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Counterrevolution?—National Criminal Law After *Raich*

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This Article provides an in-depth analysis of the Supreme Court's recent decision in Gonzales v. Raich *and its ramifications. The Court rejected by a margin of six to three a Ninth Circuit holding that the Federal Controlled Substances Act would probably be found unconstitutional as applied to intrastate users of marijuana who were in conformity with California's Compassionate Use Act. Although the majority, and Justice Scalia concurring, found the case to present a relatively straightforward problem in the application of Commerce Clause doctrine, the three dissenters (Justice O'Connor joined by Chief Justice Rehnquist, and Justice Thomas) sounded sharp notes decrying a betrayal of New Federalism principles as well as an abandonment of* United States v. Lopez *and* United States v. Morrison.

The Article begins with a detailed analysis of the four different opinions that the case generated in the Supreme Court, as well as a look at the Ninth Circuit decision. The lower court's willingness to prefer state law over federal, as well as the strong federalism themes of the Supreme Court dissents, represent important data points in any overall debate about federalism. The Article also devotes substantial attention to the use by Justices Stevens and Scalia of Wickard v. Filburn. Wickard, *with its aggregation principle, has long been a sore point for conservatives. However, no justice in* Raich *called for its overruling, and the* Wickard*-based analysis of class-of-activities statutes emerged stronger than ever.*

The second Part of the Article discusses the potential impact of Raich *on the current Court's New Federalism initiative. I contend that to adopt the view of the Ninth Circuit would have constituted a substantial advance of that set of precepts. However, the fact that* Raich *came out the way it did does not necessarily constitute a rollback for the New Federalism. In particular, Justice Stevens' insistence on the need for an economic/commercial subject of regulation as the overall test of validity of statutes with a purported effect*

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on interstate commerce represents a reaffirmation of Lopez *and* Morrison. *The open question is whether his lack of reference to the nonattenuation or noninfinity arguments of the majority in those cases represents any form of retreat.*

In the third Part I consider some implications of Raich *for the federal criminal law. The Article presents the case as supporting the view that the American system will continue to be noteworthy for the presence of two largely overlapping sets of criminal statutes. The Article also examines specific issues such as the use of jurisdictional elements, as-applied challenges, and the reach of federal criminal law at the outer boundaries of national authority. The cases involving federal prosecution for child pornography are used to illustrate this latter problem as well as to provide a further elucidation of the general discussion of the current status of federal criminal laws, particularly those passed under the Commerce Clause.*

I. INTRODUCTION

In *Gonzales v. Raich*[1] the Supreme Court called a halt to the New Federalism.[2] The Court could have altered the constitutional landscape by striking down a federal criminal statute[3] prohibiting marijuana as part of a comprehensive regulation of drugs—when applied to purely intrastate conduct. State law—the California Compassionate Use Act[4]—permitted the conduct. The Ninth Circuit Court of Appeals had invalidated the federal statute "as applied,"[5] relying heavily on two pillars of the New Federalism—

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[1] Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[2] The term "New Federalism" encompasses many issues. Prominent among them are the following: state sovereignty and immunity under the Eleventh Amendment, *see, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); limits on federal ability to "commandeer" the institutions of state government, *see, e.g.*, Printz v. United States, 521 U.S. 898 (1997); and, limits on federal regulatory authority under the enumerated powers of the Constitution, *see, e.g.*, United States v. Lopez, 514 U.S. 549 (1995). *Raich* involves a variant on the issue present in *Lopez*—whether federal power to regulate a criminal matter is lacking, thus leaving the area to the states. For an excellent introduction to the New Federalism, see Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002). For a critical assessment of the enterprise, particularly the central role of notions of state sovereignty, see Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601 (2002).

[3] Controlled Substances Act, 21 U.S.C. §§ 801-904 (2000).

[4] CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

[5] Raich v. Ashcroft, 352 F.3d 1222, 1228 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

United States v. Lopez[6] and *United States v. Morrison.*[7] The appeals court had also used language central to the debate over federal criminal law: "[I]t is particularly important that in the field of criminal law enforcement, where state power is preeminent, national authority be limited to those areas in which interstate commerce is truly affected . . . .The police power is, essentially, reserved to the states . . . ."[8] The Supreme Court disagreed, reversing the Ninth Circuit by a margin of six to three.[9] It emphasized the supremacy of federal law, and the ability of valid regulations of interstate commerce to reach broadly into intrastate activity. *Raich* was a straightforward case that could be answered on the basis of "[w]ell-settled law."[10]

Noticeably absent from Justice Stevens' majority opinion were any references to federalism in general, or to such specific staples of New Federalism rhetoric as state sovereignty, spheres of state authority, the special status of criminal law enforcement as a state function, or the need to confine the national government in order to assure some form of balance. Instead, Justice Stevens treated the case as presenting a classic Commerce Clause problem.[11] He relied heavily on *Wickard v. Filburn*,[12] a problem case for many conservatives.[13]

It is in the dissents of Justices O'Connor and Thomas[14] that one finds sharp, almost anguished, invocations of federalism themes. They saw *Lopez* and *Morrison* as pushed to the margins of constitutional analysis, reduced to little more than drafting guides.[15] The beast that had been slain in those cases—the contention that, because everything is somehow connected to commerce at some level of abstraction, this interconnectedness permits use of the Commerce Clause to regulate everything—had reared its head again.[16]

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[6] United States v. Lopez, 514 U.S. 549 (1995).

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

[8] *Raich*, 352 F.3d at 1234 (quoting *Morrison*, 529 U.S. at 618).

[9] Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[10] *Id.* at 2201.

[11] *Id.* at 2198–99.

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

[13] United States v. Kallestad, 236 F.3d 225, 231–33 (5th Cir. 2000) (Jolly, J., dissenting); *see* Brief for Constitutional Law Scholars as Amici Curiae Supporting Respondents at 12–13, Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003) (No. 03-1454).

[14] *Raich*, 125 S. Ct. at 2220 (O'Connor, J., and Rehnquist, C.J., dissenting); *id.* at 2229 (Thomas, J., dissenting).

[15] *Id.* at 2223 (O'Connor, J., dissenting).

[16] *Id.* at 2225; *id.* at 2235–37 (Thomas, J., dissenting). For an example of this reasoning, see United States v. Lopez, 514 U.S. 549, 620–25 (1995) (Breyer, J., dissenting).

For them, the rejection of such reasoning is central to whatever one might mean by a New Federalism. This Article will refer to this position as the nonattenuation or noninfinity principle. *Lopez* and *Morrison* are good examples of the principle at work. It was in part because highly attenuated arguments of interconnectedness were key to justifying the Gun Free School Zones Act and the Violence Against Women Act that the Court struck down these statutes.[17]

In *Raich* itself, the validity of the general federal law at issue in the case—the Controlled Substances Act and its regulation of the interstate market in drugs—was conceded by all parties.[18] What was at issue was how far that law could extend to intrastate possession of a particular drug—marijuana. This is a far different matter from the question in *Lopez* and *Morrison*, where any form of federal regulation was challenged. Another factor distinguishing *Raich* from other federal criminal law cases was the presence of a state law permitting what federal law prohibited.[19] In most contexts, federal and state law are essentially parallel in forbidding the same sort of conduct.[20] Joint enforcement efforts often occur.[21] Not so here. The California Compassionate Use Act permitted limited use of drugs upon a doctor's recommendation.[22] The fact that federal law said otherwise was apparently irrelevant. As discussed at greater length below,[23] I do not think that forbidding such a state override of federal law is a serious setback to the attempt to find balance in American Federalism. The Supremacy Clause makes clear that even concurrent regulation is not an undertaking among equals.[24]

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[17] 18 U.S.C. § 922(q)(1)(A) (1994); 42 U.S.C. § 13981 (1994); United States v. Morrison, 529 U.S. 598, 612–616 (2000); *Lopez*, 514 U.S. at 563–67; *see* Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 578 (2004) (referring to the "non-infinity" principle of *Lopez*).

[18] Gonzales v. Raich, 125 S. Ct. 2195, 2204 (2005).

[19] CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

[20] 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, 963 (1997).

[21] Daniel C. Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 370 (2001); Litman & Greenberg, *supra* note 20, at 963.

[22] CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 1996).

[23] *See infra* Part III.A–B.

[24] U.S. CONST. art. VI, cl. 2; *cf.* New York v. United States, 505 U.S. 144, 159 (1992) (explaining that "the Supremacy Clause gives the Federal Government 'a decided advantage in th[e] delicate balance' the Constitution strikes between state and federal power").

In order to get a general perspective of where the New Federalism stands after *Raich*, it is necessary to examine in detail the several opinions in the case with an eye to the important doctrinal battle being waged. This Article gives more space to the dissents than would normally be the case.[25] They represent an initial New Federalist critique of *Raich*, as well as a glimpse at what might have been. What emerges from this examination is the conclusion that a counterrevolution did not occur.[26] *Raich* is a setback for the New Federalism, but it is not a rollback to some form of *Lopez*-Lite or to the nonfederalism of Justices Breyer and Souter.[27] This Article also uses *Raich* as a springboard to discuss several issues within the overall federal criminal law debate. The first is the current state of the debate itself, and which vision of federal criminal law and its relation to state law is furthered by the decision.[28] A second issue is how challenges to particular federal criminal laws can be mounted.[29] The Article considers the hotly contested question of whether courts may consider as-applied challenges to federal statutes regulating broad classes of activity. It concludes that *Raich* correctly validates such challenges.[30] The Article next deals with the role of jurisdictional elements—provisions of a statute that require the government to prove a link between the conduct at issue and the federal power invoked.[31] Jurisdictional elements present serious problems and can easily permit an end run around the Court's efforts to cabin national power. They are likely to be the next battleground in federal criminal law. Finally, as a way of tying these questions together, the Article examines the outer reaches of federal law through consideration of the current circuit conflict over federal power to ban child pornography.[32] These cases raise issues of the possibility of as-applied challenges to federal statutes, the Commerce Clause reach of the latter into "purely intrastate, private" conduct, and the role of jurisdictional elements. It is highly significant that three weeks after *Raich*, the Supreme Court vacated and remanded to the Eleventh Circuit, for consideration in light of *Raich*, a judgment invalidating a federal child pornography statute as applied.[33] The outer reaches may indeed be expansive.

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[25] *See infra* Part II.D–E.

[26] *See infra* Part V.

[27] *See infra* Part III.

[28] *See infra* Part III.A–B.

[29] *See infra* Part IV.A–C.

[30] *See infra* Part IV.D.

[31] *See infra* Part IV.E.

[32] *See infra* Part IV.F.

[33] United States v. Smith, 402 F.3d 1303 (11th Cir. 2005), *vacated*, 125 S. Ct. 2938 (2005). The Supreme Court has vacated other decisions for consideration in light of

Part II of the Article analyzes the various opinions in *Raich*, both at the Supreme Court and the circuit court levels.[34] Part III considers the impact of *Raich* on the New Federalism, and advances the argument that the New Federalism is alive and well after *Raich*, particularly if the nonattenuation principle retains its force.[35] Part IV examines the federal criminal law debate[36] and the specific questions alluded to in the previous paragraph.

II. *RAICH* AND THE LIMITS OF *LOPEZ*

A. *The Ninth Circuit: Pushing the New Federalism Envelope*

This Article's analysis of the case begins with the remarkable decision of the Ninth Circuit Court of Appeals.[37] The court invalidated a federal statute utilizing a mode of analysis purportedly derived from *Lopez* and *Morrison*, took a law regulating an entire class of activities and broke it down into subclasses, and utilized state law in defining the subclass of activities which federal law could not reach.[38]

The case arose out of the clash between two statutes. The Federal Controlled Substances Act (CSA) bans marijuana as a "Schedule I controlled substance."[39] Possession of a controlled substance is a criminal offense.[40] California, on the other hand, passed in 1996 the Compassionate Use Act.[41] The California Act permits use of marijuana for medical purposes when recommended by a physician.[42] A patient or a patient's caregiver, who possesses or cultivates marijuana for medical treatment upon the recommendation of a physician, is exempt from state criminal anti-drug provisions. The two principal plaintiffs utilize marijuana as part of medical treatment that meets the standards of the Act. One cultivates her own supply; the other is given marijuana by friends.[43] Federal and state officials

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Raich: United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004), *vacated*, 126 S. Ct. 321 (2005); Klingler v. Dir., Dep't of Revenue, 366 F.3d 614 (8th Cir. 2004), *vacated*, 125 S. Ct. 2899 (2005); United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003), *vacated*, 125 S. Ct. 2899 (2005).

[34] *See infra* notes 37–193.

[35] *See infra* notes 194–296.

[36] *See infra* notes 297–455.

[37] Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[38] *Id.* at 1228–35.

[39] 21 U.S.C. § 812(c) (1970).

[40] *Id.*

[41] CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

[42] *Id.*

[43] Gonzales v. Raich, 125 S. Ct. 2195, 2200 (2005).

confronted one of the plaintiffs in a "standoff" that led to federal agents seizing and destroying her six cannabis plants.[44] The plaintiffs then brought a suit seeking declaratory and injunctive relief against the United States Attorney General and the Administrator of the Drug Enforcement Agency.

The specific issue in *Raich*, as it was brought before the Ninth Circuit, was whether the plaintiffs had demonstrated a probability of success in their prayer for preliminary relief, which included a finding of likelihood that the court would ultimately declare the federal statute unconstitutional as to them.[45] A divided panel found that the "appellants [had] demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress'[s] Commerce Clause authority."[46] The key to the court's analysis was its willingness to treat the plaintiffs as members of a particular subclass within the broader entity that the CSA regulates.[47] Indeed, there was substantial circuit precedent to the effect that the CSA is a valid regulation of commerce.[48] Any other conclusion as to the statute would seem impossible, given the extensive interstate market in drugs. However, the court was willing to excise the plaintiffs from that broader class, and defined their subclass in terms of "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law."[49]

The court had, in effect, allowed an as-applied challenge to the CSA on the part of the class that it had identified and carved out from that statute. It then applied to that class a four-part test of validity, which it purported to find in *Morrison* and its refinement of *Lopez*.[50] The first factor was stated as "whether the statute regulates commerce or any sort of economic enterprise."[51] The court concluded that the cultivation and possession of marijuana under the circumstances presented could not be characterized as

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[44] *Id.*

[45] Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[46] *Id.*

[47] *Id.* at 1228.

[48] *See* United States v. Bramble, 103 F.3d 1475, 1479–80 (9th Cir. 1996); United States v. Tisor, 96 F.3d 370, 375 (9th Cir. 1996); United States v. Kim, 94 F.3d 1247, 1249–50 (9th Cir. 1996); United States v. Visman, 919 F.2d 1390, 1393 (9th Cir. 1990); United States v. Montes-Zarate, 552 F.2d 1330, 1331 (9th Cir. 1977); United States v. Rodriquez-Camacho, 468 F.2d 1220, 1221–22 (9th Cir. 1972).

[49] *Raich*, 352 F.3d at 1229.

[50] *Id.*

[51] *Id.*

commercial or economic activity. It found dispositive the lack of any sale, exchange, or distribution.[52] The government attempted to invoke *Wickard v. Filburn*[53] in order to utilize its aggregation principle, but the court found that the noncommercial nature of the activity precluded any such application of *Wickard*.[54] In particular, the Ninth Circuit viewed the marijuana at issue not as a fungible commodity, "as its use is personal and the appellants do not seek to exchange it or to acquire marijuana from others in a market."[55] The court then turned to the second factor: whether the statute contained any "'express jurisdictional element that might limit its reach to a discrete set' of cases."[56] The lack of a jurisdictional element in the CSA cut in the plaintiffs' favor.[57] As for the third factor—legislative findings—the Ninth Circuit noted that Congress had made findings in the Act itself, including a reference to local possession of controlled substances.[58] Still, the court emphasized the lack of any direct finding on marijuana, much less intrastate medicinal use of marijuana.[59] It also diluted the weight of the third factor by stating that "*Morrison* counsels courts to take congressional findings with a grain of salt."[60]

Finally, the court turned to the fourth factor of the test that it had found in *Morrison*: "whether the link between the regulated activity and a substantial effect on interstate commerce is 'attenuated.'"[61] *Lopez*, *Morrison*'s predecessor, had dealt with a different problem.[62] At issue was not the possible bearing of the nonattenuation principle on the extent of Congress's ability to regulate an activity over which it clearly had power. Rather, the question was whether a general concern like the quality of the educational system could be invoked to justify regulation of a specific activity such as gun possession in school zones. *Raich* did present the first

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[52] *Id.* at 1229–30.

[53] *Id.* at 1230.

[54] *Id.* at 1230–31.

[55] Raich v. Ashcroft, 352 F.3d 1222, 1231 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005). The court had earlier acknowledged the existence of an interstate market in drug trafficking. *Id.* at 1228.

[56] *Id.* at 1229.

[57] *Id.* at 1231.

[58] *Id.* at 1232 (finding "local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances").

[59] *Id.*

[60] *Id.*

[61] Raich v. Ashcroft, 352 F.3d 1222, 1233 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S Ct. 2195 (2005).

[62] *See infra* notes 114–18.

issue, and the court found the plaintiffs' conduct to be remote from the statute's regulatory ambit.[63] In sum, the weighing of the four factors led the Ninth Circuit to conclude that the plaintiffs were likely to prevail.[64] It also emphasized the fact that the field of criminal law was in issue, a field "where state power is preeminent."[65]

The court of appeals departed from the pattern of virtually all lower courts that have navigated around *Lopez* to find federal criminal statutes valid.[66] Instead, it found in *Morrison* the four-part test for evaluating the constitutionality of a federal statute. While it is true that both *Lopez* and *Morrison* mentioned these factors prominently, neither presented them as a test to be applied mechanically to determine the question of a statute's validity.[67] Of course, before the circuit court could apply any such test to the plaintiffs' claim, it had to treat them as members of a separate and distinct

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[63] *Raich*, 352 F.3d at 1233.

[64] *Id.* at 1234.

[65] *Id.* (quoting United States v. McCoy, 323 F.3d 1114, 1124 (9th Cir. 2003)). Also, it should be noted that, in addition to the role that state law played in defining the class viewed as relevant by the court, the majority opinion brought the presence of state law into the case again, in listing the desirability of state experiments as one of the "public interest" factors that should be considered in an injunctive proceeding. *Id.* at 1235.

