijuana to a handful of sick patients.[181]

American doctors began to explore cannabis-based medicine in the 19th century. The *United States Pharmacopoeia*, a highly selective drug reference manual, began listing *Extractum Cannabis* as a recognized medicine in 1850. In 1860, the Ohio State Medical Society held the first American clinical conference on medical marijuana, concluding that it was useful in the treatment of an array of ailments including tetanus, painful menstruation, convulsions, asthma, rheumatism, post-partum depression, gonorrhea, and chronic bronchitis. It has been reported that over 100 articles were published between 1840 and 1890 recommending cannabis for one disorder or another. Accordingly, pharmaceutical companies like Eli Lilly, Parke-Davis, and Squibb manufactured preparations during this period with traces of cannabis, made them available over the counter, and marketed them largely as painkillers or sedatives.

See generally Michael Aldrich, *History of Therapeutic Cannabis*, in CANNABIS IN MEDICAL PRACTICE (Mary Lynn Mathre, ed., 1997); BLOOMQUIST, *supra* note 54; ALAN BOCK, WAITING TO INHALE: THE POLITICS OF MEDICAL MARIJUANA (2000); RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES (1974); NICK BROWNLEE, THE ILLUSTRATED GUIDE TO CANNABIS (2003); ALBERT GOLDMAN, GRASSROOTS: MARIJUANA IN AMERICA TODAY (1979); LESTER GRINSPOON & SCOTT BAKALAR, MARIHUANA: THE FORBIDDEN MEDICINE (1993); MARK DAVID MERLIN, MAN AND MARIJUANA: SOME ASPECTS OF THEIR ANCIENT RELATIONSHIP (1972); LARRY SLOMAN, THE HISTORY OF MARIJUANA IN AMERICA: REEFER MADNESS (1979); DAVID SOLOMON, THE MARIHUANA PAPERS (1966); SOLOMON H. SNYDER, USES OF MARIJUANA (1971).

[181] *See* BOCK, *supra* note 10, at 154-55.

Under these circumstances, the least Congress should have done long ago is to have reclassified cannabis as a schedule II substance under the CSA. As we have seen, however, even this modest step toward reason is not politically viable.[182] Indeed, last year the House rejected a bill simply directing the DEA not to enforce the CSA contrary to state laws allowing medical marijuana.[183] Most recently, on May 4, 2005, the States' Rights to Medical Marijuana Act (HR 2087) was reintroduced and referred to the House Energy and Commerce Committee,[184] where it remains in limbo. If the Court rules against Raich and Monson, then, it will not only highlight Congress' failures in this area, but increase pressure for reform from a body with little political courage, even on behalf of the sick and dying.

As for the Court itself, finally, a realist can certainly say that the Court must simply choose in this case between conflicting but powerful and relevant principles - deferring to federal power vs. limiting federal power. I conclude, however, with three observations.

First, Raich and Monson challenged the CSA not on its face, but only as applied to the specific facts of their case. They do not seek to invalidate an entire statute or even a single provision of federal law, only to void its application to the facts of their

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[182] Neusch, *supra* note 10, at 211. Indeed, shortly after Proposition 215 was enacted, Congress passed a "sense of the Congress" resolution in opposition to medical marijuana. Act of Oct. 21, 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2681-760.

[183] *Viewpoint*, ROLL CALL, July 13, 2004; *For the Record*, WASH. POST, July 11, 2004, at T11.

[184] 151 CONG. REC. 2975 (2005).

cases. In that sense, the ruling they seek is quite limited in scope.

Second, if the activities in *Lopez* and *Morrison* were beyond Congress' regulatory reach as non-economic activities, the Court would be hard pressed to make a convincing case that the activity in *Raich*, which is at the core of states' police power to legislate on behalf of public health and welfare, IS economic activity within Congress' reach. If the Court were to rule for Congress yet fail to make this case, it would undermine the coherence of its federalism jurisprudence for decades. Indeed, at that point, it would be difficult to identify any human activity Congress could not regulate. Even such a champion of federal power as John Marshall would never have gone that far.

Finally, beyond the Commerce Clause dimension of this case, Monson and Raich also filed suit under the Due Process clause of the Fifth Amendment.[185] The lower courts did not address this theory, and the justices did not focus on it at oral argument, yet there is a profound liberty dimension to this case. This in turn implicates cases like *Roe v. Wade*, which held that a woman has a constitutional right, early in her pregnancy and in consultation with her doctor, to abort a fetus. That being the law, it would be hard to see how a sick patient, in consultation with her doctor, would have no right to consume cannabis in the privacy of her home in order to relieve illness. Destruction of innocent potential human life would be protected, but protection of innocent actual human life would not. Once again, it would take decades to sort out

[185] *See Raich*, 352 F.3d at 1227.

such inconsistency in our constitutional law, and for this the Court would have egg on its face as well.

Whichever way the Court rules, the U.S. can resist the trend of other western liberal democracies for only so long. Especially if the states, like Canada and Europe, maintain their momentum toward more rational cannabis policy, Congress will eventually have to follow.