READING 6
The Commerce Power

Constitutional Law for a Changing America

Institutional Powers and Constraints

11th Edition

Lee Epstein

Washington University in St. Louis

Kevin T. McGuire

University of North Carolina at Chapel Hill

Thomas G. Walker

Emory University

SAGE | CQPRESS

Wickard v. Filburn

317 U.S. 111 (1942)
https://caselaw.findlaw.com/us-supreme-court/317/111.html
Vote: 9 (Black, Byrnes, Douglas, Frankfurter, Jackson, Murphy, Reed, Roberts, Stone)
0

OPINION OF THE COURT: ***Jackson***

FACTS:

The 1938 Agricultural Adjustment Act, as amended, allowed the secretary of agriculture to establish production limits for various grains. Under these limits, acreage allotments were assigned to the individual farmer. The purpose of the law was to stop wild swings in grain prices by eliminating surpluses and shortfalls.

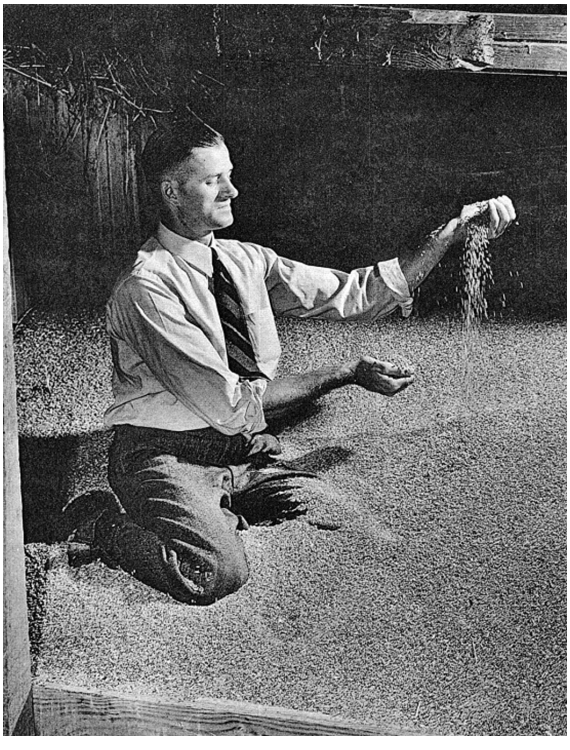
Roscoe Filburn owned a small farm in Montgomery County, Ohio. For many years he raised dairy cattle and chickens, selling the milk, poultry, and eggs the farm produced. He also raised winter wheat on a small portion of his farm. He sold some wheat and used the rest to feed his cattle and chickens, make flour for home consumption, and produce seeds for the next planting.

In July 1940 Secretary of Agriculture Claude R. Wickard set the wheat production limits for the 1941 crop. Filburn was allotted 11.1 acres to be planted in wheat with a yield of 20.1 bushels per acre. He planted not only his allotted acres but also some other land to produce the wheat for home consumption. In total Filburn planted 23 acres in wheat, from which he harvested 239 bushels more than the government allowed him. For this excess planting Filburn was fined $117.11. He refused to pay the fine, claiming that Congress had exceeded its powers under the commerce clause by regulating the planting by an individual of wheat on his own property for on-farm consumption. The lower court ruled in Filburn's favor, and Secretary Wickard appealed.

ARGUMENTS:

For the appellant, Claude R. Wickard, secretary of agriculture, et al.:

- The quota on wheat is a valid exercise of the commerce power. That the law penalizes excess wheat, which is available for marketing but is consumed as feed, seed, or household food, does not make it invalid. Because excessive wheat affects national price and supply, Congress reasonably concluded that orderly interstate marketing and reasonable interstate prices could best be achieved if the quota system



Courtesy of Mary Lou Spurgeon

Roscoe Filburn, the Ohio farmer who unsuccessfully argued that Congress lacked the constitutional power to regulate the production of wheat intended for on-farm consumption.

applied to all wheat available for marketing and not just to that actually sold.