Judge Beam, in a prescient dissent, viewed the case as a straightforward application of *Wickard*. *Id.* at 1235 (Beam, J., dissenting). He noted that the farmer in *Wickard* would have been held subject to federal regulation even if his conduct was viewed as noneconomic. Having made the inevitable comparison between the case before the court and the situation in *Wickard*, Judge Beam, admitting his own "redundancy," applied the four *Morrison* factors. Unlike the majority, he found the statute valid as applied. *Id.* at 1240. He viewed the activity as economic in that the marijuana grown was fungible and might be sold in the marketplace, and that plaintiffs' reliance on it precluded their recourse to other products in the market. He also viewed regulation of intrastate possession as "essential to reaching the larger commercial activity" that Congress was validly regulating. *Id.* He admitted the lack of a jurisdictional element, viewed the findings as adequate, and essentially repeated his commercial arguments in the context of the fourth factor—the presence of an attenuated connection. *Id.* at 1241–43. Thus, both the "test" and *Wickard* led to different conclusions on the ultimate question: whether the activities of the plaintiffs, and those similarly situated, could be said to have a substantial effect on interstate commerce—the touchstone for validity under *Lopez*. United States v. Lopez, 514 U.S. 549, 554–59 (1995).

[66] *See, e.g.*, Bradley, *supra* note 17, at 575; *id.* at 603–05 (noting limited impact of *Lopez* on lower court decisions).

[67] *Morrison* perhaps goes further, presenting the factors as "significant considerations [that] contributed to our decision." United States v. Morrison, 529 U.S. 598, 609 (2000). The *Morrison* majority also stated that in considering questions of substantial effect on commerce, *Lopez* "provides the proper framework for conducting the required analysis of [the statute in question]." *Id.*

subclass, different from the general class that was validly regulated by the CSA. There is certainly no authority in *Lopez* and *Morrison* for this major analytical step: disaggregating a legislative class. Those cases did not even involve the problem.[68]

Let us assume, for now, that an as-applied challenge is possible. It is far from clear that the four-part test is much help. For example, reading *Lopez* and *Morrison* as preferring a jurisdictional element does not seem to add much to the analysis. Some justices have apparently expressed a preference for statutes with a jurisdictional element, such as a requirement that the defendant's conduct have an effect on commerce.[69] Such elements both narrow the field of regulation and link particular cases to congressional power. However, *Lopez* was careful to accept and endorse the existing body of Commerce Clause jurisprudence, which includes major class-of-activity statutes, that is, those that do not require any individualized showing through a jurisdictional element.[70] Famous examples of cases upholding such statutes are *Wickard* and *Perez v. United States*.[71] *Lopez* would indeed have been a constitutional revolution if it cast serious doubt on class-of-activity statutes.

The Ninth Circuit in *Raich* was correct in identifying the economic/commercial nature of a regulation as central to any *Lopez*-based inquiry as to its validity. The CSA passes that test, given the highly developed interstate market in drugs. The question, again, is whether the general regulated class can be somehow disaggregated to focus on those who do not participate in any discernible way in that market. In addition, one should flag the circuit's use of state law in carving out the class.[72] The definition of the class, with its basis in state law, raises the troubling question of whether states can play a role in establishing the validity of federal regulation. The Supremacy Clause[73] dictates otherwise. Finally, there is the suggestion that the fact that the statute regulates "'the field of criminal law enforcement, where state power is preeminent'" should play a separate role

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[68] At issue was the basic constitutionality of the statutes involved, not their application to particular groups.

[69] *See generally* text accompanying notes 372–417 *infra* (discussing current status of jurisdictional elements).

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

[71] Perez v. United States, 402 U.S. 146 (1971); Wickard v. Filburn, 317 U.S. 111 (1942).

[72] Raich v. Ashcroft, 352 F.3d 1222, 1228 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005) (defining the class as "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law").

[73] U.S. CONST. art. VI, cl. 2.

in analyzing the statute's validity.[74] To accept this proposition would be a major step toward a strong version of the New Federalism.

B. Raich—*An Easy Case*

In *Raich*, Justice Stevens wrote the Supreme Court's opinion reversing the decision below.[75] He was joined by four justices. Justice Scalia joined the decision, but not the majority opinion. Like the circuit court, Justice Stevens began with *Lopez*[76] as the analytical starting point for any Commerce Clause analysis of a challenged federal statute. However, that is virtually the only resemblance between his opinion and that of the court below. He viewed the matter as one of "well-settled law."[77] That law is the body of Commerce Clause jurisprudence that *Lopez* (and *Morrison*) had maintained. Justice Stevens did not present those cases as departing from that body of law through the formulation of any new federalism-based "test," against which to measure the validity of congressional statutes. Indeed, the opinion is noteworthy for its virtual lack of any reference to federalism. What he found present in *Raich* was the classic Commerce Clause issue of federal power to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[78]

Justice Stevens presented *Lopez* as the starting point for analysis,[79] but the central case in his Commerce Clause discussion was *Wickard*.[80] *Wickard* was quoted initially for the proposition that "'even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.'"[81] Justice Stevens used this analysis to repeat the Court's openness to congressional legislation that regulates an entire class of activities.[82] Having raised the class-of-activities issue, Justice Stevens then turned to the question of whether as-applied challenges are available in the

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[74] *Raich*, 352 F.3d at 1234 (quoting United States v. McCoy, 323 F.3d 1114, 1124 (9th Cir. 2003)).

[75] *See generally* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[76] United States v. Lopez, 514 U.S. 549 (1995).

[77] *Raich*, 125 S. Ct. at 2201.

[78] *Id.* at 2205.

[79] *Id.*

[80] *Id.* at 2205–15. Cites to *Wickard* proliferate throughout this analysis. *E.g.*, *id.* at 2205–10.

[81] *Id.* at 2205–06 (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

[82] *Id.* at 2206.

case of such statutes. He repeated the famous quote from *Maryland v. Wirtz*[83] to the effect 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."[84]

Nonetheless, he proceeded to perform a *Wickard*-driven analysis of the CSA in the context of the *Raich* challenge. He treated the challengers as analogous to the farmer cultivating wheat,[85] even though one of the plaintiffs did not grow her own marijuana. For Justice Stevens, the marijuana, like the wheat in the earlier case, could seep into the interstate market.[86] Using the "rational basis" test that had been applied in *Lopez* to give judicial review some teeth,[87] he stated that, as in *Wickard,* there is "no difficulty"[88] in concluding that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."[89] Thus, the requirement of a substantial effect on interstate commerce—the third category of congressional authority recognized in *Lopez*[90]—was satisfied.[91]

As with *Wickard* itself, there is a certain ambiguity as to whether the marijuana was at least a potential part of the interstate market that Congress could easily regulate under the Commerce Clause, or whether leaving it for "home" cultivation and consumption represented an instance where noncommercial activities might undercut regulation of an interstate market.[92] Either way, there would be a substantial effect on interstate commerce. Justice Stevens did not place major reliance on the argument that the plaintiffs, like the farmer in *Wickard* who might have bought his wheat in the interstate market if he did not grow his own, might have recourse to the interstate market.[93] Overall, *Wickard* seems relevant for three particular propositions: (1) the possibility of diversion into the interstate market; (2) the

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[83] Maryland v. Wirtz, 392 U.S. 183 (1968).

[84] *Id.* at 196 n.27.

[85] Gonzales v. Raich, 125 S. Ct. 2195, 2206–07 (2005).

[86] *Id.* at 2207.

[87] United States v. Lopez, 514 U.S. 549, 554 (1995).

[88] *Raich*, 125 S. Ct. at 2207.

[89] *Id.*

[90] *Lopez*, 514 U.S. at 559.

[91] Gonzales v. Raich, 125 S. Ct. 2195, 2208–09 (2005).

[92] *See, e.g., id.* at 2206–07. The fact that the regulation was a ban also brings the two arguments closer together. Justice Stevens stated that "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id.* at 2206.

[93] He noted the possibility in a footnote. *Id.* at 2207 n.28.

risk of undercutting federal regulations; and (3) the possibility of aggregating the instances of admittedly local activity to the point at which they have an impact on interstate commerce.[94]

Justice Stevens went on to explain why *Lopez* and *Morrison* did not support the plaintiffs' challenge to the CSA, and to refute point-by-point their as-applied critique.[95] As for *Lopez* and *Morrison*, he criticized the plaintiffs for reading those cases "far too broadly."[96] Furthermore, they presented statutory challenges quite different from those in *Raich*. Neither was an as-applied challenge to a "concededly valid statutory scheme."[97] Rather, the *facial challenge* was whether the statute fell outside of congressional power under the Commerce Clause.[98] The main defect of the statute in *Lopez* (the Gun-Free School Zones Act)[99] was that it did not regulate economic activity or represent an essential part of a larger regulation of economic activity, "'in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'"[100] The CSA, by contrast, is a classic general regulation of an admittedly economic problem.[101] Justice Stevens stated that it is an example of a federal law that regulates

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[94] *See Raich*, 125 S. Ct. at 2207 (stating that production of a commodity for home consumption has a substantial effect on supply and demand in the national market). *Id.* at 2209 (finding a "rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA"). This portion of the opinion closed with another strong suggestion that the as-applied challenge could not have been brought in the first place. Having previously stated that "[w]e have never required Congress to legislate with scientific exactitude," Justice Stevens concluded his analysis with the statement "[t]hat 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." *Id.* at 2206, 2209.

[95] *Id.* at 2209–15.

[96] *Id.* at 2209.

[97] *Id.*

[98] United States v. Morrison, 529 U.S. 590, 604–05 (2000); United States v. Lopez, 514 U.S. 549, 552 (1995).

[99] *Raich*, 125 S. Ct. at 2209.

[100] *Id.* (quoting *Lopez*, 514 U.S. at 561).

[101] *Morrison* was of no greater help to the plaintiffs. Justice Stevens stated that:

> [L]ike the statute in *Lopez*, it did not regulate economic activity. We concluded that 'the noneconomic, criminal nature of the conduct at issue was central to our decision' in *Lopez*, and that our prior cases had identified a clear pattern of analysis: 'where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'

Id. at 2210 (quoting *Morrison*, 529 U.S. at 610) (alteration in original).

"quintessentially economic" activities.[102] The fact that it is, partially, a ban made no difference: "Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product."[103]

Justice Stevens went beyond contrasting the statutory backgrounds and proceeded to rebut the other components of the as-applied challenge.[104] He reserved his strongest language for the proposition that state law could somehow set the class apart from intrastate possessors in general.[105] In part, he saw this argument as a direct challenge to federal supremacy, clearly invalid given that "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."[106] The possibility of any such contention gave him the opportunity to accuse Justice Thomas, one of the dissenters, of attempting to "turn the Supremacy Clause on its head . . . ."[107] Plaintiffs apparently did not utilize state law to exempt themselves from the general federal regulation, but to argue that those who complied with the Compassionate Use Act presented no danger of the seeping-into-the-market sort that Justice Stevens had hypothesized in applying *Wickard*.[108] Their contention was that the "legal" usage would be tightly controlled: "a discrete activity that is hermetically sealed off from the larger interstate . . . market . . . ."[109] He found this proposition one that Congress could have rationally rejected, and went to

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[102] Gonzales v. Raich, 125 S.Ct. 2195, 2211 (2005).

[103] *Id.* (footnote omitted).

[104] The key to any such challenge was the definition of the relevant class of activities by the Ninth Circuit as "'the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law.'" *Id.* (quoting Raich v. Ashcroft, 352 F.3d 1222, 1229 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005)). The first component, that the use was for personal medical purposes on advice of a physician, could not save any such class. For Justice Stevens, Congress had considered possible medical uses of marijuana and rejected them. *Id.* at 2211–12. Thus, this purported aspect of the class was, in his view, tantamount to saying that personal use, regardless of the purpose, was an acceptable exemption from the Act. He had little difficulty in treating any such broad exemption as a fundamental conflict with the purposes of the CSA. *Id.* at 2212 (stating that "[t]he congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity").

[105] *Id.* at 2212–15.

[106] *Id.* at 2212.

[107] *Id.* at 2213 n.38.

[108] Gonzales v. Raich, 125 S. Ct. 2195, 2213–15 (2005).

[109] *Id.* at 2213.

some lengths to demonstrate why.[110] In the end, the plaintiffs' only distinction was that, unlike participants in the interstate market, they engaged in "'the intrastate, noncommercial cultivation, possession and use of marijuana.'"[111] Any such contention was foreclosed by the CSA's specific findings on interstate possession, the large commercial market for marijuana, and *Wickard*.[112]

Given the importance of *Raich*, and the likelihood that it will be seen as a serious setback for the New Federalism as espoused in *Lopez* and *Morrison*, it is worth noting three significant omissions from the majority opinion. Justice Stevens did not present the issue as one of federalism in the way that Justice Rehnquist began *Lopez* in the ringing tones of starting "with first principles."[113] Indeed, there is no discussion of the constitutional vision in which a construction of the enumerated powers of the national government serves to enlarge or diminish those of the states. A second omission is any reference to such staples of the New Federalism as notions of traditional state authority, spheres in which states play a special role, the lack of a national police power, or heightened scrutiny when a basically state activity, such as the criminal law, is at issue.[114] Finally, there is no invocation of the nonattenuation principle, or even a reference to the role that it played in *Lopez* and *Morrison*. In *Morrison*, for example, Chief Justice Rehnquist referred to *Lopez*'s rejection of a "but-for reasoning" under which "'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).'"[115] He went on to base his rejection of such attenuated chains of causation on the ground that "'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.'"[116] This reasoning played a central role in both *Lopez* and *Morrison*, cases which Justice Stevens treated as good law.[117] The omission of any such reference is

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[110] He viewed the medical exemption as likely to increase the supply of marijuana in the California market and foresaw a danger that unscrupulous users would take advantage of it. *Id.* at 2214.

[111] *Id.* at 2215 (citing Raich v. Ashcroft, 352 F.3d 1222, 1229 (9th Cir. 2003)).

[112] *Id.*

[113] United States v. Lopez, 514 U.S. 549, 552 (1995).

[114] *See* Gonzales v. Raich, 125 S. Ct. 2195, 2222 (2005) (O'Connor, J., dissenting); United States v. Morrison, 529 U.S. 598, 611–19 (2000); *Lopez*, 514 U.S. at 572 (1995) (Kennedy, J., concurring).

[115] *Morrison*, 529 U.S. at 613 (quoting *Lopez*, 514 U.S. at 564).

[116] *Id.* (citing *Lopez*, 514 U.S. at 564).

[117] *See, e.g.*, *Raich*, 125 S. Ct. at 2209–11.

surprising. It is perhaps even more surprising given the fact that the lower court had invoked the nonattenuation principle in arguing that the plaintiffs' marijuana had no connection to the market.[118]

C. *Justice Scalia: A New Federalist Concurs*

Justice Scalia concurred in the judgment, in an opinion he stylized as "more nuanced."[119] His vote is important both because it produced a more solid-looking six-three alignment, and because he was in the majority in *Lopez* and *Morrison*. Without his support, any attempt to extend those cases was doomed from the outset. It is not clear that Justice Scalia adds substantially to the Stevens analysis. His difference with the majority, if any, seems primarily methodological. Cases had routinely referred to the "substantially affect[ing] interstate commerce"[120] category as one of the basic concepts permitting congressional regulation. However, Justice Scalia viewed the category as misleading. He argued that rules governing activities that substantially affect interstate commerce, but are not themselves part of interstate commerce, cannot derive their authority from the Commerce Clause.[121] Rather, once Congress goes beyond regulation of commercial activities, it is deriving its power from the Necessary and Proper Clause.[122] Thus, in a given case, we might find Congress devising rules either for the governance of commerce or to facilitate it by eliminating obstructions.[123] Justice Scalia derived support for this distinction from *Lopez* and *Morrison* themselves.[124] However, he read the cases as imposing a further distinction. If the conduct in question is economic, Congress may regulate it if that conduct substantially *affects* interstate commerce.[125] On the other hand, Congress may regulate "noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."[126]

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[118] Raich v. Ashcroft, 352 F.3d 1222, 1233 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[119] *Raich*, 125 S. Ct. at 2215 (Scalia, J., concurring).

[120] *E.g.*, United States v. Morrison, 529 U.S. 598, 608–09 (2000).

[121] Gonzales v. Raich, 125 S. Ct. 2195, 2215–16 (2005) (Scalia, J., concurring).

[122] U.S. CONST. art. I, § 8, cl. 18; *Raich*, 125 S. Ct. at 2215–16.

[123] *Raich*, 125 S. Ct. at 2216.

[124] *Id.*

[125] *See id.* (quoting United States v. Lopez, 514 U.S. 549, 560 (1995); United States v. Morrison, 529 U.S. 598, 610 (2000)).

[126] *Id.* at 2217. As an illustration, Justice Scalia cited *United States v. Darby*, 312 U.S. 100 (1941), in which Congress both excluded from commerce goods that were made in violation of federal standards, and also required employers to keep records to

At least two reservations about Justice Scalia's general doctrinal framework should be noted. In drawing the line between regulation of economic and noneconomic activity,[127] he appears to be saying that the latter cannot be sustained under any notion of "substantial effects." Rather, the question is whether the noneconomic activity "undercut[s]"[128] the regulatory scheme. As later discussion of the Hobbs Act[129] will show, there may well be instances of noneconomic activity with a substantial effect on commerce that do not harm a regulatory scheme. It is possible to draw such distinctions too finely. Second, applying a distinction between substantial effect and undercutting regulation is hard to do in the context of cases like *Wickard* and *Raich*. The commodities in question—wheat and marijuana—are closely related to the interstate market and potentially part of it. Moreover, the "regulation" is in the form of a ban. Does it make more sense to say that Ms. Raich was potentially a market participant, and thus could be regulated as part of it, or that somehow her consumption undercut the broader federal regulation? Although Justice Scalia attempted to draw the line sharply between these two forms of legislation, his application of it to the facts of the case blurred the issue. He followed closely Justice Stevens in explaining that marijuana is a fungible commodity and that the drugs in possession of individuals like Raich could easily find their way into the market.[130] Nonetheless, his summation of his views stated that "Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market 'could be undercut' if those activities were excepted from its general scheme of regulation."[131]

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demonstrate compliance. The first part of the scheme could be viewed as an example of regulating an economic activity with a substantial effect on interstate commerce, while the record-keeping requirement is an example of a noneconomic activity regulated under the Necessary and Proper Clause to further the aims of the economic regulation. *Raich*, 125 S. Ct. at 2217–18 (Scalia, J., concurring).

[127] Gonzales v. Raich, 125 S. Ct. 2195, 2217 (2005).

