

MEDICAL MARIJUANA'S FATE IN THE AFTERMATH OF THE SUPREME COURT'S NEW COMMERCE CLAUSE JURISPRUDENCE

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INTRODUCTION

The decriminalization of marijuana for medical purposes has ignited a contentious battle between states and the federal government. To the consternation of federal drug enforcement officials, nine states have authorized the use of marijuana to reduce pain or treat symptoms associated with serious illnesses,¹ and other states are likely to follow suit.² Yet state medical marijuana laws conflict with the blanket federal prohibition against marijuana.³ The federal government strongly

1. Voters in the following eight states have approved ballot initiatives legalizing medical marijuana: California codified at CAL. HEALTH & SAFETY CODE § 11362.5(e) (West Supp. 2000); Colorado, see COLO. CONST. amend. XX; Nevada, see NV. CONST. art. 4, § 38; Alaska, codified at ALASKA STAT. §§ 17.37.010-.080 & 11.71.090 (Michie 1999); Arizona, codified at ARIZ. REV. STAT. § 13-3412.01 (1999); Maine, codified at ME. REV. STAT. ANN. tit. 22, § 2383-B (West 1999); Oregon, codified at OR. REV. STAT. §§ 475.300-.375 (1999); and Washington state, codified at WASH. REV. CODE § 69.51A.005-.902 (1999). District of Columbia voters overwhelmingly approved a 1998 initiative, but a congressional amendment initially prevented the ballots from being counted; a federal court ruling subsequently allowed a vote count, though the amendment continues to block the initiative from taking effect. See Bill Miller & Spencer S. Hsu, *Results Are Out: Marijuana Initiative Passes*, WASH. POST, Sept. 21, 1999, at A1 (reporting that the measure received sixty-one percent of the vote). In June of 2000, Hawaii became the first state to approve the use of medical marijuana through the legislative process. See *Hawaii's Governor Signs Medical Marijuana Bill*, L.A. TIMES, June 15, 2000, at A14. Several states have introduced legislation concerning medical marijuana. See *National Organization for Reform of Marijuana Laws*, (visited Sept. 17, 2000) <<http://norml.org/laws/stateleg2000.shtml>>.

2. See 144 CONG. REC. H7720 (daily ed. Sept. 15, 1998) (statement of Rep. McCollum) (warning that over thirty states have been identified as potential targets for medical marijuana initiatives). In November of 2000, Colorado and Nevada approved medical marijuana ballot initiatives. See *Pot and Vouchers*, ECONOMIST, Nov. 11, 2000, at 41.

3. See Controlled Substances Act, 21 U.S.C. §§ 801-971 (1994 & Supp. IV 1998).

opposes these state laws and has made certain that states and their residents realize which law is superior.⁴ To this end, the federal government has threatened to prosecute both patients who use and doctors who recommend the drug.⁵ In addition, the Department of Justice secured an injunction closing down cannabis clubs that distribute medicinal marijuana.⁶ Federal opposition to medical marijuana—backed by the force of the United States Constitution—compels defiance of federal criminal law by those who use the drug in accordance with state law to treat debilitating illnesses.⁷ While it is difficult to conceive of any limits to federal power over drugs, the recent United States Supreme Court's Commerce Clause decisions in *United States v. Lopez*⁸ and *United States v. Morrison*⁹ demand that Congress's authority to regulate medical marijuana be re-examined.¹⁰

As the first and most populous state to legalize medical marijuana, California has been the battleground for the fed-

4. Under the Supremacy Clause, federal law preempts a conflicting state law. See U.S. CONST. art. VI, cl. 2.

5. See *Conant v. McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997) (granting preliminary injunction against federal government threats), *entering permanent injunction*, No. C 97-00139 WHA, 2000 WL 1281174 (N.D. Cal. Sept. 7, 2000); see also Raymond J. Walsh, Jr., *Populations at Risk for Criminal Liability under Compassionate Use Acts*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 275, 308 (1999) ("Physicians, patients and primary caregivers are currently at risk for incarceration or penalty for medical use of marijuana under current federal law."); Edward Epstein, *Medicinal Pot Initiative Rolls to An Easy Victory*, S.F. CHRON., Nov. 6, 1996, at A1 ("[F]ederal drug enforcement officials have warned that they will enforce the nation's marijuana laws, meaning that they could go after physicians and other health providers who recommend its use to patients, and after those who grow it or use it medicinally").

6. See *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086 (N.D. Cal. 1998), *rev'd in part sub nom.*, *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999), *cert. granted*, No. 00-151, 2000 WL 1053564 (US Nov. 27, 2000).

7. See Jordan Lite, *Despite Prop. 215, Medicinal Pot Use Still Smoked Out by Courts Drugs: Closure of Cannabis Clubs Forces Some Patients to Journey Hundreds of Miles to Find Supplies or to Grow Their Own Plants, Risking Arrest and Jail*, L.A. TIMES, Feb. 14, 1999, at B1.

8. 514 U.S. 549 (1995).

9. 120 S. Ct. 1740 (2000).

10. This comment explores the constitutionality of the federal drug laws as applied to the cultivation, distribution, and possession of medical marijuana in a state, which has legalized its cultivation and possession for medical purposes. Additionally, it presupposes that the state will either implement a government distribution system or authorize a highly regulated private system. See *infra* Part IV.

eral-state conflict. On November 5, 1996, California voters approved a ballot initiative, the "Compassionate Use Act," that decriminalizes the use of medical marijuana.¹¹ Popularly known as Proposition 215, the law exempts from state prosecution the possession, cultivation, and use of marijuana by seriously ill persons who receive a physician's recommendation.¹² It also immunizes physicians from state prosecution for recommending the drug.¹³ Proposition 215 thus provides a legal means by which persons suffering from debilitating diseases such as AIDS and cancer can alleviate suffering and stimulate appetites.¹⁴ Many users of medicinal marijuana have discovered, and a growing number of studies have supported,¹⁵ that

11. See CAL. HEALTH & SAFETY CODE § 11362.5(e) (West Supp. 2000). For news coverage of Proposition 215's passage; see Epstein, *supra* note 5 and John Balzar, *Voters Approve Measure to Use Pot As Medicine*, L.A. TIMES, Nov. 6, 1996, at A1. Arizona voters approved a similar initiative in the 1996 election only to have the legislature effectively repeal it; however, in 1998 Arizona voters once again authorized the medicinal use of marijuana. See Steve Yozwiak, *Voters Reinstate Marijuana Law*, ARIZ. REPUB., Nov. 4, 1998, at A1.

12. The stated purpose of the "Compassionate Use Act" is "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician." § 11362.5(b)(1)(A). The Act provides, in relevant part:

Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

§ 11362.5(d). Although opponents of this and other initiatives are quick to point out that the statute does not confine marijuana use to AIDS and cancer, whether marijuana is beneficial for a particular patient ought to be determined by a physician, not the federal government.

13. See § 11362.5(c). Under the law physicians cannot actually prescribe marijuana for medical purposes but they can provide a written or oral "recommendation." See § 11362.5(d).

14. For an in-depth discussion of the health effects of marijuana and a review of anecdotal evidence, see LESTER GRINSPOON, M.D. & JAMES B. BAKALAR, MARIJUANA, THE FORBIDDEN MEDICINE (rev. ed. 1997); see also MARTIN MARTINEZ, M.D., THE NEW PRESCRIPTION: MARIJUANA AS MEDICINE (2000) (collecting recent research on the medical uses of marijuana); Stephen Sidney et al., *Marijuana Use and Mortality*, 87 AM. J. PUB. HEALTH 585 (1997); *Hearing on Medical Marijuana Referenda Movement in America Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong. (Oct. 1, 1997), available in 1997 WL 14151530 [hereinafter *Marijuana Referenda Hearing*] (testimony by Dr. Lester Grinspoon, Associate Professor of Psychiatry, Harvard Medical School).

15. See INSTITUTE OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (Janet E. Joy et al. eds., 1999); see also Mary Curtius & Bettina Boxall, *Pot Has Uses as Medicine*, L.A. TIMES, Mar. 18, 1999, at A1. For a broader discussion of the dispute over the medical value of marijuana, see *infra* Part I.B.

marijuana provides inexpensive and effective relief for a range of ailments.¹⁶

California's medical marijuana law, and recent state laws patterned after it, run counter to the traditional governmental approach to illicit drugs in which states and the federal government fully cooperate with each other. Since 1970, the federal government has exerted a pervasive and unwavering presence over drugs in this country, giving rise to what is commonly known as the "war on drugs."¹⁷ In a determined effort to eradicate drugs at the federal, state, and local levels, governments collectively spend nearly fifty billion dollars annually.¹⁸ Although states have their own prohibitions against drugs, they have historically deferred to the federal government whenever the latter intervened, welcoming the resources the federal government contributes. Beyond the narrow exception carved out for medical marijuana, states still remain committed to the goal of eradicating drugs and enforcing other drug prohibitions, including the ban on the cultivation, distribution, and possession of marijuana.¹⁹

16. See generally GRINSPOON & BAKALAR, *supra* note 14; *Marijuana Referenda Hearing*, *supra* note 14, at 1997 WL 14151530 (testimony of Dr. Grinspoon).

17. See generally Diane-Michele Krasnow, *To Stop the Scourge: The Supreme Court's Approach to the War on Drugs*, 19 AM. J. CRIM. L. 219 (1992); David O. Stewart, *Slouching Toward Orwell*, A.B.A. J., June 1989, at 44; Silas J. Wasserstrom, *The Incredibly Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); Steven Wisotsky, *Crackdown: The Emerging 'Drug Exception' to the Bill of Rights*, 38 HASTINGS L. J. 889 (1987); MICHAEL MASSING, *THE FIX* 9 (1998) ("It would be hard to think of an area of U.S. social policy that has failed more completely than the war on drugs."); STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR* (1993) (detailing the enormous social and economic costs of drug prohibition in the United States).

18. See *The War on Drugs: First, Inhale Deeply*, THE ECONOMIST, Sept. 2, 2000, at 26 (noting that the federal government this year will spend \$18.5 billion dollars to fight drugs while the Department of Justice's entire budget for the year is only \$21 billion) (reporting that of the two million persons imprisoned in the United States, 450,000 were for drug offenses). The "war on drugs" began in the 1970s with the Nixon administration and intensified under the Reagan and Bush administrations during the 1980s. It has continued unabated during the 1990s with the Clinton administration. See J. Wells Dixon, Note, *Conant v. McCaffrey: Physicians, Marijuana, and the First Amendment*, 70 U. COLO. L. REV. 975, 999 (1999) (stating that under Clinton, the drug war continues at its highest level in terms of dollars spent, number of incarcerations, and lengths of prison sentences) (citing Eric Blumenson & Eva Nilssen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998)).

19. See, e.g., John Johnson, *Weeding Out Pot Farms from Aloft*, L.A. TIMES, Sept. 6, 2000, at A1 (describing California's eradication program, known as the

A discussion of medical marijuana therefore must acknowledge the broader political and social context of illicit drugs. The drug war has been a cornerstone of federal policy for more than a quarter of a century.²⁰ Some commentators attribute the federal intransigence to medical marijuana to the "war on drugs" mentality.²¹ Furthermore, that marijuana is viewed largely as a recreational drug, with its attendant social connotations, causes irrational responses to its medical use.²² The "war on drugs" thus shapes the reactions to medical marijuana by all three branches of the federal government, creating a formidable obstacle to new ideas regarding drug policy as well as affecting judicial responses to drugs.

The federal government's response to the medical marijuana movement underscores the fundamental barrier federal law poses to state medical marijuana laws.²³ Since these initiatives emerged, the federal government has steadfastly denied that marijuana has any medical benefits and has expressed concern that legalizing it for medical use undermines

Campaign Against Marijuana Plants, or CAMP, that uses helicopters to seize cannabis plants growing in rural areas).

20. See, e.g., Dixon, *supra* note 18, at 999 ("The federal government's reluctance to accept a legitimate medical use of marijuana stems from the extensive and exhaustive efforts it has expended since the Nixon Administration to prohibit and discourage recreational drug use, especially by adolescents.").

21. See Gregg A. Bilz, *The Medical Use of Marijuana: The Politics of Medicine*, 13 HAMLIN J. PUB. L. & POL'Y 117, 123 (1992) (arguing that because of irrational fears, politics dominates the debate and drowns out scientific evidence); Dixon, *supra* note 18, at 999-1001 (discussing the political and moral context in which medical marijuana laws are viewed); *id.* at 980 (stating that the Clinton administration's response to medical marijuana may have stemmed less from a scientific justification than a desire not to appear "soft on drugs"); GRINSPOON & BAKALAR, *supra* note 14, at xii ("[T]he political climate has now deteriorated to the point where it has become difficult to discuss marijuana openly and freely."). Marijuana prohibition in this country also has a darker aspect. See, e.g., Laura M. Rojas, Comment, *California's Compassionate Use Act and the Federal Government's Medical Marijuana Policy: Can California Physicians Recommend Marijuana to Their Patients without Subjecting Themselves to Sanctions?*, 30 MCGEORGE L. REV. 1373, 1377-78 (1999) (reviewing authorities documenting the racist stereotypes associated with marijuana use in the early twentieth century).

22. See, e.g., GRINSPOON & BAKALAR, *supra* note 14, at xiv ("The largely undeserved reputation of cannabis as a harmful recreational drug and the resulting legal restrictions have made medical use and research difficult.").

23. Under the Supremacy Clause of the United States Constitution, federal law preempts state law in the event of a conflict. See U.S. CONST. art. VI, cl. 2; see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Moreover, Congress has explicitly declared an intention to preempt any contrary state drug laws. See 21 U.S.C. § 903 (1994).

the message to children that drugs are bad.²⁴ In 1997, the Clinton administration formulated an official response to demonstrate its commitment to enforcing the federal proscription on all marijuana use.²⁵ Patients who cultivate and possess marijuana are technically in violation of federal criminal law,²⁶ however, the federal government to date has seriously targeted only physicians and cannabis clubs.²⁷ Federal agencies have threatened to sanction and prosecute physicians who recommend marijuana.²⁸ In 1998, the Department of Justice obtained a court order enjoining several Northern California medical cannabis clubs from cultivating and distributing marijuana.²⁹ Recently, when the federal judge who issued the preliminary injunction modified it to allow an Oakland cannabis club to distribute marijuana to patients for whom it is a medical necessity, the United States Supreme Court, at the emergency request of the Justice Department, postponed the order.³⁰ In granting the stay by a 7–1 vote, the Court may have

24. See Drug Enforcement Admin., U.S. Dep't of Justice, *Say It Straight: The Medical Myths of Marijuana* (visited Sept. 11, 2000) <<http://www.usdoj.gov/dea/pubs/sayit/myths.htm>>; *Marijuana Referenda Hearing*, *supra* note 14, at 1997 WL 14151535 (testimony of Gen. Barry R. McCaffrey, director of the Office of National Drug Control Policy, submitted for the record).

25. See *Administration Response to Arizona Proposition 200 and California Proposition 215*, 62 Fed. Reg. 6164 (1997) [hereinafter *Response*] (notice signed Jan. 15, 1997 by Gen. Barry R. McCaffrey, director of the Office of National Drug Control Policy).

26. See 21 U.S.C. § 844 (1994 & Supp. IV 1998).

27. The first federal criminal prosecution of a “patient” and “caregiver” since passage of Proposition 215 occurred in 1999 when B.E. Smith who openly grew pot for himself and other persons for whom he served as a “caregiver” was convicted in federal court and sentenced to twenty-seven months in prison. See *Marijuana Grower Sentenced to 27 Months*, L.A. TIMES, Aug. 7, 1999, at A21; see generally Andrew J. LeVay, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 726–34 (discussing the *Smith* prosecution and suggesting political motives on the part of the federal government for pursuing the case).