- The quota system was also adopted because of the practical difficulties in devising an enforcement system limited to wheat sold. It would be impossible for the government to check on all sales by the more than one million wheat producers. Under the current system, enforcement is feasible because all the government needs to know is the amount of acreage planted by the farmer and the average yield per acre.
- Under the Constitution, Congress can choose whatever means it deems appropriate and necessary to carry out its policy of keeping excess wheat off the interstate market under its commerce clause power.

For the appellee, Roscoe Filburn:

- Neither interstate nor intrastate commerce, nor an intermingling between the two, is at issue here. It involves wheat that a farmer may consume on his own farm for food, seed, or feed. It at no time moves into commerce between the states, nor even in a state. It is under the control of the farmer and has not moved into any channel of trade; it is private property.
- The government insists that wheat used on a farm for the farmer's own purposes is in competition with commercial feed and seeds. This is too absurd to take seriously. This is akin to saying that because person A manufactures a radio, A cannot use the radio in his own home but must instead buy a radio from person B so that B can continue his business and B must buy a radio from A to keep A in business. Neither party can have the benefit of his own product.

MR. JUSTICE JACKSON DELIVERED THE OPINION OF THE COURT.

It is urged that under the Commerce Clause of the Constitution, Article I, §8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in *United States v. Darby* sustaining the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives, so that as related to wheat, in addition to its conventional meaning, it also means to dispose of "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. Wheat produced on excess acreage is designated as "available for marketing" as so defined, and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty, or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most "indirect." In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a "necessary and proper" implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption, rather than of marketing, is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons v. Ogden.* He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes.

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting

almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference, instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. 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.

It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress. *United States v. Knight Co.* These earlier pronouncements also played an important part in several of the five cases in which this Court later held that Acts of Congress under the Commerce Clause were in excess of its power.

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden.* . . .

Whether the subject of the regulation in question was "production," "consumption," or "marketing" is . . . not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect." . . .

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many other similarly situated, is far from trivial.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices. . . .

Reversed.

LIMITS ON THE COMMERCE POWER: THE REPUBLICAN COURT ERA

As the nation entered the 1990s, commerce clause jurisprudence seemed to be a settled matter. Since 1937, the Court had persevered in its commitment to an expansive view of the federal government's commerce powers.

Under the surface, however, the prospects for change were mounting. The nation had turned decidedly in the direction of the Republicans by electing presidents of that party in three successive elections (1980, 1984, and 1988). Republican President Ronald Reagan had the opportunity to appoint four new justices to the Court, and George H. W. Bush added two more. The most consequential of those appointments was Bush's 1991 selection of conservative justice Clarence Thomas to replace the retiring Thurgood Marshall. This appointment tipped the scales in favor of justices who were sympathetic to the interests of the states and less supportive of expansive federal regulation.

Even so, the Court's decision in *United State v. Lopez* (1995) came as somewhat of a surprise. For the first time in the modern era the Court invalidated a federal statute as falling outside the authority granted to Congress by the commerce clause. In addition to explaining the rationale for this outcome, Chief Justice Rehnquist's majority opinion nicely reviews the evolution of the Court's commerce clause doctrine.

Lopez is on the next page. Keep reading-->

United States v. Lopez

514 U.S. 549 (1995)
https://caselaw.findlaw.com/us-supreme-court/514/549.html
Oral arguments are available at https://www.oyez.org/cases/1994/93-1260.
Vote: 5 (Kennedy, O'Connor, Rehnquist, Scalia, Thomas)
4 (Breyer, Ginsburg, Souter, Stevens)

OPINION OF THE COURT: ***Rehnquist***

CONCURRING OPINIONS: ***Kennedy, Thomas***

DISSENTING OPINIONS: ***Breyer, Souter, Stevens***

FACTS:

On March 10, 1992, Alfonso Lopez Jr. came to Edison High School carrying a concealed .38 caliber handgun and five rounds of ammunition. Acting on an anonymous tip, officials at the San Antonio, Texas, school confronted the twelfth-grade student, and he admitted to having the weapon. Lopez claimed that he had been given the gun by an individual who instructed him to deliver it to a third person. The gun was to be used in gang-related activities. Lopez was arrested for violating the federal Gun-Free School Zones Act of 1990.