[128] *Id.* (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 561).

[129] *See infra* notes 333–34, 373–90.

[130] *Raich*, 125 S. Ct. at 2219.

[131] *Id.* at 2220 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)). The differences between the two approaches seem slight, despite Justice Scalia's emphasis on interference with federal regulation and Justices Stevens's emphasis on activities that can be aggregated to produce a substantial effect on commerce. He too stresses the risk of a gap that would "undercut" or "frustrate" the regulatory scheme, as well as the risk of a "gaping hole in the CSA." *Id.* at 2206, 2207, 2209 (majority opinion). Both focus on the fact that the marijuana might enter the interstate market—in Justice Scalia's words, "marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market." *Id.* at 2219 (Scalia, J., concurring). This is a result that Congress can forbid as part of the CSA. The drug's entrance into the market would certainly have an effect on that market. The presence of more drugs for law enforcement

Justice Scalia did sound some New Federalism themes absent from the majority opinion. He paid homage to "the line between 'what is truly national and what is truly local.'"[132] He also affirmed not only the validity of *Lopez* and *Morrison* but also the nonattenuation principle expressed therein.[133] However, he found no inconsistency with these cases. Upholding the regulation of intrastate activity in *Raich* was permissible because Congress had set in place a valid scheme of regulating interstate activity.[134] Whether such a scheme existed at all was the central issue on which the Court divided in *Lopez* and *Morrison*.[135] Once such a scheme is in place, as in the case of the CSA, *Lopez* and *Morrison* do not prevent regulation of intrastate noneconomic activity to protect it. Like Justice Stevens, Justice Scalia gave no weight to the existence of a contrary state statutory approach, despite the fact that the area was one "typically left to state regulation."[136] Thus, on the key issues in *Raich*, the New Federalism seemed to have no impact on Justice Scalia's opinion.[137]

D. *Justice O'Connor's Dissent—New Federalism Abandoned?*

Justice O'Connor (joined by Chief Justice Rehnquist) authored a strong dissent[138] that treated the decision as a betrayal of the New Federalism, particularly insofar as that general approach's precepts were embodied in *Lopez* and *Morrison*. Her opinion contains many of the formulations that have been integral portions of the Court's recent decisions arguing for a strengthened state role. She began by stating that "[w]e enforce the 'outer limits' of Congress'[s] Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental

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to deal with, as well as the difficulty of distinguishing between intrastate and interstate marijuana, could also interfere with the federal regulatory goal of interdicting marijuana by making that goal harder to accomplish. It may be that stating the problem as one of what is necessary and proper leads to a focus on undercutting a regulation, while viewing the market as a single entity leads to a focus on the need to regulate all facets of it.

[132] *Id.* at 2218 (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 567–68); *see also id.* at 2216.

[133] *Id.* at 2216–17.

[134] *Id.* 2219–20.

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

[136] Gonzales v. Raich, 125 S. Ct. 2195, 2220 (2005).

[137] As to the validity of the regulation, Justice Scalia did seem to require that the regulation be reasonable, as opposed to requiring a mere rational basis. *Id.*

[138] *Id.*

to our federalist system of government."[139] She also made reference to "dual sovereignty,"[140] the dangers of a "federal police power,"[141] and the historic and special role of the states in "areas of criminal law and social policy."[142] She placed special emphasis on the role of the states as "laboratories" for innovative policies,[143] one of the classic and most frequently invoked arguments for a vigorous federalism.[144] Indeed, the importance of the state role as laboratories is present in both the first and last paragraphs of her opinion, and plays a role in her doctrinal argument that the content of state law carries substantial weight in a case like *Raich*, which "involves the interplay of federal and state regulation . . . ."[145]

However, the heart of her analysis was devoted to *Lopez* and *Morrison* and her view that they are "materially indistinguishable"[146] from *Raich*, and "irreconcilable" with the Court's decision.[147] Although stopping short of the widespread notion in courts of appeals that *Lopez* or *Morrison* contained a four-part "test," she stated that the former case "turned on"[148] four considerations. The first was that "substantial effects" cases have generally upheld regulation of economic activity that affected interstate commerce, but that the criminal statute in *Lopez* had "nothing to do with 'commerce' or any sort of economic enterprise."[149] The case also noted the lack of a jurisdictional element, and the lack of legislative findings.[150] Finally, *Lopez* contained the nonattenuation principle,[151] specifically, rejection of the

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[139] *Id.*

[140] *Id.* at 2224. She also invoked "state autonomy." *Id.*

[141] *Id.* at 2225.

[142] Gonzales v. Raich, 125 S. Ct. 2195, 2224 (2005).

[143] *Id.* at 2221.

[144] *See, e.g.*, Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 776–77; John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 519 (2002). Calabresi points to "an incentive for state governments to experiment and improve." Calabresi, *supra*, at 777. The benefits are twofold: potentially better services in individual states and models for other states to follow. *Id.*

[145] *Raich*, 125 S. Ct. at 2224.

[146] *Id.* at 2222.

[147] *Id.* at 2221.

[148] *Id.*; United States v. Morrison, 529 U.S. 598 (2000).

[149] Gonzales v. Raich, 125 S. Ct. 2195, 2221 (2005) (O'Connor, J., dissenting) (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)); *see id.* at 2222 (stating that the Court relied on the same four considerations in *Morrison*).

[150] *Id.* at 2221–22.

[151] *See also Morrison*, 529 U.S. at 610–12.

argument "that firearm possession in school zones could result in violent crime, which, in turn, could adversely affect the national economy."[152]

The key to her analysis was whether the conduct to be considered was that of the plaintiffs, or the entire field regulated by the CSA.[153] She expressed great concern that the Court was encouraging Congress to use general statutes to mask regulation of intrastate activity.[154] Thus, *Lopez* had been reduced to "nothing more than a drafting guide."[155] She argued that in the case of the statute at issue in *Lopez*, Congress might as easily have described the crime as "transfer or possession of a firearm anywhere in the nation,"[156] thus encompassing a broad range of activities, some of which would have the necessary substantial effect, and which would include the possession of guns in school zones.

She addressed the appropriateness of an as-applied challenge, noted the Court's expressed preference for such challenges, and proceeded to consider the definition of the relevant class.[157] For her, state law played a role both in defining the relevant class and in giving it a presumptive status of validity. In general, Justice O'Connor argued that situations like *Raich* call for a balancing test that "depends on the regulatory scheme at issue and the federalism concerns implicated."[158] Because of the high deference that should be accorded to state actions in areas of criminal and social policy, the burden lies with the federal government to justify its regulation in such situations.[159] For Justice O'Connor, "a concern for dual sovereignty requires that Congress'[s] excursion into the traditional domain of States be justified."[160] After noting the role of state law in permitting medical use, she defined the class as individuals engaged in "the personal cultivation, possession, and use of marijuana for medicinal purposes."[161] She expressed strong doubt that such activity could be labeled as economic or commercial.[162] For Justice O'Connor, examining whether regulating intrastate activity somehow furthered the interstate scheme of the CSA was subject to the same burden on the part of the federal government, even if the

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[152] *Raich*, 125 S. Ct. at 2222.
[153] *Id.* at 2222–23.
[154] *Id.*
[155] *Id.* at 2223.
[156] *Id.*
[157] *Id.* at 2223–24 (2005).
[158] Gonzalez v. Raich, 125 S. Ct. 2195, 2223 (2005) (O'Connor, J., dissenting).
[159] *Id.* at 2226.
[160] *Id.*
[161] *Id.* at 2224.
[162] *Id.* at 2225.

Necessary and Proper Clause came into play.[163] Here again, principles of state sovereignty played an important role in a negative answer.

Justice O'Connor's opinion is noteworthy for the extent to which she was willing to have the Court engage in judicial consideration of the issue of the intrastate dimensions of marijuana. She distinguished *Wickard* on the grounds that it contained an extensive record developed in the litigation itself.[164] As for intrastate possession under the CSA, Justice O'Connor concluded that Congress had not made relevant findings, in particular, findings that dealt with marijuana.[165] She viewed the "findings" in the CSA that dealt with local manifestations of drug-related issues as nothing more than "declarations."[166] She left open the possibility that the government could make an argument that the intrastate activities had an effect on or constituted an interference with the federal statute, but found that in the actual litigation the presumption created by state action had not been overcome.[167]

Justice O'Connor is certainly right in emphasizing the problems that arise in as-applied challenges to statutes that regulate a concededly interstate problem, such as the drug market. However, it is unrealistic to assume that Congress would pass broad statutes primarily for the purpose of reaching a narrow and discrete set of intrastate activities. For example, it is highly unlikely that Congress would pass a statute prohibiting "transfer or possession of a firearm anywhere in the nation" in order to get at guns in school zones. The political difficulties that are obvious in trying to pass any such broad statute inevitably lead toward attempts at the narrow one, attempts of the sort foiled in *Lopez*.[168] National power *would* be expanded greatly if the Court examined intrastate effects without reference to a general statute, or did not even require the existence of one. Again, neither step seems likely, although Justice O'Connor is right in noting the analytical difficulties present.[169] The reviewing court has to be mindful at all times of the relationship between the challenging class and the broadly regulated area.

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[163] *Id.* at 2226.

[164] Gonzalez v. Raich, 125 S. Ct. 2195, 2227 (2005) (O'Connor, J., dissenting). She also distinguished it on the ground that the relevant statute had exempted some small producers. *Id.* at 2225.

[165] *Raich*, 125 S. Ct. at 2227–28.

[166] *Id.* at 2227.

[167] *Id.*

[168] *See id.* at 2210 n.34 (majority opinion).

[169] She referred to "the problem endemic to the Court's opinion—the shift in focus from the activity at issue in this case to the entirety of what the CSA regulates." *Id.* at 2224.

On the more fundamental issue of the consistency of *Raich* with *Lopez* and *Morrison*, Justice O'Connor ignored the difference in statutory context that she elsewhere discussed at length.[170] Those cases were "on their face" challenges to statutes that the Court held beyond Congress's power to enact at all. The majority in each case found no substantial effect on interstate commerce.[171] In *Raich*, on the other hand, there was a valid regulation of commerce.[172] Nothing in *Lopez* or *Morrison* casts doubt on the CSA. The question in *Raich* was how to analyze the as-applied challenge in light of the larger statute. It is difficult to excise the intrastate conduct and attempt to measure its effect on commerce separately from the effect of the entire regulated class. Markets, including potential parts thereof, may not lend themselves to disaggregation for legal analysis. Placing the burden of justification on the federal government, Justice O'Connor appeared to answer the substantial effects question[173] with insufficient concern for the CSA and its goal of banning interstate trafficking in marijuana. It seems, as the majority argued, a serious misreading of *Lopez* and *Morrison* to approach valid class-of-activity statutes in this manner.[174]

Particularly problematic is the role of state law. There is no mention in Justice O'Connor's opinion of the Supremacy Clause. Her analysis seems to be that congressional and state statutes are arrayed against each other on a playing field which varies, in terms of relative advantage, with the nature of the subject matter and the degree to which the subject matter looks more "state" or more "federal." One might have reservations about giving this much weight to any state law when a conflict with federal law is present. These reservations ought to extend to the possibility of a judicial examination of whether the operation of the state law seals off the relevant class from the interstate market and, thereby, makes the federal law unnecessary as to that class. More fundamental, however, is the question of whether the decision that the federal statute is valid totally precludes any inquiries along these lines given the basic principle embodied in the Supremacy Clause.

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[170] *Id.* at 2221–24.

[171] United States v. Morrison, 529 U.S. 598, 612–13 (2000); United States v. Lopez, 514 U.S. 549, 561 (1995).

[172] Gonzalez v. Raich, 125 S. Ct. 2195, 2204 (2005) (O'Connor, J., dissenting).

[173] *Id.* at 2225–26.

[174] *Id.* at 2209–11 (majority opinion).

E. *Justice Thomas and the Role of State Law Within Necessary and Proper Analysis*

Like Justice O'Connor, Justice Thomas sounded many New Federalism themes, in particular, the danger that the federal government could become "no longer one of limited and enumerated powers."[175] After concluding that plaintiffs' conduct did not represent interstate commerce under either his definition or that of the majority,[176] he examined what he regarded as the more difficult question of whether regulation of their intrastate conduct might still be justified under the Necessary and Proper Clause.[177] Surprisingly, he concluded that, looked at on its face, the intrastate ban on cultivation, possession, and distribution could be "plainly adapted to stopping the interstate flow of marijuana."[178] In this respect, he appeared to accept the majority's reasoning about marijuana's potential entry into the market, thus making it more difficult to regulate. However, for Justice Thomas, the fact that the plaintiffs challenged the CSA as applied to their conduct, instead of on its face, was determinative.[179]

He saw state law as playing a crucial role in determining the class whose challenge was before the Court: "local growers and users of *state-authorized*, medical marijuana."[180] He also devoted considerable attention to the "strict[] controls"[181] that California placed upon such users and concluded that the state statutory scheme probably demonstrated that it was not "necessary" for the federal government to override it in order to preserve effective regulation of the interstate marijuana traffic.[182]

Even if necessary, the federal scheme—reaching so deeply into state-regulated intrastate matters—would not be "proper,"[183] according to Justice Thomas. In applying the term *proper*, Justice Thomas focused on the role of federal law in expanding the powers of Congress to the point of giving it "a

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[175] *Id.* at 2229 (Thomas, J., dissenting).

[176] *Raich*, 125 S. Ct. at 2229–30. Justice Thomas expounded on his definition of commerce in his separate *Lopez* opinion. United States v. Lopez, 514 U.S. 549, 585–87 (1995) (Thomas, J., concurring).

[177] *Raich*, 125 S. Ct. at 2230–34 (Thomas, J., dissenting).

[178] *Id.* at 2231.

[179] *Id.*

[180] *Id.* at 2231 (emphasis added).

[181] *Id.* at 2232 (Thomas, J., dissenting).

[182] *Id.* at 2233.

[183] Gonzales v. Raich, 125 S. Ct. 2195, 2233 (2005) (Thomas, J., dissenting).

general 'police power' over the Nation."[184] In particular, he expressed grave concern over the encroachment on states' traditional police powers in the areas of criminal law, health, safety, and welfare, and explicitly denied Congress any power to use its "incidental authority to subvert basic principles of federalism and dual sovereignty."[185] Justice Thomas, like Justice Scalia, also attacked the "substantial effects test," albeit for different reasons. He argued that it is too malleable. It allows definition of the class at such a high level of generality—for example, any intrastate possession—that the test imposes no limits on congressional authority.[186] He also took issue with the extension of federal power to intrastate noneconomic activity as inconsistent with recent precedent.[187] He invoked the nonattenuation principle against the majority, arguing that it was allowing the Commerce Clause to "reach the entire web of human activity," based on the interconnectedness of the various aspects of the economic activity that Congress might wish to reach.[188] The result of such extensive federalization is to "strip" the states of their authority over conduct such as that in *Raich*, since the operation of federal law would prevent state law from having any say, at least a contrary one.[189]

In the course of this discussion of his differences with the majority, Justice Thomas conceded the validity of traditional class-of-activities analysis and even cited the famous language from *Maryland v. Wirtz* to the effect that when a valid class is in existence, individual, de minimis instances cannot be excised.[190] However, he also expressed a preference for as-applied challenges.[191] In any such challenge, the nature of the class and the manner in which it is defined are key. Justice Thomas emphasized, once again, the special characteristics of these plaintiffs and their purported class.[192] As with Justice O'Connor, state law played the roles of demarcation of the specific subclass, attempting a potentially important experiment in the difficult,

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[184] *Id.*

[185] *Id.* at 2234.

[186] *Id.* at 2235–37.

[187] *Id.* at 2235–36 (citing United States v. Morrison, 529 U.S. 598, 613 (2000)).

[188] *Id.* at 2236.

[189] Gonzales v. Raich, 125 S. Ct. 2195, 2236–37 (2005) (Thomas, J., dissenting); *see also id.* at 2237 ("One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States.").

[190] *Id.* at 2237.

[191] *Id.* at 2238.

[192] *Id.* at 2237 ("If medical marijuana patients like . . . Raich largely stand outside the interstate drug market, then courts must excise them from the CSA's coverage.").

sometimes intractable, field of drug regulation,[193] and removing a quantity of marijuana from any possible interstate uses. By focusing on the issue of state law in the way that they did, the inevitable question about the *Raich* dissents (and the Ninth Circuit majority) is whether the dissenters wished to extend the New Federalism beyond a point which it had previously reached, with grave implications for national authority.

III. *RAICH* AND THE NEW FEDERALISM

A. Raich *as a Setback*

There are a number of reasons why *Raich* might be seen as a setback for the New Federalism. Perhaps most important is its failure to grant *Lopez* (and *Morrison*) any generative force. *Lopez* is treated with respect, as establishing the parameters for considering the general validity of a federal statute under the substantial effects prong of regulations of commerce.[194] But the analysis may seem *Lopez*-Lite in the sense that *Lopez*'s ramifications do not extend beyond congressional attempts to define a problem as so sufficiently related to commerce that the federal government has power to deal with it. *Raich* presented the proverbial next question of how to deal with the *intrastate* dimensions of an admittedly national problem subject to valid federal regulation. From the point of view of a New Federalism advocate, cases such as *Lopez* and *Raich* might be seen as presenting two issues that are analytically close: (1) does the national government have the power to deal with a problem at all; and, (2) if it does, how far does its power reach into the intrastate manifestations of the problem? For the New Federalist, the second question is just as important as the first.

I think that the New Federalist critique of *Raich* has to be taken seriously. After all, of the twelve appellate judges who passed on the case, five thought that the CSA was invalid as applied.[195] Granted, the *Raich* context is different from that of *Lopez* and *Morrison*, but these judges found in the latter cases principles applicable to the former. Should Justice Stevens have drawn the economic/commercial line differently, excluding the small-scale intrastate activity in question? Justice O'Connor criticized him for analytical confusion: using the admittedly commercial nature of the general statute as an excuse for jumping to all intrastate manifestations of marijuana

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[193] *Id.* at 2232, 2238–39.

[194] *Id.* at 2209–10 (majority opinion).

