"In assessing the scope of Congress's authority under the Commerce Clause ... [our] task ... is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."—Justice Stevens

"Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."—Justice Scalia

"If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers."—Justice O'Connor

“Íf Congress can regulate this under the Commerce Clause, then it can regulate virtually anything ... [L]ocal cultivation and consumption of marijuana is not ‘Commerce ... among the several States.’"—Justice Thomas

Gonzales v. Raich

545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).

Pursuant to Proposition 15, a state ballot initiative, the California legislature enacted the Compassionate Use Act (CUA) of 1996. CUA permits the cultivation and use of marijuana for physician-prescribed medical purposes. Despite California law, the federal Controlled Substances Act (CSA) outlaws the growth and use of marijuana. The CSA contains no medical exemption. In separate raids, agents of the federal Drug Enforcement Agency (DEA) seized and destroyed the marijuana plants of Angel Raich and Diane Monson, California residents who were using marijuana under doctors' prescriptions. Raich and Monson sought injunctions against future DEA raids, claiming that the CSA, as applied to them, exceeded the Commerce Power. The district court denied their motion. But the Ninth Circuit Court of Appeals reversed, citing United States v. Lopez (1995). The Supreme Court granted certiorari.

Justice **STEVENS** delivered the opinion of the Court....

I

... The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case....

III

Respondents ... do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power.... Rather ... they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause....

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

... In *Wickard*, we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. The regulations established an allotment of 11.1 acres for Filburn's 1941 wheat crop, but he sowed 23 acres, intending to use the excess by consuming it on his own farm. Filburn argued that even though we had sustained Congress' power to regulate the production of goods for commerce, that power did not authorize "federal regulation [of] production not intended in any part for commerce but wholly for consumption on the farm." Justice Jackson's opinion for a unanimous Court rejected this submission. He wrote: "... 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." *Id.*

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

... Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.... In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions....

... In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity....

... Respondents nonetheless insist that the CSA cannot be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market.... [W]e have never required Congress to make particularized findings in order to legislate, see United States v. Lopez (1995), absent a special concern such as the protection of free speech. [W]hile we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. *Lopez.* Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce ... among the several States." U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment....

IV

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases.... Those two cases, of course, are *Lopez* and United States v. Morrison (2000).... Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." Perez v. United States (1971).

At issue in *Lopez* was the validity of the Gun–Free School Zones Act of 1990, a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity....

The statutory scheme ... in this litigation is at the opposite end of the regulatory spectrum. [T]he CSA.... was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." ... That classification, unlike the discrete prohibition established by the Gun–Free School Zones Act of 1990, was merely one of many "essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were

regulated." *Lopez*. Our opinion in *Lopez* casts no doubt on the validity of such a program.

Nor does this Court's holding in *Morrison*. The Violence Against Women Act of 1994 created a federal civil remedy for the victims of gender-motivated crimes of violence.... Despite congressional findings that such crimes had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity....

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic.... Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

The Court of Appeals was able to conclude otherwise only by isolating a "separate and distinct" class of activities that it held to be beyond the reach of federal power, defined as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." ... The differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment ... was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA....

First, the fact that marijuana is used "for personal medical purposes on the advice of a physician" cannot itself serve as a distinguishing factor. The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses....

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

Second, limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "superior to that of the States to provide for the welfare or necessities of their inhabitants," however legitimate or dire those necessities may be. Maryland v. Wirtz (1968). Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, see, e.g., *Morrison* (Breyer, J., dissenting) (noting that 38 States requested federal intervention), so too state action cannot circumscribe Congress' plenary commerce power. See United States v. Darby (1942) ("That power can neither be enlarged nor diminished by the exercise or non-exercise of state power").[1]

Respondents acknowledge this proposition, but nonetheless contend that their activities were not "an essential part of a larger regulatory scheme" because they had been "isolated by the State of California, and [are] policed by the State of California," and thus remain "entirely separated from the market." The dissenters fall prey to similar reasoning. The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.

Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just "plausible" as the principal dissent concedes (O'Connor, J., dissenting), it is readily apparent.... Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana ... Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

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

V

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[1] ... California's decision (made 34 years after the CSA was enacted) to impose "stric[t] controls" on the "cultivation and possession of marijuana for medical purposes" (Thomas, J., dissenting), cannot retroactively divest Congress of its authority under the Commerce Clause. Indeed, Justice Thomas' urgings to the contrary would turn the Supremacy Clause on its head, and would resurrect limits on congressional power that have long since been rejected.... Justice Thomas' suggestion that States possess the power to dictate the extent of Congress' commerce power would have far-reaching implications beyond the facts of this case.... Indeed, 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." [Footnote by the Court.]

Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief ... were not reached by the Court of Appeals. We therefore do not address ... the[m]. We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress.... The case is remanded for further proceedings consistent with this opinion.

Justice **SCALIA**, concurring in the judgment.

