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Good Cop, Bad Cop: Federal Prosecution of State- Legalized Medical Marijuana Use After *United States v. Lopez*

Alistair E. Newbern†

The Supreme Court's recent decisions in United States v. Lopez and United States v. Morrison articulate a vision of federalism under which Congress's regulatory authority under the Commerce Clause is severely limited in favor of returning traditional areas of state concern, particularly criminal law enforcement, to local or state control. The Court's decisions in these cases coincide with ballot initiatives legalizing the medical use of marijuana garnering a majority of the vote in California, Arizona, Alaska, Colorado, Nevada, Oregon, Washington, Maine, and Washington D.C. Those who use marijuana for medical purposes under sanction of state law, however, still face the threat of federal prosecution under the Controlled Substances Act. Medical marijuana proponents have traditionally, and unsuccessfully, contested federal prosecution using individual rights arguments under theories of equal protection or substantive due process. This Comment argues that after Lopez and Morrison, the federal government's authority to regulate intrastate use of marijuana for medicinal purposes is not the foregone conclusion it once was. The author suggests that proponents of medical marijuana use should invoke the

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federalism arguments of Lopez and Morrison and argue for state legislative independence from the federal government on this issue.

Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty.¹

The beauty of our system is that everything bites back eventually.²

In November 1996, the voters of California, through the state's initiative process, passed Proposition 215, entitled the "Compassionate Use Act of 1996."³ Proposition 215's purpose is threefold: "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes;"⁴ "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes . . . are not subject to criminal prosecution;"⁵ and "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana."⁶ Its passage placed California's state drug enforcement laws in direct conflict with federal drug laws, which classify marijuana as a Schedule I drug whose use and distribution are illegal unless sanctioned as part of an FDA study.⁷

The Clinton Administration was quick to assert that federal drug statutes were the controlling legal authority.⁸ Federal law enforcement agencies made public statements reminding Californians that what was now legal under the laws of their state remained a crime under federal statutes.⁹ At the same time, however, many federal officers admitted that limited federal resources would make it virtually impossible for drug enforcement

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

2. Linda Greenhouse, *Battle on Federalism*, N.Y. TIMES, May 16, 2000, at A18 (quoting Professor Glenn H. Reynolds' assertion that viewing *United States v. Morrison* as a conservative victory was short-sighted).

3. CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 1999). Also in 1996, Arizona voters passed Proposition 200, a substantially similar ballot initiative which decriminalized the use of marijuana and other Schedule I drugs for medicinal purposes. See ARIZ. REV. STAT. § 13-3412.01(A) (1996). For the purpose of this paper, I principally examine only California's medical marijuana law and its recent testing in federal court.

4. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A).

5. *Id.* at § 11362.5(b)(1)(B).

6. *Id.* at § 11362.5(b)(1)(C).

7. See Controlled Substances Act, 21 U.S.C. § 801, §§ 822-23 (1994). Schedule 1 drugs have "a high potential for abuse . . . no currently accepted medical use in treatment . . . [and] a lack of accepted safety for use of the drug under medical supervision." 21 U.S.C. § 812(b)(1). Other Schedule 1 drugs include PCP and heroin. See Schedule of Controlled Substances, 21 U.S.C. § 812(c).

8. See Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (1997).

9. See William Claiborne, *Federal Warning on Medical Marijuana Leaves Physicians Feeling Intimidated*, WASH. POST, Jan. 1, 1997, at A6.

agents to pursue each individual case.¹⁰ The Administration proposed alternate enforcement strategies, such as suspending the medical licenses of all physicians who prescribed marijuana to their patients, or making those physicians' clinics ineligible for Medicare and Medicaid funding. These were powerful threats that many California physicians conceded would likely keep them from recommending the drug.¹¹ Indeed, some physicians noted with irony that the passage of Proposition 215 might have had the sole effect of making marijuana more difficult for their patients to obtain.¹²

Had voter mandates for legalization of medical marijuana been enacted in only one or two states, these federal enforcement strategies might well have quelled a larger movement. Yet in 1996, the voters of Arizona passed their own medical marijuana initiative.¹³ And in the 1998 elections, voters in Alaska, Colorado, Nevada, Oregon, and Washington, and Washington, D.C., echoed the will of the California and Arizona electorates.¹⁴ In the November 1999 elections, Maine joined the list of states to legalize the drug through the passage of Question Two.¹⁵ Each of these states passed ballot measures similar to Proposition 215 in that they, in some way, lessened or eliminated state criminal penalties for possessing marijuana for medical use.¹⁶

10. See William Claiborne & Roberto Suro, *Medicinal Marijuana Brings Legal Headache*, WASH. POST, Dec. 5, 1996, at A1. As an example of the federal government's limited law enforcement powers, there are 30,000 police officers in New York City alone, but only 10,000 FBI agents nationwide. See Otto G. Obermaier & Ronald R. Rossi, *Too Many Federalized Crimes?*, N.Y. L.J., July 6, 1998, at 9.

11. See Claiborne, *supra* note 9, at A6.

12. See *id.*

13. See ARIZ. REV. STAT. § 13-3412.01(A), which reads in pertinent part: "Notwithstanding any law to the contrary any medical doctor licensed to practice in this state may prescribe a controlled substance included in schedule I to treat a disease, or to relieve the pain and suffering of a seriously ill patient or terminally ill patient . . ."

14. See James Brooke, *5 States Vote Medical Use of Marijuana*, N.Y. TIMES, Nov. 5, 1998, at B10.

15. See Francis X. Quinn, *Maine Speaks on Medical Marijuana Measure*, A.P. NEWSWIRE, Nov. 8, 1999. The text of the Maine initiative has not yet been codified by the state's legislature, and thus is unavailable for reprinting here.

16. The text of these bills, in pertinent parts, reads as follows:
Alaska:

In a prosecution . . . charging the manufacture, delivery, possession, possession with intent to manufacture or deliver, use, or display of a schedule VIA controlled substance, it is an affirmative defense that the defendant is a patient, or the primary caregiver or alternate caregiver for a patient, and (1) at the time of the manufacture, delivery, possession, possession with intent to manufacture or deliver, use, or display, the patient was registered . . . [and] (2) the manufacture, delivery, possession, possession with intent to manufacture, deliver, use, or display complied with the requirements of AS 17.37; and (3) if the defendant is the (A) primary caregiver of the patient, the defendant was in physical possession of the caregiver registry identification card at the time of the manufacture, delivery, possession, possession with intent to manufacture or deliver, use, or display; or (B) alternate caregiver of the patient, the defendant was in physical possession of the caregiver registry identification card at the time of the manufacture, delivery, possession, possession with intent to manufacture or deliver, use, or display.

ALASKA STAT. § 11-71-090 (Supp. 1999);

The strength of political resistance to medical marijuana use became immediately apparent in the reaction of elected officials to the legalization initiatives on the ballots in Colorado and Washington, D.C. In Colorado, the Secretary of State refused to count the votes for that state's medical marijuana proposition, erroneously claiming that the initiative did not have enough signatures to be validly placed on the ballot.¹⁷ In Washington, D.C., election officials were stymied by a provision included by Representative Bob Barr in the District's appropriation bill. The provision forbade the District to spend any money on the medical marijuana ballot measure, including the \$1.64 it would cost to have an employee of the District's Board of Elections and Ethics push a computer button to certify the election's results.¹⁸ When the results were later released by court order, they showed that D.C. voters had approved the medical use of marijuana by an

Colorado:

[A] patient or primary care-giver charged with a violation of the state's criminal laws related to the patient's medical use of marijuana will be deemed to have established an affirmative defense to such allegation where: (I) The patient was previously diagnosed by a physician as having a debilitating medical condition; (II) The patient was advised by his or her physician . . . that the patient might benefit from the medical use of marijuana . . . and (III) The patient and his or her primary care-giver were collectively in possession of amounts of marijuana only as permitted under this section.