28. See *Response*, *supra* note 25; David G. Savage & Jennifer Warren, *U.S. Threatens Penalties if Doctors Prescribe Pot Drugs: Criminal Charges, Other Sanctions Are Possible, Officials Warn California and Arizona Physicians*, L.A. TIMES, Dec. 31, 1996, at A3; see also *infra* Part I.C.

29. See *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086 (N.D. Cal. 1998), *rev'd in part sub nom.*, *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999), *cert. granted*, No. 00-151, 2000 WL 1053564 (US Nov. 27, 2000) (instructing lower court to consider the medical necessity defense in modifying injunction).

30. See *United States v. Oakland Cannabis Buyers' Coop.*, No. OOA145, 2000 WL 1230133 (U.S. Aug. 29, 2000) (mem.). To review the Department of Justice's arguments, see *Petition for a Writ of Certiorari, United States v. Oakland*

signaled the hostility with which it views medical marijuana, thus foreshadowing a possible ruling on the constitutionality of the state law.³¹

In combating the state medical marijuana movement, the federal government is armed with a powerful federal drug statute.³² Relying on its Commerce Clause authority, Congress regulates most drug activity under a comprehensive federal statutory scheme that prohibits the manufacture, distribution, and possession of a number of drugs, including marijuana.³³ Significantly, Congress expressly classifies marijuana as a controlled substance devoid of medical use.³⁴ The Supreme Court's traditionally broad interpretation of the Commerce Clause has deferred to congressional policy judgments in this area, allowing federal control of virtually all drug activity, including the local cultivation and use of marijuana.³⁵

However, the United States Supreme Court's Commerce Clause decisions in *United States v. Lopez*³⁶ and, more recently, *United States v. Morrison*,³⁷ suggest that Congress's seemingly unlimited commerce power is subject to real limits. In both cases, the Court held that Congress exceeded its regulatory power under the Commerce Clause. In 1995, the *Lopez* decision struck down the Gun-Free School Zones Act (GFSZA),³⁸

Cannabis Buyers' Coop., No. OOA145, 2000 WL 1230133 (U.S. Aug. 29, 2000) (mem.) (No. 00-151). For media coverage of the decision, see David G. Savage & John M. Glionna, *High Court Bars Pot Distribution for Medical Uses*, L.A. TIMES, Aug. 30, 2000, at A1.

31. See David Stout, *Supreme Court Continues Stay Barring Medical Use of Marijuana*, N.Y. TIMES, Aug. 30, 2000, at A18. The underlying case is a Ninth Circuit decision in which the court held that the lower court has equitable power to consider the medical necessity defense in an injunction against the cannabis clubs. See *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999), *rev'd*, *United States v. Oakland Cannabis Buyers' Coop.*, No. OOA145, 2000 WL 1230133 (U.S. Aug. 29, 2000) (mem.), and *cert. granted*, No. 00-151, 2000 WL 1053564 (US Nov. 27, 2000).

32. See Controlled Substances Act, 21 U.S.C. §§ 801-971 (1994 & Supp. IV 1998).

33. See 21 U.S.C. §§ 841, 844(a).

34. See 21 U.S.C. § 812 (listing marijuana under Schedule I).

35. See *infra* Part II. As a practical matter, the local use and distribution of limited quantities of marijuana have mostly been handled by the states, even though the federal government has authority over such activity. The passing of state medical marijuana initiatives has highlighted the supremacy of federal law over local matters.

36. See *United States v. Lopez*, 514 U.S. 549 (1995).

37. See *United States v. Morrison*, 120 S. Ct. 1740 (2000).

38. 18 U.S.C. § 922(q) (1994).

which made it a federal crime to possess a firearm within 1000 feet of school grounds. *Lopez* marked the first case in nearly sixty years in which the Court invalidated a congressional act on Commerce Clause grounds. Similarly, in its 1999 term, the Court held that Congress exceeded its commerce power by providing victims of gender-motivated violence with a federal civil remedy to use against their attackers as part of the Violence Against Women Act of 1994 ("VAWA").³⁹ *Morrison* thus confirmed that *Lopez's* interpretation of the Commerce Clause was not an aberration but, rather, an attempt to rein in federal power in favor of the states. These two opinions, moreover, constitute an integral part of the Court's broader federalism trend toward curtailing federal power in favor of the states.⁴⁰ Such developments have not been without vigorous dissent, however, as the Court remains fiercely divided along 5-4 lines in decisions addressing the relationship between federal and state power.⁴¹ In particular, both Commerce Clause decisions

39. See *Morrison*, 120 S. Ct. at 1740; Violence Against Women Act, 42 U.S.C. § 13981 (1994).

40. See, e.g., *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (holding that the Eleventh Amendment immunity precludes individuals from suing States under the federal Age Discrimination in Employment Act); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (holding that Congress could not authorize suits against States to proceed in federal court in trademark and patent infringement suits); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that States cannot be sued under the Fair Labor Standards Act in federal or state court); *Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government cannot require state employees to conduct background checks on prospective handgun buyers); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding Congress exceeded its § 5 enforcement powers in enacting the Religious Freedom and Restoration Act, the most onerous provisions of which applied to the States); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that the Commerce Clause does not grant Congress authority to abrogate states' Eleventh Amendment sovereign immunity), *overruling*, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (holding that a district court exceeded its federal power to remedy the effects of past discrimination in a school system); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress cannot compel states to pass legislation to address the disposal of radioactive waste). *But see* *Reno v. Condon*, 120 S. Ct. 666 (2000) (holding that the Driver's Privacy Protection Act, which prevents state motor vehicle departments from selling personal data to commercial entities, was a valid exercise of Congress's commerce power). One commentator has remarked that "it is amazing that the justices are so clearly determined to resurrect principles of judicial federalism." Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 954 (1999).

41. See generally David G. Savage, *The 5-4 Federalism Chasm*, A.B.A. J., March 2000, at 36.

elicited strong dissents regarding the majority's construction of Congress's commerce power.

Under the Rehnquist Court's interpretation of the Commerce Clause, Congress may regulate purely intrastate conduct if it is *commercial* and if it *substantially affects* interstate commerce.⁴² In *Lopez*, the Court reasoned that gun possession near a school is not a "commercial activity" and therefore cannot substantially affect interstate commerce.⁴³ The Court reaffirmed its commitment to the commercial/noncommercial distinction in *Morrison*, emphasizing that "where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."⁴⁴ And, it thus concluded that the criminal activity targeted by the VAWA could not be considered economic.⁴⁵ By insisting that the regulated activity must involve economic conduct, the Court has placed Congress's continued ability to regulate certain intrastate activities in question.

Accordingly, *Lopez* and *Morrison* require a revisiting of the constitutionality of Congress's authority to regulate medical marijuana. Part I of this comment reviews the background of the medical marijuana initiative in California and the federal response it provoked. Part II explores the Court's Commerce Clause jurisprudence over the last sixty years and *Lopez's* and *Morrison's* departure from it. Part III examines how courts have responded to *Lopez*-type Commerce Clause challenges to federal drug legislation. Specifically, this Part reviews decisions upholding federal prohibitions against purely intrastate and noncommercial drug activity, such as cultivation and possession of marijuana, despite *Lopez's* apparent curtailment of federal power. Finally, Part IV analyzes medical marijuana under the framework delineated by the Court in *Lopez* and *Morrison*, and briefly focuses on the extent to which these two decisions are indicative of a larger states' rights trend embraced by the conservative Rehnquist Court. This comment

42. See *United States v. Lopez*, 514 U.S. 549, 560 (1995); *United States v. Morrison*, 120 S. Ct. 1740, 1750 (2000).

43. See *Lopez*, 514 U.S. at 551.

44. *Morrison*, 120 S. Ct. at 1750. As the dissent in *Morrison* emphasizes, there is much dispute as to whether the precedents actually support this proposition. See *id.* at 1759 (Souter, J., dissenting).

45. See *Morrison*, 120 S. Ct. at 1751.

contends that under the new Commerce Clause analysis of *Lopez* and *Morrison*, in conjunction with their underlying states' rights philosophy, Congress's regulation of medical marijuana in a legal state regime is constitutionally suspect.

I. BACKGROUND: FEDERAL RESPONSE TO MEDICAL MARIJUANA IN CALIFORNIA

The clash between the federal government and states has ensued because marijuana remains illegal under federal law and because the federal government denies that the drug has any proven therapeutic value. This Part briefly reviews the dispute over whether marijuana has medical uses, discussing the common arguments for and against medical marijuana. It also recounts two specific actions undertaken by the Clinton administration against the states in an effort to enforce the federal prohibition against marijuana.

A. *Federal Drug Laws: Marijuana Lacks an Accepted Medical Use*

Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, or Controlled Substances Act ("CSA"),⁴⁶ pursuant to its Commerce Clause power.⁴⁷ The statute classifies marijuana as a "Schedule I" drug that has a "high potential for abuse" and "no currently accepted [use as medical] treatment in the United States."⁴⁸ Marijuana's inclusion in the most restrictive category precludes any medical use of marijuana.⁴⁹ Other Schedule I drugs include heroin and LSD.⁵⁰ By contrast, Schedule II drugs, which include cocaine, morphine,

46. See 21 U.S.C. §§ 801-971 (1994 & Supp. IV 1998). Section 841(a)(1) prohibits the manufacture and distribution of marijuana and possession with the intent to manufacture or distribute. Section 844(a) makes simple possession unlawful.

47. See U.S. CONST. art. I, § 8, cl. 3.

48. See § 812(b)(1); 21 C.F.R. § 1308.11 (1999).

49. See Bilz, *supra* note 21, at 118 (noting that doctors in United States have recognized therapeutic uses of marijuana since the 1840s). The Marihuana Tax Act of 1937, however, prohibited the medicinal use of marijuana. See *id.* See also Lester Grinspoon, M.D. & James B. Bakalar, *Marijuana as Medicine: A Plea for Reconsideration*, 273 JAMA 1875, 1875 (1995) (reporting that between 1840 and 1900, more than 100 articles on therapeutic benefits of marijuana were published in European and American journals).

50. See § 812(b)(1).

and methamphetamines, have a "currently accepted medical use."⁵¹ Because of marijuana's status as a Schedule I drug, physicians who recommend, and patients who use, marijuana in accordance with state law can be held criminally liable under federal law.

The most logical solution to the problem, rescheduling marijuana from a Schedule I category to a Schedule II category, is not politically viable.⁵² Reformers contend that it is indefensible that such rescheduling has not occurred in light of what is known about marijuana vis-à-vis other controlled substances that can be prescribed, such as morphine and cocaine.⁵³ Efforts to reclassify marijuana at both the administrative and legislative levels have repeatedly failed. Congress consistently rejects legislation that would move marijuana to a Schedule II category and thereby permit patients and physicians to proceed under state law.⁵⁴ In fact, like the Clinton administration, Congress has only reaffirmed its opposition to the medical use of marijuana.⁵⁵ The unsuccessful twenty-two year struggle to reschedule marijuana waged by the National Organization for the Reform of Marijuana Laws (NORML) is a stark illustration of this option's futility.⁵⁶ As one federal judge remarked, "[t]he

51. See § 812(b)(2).

52. See 21 U.S.C. § 811 (detailing procedures and factors for rescheduling controlled substances). An interested party may initiate a petition with the Drug Enforcement Administration ("DEA"), which acts on behalf of the Attorney General. The DEA refers the petition to the Secretary of Human Health and Services for a binding scientific and medical opinion. The final decision of the DEA is subject to judicial review. See *id.* See generally INSTITUTE OF MEDICINE, *supra* note 15, at 194-202 (discussing rescheduling process).

53. See, e.g., *Marijuana Referenda Hearing*, *supra* note 14, at 1997 WL 14151530 (testimony of Dr. Grinspoon) ("The Schedule I classification persists, although in my view and the view of millions of other Americans, it is medically absurd, legally questionable, and morally wrong."); Jerome P. Kassirer, M.D., Editorial, *Federal Foolishness and Marijuana*, 336 NEW ENG. J. MED. 366, 366 (1997).

54. Rep. Barney Frank, D-MA, proposed The Medical Use of Marijuana Act, H.R. 1782, 105th Cong. (1997). In March 1999, he reintroduced this bill in the 106th Congress. See H.R. 912, 106th Cong. (1999).

55. In reaction to the state initiatives, Congress in 1998 enacted legislation entitled "Not Legalizing Marijuana For Medical Use" in which it declared that all drugs must receive approval by the Food and Drug Administration as safe and effective before they can be prescribed for medical purposes. The legislation also cites studies showing increased marijuana use among children between 1992 and 1996. See Pub. L. No. 105-277, Div. F, 112 Stat. 2681-760 to 2681-761 (1998).

56. See *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, 1137 (D.C. Cir. 1994) (affirming the DEA's determination, found in 57

Court doubts whether a rescheduling petition is a reasonable alternative for all seriously ill patients whose physicians have recommended marijuana for therapeutic purposes."⁵⁷

The federal government adamantly opposes rescheduling, arguing that marijuana has no demonstrated medical value or, alternatively, that the harms outweigh any benefits.⁵⁸ Drug enforcement officials such as Drug Czar General Barry McCaffrey, who served as the Director of the Office of National Drug Control Policy under President Clinton, assert that marijuana is a "gateway drug" that leads to the use of harder drugs.⁵⁹ Federal officials fear that legalizing marijuana for medical use sends the wrong message to children and that it will serve as an impetus, if not a Trojan horse, for outright legalization.⁶⁰

Fed. Reg. 10,499 (1992), that marijuana has no currently accepted medical use); see generally Bilz, *supra* note 21, at 124–30 (recounting the unsuccessful legal struggle during the 1980s to reschedule marijuana to allow medicinal uses).

57. See *Cannabis Cultivators Club*, 5 F. Supp. 2d at 1102.

58. See Drug Enforcement Admin., U.S. Dep't of Justice, *Say It Straight: The Medical Myths of Marijuana* (visited Sept. 22, 2000) <<http://www.usdoj.gov/dea/pubs/sayit/myths.htm>>; *Response*, *supra* note 25, at 6165 ("The [federal government's] message will remind the public there is no medical use for smoked marijuana and will educate the public about strategies to prevent marijuana use."); *Marijuana Referenda Hearing*, *supra* note 14, at 1997 WL 14151535 (testimony of Gen. Barry R. McCaffrey, director of the Office of National Drug Control Policy, submitted for the record); see also Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal and State Responses to California's Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 181 (1997). In addition, prominent national medical organizations oppose medical marijuana as a remedy. See Rojas, *supra* note 21, at 1389 (noting that the American Medical Association, the National Multiple Sclerosis Society, the American Glaucoma Society, and the American Cancer Society have rejected marijuana's medicinal value).

59. See *Marijuana Referenda Hearing*, *supra* note 14, at 1997 WL 14151535 (testimony by Gen. Barry R. McCaffrey, director of the Office of National Drug Control Policy, submitted for the record); see generally Nicole Dogwill, Comment, *The Burning Question: How Will the United States Deal with the Medical-Marijuana Debate?*, 1998 DET. C.L. MICH. ST. U. L. REV. 247, 286–87 (1998) (citing Gen. Barry McCaffrey's statement that marijuana smokers are eighty-five more times likely to attempt cocaine). But see GRINSPOON & BAKALAR, *supra* note 14, at 245–47 (emphasizing empirical evidence that marijuana is not a gateway drug that leads to more dangerous drug use); Aryeh Y. Brown, Comment, *In Memoriam: Ralph Seely, Obscured by Smoke: Medical Marijuana and the Need for Representation Reinforcement Review*, 22 SEATTLE U. L. REV. 175, 225–26 (1998) (refuting contention that marijuana is a gateway drug).