Lopez, who had no record of previous criminal activity, was convicted in federal district court and sentenced to six months in prison, two years of supervised release, and a $50 fine. His attorneys appealed to the Fifth Circuit Court of Appeals, claiming that Congress had no constitutional authority to pass the Gun-Free School Zones Act. Attorneys for the United States countered by arguing that the law was an appropriate exercise of congressional power to regulate interstate commerce. The appeals court held in favor of Lopez, and the government asked the Supreme Court to review that ruling.

Congress passed the Gun-Free School Zones Act—section 922(q) of chapter 18 of the United States Code—in 1990. In passing the act, Congress did not issue any findings showing a relationship between gun possession on school property and commerce. The federal government argued that such findings should not be required, that it would be sufficient if Congress could reasonably conclude that gun-related violence in schools affects interstate commerce directly or indirectly. Lopez argued that the simple possession of a weapon on school grounds is not a commercial activity that reasonably falls under commerce clause jurisdiction. Furthermore, the regulation of crime and education are traditional areas of state, not federal, jurisdiction.

ARGUMENTS:

For the petitioner, United States:

- Under the commerce clause and based on past decisions, Congress is empowered to regulate even intrastate, noneconomic activity that, in the aggregate, exerts a substantial impact on interstate commerce.
- All Congress must show is that it could rationally have concluded that gun possession on or near school premises affects interstate commerce.
- There is an abundant basis from which Congress could reasonably determine that the conduct regulated in the law affects interstate commerce. For example, the need for insurance spreads the economic consequences of violent crime throughout the nation. In addition, violent crime affects interstate commerce by reducing the willingness of people to travel to areas they think are unsafe.
- Congress also had grounds for concluding that the presence of guns in schools poses an unacceptable threat to the proper functioning of primary and secondary education. For the last decade or so, the importance of education to national productivity and economic competitiveness was the subject of extensive national concern and debate.

For the respondent, Alfonso Lopez Jr.:

- Under the Supreme Court's decision in *Perez v. United States* (1971), congressional jurisdiction under the commerce clause reaches, in the main, three categories: (1) the use of channels of interstate or foreign commerce, (2) protection of the instrumentalities of interstate commerce, and (3) those activities affecting interstate commerce. This case involves only the third *Perez* category.
- Congress must demonstrate a substantial link between the object of its regulation and interstate commerce. Here, Congress failed to provide any link between interstate commerce and possession of a firearm.
- Even if the Court finds that Congress need not have made formal or informal findings or even have concrete evidence of an effect on commerce when passing the Gun-Free School Zones Act, the act is still unconstitutional. In *Gibbons,* Chief Justice Marshall recognized that Congress's power under the commerce clause does not extend to "exclusively internal commerce of a State." The power to regulate commerce, however broad, is not unlimited. Because it regulates internal, noneconomic activity without a substantial connection to interstate commerce, the Gun-Free School Zones Act exceeds those limits.

CHIEF JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce . . . among the several States." . . .

We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft* (1991). . . .

. . . The Court, through Chief Justice Marshall, first defined the nature of Congress' commerce power in *Gibbons v. Ogden* (1824):

> "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Id. . . .

For nearly a century thereafter, the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce. . . . Under this line of precedent, the Court held that certain categories of activity such as "production," "manufacturing," and "mining" were within the province of state governments, and thus were beyond the power of Congress under the Commerce Clause. See *Wickard v. Filburn* (1942) (describing development of Commerce Clause jurisprudence).

In 1887, Congress enacted the Interstate Commerce Act, and in 1890, Congress enacted the Sherman Antitrust Act. These laws ushered in a new era of federal regulation under the commerce power. When cases involving these laws first reached this Court, we imported from our negative Commerce Clause cases the approach that Congress could not regulate activities such as "production," "manufacturing," and "mining." See, *e.g., United States v. E. C. Knight Co.* (1895); *Carter v. Carter Coal Co.* (1936). Simultaneously, however, the Court held that, where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation. See, *e.g., Houston, E. & W. T. R. Co. v. United States* (1914) (Shreveport Rate Cases).

In *A. L. A. Schechter Poultry Corp. v. United States* (1935), the Court struck down regulations that fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly. In doing so, the Court characterized the distinction between direct and indirect effects of intrastate transactions upon interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system." Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach. The justification for this formal distinction was rooted in the fear that otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."