1998 Colo. Bal. Meas. 4;

Oregon:

[A] person engaged in or assisting in the medical use of marijuana is excepted from the criminal laws of the state for possession, delivery or production of marijuana, aiding and abetting another in the possession, delivery or production of marijuana, or any other criminal offense in which possession, delivery or production of marijuana is an element if . . . the person holds a registry identification card issued pursuant to this section . . . and . . . the person who has a debilitating medical condition and his or her primary caregiver are collectively in possession of, delivering or producing marijuana for medical use in the amounts allowed

Oregon Medical Marijuana Act, OR. REV. STAT. tit. 37, § 475.309 (1999);

Washington:

Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana; Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana; and Physicians also be excepted from liability and prosecution for the authorization of marijuana use to qualifying patients for whom, in the physician's professional judgment, medical marijuana may prove beneficial.

Washington Medical Use Of Marijuana Act, WASH. REV. CODE tit. 69, § 69.51A.005 (1998);

Nevada voters passed a similar medical marijuana initiative in 1996, but it must be ratified in that state's November 2000 elections before it can become law. See *Lockyer Plans Washington Trip to Talk Changes in Marijuana Laws*, A.P. NEWSWIREs, Feb. 24, 1999.

17. See Brooke, *supra* note 14. A recount of the petition signatures under a new Secretary of State later revealed that former Secretary of State Victoria Buckley had erred in her tally of the signatures. The ballots, however, were never counted. Colorado voters will vote on the medical marijuana initiative for a second time in the November 2000 elections. See Peter Blake & Berny Morsen, *Voters Will Decide on Marijuana, New Secretary of State Says Her Predecessor Undercounted Petitions*, DENV. ROCKY MTN. NEWS, Sept. 22, 1999, at 4A.

18. See Francis X. Clines, *\$1.64 May Block Medical Use of Marijuana in Capital*, N.Y. TIMES, Nov. 13, 1998, at A22.

overwhelming margin of sixty-nine percent of the vote, the largest percentage recorded in any medical marijuana initiative election.¹⁹

The federal government has been explicit that its drug policy forbidding the medical use of marijuana will not be swayed by the collective shout of the voters of these states. However, after the Supreme Court's 1995 landmark decision in *United States v. Lopez*,²⁰ the first decision in sixty years to place a tangible limit on Congress's power under the Commerce Clause, the voters' choice to place their states' drug enforcement policies in direct conflict with federal laws takes on new significance. After *Lopez*, and *Lopez*'s recent affirmation in *United States v. Morrison*,²¹ it is reasonable to question the source of Congress's power to regulate the intrastate procurement and use of marijuana for medical purposes. The Commerce Clause arguably does not afford Congress such authority.

Traditionally, Congress has relied heavily on the Commerce Clause as the source of its power to regulate both inter- and intrastate crime.²² Indeed, the over-federalization of crime under the Commerce Clause has been much bemoaned from the law school classroom to the chambers of the Supreme Court.²³ Voters, however, generally praise the federal government for being "tough on crime" when it enacts these laws.²⁴ Thus, Congress continues to draw on the Commerce Clause as the basis for some of its most politically popular criminal statutes on activity that is overwhelmingly intrastate in character, even while decrying the expansion of "big government" control over the states.

Under the Court's holding in *Lopez*, however, Congress's power to regulate intrastate medical marijuana use is not the foregone conclusion it once was. Nevertheless, although Congress's power has arguably been

19. The results of the District's Initiative 59 were finally ordered released by U.S. District Judge Richard W. Roberts on September 17, 1999. See Bill Miller & Spencer S. Hsu, *Results Are Out: Marijuana Initiative Passes*, WASH. POST, Sept. 21, 1999, at A1.

20. 514 U.S. 549 (1995).

21. 2000 WL 574361 (U.S.) (decided May 15, 2000).

22. For a comprehensive discussion of the early development of Congress's criminal law authority, originating in the Necessary and Proper Clause and Postal Clause, and finally settling in the Commerce Clause, see Andrew St. Laurent, *Reconstituting United States v. Lopez: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 64-74 (1997).

23. See Roberto Suro, *Rehnquist: Too Many Offenses Are Becoming Federal Crimes*, WASH. POST, Jan. 1, 1999, at A2; Steve Lash, *Federal Criminal Code Shouldn't Be Widened, Justices Tell Congress*, HOUSTON CHRON., Mar. 12, 1998, at 15 (noting similar comments from Justices Kennedy and Souter).

24. See *Federalization of Criminal Law: Hearing Before the Committee on Governmental Affairs*, 106th Cong. (1999) (testimony of Edwin Meese III, former U.S. Attorney General) [hereinafter *Testimony of Edwin Meese III*], available in 1999 WL 16947250.

Because relatively little hard research on effective crime control has been conducted or disseminated to lay people, they are easily convinced that making an offense a federal crime means we are taking a tougher stance against such actions. . . . Herein lies the greatest danger in federalization: creating the illusion of greater crime control while undermining an already over-burdened criminal justice system.

Id. (quoting statement by the Police Executive Research Forum).

curtailed, proponents of medical marijuana have not defended these initiatives by pointing out the limits of the Commerce Clause. Instead, the medical marijuana debate has been relegated almost exclusively to the realm of public policy. Perhaps this is because those who would most benefit from pointing out *Lopez*'s potential impact upon this issue are, in other debates, those who would object most strenuously to the limitation of the federal government's power, especially in cases involving individual rights.²⁵ *Lopez* has made strange bedfellows in the federalism debate; its impact on a wide range of issues, from abortion to clean water to carjacking, will depend largely upon the ever-shifting political climate surrounding these issues. Advocates of state control of medical marijuana law enforcement would do well, however, to embrace the theories of federalism articulated in *Lopez* and argue for state legislative independence from the federal government on this issue.

This Comment explores the tensions among the Supreme Court's decision in *Lopez*, the recent spate of state initiatives to decriminalize medical marijuana use, the federal government's traditional power to regulate drug use under the Commerce Clause, and legislative and executive branches dead-set on proving that the era of big government is over. Part I reviews the modern geometric expansion of federal criminal law, and the more recent surge of interest in restricting its scope. Part II considers the argument that the Court should review issues like medical marijuana use not in the context of federalism or political power, but rather in the context of individual rights. As this is the avenue recent lower court decisions considering federal prosecution of medical marijuana use have followed, I examine these decisions and other instances in which the courts have considered medical rights in an equal protection or substantive due process context. Observing the unwillingness of the Court in these cases to recognize specific forms of medical treatment as a substantive right, I argue that those prosecuted under federal drug laws for medical marijuana use would find a more effective defense under *Lopez* and the limitations of the Commerce Clause. Part III traces the history of the Supreme Court's Commerce Clause jurisprudence, following the road that leads to *Lopez*. Part IV examines *Lopez* and later Supreme Court decisions evincing a more vocal embrace of federalism principles, culminating in the Court's

25. See also Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1065 (1995) ("[M]any 'liberals' today oppose the federalization of crime largely because of the severity of federal criminal Sentencing Guidelines Yet these opponents may be loath to make states-rights federalism arguments reminiscent of anti-civil rights and anti-New Deal arguments that were successfully battled decades ago.") (citations omitted); cf. David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59 (1997) (discussing the very similar political paradox faced by those who oppose a federal ban on late-term abortions which itself might be untenable under *Lopez*, but who are, on other issues, advocates of expansive federal power and conducting a similar *Lopez*-based analysis of a proposed federal late-term abortion ban).

Morrison decision. Part V extracts a number of core values the Court has repeatedly embraced in *Lopez* and the subsequent Commerce Clause and federalism decisions that have come in its wake. It then considers these values in the context of medical marijuana, ultimately concluding that the post-*Lopez* Commerce Clause does not afford federal prosecutorial power over state-legalized medical marijuana use.