60. Drug Czar McCaffrey has said: "We view this as part of [a] national strategy to legalize all dangerous drugs." Tom Curley, *A Cloud of Confusion over Marijuana Votes*, U.S.A. TODAY, Dec. 24, 1996, at 3A. See also Abbie Crites-Leoni, *Medicinal Use of Marijuana: Is the Debate a Smoke Screen for Movement Toward Legalization?*, 19 J. LEGAL MED. 273, 274 (1998); Hanna Rosin, *The Re-*

Additionally, the government worries that allowing marijuana use for medical purposes will increase the drug's availability on the street for illicit use and thereby lead to greater dependency.⁶¹

Government officials further contend that rescheduling marijuana is unnecessary because a legal alternative exists in Marinol.⁶² An FDA-approved drug, Marinol contains a synthetic version of marijuana's active ingredient, THC.⁶³ According to the federal government, Marinol is sufficiently effective to treat medical conditions for which marijuana is used. But medical marijuana advocates counter that this pill is an inadequate substitute for many patients.⁶⁴ They argue that smoking or ingesting marijuana is preferable to Marinol because of its comfort, cost, and effectiveness.⁶⁵

B. Medical Marijuana Debate

Whether marijuana has therapeutic benefits remains the subject of fierce debate. Because the federal government has historically resisted efforts to research the medical benefits of the drug, most of the evidence supporting its medicinal uses is anecdotal.⁶⁶ Seizing on this lack of conclusive evidence, opponents argue either that marijuana has no health benefits or that the purported long-term side effects, such as addiction,⁶⁷ lung cancer, and use of harder drugs,⁶⁸ outweigh any potential

turn of Pot, NEW REPUBLIC, Feb. 17, 1997, at 18, 19; *Marijuana Referenda Hearing*, *supra* note 14, at 1997 WL 14151535 (testimony by Gen. Barry R. McCaffrey, director of the Office of National Drug Control Policy, submitted for the record).

61. See *Marijuana Referenda Hearing*, *supra* note 14, at 1997 WL 14151535 (testimony by Gen. Barry R. McCaffrey, director of the Office of National Drug Control Policy, submitted for the record).

62. See *id.*

63. See *id.*

64. See Dixon, *supra* note 18, at 976-77; GRINSPOON & BAKALAR, *supra* note 14, at 43-44.

65. See Dixon, *supra* note 18, at 976-77.

66. But see GRINSPOON & BAKALAR, *supra* note 14, at 226-33 (defending anecdotal evidence).

67. See 21 C.F.R. § 329.1 (1999) (finding that cannabis extracts and derivatives are habit-forming); Drug Enforcement Administration, United States Department of Justice, *Say It Straight: The Medical Myths of Marijuana* (visited Sept. 22, 2000) <www.usdoj.gov/dea/pubs/sayit/myths.htm> ("There are over 10,000 scientific studies that prove marijuana is a harmful addictive drug. There is not one reliable study that demonstrates marijuana has any medical value.")

68. See generally Crites-Leoni, *supra* note 50, at 282.

therapeutic benefits. The dearth of studies on marijuana's medical efficacy has enabled opponents to argue, somewhat plausibly, that the drug should not be available for medical treatment until a greater body of knowledge is developed about the drug and its possible side effects.

While marijuana produces a paranoid reaction in some users, it is those who oppose its medical use that seem to be exhibiting the most paranoia, according to medical marijuana supporters.⁶⁹ Proponents of marijuana's therapeutic use maintain that ingesting or smoking the drug can provide relief—in a way conventional treatments sometimes cannot—to persons suffering from diseases such as AIDS, cancer, and multiple sclerosis.⁷⁰ Smoking marijuana has shown particular effectiveness in treating the AIDS wasting syndrome⁷¹ and the nausea and vomiting associated with chemotherapy.⁷² Furthermore, these advocates dispute the contention that marijuana serves as a “gateway drug”⁷³ and reject the notion that legalizing marijuana for medical use sends the wrong message to children, pointing out that more dangerous drugs can be legally prescribed.⁷⁴ Advocates of medical marijuana also contend that the drug is safer than many other legal drugs such as alcohol and tobacco.⁷⁵ And, as a noted physician emphasized, many

69. See GRINSPOON & BAKALAR, *supra* note 14, at xi.

70. A recent study commissioned by the federal government itself offers support to medical marijuana advocates by concluding that the “[s]cientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC, for pain relief, control of nausea and vomiting, and appetite stimulation.” See INSTITUTE OF MEDICINE, *supra* note 15; see also GRINSPOON & BAKALAR, *supra* note 14, at 23–162 (documenting anecdotal evidence of marijuana's therapeutic effects); *Marijuana Referenda Hearing*, *supra* note 14, at 1997 WL 14151530 (testimony of Dr. Grinspoon) (stating that millions of glaucoma sufferers could benefit from marijuana); Dixon, *supra* note 18, at 997 (“[R]ecent studies indicate that the active biochemicals in marijuana have a direct mitigating effect on pain signals in the central nervous system and other related tissues.”).

71. See GRINSPOON & BAKALAR, *supra* note 14, at 102 (describing AIDS wasting syndrome as a “fatal outcome of HIV infection [as defined by] a loss of [ten] percent of body weight or more”).

72. See *id.* at 100–09; MARTINEZ, *supra* note 14, at 21–28.

73. See GRINSPOON & BAKALAR, *supra* note 14, at 245–47; MARTINEZ, *supra* note 14, at 65 (“[T]he vast majority of caffeine, tobacco, and alcohol, or marijuana users do not advance to stronger drugs.”).

74. See, e.g., Marsha Rosenbaum, Editorial, *Feds' Myths about Medical Marijuana: Studies Dispel Arguments that Passage of Prop. 215 Led to Increase Teen Drug Use*, S.F. CHRON., Sept. 6, 2000, at A21.

75. See, e.g., GRINSPOON & BAKALAR, *supra* note 14, at xiv (“I have come to conclude that if any other drug had revealed similar therapeutic promise com-

users of the drug are terminally ill, so any long-term side effects from the drug, such as lung cancer, are irrelevant.⁷⁶ Thus, many view the issue as extending compassionate relief to those suffering from illnesses for which conventional medicine is inadequate—a popular sentiment considering that medical marijuana ballot measure initiatives have yet to suffer defeat.⁷⁷

In 1999, the federal government relented from its refusal to explore the potential medicinal value of marijuana and commissioned a study performed by the Institute of Medicine (IOM). The IOM study offers support, albeit cautious, for marijuana's therapeutic benefits.⁷⁸ It concluded that "[f]or patients such as those with AIDS or who are undergoing chemotherapy, and who suffer simultaneously from severe pain, nausea, and appetite loss, cannabinoid drugs might offer broad-spectrum relief not found in any other single medication."⁷⁹ Equally important, the study refuted the claim that marijuana serves as a gateway drug that leads to more dangerous drug use.⁸⁰ It similarly rejected the notion that the medical use of marijuana will lead to greater overall recreational use among children.⁸¹ The study further concluded that users of marijuana are less likely to become dependent on the drug in comparison to alcohol and nicotine.⁸² Although the report recommended research into a non-smoking delivery device to

bined with a similar record of safety, professionals and the public would have shown far more interest in it."); *id.* at 227 ("[T]here is no question about [marijuana's] safety. It has been used for thousands of years by millions of people with very little evidence of significant toxicity."); *Marijuana Referenda Hearing, supra* note 14, at 1997 WL 14151530 (testimony of Dr. Grinspoon).

76. See Kassirer, *supra* note 53, at 366. Here, the editor-in-chief of the *New England Journal of Medicine* further stated that the federal policy is "misguided, heavy-handed, and inhumane." *Id.*

77. See Tom Morganthau, *The War Over Weed*, NEWSWEEK, Feb. 3, 1997, at 20. Of course, it is undeniable that some supporters seek outright legalization, a fact used by opponents in an attempt to undermine the movement's credibility. *Id.* at 22.

78. See INSTITUTE OF MEDICINE, *supra* note 15; see also Curtius & Boxall, *supra* note 15.

79. INSTITUTE OF MEDICINE, *supra* note 15, at 177.

80. See *id.* at 98–101.

81. See *id.* at 101. In response to the concern that the medical value of marijuana will detract from the message targeted to children, the report stated that "many of our powerful medicines are also dangerous medicines." *Id.* at 104. "[T]here is little evidence that decriminalization of marijuana use necessarily leads to substantial increase in marijuana use." *Id.*

82. See *id.* at 98.

alleviate possible respiratory cancer resulting from long-term use,⁸³ it did acknowledge that many patients cannot afford to wait for such a development to materialize.⁸⁴

C. Federal Response: Physicians and Cannabis Clubs

One prong of the federal government's anti-medical marijuana strategy targeted physicians who recommended marijuana pursuant to state law.⁸⁵ Specifically, the federal government threatened physicians with criminal prosecution, disqualification from Medicare and Medicaid programs, and revocation of DEA registration to prescribe controlled substances.⁸⁶ California physicians, along with patients, responded with a class action suit, arguing that the policy infringed upon their free speech rights to discuss marijuana with patients. The federal district court granted a preliminary injunction on the ground that the federal government's actions may violate the physicians' First Amendment rights.⁸⁷ But the court emphasized that the conversations were protected only to the extent that the physician did not aid and abet⁸⁸ or conspire to violate the federal prohibition against marijuana.⁸⁹ Thus,

83. See *id.* at 111–15.

84. See *id.* at 179 (“Until a nonsmoked rapid-onset cannabinoid drug delivery system becomes available, we acknowledge that there is no clear alternative for people suffering from chronic conditions that might be relieved by smoking marijuana, such as pain or AIDS wasting.”).

85. See *Response*, *supra* note 25.

86. See *id.*

87. See *Conant v. McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997), *entering permanent injunction*, No. C 97-00139 WHA, 2000 WL 1281174 (N.D. Cal. Sept. 7, 2000); see also George J. Annas, *Reefer Madness—The Federal Response to California's Medical-Marijuana Law (Legal Issues in Medicine)*, 337 NEW ENG. J. MED. 435 (1997). For a thorough analysis of the first *Conant* decision, see Dixon, *supra* note 18. Under 21 U.S.C. § 824, the Attorney General has the power to revoke a physician's DEA registration to prescribe controlled substances. This authority has been delegated to the Drug Enforcement Administration. See 28 C.F.R. § 0.100(b) (1999).

88. See 18 U.S.C. § 2 (1994).

89. See *Conant*, 172 F.R.D. at 698. Before the first *Conant* decision was litigated, the federal government revised its policy to permit physicians to discuss medical marijuana with their patients without providing a recommendation with which patients could obtain marijuana. See *id.* at 687–88; see also Rojas, *supra* note 21, at 1396–1424 (discussing the clarified policy that attempts to distinguish between lawful discussions and unlawful recommendations); Stephanie Stapleton, *Medical Pot: Feds Say Talk Is OK, Just Don't Recommend It*, AM. MED. NEWS,

even with this favorable ruling, physicians could have been criminally liable under federal law for conduct that is legal under state law, namely recommending the use of marijuana for medical purposes.⁹⁰ On September 7, 2000, however, the district court permanently enjoined the federal government from threatening to revoke DEA prescription licenses from physicians who recommend marijuana to patients.⁹¹ The court reasoned that the line drawn by the government between permissible discussions and impermissible recommendations is unworkable in view of First Amendment concerns.⁹²

In addition to threatening physicians, the federal government has vigorously pursued legal action against the cannabis clubs that dispense marijuana. While a stated purpose of Proposition 215 is to encourage a government plan for distribution of marijuana to qualified patients,⁹³ it has yet to materialize. Since the law's passage, however, roughly two dozen private medical cannabis clubs have emerged throughout California.⁹⁴ Cannabis clubs, which grow the drug themselves or obtain it from illicit dealers, serve the demand for the drug because there is not yet a legal distribution system. Typically, a patron presents the club with a doctor's recommendation to demonstrate qualification to receive the drug.⁹⁵ These clubs, moreover, perform an important role in distributing marijuana

Mar. 17, 1997, at 1; Reynolds Holding, *U.S. Letting Doctors Discuss Marijuana*, S.F. CHRON., Mar. 1, 1997, at A3.

90. See Rojas, *supra* note 21, at 1399–1400 (reviewing the California Medical Association guidelines for discussing marijuana use with patients). The author notes that an “unofficial truce” has been achieved between the federal government and doctors as it begins to focus more intensely on the cannabis buyers’ clubs. See *id.*

91. See *Conant v. McCaffrey*, No. C 97-00139 WHA, 2000 WL 1281174 (N.D. Cal. Sept. 7, 2000). The court specifically held that in light of the First Amendment concerns the DEA exceeded its statutory authority in threatening to revoke licenses to prescribe controlled substances under the Controlled Substances Act. See *id.* at *7. The court did not address the threats of criminal prosecution or of removal from Medicare/Medicaid programs because the threat was not sufficiently “clear and specific” to be justiciable. See *id.* at *9.

92. See *id.* at *15 (“A sincere recommendation alone is not a federal crime, even if the doctor foresees it could be used to facilitate a federal crime. The federal interest in enforcing the marijuana prohibition in the United States is a legitimate concern, but it pales by comparison to free speech concerns.”).

93. See CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(C) (West Supp. 2000).

94. See Jean Merl, *Marijuana Distribution Ban Alarms Patients*, L.A. TIMES, Aug. 31, 2000, at C1.

95. See *id.*

to seriously ill patients or their caregivers, eliminating the need for either to resort to purchasing marijuana on the streets.⁹⁶ Although it is uncertain whether these clubs can legally distribute marijuana even under state law,⁹⁷ the cannabis clubs nevertheless operate largely with the tacit approval of various Northern California local governments.⁹⁸ Today, state officials, including some members of law enforcement, are exploring ways to implement Proposition 215 under the shadow of federal opposition.⁹⁹

In *United States v. Cannabis Cultivators Club*, the United States District Court for the Northern District of California granted the Justice Department's request for a preliminary

96. See Rosin, *supra* note 60, at 19. While Proposition 215 and similar state laws provide an affirmative defense to cultivation and possession, it is not feasible for some ill patients to plant and harvest the drug themselves.

97. In construing this initiative, the California Court of Appeals has held that cannabis clubs are not "primary caregivers" within the meaning of Proposition 215. See *People ex. rel. Lungren v. Peron*, 70 Cal. Rptr. 2d 20 (Cal. Ct. App. 1997). Significantly, the *Peron* court concluded that the Act does not allow clubs to furnish marijuana; it merely provides an affirmative defense for possession and cultivation. See *id.* at 27. To achieve the stated purpose of the measure, however, which is to provide a legal right to medical marijuana, there must be a means by which patients can obtain marijuana or at least the seeds with which to grow it. The concurring opinion emphasized this point: "The 'right to obtain' marijuana is, of course, meaningless if it cannot legally be satisfied." *Id.* at 32 (Kline, J., concurring in the judgment); cf. *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999), *cert. granted*, No. 00-151, 2000 WL 1053564 (US Nov. 27, 2000) (holding that district court has equitable discretion to modify injunction to allow cannabis clubs to distribute marijuana to patients who can demonstrate a medical necessity).

98. Unlike his predecessor who was a staunch opponent of medical marijuana, California's new Attorney General Bill Lockyer supports Proposition 215. See Mary Curtius, *Lockyer Pushing Ways to Make Pot Law Work*, L.A. TIMES, Mar. 10, 1999, at A1; see also Ulysses Torassa, *City's Pot Clubs Live on Keeping a Lower Profile, But in Plain View of the Police*, S.F. EXAM., June 13, 1999, at D1. In an attempt to circumvent the federal law, Oakland has authorized private clubs to distribute marijuana. See Laura Hamburg, *Law and Disorder*, S.F. CHRON., Mar. 26, 2000, at Sunday Chronicle 1 (reviewing local programs implementing medical marijuana); Thaa Walker, *Oakland Designates Pot Club: City Council OKs Group to Distribute Medical Marijuana*, S.F. CHRON., July 23, 1998, at A16 (discussing a recently passed ordinance that gives the city power to designate associations that are able to dispense marijuana for medical uses).