[195] Chief Justice Rehnquist and Justices O'Connor and Thomas, of the Supreme Court; and the two judges in the majority on the Ninth Circuit.

consumption and production as covered by the CSA's wide net.[196] However, two important points need to be made in defense of Justice Stevens. The first is that *Lopez* reaffirmed the notion of a class-of-activities statute from which, once the statute was held valid, "trivial" excisions should not be made.[197] The second is that *Lopez* reaffirmed *Wickard* as well, and Justice Stevens engaged in a plausible application of that case and its analysis. Like the wheat in *Wickard*, "purely intrastate"[198] marijuana "overhangs"[199] the market, and, if it entered the market, would have a substantial effect. Perhaps Justice Stevens can be faulted by defenders of *Lopez* for applying rational basis analysis so as not to force Congress to justify its actions more fully.[200] This would be a possible departure, at least from the spirit of *Lopez*, which suggested a more thorough judicial undertaking. However, it remains the case that *Lopez* treated *Wickard*'s analysis of intrastate problems as good law.[201] If *Lopez* lacks generative force, the fault may well lie in the case itself, a point made by commentators who have seen it more as a necessary correction than as a "revolution" in federal-state relations and American constitutional law.[202]

Another reason *Raich* might be regarded as a setback for the New Federalism is the Court's dismissal of any role for state law. California's Compassionate Use Act would, after all, have created the class of activities to be analyzed: "the intrastate, noncommercial cultivation, possession and

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[196] Justice O'Connor stated:

> Putting to one side the problem endemic to the Court's opinion—the shift in focus from the activity at issue in this case to the entirety of what the CSA regulates, (depending on the level of generality, any activity can be looked upon as commercial)—the Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

Gonzales v. Raich, 125 S. Ct. 2195, 2224 (2005) (O'Connor, J., dissenting) (citation and internal quotation marks omitted).

[197] United States v. Lopez, 514 U.S. 549, 558 (1995) (quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968)).

[198] *Raich*, 125 S. Ct. at 2206.

[199] Wickard v. Filburn, 317 U.S. 111, 128 (1942).

[200] *See Raich*, 125 S. Ct. at 2207; *Lopez*, 514 U.S. at 557.

[201] *See Lopez*, 514 U.S. at 556.

[202] Massey, *supra* note 2, at 479 ("The Court tinkered with existing doctrine rather than challenging its foundations."). One commentator predicted that *Lopez* would not have a significant effect on federal criminal law because of its approval of the aggregation principle and jurisdictional elements. Andrew St. Laurent, *Reconstituting* United States v. Lopez*: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 107 (1997).

use of marijuana for personal medical purposes on the advice of a physician *and in accordance with state law*."[203] The majority viewed state law as irrelevant once federal power was found. The dissenters would have accorded it an importance far beyond anything suggested in *Lopez*. Essentially, they adopted the position of the Ninth Circuit, which concluded that *state law itself* rendered inoperative an otherwise valid federal statute.[204] California law bestowed the legitimacy of medical use on designated individuals,[205] and thereby removed those individuals from the regulatory regime of the CSA. In other words, state law played the key role in identifying and excising a subclass.

Justice Stevens surely was correct in invoking concepts of federal supremacy to negate the notion of any such role for state law. If federal law regulating private conduct is valid, the notion that state law purporting to regulate that same conduct in a diametrically opposed way could insulate it from the federal regime flies in the face of the scheme established by the Supremacy Clause.[206] Moreover, the uniformity of federal law would also be seriously undermined. What would happen in states with no compassionate use scheme? No intrastate subclass of state-law-authorized medical users could be distinguished, even if there were users exactly like the *Raich* plaintiffs. Thus, the general class-of-activities analysis of cases like *Maryland v. Wirtz*[207] and *Perez v. United States*[208] would presumably prevail.

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[203] This is the class as defined by the court of appeals. Raich v. Ashcroft, 352 F.3d 1222, 1229 (9th Cir. 2003) (emphasis added), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005). Justice O'Connor approved of this definition. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2224 (2005) (O'Connor, J. dissenting).

[204] State law not only played a key role in defining the class. The Ninth Circuit, in weighing the public interest factors relevant to injunctive relief, stated that "[t]he public interest of the state of California and its voters in the viability of the Compassionate Use Act also weighs against the appellees' concerns." *Raich*, 352 F.3d at 1235.

[205] CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

[206] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."); *see Raich*, 125 S. Ct. at 2213 (2005) ("[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress") (quoting Wickard v. Filburn, 317 U.S. 111, 124 (1942) (alternation in original)). In response to Justice Thomas, Justice Stevens stated that "his rationale seemingly would require Congress to cede its constitutional power to regulate commerce whenever a State opts to exercise its 'traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.'" *Raich*, 125 S. Ct. at 2213 n.38.

[207] Maryland v. Wirtz, 392 U.S. 183 (1968).

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

However, not all cases will be this clear. What if state law differed substantially from federal law in some other way? What would happen in a state where recreational, personal use of marijuana is quasi-legal in that it is subject to minor civil penalties only? Should courts excise a subclass of "noncriminal, recreational, personal, intrastate users of marijuana" who cannot be prosecuted by the federal government under the CSA? Once again, it would be state law that determined whether federal prosecutions could proceed. In states without any such statutes, such subclasses would not exist and the prosecutions could proceed. As the hypothetical suggests, fundamental precepts of uniformity and supremacy argue against any such result. Federal law should be more than the default position.

The fact that the *Raich* Court did not go down this road is strong evidence that a substantial, perhaps radical, extension of the New Federalism did not occur. There are other aspects of *Raich* that lead to the same conclusion. One of the most important aspects of the New Federalism, potentially present in *Raich*, is the concept of states serving as laboratories.[209] Advocates of state power often cite as an advantage of federalism the ability of states to experiment with differing solutions to social problems.[210] These solutions might then be adopted by other states or by the federal government. Justice O'Connor criticized the majority sharply for "extinguish[ing]" any such laboratory role in *Raich*.[211] However, the laboratory analogy seems best applied to situations in which no government has formulated a solution, or, at least, in which the legal landscape leaves wide room to maneuver. This is hardly the case with drugs. The national government has established a policy that stands until the national government is convinced to change it. In a variant on the "political safeguards of

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[209] Gonzales v. Raich, 125 S. Ct. 2195, 2229 (2005) (O'Connor, J. dissenting) ("[T]he federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case."); *see also id.* at 2239 (Thomas, J., dissenting) ("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.").

[210] *Id.* at 2220 (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'") (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); *see* Calabresi, *supra* note 144, at 777 (describing Brandeis' view as creating "an incentive for state governments to experiment and improve"). *But cf.* Gey, *supra* note 2, at 1671 (expressing doubt about the factual premise of the laboratory theory).

[211] *Raich*, 125 S. Ct. at 2221; *see id.* at 2229 (*Raich* "stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently.").

federalism"[212] argument, Justice Stevens argued that California and like-minded states could use the political process to achieve acceptance for their results.[213] Given the size of California's congressional delegation, this is hardly a fanciful contention. However, striking down federal statutes so that the "laboratories" are free to experiment would be a substantial expansion of the judicial role in federalism disputes. It would go well beyond Justice Kennedy's *Lopez* concurrence and its invocation of the laboratory role.

Beyond the laboratory argument of providing useful examples for other jurisdictions lies a more fundamental justification for federalism: the possibility, and desirability, that states will be different. As Professor Calabresi puts it,

> The opening argument for state power is that social tastes and preferences differ, that those differences correlate significantly with geography, and that social utility can be maximized if governmental units are small enough and powerful enough so that local laws can be adapted to local conditions, something the national government, with its uniform lawmaking power, is largely unable to do.[214]

In a relevant example, Professors Nelson and Pushaw contend that "if 51% of Americans believe that drug use should be dealt with through harsh criminal sanctions, and 49% think it should be addressed through education and rehabilitation, it is better that state laws reflect that diversity (however unevenly) than to impose one view (e.g., strict criminalization) nationwide."[215] The criminal law in general is a prime example of the "cultural federalism" that the New Federalism seeks to enhance.[216] However, as long as a majority favors criminal sanctions in the drug context, it seems essential to achieve them through federal law. The problem has substantial

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[212] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The core of Professor Wechsler's thesis is that the states are adequately represented in Congress and can rely on it to protect federalism interests. Judicial intervention for this purpose is not necessary. *Id.* at 558–59.

[213] *Raich*, 125 S. Ct. at 2213–14.

[214] Calabresi, *supra* note 144, at 775.

[215] Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 116–17 (1999). Professors Nelson and Pushaw accept the federal drug laws in general, but would exempt donative transfers and mere possession without intent to sell. *Id.* at 137–38; *see infra* note 300 (discussing their test for "commerce" and its implications for the aggregation principle).

[216] Nelson & Pushaw, *supra* note 215, at 113.

interstate and international dimensions. Moreover, federal criminal legislation is closely tied to national regulation of drugs.

Not only did the Court refuse to extend the New Federalism; it also ignored its rhetoric. In this respect, it is helpful to consider the role that key phrases of the New Federalism vocabulary played in *Raich*. The majority and concurring opinions in *Lopez*, the majority opinion in *Morrison*, and the dissents in *Raich* are replete with phrases that have come, in many ways, to symbolize the New Federalism. These include: the notion of spheres of state autonomy,[217] state sovereignty,[218] the lack of a national police power,[219] the special state role in criminal law,[220] the role of enumerated federal powers as a guarantee of state power,[221] and dual federalism.[222] These are not only phrases with important symbolic content. They point toward a methodology for evaluating federal statutes. This methodology would treat any "incursion" on federalism values as playing a role in assessing the validity of the federal law. In his concurring opinion in *Lopez*, Justice Kennedy stated that "the statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required."[223] For Justice Kennedy, if Congress attempts to extend the commerce power too far, "then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."[224] In *Morrison*, the majority took a step further towards such a mode of analysis. After stating that "[t]he Constitution requires a distinction between what is truly national and what is truly local,"[225] Chief Justice Renquist cited the criminal law as a prime example.[226] It is possible that his language, which came in the Commerce Clause context, is only directed at

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[217] *See* Gonzales v. Raich, 125 S. Ct. 2195, 2220 (2005) (O'Connor, J., dissenting); United States v. Morrison, 529 U.S. 598, 611 (2000); United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).

[218] *Raich*, 125 S. Ct. at 2226 (O'Connor, J., dissenting); *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

[219] *Raich*, 125 S. Ct. at 2222 (O'Connor, J., dissenting); *Morrison*, 529 U.S. at 618–19; *Lopez*, 514 U.S. at 564 (majority opinion).

[220] *Raich*, 125 S. Ct. at 2224 (O'Connor, J., dissenting); *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 564 (majority opinion).

[221] *Raich*, 125 S. Ct. at 2226 (O'Connor, J., dissenting); *Morrison*, 529 U.S. at 619; *Lopez*, 514 U.S. at 552 (majority opinion).

[222] *See Raich*, 125 S. Ct. at 2234 (Thomas, J., dissenting); *see also Morrison*, 529 U.S. at 608; *Lopez*, 514 U.S. at 557.

[223] United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).

[224] *Id.*

[225] United States v. Morrison, 529 U.S. 598, 618–19 (2000).

[226] *Id.* at 619.

determining whether a particular activity is "commerce" or "interstate commerce." However, the language is perhaps more a step toward attempting to identify spheres of state authority that the national government cannot reach regardless of whether it has prima facie power.[227]

In *Raich*, however, it is only in the dissents that this analysis plays a substantial role. Justice O'Connor stated that "because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy in which 'States lay claim by right of history and expertise.'"[228] She also declared that "a concern for dual sovereignty requires that Congress'[s] excursion into the traditional domain of States be justified."[229] Justice Thomas, in his analysis of whether the CSA, in its application to the *Raich* facts, was "proper," used similar language.[230]

One of the surprising aspects of *Raich* is that neither the majority opinion, joined by Justice Kennedy, nor the concurrence authored by Justice Scalia, made serious reference to these concepts and their implications for national power. Justice Stevens, who had dissented in *Lopez* and described the decision as "radical,"[231] portrayed the Commerce Clause as the central component of American federalism, while ignoring the New Federalism rhetoric completely.[232] Justice Scalia did quote from *Lopez* about the danger of letting the Clause obliterate the line between "what is truly national and what is truly local,"[233] but found no such danger in *Raich*. Justice Stevens' other reference to federalism problems is his invocation of the Supremacy Clause in rejecting the notion that state law could affect the validity of federal law.[234] Obviously, both the majority and Justice Scalia realized that the case was about federalism. These justices simply did not think that

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[227] *See* Peter J. Henning, *Misguided Federalism*, 68 MO. L. REV. 389, 394 n.32 (2003) (criticizing the notion of criminal law as a separate sphere and citing numerous critiques of the sphere approach).

[228] Gonzales v. Raich, 125 S. Ct. 2195, 2224 (2005) (O'Connor, J. dissenting) (quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)). Justice O'Connor also cited to Justice Kennedy's concurrence in *Lopez* and her earlier dissenting opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 586 (1985) ("'[s]tate autonomy is a relevant factor in assessing the means by which Congress exercises its powers' under the Commerce Clause") (alteration in original).

[229] *Raich*, 125 S. Ct. at 2226 (O'Connor, J., dissenting).

[230] *Id.* at 2234 (Thomas, J., dissenting).

[231] United States v. Lopez, 514 U.S. 549, 602 (1995) (Stevens, J., dissenting).

[232] *Raich*, 125 S. Ct. at 2205.

[233] *Id.* at 2218 (Scalia, J., concurring); *see also id.* at 2216 ("what is [truly] national and what is [truly] local").

[234] Gonzales v. Raich, 125 S. Ct. 2195, 2212–13 n.38 (2005) (majority opinion).

anything the Court has said recently on the subject required considering a departure from the *Wickard*-based analysis that plays such a key role in their opinions. The standard phrases that accompany New Federalism analysis are conspicuous in their absence, in particular, the notion that federal criminal statutes present special problems because they touch on an area of traditional state concern.

The prominent role of *Wickard* will be particularly galling to advocates of the New Federalism. *Lopez* had described that case as representing the outer limits of the Court's tolerant view of the Commerce Clause and the reach of legislation based on it.[235] Conservatives have long viewed *Wickard* with suspicion,[236] particularly because of the possibilities it opens of broad federal regulation of intrastate activity, even when that activity seems totally removed and separate from any interstate market. A logical next step for New Federalists would be to call for the Court to overrule or substantially limit *Wickard*. In their landmark analysis of Commerce Clause doctrine, Professors Nelson and Pushaw express sympathy for conservative arguments that would limit the role of aggregation.[237] However, they appear to accept *Wickard* "because in our integrated national economy, almost any commercial activity might reasonably be viewed as affecting interstate commerce."[238] Their overall solution is for the Court to adopt a more limited view of the Commerce Clause in general.[239] *Raich* does not seem a step in that direction, despite its emphasis on the economic/commercial line.

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

[236] *E.g.*, United States v. Kallestad, 236 F.3d 225, 232 (5th Cir. 2000) (Jolly, J., dissenting); *cf.* Brief of Constitutional Law Scholars as Amici Curiae in Support of Respondents at 12–13, Raich v. Ashcroft 352 F.3d 1222 (2003) (No. 03-1454) (explaining that because virtually any conceivable activity in the aggregate affects interstate commerce, *Wickard*'s aggregation analysis has the potential to remove all limits on Congress's authority). Professor McGinnis has stated that "[p]erhaps the ultimate indignity that federalism suffered in [the New Deal] period was *Wickard v. Filburn*." McGinnis, *supra* note 144, at 511. *See* Calabresi, *supra* note 144, at 804 (stating that there was "no reason [in *Lopez*] for the Court's extreme show of respect for atrocities such as *Wickard*"); *see also* Massey, *supra* note 2, at 476–79 (discussing and criticizing *Wickard*'s aggregation principle).

[237] Nelson & Pushaw, *supra* note 215, at 111 n.518.

[238] *Id.*

[239] Their test is as follows: "Congress must (1) regulate 'commerce,' (2) that implicates commerce in more than one state." *Id.* at 107 (footnote omitted). Recall that even Justice Thomas, dissenting in *Raich*, accepted the *Wickard* rationale:

> On its face, a ban on intrastate cultivation, possession and distribution of marijuana may be plainly adapted to stopping the interstate flow of marijuana. Unregulated local *growers and users* could swell both the supply and the demand

The question naturally arises whether *Raich* will have generative force. A recent pornography case suggests an affirmative answer.[240] As discussed below,[241] there has been ongoing disagreement among the courts of appeals about the federal government's use of anti-pornography statutes to reach "personal" pornography, that is, items generated by individuals with no apparent connection to any market. In *United States v. Smith*,[242] the lower court had found such pornography beyond the reach of federal regulatory power. Three weeks after *Raich*, the Supreme Court granted certiorari and vacated the judgment of the Eleventh Circuit, directing the Court of Appeals to reconsider its decision in light of *Raich*.[243] This remand for reconsideration in light of *Raich* does not stand alone.[244] Thus, the case seems to have generative force, a result that will give advocates of the New Federalism considerable cause for concern.

In sum, *Raich* refused to build upon *Lopez* and extend it to intrastate problems, relied on *Wickard*, denied state law any role in challenges to federal law of the sort presented, and virtually ignored the rhetoric of the New Federalism, let alone the possibility that this rhetoric signaled a new methodology for evaluating federal laws. In particular, the Court did not treat federal criminal statutes as presenting special problems. In addition, as the various remands of lower courts of appeals decisions for reconsideration in light of *Raich* show, it is a precedent to be reckoned with. Taken together, all of this sounds like a serious setback for the New Federalism.

B. *The New Federalism Lives*

Nonetheless, there are reasons to believe that the New Federalism concept, as embodied in *Lopez* and *Morrison*, retains its validity. *Raich* can be seen more as a refusal to extend it than an abandonment. Let us first consider the role of *Lopez* and *Morrison* in *Raich* itself. After all, if *Lopez* and *Morrison* are alive and well, then the New Federalism retains

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> sides of the interstate marijuana market, making the market more difficult to regulate.

Raich, 125 S. Ct. at 2231 (Thomas, J., dissenting) (emphasis added).

240 United States v. Smith, 402 F.3d 1303 (11th Cir. 2005), *vacated* 125 S. Ct. 2938 (2005).

241 *See infra* notes 398–455.

242 *Smith*, 402 F.3d at 1328.