I

FIGHTING CRIME ON A NATIONAL SCALE

Crime is at the forefront of our national consciousness. It is the story that leads our evening news because it is the news we most want to see.²⁶ More importantly, it has become the ubiquitous litmus test by which we elect our leaders. Even as our national crime rate continues to decline, voters repeatedly assert that crime prevention is one of the most pressing issues facing elected officials.²⁷ In the words of political consultant Joe Cerrell, "Crime is always safe . . . It's good for the political routine, for the political road show. I put this right up there with motherhood and apple pie, the fear of crime."²⁸

Once in office, officials elected on promises to be tough on crime tend to dance with the one that brought them. Even while proclaiming the end of the "era of big government" and advocating a return to the states of control over other major areas of legislation, Congress continues to increase the breadth of federal criminal legislation.²⁹ More than forty percent of federal criminal provisions enacted since the Civil War were enacted after 1970.³⁰ Approximately one thousand bills dealing with crime were

26. See Steve Twomey, *Horrible News Judgment*, WASH. POST, Jan. 19, 1998, at B1 ("One of the most surprising and encouraging societal shifts of the 1990s has taken place in crime rates. They're down. They're down nationally. They're down locally. But as near as I can tell, the good news hasn't reached the newsrooms of local TV, which churn out blood news because blood news works. Enough people watch.").

27. See Beth Shuster, *Living in Fear*, L.A. TIMES, Aug. 23, 1998, at A1.

28. *Id.*; see also TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 2 (1998) [hereinafter ABA TASK FORCE REPORT] ("The Task Force was told explicitly by more than one source that many . . . new federal laws are passed not because federal prosecution of these crimes is necessary but because federal crime legislation in general is thought to be politically popular.").

29. The Republican Party's much-touted Contract With America, advertised by the Party as "the end of government that is too big, too intrusive, and too easy with the public's money," itself included the "Taking Back our Streets Act" and "Family Reinforcement Act," both of which call for greater federal criminal jurisdiction. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847.

As Professor Sanford H. Kadish notes, "It is curious . . . that crime is the one area of traditional state and local concern where even strongly federally oriented politicians often support national intervention . . . In [the areas of health of the population, the effects of impoverishment, or welfare] the same politicians pushing for increased federal criminal legislation turn into ardent federalists." Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1247 (1995).

30. See Testimony of Edwin Meese III, *supra* note 24.

introduced during the 1997-98 Congress.³¹ However, despite this plethora of recently codified federal crimes, federal prosecutions make up only five percent of criminal prosecutions nationwide.³² Statistics like this reinforce the widely held view that federal prosecution is often selective and that the creation of federal causes of action is more often motivated by an intent to make a political statement in the face of popular outrage than by a realistic attempt to control crime.³³ In the words of former U.S. Attorney General Edwin Meese:

[N]ew 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. Observers have recognized that a crime being considered for federalization is often regarded as appropriately federal because it is serious and not because of any structural incapacity to deal with the problem on the part of state and local government.³⁴

A. *Federalization of Crime Usurps a Traditional Responsibility of the States*

Modern federal legislators' steadfast commitment to crime fighting on a national level comes in stark contrast to early visions of the federal police power. In the Framers' vision of the Constitution, a vision that persisted until the middle of the twentieth century, crime control was steadfastly a matter for the states.³⁵ The Constitution expressly grants criminal police power to the nation in only four specific arenas: counterfeiting,³⁶ piracies,³⁷

31. See ABA TASK FORCE REPORT, *supra* note 28, at 11.

32. See ABA TASK FORCE REPORT, *supra* note 28, at 4. In 1992, California and Texas state prosecutors each prosecute approximately five times as many crimes annually as the entire federal system. See Lynn N. Hughes, *Don't Make a Federal Case Out of It: The Constitution and the Nationalization of Crime*, 25 AM. J. CRIM. L. 151, 159 (1997) (citing State Justice Institute, State Court Caseload Statistics: Annual Report 1992, at 154, 156 (1992)).

33. See ABA TASK FORCE REPORT, *supra* note 28, at 12 (noting as an example of such motivation the introduction of a federal hate crimes bill in the aftermath of the highly-publicized and especially gruesome racially motivated death of an African American man dragged behind a pick-up truck); see also Hughes, *supra* note 32, at 161. Judge Hughes recounts a story that bears repeating in full in this context:

When Rudolph Giuliani was United States Attorney for Southern New York, he would pick a day of the week at random and on that day, every drug case brought was prosecuted in federal court. On the other six days, those cases all went to state courts. This illustrates how arbitrary the discretion can be as well as how merged the state and federal jurisdiction has become.

Id. (citations omitted).

34. Testimony of Edwin Meese III, *supra* note 24. For example, though the crime of committing a drive-by shooting was made a federal cause of action, not one drive-by shooting was federally prosecuted during 1997. See ABA TASK FORCE REPORT, *supra* note 28, at 21.

35. See Little, *supra* note 25, at 1067 (1995).

36. See U.S. CONST. art. I, § 8, cl. 6.

37. See U.S. CONST. art. I, § 8, cl. 10.

military crimes,³⁸ and treason.³⁹ The expansion of federal criminal police power has been accomplished through exercise of congressional power to prevent misuse of the mail service,⁴⁰ and to regulate commerce among the several states.⁴¹ At first, the Supreme Court kept close guard over Congress's attempts to invoke the Commerce Clause as a basis for this expansion of federal police power.⁴² Gradually, however, through the post-New Deal years, as the Court's view of the Commerce Clause generally became more inclusive, so too did its view of the use of that power to create federal crimes.⁴³ The importance of *United States v. Lopez* is thus underscored: the Court's 1995 invalidation of the Gun Free School Zones Act was only the second time it had struck down a federal criminal statute since 1936.

This influx of federal criminal legislation, and the resulting swell of federal litigation, has elicited cries of horror from the highest echelons of the legal community.⁴⁴ Though swift action towards federalization of crime has proved politically beneficial to many an elected representative, a report of the American Bar Association Task Force on Federalization of Criminal Law brings to light the costs such legislative action has imposed upon the federal judiciary and the government as a whole. Overall expenditures of the federal justice system increased 317% between 1982 and 1993, as opposed to a 163% increase in state and local judiciary expenditures during the same time period.⁴⁵ Criminal cases crowd the federal courts' dockets, accounting for 39% of all trials and 62% of trials lasting 20 days or more.⁴⁶ In many district courts, criminal cases make up well over half the docket.⁴⁷ Moreover, the Task Force expressed grave concern that federal lawmakers' attempts to decrease national crime by subjecting criminals to federal prosecution may actually have the unintended consequence of making local criminal prosecution less effective. The Report notes the fertile ground for "turf wars" between federal and state prosecutors, each seeking

38. See U.S. CONST. art. I, § 8, cl. 16.

39. See U.S. CONST. art. I, § 3, cl. 2.

40. See U.S. CONST. art. I, § 8, cl. 7. For a historical discussion of the development of criminal law under the postal clause, see St. Laurent, *supra* note 22, at 66-68.

41. See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.").

42. See ABA TASK FORCE REPORT, *supra* note 28, at 6.

43. See *id.*

44. See Hughes, *supra* note 32; William H. Rehnquist, *Address to the American Law Institute, 75TH ANNUAL ALI MEETING, PROCEEDINGS 1998* (1999).

45. ABA TASK FORCE REPORT, *supra* note 28, at 14. The Task Force also notes a 96% increase in federal justice system personnel, a 177% increase in federal prison inmates, and, over the past 30 years, an increase in the number of federal prosecutors from 3,000 to 8,000. See *id.* The increase in the number of federal justice system personnel stands in stark contrast to the increase in federal judgeships during the same time period—only 26%. See *id.* at 35.

46. See *id.* at 38.

47. See *id.* at 39.

political gain, which do little to increase actual apprehension of wrongdoers while consuming vast resources.⁴⁸ Also, the increased presence of federal law enforcement on the streets causes a perceived diminishing of local law enforcement in the community. This leads to a feeling among citizens that the law enforcement officers policing their neighborhoods are not directly accountable to them, fostering distrust between community residents and officers, and a potential decrease in community policing efforts.⁴⁹ As the Task Force concludes, the benefits of increased federalization, at this juncture, seem far outweighed by the costs.⁵⁰

B. *The War on Drugs*

The 800-pound gorilla in the federalization landscape is the nation's "War on Drugs." Since 1970, when Congress enacted the Comprehensive Drug Abuse Prevention and Control Act (commonly known as the Controlled Substances Act),⁵¹ the federal government has devoted much of its crime-fighting resources to the prosecution of crimes involving drugs.⁵² Federal involvement in the prosecution of drug crimes derives primarily from a desire to maximize sentencing, as federal sentences are often ten to twenty times higher than state sentences for the same crime.⁵³ The sheer volume of resources spent on this battle has ballooned in recent years. The A.B.A. Task Force reports that in the past fifty years, the number of drug cases prosecuted in federal court has increased by 1085%.⁵⁴ As Professor Sanford Kadish notes, federal drug policy has "produced the most profound expansion of federal criminal jurisdiction in our history," most of it targeted not at large-scale conspiracies, or import and export of illegal substances, but rather at on-the-street small offenses, precisely the sort of criminal acts local law enforcement is best suited to monitor.⁵⁵ And yet, though the armies are well funded and the mission clear, the war on drugs

48. *See id.* at 40.