99. See Curtius, *supra* note 98 (discussing the state attorney general's task force comprised of law enforcement officials and medical marijuana advocates that is charged with implementing the state law despite the acknowledged impediment posed by federal law). Recently, the state of California appropriated money to UC San Diego in order to study the medical benefits of marijuana. See Tony Perry & John Glionna, *UC Research Center to Study Medical Value of Pot*, Aug. 30, 2000, at A3.

civil injunction, closing six Northern California cannabis clubs for violating federal drug laws.¹⁰⁰ Recognizing the supremacy of federal law, the clubs attempted to defend, in part, by challenging Congress's power under the Commerce Clause to regulate the local distribution of medical marijuana.¹⁰¹ In light of *Lopez's* landmark ruling curtailing federal commerce power, such a contention seemed plausible. But the court upheld the constitutionality of the CSA as applied to the local cannabis clubs by expressly distinguishing *Lopez*.¹⁰² It reasoned that *Lopez* has not affected Commerce Clause analysis with respect to federal drug laws.¹⁰³ The 1998 injunction forced many of the clubs to close down, go underground, or change their method of operation.¹⁰⁴ After the district court modified the injunction on July 17, 2000 to permit one cannabis club to distribute marijuana to patients for whom it is a "medical necessity,"¹⁰⁵ the United States Supreme Court granted the federal government's request to stay the order.¹⁰⁶ These events may force the Court

100. See *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086 (N.D. Cal. 1998), *rev'd in part sub nom*, *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999), *cert. granted*, No. 00-151, 2000 WL 1053564 (US Nov. 27, 2000); Mary Curtius & Maria L. La Ganga, *U.S. Launches Drive to Close Marijuana Clubs*, L.A. TIMES, Jan. 10, 1998, at A1.

101. See *Cannabis Cultivators Club*, 5 F. Supp. 2d at 1097. Recently the Ninth Circuit held that the district court judge has equitable power to allow a medical necessity defense to the federal drug laws. See *Oakland Cannabis Buyers' Coop.*, 190 F.3d at 1109. On remand, the federal judge permitted one cannabis club to distribute marijuana to patients for whom it is a medical necessity. See Bob Egelko, *Federal Judge Lets Oakland Pot Club Distribute Drug: Ruling Limits Use to Strictly Defined Medical Necessity*, S.F. EXAM., July 18, 2000, at A1.

102. See *Cannabis Cultivators Club*, 5 F. Supp. 2d at 1098.

103. See *id.* at 1097-98. Having determined that the CSA reaches the defendants' actions, the court then stated that "[a] state law which purports to legalize the distribution of marijuana for any purpose, however, even a laudable one, nonetheless directly conflicts with federal law, 21 U.S.C. § 841(a)." *Id.* at 1100.

104. See *Lite*, *supra* note 7 at B1; *Torassa*, *supra* note 98, at D1.

105. After the district court's initial preliminary injunction, the Ninth Circuit reversed, holding that the court has equitable discretion to modify the injunction to consider the medical necessity defense. See *United States v. Oakland Cannabis Buyer's Coop.*, 190 F.3d 1109, 1115 (9th Cir. 1999), *cert. granted*, No. 00-151, 2000 WL 1053564 (US Nov. 27, 2000). On remand, the district court judge allowed the clubs to distribute marijuana under the common law medical necessity exception to federal criminal law. See *United States v. Oakland Cannabis Buyers' Coop.*, No. C98-00088 CRB, July 17, 2000 (N.D. Cal. 2000).

106. See *United States v. Oakland Cannabis Buyers' Coop.*, No. 00A145, 2000 WL 1230133 (Aug. 29, 2000) (mem.).

to address Congress's authority to regulate medical marijuana under the Commerce Clause.

II. COMMERCE CLAUSE DOCTRINE

This Part discusses the source of authority from which Congress enacted the Controlled Substances Act,¹⁰⁷ which has prevented the full implementation of state medical marijuana laws. Since the New Deal, the Court has broadly interpreted the Commerce Clause, enabling Congress to enact several federal laws that can displace conflicting state laws. This Part concludes with a review of how *Lopez* and *Morrison* affected the traditional Commerce Clause analysis.

A. *Trajectory of the Commerce Clause*

In regulating a myriad of social and economic matters, Congress has relied upon its commerce power. The Commerce Clause grants Congress the authority “[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.”¹⁰⁸ In *Gibbons v. Ogden*,¹⁰⁹ Chief Justice Marshall first suggested the broad power accorded Congress under the Commerce Clause, stating that the commerce power “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”¹¹⁰ Since *Gibbons*, Congress's power under the Commerce Clause has been subject to various interpretations by the Court.¹¹¹ Despite the early enunciation of the potentially expansive federal power over commerce, the nineteenth century did not test Congress's commerce power.¹¹² As the In-

107. 21 U.S.C. §§ 801–971 (1994 & Supp. IV 1998).

108. U.S. CONST. art. I, § 8, cl. 3.

109. 22 U.S. (9 Wheat.) 1 (1824).

110. *Id.* at 196.

111. *See United States v. Lopez*, 514 U.S. 549, 568–74 (Kennedy, J., concurring) (describing the history of the Commerce Clause). For an excellent scholarly review of the interpretations of the Commerce Clause, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-4, at 807–17 (3d ed. 2000).

112. Before 1890, the Court largely addressed dormant Commerce Clause issues in reviewing state legislation. *See id.* at 809. The Court's decisions between 1890 and 1937 tested Congress's authority under the Commerce Clause and the “view of the Commerce Clause developed by the Court during this period contrasted sharply with the approach of Chief Justice Marshall in *Gibbons v. Ogden*.” *Id.* at 810.

dustrial Revolution spawned national legislation, the Court consistently rejected attempts by Congress to expand its power by adhering to a rigid view of the Commerce Clause, relying on a categorical approach of what constitutes "commerce" that frequently failed to consider the actual impact an activity had on interstate commerce.¹¹³

The New Deal era, however, fundamentally changed Commerce Clause jurisprudence by expanding congressional power. In the seminal 1937 case of *NLRB v. Jones & Laughlin Steel Corp.*,¹¹⁴ the Court laid the groundwork for the "substantial effects" principle to govern federal power over intrastate activity.¹¹⁵ There, the Court held that Congress may regulate intrastate activities that "have such a close and substantial relationship to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."¹¹⁶ With *Jones & Laughlin*, the Court replaced the categorical view of the Commerce Clause with the "substantial effects" test and began considering the actual impact of an activity on interstate commerce.¹¹⁷ Requiring that intrastate activity substantially affect interstate commerce has since become a touchstone for Commerce Clause analysis.¹¹⁸

113. See *TRIBE*, *supra* note 111, at 811 n.12 (listing cases in which the Court invalidated congressional legislation). During the era of narrow Commerce Clause analysis, the Court used formalistic categories, including distinguishing "manufacture" from "commerce" and "indirect" from "direct" effect on interstate commerce. See *Lopez*, 514 U.S. at 569–73 (Kennedy, J., concurring) (describing the Court's earlier reliance on a categorical or semantic approach over a practical view of what actually impacts interstate commerce.); see also *Wickard v. Filburn*, 317 U.S. 111, 121 (1942) ("Certain activities such as 'production,' 'manufacturing,' and 'mining' were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause.").

114. 301 U.S. 1 (1937).

115. See *Lopez*, 514 U.S. at 555.

116. *Jones & Laughlin Steel Corp.*, 301 U.S. at 37.

117. See *Lopez*, 514 U.S. at 573 (Kennedy, J., concurring); see also *TRIBE*, *supra* note 111, at 812.

118. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 312 (1981) (Rehnquist, J., concurring in the judgment) ("There must instead be a showing that regulated activity has a *substantial effect* on that commerce.") (emphasis in original); *Maryland v. Wirtz*, 392 U.S. 183, 189 (1968) (stating that Congress may regulate intrastate activities that have a substantial effect on interstate commerce); *United States v. Darby*, 312 U.S. 100, 118–19 (1941) (applying the "substantial effects" principle to uphold the Fair Labor Standards Act's maximum hours and minimum wages requirements as applied to a local lumber mill).

A few years after *Jones & Laughlin*, the Court's decision in *Wickard v. Filburn*¹¹⁹ marked the greatest expansion of federal commerce power by introducing the "aggregate effects" principle. There, the Court held that personal consumption of wheat grown by a single farmer was nevertheless subject to federal control because the cumulative impact of similarly situated farmers across the nation growing their own wheat substantially affected interstate commerce by altering supply and demand.¹²⁰ Under *Wickard*, "even if [a person'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."¹²¹ The powerful reach of the "aggregate" or "cumulative" effects principle has enabled Congress to regulate a multitude of activities previously believed to be beyond its scope.

Under this broad interpretation of the Commerce Clause, the Court in the modern era has sustained—until *Lopez*—all congressional attempts to regulate intrastate activity by applying the "substantial effects" test.¹²² For example, Congress relied on its commerce power to combat racial discrimination by passing the Civil Rights Act of 1964. In *Heart of Atlanta Motel, Inc. v. United States*,¹²³ the owner of a motel who refused to serve blacks challenged the Act's constitutionality on the ground that Congress lacked authority to regulate local activity.¹²⁴ The Court held that the regulation was a permissible ex-

119. 317 U.S. 111 (1942).

120. *See id.* at 127-28.

121. *Id.* at 125; *see also* *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("[I]t is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires preventative regulation.") (citations omitted).

122. *See, e.g.*, *Hodel v. Virginia Surface Mining & Coal Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding federal pollution laws as a valid exercise of Congress's commerce power because coal mining and its effect on land substantially affects interstate commerce); *Perez v. United States*, 402 U.S. 146 (1971) (upholding legislation criminalizing loan sharking because the activity substantially affected interstate business); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding the Fair Labor Standards Act's application to schools and hospitals because both used goods that had moved in interstate commerce); *overruled by*, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act as valid exercise of Congress's commerce authority).

123. 379 U.S. 241 (1964).

124. *See id.* at 258.

ercise of congressional power, reasoning that the “overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse” satisfied the substantial effects test.¹²⁵ The Court in *Perez v. United States*¹²⁶ upheld an anti-loan sharking provision in the Consumer Credit Protection Act as applied to a particular instance of intrastate conduct on the theory that it is within a “class of activities” that affects interstate commerce.¹²⁷ In each of these cases the Court deferred to Congress’s judgment as to whether the regulated activity substantially affected interstate commerce.¹²⁸

B. *Contours of Commerce Clause Analysis: Regulating Intrastate Activity*

The foregoing authorities have supplied the contours of the Commerce Clause doctrine to which the Court has subscribed for over a half century. Under the Commerce Clause, Congress may regulate: (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce”; and (3) “those activities having a substantial relation to interstate commerce.”¹²⁹ In regulating commerce, Congress may insert into the statute a jurisdictional element to ensure that the

125. *Id.* at 257. The Court also responded to the local nature of the activity with the following statement: “[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.” *Id.* at 258 (quoting *United States v. Women’s Sportswear Mfrs. Ass’n*, 336 U.S. 460, 464 (1949)). In a companion case, the Court similarly upheld the Act as applied to a local restaurant because it “either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce.” *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

126. 402 U.S. 146 (1971).

127. *See id.* at 153 (“Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce.”). In *Perez*, the Court reasoned that the petitioner was a member of a class, which engages in extortionate credit transactions, with which Congress was concerned. *See id.*

128. *See Perez*, 402 U.S. at 155–56 (describing congressional hearings on the connection between intrastate loan sharks and interstate organized crime); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 253 (1964) (“While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce.”); *McClung*, 379 U.S. at 299–300 (relying heavily on congressional findings of the impact racial discrimination by restaurants had in impeding interstate travel among blacks).

129. *See United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (citations omitted).

regulated activity has an effect on interstate commerce.¹³⁰ Absent an express jurisdictional element, however, the regulated activity must substantially affect interstate commerce in order to fall within Congress's commerce power under Article I, § 8, of the Constitution.¹³¹

Congress derives its authority to regulate intrastate activity from the Commerce Clause working in conjunction with the Necessary and Proper Clause.¹³² Under the Necessary and Proper Clause, Congress may regulate conduct occurring within one state if it is necessary to carry out regulation of interstate commerce.¹³³ This principle implicitly underlies *Wickard's* aggregate effects doctrine, allowing Congress to regulate an instance of wholly intrastate activity because the cumulative effects of the activity substantially affect interstate commerce. *Wickard* has thus been construed to establish the following principle: "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the

130. A jurisdictional element does not implicate the *Lopez* analysis because the words in the statute such as "affecting commerce" or "in commerce" "ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Lopez*, 514 U.S. at 561. For example, in 1996 Congress amended the Gun-Free School Zones Act to limit the statute to "a firearm that has moved in or that otherwise affects interstate commerce." 18 U.S.C. § 922(q)(2)(A) (Supp. IV 1998); see also *infra* note 141. By adding this jurisdictional element, Congress has likely circumvented the *Lopez* holding.

131. See, e.g., *United States v. Darby*, 312 U.S. 100, 119–20 (1941); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Because the statutes at issue in *Lopez* and *Morrison* lacked a jurisdictional element and because they involved intrastate activity, the controlling analysis in those decisions focused on whether the conduct Congress sought to regulate substantially affected interstate commerce.

132. U.S. CONST. art. I, § 8, cl. 18 (providing Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States").

133. See *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (applying theory that intrastate activity, such as milk production, may be regulated if it is necessary to effectuate federal control of interstate commerce); *Darby*, 312 U.S. at 118–19 (stating that in order to effectuate Congress's commerce power, it is necessary to regulate hours and wages of intrastate employees even if they are not directly involved with the production of goods intended for interstate commerce). According to Professor Tribe, "*Wickard's* progeny [including *Lopez*] have tended to forget part of their ancestry, often letting the Necessary and Proper Clause drop out of the equation, as if the Commerce Clause alone had to do all the work—and was up to the task." TRIBE, *supra* note 111, at 813 n.22.

class.”¹³⁴ In other words, Congress may reach trivial intrastate activities in order to avoid undermining a broader regulatory scheme.

Moreover, the Court’s deferential standard of review has afforded Congress considerable leeway under the Commerce Clause. In reviewing whether Congress has a rational basis for asserting its commerce power, the Court has deferred to the institutional expertise of the legislative branch.¹³⁵ Until *Lopez*, the Court had not rejected Congress’s judgment regarding an activity’s effect upon interstate commerce, whether or not expressed in the statute in the form of legislative findings.¹³⁶ Both the deferential rational basis review and aggregate effects doctrine, then, have provided Congress the ability to legislate virtually any area. And, as one noted commentator points out, these principles “placed [the Court] in the increasingly untenable position of claiming the power to strike down invocations of the Commerce Clause, while at the same time applying a set of doctrines that made it virtually impossible actually to exercise this power.”¹³⁷

134. *Perez v. United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

135. The Court’s 1981 recitation of the proper Commerce Clause analysis is highly revealing of the change wrought by *Lopez*:

The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. . . . The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme. Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. . . . Here, the District Court properly deferred to Congress’[s] express findings, set out in the Act itself, about the effects of surface coal mining on interstate commerce.

Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc., 452 U.S. 264, 276–77 (1981) (citations omitted).