243 United States v. Smith, 125 S. Ct. 2938 (2005).

244 *Id.*; United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004), *vacated*, 126 S. Ct. 321 (2005); Klingler v. Director Dept. Rev., 366 F.3d 614 (8th Cir. 2004), *vacated*, 125 S. Ct. 2899 (2005); United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003), *vacated*, 125 S. Ct. 2899 (2005).

considerable force in constitutional analysis. All four opinions in *Raich* treated *Lopez* and *Morrison* as the major recent cases to guide analysis in Commerce Clause challenges. I will focus here on the opinions of Justices Stevens and Scalia. Justice Stevens began his analysis with a citation to *Lopez* in a manner that puts that case forward as the definitive recent guide.[245] It is true that he turned to *Wickard* as the Commerce Clause precedent most directly on point.[246] However, he later devoted a key part of the majority opinion to rebutting plaintiffs' attempts to extend *Lopez* and *Morrison* to the situation in *Raich*.[247] Justice Stevens first noted the important difference in the form of the challenge present before the Court in *Raich*[248] as opposed to that in *Lopez* and *Morrison*. In the latter two cases, the issue was whether Congress had the power to regulate the conduct at all.[249] *Raich* presented the different question of how far into potential subclasses of intrastate conduct a valid general regulatory statute reaches.[250] Justice Stevens viewed as important a second difference in the statutory context. *Lopez* had involved "a brief, single-subject statute."[251] It was not a general regulation of economic activity. Therefore, the situation was not present in which a general statute can be "undercut" by failure to reach specific intrastate examples of the conduct in question.[252] By contrast, the CSA is a broad-scale statute, covering a wide range of drugs and possible uses. Thus, the doctrine of intrastate undercutting could come into play. The most important distinction between the CSA and the statutes at issue in *Lopez* and *Morrison* was, for Justice Stevens, that those two statutes were unconstitutional because they "did not regulate economic activity."[253] By contrast, he presented the CSA as regulating "quintessentially economic"[254] activities, and concluded that "[b]ecause the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality."[255]

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[245] Gonzales v. Raich, 125 S. Ct. 2195, 2205 (2005); *see id.* at nn.24, 26, 27 (citing *Lopez*).

[246] *Id.* at 2206–08.

[247] *Id.* at 2209–11.

[248] *Id.*

[249] *Id.*

[250] *Id.* at 2209.

[251] Gonzales v. Raich, 125 S. Ct. 2195, 2209 (2005).

[252] *See, e.g., id.* at 2216–17 (Scalia, J., concurring).

[253] *Id.* at 2210.

[254] *Id.* at 2211.

[255] *Id.*

Lopez and *Morrison*, especially the former, play a central role in Justice Scalia's concurring opinion. He noted both that they recognize the "expansive scope"[256] of congressional authority under the general rubric of activities with a substantial effect on interstate commerce, and also that they recognize the notion of limits on congressional power.[257] As noted earlier, much of his analysis focused on the possibility of what *Lopez* referred to as the existence of "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[258] Again drawing on *Lopez*, he made it clear that such a regulation can extend to noneconomic activity. He agreed with Justice Stevens on the importance of the difference in statutory context between *Raich,* on the one hand, and *Lopez* and *Morrison* on the other: "neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation."[259] As did Justice Stevens, he saw the economic/commercial line as at the heart of the holding of invalidity of the federal statutes in *Lopez* and *Morrison*: "The pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[260]

Particularly noteworthy is the emphasis that Justice Stevens placed on the economic/commercial line for evaluating the validity of federal legislation under the third prong of standard Commerce Clause analysis: "the power to regulate activities that substantially affect interstate commerce."[261] He emphasized the noneconomic nature of the statutes at issue in *Lopez* and *Morrison* as both the reason for their invalidity and the central distinction from the statute in *Raich*.[262] It is true that his analysis sometimes blurs the line between regulating commerce and preventing the undercutting of regulation,[263] but the central point holds: federal statutes that did not directly regulate economic/commercial activity were struck down. The very reason for proceeding with the further analysis in *Raich* was that the CSA did regulate such activity. Yet the economic/commercial line necessarily involves the Court in the categorical, formalistic inquiries for which *Lopez*

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[256] *Id.* at 2216 (Scalia, J., concurring).

[257] *See generally* Gonzales v. Raich, 125 S. Ct. 2195, 2215 (2005) (Scalia, J., concurring).

[258] *Id.* at 2217 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

[259] *Id.* at 2218.

[260] *Id.* at 2216 (quoting *Lopez*, 514 U.S. at 560 (alteration in original)).

[261] *Raich*, 125 S. Ct. at 2205.

[262] *See generally Id.* at 2195 (majority opinion).

[263] The same criticism can be made of Justice Scalia's analysis.

and *Morrison* had been so sharply criticized.[264] Dissenting in the latter case, Justice Souter decried "formalistically contrived confines of commerce power."[265] With respect to *Morrison* itself, he castigated the majority in the following terms:

> [T]oday's decision can only be seen as a step toward recapturing the prior mistakes. Its revival of a distinction between commercial and noncommercial conduct is at odds with *Wickard*, which repudiated that analysis, and the enquiry into commercial purpose, first intimated by the *Lopez* concurrence, is cousin to the intent-based analysis employed in *Hammer* but rejected for Commerce Clause purposes in *Heart of Atlanta* and *Darby*.[266]

From a New Federalist perspective, the line presents the possibility of striking down legislation that exceeds an important enumerated power, thus protecting state authority. The economic/commercial line can also come into play in statutory interpretation, as established by *Jones v. United States*[267] in which the Court utilized *Lopez* and *Morrison* to construe a federal arson statute narrowly.[268] The analysis could also lead to a finding of no federal power in cases which involve a statute that contains a jurisdictional element requiring an effect on commerce.[269] Thus, the preservation and central role in *Raich* of this key analytical element of *Lopez* and *Morrison* should be seen as a significant victory by advocates of the New Federalism.

Before they declare victory, however, there is another aspect of the majority opinion that should give them considerable pause: the absence of any reference to the nonattenuation principle that played such a fundamental role in *Lopez* and *Morrison*.[270] In *Lopez*, Justice Rehnquist spent some time in addressing the government's overall argument that "possession of a firearm in a local school zone does indeed substantially affect interstate

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[264] United States v. Morrison, 529 U.S. 598, 638–39 (2000) (Souter, J., dissenting).

[265] *Id.* at 642. This was a principal cause of the judicial crisis of the New Deal period.

[266] *Id.* at 643 (citations omitted).

[267] Jones v. United States, 529 U.S. 848, 854 (2000); *see* George D. Brown, *Constitutionalizing the Federal Criminal Law Debate:* Morrison, Jones, *and the ABA*, 2001 U. ILL. L. REV. 983, 1009–13 (2001).

[268] For discussion of *Jones*, see Bradley, *supra* note 17, at 583–86; Brown, *supra* note 267 at 1009–13.

[269] *See* United States v. Hickman, 179 F.3d 230, 231 (5th Cir. 1999) (dissenting opinion).

[270] I have already referred to the absence of much of the basic New Federalism vocabulary in the opinion.

commerce."[271] Among other contentions, the government argued that there was a potential effect on travel to areas considered unsafe, but Justice Rehnquist's main concern seemed to be with the following reasoning:

> [T]he 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.[272]

For Justice Rehnquist, such reasoning could lead to congressional power to regulate everything. For example, the "national productivity" argument could lead to congressional regulation of "any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example."[273] Thus, if the attenuated causal chain was accepted, no areas would be off limits, and any activity by any individual would be subject to federal regulation. The result would be a national police power.[274]

In *Morrison*, Justice Rehnquist dealt with similar reasoning underlying the civil remedy of the Violence Against Women Act:[275] the notion that gender-motivated violence affects interstate commerce by deterring travel, engaging in employment or transacting business, and by increasing medical and related costs, as well as decreasing the demand for interstate products.[276] He expressed concern over what he referred to as a "but-for causal chain" from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce.[277] Indeed, he expressed the concern that this reasoning would allow Congress to regulate *any* crime, since the aggregate effects of that crime could be seen as having a substantial impact on such economic factors as employment, production, or transit.[278] The nonattenuation principle seemed in *Lopez* essentially to play the role of a

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[271] United States v. Lopez, 514 U.S. 549, 563 (1995).

[272] *Id.* at 564.

[273] *Id.*

[274] *Id.* at 567.

[275] United States v. Morrison, 529 U.S. 598, 613–14 (2000).

[276] *Id.* at 615.

[277] *Id.*

[278] *Id.*

supporting counter-argument to the government's position. In *Morrison*, Chief Justice Rehnquist moved the principle a substantial step toward part of the core reasoning underlying the holding.[279] Such a perception of *Morrison* would explain the nonattentuation principle's incorporation into the four-part test that the courts of appeals had derived from *Morrison*.[280] Apart from the degree to which the principle was central to the holding in either case, it is, from the New Federalism perspective, perhaps the most important contribution of *Lopez* and *Morrison* to the debate over the nature of our federal system.

Justices Breyer and Souter really did seem to want to get rid of the federal system in its present form and let the national government regulate everything. Dissenting in *Lopez*, Justice Breyer cited globalization and other changes in the American economy as justification for a changing approach to Commerce Clause interpretation.[281] He argued that Congress must at all times be able to utilize that power so that the nation is not "powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy."[282] In *Morrison*, Justice Souter criticized the majority for attempting to revive "the federalism of some earlier time,"[283] and noted the high degree of integration that characterizes the national economy.[284] Justice Breyer, if anything, went further and essentially called for the abandonment of any serious boundaries within the federal system, if not for the abandonment of the system itself: "We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate."[285]

As long as this reasoning is out there, the New Federalism, or any federalism, is in danger. Thus, Justice Stevens's omission of any reference to the nonattenuation principle seems cause for concern. It should also be noted that this principle played an important role in the application of the four-part

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[279] *Id.* at 612.

[280] *E.g.*, Raich v. Ashcroft, 352 F.3d 1222,1229–34 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005) (discussing the four-part test).

[281] United States v. Lopez, 514 U.S. 549, 621 (1995) (Breyer, J., dissenting).

[282] *Id.* at 625 (quoting North American Co. v. SEC, 327 U.S. 686, 705 (1946)).

[283] United States v. Morrison, 529 U.S. 598, 655 (2000) (Souter, J., dissenting).

[284] *Id.*

[285] *Id.* at 660 (Breyer, J., dissenting); *see* Gey, *supra* note 2, at 1665–68 (questioning the nonattenuation argument and stating that "in the modern world neither crime nor, for that matter, marriage, divorce, and childbearing are local affairs").

test by the Ninth Circuit, and in that court's invalidation of the CSA as applied.[286] In particular, the appeals court found the same danger of attenuation[287] that Chief Justice Rehnquist cited in his *Lopez* and *Morrison* opinions.[288] The court was concerned that the marijuana in question could only be regulated at the federal level through a highly attenuated analytical process which placed it within the realm of the national problem of marijuana by grouping together acts of possession that bore virtually no resemblance to each other.[289] The notion that the plaintiff's personal drugs might somehow affect the interstate market seemed an example of the discredited use of the house-that-Jack-built reasoning.

However, the question in the two contexts is significantly different. *Raich* does not present the issue of what Congress can regulate, but how far into local, intrastate, activity federal regulation can penetrate. This, too, can be seen as a step toward regulating everything, but it requires the essential predicate of congressional authority to reach the subject in the first place. Thus, in considering the status of the nonattenuation principle, it is important to emphasize that Justice Stevens did draw a line that restricts congressional authority: the economic/commercial line.[290] That line serves the same purposes as the nonattenuation principle, namely, confining national authority in order to preserve and advance federalism values. In this respect, it is instructive to read lower court applications of the four-part test, in which the economic/commercial nature of regulated activity is one factor, and the nonattenuation principle is another. Analyses of the two factors often overlap to the point of coalescing.[291]

It is true that one might view *Raich* as presenting the following attenuation issue: was the government positing an interconnectedness of marijuana so that small users could be grouped with interstate traffickers?[292]

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[286] Raich v. Ashcroft, 352 F.3d 1222, 1233 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[287] *Raich*, 352 F.3d at 1233.

[288] *Morrison*, 529 U.S. at 612–15; *Lopez*, 514 U.S. at 563–67.

[289] *Raich*, 352 F.3d at 1233.

[290] *See generally* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[291] *See, e.g.*, United States v. Riccardi, 405 F.3d 852, 869 (10th Cir. 2005) (facts of payment and transportation satisfy both the economic and the nonattenuation considerations); United States v. Smith, 402 F.3d 1303, 1317, 1322 (11th Cir. 2005), *vacated*, 125 S. Ct. 2938 (2005) (conduct not commercial; link too attenuated); United States v. McCoy, 323 F.3d 1114, 1122 (9th Cir. 2003) ("inference upon inference" objection to viewing defendant's conduct as economic) (quoting United States v. Lopez, 514 U.S. 549, 567 (1995)).

[292] Raich v. Ashcroft, 352 F.3d 1222, 1233 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005) ("The connections in this case are, indeed, attenuated.");

However, answering this question in the affirmative does not require recourse to amorphous concepts like the economic well-being of the nation to justify the similar treatment. It is the use of such hopelessly general concepts, and their ability to justify national regulation of everything, that the nonattenuation principle rejects. Thus, it seems possible to conclude that the nonattenuation principle—perhaps the heart of *Lopez* and *Morrison*—survives Justice Stevens' failure to mention it. The majority opinion in *Raich*, with its emphasis on the economic/commercial line, was, after all, joined by one member of the *Lopez-Morrison* majority,[293] and the judgment was concurred in by another.[294] *Raich* seems closer to the New Federalism of those cases than to the nonfederalism of Justices Breyer and Souter.

In saying this, I do not overlook the possibility that Justice Stevens was able to slip by, so to speak, a modification of *Lopez* and *Morrison*, reducing those cases to *Lopez*-Lite. Most important is his deference to Congress and his use of the rational basis test. Moreover, the result of *Raich* was to *overturn*[295] a circuit court opinion striking down federal regulation based largely on the application of *Lopez* and *Morrison*.[296] Nonetheless, I view the opinion and result in the case as more of a stopping point, a refusal to extend, than any form of serious cutting back of the basic thrust of *Lopez* and *Morrison*.

IV. FEDERAL CRIMINAL LAW AFTER *RAICH*

A. *The "Explosion" in Federal Criminal Law*

There has been a veritable explosion in the number of federal criminal laws over the last half century.[297] Although precise numbers are hard to come by, it is usually estimated that there are at least 3000 federal crimes, and perhaps more than 3600.[298] These crimes are not limited to narrow cases

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see also Gonzales v. Raich, 125 S. Ct. 2195, 2236 (2005) (Thomas, J., dissenting) ("The interconnectedness of economic activity is not a modern phenomenon unfamiliar to the framers.").

[293] Justice Kennedy.

[294] Justice Scalia.

[295] *Raich*, 125 S. Ct. at 2201.

[296] *Id.* at 1234.

[297] Am. Bar Ass'n, Criminal Justice Section, Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 7, 51 (1998) [hereinafter Report]; NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 65 (3d ed. 2000).

[298] Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 825–26 (2000); Report, *supra* note 297, at 9–10 n.11 (noting difficulty of exact count but stating that the estimate of 3000 is almost certainly too low).

of federal interest, such as theft or bribery concerning federal funds,[299] but spread across the entire range of the criminal law. According to Professors Abrams and Beale, "it is hard to think of a crime under state law that cannot be prosecuted federally."[300] This extraordinary increase can be attributed in part to the growth of new threats to national interests, such as terrorism and the international drug traffic, as well as to perceived state inability to deal with such threats. However, a Task Force of the American Bar Association recently offered a more cynical explanation for much of the trend:

> New crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need. . . . There is widespread recognition that a major reason for the federalization trend—even when federal prosecution of these crimes may not be necessary or effective—is that federal crime legislation is politically popular.[301]

Not surprisingly, the trend toward a rapid increase in the number of federal crimes has been seen by many as presenting a serious challenge to the values of American federalism. After all, the investigation and prosecution of criminal activity is a principal responsibility of the states.[302] Judge Susan Ehrlich has stated that "federalization obscures the boundaries of political responsibility and accountability, undermines the confidence constituents have in their officials, and erodes the authority of state and local institutions."[303] The ABA Task Force weighed in against the trend, going so far as to state that "it is vital to remember that the American criminal justice system was set up to operate within distinct spheres of government."[304] Collateral consequences have been criticized as well, for example, the risk of whipsawing defendants between the two systems and the general perception of unfairness generated by widely differing results.[305]

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299 18 U.S.C. § 666 (2000).

300 ABRAMS & BEALE, *supra* note 297, at 64.

301 Report, *supra* note 297, at 14–15.

302 United States v. Morrison, 529 U.S. 598, 610–12 (2000).

303 Ehrlich, *supra* note 298, at 838.

304 Report, *supra* note 297, at 24.

305 *Id.* at 34–35.

B. *Federal Criminal Law after* Lopez *and* Morrison

It was widely thought that the decision in *Lopez*, supplemented by *Morrison*, would have an impact on this development.[306] *Lopez* was a federalism-based decision striking down a federal criminal law. The majority noted, albeit in a footnote, the role of the states in criminal law enforcement. Justice Kennedy's concurring opinion, while focusing on education, suggested the possibility of spheres of state responsibility.[307] *Lopez* potentially reined in the Commerce Clause basis for congressional power by relying on the economic/commercial line as necessary for the validity of federal legislation, and articulating the nonattenuation principle. *Morrison* went further, particularly in its focus on crime. The majority referred to the suppression of violent crime as a matter "which has always been the prime object of the States' police power,"[308] and made clear that a wide-ranging federal criminal law ran counter to its vision of the federal system. However, it should be noted that not even *Morrison* rested on any notion of a "sphere"; rather it applied the *Lopez* analysis, relying heavily on the noneconomic nature of violence against women, and also invoking the nonattenuation principle.[309]

Even before *Morrison*, federal defendants rushed to attack federal criminal statutes. However, their efforts were virtually always unsuccessful.[310] There are several reasons for this sharp divergence. In part, it may simply be that the lower courts regarded *Lopez* as something of a "sport," that is, a case that presented such an unusual fact pattern that it led to a one-of-a-kind result. The principal reason appears to have been the presence in the relevant statutes of a jurisdictional element, that is, a requirement that the defendant's conduct either have an effect on commerce, or more frequently, that the defendant or some object connected with the

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[306] *E.g.*, Brown, *supra* note 267, at 985.

[307] *See* United States v. Lopez, 514 U.S. 549, 568 (1995).

[308] United States v. Morrison, 529 U.S. 598, 615 (2000).

[309] *Id.* at 613, 615.