49. *See id.* at 41-42.

50. *See id.* at 43.

51. 21 U.S.C. §§ 801-971 (1994).

52. *See* Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 985 (1995) (noting that 18% of federal defendants were charged with drug offenses in 1972, as opposed to 41% in 1992).

53. *See Federalization of Criminal Law: Hearings before the Senate Committee on Governmental Affairs*, 106th Cong. (1999) (testimony of John S. Baker, Jr., Dr. Dale E. Bennett Professor of Law, Louisiana State University Law Center) (citing Bureau of Justice Statistics, U.S. Department of Justice, *Felony Sentences in the U.S. 1994*, Bulletin NCJ01651049, at 6-9), available in 1999 WL 16947251.

54. *See* ABA TASK FORCE REPORT, *supra* note 28, at 89, app. B § 3. In 1997, 1,104 cases involving simple drug possession were filed in federal court. *See id.* at 87, app. B § 2.

55. Sanford H. Kadish, *Fifty Years of Criminal Law: an Opinionated Review*, 87 CALIF. L. REV. 943, 973 (1999).

has yielded few success stories.⁵⁶ Statistics tell us that despite the increased numbers of police on the streets, despite the mandatory minimum sentencing, despite the ad campaigns directed at children and adults alike, the percentage of Americans who use drugs illegally has remained virtually static.⁵⁷

In spite of the increased federal criminalization surrounding the war on drugs, advocates of medical marijuana have traveled various argumentative paths in hopes of legitimating the drug's use by the critically ill. The structure of current federal drug law, however, has proved to be a significant impediment to their efforts. Under the regulatory scheme introduced by the Controlled Substances Act, marijuana is classified as a Schedule I drug, meaning that it has the highest risk of abuse by the public and no medically acceptable use in the United States.⁵⁸ Classification as a Schedule I drug also limits the availability of a drug for research to determine possible medical uses.⁵⁹ In their efforts to reclassify the drug, medical marijuana advocates have pursued a number of legal and political approaches, all unsuccessful in varying degrees.

II

OTHER PATHS PLAINTIFFS MIGHT FOLLOW, AND WHY *LOPEZ* IS (BUT SHOULDN'T BE) THE ROAD LESS TAKEN

This Part examines different individual rights arguments made in hopes of protecting medical marijuana initiatives from federal interference. While many advocates may find these claims more intellectually satisfying and politically comfortable than arguments based on *Lopez* and a limitation of the Commerce Clause, recent court decisions show that federalism arguments are more likely to protect medical marijuana users.

A. *The Aftermath of Decriminalization*

With the wave of voter-approved legalization of medical marijuana use realized in the 1998 elections came another round of litigation testing the limits of the new laws. Following the government's threats to revoke the licenses of physicians who prescribed marijuana to their patients, ten physicians, five patients, and two nonprofit organizations filed a case,

56. See David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 237 ("Today, after the expenditure of billions of dollars . . . the War on Drugs has failed to reduce significantly, much less eliminate, drugs as a problem in our society.").

57. See David Boaz, *A Drug-Free America—or a Free America?*, 24 U.C. DAVIS L. REV. 617, 618-23 (1991) (noting that gross expenditures made by the federal government in pursuit of an anti-drug agenda have failed to curtail illegal drug use).

58. See 21 U.S.C. § 812(b)(1).

59. See *id.*

Conant v. McCaffrey,⁶⁰ in U.S. District Court for the Northern District of California. The plaintiffs argued that the Clinton Administration's marijuana policy, as articulated in the Administration's Response to the Passage of California Proposition 215,⁶¹ impermissibly infringed upon their First Amendment rights by chilling constitutionally protected doctor-patient communication.⁶² The district court granted a preliminary injunction for plaintiffs, holding that the government's policy was overly broad and that while the government might be able to regulate the distribution and possession of drugs, it cannot quash speech about the use of those drugs.⁶³ The court did note, however, that the government could regulate speech that was inextricably intertwined with criminal conduct, and that if a physician's speech became criminal itself—for example, aiding and abetting or conspiracy—the government could once again regulate that speech.⁶⁴ The court also questioned the government's ability to sanction physicians under the Controlled Substances Act for merely recommending marijuana at all, noting that traditionally, sanctions were available under that statute only for conduct that violated a federal, state, or local law.⁶⁵ Perhaps the most important contribution to the present analysis of the District Court's ruling in *Conant v. McCaffrey*, however, is an off-hand remark contained in a footnote: "[T]he government's fears in this case are exaggerated and without evidentiary support. It is unreasonable to believe that use of medical marijuana by this discrete population for this limited purpose will create a significant drug problem."⁶⁶ In other words, the use of marijuana for medical purposes alone is not enough to substantially affect the interstate drug trade.

1. *Questions of Degree: California State Court Cases Test the Boundaries of Proposition 215*

Two cases argued in California state courts under Proposition 215 indicate the potential amenability of courts to a Commerce Clause defense of medical marijuana. The first, *People v. Trippet*,⁶⁷ concerned a woman charged with transporting two pounds of marijuana which she claimed was in her possession for the treatment of migraine headaches and for "religious purposes."⁶⁸ Although the defendant was apprehended in 1994, two years before the Compassionate Use Act was passed, the court held the

60. 172 F.R.D. 681 (N.D. Cal. 1997).

61. See Administration Response to Arizona Proposition 200 and California Proposition 215, *supra* note 8.

62. See *Conant*, 172 F.R.D. at 694.

63. See *id.*

64. See *id.* at 698.

65. See *id.* at 699.

66. *Id.* at 694, n.5.

67. 66 Cal. Rptr. 2d 559 (1997).

68. See *id.* at 564.

medical use defense to be retroactive and permitted her to apply it to her case.⁶⁹ While the court held that the facts of the defendant's case, including the large amount of marijuana she was transporting and the secondary spiritual purpose of her marijuana use, did not merit successful use of the defense, it did hold that the Compassionate Use Act might provide a defense for the transportation of marijuana if "the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs."⁷⁰ The court so held despite the absence of language in the Compassionate Use Act expressly legalizing the transportation of medical marijuana. Yet the court's establishment of a "reasonable relationship" standard leaves many questions unanswered. Does the statute impliedly permit only the transport of marijuana from a homegrown plant to a patient's bedside? From a distributor to a patient's home? From Oakland to San Francisco? From Los Angeles? Does the amount that may be transported depend on the seriousness of the patient's condition? Is one marijuana cigarette the limit, or one pound? More importantly, what role does the purchase and sale of marijuana play in this equation? May a patient purchase amounts of marijuana in reasonable relation to her medical need? May a seller of marijuana invoke the same defense for providing that amount?

In *People v. Peron*,⁷¹ the California Court of Appeal held that even after the Compassionate Use Act, sale and possession for sale of marijuana remain illegal, even if the sale is not for profit.⁷² The Compassionate Use Act, the court held, exempted from prosecution only simple possession and cultivation of marijuana.⁷³ In addition, the court held that the state's many cannabis clubs were not authorized primary caregivers so as to be exempted under the statute for possession or cultivation of marijuana.⁷⁴ The statute defines "primary caregiver" as "the individual designated by the person exempted under this section [the patient] who has consistently assumed responsibility for the housing, health, or safety of that person."⁷⁵ The court rejected defendants' arguments that the clubs' provision of marijuana aided the patient's health and safety by providing the needed medication and a safe place to obtain the drug.⁷⁶ These arguments, the court held, would allow any marijuana dealer to obtain primary caregiver status, which was clearly not the voters' intent in enacting the statute.⁷⁷ The

69. *See id.* at 567.