136. *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964) (“[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”); accord *Hodel*, 452 U.S. at 276; *Perez*, 402 U.S. at 155–56; *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252–53 (1964). *But see Hodel*, 452 U.S. at 310 (Rehnquist, J., concurring in the judgment) (“[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”).

137. TRIBE, *supra* note 111, at 816.

C. United States v. Lopez

The Supreme Court's 1995 decision in *United States v. Lopez*¹³⁸ has been characterized as a revolutionary shift in the Court's Commerce Clause jurisprudence,¹³⁹ generating much scholarly commentary.¹⁴⁰ In *Lopez*, a federal grand jury indicted Alfonso Lopez, a twelfth-grade student, under the Gun-Free School Zones Act of 1990 ("GFSZA"). The GFSZA made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."¹⁴¹ Lopez had brought a concealed .38-caliber handgun and bullets to his San Antonio high school.¹⁴² He admitted that he intended to sell the firearm to

138. 514 U.S. 549 (1995).

139. See, e.g., Charles E. Ares, *Lopez and the Future Constitutional Crisis*, 38 ARIZ. L. REV. 825, 825 (1996) (arguing that the decision "opened the floodgates" for lower courts to invalidate congressional acts); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995) (characterizing the decision as "revolutionary" and "long overdue"); Joan Biskupic, *Court Signals Sharp Shift on Congressional Powers*, WASH. POST, Apr. 28, 1995, at A3 (reporting the comments of one law professor who noted that after *Lopez*, "a whole body of federal criminal law, federal environmental law, [and] social policies of an enormous range are in question"); Linda Greenhouse, *Justices Curb Federal Power to Subject States to Lawsuits*, N.Y. TIMES, Mar. 28, 1996 at A1; Bruce Ackerman, *Supreme Court Rules Ban on Guns Near Schools Invalid* (National Public Radio broadcast, Apr. 27, 1995), available in WESTLAW, 1995 WL 2958158 (pages unavailable); see also Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 167 (1996) ("*Lopez* may turn out to be a flash in the pan, or it may usher in a new age of constitutional restraint. Either way, it stands as the most important Commerce Clause decision since the civil rights cases of thirty years ago . . ."); Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921 (1997) (reviewing scholarly commentary on the decision). But see Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 767 (1996) (predicting that "[i]t is most unlikely . . . that the Court will be able to muster five votes to invalidate a commerce power measure when Congress does not commit the oversight that explains *Lopez*").

140. See generally Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998).

141. 18 U.S.C. § 922(q)(2)(A) (1994). A year after *Lopez*, Congress amended the GFSZA, Pub. L. No. 104-208, § 101(f) (codified as amended at 18 U.S.C. § 922(q) (Supp. IV 1998)), by adding a jurisdictional element so that it only applies to a "firearm that has moved in or otherwise affects interstate commerce."

142. See *Lopez*, 514 U.S. at 551.

another student who wanted it for a gang fight.¹⁴³ When school officials confronted Lopez, he confessed to carrying the gun and was arrested by the police on state charges.¹⁴⁴ The next day, after federal agents charged Lopez under the GFSZA, state charges were dropped and the case proceeded in federal court.¹⁴⁵

In challenging his indictment, Lopez argued that Congress lacked authority under the Commerce Clause to enact the statute under which he was charged.¹⁴⁶ In a bench trial, the district court upheld the constitutionality of the Act and found Lopez guilty, sentencing him to six months' imprisonment.¹⁴⁷ On appeal, however, the Fifth Circuit reversed Lopez's conviction on the ground that the GFSZA was outside of Congress's commerce power.¹⁴⁸ The Fifth Circuit's principal rationale for so holding was the statute's lack of congressional findings and legislative history documenting any connection between gun possession and interstate commerce.¹⁴⁹

In a 5-4 decision, the Supreme Court affirmed the Fifth Circuit but applied different reasoning. Because the gun possession statute sought to regulate intrastate activity, the Court declared that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."¹⁵⁰ In defense of the GFSZA's constitutionality, the federal government argued that local gun possession near a school affects interstate commerce because of crime costs, the effects violence has on the educational process, and, by extension, the adverse impact on national productivity.¹⁵¹ Writing for the five-member majority, Chief Justice Rehnquist held that Congress exceeded its commerce authority by enacting the GFSZA,

143. See *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

144. See *Lopez*, 514 U.S. at 551.

145. See *id.*

146. See *id.*

147. See *id.* at 552.

148. See *Lopez*, 2 F.3d at 1367-68.

149. See *id.* at 1366-67 ("We are unwilling to ourselves simply assume that the concededly intrastate conduct of mere possession by any person of any firearm substantially affects interstate commerce . . .").

150. *Lopez*, 514 U.S. at 559.

151. See *id.* at 563-64. In 1994, Congress amended the GFSZA, Pub. L. No. 103-322, 320904(1) (codified at 18 U.S.C. § 922(q)(1)(A) (Supp. IV 1998)), to include congressional findings on the interstate impact of gun possession near schools. The government, however, did not expressly rely upon these findings in its argument. See *Lopez*, 514 U.S. at 563 n.4.

reasoning that the "Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."¹⁵²

To support its holding, the *Lopez* majority claimed that all of the precedents sustaining Congress's power to regulate intrastate activity involved economic conduct.¹⁵³ According to the Chief Justice, "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."¹⁵⁴ And, a statute prohibiting gun possession near a school "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."¹⁵⁵ Nor could the GFSZA be upheld under the broader view of economic activity implicit in the *Wickard* line of authority because the statute "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."¹⁵⁶ In this respect, the Court expressly distinguished gun possession from the personal wheat production in *Wickard* on the basis that the latter involved a commercial activity whose intrastate affects could be aggregated.¹⁵⁷ Chief Justice Rehnquist observed that despite the expansive interpretation of the Commerce Clause, the precedents "confirm that this power is subject to outer limits."¹⁵⁸ If it were to accept the government's request to aggregate the noneconomic conduct here, the Court reasoned that it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate."¹⁵⁹

Federalism principles undeniably propelled *Lopez's* search for "meaningful limits on the commerce power of Congress."¹⁶⁰

152. *Lopez*, 514 U.S. at 551.

153. See TRIBE, *supra* note 111, at 817-18 ("The focus of the Court's analysis, and the basis of its holding, was a search for judicially cognizable limits to the increasingly amorphous and seemingly unbounded 'substantial effects' test that had developed in the wake of *Jones & Laughlin*.").

154. *Lopez*, 514 U.S. at 560.

155. *Id.* at 561.

156. *Id.* (emphasis added).

157. See *id.* at 560.

158. *Id.* at 557.

159. *Id.* at 564.

160. *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring); see also *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 858 (4th Cir. 1999) (en banc) (recognizing the "first principles of federalism that collectively constitute

A central theme of *Lopez* is the proper balance between national and state government. Chief Justice Rehnquist begins the Commerce Clause analysis with a recitation of the "first principles" of federalism.¹⁶¹ The Court discusses the traditional state areas of regulation such as criminal law and education, noting the prohibition against federal police power. Justice Kennedy's concurring opinion articulates the federalism principles implicated by *Lopez* by emphasizing the judiciary's role in maintaining the balance between state and federal power.¹⁶² He opined that "[t]he statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power."¹⁶³ The majority further reasoned that to sustain the Act would undermine any "distinction between what is truly national and what is truly local."¹⁶⁴ Consistent with the Court's recent federalism decisions, then, *Lopez* reflects a concern for states' rights and a concomitant effort to curtail federal power.¹⁶⁵

D. United States v. Morrison

Providing greater insight into the changes wrought by *Lopez*, the Court in *United States v. Morrison*¹⁶⁶ recently addressed the constitutionality of a provision of the Violence Against Women Act of 1994 ("VAWA").¹⁶⁷ Congress expressly invoked both its authority under the Commerce Clause and Section 5 of the Fourteenth Amendment to enact section 13981 of the VAWA, which enabled victims of gender-motivated violence to sue their attackers in federal court.¹⁶⁸ This provision was part of a larger act that Congress passed to address the problems of domestic violence and sexual assault against

the infrastructure of the majority opinion in *Lopez*"), *aff'd sub nom.* *United States v. Morrison*, 120 S. Ct. 1740 (2000).

161. *See Lopez*, 514 U.S. at 552 (describing the constitutional framework of our government divided among the national government and the states).

162. *See id.* at 575-76 (Kennedy, J., concurring).

163. *See id.* at 580 (Kennedy, J., concurring).

164. *Id.* at 567-68 (citing *NRLB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

165. *See cases cited supra* note 40.

166. 120 S. Ct. 1740 (2000).

167. 42 U.S.C. §§ 13981-14040 (1994).

168. *See United States v. Morrison*, 120 S. Ct. 1740, 1748 (2000).

women.¹⁶⁹ Specifically, Congress enacted section 13981 to compensate for the inadequate state court remedies afforded victims of gender-motivated violence.¹⁷⁰ Notably, unlike the statute in *Lopez*, the VAWA contained ample congressional findings documenting the impacts which violence against women have on the national economy.¹⁷¹

The constitutionality of the VAWA's civil remedy provision arose when a female Virginia Tech student, who alleged that two football players raped her, brought a civil case under section 13981 against them in federal court.¹⁷² In their successful motion to dismiss the complaint, the two defendants argued that Congress lacked constitutional authority to pass section 13981.¹⁷³ On appeal, the plaintiff, and the intervening federal government, contended that gender-motivated violence against women substantially impacts the national economy and thus justifies Congress's invoking its commerce power.¹⁷⁴ Relying exclusively on the principles enunciated in *Lopez*, a divided en banc Fourth Circuit upheld the district court's finding that Congress exceeded both its Enforcement Clause and Commerce Clause authority in enacting section 13981.¹⁷⁵ For the Fourth Circuit, *Lopez* "substantially clarified the scope and the limits of Congress's Article I, Section 8 power"¹⁷⁶ and therefore dictated the outcome.

In affirming the Fourth Circuit's conclusion, the Supreme Court applied the principles delineated in *Lopez*.¹⁷⁷ As in *Lopez*, the dispositive factor in the Commerce Clause analysis was the regulated activity's lack of a commercial character: "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."¹⁷⁸ And like *Lopez*, the Court refused to aggregate noneconomic activity: "We accordingly reject

169. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 827 (4th Cir. 1999) (en banc), *aff'd sub nom.* *United States v. Morrison*, 120 S. Ct. 1740 (2000).

170. See *Morrison*, 120 S. Ct. at 1773 (Souter, J., dissenting).

171. See *id.* at 1752.

172. See *Brzonkala*, 169 F.3d at 827.

173. See *id.* at 828.

174. See *id.*

175. See *id.* at 826.

176. *Id.* at 830.

177. See *United States v. Morrison*, 120 S. Ct. 1740, 1749 (2000) (stating that *Lopez* "clarified our case law governing" the substantial effects test).

178. See *id.* at 1751.

the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.¹⁷⁹ In so doing, the Court disregarded the potential impact violence against women had on the national economy. Federalism principles were also at work in this case, informing the majority's analysis as it reasoned that to accept such congressional findings would "completely obliterate the Constitution's distinction between national and local authority"¹⁸⁰

E. Dissenters' View of the Commerce Clause

The dissents in *Lopez* and *Morrison* illustrate the extent to which the majority has departed from the principles of traditional Commerce Clause jurisprudence.¹⁸¹ According to the dissenters, the majority has engaged in a more stringent review than the customary rational basis standard.¹⁸² The dissenters would continue to apply the rational basis standard of review because it implicitly accepts that Congress, not the judiciary, is best suited to assess whether an activity substantially affects interstate commerce,¹⁸³ particularly in view of the political checks on that institution.¹⁸⁴ Under the Commerce Clause jurisprudence of the past six decades, the dissent argues, both statutes pass constitutional muster. In *Lopez*, for instance, the dissent argued that gun possession in schools undoubtedly affects commerce given the role education performs in our na-

179. *Id.* at 1754.

180. *Id.* at 1752.

181. See *United States v. Lopez*, 514 U.S. 549, 603–06 (1995) (Souter, J., dissenting) (arguing that application of the traditional Commerce Clause jurisprudence would uphold the constitutionality of the statute); *Morrison*, 120 S. Ct. at 1764 (Souter, J., dissenting) ("The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995"); *id.* at 1777 (Breyer, J., dissenting) (stating belief that *Lopez* misstated the Commerce Clause jurisprudence).

182. See *Morrison*, 120 S. Ct. at 1764 (Souter, J., dissenting) (stating that the majority has not expressly eschewed the substantial effects or cumulative effects principles but is "supplanting rational basis scrutiny with a new criterion of review").

183. See *Lopez*, 514 U.S. at 617 (Breyer, J., dissenting) ("[T]he specific question before us . . . is not whether the 'regulated activity sufficiently affected interstate commerce,' but rather, whether Congress could have had a 'rational basis' for so concluding.") (alteration in original) (citation omitted).

184. See *Morrison*, 120 S. Ct. at 1776–78 (Breyer, J., dissenting) (stating belief that political checks on Congress best preserve balance between the federal government and States).

tion's economy.¹⁸⁵ Likewise, the dissent in *Morrison* analogized violence against women to the racial discrimination upheld in the civil rights cases, noting that both affected the national economy.¹⁸⁶

The dissenters, moreover, contend that the majorities' insistence upon the distinction between commercial and non-commercial activity signals a dangerous return to the categorical approach to the Commerce Clause that was long ago rejected.¹⁸⁷ In the dissent's view, the precedents focus not on the economic nature of the underlying activity but on the effects the activity has on interstate commerce.¹⁸⁸ Thus, both the wheat production for personal use in *Wickard* and the racial discrimination in *Heart of Atlanta Motel* involved noneconomic activities that were nonetheless upheld because of their effects on interstate commerce when aggregated.¹⁸⁹ For the dissent, formalistic categories like the majority's distinction between commercial and noncommercial activities are "as unworkable in practice as they are unsupportable in theory."¹⁹⁰ In his *Morrison* dissent, Justice Souter attributes the majority's desire to advance federalism as the motivation for its use of such formalistic categories as the "commercial" versus "noncommercial" distinction.¹⁹¹

185. See *Lopez*, 514 U.S. at 620–24 (Breyer, J., dissenting) (describing connection between education and interstate commerce).

186. See *Morrison*, 120 S. Ct. at 1760–63 (Souter, J., dissenting) (listing studies documenting the impacts of violence against women).

187. See *Lopez*, 514 U.S. at 627–28 (Breyer, J., dissenting) ("[T]his approach fails to heed this Court's earlier warning not to turn 'questions of the power of Congress'[s] upon 'formula[s]' that would give 'controlling force to nomenclature . . . and foreclose consideration of the actual effects of the activity in question upon interstate commerce.'" (quoting *Wickard v. Filburn*, 317 U.S. 111, 120 (1942)); see also *Morrison*, 120 S. Ct. at 1766–67 (Souter, J., dissenting) ("[T]oday's attempt to distinguish between primary activities affecting commerce in terms of the relatively commercial or noncommercial character of the primary conduct proscribed comes with the pedigree of near tragedy . . .").

188. See *Lopez*, 514 U.S. at 628 (Breyer, J., dissenting) (noting that the Court in *Perez*, *McClung*, and *Wickard* did not consider the commercial nature of the underlying activity); *Morrison*, 120 S. Ct. at 1775 (Breyer, J., dissenting) ("This Court has long held that only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant.") (citations omitted).

189. See *Morrison*, 120 S. Ct. at 1775 (Breyer, J. dissenting).

190. *Id.* at 1766 (Souter, J., dissenting); *id.* at 1774 (noting the difficulty of drawing the line between "commercial" and "noncommercial" activity).