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

... Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. [T]he authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. [T]he commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants....

This principle is not without limitation. In *Lopez* and *Morrison*, the Court—conscious of the potential of the "substantially affects" test to "obliterate the distinction between what is national and what is local"—rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences....

As we implicitly acknowledged in *Lopez*, however, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce.... Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. See *Lopez*. The relevant question is simply whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power. See *Darby*....

Today's principal dissent objects that ... the Court reduces *Lopez* and *Morrison* to "little more than a drafting guide." I think that criticism unjustified. Unlike the power to regulate

activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective.... This is not a power that threatens to obliterate the line between "what is truly national and what is truly local." *Lopez*.

Lopez and *Morrison* ... do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation.... [T]he Necessary and Proper Clause ... empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation. See McCulloch v. Maryland (1819).

And there are other restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCulloch*, even when the end is constitutional and legitimate, the means must be "appropriate" and "plainly adapted" to that end. Moreover, they may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution." These phrases are not merely hortatory. For example, cases such as Printz v. United States (1997) and New York v. United States (1992) affirm that a law is not " '*proper* for carrying into Execution the Commerce Clause' " "[w]hen [it] violates [a constitutional] principle of state sovereignty."

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this.... To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances—both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation....

[N]either respondents nor the dissenters suggest any violation of state sovereignty ... that would render this regulation "inappropriate," except to argue that the CSA regulates an area typically left to state regulation. That is not enough to render federal regulation an inappropriate means....

I thus agree with the Court 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. See *Lopez*....

Justice **O'CONNOR**, with whom The Chief Justice [**REHNQUIST**] and Justice **THOMAS** join as to all but Part III, dissenting.

We enforce the "outer limits" of Congress' Commerce Clause authority ... to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. *Lopez*.

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." New State Ice Co. v. Liebmann (1932) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California ... has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal CSA that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation.... [T]his case [is] irreconcilable with our decisions in *Lopez* and *Morrison*. Accordingly I dissent.

... Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential to the interstate regulatory scheme.... If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation." ... Until today, such arguments have been made only in dissent. See *Morrison* (Breyer, J., dissenting).... If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers....

The Court's definition of economic activity is breathtaking. It ... threatens to sweep all of productive human activity into federal regulatory reach....

... It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity.... Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow—a federal police power. *Lopez*....

The Court suggests that *Wickard*, which we have identified as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, established federal regulatory power over any home consumption of a commodity for which a national market exists. I disagree.... In contrast to the CSA's limitless assertion of power, Congress provided an exemption within the AAA for small producers.... Wickard ... did not extend Commerce Clause authority to something as modest as the home cook's herb garden.... [It] did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress' reach.

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in

California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. [A] concern for dual sovereignty requires that Congress' excursion into the traditional domain of States be justified....

The Court recognizes that "the record in the *Wickard* case itself established the causal connection between the production for local use and the national market" and argues that "we have before us findings by Congress *to the same effect*" (emphasis added).... [I]f declarations like these suffice to justify federal regulation, and if the Court today is right about what passes rationality review before us, then our decision in *Morrison* should have come out the other way. In that case, Congress had supplied numerous findings regarding the impact gender-motivated violence had on the national economy. But, recognizing that "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question," we found Congress' detailed findings inadequate. *Id.* [H]ow can it be that voluminous findings, documenting extensive hearings about the specific topic of violence against women, did not pass constitutional muster in *Morrison*, while the CSA's abstract, unsubstantiated, generalized findings about controlled substances do? ...

Relying on Congress' abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.

Justice **THOMAS**, dissenting.

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

Respondents' local cultivation and consumption of marijuana is not "Commerce ... among the several States." ... The Commerce Clause's text, structure, and history all indicate that, at the time of the founding, the term " 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Lopez* (Thomas, J., concurring). Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture. Throughout founding-era dictionaries, Madison's notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term "commerce" is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange. Barnett, The Original Meaning of the Commerce Clause, 68 U. Chi. L.Rev. 101, 112–125 (2001)....

... Certainly no evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.

On this traditional understanding of "commerce," the CSA regulates a great deal of marijuana trafficking that is interstate and commercial in character. The CSA ..., however, ... bans the entire market—intrastate or interstate, noncommercial or commercial—for marijuana. Respondents are correct that the CSA exceeds Congress' commerce power as applied to their conduct, which is purely intrastate and noncommercial.

More difficult, however, is whether the CSA is a valid exercise of Congress' power to enact laws that are "necessary and proper for carrying into Execution" its power to regulate interstate commerce. The Necessary and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power.... *McCulloch* ... set forth a test for determining when an Act of Congress is permissible under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." ...

[I]n order to be "necessary," the intrastate ban must be more than "a reasonable means [of] effectuat[ing] the regulation of interstate commerce." It must be "plainly adapted" to regulating interstate marijuana trafficking.... [R]espondents do not challenge the CSA on its face. Instead, they challenge it as applied to their conduct. The question is thus whether the intrastate ban is "necessary and proper" as applied to medical marijuana users like respondents.