Two years later, in the watershed case of *NLRB v. Jones & Laughlin Steel Corp.* (1937), the Court upheld the National Labor Relations Act against a Commerce Clause challenge, and in the

process, departed from the distinction between "direct" and "indirect" effects on interstate commerce. The Court held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate.

In *United States v. Darby* (1941), the Court upheld the Fair Labor Standards Act, stating:

> "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."

In *Wickard v. Filburn,* the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, stating:

> "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"

The *Wickard* Court emphasized that although Filburn's own contribution to the demand for wheat may have been trivial by itself, that was not "enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

Jones & Laughlin Steel, Darby, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel,* the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." . . . See also *Darby* (Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); *Wickard* (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce. . . .

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact 922(q). The first two categories of authority may be quickly disposed of: 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of home-grown wheat. These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained. . . .

Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise,

however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. 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.

Second, 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in *United States v. Bass* (1971), the Court interpreted former 18 U.S.C. 1202(a), which made it a crime for a felon to "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce . . . any firearm." The Court interpreted the possession component of 1202(a) to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." . . . Unlike the statute in *Bass,* 922(q) has no 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.

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the Government concedes that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here. . . .

The Government's essential contention, *in fine,* is that we may determine here that 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate. . . .

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." . . .

These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do. For the foregoing reasons the judgment of the Court of Appeals is

Affirmed.

JUSTICE BREYER, WITH WHOM JUSTICE STEVENS, JUSTICE SOUTER, AND JUSTICE GINSBURG JOIN, DISSENTING.

The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half-century.

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce . . . among the several States" encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. . . . I use the word "significant" because the word "substantial" implies a somewhat narrower power than recent precedent suggests. But, to speak of "substantial effect" rather than "significant effect" would make no difference in this case.

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (i.e., the effect of all guns possessed in or near schools).

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "a rational basis" for so concluding.

I recognize that we must judge this matter independently. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." And, I also recognize that Congress did not write specific "interstate commerce" findings into the law under which Lopez was convicted. Nonetheless, as I have already noted, the matter that we review independently (*i.e.,* whether there is a "rational basis") already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of some extra leeway. This extra deference, in principle, might change the result in a close case, though, in practice, it has not made a critical legal difference. . . .

Applying these principles to the case at hand, we must ask whether Congress could have had a rational basis for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. . . . As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," *Swift & Co. v. United States* (1905), the answer to this question must be yes. . . .

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. . . . Congress obviously could have thought that guns and learning are mutually exclusive. And, Congress could therefore have found a substantial educational problem—teachers unable to teach, students unable to learn—and concluded that guns near schools contribute substantially to the size and scope of that problem.

Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy. . . .

In recent years the link between secondary education and business has strengthened, becoming both more direct and more important. Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills. . . .

Increasing global competition also has made primary and secondary education economically more important. . . . Indeed, Congress has said, when writing other statutes, that "functionally or technologically illiterate" Americans in the work force "erod[e]" our economic "standing in the international marketplace," and that "our Nation is . . . paying the price of scientific and technological illiteracy, with our productivity declining, our industrial base ailing, and our global competitiveness dwindling."

Finally, there is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education. . . .

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical threat to teaching and learning also substantially threatens the commerce to which that teaching and learning is inextricably tied? That is to say, guns in the hands of six percent of inner-city high school students and gun-related violence throughout a city's schools must threaten the trade and commerce that those schools support. The only question, then, is whether the latter threat is (to use the majority's terminology) "substantial." And, the evidence of (1) the extent of the gun-related violence problem, (2) the extent of the resulting negative effect on classroom learning, and (3) the extent of the consequent negative commercial effects, when taken together, indicate a threat to trade and commerce that is "substantial." At

the very least, Congress could rationally have concluded that the links are "substantial."

Specifically, Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage, of a kind that location near a railhead or harbor provided in the past. . . . The violence related facts, the educational facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, the sufficiency of the constitutionally necessary Commerce Clause link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional.

The majority's holding—that 922 falls outside the scope of the Commerce Clause—creates three serious legal problems. First, the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence. . . .