191. See *Morrison*, 120 S. Ct. at 1768 (Souter, J., dissenting) (comparing the present Court's penchant for new federalism to the pre-New Deal Court's laissez-faire ideology).

F. *Implications of Lopez and Morrison*

Lopez is significant because it marks the first time in nearly sixty years that the Court invalidated an act of Congress for exceeding its commerce power.¹⁹² *Lopez* established, and *Morrison* reinforced, that the Court will enforce substantive limits on Congress's commerce power. These cases' ultimate impact on existing federal legislation and future congressional acts remains unclear largely because the majority opinions did not, on the surface, reject the established principles of the 'substantial effects' or 'aggregate effects' tests.¹⁹³ Rather, they purported to apply the same Commerce Clause analysis in line with sixty years of precedent. On a closer examination, however, a conscious attempt to rein in Congress's power under the Commerce Clause is evident. The majority opinion in *Lopez*, for example, commences with a statement on the principles of federalism and an evaluation of the historical trajectory of Commerce Clause jurisprudence.¹⁹⁴ It then expressly declares that, despite the broad authority that the precedents afford Congress, the Commerce Clause "is subject to outer limits" derived from our federalism system.¹⁹⁵ As the dissent in *Morrison* suggests, the majority is perhaps allowing its federalism concern to shape its Commerce Clause analysis.¹⁹⁶

1. Heightened Judicial Review

Both the *Lopez* and *Morrison* decisions suggest a more rigorous judicial review of Congress's judgment in regulating under the Commerce Clause.¹⁹⁷ These cases marked a change

192. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 310 (1936) (invalidating the Bituminous Coal Conservation Act of 1935). The Court's invalidation of federal legislation applied to the states on Eleventh Amendment grounds and does not implicate the "substantially effects" Commerce Clause analysis.

193. See *TRIBE*, *supra* note 111, at 825–26.

194. See *Lopez*, 514 U.S. at 551–58.

195. *Id.* at 556–57. Justice Thomas's concurring opinion expresses the most extreme manifestation of the Court's desire to limit Congress's commerce power when he argues that the Court took a "wrong turn" in the 1930s when responding to New Deal legislation. See *id.* at 599 (Thomas, J., concurring).

196. See *United States v. Morrison*, 120 S. Ct. 1740, 1768 (2000).

197. See *Lopez*, 514 U.S. at 562 (requiring an "independent evaluation" of Congress's attempt to invoke the Commerce Clause); see generally *TRIBE*, *supra* note 111, at 817–18; Merritt, *supra* note 140, at 683 (concluding that the *Lopez* opinion has toughened the rational basis standard rather than abandoning it).

from the deferential approach the court traditionally employed in reviewing congressional legislation.¹⁹⁸ Indeed, *Lopez* and *Morrison* demand a more searching inquiry into both the nature of the regulated activity and its impact on interstate commerce. To this end, the Court now subjects regulations enacted by Congress to an "independent evaluation" of the impact on interstate commerce.¹⁹⁹ *Morrison* illustrates this heightened judicial review in practice, as the statute there was supported by numerous legislative findings that documented the connection between the regulated activity and interstate commerce. *Lopez* may therefore signal a more active judiciary with respect to congressional legislation enacted under the Commerce Clause.²⁰⁰

2. Commercial Character

Even more important, the Rehnquist Court has attempted to curtail congressional power by restricting the Commerce Clause to the regulation of commercial activities.²⁰¹ The majority contends that the precedents in which intrastate activity was within Congress's commerce power all involved economic activity.²⁰² Indeed, that neither gun possession nor violence against women could be considered "economic" conduct con-

198. See, e.g., *United States v. Lopez*, 2 F.3d 1342, 1363 (5th Cir. 1993) ("Practically speaking, such findings almost always end the matter."); *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F. 3d 820, 849 (4th Cir. 1999) (en banc) ("*Lopez*, then, cannot reasonably be understood to contemplate absolute deference to legislative findings, either in theory or in practice."), *aff'd sub nom. United States v. Morrison*, 120 S. Ct. 1740 (2000); see also *supra* notes 135-137 and accompanying text.

199. See *Lopez*, 514 U.S. at 562.

200. See *id.* at 605-06 (Stevens, J., dissenting) (recalling early twentieth century decisions in which the Court used "exacting judicial scrutiny" of Congress's economic ends); *id.* at 608 (Souter, J., dissenting) ("[T]here is no reason to hope that the Court's qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began.").

201. See generally *TRIBE*, *supra* note 111, at 820 ("Indeed, the *Lopez* Court characterized the substantial effects test itself as limited to regulation of economic or commercial activity . . .").

202. See *Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); see also *United States v. Morrison*, 120 S. Ct. 1740, 1750 (2000) ("[W]here we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.").

trolled the Court's analysis. The concurrence in *Lopez* also confirmed the focus on the underlying commercial nature of the activity.²⁰³ One scholar suggests that by characterizing the precedents as involving *economic* intrastate activity, "the focus of the Court's attention . . . will not be simply on whether the cumulative or aggregated effects on interstate commerce of an intrastate activity can be called substantial, but rather on whether there is a colorable claim that the intrastate activity itself is 'commercial' or 'economic.'"²⁰⁴ This point is underscored by the fact that the Court disputes neither the 167 studies cited in Justice Breyer's *Lopez* dissent which detail the link between gun violence and interstate commerce,²⁰⁵ nor the voluminous record compiled by Congress in passing the VAWA which documents the impact violence against women has on the national economy.²⁰⁶ Put simply, even though a noneconomic activity, like gun possession and violence against women, may affect interstate commerce, such impacts are too attenuated to justify exercise of the Commerce Clause.

While *Lopez* has spawned a plethora of law review commentaries, lower courts—with the exception of the Fourth Circuit in *Brzonkala*—have yet to fully embrace its message.²⁰⁷ Some commentators have argued that *Lopez* is unremarkable precisely because the Court refused to alter the established tests.²⁰⁸ Others have suggested that *Lopez* may signal a meaningful departure from traditional Commerce Clause juris-

203. See *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("[U]nlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus.").

204. TRIBE, *supra* note 111, at 819.

205. See *Lopez*, 514 U.S. at 631–44 (appendix) (Breyer, J., dissenting).

206. See *Morrison*, 120 S. Ct. at 1759–63 (Souter, J., dissenting).

207. See Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 371 (2000) ("We find that lower courts have tended to limit *Lopez* to its facts, rather than using it as a springboard to enforce a more robust theory of federalism.").

208. See Litman & Greenberg, *supra* note 139, at 977 (arguing that the *Lopez* decision "will prove to have no more than a modest impact on the interpretation of the Commerce Clause and a negligible one on federalism jurisprudence"); Molly E. Homan, Comment, *United States v. Lopez: The Supreme Court Guns Down the Commerce Clause*, 73 DENV. U. L. REV. 237, 291 (1995) (arguing that *Lopez* is limited to its facts despite the Court's conscious attempt to curtail expansion of the Commerce Clause).

prudence.²⁰⁹ At any rate, both litigants and courts have been alerted to potential challenges to congressional commerce power on *Lopez* grounds.²¹⁰ As one circuit court has explained: "Apparent change in course has resulted in reexamination of the Commerce Clause in a variety of contexts, as litigants attempt to persuade the courts that *Lopez* has breathed new life into statutory challenges that would, in other times, have been rejected summarily."²¹¹

III. POST-*LOPEZ* CHALLENGES TO THE COMMERCE CLAUSE

Notwithstanding *Lopez*'s landmark ruling, lower federal courts have uniformly upheld the federal drug laws in the face of challenges on Commerce Clause grounds, just as they have dismissed challenges to other federal statutes. This Part reviews how lower courts have responded to *Lopez* challenges. Specifically, federal courts assert that *Lopez* has not altered the Commerce Clause analysis with respect to drug possession even if there is no intent to distribute.

A. *Federal Controlled Substances Act*

While regulating drugs seems to fall within the purview of state police power, Congress made the drug problem a national one in 1970 by asserting its Commerce Clause authority. It made federal power over drugs concurrent with the states' power by enacting the federal Controlled Substances Act

209. See, e.g., Epstein, *supra* note 139, at 167 ("*United States v. Lopez* may turn out to be a flash in the pan, or it may usher in a new age of constitutional restraint.").

210. See William Funk, *The Lopez Report*, ADMIN. & REG. L. NEWS, Summer 1998, at 1 (noting that after *Lopez*, federal circuit courts have referred to it nearly 400 times in addressing challenges to over forty federal laws). The article provides a list of the numerous cases in which a *Lopez*-type challenge has been raised.

211. *United States v. Parker*, 108 F.3d 28, 29 (3d Cir. 1997); see also *United States v. Murphy*, 107 F.3d 1199, 1211 (6th Cir. 1997) ("In the wake of the *Lopez* decision, courts across the country have been faced with repeated challenges to a variety of statutes, all of which are alleged to exceed congressional authority under the Commerce Clause."); *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 974 (4th Cir. 1997) (Luttig, J., dissenting) (emphasizing "the overarching change in Commerce Clause analysis wrought by *Lopez*."), *rev'd en banc*, 169 F.3d 820 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*, 120 S. Ct. 1740 (2000).

("CSA"),²¹² which prohibits manufacture, distribution, and possession of numerous illicit substances—including marijuana.²¹³ As the Commerce Clause has been interpreted, Congress can regulate intrastate drug activities, including the personal consumption of marijuana, on the theory that the activity nevertheless has a 'substantial effect' on interstate commerce.²¹⁴ The introduction to the CSA provides the following legislative findings:

A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flows, such as manufacture, *local distribution*, and possession, *nonetheless have a substantial and direct effect upon interstate commerce . . .*

Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

*Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.*²¹⁵

These prefatory remarks in the statute clearly demonstrate that Congress knew what sufficed under the Supreme Court's expansive Commerce Clause interpretation.

B. Rulings on the Controlled Substances Act— Distinguishing Lopez

Before *Lopez*, federal courts consistently upheld the constitutionality of the CSA's application to purely intrastate drug

212. 21 U.S.C. § 801-971 (1994).

213. See 21 U.S.C. §§ 841-44.

214. See *Proyect v. United States*, 101 F.3d 11, 14 (2d Cir. 1996) (holding that Congress did not exceed its Commerce Clause power by criminalizing marijuana possession for personal consumption).

215. § 801(3)-(6) (emphasis added).

activity.²¹⁶ Given the traditionally broad Commerce Clause interpretation, the constitutional issue scarcely warranted inquiry. Courts merely asked whether Congress had a rational basis for determining that a regulated activity substantially affected interstate commerce. In *United States v. Visman*,²¹⁷ for instance, the Ninth Circuit concluded that Congress had a rational basis for its finding that intrastate drug activities affect interstate commerce and thus held that Congress may regulate intrastate cultivation of marijuana plants discovered rooted in the soil.²¹⁸ The court stated that it would “defer to Congress’s findings that controlled substances have a detrimental effect on the health and general welfare of the American people and that intrastate drug activity affects interstate commerce.”²¹⁹ Similarly, the Fifth Circuit sustained the validity of the CSA after emphasizing that the judicial role is limited to ascertaining whether Congress had a rational basis for concluding that a class of activities affects interstate commerce, and if so “courts have no power ‘to excise, as trivial, individual instances’ of the class.”²²⁰ It reasoned that “there was a rational basis for these findings because they stemmed from statistical reports and extensive testimony as to the extent of the drug traffic and the unauthorized use of drugs.”²²¹

Even in the wake of *Lopez*, courts have not deviated from the traditional Commerce Clause analysis in upholding federal drug laws.²²² *Lopez*’s ruling prompted numerous challenges to

216. For pre-*Lopez* cases upholding the constitutionality of the CSA, see *United States v. Broadwell*, 870 F.2d 594 (11th Cir. 1989); *United States v. Atkinson*, 513 F.2d 38, 40 (4th Cir. 1975); *United States v. Maiden*, 355 F. Supp. 743, 747 n.3 (D. Conn. 1973) (“[I]f Congress can ban interstate distribution of marijuana under the Commerce Clause, it can reasonably conclude that intrastate prohibition is ‘essential to the effective control of the interstate incidents of such traffic.’”) (quoting 21 U.S.C. § 801(6)); *United States v. Sledge*, 346 F. Supp. 485, 486 (E.D. Wis. 1972).

217. 919 F.2d 1390 (9th Cir. 1990).

218. See *id.* at 1393.

219. *Id.* (citing *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1221–22 (9th Cir. 1972)).

220. *United States v. Lopez*, 459 F.2d 949, 952 (5th Cir. 1972) (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971) (citing *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968))).

221. *Id.* at 953.

222. See, e.g., *Gilbert v. United States*, 165 F.3d 470 (6th Cir. 1999); *United States v. Walker*, 142 F.3d 103, 111 (2d Cir. 1998), cert. denied, 525 U.S. 896 (1998) (upholding constitutionality of CSA because of specific congressional findings on intrastate drug activity’s impact on interstate commerce); *United States v.*

the constitutionality of the CSA from defendants convicted of various drug offenses. Courts, however, have uniformly rejected such challenges, holding that Congress can permissibly regulate purely intrastate drug activity. More importantly, challenges specifically to the federal ban on mere possession, including marijuana, have likewise failed.²²³ Just as their predecessors in the pre-*Lopez* era, these courts conclude that Congress had a rational basis for finding that intrastate drug activity substantially affects interstate commerce.

Generally, courts distinguish the federal gun possession statute struck down by the *Lopez* Court from federal drug laws on three grounds. First, they argue that unlike the GFSZA invalidated in *Lopez*, the CSA contains specific and extensive

Westbrook, 125 F.3d 996, 1009 (7th Cir. 1997) ("We join the other circuits that uniformly have held, after *Lopez*, that it was within the authority of the Congress under the Commerce Clause to create drug laws criminalizing narcotics transactions such as those found under 21 U.S.C. §§ 846 and 841."); *Tisor v. United States*, 96 F.3d 370, 375 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140 (1997) (concluding that intrastate distribution of methamphetamine substantially affects interstate commerce); *States v. Staples*, 85 F.3d 461, 463 (9th Cir. 1996) (holding that "drug trafficking is a commercial activity which substantially affects interstate commerce"); *United States v. Tucker*, 90 F.3d 1135, 1140-41 (6th Cir. 1996) (upholding the constitutionality of the CSA); *United States v. Lerebours*, 87 F.3d 582, 583-85 (1st Cir. 1996) (rejecting a *Lopez* challenge to the CSA by noting that "de minimis" individual cases under a particular statute do not alter jurisdiction); *United States v. Brown*, 72 F.3d 96, 97 (8th Cir. 1995) ("We note that intrastate drug activity affects interstate commerce."); *United States v. Wacker*, 72 F.3d 1453, 1475 (10th Cir. 1995) (stating that *Lopez* did not affect its previous holding that the CSA is constitutional because the "conduct regulated by the Drug Act clearly implicates interstate commerce, and Congress made explicit findings explaining the conduct's 'substantial and direct effect upon interstate commerce'" (quoting 21 U.S.C. § 801(3)-(6)); *United States v. D'Armond*, 65 F. Supp. 2d 1189, 1197-98 (D. Kan. 1999) ("So that it is clear, this court as well as every other federal court including the Tenth Circuit, considers the defendant's challenge . . . [to] the constitutionality of federal drug trafficking laws to be completely frivolous.").