Respondents are not regulable simply because they belong to a large class (local growers and users of marijuana) that Congress might need to reach, if they also belong to a distinct and separable subclass (local growers and users of state-authorized, medical marijuana) that does not undermine the CSA's interstate ban.

... We normally presume that States enforce their own laws.... The scant evidence that exists suggests that few people—the vast majority of whom are aged 40 or older—register to use medical marijuana.... [M]any law enforcement officials report that the introduction of medical marijuana laws has not affected their law enforcement efforts. These controls belie the Government's assertion that placing medical marijuana outside the CSA's reach "would prevent effective enforcement of the interstate ban on drug trafficking."

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

In *Lopez*, I argued that allowing Congress to regulate intrastate, noncommercial activity under the Commerce Clause would confer on Congress a general "police power" over the Nation

(concurring opinion). This is no less the case if Congress ties its power to the Necessary and Proper Clause.... If the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption ... then Congress' Article I powers—as expanded by the Necessary and Proper Clause—have no meaningful limits....

Even if Congress may regulate purely intrastate activity when essential to exercising some enumerated power, Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty.

Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. Further, the Government's rationale—that it may regulate the production or possession of any commodity for which there is an interstate market—threatens to remove the remaining vestiges of States' traditional police powers. This would convert the Necessary and Proper Clause into precisely ... a "pretext ... for the accomplishment of objects not intrusted to the government." *McCulloch*.

... The majority's decision is further proof that the "substantial effects" test is a "rootless and malleable standard" at odds with the constitutional design. *Morrison* (Thomas, J., concurring).

The majority's treatment of the substantial effects test is rootless, because it is not tethered to either the Commerce Clause or the Necessary and Proper Clause. Under the Commerce Clause, Congress may regulate interstate commerce, not activities that substantially affect interstate commerce.... Whatever additional latitude the Necessary and Proper Clause affords, the question is whether Congress' legislation is essential to the regulation of interstate commerce itself—not whether the legislation extends only to economic activities that substantially affect interstate commerce.

[T]he majority defines economic activity in the broadest possible terms as the "the production, distribution, and consumption of commodities." This carves out a vast swath of activities that are subject to federal regulation. If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined," while those of the States are "numerous and indefinite." The Federalist No. 45 (Madison)....

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern." *Lopez* (Kennedy, J., concurring).... Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens.... I respectfully dissent.

Editors' Notes

(1) Justice O'Connor argues in dissent that the majority here reduces *Lopez* to a "drafting

guide." Justice Scalia denies this from the apparent belief that an objective difference separates noneconomic intrastate activity whose regulation in fact *is* necessary to the success of a constitutionally authorized regulatory scheme (like the CSA) from noneconomic intrastate activity whose regulation in fact *is not* necessary to a constitutionally authorized regulatory scheme. **Query:** Do you agree with Justice Scalia that Congress could not have saved the Gun Free School Zones Act simply by declaring that outlawing guns in school zones played a useful part in a broader plan for regulating the interstate flow of guns? Suppose you add that in reviewing Congress's declaration, a court would face the "modest task" of deciding, not whether Congress's declaration is in fact true, but whether there is a "rational basis" to believe it true? Would you still agree with Justice Scalia?

(2) Both of the dissenting opinions play variations on the following general argument: If the majority of the Court were right in this case, that would mean the end of any notion of limited national power; therefore, the majority must be wrong. This general argument assumes that the limits on national power must come in the form of *rights* (here, states' rights or reserved powers of the states) that carve out *exemptions* from what would otherwise be complete national power ("plenary power," the Court says). Here the states' traditional power over the health and morals of their people would permit them to decide whether to outlaw medicinal marijuana. **Query:** Can you think of a different sense of "limited national power"? Could national power be "limited" to certain purposes or ends, as Marshall reasoned in *McCulloch*? As long as Congress were pursuing those ends in good faith (i.e., without "pretext," in Marshall's terms), it could disregard the so-called reserved powers of the states. Here Congress would have to act not from hostility to marijuana per se, but from a belief that marijuana use is harmful to ends like national prosperity or national defense *and* that cultivation and use of medical marijuana undermines a regulatory scheme for pursuing those ends. Wouldn't limiting Congress to good-faith pursuit of authorized national ends still be a "limit" on Congress's power—even if it meant, as Marshall thought, that no area of traditional state control is *categorically* beyond Congress's reach, regardless of the circumstances? Justice Thomas cites Marshall's assurance that the Court would void "pretextual" uses of congressional power. But Thomas's understanding of Marshall is not faithful to Marshall's intent, for Thomas conflates Marshallean limits (limited to ends) with categorical limits (reserved categories of social activities and governmental functions). Is fidelity to Marshall's intent the sole basis for judging Thomas's position?