The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between "commercial" and noncommercial "transaction[s]." That is to say, the Court believes the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is "commercial" in nature. . . .

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. . . .

In sum, to find this legislation within the scope of the Commerce Clause would permit "Congress . . . to act in terms of economic . . . realities." . . . Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. Respectfully, I dissent.

Just how far-reaching was *United States v. Lopez*? How did it fit into the Court's evolving commerce clause jurisprudence? Some commentators interpreted it quite narrowly, simply as a warning to Congress that it must justify its legislation by showing the relationship between the activities regulated and interstate commerce. Had Congress explicitly demonstrated that it was responding to the negative impact school violence has on the economy, they asserted, it is likely that the Court would have found no fault with the law. These commentators saw the decision as little more than a detour and not a full-scale retreat from the body of commerce clause jurisprudence. After all, Chief Justice Rehnquist's opinion did not backtrack from the Court's commerce clause precedents; it simply acknowledged that the commerce power, however broad, was "subject to outer limits." In this sense, the Court could be seen as merely recognizing that Congress could not pull any local activity it wished into the embrace of the commerce clause.

Others viewed the decision as more sweeping and as a signal that the Court would no longer allow Congress to regulate whatever it wished on the ground that all activities somehow affect interstate commerce.

The justices themselves seemed divided on what the case represented. In their concurring opinions, Justice Anthony Kennedy called *Lopez* a "limited holding," but Justice Clarence Thomas declared that it was time "to modify our Commerce Clause jurisprudence." The Court's 5–4 vote contributed additional uncertainty. Whether *Lopez* was an aberration or a signal that the Court was narrowing the reach of the commerce clause is a question to consider as you read *Gonzales v. Raich* (2005).

Gonzales is on the next page. Keep reading-->

Gonzales v. Raich

545 U.S. 1 (2005)
https://caselaw.findlaw.com/us-supreme-court/545/1.html
Oral arguments are available at https://www.oyez.org/cases/2004/03-1454.
Vote: 6 (Breyer, Ginsburg, Kennedy, Scalia, Souter, Stevens)
3 (O'Connor, Rehnquist, Thomas)

OPINION OF THE COURT: ***Stevens***

OPINION CONCURRING IN JUDGMENT: ***Scalia***

DISSENTING OPINIONS: ***O'Connor, Thomas***

FACTS:

Using its commerce clause power, Congress regulates a variety of pharmaceuticals. The Food and Drug Administration (FDA)—created by Congress to administer federal policy over, among other things, food, drugs, cosmetics, and tobacco—regulates prescription drugs and over-the-counter medications. At the same time, Congress has also judged some substances to pose such a danger to the public welfare that they are typically prohibited from use, either medically or recreationally. The Drug Enforcement Administration, working with the FDA, determines when, if ever, various controlled sub-stances can be used and for what purposes. Under federal policy, marijuana is considered to have a high potential for addiction or abuse and no medical use. Thus, under federal law, it is illegal to cultivate or use marijuana.

Exercising their police powers, states also enact their own laws regarding dangerous substances. Most of the time, these policies overlap with national policy; both federal and state laws usually prohibit the use of the same substances, such as heroin and LSD. Some, however, believe that marijuana has valid medical uses, and in1996 the voters in California passed Proposition 215, commonly known as the Compassionate Use Act. The law allowed seriously ill state residents to use marijuana for medical purposes. The act also created an exemption from criminal prosecution for patients, physicians, and caregivers who cultivate and possess marijuana for medical reasons. This law obviously conflicted with federal law, which allowed no such use.

Californian Angel Raich suffered from more than ten serious and possibly life-threatening medical conditions, including an inoperable brain tumor. On the advice of her doctor she used marijuana to help ease her suffering. Too ill to produce her own supply, Raich depended on two caregivers to grow and provide marijuana without charge.

Diane Monson, another California resident following her phy-sician's advice, had been using marijuana in compliance with the Compassionate Use Act for about five years to combat chronic back pain caused by a degenerative disease of the spine. She grew about six cannabis plants to maintain a supply of the drug.

In 2002 county deputy sheriffs and federal drug agents came to Monson's home. After an investigation, the local officials found no evidence of illegal activity under California law. The federal agents, however, concluded that Monson's possession of marijuana violated the federal Controlled Substances Act. They seized and destroyed her marijuana plants.