223. See, e.g., *Proyect v. United States*, 101 F.3d 11 (2d Cir. 1996) (holding that Congress did not exceed its commerce power by criminalizing marijuana grown for personal consumption); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996) (holding that § 844 which prohibits possession of marijuana is a valid exercise of Congress's commerce power); *United States v. Leshuk*, 65 F.3d 1105, 1112 (4th Cir. 1995) (holding that "[i]n contrast to the firearm possession prohibited in the Gun Act, the intrastate drug activities regulated in the Drug Act are clearly tied to interstate commerce."); *United States v. Visman*, 919 F.2d 1390 (9th Cir. 1990) (holding that it is constitutionally permissible for Congress to regulate intrastate criminal cultivation of marijuana plants); *Kuromiya v. United States*, 37 F. Supp. 2d 717 (E.D. Pa. 1999) (holding CSA as applied to medical marijuana is a valid exercise of congressional power); *United States v. Watson*, 942 F. Supp. 1378 (D. Kan. 1996) (holding that Congress can constitutionally regulate intrastate possession of crack cocaine).

congressional findings as to the substantial effect single state drug activities have on interstate commerce. Second, the courts conclude that in contrast to gun possession, intrastate drug possession is inherently commercial. Third, courts hold that under the “class of activities” theory, or the *Wickard* doctrine, Congress may regulate a trivial instance of intrastate drug activity, such as possession, because it falls within a broader activity that Congress believed to affect interstate commerce.

First, federal courts rely on the specific congressional findings contained in the CSA to distinguish the GFSZA struck down in *Lopez*.²²⁴ Presumably, these courts reason that the lack of legislative findings in the gun statute was the controlling factor in *Lopez*. In *United States v. Tisor*,²²⁵ the Ninth Circuit rejected a constitutional challenge to the CSA brought by a defendant who was convicted of selling methamphetamine. The court reasoned that, unlike the statute in *Lopez*, the CSA contains explicit congressional findings on the interstate impact of intrastate drug trafficking.²²⁶ Similarly, a district court highlighted the contrast between the absence of congressional findings in the GFSZA and the presence of findings in the CSA as a principal basis for the latter’s constitutionality.²²⁷ In *United States v. Cannabis Cultivators Club*,²²⁸ the district court in part justified enjoining the cannabis clubs by relying heavily on the CSA’s legislative findings to determine that the statute was a valid exercise of congressional authority under the Commerce Clause. And further reflecting the pre-*Lopez* analysis, the Second Circuit stated that courts “must defer to a congressional finding that a regulated activity affects interstate

224. See 21 U.S.C. § 801 (1994); see also *United States v. Genao*, 79 F.3d 1333, 1337 (2d Cir. 1996) (“Congress has made specific findings that local narcotics activity has a substantial effect on interstate commerce.”); *United States v. Leshuk*, 65 F.3d 1105, 1112 (4th Cir. 1995) (“This Court, as well as other courts, has relied upon these findings in concluding that Congress may regulate intrastate drug activities under the Commerce Clause.”).

225. 96 F.3d 370 (9th Cir. 1996), cert. denied, 519 U.S. 1140 (1997).

226. See *id.* at 374.

227. See *Kuromiya*, 37 F. Supp. 2d at 724.

228. 5 F. Supp. 2d 1086, 1097 (N.D. Cal. 1998), *rev’d in part sub nom.* *United States v. Oakland Cannabis Buyers’ Coop.*, 190 F.3d 1109 (9th Cir. 1999), cert. granted, No. 00-151, 2000 WL 1053564 (US Nov. 27, 2000).

commerce if there is any rational basis for such a finding.²²⁹

Second, courts distinguish *Lopez* based on the supposition that all drugs, unlike guns, have a commercial component.²³⁰ As the Second Circuit asserted, the "difference between [the GFSZA] and the manufacture and distribution of controlled substances is striking. These activities are commercial by their very nature. . . ."²³¹ Likewise, the *Cannabis Cultivators Club* court distinguished the local gun possession in *Lopez* from local distribution of marijuana by cannabis clubs on the ground that the latter involves distribution and *a fortiori* commerce.²³² In sustaining the CSA's marijuana prohibition, a federal district court in Pennsylvania concluded that "marijuana trafficking, whether legal or illegal, falls within the commerce clause because of its inherently commercial and interstate nature."²³³ Because the overwhelming majority of drug cases before the courts concerns possession with intent to distribute, a court can persuasively contend that *Lopez's* gun possession is distinguishable from drug possession. For instance, *Lopez's* focus on the commercial character of the regulated activity means that Congress cannot regulate gun possession in a school zone, though it can reach the possession of drugs with an intent to distribute in the same area.²³⁴

229. *Proyect v. United States*, 101 F.3d 11, 12 (2d Cir. 1996) (quoting *Preseault v. ICC*, 494 U.S. 1, 17 (1990)) (citation and internal quotation marks omitted).

230. While most cases address distribution of drugs, the courts that have considered the personal possession of drugs such as marijuana do not attempt to claim that intrastate personal use of drugs is commercial. Rather, they argue that Congress can nevertheless reach such activity because it is within a class of activities that Congress found to affect interstate commerce. See *infra* text accompanying notes 235–246.

231. *Proyect*, 101 F.3d at 13 ("The Controlled Substances Act concerns an obviously economic activity.") (quoting *United States v. Genao*, 79 F.3d 1333, 1337 (2d Cir. 1996)).

232. See *Cannabis Cultivators Club*, 5 F. Supp. 2d at 1098.

233. *Kuromiya v. United States*, 37 F. Supp. 2d 717, 723 (E.D. Pa. 1999).

234. Post-*Lopez* courts have routinely upheld the Drug-Free-School Zones Act, which increases the sentence of a person who is convicted of possession of a controlled substance with intent to distribute within 1000 feet of a school. See 21 U.S.C. § 860(a) (1994); see also *United States v. Orozco*, 98 F.3d 105, 107 (3d Cir. 1996) (contrasting the commercial nature of drug trafficking with the noncommercial nature of firearm possession); *United States v. Jackson*, 111 F.3d 101 (11th Cir. 1997) (making the same comparison of drug trafficking to firearm possession).

Third, courts apply the "class of activities" theory to sustain Congress's power over purely intrastate activity that has no, or only an attenuated, connection to interstate commerce. In doing so, these courts rely on the following language from *Lopez*:

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. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.²³⁵

Additionally, *Lopez* cited the following statement made by the *Wirtz* Court in construing the *Wickard* doctrine and trivial impacts on interstate commerce: "[W]here a *general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under the statute is of no consequence."²³⁶ Based on the above language, circuit courts maintain that *Lopez* did not expressly repudiate the class of activities doctrine.²³⁷

The Fourth Circuit's post-*Lopez* decision in *United States v. Leshuk*²³⁸ illustrates how courts apply this theory to support federal regulation of intrastate and noncommercial marijuana possession. In *Leshuk*, the court upheld the constitutionality of the CSA as applied to marijuana cultivation for personal use by analogizing to home wheat production for personal consumption.²³⁹ It reasoned that Congress can regulate personal cultivation and consumption of marijuana simply because it falls within a class of activities with which Congress was concerned.²⁴⁰ In other words, marijuana possession, like wheat

235. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

236. *Id.* at 558 (first emphasis added) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)).

237. *See United States v. Leshuk*, 65 F.3d 1105, 1112 (4th Cir. 1995); *United States v. Proyect*, 101 F.3d 11, 13 (2d Cir. 1996).

238. 65 F.3d 1105 (4th Cir. 1995).

239. *See id.* at 1112.

240. *See id.* (noting that Congress made explicit findings that the intrastate manufacture, use, and possession of drugs is part of a class of activities that affect interstate commerce); *see also Tisor v. United States*, 96 F.3d 370, 375 (9th Cir. 1996) ("The challenged laws are part of a wider regulatory scheme criminalizing interstate and intrastate commerce in drugs.").

production, is an essential part of a larger economic regulatory scheme and is therefore "economic activity."²⁴¹ Under this theory, then, it is immaterial that marijuana possession may not in itself affect interstate commerce.²⁴²

In the drug context, courts generally view all intrastate manufacturing, distribution, and possession of drugs as the class of activities to be aggregated. In *Leshuk*, for instance, the court adhered to a broad class of activities because "Congress made detailed findings that intrastate manufacture, distribution, and possession of controlled substances, as a class of activities" directly and substantially impact interstate commerce.²⁴³ The Second Circuit similarly refused to restrict the class of activities to the cultivation of marijuana.²⁴⁴ In *Cannabis Cultivators Club*, the court asserted that even if the class of activities were narrowed so that it was beyond Congress's concern—namely legal distribution—there would still be an interstate impact because it cannot be made certain that the marijuana would originate or remain in state.²⁴⁵ The court further reasoned that "[t]his case, unlike *Lopez*, is not about mere possession but rather about distribution, a class of activities that, even if done for the humanitarian purpose of serving the legitimate health care needs of seriously ill patients, can affect interstate commerce."²⁴⁶

241. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 835 n.7 (4th Cir. 1999) (en banc) (distinguishing gender-motivated crime from drugs and wheat because the former is not an essential part of a larger regulatory economic scheme), *aff'd*, *United States v. Morrison*, 120 S. Ct. 1740 (2000). For more discussion on this distinction, see *infra* note 286.

242. See, e.g., *Leshuk*, 65 F.3d at 1112.

243. *Leshuk*, 65 F.3d at 1112.

244. See *United States v. Proyect*, 101 F.3d 11, 14 (2d Cir. 1996).

245. See *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1098 (N.D. Cal. 1998) (stating that even if "all marijuana was cultivated locally, distributed locally, and consumed locally by California residents" it does not preclude an impact upon interstate commerce), *rev'd in part sub nom.* *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999), *cert. granted*, No. 00-151, 2000 WL 1053564 (US Nov. 27, 2000). Citing an evidentiary concern, the court stated that it would be impractical to subject every case to an individual hearing as to whether the proscribed action affected interstate commerce. See *id.*

246. *Id.*

IV. *LOPEZ'S APPLICATION TO MEDICAL MARIJUANA*

Under *Lopez's* analytical framework, medical marijuana, as established within a legal state regime, is not an essential part of a larger regulation of economic activity. While Congress has expressly stated in the CSA that intrastate drug activity substantially affects interstate commerce, the Court has made clear that legislative findings do not end the matter and, more importantly, that it will closely scrutinize such assertions of interstate impact. Rather than undermine the federal statutory scheme established by the CSA, state medical marijuana laws do not substantially affect the illicit interstate market in marijuana. In fact, a highly regulated state system may actually diminish the illegal interstate market by reducing demand. Also, the Commerce Clause is now susceptible to an ad hoc determination of what substantially affects interstate commerce, thus allowing the Court's political judgment to affect its decision making. Consequently, the majority may not be willing to extend *Lopez* to a states' right it finds ideologically unpalatable.

A. *The Majority's New Commerce Clause: Analytical Framework*

Clearly, *Lopez* and *Morrison* endeavored to apply "judicially enforceable limits" to the Commerce Clause given the federalism principles of our government.²⁴⁷ The majority believes that the judiciary must reassert its role in placing substantive limits on an enumerated power that, in its view, has expanded to an untenable degree.²⁴⁸ Yet it attempts to do so within the framework of existing precedents under which Congress's commerce power appeared limitless. To this end, the majority has offered a confusing, and perhaps unworkable, framework to determine whether an intrastate activity substantially affects interstate commerce. In light of the Court's vague guidance, the lower courts' failure to adhere to *Lopez's* analysis is understandable. As the most problematic develop-

247. See *United States v. Lopez*, 514 U.S. 549, 566 (1995).

248. See, e.g., *United States v. Morrison*, 120 S. Ct. 1740, 1754 ("The Constitution requires a distinction between what is truly national and what is truly local.").

ment, the Court's novel distinction between commercial and noncommercial activities has been criticized by the dissent²⁴⁹ and often ignored by lower courts.²⁵⁰ But as Chief Justice Rehnquist observed in *Morrison*, "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."²⁵¹

The guideposts that the Court explicitly offers are not particularly instructive. In striking down the civil remedy provision of the Violence Against Women Act, the Court in *Morrison* relied upon the four reasons articulated in *Lopez* for invalidating the Gun-Free School Zones Act: (1) the gun possession statute was "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";²⁵² (2) the statute lacked an "express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce";²⁵³ (3) neither the statute nor the legislative history has legislative findings explaining the impact gun possession near schools had on interstate commerce;²⁵⁴ and (4) the connection between gun possession and interstate commerce was too attenuated in light of the federalism concerns.²⁵⁵ Under the Court's broader conception of "commerce," Congress could presumably continue to regulate "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."²⁵⁶ That is, unlike the wheat in *Wickard*, the gun possession in *Lopez* "is not an essen-

249. See *supra* Part II.E.

250. See, e.g., *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 972 (4th Cir. 1997) (reviewing circuit decisions upholding regulation of noncommercial activities after *Lopez*), *rev'd en banc*, 169 F.2d 820 (4th Cir. 1999); *Terry v. Reno*, 101 F.3d 1412, 1417-18 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997) (upholding constitutionality of the Freedom of Access to Clinic Entrances Act by concluding in part that *Lopez* did not limit Congress's commerce power to economic activity); *National Assoc. of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (upholding constitutionality of the Endangered Species Act's application to the endangered Delhi Sands Flower-Loving Fly because *Lopez* does not limit Commerce Clause to economic activity).

251. *Morrison*, 120 S. Ct. at 1750.

252. *Morrison*, 120 S. Ct. at 1749-50 (quoting *Lopez*, 514 U.S. at 561).

253. *Id.* at 1750-51 (quoting *Lopez*, 514 U.S. at 562).

254. See *id.* at 1751.

255. See *id.*

256. *Lopez*, 514 U.S. at 561 (emphasis added).

tial part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²⁵⁷ Thus, “[e]ven *Wickard* . . . involved economic activity in a way that the possession of a gun in a school zone does not.”²⁵⁸

Accordingly, to the extent one exists, the central principle that seems to encompass the Court’s analytical framework for evaluating whether an intrastate activity substantially affects commerce involves two inquiries.²⁵⁹ Bearing in mind the majority’s admission that “a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty,”²⁶⁰ the following seems to best capture the majority’s broadest test for what constitutes commercial conduct. First, it is necessary to identify the *larger economic activity* under which Congress seeks to regulate the intrastate conduct. For example, the civil remedy provision in the Violence Against Women Act failed because gender-motivated violence was neither commercial in itself nor was it part of a larger economic regulatory scheme. Second, it must be determined whether the intrastate activity is *an essential part of larger economic activity*. In other words, a determination of whether an activity is “commercial” depends upon its relation to the larger economic activity with which Congress was concerned by enacting the statute. For example, Congress cannot regulate gun possession near schools but can regulate possession of assault weapons because only the latter are an essential part of an interstate market in the illegal trafficking of guns that Congress seeks to control.

1. The Larger Regulation of Economic Activity

The federal ban on marijuana manufacture, distribution, and possession is part of the CSA.²⁶¹ In adopting this statutory scheme, Congress made explicit formal findings regarding the

257. *Id.*

258. *Id.* at 560.

259. It should be noted that a statute containing an express jurisdictional element avoids this analysis. But Congress’s present ability to regulate medical marijuana under the Controlled Substances Act is dependent upon a jurisdictional element.

260. *Lopez*, 514 U.S. at 566.

261. *See supra* Part III.A.

interstate impact of local drug activity: "manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce."²⁶² Such legislative findings would have likely been sufficient before *Lopez* altered the deferential standard to which the Court traditionally adhered.²⁶³ *Lopez*, however, reaffirmed that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."²⁶⁴

If *Lopez* equivocated as to the role performed by legislative findings, *Morrison* makes clear that such findings are of significantly less importance. In *Morrison*, the Court ended speculation that Congress need only provide plausible findings of a regulated activity's impact on interstate commerce for a statute to pass constitutional muster. That Congress's 1994 amendment to the Gun-Free School Zones Act added legislative findings did not affect the Court's commerce analysis.²⁶⁵ And the Court did not dispute the overwhelming evidence presented in Justice Breyer's dissent that traced gun violence in schools to the national economy.²⁶⁶ As the majority in *Morrison* observed, "[i]n contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."²⁶⁷ The Court thereafter announced that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."²⁶⁸

Congress's findings that all intrastate drug activity substantially affects interstate commerce should be evaluated under the rigid *Morrison* and *Lopez* standards. Federal courts

262. 21 U.S.C. § 801(3) (1994).