70. *Id.* at 571.

71. 70 Cal. Rptr. 2d 20 (1997).

72. *See id.* at 25-26.

73. *See id.* at 26.

74. *See id.* at 28.

75. CAL. HEALTH & SAFETY CODE § 11362.5(e).

76. *See Peron*, 70 Cal. Rptr. 2d at 28-29.

77. *See id.* at 30.

court did note, however, that nothing in its ruling should be seen as preventing a patient from paying a bona fide caregiver for cultivating and furnishing marijuana to the patient.⁷⁸

By holding that the Compassionate Use Act protects only the possession and use of marijuana for medical purposes, but not its purchase or sale, the Court of Appeal has drawn a rough boundary for California's ability to legalize marijuana use in contradiction with federal drug laws. The court has afforded the state such power, and thereby afforded defendants the power to invoke a medical marijuana defense, only when commerce does not enter into the equation. If marijuana is not bought or sold but is simply used or cultivated for medical purposes, California's criminal exemption may apply. However, once money changes hands, the conduct in question falls outside the Compassionate Use Act's reach—and the state's authority to sanction such behavior. By limiting the legal sale of marijuana only to bona fide primary caregivers, the court hopes to ensure that the Compassionate Use Act does not sanction the illegal drug trade by attempting to keep any purchase or sale of marijuana for medicinal purposes outside the stream of commerce. In doing so, the court has implicitly recognized the limits of *Lopez*. By extracting the drugs in question from the larger national market of illegal drugs, the court attempts to demonstrate that the marijuana in question has not traveled in interstate commerce, and thus, after *Lopez*, perhaps does not fall within the scope of the Commerce Clause's authority.

2. *The Reach of Federal Power: Commerce Clause Analysis of the Compassionate Use Act in One District Court*

One case, *United States v. Cannabis Cultivators Club* (“CCC”),⁷⁹ has expressly considered a Commerce Clause argument for invalidating federal prosecution of medical marijuana use under Proposition 215. It did so in the commercial context of distribution of medical marijuana by a buyer's club, and did not explicitly consider instances of simple possession and use. Federal authorities and state legalization proponents came into conflict when federal marshals began closing down local cannabis buyers' clubs, which patients had used as central locations from which to procure marijuana for their treatment. The federal government filed for a preliminary injunction to close the San Francisco Cannabis Cultivators Club, which the United States District Court for the Northern District of California granted in May of 1998.⁸⁰ The court ruled on the narrow issue of the Club's ability to distribute marijuana to medical users, and not on the ability of patients themselves to use the drug.

78. See *id.* at 31.

79. 5 F. Supp. 2d 1086 (N.D. Cal. 1998) [hereinafter *Cannabis Cultivators' Club I*].

80. See *id.*

Conducting a brief and conclusory Commerce Clause analysis, the district court upheld its jurisdiction to hear the matter before it. The court reasoned that because Congress had the ability to regulate a whole class of activities—illegal drug use—“[t]he only question for the courts then is whether the class is within the reach of federal power.”⁸¹ The court then held that simply because the marijuana in question was cultivated for medical purposes did not mean that the drug did not travel in interstate commerce, nor did it mean that it was not purchased as part of the larger, national drug market.⁸² Finally, the court distinguished the present case from *Lopez* by noting that while the defendant in *Lopez* was prosecuted for merely *possessing* a gun, the Club’s conduct in question involved *distribution* of marijuana, a commercial activity that invokes the authority of the Commerce Clause.⁸³

The district court’s analysis in this case demonstrates that it did not take the warnings of *Lopez* seriously. The court required no factual record to ascertain whether or not the marijuana in question had traveled in interstate commerce, nor did it inquire into the impact the distribution of the buyers’ clubs might have had on a national market. Two factors may account for this superficial level of review. First, this ruling was issued in the context of a preliminary injunction, which does not require as complete a review of the case’s factual record. Second, because this case dealt only with distribution, and not with simple possession and use of medical marijuana, the district court judge may have seen no need to determine the interstate movement of the plants, as they were clearly involved in an economic function.

In February 1999, a motion by the Oakland CCC to enjoin the federal government from enforcing the Controlled Substances Act was dismissed by the district court.⁸⁴ The Court held that whether or not the plaintiffs had the right to be treated with marijuana they had grown themselves, they did not have the right to obtain such marijuana from a buyers’ club outside the authority of state police power.⁸⁵ It is significant, however, that the district court specifically excluded from its discussion the possibility that the plaintiffs could legally use marijuana they had grown on their own. The court distinctly noted that it was not ruling on this issue, thereby holding it out as a possible area that might fall outside of Congress’s regulatory

81. *Id.* at 1097 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 192 (1968)).

82. *See id.* at 1098.

83. *See id.*

84. *See United States v. Cannabis Cultivators’ Club*, 1999 WL 111893 (N.D. Cal. 1999) [hereinafter *Cannabis Cultivators’ Club II*].

85. *See id.* at *2. *See* discussion, *infra*, for a more detailed description of the district court’s holding.

power.⁸⁶ The court, therefore, left open an avenue for a plaintiff to argue that *Lopez* does not afford Congress such control.

B. Arguments Under a Theory of Individual Rights

Professor Jesse Choper argues that the institutional capacity of the Supreme Court to intervene in congressional action under the Commerce Clause should be much weaker than it is when considering cases involving individual rights.⁸⁷ He argues that in the arena of federalism, the political process is the better arbitrator of disputes, and that the Court's power should be reserved for issues of individual rights, where it serves a more vital purpose.⁸⁸ This is an attractive theory for proponents of medical marijuana to embrace in challenging federal prosecution of medical marijuana use. First, as noted earlier, arguing from an individual rights perspective helps assuage the effects of the "liberal paradox"—the odd position in which liberal advocates of state-legalized medical marijuana use are placed in arguing for a reduced role for the federal government against a history that equates such arguments with a time in which states clung to their autonomy as a means of preserving a racist past. Second, arguing from an individual rights perspective allows medical marijuana proponents to follow the law school adage, "when the law's on your side, argue the law; when the facts are on your side, argue the facts." The tragic personal accounts of the gravely ill who find relief from their suffering only through marijuana use are the backbone of the medical marijuana movement, and their recounting has been the strength of the movement's political campaigns. However, in recent federal court decisions, judges have proven particularly unmoved by facts of medical suffering, and after *Lopez*, the law may be on the marijuana proponents' side. Therefore, medical marijuana advocates must look to legal, and not humanitarian, arguments to meet with success.

1. Equal Protection and Substantive Due Process Arguments

An equal protection claim in the medical marijuana context arises from the fact that while the federal government interprets the Controlled Substances Act to prohibit all marijuana use, including use for medical

86. See *id.* at *2. The court stated:

If the issue before the Court were whether the Intervenors have a right to use marijuana which they have grown themselves, the Court would not have granted them leave to intervene since such a claim is not related to the claims raised by the United States' lawsuits. By their complaint, however, the Intervenors seek an order enjoining the United States from enforcing the Controlled Substances Act against the medical cannabis cooperatives in which they are members. Indeed, in their motion to intervene, they emphasized that their complaint alleges that they have a "protectable interest in obtaining cannabis."

Id. (citations omitted).

87. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

88. See *id.*

purposes, it at the same time provides marijuana to eight seriously ill individuals for medicinal use through its own compassionate use program.⁸⁹ Thus, one small group of seriously ill persons receives the benefit of medical marijuana treatment which the government denies to all other similarly situated. The government's own actions have made the CSA's applications under-inclusive, violating the fundamental principle that "all persons similarly situated . . . be treated alike" by the state.⁹⁰ A substantive due process claim would contend that plaintiffs have been denied a fundamental liberty interest, perhaps most easily characterized as the right to effective medical treatment.