[310] Bradley, *supra* note 17, at 575 (referring to the "nearly unanimous views of the courts of appeals"); Brown, *supra* note 267, at 985 n.19 (citing United States v. Trupin, 117 F.3d 678, 685 n.3 (2d Cir. 1997)) ("Numerous statutes have been upheld against post-*Lopez* Commerce Clause challenges in this and other courts."); United States v. Sirois, 87 F.3d 34, 40 (2d Cir. 1996) (upholding 18 U.S.C. § 2251(a)); United States v. Serrentino, 72 F.3d 294, 296 (2d Cir. 1995) (upholding 18 U.S.C. § 922(g)); United States v. Bishop, 66 F.3d 569, 585–88 (3d Cir. 1995) (upholding 18 U.S.C. § 2119)); *see generally* ABRAMS & BEALE, *supra* note 297, at 32, 54 (discussing trend in courts of appeal).

crime have traveled in interstate commerce.[311] It should be noted that the *Lopez* Court (as was later the case in *Morrison*) distinguished the statute before it on the grounds that it contained no such jurisdictional element.[312] Thus, it was easy for the lower courts to conclude either that the mere presence of a jurisdictional element saved a statute from possible invalidity, or to construe statutes using this technique in a way that made satisfying the requirements of the elements a simple task for prosecutors. *Raich* is an example of a small group of cases in which lower courts did use *Lopez* and *Morrison* to strike down criminal statutes.[313] Federal prosecutions of highly personal, intrastate activity such as home-grown marijuana and family pornography appeared to these courts to go beyond the outer edge of any class of activities that Congress could regulate.[314] Not even the presence of a jurisdictional element was sufficient in the pornography cases.[315] These courts utilized the four-part test drawn from *Morrison*'s elaboration on *Lopez*, and emphasized the economic/commercial line and the nonattenuation principle in striking down statutes.[316] Furthermore, the Supreme Court strengthened the possibility of constitutional analysis in its decision in *Jones v. United States*,[317] which utilized the constitutional precepts of *Lopez* and *Morrison* to guide statutory construction in a manner that led to finding the federal arson statute's requirements unmet.[318]

Thus, as of the early 2000s, there existed a curious dichotomy between the Supreme Court and the lower courts. The former had three times sent strong signals that there are constitutional limits to the development of federal criminal law.[319] Yet the latter seemed virtually to ignore these signals.[320] The momentum behind the growing body of federal criminal law had certainly not stopped. Congress continued to consider a wide range of possible new criminal statutes. According to Judge Ehrlich, in the 105th Congress,

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311 *E.g.*, United States v. Bishop, 66 F.3d 569, 585–88 (3d Cir. 1995).

312 *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 560.

313 *See generally* Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

314 *E.g.*, *id.* at 1234.

315 *E.g.*, United States v. McCoy, 323 F.3d 1114, 1115 (9th Cir. 2003).

316 *E.g.*, *Raich*, 352 F.3d at 1229–34.

317 Jones v. United States, 529 U.S. 848, 851 (2000).

318 *Id.* at 858–59.

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

320 Bradley, *supra* note 17, at 575.

> hundreds of bills were introduced having to do with federal criminal statutes, many of which pertained to juvenile justice, including one unsuccessful measure that would require that 14- and 15-year-olds be tried as adults if accused of offenses constituting what Congress defines as serious violent crimes or drug offenses.[321]

Despite the Supreme Court cases, the authors of such bills could point to widely differing results in the lower courts, should constitutional objections be raised. Indeed, the ABA Task Force report, published three years after *Lopez*, reached the surprising conclusion that the political process is the only check on the growth of federal criminal statutes: "[t]he opportunity to limit the excessive federalization of local crimes rests entirely with Congress."[322]

C. *Federal Criminal Law After* Raich

Whatever momentum existed before 2005, *Raich* can only sustain and probably increase it. Once the Court has concluded that a statute passes the initial hurdle for substantial effects analysis, as was the case in *Raich*, Congress's power to legislate broadly under that category is striking. As Professor Bradley remarked, prior to *Raich*, "[a]s long as the 'substantial effects' test remains on the books, federal criminal jurisdiction, even if somewhat constrained, will continue to be broad."[323] The six to three decision upheld a federal criminal statute, using *Wickard*-based analysis, at the outer limits of its intrastate application. As noted, *Raich* seemed to reject any "sphere" or other state sovereignty notion of limiting federal law, and did not give support to the approach of subjecting federal statutes to a four-part test based on *Lopez* and *Morrison*.[324]

Raich, however, does not mean carte blanche, as long as *Lopez* and *Morrison* are on the books.[325] After all, the economic/commercial line does have to be satisfied, and *Lopez* and *Morrison* demonstrate that there are class-of-activity statutes that do not satisfy it. I have argued above that a high degree of acceptance of the nonattenuation principle is implicit in *Raich*,[326] but admit that the matter is somewhat left up in the air. Battles remain to be fought. It is likely that the wide use of jurisdictional elements will come

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[321] Ehrlich, *supra* note 298, at 825.

[322] Report, *supra* note 297, at 51.

[323] Bradley, *supra* note 17, at 579.

[324] *See supra* Part II.B.

[325] Like Professor Bradley, I have argued that the constitutional overtones of *Jones* are also significant. Bradley, *supra* note 17, at 573; Brown, *supra* note 267, at 1009.

[326] *See supra* notes 290–91.

under increasing scrutiny.[327] Some courts have already indicated a willingness to hold jurisdictional elements ineffective to sustain federal legislative power. Questions of limits will remain, although the remands of several decisions favorable to defendants for consideration in light of *Raich*[328] suggest that the hospitable attitude demonstrated in *Raich* will continue to have an effect. Overall, the notion of an expansive federal criminal law is strengthened by the decision. The main question now may shift to consideration of what it should look like. In this respect, the ABA Task Force's emphasis on the legislative process seems vindicated. Indeed, it would be an anomaly of the New Federalism if the area in which it appeared to have made some of its greatest gains—the criminal law—was now remitted to the congressional process and the "political safeguards of federalism" that often are the antithesis of the federalism found in *Lopez*.

It seems clear that we will have a wide-ranging federal criminal law rather than one based on notions of spheres or of a sharp demarcation between the two levels of government. It is true that the debate will continue, a debate that Professors Abrams and Beale have characterized "as a disagreement between the federalizers and the anti-federalizers,"[329] but the former are clearly in the ascendancy. Furthermore, it is doubtful that any significant limit can be imposed by a search for "principles" that perform a sub-constitutional function of demarcation.[330] Thus, what we are likely to see, as is already the case to a considerable degree, is an increasing overlap between criminal statutes at both the state and federal levels. In an important article, Harry Litman and Mark Greenberg defend this model vigorously:

> It is often impossible to draft a statute in a way that includes only those crimes that are sophisticated, interjurisdictional, or sensitive enough to require a federal solution. In order to allow sufficient flexibility to bring a federal prosecution when an aspect of a law enforcement problem requires it, federal criminal legislation inevitably will have to be overinclusive.[331]

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[327] Brown, *supra* note 267, at 1013–23.

[328] United States v. Smith, 402 F.3d 1303 (11th Cir. 2005), *vacated*, 125 S. Ct. 2938 (2005); United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004), *vacated*, 126 S. Ct. 321 (2005); Klingler v. Director Dept. Rev., 366 F.3d 614 (8th Cir. 2004), *vacated*, 125 S. Ct. 2899 (2005); United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003), *vacated*, 125 S. Ct. 2899 (2005).

[329] ABRAMS & BEALE, *supra* note 297, at 65.

[330] *See id.* at 68.

[331] Litman & Greenberg, *supra* note 20, at 964–65. Professor Kurland has demonstrated that historically the states and federal government have had concurrent

Advocates of a broad federal criminal law point out that this model has been continuously present since the early days of the Republic.[332] The Court has not been hospitable to efforts to curtail it. A unanimous decision concerning the scope of the Hobbs Act stated that "[w]ith regard to the concern about disturbing the federal state balance . . . there is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law."[333] The New Federalists were swimming upstream when they attempted to establish spheres of state authority, particularly the criminal law.[334] *Raich* makes the task even harder.

D. *As-Applied Challenges in the Commerce Clause Context*

Raich appears to have put to rest the controverted question of whether as-applied challenges can be brought to the intrastate manifestations of federal statutes regulating interstate commerce. That there is an issue at all is surprising given what Professor Fallon calls the "familiar understanding that as-applied challenges are the normal mode of constitutional adjudication."[335] The Supreme Court has often expressed strong reservations about *facial* challenges—the analytical technique at the other end of the constitutional spectrum from as-applied challenges.[336] In the 2004 decision of *Sabri v. United States*, the Court stated:

> Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks. Facial adjudication carries too much promise of 'premature interpretatio[n] of statutes' on the basis of factually bare-bones records.[337]

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jurisdiction in the area of criminal law. Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1 (1996).

[332] *See* Henning, *supra* note 227, at 413 (The Court "has historically accepted that federal provisions operate in many areas already subject to state regulation. The fact that both the federal and state governments can enforce criminal laws covering similar conduct has not been troubling in a constitutional sense."); Kurland, *supra* note 331, at 58 (discussing overlapping criminal jurisdiction in the context of the postal power).

[333] United States v. Culbert, 435 U.S. 371, 379 (1978).

[334] *See* Henning, *supra* note 227, at 394 n.32.

[335] Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1329 (2000).

[336] United States v. Salerno, 481 U.S. 739, 745 (1987); Fallon, *supra* note 335, at 1342–59.

[337] Sabri v. United States, 541 U.S. 600, 609 (2004) (alteration in original) (citing United States v. Raines, 362 U.S. 17, 22 (1960)).

On the other hand, as-applied challenges have the advantage of considering statutes in the context of particular applications. As Professor Fallon puts it, "statutes often are best understood as encompassing a number of subrules, which frequently are specified only in the process of statutory application, and . . . some subrules may validly be applied even if others may not."[338]

In the Commerce Clause context, however, doubt has existed about whether litigants could challenge a generally valid statute when the challenge was to the law's application to their intrastate, small-scale activities. The main source of these doubts was the famous quote from *Maryland v. Wirtz*,[339] repeated frequently by the Court, including in the majority opinion in *Lopez*, that "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."[340] The decision in *Perez v. United States*[341] is illustrative of the approach embodied in the quote. *Perez* involved the application of a general law on "extortionate credit transactions" to a local loan shark. The Supreme Court reviewed and accepted Congress's conclusion that loan-sharking was a national problem, frequently tied to organized crime.[342] The Court concluded that Congress could properly deal with loan-sharking as a class of activities.[343] Since the defendant was a member of the class, the principle articulated in *Wirtz* controlled.[344]

It can thus be argued that substantive Commerce Clause doctrine bars as-applied challenges of the sort presented in *Raich*. This was the position taken

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[338] Fallon, *supra* note 335, at 1334. It should be noted that Fallon does not regard the distinction between the two types of challenges as clear cut.

[339] Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968).

[340] United States v. Lopez, 514 U.S. 549 (1995). As the Ninth Circuit has pointed out, that sentence originated in a discussion of congressional power to regulate all aspects of a single enterprise. United States v. Stewart, 348 F.3d 1132, 1140–41 (9th Cir. 2003), *vacated*, 125 S. Ct. 2899 (2005) ("Read in context, the sentence . . . can only mean that where a general regulatory statute governs a large enterprise, it does not matter that its components have a *de minimus* relation to interstate commerce on their own."). *Stewart*, 348 F.3d at 1141. However, the sentence has taken on a life of its own and is generally read broadly as its language invites.

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

[342] *Id.* at 157.

[343] *Id.* at 153–55.

[344] *Id.* at 154 (citing *Wirtz*, 392 U.S. at 193). In *Perez* the Court stated cryptically that "[i]n the setting of the present case there is a tie-in between local loan sharks and interstate crime." *Id.* at 155.

by Judge Trott in *United States v. McCoy*,[345] a case involving "personal" intrastate child pornography. He drew on *Wirtz* and on other Supreme Court cases to conclude that "if the general regulatory statute at issue does bear a substantial relation to commerce, an 'as applied' challenge is inappropriate."[346] He then applied *Lopez* and *Morrison*, as well as the four-part test that courts of appeals had distilled from them, to determine whether the *general statute* on child pornography was valid.[347] The defendant's conduct was irrelevant to the inquiry. A strong argument can be made that Judge Trott was correct. An as-applied challenge permits reconsideration of the validity of regulation of the class after that issue has been decided. It represents a sort of second constitutional bite at the apple.

However, Judge Trott was dissenting from a decision in which a majority of the Ninth Circuit did precisely what he viewed as forbidden: entertain an as-applied challenge to the intrastate conduct at issue.[348] The majority utilized the same four factors to resolve what it specifically described as an as-applied challenge.[349] It stated the issue as follows:

> [W]hether a statute enacted pursuant to the Commerce Clause may constitutionally reach non-commercial, non-economic individual conduct that is purely intrastate in nature, when there is no reasonable basis for concluding that the conduct had or was intended to have any significant interstate connection or any substantive effect on interstate commerce.[350]

In a recent important article, Professor Henning has criticized cases such as *McCoy*, and the lower courts' willingness to entertain as-applied challenges to federal criminal prosecutions.[351] He sees the lower courts as improperly utilizing federalism principles as an additional check—beyond any statutory or constitutional inquiry—to block interference by federal prosecutors with inherently local crimes. He warns that

> [t]he application of federalism to prohibit a particular prosecution of an offense—despite the constitutionality of the statute—because a federal court deems the conduct to fall within the category of a 'truly local' crime

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[345] United States v. McCoy, 323 F.3d 1114, 1133 (9th Cir. 2003) (Trott, J., dissenting).

[346] *Id.* at 1135.

[347] *Id.* at 1137–40.

[348] *See id.* at 1133.

[349] *Id.* at 1119; *see also* United States v. Stewart, 348 F.3d 1132, 1140–43 (9th Cir. 2003), *vacated*, 125 S. Ct. 2899 (2005) (discussing and defending as-applied challenges).

[350] *Id.* at 1117.

[351] Henning, *supra* note 227, at 436–42.

> has the hallmark of a standardless judicial authority to assess the propriety of the decision to prosecute.[352]

Professor Henning is certainly correct that the lower courts often express a preference for state prosecution of local matters[353] and refer frequently to federalism issues in the context of the prosecutions he discusses.[354] However, it is also possible, in some cases, to view the lower courts as engaging in Commerce Clause analysis, as the Ninth Circuit maintained in *McCoy*.[355] Like other commentators, Professor Henning accepts the validity of Professor Monaghan's concept of the "valid rule of law" requirement: the right to be governed by laws that are within the power of the legislature to enact.[356] The question then becomes whether Congress's power to reach intrastate manifestations of an activity it can regulate on the interstate level is part of the issue of the statute's validity. In theory, the valid interstate component shields the rule from a facial challenge of the *Lopez* variety. Nonetheless, is the challenge to intrastate application a form of challenge to the rule's validity?

One might contend that once the basic issue of the rule's validity is settled, any challenges to intrastate applications are of the as-applied variety and are subject to the limitations on such claims. Professor Henning states that an as-applied challenge involves the assertion of individual rights such as free speech or trial by jury.[357] The Commerce Clause may not be a source of such rights. "The Commerce Clause—or the other enumerated powers—does not provide individuals with any rights beyond the requirement of a valid rule adopted pursuant to a legitimate exercise of constitutional

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[352] *Id.* at 446–47.

[353] *E.g.*, United States v. McCoy, 323 F.3d 1114, 1117 (9th Cir. 2003).

[354] Henning, *supra* note 227, at 395–96. Professor Henning states:

> [s]ome lower courts, encouraged by off-handed references in Supreme Court opinions about the limiting effect of federalism on congressional authority to reach certain types of crimes, have taken that cue to reject the federal government's power to pursue a particular case even when the statute itself is a proper exercise of Congress's power to regulate. This application of federalism creates a new form of judicial supervisory authority to invoke a vague constitutional limitation—one not mentioned explicitly in the Constitution—to limit the national government's power to pursue criminal prosecutions.

Id. (footnote omitted).

[355] *See McCoy*, 323 F.3d at 1117–31.

[356] *See* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3–4; Henning, *supra* note 227, at 432; Fallon, *supra* note 335, at 1327.

[357] Henning, *supra* note 227, at 436.

authority."[358] Once the facial validity of a statute is established, there is nothing left for the individual litigant to assert in the as-applied challenge.

On the other hand, the challenge to intrastate application does seem similar to a valid rule argument: Congress's power does not reach the subclass of activities in which the challenger participates; thus it lacks authority to regulate those activities. The challenger is asserting at the intrastate level the same valid rule right asserted in *Lopez* at the interstate level.[359] There are two bites at the apple because there are two apples (indeed, there might be multiple bites at the intrastate apple[360]). Even *Perez* may provide support for such an approach. It referred to the general rule about class-of-activities statutes with the possible qualification that the class be "within the reach of federal power."[361] For the Ninth Circuit in *Raich*, this requirement was key to its ability to analyze the constitutionality of the CSA as applied to the subclass of intrastate, noncommercial cultivation, possession, and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law.[362] From the New Federalist point of view, one might add that the breadth of judicial review of federalism issues is directly related to the availability of that review in the first place. Thus, New Federalists would be expected to favor as-applied challenges as a general matter. Moreover, it is only through such challenges that the courts can resolve the difficult problems posed by "outer limits" cases such as the pornography cases discussed below.[363]

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[358] *Id.* at 443. *But see* Dennis v. Higgins, 498 U.S. 439, 448 (1991) ("The Court has often described the Commerce Clause as conferring a 'right' to engage in interstate trade free from restrictive state regulation."). The Court held that a successful challenge to state regulation on dormant Commerce Clause grounds entitled the challenger to attorney's fees under 42 U.S.C. § 1988 because he had successfully asserted "rights, privileges, or immunities" under the Commerce Clause. *Id.* at 446. The result effectively overrules *Consolidated Freightways v. Kassel*, 730 F.2d 1139, 1144 (8th Cir. 1984) (The Commerce Clause is not a source of rights cognizable under 42 U.S.C. § 1983.).

[359] In *Raich*, Justice Thomas compared the challenge in that case to *Lopez* and *Morrison* and stated that "[t]here is no reason why, when Congress exceeds the scope of its commerce power, courts may not invalidate Congress'[s] overreaching on a case-by-case basis." Gonzales v. Raich, 125 S. Ct. 2195, 2238 (2005) (Thomas, J., dissenting).