Raich and Monson brought a lawsuit against Attorney General Alberto Gonzales and the head of the U.S. Drug Enforcement Administration to bar enforcement of the Controlled Substances Act to the extent that it prevented them from obtaining and possessing marijuana for medical purposes. The federal government claimed that its constitutional power to regulate commerce was sufficiently broad to regulate the use of the substance.

Raich and Monson argued that the federal commerce power does not extend to the medical use of marijuana, a purely local and noncommercial activity regu-lated by state law. They further claimed that their marijuana plants were grown and processed only with water, nutrients, supplies, and equipment originating in California. The court of appeals ruled in favor of Raich and Monson, and the federal government asked the Supreme Court to reverse.

Associated Press/Noah Berger

Angel Raich, shown here at a 2004 press conference, sued to block the U.S. attorney general from enforcing the federal Controlled Substances Act against her. Raich, suffering from a brain tumor and other serious medical conditions, used marijuana under California's Compassionate Use Act to combat her pain and discomfort.

Associated Press/Rich Pedroncelli

Diane Monson joined Angel Raich in asking the Supreme Court to uphold California's medicinal marijuana law. Monson, under a physician's direction, regularly used marijuana to alleviate chronic and severe back pain.

ARGUMENTS:

For the petitioners, Alberto R. Gonzales, attorney general, et al.:

- Congress has the power under the commerce clause, coupled with the necessary and proper clause, to regulate local activity that substantially affects interstate commerce (see *Wickard v. Filburn* and *United States v. Darby*). Congress's determination that local activity with respect to a product substantially affects interstate commerce or could

(Arguments continue on the next page)

interfere with Congress's objective in regulating the interstate market of that product is entitled to substantial deference.

- Because marijuana trafficking is a commercial activity that occurs in interstate and foreign commerce and affects interstate commerce, Congress has the power under the commerce clause to regulate all commercial marijuana activity, including commercial possession, manufacture, and distribution that occurs wholly intrastate (see *United States v. Lopez*).
- The act also constitutionally regulates intrastate manufacture and possession of marijuana for personal use and the distribution of those substances without charge. Congress has concluded that regulation of all intrastate drug activity "is essential to the effective control" of interstate drug trafficking and that regulation of intrastate drug activity was a reasonably necessary means to accomplish its comprehensive regulation of the interstate market in controlled substances.

For the respondents, Angel McClary Raich et al.:

- This case is and always has been about state sovereignty and federalism. The issue is whether the federal government may criminalize wholly intrastate, noncommercial conduct that is expressly authorized by the state in an exercise of its broad powers to define criminal law, regulate medical practice, and protect the lives of its citizens. In *Lopez* and *United States v. Morrison* the Court invalidated federal statutes that were consistent with achievement of goals shared by all the states.
- The government's argument goes beyond the outer limits of *Wickard,* which involved regulation of commercial farming activity. The respondents' activity is not commercial, and the link between it and interstate commerce is, at best, attenuated. In addition, prohibiting respondents' activity is not essential to a larger regulation of interstate economic activity.

JUSTICE STEVENS DELIVERED THE OPINION OF THE COURT.

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

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

In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation. As charted in considerable detail in *United States v. Lopez* [1995], our understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time. . . .

. . . [We have now] identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce. Only the third category is implicated in the case at hand.

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. See, *e.g., Perez* [*v. United States* (1971)]*; Wickard v. Filburn* (1942). As we stated in *Wickard,* "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." We have never required Congress to legislate with scientific exactitude. When Congress decides that the "'total incidence'" of a practice poses a threat to a national market, it may regulate the entire class. In this vein, we have reiterated that when "'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'"

Our decision in *Wickard* is of particular relevance. . . .

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

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

of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard,* we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity. . . .

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard,* when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly. Those two cases, of course, are *Lopez* and [*United States v.*] *Morrison* [2000]. . . .

Unlike those at issue in *Lopez* and *Morrison,* the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's *Third New International Dictionary* 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. . . . Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality. . . .

The exemption for cultivation by patients and care-givers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious. Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so. Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, . . . Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

. . . Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim. . . .