The viability of both equal protection and substantive due process claims hinges upon the characterization of the denied right at issue. If the government's denial of medical marijuana is deemed to infringe upon a fundamental right, the rationale for that denial will be subject to strict scrutiny on review. However, outside the context of abortion (and less so there in recent years) courts have hesitated to recognize fundamental rights related to medical treatment. Particularly, courts have denied that patients possess a fundamental right to choose a particular method of treatment for their illnesses, as is illustrated by the following cases.

2. *Legalizing Apricots: The Case of Laetrile*

In the 1970s, word of a new form of cancer treatment spread like wildfire throughout the United States. The drug, Laetrile, was made from apricot pits, and its proponents claimed that if taken in high doses with a special diet, it slowed the devastating effects of cancer.⁹¹ The ardor of Laetrile's proponents was matched only by that of the medical community in condemning what it perceived to be a "quack" medicine. The FDA banned Laetrile, saying the drug failed to meet its standards for safety and effectiveness, and therefore could not be distributed between states.⁹² Twenty-two states acted against the FDA by legalizing sale of Laetrile within their borders; at one point, the general public favored legalization of Laetrile by a margin of thirty percent.⁹³ The issue reached the Supreme Court in *United States v. Rutherford*,⁹⁴ when a group of patients and physicians brought suit to enjoin the FDA from interfering with Laetrile's distribution.

89. See *Kuromiya v. United States*, 37 F. Supp. 2d 717, 720 (E.D. Pa. 1999). Though the United States government has discontinued its compassionate use program, through which medical marijuana was distributed to a small number of patients, it continues to provide medical marijuana to eight individuals who were participants in the program before its discontinuance. See *id.*

90. *City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432, 439 (1985).

91. See Editorial, *Why Laetrile Lived So Long*, N.Y. TIMES, Feb. 3, 1982, at A26.

92. See *id.* Prosecution of violations of the FDA's interstate ban were civil, not criminal, in nature.

93. See *id.*

94. 442 U.S. 544 (1979).

The *Rutherford* plaintiffs argued, first, that although the FDA had banned the sale of Laetrile, an exception should be found for its distribution to terminally ill patients. Alternatively, the plaintiffs argued that denial of Laetrile constituted an invasion of their right to privacy.⁹⁵ Justice Marshall, writing for the Court, held that the regulatory authority for approving a new drug resided entirely with the FDA and that courts could not sit “as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.”⁹⁶ As Justice Marshall noted, such judicial deference was “particularly appropriate” in this case, concerning a matter of “considerable public controversy” in the face of which Congress had chosen not to amend its regulatory schemes.⁹⁷ The Court further held that no exception could be made based on the gravity of a patient’s illness, and that the more critically ill should, in fact, be protected from fraudulent cures not recognized by the FDA.⁹⁸ The Court did not address the issue of the Laetrile plaintiffs’ constitutional rights.⁹⁹

The Laetrile decisions are particularly important to a discussion of medical marijuana use, as the dismissal of plaintiffs’ case in *Cannabis Cultivators’ Club II* was premised almost entirely on the holding of a Ninth Circuit Laetrile decision. In *Carnohan v. United States*,¹⁰⁰ the court dismissed a plaintiff’s declaratory action to enjoin the FDA from preventing his obtaining Laetrile. The court held that the plaintiff’s action was misplaced, and that the proper action was an administrative one petitioning the FDA to reclassify Laetrile as an effective and safe drug.¹⁰¹ The court further held, however, that it “need not decide whether Carnohan has a constitutional right to treat himself with home remedies of his own confection. Constitutional rights of privacy and personal liberty do not give individuals the right to obtain Laetrile free of the lawful exercise of government police power.”¹⁰² Invoking this precedent, the district court in *Cannabis Cultivators’ Club II* held that

[t]he fact that California law does not prohibit the distribution of medical marijuana under certain circumstances is not relevant as to whether the [plaintiffs] have a fundamental right. If that were the

95. See *id.* at 550.

96. *Id.* at 555.

97. *Id.* at 554.

98. See *id.* at 552.

99. In 1981, the Mayo Institute issued a conclusive study finding that Laetrile was not an effective treatment for cancer. See *Study Says Laetrile Is Not Effective as Cancer Cure*, N.Y. TIMES, May 1, 1981, at A26. Those who had preached of Laetrile’s effectiveness immediately claimed the study was a sham by the government to prevent the seriously ill from receiving the medicine they needed. See, e.g., A.S. Flaumenhaft, Letters, *Unfair Test of Laetrile*, N.Y. TIMES, May 28, 1981, at A18.

100. 616 F.2d 1120 (9th Cir. 1980).

101. See *id.* at 1121-22.

102. *Id.* at 1122.

case, whether one had a fundamental right to treat oneself with marijuana would depend on whether the state in which one lived prohibited such conduct.¹⁰³

Furthermore, the district court turned a deaf ear to plaintiffs' arguments that medical marijuana was the only effective treatment to relieve the symptoms of their life-threatening conditions. The court held that since the plaintiffs did not have a fundamental right to obtain the medicine of choice, their request that the United States be enjoined from interfering with that right must be dismissed.¹⁰⁴ Thus, the district court effectively eliminated any hope plaintiffs might have had that their need to use medical marijuana would be recognized under an equal protection argument.

3. *The Right to Die*

The most recent Supreme Court case to consider this issue is *Washington v. Glucksberg*,¹⁰⁵ in which the Court held that terminally ill patients did not have a fundamental right to assistance in committing suicide. The *Glucksberg* plaintiffs brought suit against the State of Washington after it issued a ban on physician-assisted suicide. The state enacted the ban as part of its criminal code after ballot initiatives attempting to legalize assisted suicide had failed to garner a majority vote in popular elections.¹⁰⁶ Plaintiffs challenging the ban relied upon *Cruzan v. Director, Missouri Department of Health*,¹⁰⁷ in which the Court held that the Constitution granted competent individuals the right to refuse medical treatment. The Court quickly differentiated *Cruzan*, holding that while *Cruzan* had granted a "constitutionally protected right to refuse lifesaving hydration and nutrition," the question before the Court in *Glucksberg* was whether the Due Process Clause included a right to a particular action, that of committing suicide.¹⁰⁸ The Court thus rejected the plaintiffs' attempt to characterize the right at issue as one of "self-sovereignty" and "basic and intimate exercises of personal autonomy,"¹⁰⁹ as the right to abortion had

103. *Cannabis Cultivators' Club II*, 1999 WL 111893, at *2.

104. The court held as follows:

Here, the plaintiffs similarly believe, and on a motion to dismiss the Court must assume they could prove, that marijuana is the only effective treatment for their symptoms. Congress and the FDA disagree. If the Intervenor believe the FDA and Congress are wrong, they should challenge the legal prohibition on the distribution of marijuana through an APA or similar action. *Carnohan* and *Rutherford* hold, however, that there is no fundamental right to obtain the medication of choice. Accordingly, the Intervenor's claim that they do have such a right, and that the United States should be enjoined from interfering with that right, will be dismissed without leave to amend.

Id. at *3 (italics added).

105. 521 U.S. 702 (1997).

106. *See id.* at 717.

107. 497 U.S. 261 (1990).

108. *Glucksberg*, 521 U.S. at 723 (quoting *Cruzan*, 497 U.S. at 279).

109. *Id.* at 724.

been characterized in *Planned Parenthood v. Casey*.¹¹⁰ By so narrowly defining the right as that to obtain a specific kind of medical treatment, the Court easily found that no such right was historically recognized in the Constitution. The Court then held that “[t]o hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.”¹¹¹ The Court’s holding, therefore, turned in large part on the historical treatment of suicide as a crime under state law. The Court also placed great reliance on a slippery slope argument, asserting that “the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps involuntary euthanasia.”¹¹²

Though the Court in *Glucksberg* considered a state’s ban on a particular form of medical treatment, rather than the federal government’s criminal prosecution of a state-legalized drug, several points from *Glucksberg* are instructive as to how the Court might consider a substantive due process claim made by medical marijuana users. First, were the Court to characterize the right at issue as the right to use marijuana, it would certainly have no trouble dismissing it as without historical basis as a fundamental right. The Court could easily make the same sorts of arguments it did in *Glucksberg*, noting that marijuana use is a criminal offense in a great majority of the states and that its status as an illegal drug extends far into history. Second, the slippery slope argument is particularly apt in the medical marijuana context, as the Court could embrace the popular notion that marijuana is a “gateway drug,” opening the door for users to “harder” substances such as heroin and cocaine. Furthermore, the Court could argue that if states could legalize one drug in a specific setting, it would only become easier to legalize that same drug across the board, or to legalize other drugs for purposes not as compelling as medical treatment. Finally, *Glucksberg* illustrates once again, as did *Rutherford*, that the Court is not moved by the plight of the critically ill. It finds no reason to lessen or eliminate certain regulations solely in the interest of easing an individual’s suffering, no matter the level of its gravity. Under such precedent, substantive due process and equal protection arguments in the medical marijuana arena appear doomed.