[360] *See* United States v. Morales-de Jesus, 372 F.3d 6, 18 (1st Cir. 2004) (discussing possibility of multiple as-applied challenges to child pornography statutes). At some point, probably sooner rather than later, substantive Commerce Clause doctrine or principles of stare decisis would operate to stop a succession of challenges.

[361] Perez v. United States, 402 U.S. 146, 154 (1971).

[362] Raich v. Ashcroft, 352 F.3d 1222, 1228–29 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[363] *See infra* notes 418–55.

In any event, the Supreme Court decision in *Raich* appears to validate unequivocally as-applied challenges to intrastate permutations of regulations of interstate commerce such as the CSA. All four opinions in the case discuss the challengers' circumstances and the bearing of *Wickard* on them.[364] Thus, all four opinions can be said to consider the constitutionality of the CSA as applied to the subclass before the Court. Justice Stevens and Justice O'Connor specifically described the class involved.[365] For Justice Scalia, the regulation in question was valid "however the class of regulated activities is subdivided."[366] Justice Thomas agreed with the Ninth Circuit's description of the class.[367] There remains the troubling question whether one is free to bring an as-applied challenge in such circumstances, but will always lose. Justice Stevens invoked the *Wirtz* quote,[368] and stated that the Court's Commerce Clause cases "foreclose" the challengers' claim.[369] On the other hand, he engaged in an extensive analysis of how that claim fared under *Wickard*, in particular.[370] In theory, at least, plaintiffs might have won, as they did below. The Ninth Circuit's error lay not in hearing their claim, but in getting it wrong.

E. *Jurisdictional Elements—The Last Frontier*

Raich solidifies the status of class-of-activity statutes. Attention will now turn to one of the most controversial issues in federal criminal law: the role of jurisdictional elements in criminal statutes passed under the commerce power.[371] Although New Federalists have seemed to favor these statutes, they have the potential to totally undermine federalism and to lead to a true national police power. It may be helpful to review the distinction between the two types of statutes. A class-of-activity statute singles out a particular form of criminal activity, for example, loan-sharking; defines it (extortionate credit transactions in which a threat of violence or other crime underlies the

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[364] *Raich*, 125 S. Ct. at 2206–08 (Stevens, J., writing for the majority); *id.* at 2217 (Scalia, J., concurring); *id.* at 2225–27 (O'Connor, J., dissenting); *id.* at 2238 (Thomas, J., dissenting).

[365] *Id.* at 2211–16 (majority opinion) (narrowing class as defined by lower court); *id.* at 2226–28 (O'Connor, J., dissenting).

[366] *Id.* at 2220 (Scalia, J., concurring).

[367] *Id.* at 2233, 2239 (Thomas, J., dissenting).

[368] *Id.* at 2206 (majority opinion).

[369] *Id.* at 2215.

[370] Gonzales v. Raich, 125 S. Ct. 2195, 2205–09 (2005).

[371] *See generally* Henning, *supra* note 227, at 429–31 (discussing jurisdictional elements and their importance after *Lopez* and *Morrison).*

obligation to repay); and provides criminal penalties. A jurisdictional element statute adds to the criminal activity a specific link to interstate commerce. This link is an element of the crime, and the prosecution must prove it as part of its case. For example, the Travel Act punishes any person who "travels in interstate or foreign commerce or uses . . . any facility in interstate or foreign commerce . . . with intent to" commit certain crimes.[372] The Hobbs Act punishes any person who

> in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.[373]

What accounts for the difference between these two techniques of statutory drafting under the Commerce Clause? Justice Breyer has suggested that the difference may reflect a congressional choice to deal with a matter either "instance by instance" or "problem by problem."[374] Congress may not be able to define the problem in advance in a manner that is consistent with its constitutional authority. For example, the Hobbs Act seems to recognize that not all robberies affect commerce, but that some may. The conservative members of the Court have taken the matter a step further and expressed an apparent preference for jurisdictional element statutes.[375] They see the jurisdictional element as a technique for limiting federal authority. In *Lopez*, the majority noted that the statute "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[376] In *Morrison*, the same majority repeated this quote and underscored its importance in the following terms: "[s]uch a jurisdictional element may establish that the enactment is in pursuance of Congress'[s] regulation of interstate commerce."[377]

However, it is important to distinguish between what can be referred to as "effects" elements and "nexus" elements.[378] The former tie the criminal

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[372] 18 U.S.C. § 1952 (1994).

[373] 18 U.S.C. § 1951 (1994).

[374] United States v. Lopez, 514 U.S. 549, 630–31 (1995) (Breyer, J., dissenting).

[375] *E.g.*, *id.* at 561.

[376] *Id.*

[377] United States v. Morrison, 529 U.S. 598, 612 (2000).

[378] Brown, *supra* note 267, at 1014; *see* ABRAMS & BEALE, *supra* note 297, at 31 ("Issues that arise in connection with the 'affecting commerce' formula and concerns about this approach are quite different from those that attach to the transportation or travel across a state line jurisdictional basis.").

activity in question closely to the third category of Commerce Clause authority recognized in *Lopez*: substantial effects on interstate commerce. Nexus elements, however, derive from categories one and two, as outlined in that case, particularly the power over the "channels" of interstate commerce.[379] The potential problem for conservatives is that virtually everything or every person moves in interstate commerce at some point, and that nexus elements could lead to open-ended congressional power. A good example is the federal child pornography statute, utilizing as one jurisdictional element the fact that the materials used to produce the pornography had traveled in "interstate commerce."[380]

Raich itself is directly relevant to statutes with effects elements. Its emphasis on the economic/commercial line indicates the necessity for such conduct at some point in the case. Professor Bradley breaks this inquiry down by arguing for a focus either on the defendant's conduct or on the victim's status.[381] Consider a prosecution under the Hobbs Act for extortion of a public official. One might argue that extortion is itself a consensual economic transaction.[382] Professor Bradley's analysis would focus on the importance to the national economy of the political process and its decisions.[383] Either way, the effects element is satisfied. Robbery cases are harder to deal with under the Hobbs Act. Robbery is not an economic/commercial activity. Thus, federal jurisdiction would, initially, depend on the commercial nature of the person or entity robbed. Robberies of private individuals would probably not satisfy a rigorous application of the economic/commercial line, while those of businesses would. As Professor Bradley puts it, "robbery of a pizza deliveryman while he is on duty violates the Hobbs Act. Robbery of him off-duty does not."[384]

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[379] *Lopez*, 514 U.S. at 558.

[380] 18 U.S.C. § 2252(a)(4)(B) (2000). The alternative jurisdictional element is satisfied if the visual depiction "has been mailed, or has been shipped or transported in interstate or foreign commerce . . . ." *Id.*

[381] Bradley, *supra* note 17, at 604–05.

[382] Brown, *supra* note 267, at 1022; Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 134 (Fall 2003-2004).

[383] Bradley, *supra* note 17, at 587–90; *see also* Henning, *supra* note 382, at 123 (contending that because "[c]orruption is largely an economic offense," Congress could use the Commerce Clause to criminalize state and local bribery). Professor Henning states his overall view of the matter as follows: "Misuse of governmental authority enriches both officeholders and those offering bribes because it is likely to result in a misallocation of governmental resources." *Id.*

[384] Bradley, *supra* note 17, at 610. Repeated robberies by those "in the business" of robbery would constitute commerce and represent an example of Professor Bradley's focus on the defendant.

It is at this point that jurisdictional element statutes utilizing the effects approach diverge from their class-of-activities counterparts by apparently requiring a quantitative analysis of the individual case. Although the Hobbs Act uses the verb "affect," the lesson of *Lopez* would appear to be that a substantial effect is necessary in category three situations.[385] Thus, even when the prosecution has gotten over the economic/commercial line, it still faces a quantitative dilemma. As Justice O'Connor has stated: "individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious—that their personal activities do not have a substantial effect on interstate commerce."[386] In theory, a jurisprudence could be developed establishing just how much individual activity is enough. There is support for a case-by-case inquiry. For example, in the *Jones* arson case, the government argued that the substantial threshold was met when an out-of-state insurer was obliged to pay more than $75,000 for the arson in question.[387] A number of alternative solutions have been suggested, including a de minimis effect on commerce,[388] but the inquiry probably turns on whether the defendant's conduct can be aggregated with similar instances to determine whether activity of that nature and volume creates a substantial effect on interstate commerce. I believe that Professor Bradley is correct in his view that aggregation is possible.[389] While I have argued elsewhere that there is a serious question "whether one may legitimately apply class of activity analysis to an individualized form of draftsmanship such as an effect element,"[390] the endorsement in *Raich* of as-applied challenges to class-of-activities statutes suggests that courts will engage in similar inquiries whether evaluating a subclass under such a statute, or the effects of individual conduct on interstate commerce in the case of a statute with an effects jurisdictional element. In each case, the aggregation technique of *Wickard* will be utilized.

Defendants in *Raich*-type challenges ask for a focus on their activities, but the courts routinely consider the way in which the statute applies to all

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[385] United States v. Lopez, 514 U.S. 549, 559 (1995).

[386] Gonzales v. Raich, 125 S. Ct. 2195, 2223 (2005) (O'Connor, J., dissenting).

[387] Brown, *supra* note 267, at 1019–20; *see* United States v. Hickman, 179 F.3d 230, 243–44 (5th Cir. 1999) (DeMoss, J., specially dissenting) ("[T]he truly determinative question . . . is whether the conduct in this case 'substantially affects interstate commerce.' It is that standard, after all, which is our constitutional touchstone, and which should ultimately control the outcome of this case.").

[388] *See generally* ABRAMS & BEALE, *supra* note 297, at 216–18 (discussing alternative solutions).

[389] Bradley, *supra* note 17, at 593; *see generally id.* at 592–597 (discussing competing theories).

[390] Brown, *supra* note 267, at 1019.

those similarly situated.[391] The same approach should apply to jurisdictional element challenges. The situations are analytically alike: an apparent focus on one person requires consideration of all those similarly situated to measure effect on commerce. The constitutional question is whether Congress can regulate such persons, not just one individual. In addition, it would be awkward if the Court offered advice to Congress as to how best to draft federal statutes that would lead to most statutes being unconstitutional. Thus, the two techniques of statutory draftsmanship come close to merging.[392]

Let us apply this analysis to *Raich* itself, assuming that the statute had been drafted to forbid any possession of marijuana with an effect on interstate commerce. The first question is whether economic/commercial activity is present at all. Possession seems like a classic case of an activity that falls outside the line, and we can perhaps assume that cultivation for one's own use also falls outside. Nonetheless, there is the analysis utilized in *Raich*, and derived from *Wickard*, that the homegrown marijuana "overhangs"[393] the market and threatens to enter it.[394] There is also the threat to the federal regulatory scheme posed by the difficulties for law enforcement officials in any attempt to distinguish between intrastate and interstate marijuana. Thus, the economic/commercial line is satisfied. If the conduct can be aggregated, as in a class-of-activities statute, utilization of a jurisdictional element would lead to the same result, based on the same analysis.

As for nexus jurisdictional elements, they have long been a staple of the federal criminal law. Professors Abrams and Beale state that "federal criminal jurisdiction under the commerce power has most often been based on the direct crossing of an interstate boundary by way of transportation, shipping, traveling or the like."[395] The lower courts' receptive attitude toward nexus statutes is a principal reason for the failure of *Lopez*-based

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[391] *E.g.*, United States v. McCoy, 323 F.3d 1114, 1124 (9th Cir. 2003) (stating the issue in the case as "the application [of the statute] to McCoy in the circumstances present here (or to others in similar circumstances).").

[392] *See* United States v. Guerra, 164 F.3d 1358, 1358 (11th Cir. 1999) (treating the Hobbs Act as regulating general conduct and applying aggregation analysis); United States v. Stillo, 57 F.3d 553, 558 n.2 (7th Cir. 1995) (applying *Wirtz* analysis concerning general regulatory statutes to Hobbs Act). There may be a certain tension between advocacy of jurisdictional element statutes, on the one hand, and hostility to *Wickard* on the other.

[393] Wickard v. Filburn, 371 U.S. 111, 128 (1942).

[394] *Raich*, 125 S. Ct. at 2207.

[395] ABRAMS & BEALE, *supra* note 297, at 20.

challenges.[396] An interesting exception is the treatment of the child pornography statute.[397] The law is aimed at visual depictions involving the use of a minor engaging in sexually explicit conduct. One of the alternative jurisdictional elements is that the offending material "was produced using materials which have been mailed or shipped or transported [in interstate or foreign commerce]."[398] Obviously, this, like some other nexus elements, is virtually meaningless, given the fact that photographic and similar materials will almost always have an interstate shipment dimension. In *United States v. McCoy*, the Ninth Circuit ruled that this jurisdictional element failed to achieve the basic goal of limiting the reach of a federal statute to a discrete set of activities.[399] It noted that the statute "encompasses virtually every case imaginable, so long as any modern-day photographic equipment or material has been used."[400] The court went on to decide the case as if the jurisdictional element were absent.[401] However, it focused on the relationship between the requirement and the effect on interstate commerce, virtually ignoring the possibility that the jurisdictional element could be viewed as an example of legislation passed under categories one or two as outlined in *Lopez*.[402] Yet the fact of extensive movement of persons and goods in interstate commerce makes it plausible to uphold such jurisdictional elements under a channels analysis. In turn, such an approach means that Congress can regulate virtually anything as long as it can make the tie to "commerce." As Diane McGimsey puts it, the Court in *Lopez* "evinced no intention to reexamine the channels or instrumentalities prongs of Congress's ability to regulate under those prongs. Further, by highlighting the absence of a jurisdictional element, the Court implied that its addition would validate an

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396 *E.g.*, United States v. Trupin, 117 F.3d 678, 685 n.3 (2d Cir. 1997) ("Numerous statutes have been upheld against post-*Lopez* Commerce Clause challenges in this and other courts."); United States v. Sirois, 87 F.3d 34, 40 (2d Cir. 1996) (upholding 18 U.S.C. § 2251(a)); United States v. Sorrentino, 72 F.3d 294, 296 (2d Cir. 1995) (upholding 18 U.S.C. § 922(q)); United States v. Bishop, 66 F.3d 569, 585–88 (3d Cir. 1995) (upholding 18 U.S.C. § 2119). Professors Abrams and Beale also note a hospitable attitude towards the Hobbs Act—an effects statute—even after *Lopez*. ABRAMS & BEALE, *supra* note 297, at 32.

397 *See generally* 18 U.S.C. § 2252 (2000).

398 *Id.* § 2252(a)(4)(B).

399 United States v. McCoy, 323 F.3d 1114, 1124–26 (9th Cir. 2003).

400 *Id.* at 1124.

401 *Id.*

402 United States v. Lopez, 514 U.S. 549, 560 (1995).

otherwise unconstitutional statute."[403] Congress is likely to take up the invitation.[404]

Commentators vary sharply as to the desirability of this situation, although it seems hard to believe that the Court would go to such great lengths to limit congressional power under one major technique, only to endorse the possibility of circumventing its holdings through the use of jurisdictional elements. McGimsey states that

> [t]he Court's failure to put meaningful limits on the use of a jurisdictional element to invoke Congress's Commerce Clause power leaves federalism in the same place it was before the Court decided *Lopez* and *Morrison*—seriously at risk. Federalism depends on limiting the use of the commerce power to when there is a true connection to interstate commerce. The current presumption that the crossing of state lines ensures a connection to interstate commerce is erroneous.[405]

Some analysts are clearly not disturbed by the prospect that broad use of nexus elements can lead to unlimited congressional power. Professors Stacy and Dayton have stated that "a nexus with interstate commerce can be shown in every case."[406] Professor Bradley, on the other hand, has expressed doubts.[407] Indeed, Professors Nelson and Pushaw have recommended eliminating jurisdiction based on categories one and two.[408]

It is possible to analyze nexus elements as presenting an example of the nonattenuation or noninfinity problem. That is, since virtually all people and goods will have some connection with commerce through movement, Congress can regulate them under the commerce power. This argument is strikingly similar to that which the Court rejected in *Lopez* and *Morrison* when confronted with arguments based on the commercial

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[403] Diane McGimsey, *The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1704 (2002).

[404] Litman & Greenberg, *supra* note 20, at 940–54 (discussing revised Gun Free School Zones Act based on movement of firearms in interstate commerce, and the basis of the new statute in categories one and two).

[405] McGimsey, *supra* note 403, at 1706. McGimsey states that "the lower federal courts have consistently upheld statutes based on the mere presence of a jurisdictional element." *Id.* at 1709.

[406] Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 297 (1997).

[407] Bradley, *supra* note 17, at 600.

[408] Nelson & Pushaw, *supra* note 215, at 107–13.

interconnectedness of our society.[409] Harry Litman and Mark Greenberg have mounted a spirited defense of a broad use of nexus jurisdictional elements, although even they recognize the need for some limits.[410] Their essential formulation is as follows: whatever the outer limits on the commerce power, the use of the power to regulate harms of which interstate commerce is a cause is straightforward.[411] They recognize the problem of happenstance movement in interstate commerce, and recommend an approach similar to the proximate cause concept widespread in torts analysis.[412] Diane McGimsey has examined a series of limitations and focuses on what she refers to as the "purpose-nexus requirement."[413] I do not think that *Raich* provides any direct answer to the question, although, as argued above, its insistence on the economic/commercial line also should be taken as expressing support for a limited commerce power such as that guaranteed by the nonattenuation principle. In any event, over the course of ten years, the Court has issued three major decisions on the constitutional dimensions of substantial effects regulation.[414] One should probably add the important statutory construction decision in *Jones*.[415] It is time for guidance as to how to handle regulation under categories one and two through the use of jurisdictional elements of the nexus variety. The Court may have provided the beginning of this guidance when it remanded a gun control case for reconsideration in light of *Raich*.[416] However, in the remanded case, the court of appeals had taken a narrow view of nexus elements.[417]

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

[410] Litman & Greenberg *supra* note 20, at 921.

[411] *Id.* at 950.

[412] *Id.* at 921; *see* ABRAMS & BEALE, *supra* note 297, at 28.

[413] McGimsey, *supra* note 403, at 1731–35 ("The purpose nexus would solve most of the problems discussed earlier regarding the lower courts' opinions, both by limiting statutes that might legitimately fall within Congress's Commerce Clause power but have been too expansively interpreted, and by invalidating statutes that do not fall within Congress's Commerce Clause power at all.").

[414] Gonzales v. Raich, 125 S. Ct. 2195 (2005); United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[415] *See generally* Jones v. United States, 529 U.S. 848 (2000).