263. See, e.g., *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 169 F.3d 820, 849 (4th Cir. 1999) (en banc) (stating that *Lopez* dictates a departure from "absolute deference to legislative findings"), *aff'd sub nom. United States v. Morrison*, 120 S. Ct. 1740 (2000).

264. *Lopez*, 514 U.S. at 557 n.2 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in the judgment)); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring) (stating that the question of whether a regulated activity sufficiently affects interstate commerce is "ultimately a judicial rather than a legislative question").

265. See *Lopez*, 514 U.S. at 563 n.4.

266. See *id.* at 631-43 (appendix) (Breyer, J., dissenting).

267. *Morrison*, 120 S. Ct. at 1752.

268. *Id.*

that have addressed *Lopez* challenges to the CSA remain wedded to the pre-*Lopez* principles of Commerce Clause jurisprudence and thus eagerly accept findings that local possession of drugs has an interstate impact.²⁶⁹ But a blanket statement by Congress that all intrastate drug activity, including possession, affects the interstate illegal market in drug trafficking conflicts with *Lopez's* and *Morrison's* basic mandate to scrutinize findings against the backdrop of federalism principles. As the Court has warned, virtually any intrastate activity can have some impact on interstate commerce. Findings could therefore be used by Congress "to completely obliterate the Constitution's distinction between national and local authority."²⁷⁰

Congress's purpose in enacting the CSA, moreover, is inapplicable to the context of medical marijuana. The CSA's findings demonstrate a congressional concern with the interstate market in illicit drugs. Congress predicated its need to regulate purely local drug activity on the grounds that (1) many drugs distributed locally may originate in other states; (2) drugs manufactured locally often enter the interstate market; and (3) possession of drugs typically results from an interstate source.²⁷¹ Of course, certain drugs by their nature travel interstate either before or after manufacture and Congress can, accordingly, regulate those particular drugs as part of its control over interstate drug trafficking. But medical marijuana does not necessarily implicate an interstate market. It can be grown, distributed, and consumed locally. In a well-regulated legal state market that authorizes a discrete set of qualified persons or their caregivers to grow and consume, but not sell, marijuana, such drugs can remain confined to one state. Additionally, where a state has implemented regulations that prevent abuse of the medical marijuana laws, a local distribution system confined to state residents will not "contribute to swelling the interstate traffic" in marijuana.²⁷²

269. See *supra* Part III.B.

270. See *Morrison*, 120 S. Ct. at 1752 (citing *Lopez*, 514 U.S. at 564).

271. See 21 U.S.C. § 801(3) (1994).

272. 21 U.S.C. § 801(4).

2. Essential Part of a Larger Regulation

In light of the purposes of the CSA, medical marijuana cannot be considered an essential part of a larger regulation of economic activity. Under the *Wickard* line of authority, which the majority would grudgingly preserve, Congress may regulate intrastate “activities that arise out of or are connected with a commercial transaction.”²⁷³ The premise underlying *Wickard*'s aggregate effects principle is that federal control over trivial instances of intrastate activity is necessary and proper in order to effectuate Congress's control over the interstate market. As the central feature of its analysis, the Court in *Lopez* and *Morrison* has construed *Wickard* to mean that Congress may regulate an intrastate activity if it is an essential part of a larger regulation. The “class of activities” theory is another way to conceptualize the aggregation principle of *Wickard*: “Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.”²⁷⁴ Although *Lopez* cites to this principle in its review of the expansive interpretations of the Commerce Clause, it has limited this principle to regulation of essential intrastate activities that, if not controlled, could undermine the regulatory scheme.²⁷⁵

Hence, the Gun-Free School Zones Act in *Lopez* failed because it was not an essential part of an economic regulation. While Congress has enacted several regulations concerning firearm possession, the gun possession statute differed from those laws in that it lacked an express jurisdictional element and was not essential to the control of the illegal interstate gun market. Following *Lopez*'s direction, lower courts distinguish unlawful intrastate possession of a machine gun from unlawful possession of a handgun near a school on the theory that the former “is integral to a larger federal scheme for the regulation in firearms—an economic activity with strong interstate ef-

273. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

274. *Perez v. United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

275. *Lopez*, 514 U.S. at 561.

fects.²⁷⁶ The Seventh Circuit, for example, has held that a rational basis exists for the prohibition against intrastate machine gun possession “to effectuate § 922(o)’s purpose of freezing the number of legally possessed machine guns at 1986 levels”²⁷⁷ Thus, under the aggregate effects principle, Congress can regulate simple machine gun possession, like simple drug possession, because it effectuates federal control over the illegal interstate market. In *United States v. Taylor*,²⁷⁸ the Seventh Circuit recently relied upon *Morrison*’s framework to uphold the constitutionality of the federal carjacking statute.²⁷⁹ It contrasted the criminal activity covered by that statute with the criminal activity in *Lopez* and *Morrison*, concluding that the carjacking statute was an essential part of a larger economic regulation.²⁸⁰ In another context, Congress may still regulate the taking of a single endangered species under the Endangered Species Act²⁸¹ because it is an “integral part of the overall federal scheme to protect” the nation’s species.²⁸²

In this respect, the *Wickard* proposition of aggregate effects is inapposite to medical marijuana. There, the federal statute sought to control the volume of wheat moving in interstate commerce.²⁸³ The *Wickard* Court reasoned that home consumption of wheat would either create a surplus in the interstate market or reduce demand because of numerous farmers consuming their own wheat that they would otherwise purchase in the interstate market.²⁸⁴ Similarly, by enacting the CSA, Congress was concerned that “[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.”²⁸⁵ Both statutes sought to control the supply and demand in the market, and therefore,

276. *United States v. Franklyn*, 157 F.3d 90, 94 (2d Cir. 1998); *see also id.* at 95 (citing cases upholding prohibition against machine gun possession in the wake of *Lopez*).

277. *United States v. Kenney*, 91 F.3d 884, 890 (7th Cir. 1996).

278. *United States v. Taylor*, 226 F.3d 593 (7th Cir. 2000).

279. 18 U.S.C. § 2119 (1994 & Supp. IV 1998).

280. *See Taylor*, 226 F.3d at 599.

281. 16 U.S.C. §§ 1531–1544 (1994 & Supp. IV 1998).

282. *See Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000); *see also id.* at 497 (“It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.”) (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981)).

283. *See Wickard v. Filburn*, 317 U.S. 111, 115 (1942).

284. *See id.*

285. 21 U.S.C. § 801(4) (1994).

it is necessary to regulate the intrastate activity of mere possession. As such, *Wickard* likely does not affect Congress's ability to reach personal cultivation and possession of marijuana on the theory that the regulation is necessary in order to control the larger illicit interstate market in marijuana. Under *Lopez's* analysis, the intrastate activity may be essential to a larger economic scheme. Like the wheat in *Wickard*, failure to control trivial instances of intrastate activity may undercut Congress's goal.²⁸⁶

By contrast, state medical marijuana laws would actually facilitate Congress's purpose underlying the CSA. Growing, distributing, and consuming marijuana for medical reasons pursuant to state law implicates fundamentally different market concerns than wheat. By providing a legal market for a narrow class of users, states help to decrease demand for marijuana in the illegal market. For example, a legal state medical marijuana regulatory system, which supplies the drug based on health needs, eliminates the need to purchase the drug on the illicit market. Of course, this scenario presupposes that certain safeguards are implemented to ensure that the distribution of the drug does not extend to non-qualified users. In the absence of a state distribution system, private clubs or individuals would be required to cultivate their own supply rather than purchasing it from illicit dealers. A commercial distribution system that is highly regulated would help to deter resort to the illicit market. Further, as a practical matter, many of the beneficiaries of medical marijuana may be too old or ill to grow their own supply and thus have to rely on the cannabis clubs. Ideally, from the perspective of a Commerce Clause analysis, state governments would develop a distribution system, using marijuana seized from the illegal market, and dispense it to qualified patients.²⁸⁷ Accordingly, the contention that Congress must regulate simple drug possession in

286. As a further illustration of this point, the Fourth Circuit in *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 835-36 n.7 (4th Cir. 1999) (en banc), distinguished gender-motivated violence against women from intrastate cultivation and possession of marijuana for personal use on the basis that only the latter is essential to a larger economic regulatory scheme. Thus, under *Lopez* one intrastate activity, marijuana possession, is economic in a general sense and the other is noneconomic.

287. See Carey Goldberg, *Maine Sees Medical Use For its Seized Marijuana*, N.Y. TIMES, Mar. 14, 2000, at A16.

order to effectuate regulation of the interstate commercial market is unavailing with respect to medical marijuana.²⁸⁸

Failing to limit Congress's authority over intrastate activity to essential parts of a larger regulation creates a perverse incentive. If, for example, Congress could regulate any intrastate activity by virtue of enacting the broadest possible statute covering economic activity, without more, it could reach conduct such as mere gun possession.²⁸⁹ It could then, as it did in the CSA, simply declare in the statute that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."²⁹⁰ Lower courts broadly applying the class of activities doctrine have badly missed the Supreme Court's narrowing of this principle to essential regulations. To assert that the activity is merely a part of a class of activities without inquiry into its necessity to the overall scheme is to overlook the central feature of *Lopez's* analysis of what constitutes economic activity in a broad sense. In this regard, the *Cannabis Cultivators Club* court's reliance upon the class of activities theory to uphold the CSA as applied to the cannabis clubs is misplaced.²⁹¹

B. Federalism: Reining in Federal Power

Federalism principles also serve as an additional consideration cited by the Court in its independent evaluation of whether an intrastate activity substantially affects interstate commerce. In one sense, all intrastate activities have some impact on interstate commerce. Medical marijuana, too, may affect interstate commerce, however attenuated. But its impact pales in comparison to the effects gun possession near schools and violence against women have on the national economy. The Court's refusal to allow either of those admittedly

288. See 21 U.S.C. § 801 (1994) (stating *inter alia* that local distribution and possession adds to the supply of the interstate market and that it is impossible to differentiate intrastate and interstate drugs).

289. See, e.g., *United States v. Morrison*, 120 S. Ct. 1740, 1775 (2000) (Souter, J., dissenting) (speculating that under the majority's analysis, Congress could save the Violence Against Women Act "by including it, or much of it, in a broader 'Safe Transport' or 'Workplace Safety' act").

290. 21 U.S.C. § 801(6).

291. See *supra* notes 245–246 and accompanying text.

real impacts on the national economy to control its decision was largely on account of our dual system of government.²⁹² It reasoned that criminal law and family law are traditional areas of state concern.

Both *Lopez* and *Morrison* comport with the general trend of the Court to curtail federal power in favor of the states.²⁹³ In fact, *Lopez* and *Morrison* are as much about federalism as they are about the Commerce Clause.²⁹⁴ This view has considerable support in the decisions. In *Lopez*, Chief Justice Rehnquist's majority opinion, for instance, commences with a discussion of basic federalism principles. As the Kennedy–O'Connor concurrence emphasizes: "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."²⁹⁵ Analogously, in *Morrison*, the majority reiterated that "[t]he Constitution requires a distinction between what is truly national and what is truly local."²⁹⁶ The statements make clear that the Court will tolerate intrusion on states' domain only when there are strong federal interests, such as a substantial connection to interstate commerce.²⁹⁷

The federalism concerns underlying *Lopez* and *Morrison* are equally applicable to medical marijuana. Under its general police power, states have the right to control public health, safety, welfare, and morals.²⁹⁸ Medical marijuana implicates

292. See *Morrison*, 120 S. Ct. at 1752.

293. See cases cited *supra* note 40.

294. See generally Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Jurisprudence*, 73 S. CAL. L. REV. 741 (2000); Peter M. Shane, *Federalism's 'Old Deal': What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1 (1999); Mathew D. Adler, *The New Etiquette of Federalism*, 1998 SUP. CT. REV. 71 (1998); Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95 (1998); Gene Nichol, *The New and Unfortunate Face of Judicial Federalism*, 23 OHIO N.U. L. REV. 1197 (1997); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125 (1995).

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

296. *Morrison*, 120 S. Ct. at 1754.

297. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

298. See *Berman v. Parker*, 348 U.S. 26, 32 (1954).

both the health and welfare of states. Furthermore, federalism principles are particularly acute in this context. Unlike *Morrison* and *Lopez*, which involved the federal government implementing a supplemental federal law, here the federal law precludes states from carrying out their will because of federal intrusion. As recent cases underscore, this Court appears increasingly concerned with federal power intruding upon state sovereignty. With medical marijuana laws, states have expressly authorized the use and possession of marijuana for certain medical uses. Yet federal law dictates another outcome, thereby displacing state policy choices. Where Congress acts pursuant to a legitimate exercise of an enumerated power, it can, of course, constitutionally preempt state law under the Supremacy Clause. But the Court has nevertheless attempted to enforce limits on Congress's commerce power to protect the states by preventing Congress from exercising a general police power.

If the Court upholds the CSA as applied to medical marijuana, it will do so in contravention of its federalism principles. The Court's Commerce Clause analysis is vague enough to allow the Court to uphold federal power when they believe it wise and invalidate it when they disagree. Such an approach is in stark contrast to the pre-*Lopez* era when all congressional regulations under the Commerce Clause were valid. To sustain Congress's power over such activity, in light of *Lopez* and *Morrison*, is to apply a selective states' rights jurisprudence. Medical marijuana offers the Court a significant opportunity to apply meaningful limits to the Commerce Clause, irrespective of preconceptions about drugs.

CONCLUSION

As long as Congress's Commerce Clause authority extends to the local cultivation, distribution, and possession of marijuana, state medical marijuana laws cannot be fully implemented. Because the political climate surrounding drugs makes legislative or administrative reform impractical, resolution of this federal-state conflict may have to be addressed in the judicial forum. State medical marijuana laws present the Supreme Court with an opportunity—one in which the states' interests are compelling—to apply its judicially enforceable limits to curtail federal power over a wholly intrastate activity.

Even though federal commerce power is plenary when validly exercised, and thus can preempt a contrary state law, state interests undoubtedly played a vital role in both *Lopez* and *Morrison*.

Here, the states have a substantial interest in providing compassionate relief to their residents by allowing marijuana for medicinal purposes. Absent a strong countervailing federal interest, Congress should not impose its will, in the form of a uniform policy, on all fifty states. States may, for instance, determine that expending resources to prevent patients with debilitating illnesses from a treatment option is neither financially nor ethically sound. When this activity does not substantially affect the interstate market, states should serve as laboratories of democracy and be free to implement their own policy. If the Rehnquist Court desires a limited Commerce Clause, then it ought to restrict Congress's authority to truly interstate impacts, not intrastate medical marijuana programs.

The issue of medical marijuana, however, may test whether other ideological concerns—namely drugs—trump the professed states' rights philosophy of the Court. Because the Commerce Clause analysis now provides for an ad hoc determination of whether an activity is "commercial," it lends itself to a selective process of what *actually* substantially affects commerce. While Congress historically determined what affected interstate commerce sufficiently to justify federal power, the Rehnquist Court has added a stronger judicial presence in this decision. It remains to be seen whether the Court's recent decisions portend, in the name of states' rights, a rollback of important federal legislation protecting civil rights and the environment, or instead enunciate a principled approach to addressing Congress's Commerce Clause authority. Whatever the ultimate impact may be, federal power should no longer reach medical marijuana in states that have established a legal regime.