110. 505 U.S. 833 (1992).

111. *Glucksberg*, 521 U.S. at 723; *see also id.* (“The mere novelty of such a claim is reason enough to doubt that “substantive due process” sustains it.” (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1993))).

112. *Id.* at 732.

C. *Triumph and Defeat: Individual Rights Arguments in the Context of Medical Marijuana*

I. *An Equal Protection Claim: Seeley v. State*

In 1996, a young Washington state lawyer, Ralph Seeley, argued his own case before the Supreme Court of Washington, contending unsuccessfully that classifying marijuana as a Schedule I drug violated his equal protection rights under the Washington Constitution.¹¹³ Seeley was diagnosed with a rare form of bone cancer while in law school and smoked marijuana during his chemotherapy treatments to reduce nausea and vomiting.¹¹⁴ The court analyzed the statute using a rational basis standard and ruled against Seeley, holding that the state constitution did not afford Washington citizens any greater right to engage in marijuana use than they enjoyed under the United States Constitution, which is to say none at all.¹¹⁵

2. *Right to Participate in the Federal Compassionate Use Program: Kuromiya v. United States*

The Eastern District of Pennsylvania considered an equal protection argument in the context of medical marijuana in the case of *Kuromiya v. United States*.¹¹⁶ The *Kuromiya* plaintiffs brought claims constructed on a number of constitutional bases, including the Commerce Clause, Ninth and Tenth Amendments, rights to privacy, and equal protections. All except the equal protection claim were dismissed for failure to state a claim upon which relief can be granted.¹¹⁷ Plaintiffs based their equal protection argument on the fact that, though similarly situated to eight persons who received marijuana from the federal government, they all had been denied admittance into the federal compassionate use program.¹¹⁸

The court did not find that the *Kuromiya* plaintiffs had a fundamental right to possess or distribute marijuana;¹¹⁹ rather, it evaluated plaintiffs' equal protection claim under the standard of rational basis review established in *Romer v. Evans*.¹²⁰ The court did not find a violation of equal protection in the government's disparate scheduling of marijuana and Marinol under the Controlled Substances Act, citing the principle that the government may address different parts of a perceived harm in different

113. See *Seeley v. State*, 940 P.2d 604 (Wash. 1997).

114. See *id.* at 606-07.

115. See *id.* at 623.

116. 37 F. Supp. 2d 171 (E.D. Pa. 1999).

117. See *id.* at 721.

118. See *supra* note 89.

119. See *Kuromiya*, 37 F. Supp. 2d at 720.

120. 517 U.S. 620, 631 (1996) ("If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

ways, absent infringement upon a fundamental right.¹²¹ The court did, however, preserve plaintiffs' claim of equal protection violation based on the government's operation of its compassionate use program to provide medical marijuana for a small number of individuals, but not for others similarly situated. Thought the court articulated that plaintiffs would have to prove the government's program to be "irrational under every conceivable justification," the court did not afford the narrow possibility that plaintiffs might establish a violation of equal protection under the law.¹²²

The *Kuromiya* plaintiffs' claims were ultimately dismissed on summary judgment.¹²³ The court held that the federal government had demonstrated a rational basis not to supply marijuana to the plaintiffs through its compassionate use program. Specifically, the government decided to terminate the program altogether, citing among its reasons "bad public policy, bad medicine, . . . the existence of alternative treatments" and a need to "balanc[e] the government's desire to avoid distributing marijuana to increasing numbers of individuals with the interests of those who had already relied upon the drug."¹²⁴ The court's opinion turned upon this last distinction between those who have used marijuana medicinally with the government's blessing for many years, and those that had not. Despite the "obviou[s] tension between the government's repeated statements that marijuana has not been proven to provide any beneficial results and its decision to continue supplying it to eight individuals for medical needs," the government could, the court ultimately held, treat these two groups of people differently, as the government could treat a problem bit by bit, or treat only one aspect of a problem at a time.¹²⁵ Yet the court closed the second *Kuromiya* opinion with a condemnation of the federal government for "having provided marijuana to a small group of people over the years . . . without having obtained a single useful clinical result as to the utility or safety of marijuana as a medicine."¹²⁶ The court noted that the government had "finally" begun a clinical program to determine the effectiveness of marijuana treatment, and noted its hopes that "both the advocates and opponents of medical marijuana will allow science to substitute for slogans."¹²⁷

121 See *Kuromiya*, 37 F. Supp. 2d at 728.

122 *Id.* at 729-30.

123. See *Kuromiya v. United States*, 78 F. Supp. 2d 367 (E.D. Pa. 1999).

124. *Id.* at 370-71.

125. *Id.* at 372.

126. *Id.* at 374.

127. *Id.*

3. *A Medical Necessity Defense: Rethinking Oakland Cannabis Buyers' Cooperative*

The individual rights perspective was also embraced, though on a very limited basis, by the United States Court of Appeals for the Ninth Circuit.¹²⁸ Considering an interlocutory appeal in *Oakland Cannabis Buyers' Cooperative*,¹²⁹ the court remanded to the district court a preliminary injunction that kept the Oakland Cannabis Buyers' Club from distributing medical marijuana while the case was in litigation. The Ninth Circuit held that the district court had abused its discretion by refusing to consider a medical necessity defense, under which the Club would be able to distribute marijuana to those whose physicians certify that they: (1) suffer from a serious medical condition, (2) will suffer imminent harm without access to cannabis, (3) need cannabis for the treatment of a medical condition or alleviation of symptoms associated with a condition, and (4) have no legal alternative for the effective treatment of the condition because the patient has tried other legal alternatives and found them ineffective.¹³⁰ The Ninth Circuit held that if the federal government had not sought an injunction, and had merely prosecuted the medical marijuana users under existing drug laws, the defendants would be able to invoke a medical necessity defense. Furthermore, the court held that the government had failed to articulate any reason that such an injunction blocking distribution to those with medical needs would be necessary. Accordingly, it held that the district court had abused its discretion by not engaging in sufficient analysis of the defendants' particular situations. This ruling demonstrates the Ninth Circuit's greater emphasis on individual factual situations for the purpose of considering a medical necessity defense, and may foreshadow a greater willingness to consider such facts in characterizing plaintiffs' rights denied under the CSA. However, this small victory is a very thin reed upon which to hang such a claim.¹³¹

4. *Evidentiary Relevance: The McCormick and McWilliams Cases*

Moreover, the individual rights perspective also recently took a strong blow in the United States District Court for the Southern District of California, with a contrary ruling that again indicates an unwillingness of the federal courts to recognize medical treatment as a fundamental right. Todd McCormick and Peter McWilliams, who suffered from bone cancer and AIDS respectively, faced federal drug charges in Los Angeles district

128. See *United States v. Oakland Cannabis Buyers' Cooperative*, 190 F.3d 1109 (9th Cir. 1999).

129. This case concerns intervenors into the *Cannabis Cultivators' Cooperative* case and thus has substantially the same facts and procedural position.