[416] United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003), *vacated*, 125 S. Ct. 2899 (2005).

[417] *Stewart*, 348 F.3d at 1136 ("[J]ust because certain of the elements that make up an object have traveled interstate at one time or another, this does not necessarily mean Congress can regulate that object under the Commerce Clause."); *see also* United States v. Morrison, 529 U.S. 598, 613 n.5 (2000) (suggesting approval of criminal provisions of the Violence Against Women Act based on their requirement of interstate travel).

F. Raich *and the Outer Limits of Federal Criminal Law*

Raich poses, in stark form, the question of the outer limits of federal criminal statutes enacted under the Commerce Clause: at what point is an activity so intrastate, so removed from "commerce," and, seemingly, so removed from the concerns of the federal government that the latter should not be able to regulate it? The general problem may be referred to as that of parallel private activity. As Justice O'Connor put it in her *Raich* dissent:

> Most commercial goods or services have some sort of privately producible analogue. Homecare substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow—a federal police power.[418]

The theme is a recurring one among conservative judges, and often leads to a parade of horribles. Justice Thomas, in *Raich*, raised the question of whether the national government may now "regulate quilting bees, clothes drives, and potluck suppers throughout the 50 states."[419] Assuming that there is no separate external limit on broad uses of the commerce power to reach intrastate activity, the answer must be found in Commerce Clause jurisprudence itself. The source of the problem, if it is one, is the opinion in *Wickard*, and its broad willingness to embrace small-scale intrastate activity in a general regulatory scheme.[420]

The much-litigated field of "personal" pornography provides a good example.[421] The key provision of the federal statutory scheme in question

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[418] *Raich*, 125 S. Ct. at 2225 (O'Connor, J., dissenting). She referred explicitly to the "outer limits" of the Commerce Clause, *id.* at 2223, and to Justice Kennedy's defense of judicial review in enforcing them. *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring); *see* United States v. Kallestad, 236 F.3d 225, 231, 233 n.32 (5th Cir. 2000) (Jolly, J., dissenting) (criticizing broad application of the Commerce Clause to intrastate activity on the ground that "[a]n intrastate market exists for virtually any product one might possess.").

[419] *Raich*, 125 S. Ct. at 2236 (Thomas, J., dissenting).

[420] Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) ("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 others similarly situated, is far from trivial.") (citation omitted).

[421] *E.g.*, United States v. Mugan, 394 F.3d 1016 (8th Cir. 2005); United States v. Riccardi, 405 F.3d 852 (10th Cir. 2005); United States v. Smith, 402 F.3d 1303 (11th Cir. 2005), *vacated*, 125 S. Ct. 2938 (2005); United States v. Morales-de Jesus, 372 F.3d 6

makes it a crime to "knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction . . . if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct."[422] The 2003 Ninth Circuit decision in *United States v. McCoy*[423] is worth in-depth consideration for several reasons. First, the facts present a compelling argument for a private, personal, non-commercial act. In addition, the Ninth Circuit decision in *Raich*, reversed by the Supreme Court, relied heavily on *McCoy*.[424] Finally, the Supreme Court's action in vacating and remanding two child pornography cases[425] for reconsideration in light of *Raich*, may shed light on earlier cases such as *McCoy*.

McCoy presented a tawdry set of facts, typical of many of these cases.[426] Apparently under the influence of alcohol, a father photographed his wife and ten-year-old stepdaughter. The photograph of the daughter meets the statutory definition of "sexually explicit conduct." The husband was a Naval Petty Officer, and the matter ultimately ended up in the hands of federal law enforcement agents. I think it is useful to examine *McCoy* as a classic outer limits case without consideration of any possible federal interest in the conduct of Naval personnel. After all, the husband's status would make no difference in determining the reach of the statute. Although the court of appeals referred to both a facial and an as-applied challenge, its analytical focus is solely on the latter.[427] The court applied[428] the four-part test discussed above.[429] Although this test is no longer operational after *Raich*, it does involve examining the application of the economic/commercial line, as well as questions of the definition of the subclass to which that line applies in as-applied challenges. As treated by the *McCoy* Court, the two issues are closely interrelated, as they were in *Raich*.

(1st Cir. 2004); United States v. Andrews, 383 F.3d 374 (6th Cir. 2004); United States v. Holston, 343 F.3d 83 (2d Cir. 2003); United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003); United States v. Galo, 239 F.3d 572 (3d Cir. 2001); United States v. Kallestad, 236 F.3d 225 (5th Cir. 2000).

[422] 18 U.S.C. § 2252(a)(4)(B) (2000).

[423] United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003).

[424] Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[425] United States v. Smith, 402 F.3d 1303 (11th Cir. 2005), *vacated*, 125 S. Ct. 2938 (2005); United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004), *vacated*, 126 S. Ct. 321 (2005).

[426] *McCoy*, 323 F.3d at 1115.

[427] *Id.* at 1119–29.

[428] *Id.* at 1117–30.

[429] *See supra* notes 316–18.

The Ninth Circuit rejected outright any role for the jurisdictional element relied on by the government: a requirement that the materials used to produce the depiction have been transported in commerce by any means.[430] It found that the jurisdictional element failed to limit the statute in any way, and that it encompasses virtually every case imaginable.[431] Like other courts of appeals, it saw intrastate pornography as presenting a category three substantial effects issue.[432] The opinion focused on that through consideration of the nature of the defendant's activities as compared to those in *Wickard*.[433] It noted the uncertain economic/commercial background of that case,[434] but quoted *Morrison* to the effect that "in every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn* . . . the regulated activity was of an apparent commercial character."[435] For the Ninth Circuit there was a substantial difference between the wheat in *Wickard* and the pornographic material in *McCoy*. As to the former, "its very existence had an economic effect," while "McCoy's photo does not have any plausible economic impact on the child pornography industry."[436] In other words, the photo was neither potentially economic nor did its purely intrastate possession affect federal regulation of interstate commerce. The Ninth Circuit devoted considerable attention to rebutting the Third Circuit decision in *United States v. Rodia*,[437] which rested in part on a notion of "addiction," that is, that "the possession of 'homegrown' pornography may well stimulate a further interest in pornography that immediately or eventually animates demand for interstate pornography."[438] The Ninth Circuit also rejected any fungibility analysis of the family pornographic photo.[439]

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[430] This jurisdictional element states that any child pornography "that has been mailed, or has been shipped or transported in interstate or foreign commerce . . . or that was produced using materials that have been mailed, or shipped or transported . . . by any means, including by computer" falls within the statute. 18 U.S.C. § 2252A(a)(5)(B) (2000).

[431] United States v. McCoy, 323 F.3d 1114, 1124 (9th Cir. 2003). The court stated that "the limiting jurisdictional factor is almost useless here." *Id.* at 1125.

[432] *E.g.*, United States v. Smith, 402 F.3d 1303, 1317 (11th Cir. 2005), *vacated*, 125 S. Ct. 2938 (2005); United States v. Holston, 343 F.3d 83, 89 (2d Cir. 2003).

[433] *McCoy*, 323 F.3d at 1120–33.

[434] *Id.* at 1120.

[435] *Id.* (quoting United States v. Morrison, 529 U.S. 598, 611 n.4 (2000)).

[436] *Id.* at 1121 n.11.

[437] United States v. Rodia, 194 F.3d 465, 465 (3d Cir. 1999).

[438] *Id.* at 477–78.

[439] United States v. McCoy, 323 F.3d 1114, 1120 (9th Cir. 2003). Perhaps unfortunately, the Ninth Circuit compared homegrown pornography to possession of a

Although some circuits have apparently rejected the possibility of as-applied challenges to the pornography statute,[440] the Ninth Circuit in *McCoy* followed the majority of courts of appeals in allowing an as-applied challenge.[441] The definition of the class is inherently bound up with the determination as to the economic/commercial nature of the activity. If this latter hurdle had been overcome, the next step would have been to measure the aggregate effect of the class on interstate commerce. The description of the class is key. The Ninth Circuit first described the class in the following highly general terms that seem so closely related to the legal standard as to prejudge the answer:

> At issue here is whether a statute enacted pursuant to the Commerce Clause may constitutionally reach non–commercial, non-economic individual conduct that is purely intrastate in nature, when there is no reasonable basis for concluding that the conduct had or was intended to have any significant interstate connection or any substantive effect on interstate commerce.[442]

Beyond the fact that it states the proposition in a manner that refutes it, this description does not help the analysis by singling out the particular nature of the defendants' activities. The court later defined the class-of-activity more specifically as "non-commercial, non-economic, simple intrastate possession of photographs for personal use."[443] The court made clear that its analysis applied to McCoy and to others similarly situated. In order to strengthen the case for treating this class as outside the reach of federal law, the Court might have emphasized even further the family dimension of the photograph.[444] Factual emphasis is important in contending that an activity is beyond the outer limits of the federal commerce power.

What is the impact of *Raich* and the subsequent remands on *McCoy*? There are two guideposts in attempting to formulate an answer. The first is a comparison of the class whose as-applied challenge was considered in *Raich* to the class presented in *McCoy*. In *Raich*, the Ninth Circuit defined the class

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single marijuana cigarette and the possibility that that could lead to further addiction. *Id.* As for the legislative history, the Court found it inconclusive. *Id.* at 1128.

[440] United States v. Mugan, 394 F.3d 1016 (8th Cir. 2005); United States v. Holston, 343 F.3d 83 (2d Cir. 2003); United States v. Galo, 239 F.3d 572 (3d Cir. 2001).

[441] United States v. Riccardi, 405 F.3d 852 (10th Cir. 2005); United States v. Smith, 402 F.3d 1303 (11th Cir. 2005), *vacated*, 125 S. Ct. 2938 (2005); United States v. Morales-de Jesus, 372 F.3d 6 (1st Cir. 2004); United States v. Andrews, 383 F.3d 374 (6th Cir. 2004); United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003); United States v. Kallestad, 236 F.3d 225 (5th Cir. 2000).

[442] *McCoy*, 323 F.3d at 1117.

[443] *Id.* at 1133.

[444] The Court made passing references to the family dimension. *Id.* at 1122, 1132.

of activities as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal, medical purposes on the advice of a physician and in accordance with state law."[445] At the Supreme Court level, Justice Stevens, for the majority, whittled down this class to "the intrastate, noncommercial cultivation, possession, and use of marijuana."[446] If one substitutes production for cultivation and child pornography for marijuana, the two classes look remarkably similar, particularly if one views pornographic materials as fungible. It is also important to remember that we are dealing with a particular form of federal commercial regulation: a ban on an activity or product. Thus it seems entirely possible that a court applying *Raich* will rely on the *Wickard* analysis to conclude that the personal product can become part of the commercial market and/or that the consumer of this product could move into that market as well.[447] The counter-argument can be stated as follows: the family nature of the photograph in a case like *McCoy* is a strong point of differentiation. The possessor would not want it to fall into non-family hands. Whether this distinction will be sufficient is, at the moment, an open question.

It is at this point that the second guidepost becomes important. One of the cases vacated and remanded for consideration in light of *Raich* is the March 2005 decision of the Eleventh Circuit in *United States v. Smith*.[448] In *Smith,* the defendant was engaged in both production and possession of what the court viewed as intrastate child pornography.[449] The Eleventh Circuit engaged in an extensive analysis of *Wickard*, in the context of "purely intrastate production and possession for personal use . . . ."[450] The key to the analysis is the difference between wheat, which is inherently part of a national market, and obscene photographs which, in the court's view, are not. I will quote at length from the Circuit's treatment of the *Wickard* analysis:

> Even if, in the aggregate, offenders like Smith somehow impact an interstate market by producing child pornography for their own use, Congress is clearly not concerned with the supply of child pornography for the purpose of avoiding surpluses and shortages or for the purpose of stimulating its trade at increased prices. . . . The conclusion is thus

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[445] Raich v. Ashcroft, 352 F.3d 1222, 1229 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[446] Gonzales v. Raich, 125 S. Ct. 2195, 2211 (2005) (quoting *Raich*, 352 F.3d at 1229).

[447] *Id.* at 2207 n.28.

[448] United States v. Smith, 402 F.3d 1303 (11th Cir. 2005), *vacated*, 125 S. Ct. 2938 (2005).

[449] *Id.* at 1315–18.

[450] *Id.* at 1321.

> inevitable that the statutes under which Smith was convicted are not concerned with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.[451]

This analysis may not give appropriate weight to the *Wickard* comparison in the context of a ban of a product as opposed to a price regulation scheme. There are two additional factors that weaken the opinion in *Smith*. It relied heavily on the Ninth Circuit decision in *Raich*.[452] In addition, the Eleventh Circuit emphasized that if *Smith* were to be prosecuted, that prosecution should come from the state, rather than from the federal government.[453] Thus, one could conclude from the remand, following almost directly on the rendering of the *Raich* decision, that *Smith* is a prime candidate for reversal. It may not follow, however, that such an action would carry over to a case like *McCoy*. Smith was a commercial operator who paid at least some of his subjects and, when arrested, was in possession of 1768 pictures.[454] Perhaps the familial and personal nature of the possession of one photograph is enough to differentiate *McCoy* from the activities of a small-time hustler like the defendant in *Smith*. If so, there is a line that will be developed through as-applied challenges. If not, if on similar facts the next *McCoy* leads to a successful prosecution, *Raich* will have gone far to extend the outer limits of federal power to conduct what would seem, to many, beyond that power.[455] To those who find this troubling, the answer may well lie not in the Commerce Clause, but in other parts of the Constitution, notably the Due Process Clause, that might be interpreted to protect the activity in question from prosecution by *any* government. Short of that, it is true that one can probably rely on congressional drafting, prosecutorial discretion, and a shortage of federal resources to obviate the prospect of federal prosecution of quilting bees, clothes drives, and potluck suppers. Still, for those who seek some form of demarcation in a government of enumerated and limited powers, the prospect of a successful prosecution in the next *McCoy* case is not a comforting one.

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[451] *Id.* at 1318 (citation omitted).

[452] *Id.*

[453] *Id.* at 1327–28.

[454] United States v. Smith, 402 F.3d 1303, 1310–11 (11th Cir. 2005), *vacated*, 125 S. Ct. 2938 (2005).

[455] *See* Nelson & Pushaw, *supra* note 215, at 158–59 (discussing outer limits problem).

V. CONCLUSION—*RAICH* AND THE NEW FEDERALISM

The Supreme Court decision in *Gonzalez v. Raich* represents a setback for the New Federalism. The Court had a golden opportunity to extend that concept by upholding a Ninth Circuit decision that limited intrastate applications of the Federal Controlled Substances Act.[456] Particularly noteworthy was the fact that state law would have permitted the conduct at issue, thus permitting the state to serve a classic "laboratory" function. Instead, the Supreme Court reversed, upholding the supremacy and sweep of federal law. Totally absent from the majority opinion were such staples of New Federalism rhetoric as state sovereignty, spheres of autonomy, and a paramount state role in criminal law.[457] Also absent was any suggestion of federalism itself as a separate and independent concept with constitutional force.[458] This Article contends that the decision is a setback for the New Federalism, but not a rollback.[459] The result is not *Lopez*-Lite or the non-federalism of Justices Breyer and Souter. The Court upheld the economic/commercial line for establishing the validity of federal regulations that purport to deal with matters having a substantial effect on interstate commerce. The Article also argues that, although the nonattenuation principle does not appear in the majority opinion, it is implicit in the Court's expressed need for a limiting category of federal authority such as the economic/commercial line.[460]

Raich helps answer some questions about the future of federal criminal law. It is likely that that law will continue to grow in a manner that overlaps with state criminal statutes.[461] Any attempt at a sharp demarcation through separate spheres seems doomed. *Raich* also appears to settle an important dispute by confirming that as-applied challenges can be brought to intrastate applications of class-of-activities statutes.[462] However, it must be noted that the Court's opinion raises doubts as to how often those challenges will succeed. It is clear that statutes with jurisdictional elements, as opposed to the class-of-activity statute in *Raich,* pose serious conceptual problems, many of which have yet to be addressed by the Court in the post-*Lopez* era. In

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[456] Raich v. Ashcroft, 352 F.3d 1222, 1234 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[457] *See supra* Part II.B.

[458] *Id.*

[459] *See supra* Part III.A-B.

[460] *See supra* Part IV.C.

[461] *See supra* Part II.B.

[462] *See supra* Part II.B.

particular, it seems unlikely that the Court would countenance a use of jurisdictional elements based on the channels or instrumentalities categories of commerce that completely undercuts what it tried to accomplish in *Lopez*. One must admit that the answer is not clear. Even less clear are the problems of the outer limits of federal statutes. Are there instances of private, intrastate conduct that federal law cannot reach, despite the presence of a generally valid statute that seems to condemn them?

Beyond the federal criminal law, broader questions arise concerning the impact of *Raich* on the New Federalism.[463] I have used that term to refer to efforts by the current Court to strengthen the state role within the overall federal balance. As many observers have noted,[464] the concept encompasses a range of areas, some constitutional, some sub-constitutional, and some statutory. One of the most important dimensions of the New Federalism debate is that there will be no clear resolution, just as there can never be any clear resolution of American federalism. The decisions of the Court placed under this rubric are not what Justice Souter condescendingly referred to as an attempt to return to "[t]he federalism of an earlier time."[465] Rather, they are an attempt to maintain a balance between the two levels in a complex, highly intergovermentalized system.[466] *Raich* will not be counted as a New Federalism decision,[467] despite elements of the concept that remain alive within it. In particular, those who support the Court's previous efforts to strengthen the state role are likely to criticize the decision for its heavy reliance on *Wickard v. Filburn*.[468] At the doctrinal level, conservatives may criticize *Raich* for failing to clarify the relationship between *Wickard* and *Lopez*, that is, utilizing the latter to limit the former. However, the case reminds us of an equally important element of the dynamic: the supremacy of the federal government, acting within its enumerated powers, is part of the glue that holds the system together.

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[463] *See supra* Part IV.D.

[464] *E.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 429 (2002); R. Shep Melnick, *Deregulating the States: The Political Jurisprudence of the Rehnquist Court*, *in* INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES 69–95 (Tom Ginsburg & Robert Kagan eds., 2005).

[465] United States v. Morrison, 529 U.S. 598, 655 (2000) (Souter, J., dissenting).

[466] *See generally*, Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH L. REV. 813, 813 (1998).

[467] *See* Randy E. Barnett, *William Rehnquist*, WALL ST. J., Sept. 6, 2005, at A28 (criticizing *Raich* as contrary to the New Federalism).

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