. . . [T]he judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, CONCURRING IN THE JUDGMENT.

I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.

Since *Perez v. United States* (1971), our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate

commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. See *Gibbons v. Ogden* (1824). The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is misleading because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs* (1838), Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. And the category of "activities that substantially affect interstate commerce," *Lopez,* is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

JUSTICE O'CONNOR, WITH WHOM THE CHIEF JUSTICE AND JUSTICE THOMAS JOIN . . . , DISSENTING.

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. . . .

The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market. . . . [T]he Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between "what is national and what is local." It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. . . . To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. . . .

The Government has not overcome empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime. Nor has it shown that Compassionate Use Act marijuana users have been or are realistically likely to be responsible for the drug's seeping into the market in a significant way. . . .

Relying on Congress' abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. . . . [T]he federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.

JUSTICE THOMAS, DISSENTING.

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

Even the majority does not argue that respondents' conduct is itself "Commerce among the several States." Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California—it never crosses state lines, much less as part of a commercial transaction. Certainly no evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana. . . .

Moreover, even a Court interested more in the modern than the original understanding of the Constitution ought to resolve cases based on the meaning of words that are actually in the document. Congress is authorized to regulate "Commerce," and respondents' conduct does not qualify under any definition of that term.

The majority's opinion only illustrates the steady drift away from the text of the Commerce Clause. There is an inexorable expansion from "'commerce,'" to "commercial" and "economic" activity, and finally to all "production, distribution, and consumption" of goods or services for which there is an "established . . . interstate market." Federal power expands, but never contracts, with each new locution. The majority is not interpreting the Commerce Clause, but rewriting it. . . .

. . . The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union." Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals. I respectfully dissent.

Although the decision in *Raich* allows federal agents to prosecute medical marijuana cases, Barack Obama's administration announced in October 2009 that it would no longer prosecute such cases *if* the individuals involved are in compliance with state law. When Donald Trump's administration took office in 2017, the Justice Department announced that it would begin enforcing the federal law against marijuana possession and distribution. The president, however, quickly reversed that policy as it pertained to activities that are legal under state law. Joe Biden's administration has been somewhat ambivalent. As a candidate, Biden argued for removing the criminal penalties associated with marijuana, not outright legalization. As president, though, he has not taken active steps to liberalize federal marijuana policy. Indeed, in the spring of 2021, the White House dismissed several staffers who admitted to past cannabis use.

Whatever the dispositions of recent presidents, marijuana remains technically illegal under federal law. So the decision of an increasing number of states, beginning with Colorado and Washington, to remove bans on recreational use of marijuana certainly widens the policy gap between the legalizing states and federal statutes. Clearly, under *Gonzales v. Raich* the federal government can enforce federal laws prohibiting the distribution and possession of marijuana no matter what state

Associated Press/Pablo Martinez Monsivais, File

On February 25, 2010, key figures in the debate over proposed health care reforms met at Blair House in Washington but were unsuccessful at finding common ground. One month later President Obama signed into law the Patient Protection and Affordable Care Act after it had passed on a nearly straight party-line vote, with congressional Democrats supporting the law and Republicans opposed. From left, President Barack Obama and Secretary of Health and Human Services Kathleen Sebelius (both Democrats), Senate Minority Leader Mitch McConnell (R-Ky.), and House Minority Leader John Boehner (R-Ohio).

law provides. For the present, federal authorities have chosen not to prosecute such violations. Whether that nonenforcement policy will continue for the long term remains to be seen.

Raich demonstrates that *Lopez* should not be seen as a wholesale repudiation of commerce clause jurisprudence as it has developed since 1937. Rather, the six-justice majority in *Raich*, which included conservatives Antonin Scalia and Anthony Kennedy, held fast to the precedent set in *Wickard v. Filburn:* the production of commercially viable items, when considered in the aggregate, has a sufficiently substantial relationship with interstate commerce to trigger the use of congressional regulatory authority. But when Congress under the commerce clause attempts to regulate noneconomic activity (such as gun possession) without showing that the regulation is a neces-sary part of a broader regulation of interstate commerce, it may impermissibly infringe on powers reserved for the states.