130. See *Oakland Cannabis Buyers' Cooperative*, 190 F.3d at 1113-14.

131. On remand, the district court reversed its prior order and held that the Oakland Cannabis Buyers' Cooperative could distribute marijuana to those with medical need. See John M. Glionna, *Judge Reverses Ban on Pot as Medicine Law*, L.A. TIMES, July 18, 2000, at A3.

court.¹³² On November 5, 1999, U.S. District Court Judge George King ruled that neither defendant could use a medical necessity defense during their trial. Accordingly, he could not testify to his medical condition, the reasons why he used marijuana, or the passage of Proposition 215 because such testimony would be irrelevant.¹³³ Through a simple evidentiary ruling, Judge King ensured that McWilliams and McCormick would be prosecuted just as any other drug user would be under federal law, the will of the California electorate notwithstanding. Though the defendants might have excruciating pain, or debilitating nausea that required their medical marijuana use, a jury would never hear those facts because they had been deemed irrelevant under the Federal Rules of Evidence.¹³⁴ This decision underscores the fact that for medical marijuana legalization to be effectively realized, the federal government's ability to prosecute instances of its use must be curtailed. This can be done under a *Lopez*-based Commerce Clause attack of congressional authority.

III

THE ROAD TO *LOPEZ*: A BRIEF HISTORY OF THE COMMERCE CLAUSE

A. *Phase One: Gibbons v. Ogden to the New Deal*

The expansion of the federal government's criminal jurisdiction is inextricably tied to the ebb and flow of the Supreme Court's Commerce Clause jurisprudence. From the adoption of the Constitution to the Civil War, criminal law was seen as the almost exclusive province of state governments.¹³⁵ This restrictive view of the federal government's power over the states is mirrored in the Court's Commerce Clause rulings during this period. The first case to significantly recognize the Commerce Clause as a broad source of legislative power was *Gibbons v. Ogden*,¹³⁶ an 1824 case which held that the Commerce Clause invested in Congress the power to regulate all "commercial intercourse" taking place between the states.¹³⁷

132. See *Judge Bars Medical Need, Prop 215 as Basis for Defense in Marijuana Trial*, L.A. TIMES, Nov. 6, 1999, at A19.

133. See *id.*

134. Following this ruling, McWilliams and McCormick both pled guilty to the charges against them. See *Case Involving Medical Use of Marijuana Results in Plea*, N.Y. TIMES, November 21, 1999, at A36. Mr. McCormick was sentenced to five years in federal prison. See David Rosenzweig, *Medical Pot Advocate Gets 5-Year Sentence*, L.A. TIMES, March 28, 2000, at B3. Mr. McWilliams died of AIDS and non-Hodgkin's lymphoma, the conditions for which he used medical marijuana, while awaiting sentencing. See *Author Peter McWilliams; Marijuana Proponent*, WASH. POST, June 18, 2000 at C8.

135. See ABA TASK FORCE REPORT, *supra* note 28, at 5. For a more expansive discussion of the early development of federal criminal jurisdiction, see Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995).

136. 22 U.S. (9 Wheat.) 1 (1824) (holding that the State of New York could not, at the expense of steamboat operators from other states, grant the exclusive right to navigate steamboats in its waters).

137. *Id.* at 193. As Chief Justice Marshall wrote for the Court:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the

After *Gibbons*, the Court did not review Congress's legislative power under the Commerce Clause again for almost a century. Instead, the Court developed its early Commerce Clause jurisprudence largely by reviewing state legislative actions that infringed on areas Congress felt were exclusively theirs to maintain.¹³⁸ When Congress did begin to exercise its legislative power under the Commerce Clause, the Court strictly maintained the boundaries of "dual federalism,"¹³⁹ generally invalidating Congress's attempts to regulate areas it saw as appropriately left to the states.¹⁴⁰ It was in this era of "dual federalism" jurisprudence that Congress first attempted to use the Commerce Clause as a police power to regulate activities that offended the nation's collective morals, yet took place on a wholly local level. Though arguably allowing Congress to exert control over an exclusively local sphere—that of a state's ability to regulate the health, safety, and welfare of its citizens—the Court looked favorably upon Congress's actions, upholding federal regulation of interstate shipment of lottery tickets¹⁴¹ and interstate transportation of women for immoral purposes.¹⁴² The Court did, however, maintain some arguably commerce-related areas as exclusively under local control, most notably the relationship between employer and employee.¹⁴³

states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

Id. at 195.

138. See, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869) (upholding state regulation of interstate insurance business on grounds that it was not a form of commerce); *Kidd v. Pearson*, 128 U.S. 1 (1888) (upholding state ban on liquor manufacture, because making of liquor itself is outside the definition of commerce). These decisions are only two examples of the scores of similarly themed decisions handed down during this time.

139. The term "dual federalism" commonly connotes the nineteenth century concept of federal and state autonomy under which the states exercised broad autonomy over issues commonly thought to be within their sole province. See Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 568 (1999).

140. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding Congress could not, under the Sherman Antitrust Act, forbid a monopoly in the refining of sugar, as manufacture of goods was an area left to state control). But see *Houston E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 351 (1914) (upholding federal regulation of purely intrastate railroad charter on grounds that the intrastate operation of interstate carriers held such a "close and substantial relation" to interstate commerce that it was properly regulated).

141. See *The Lottery Case*, 188 U.S. 321, 357-58 (1903) ("We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.").

142. See *Hoke v. United States*, 227 U.S. 308 (1913).

143. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (reaffirming that manufacture of goods produced for interstate shipment, and accordingly, the employer-employee relationship associated with that manufacture, remains an area of local control).

B. *Phase Two: Jones & Laughlin Steel to Perez*

As the Great Depression enveloped the nation, President Franklin Roosevelt began to place heavy reliance on the Commerce Clause's powers to enact his sweeping New Deal legislation. The Court initially reacted against the New Deal, and, in cases like *A.L.A. Schechter Poultry Corporation v. United States*¹⁴⁴ and *Carter v. Carter Coal*,¹⁴⁵ began to strictly maintain that purely local economic activity was subject to federal regulation only if it had a "direct effect" upon interstate commerce. In the aftermath of Roosevelt's infamous "Court packing" plan, however, a distinct shift in the Court's Commerce Clause jurisprudence emerged.¹⁴⁶

In the first Commerce Clause case to reach its docket after Roosevelt's threat to usurp Supreme Court power, *NLRB v. Jones & Laughlin Steel Corp.*,¹⁴⁷ the Court upheld the National Labor Relations Act,¹⁴⁸ prevented Jones & Laughlin Steel from dismissing employees for engaging in union organizing, and effectively overruled its holdings in *Schechter* and *Carter Coal*. The Court held that "[a]lthough activities may be intrastate in character when separately considered," Congress may still regulate them "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate."¹⁴⁹

Subsequently, in *Wickard v. Filburn*,¹⁵⁰ the Court embraced an even broader interpretation of the federal government's power under the Commerce Clause. The *Wickard* Court expanded on its holding in *Jones & Laughlin Steel*, which ruled that one company's labor strife would alone affect interstate commerce. In *Wickard*, the Court held that even when one actor's economic conduct would not itself affect interstate commerce, the actor's conduct could be hypothetically multiplied until it would influence commerce as a whole.¹⁵¹ Specifically, the Court held that Congress could

144. 295 U.S. 495 (1935) (invalidating attempt to impose wage and hour regulations upon exclusively local poultry producer).

145. 298 U.S. 238 (1936) (invalidating wage and hour regulations for coal miners on grounds that any abuses imposed by the coal company upon its employees were a purely local evil). *Carter Coal* marked the last time the Court invalidated legislation under a Commerce Clause rationale until *United States v. Lopez*.

146. See generally WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 216 (1995) (discussing the Court's doctrinal about-face in light of President Roosevelt's announcement of a plan to add new justices to the Supreme Court, a plan ostensibly formed to alleviate the work load of the more senior justices, though popularly regarded as having the practical significance of ensuring the upholding of Roosevelt's New Deal legislation).

147. 301 U.S. 1 (1937).

148. 29 U.S.C. §§ 151-169 (West 2000).

149. *Jones & Laughlin Steel*, 301 U.S. at 37. The Court further expanded the Commerce Clause power four years later in *United States v. Darby*, 312 U.S. 100 (1941), which held that if a federal regulation held a rational relation to a legitimate government interest, for example, the regulation of interstate commerce, Congress could choose the means by which it worked to meet those ends.

150. 317 U.S. 111 (1942).

151. See *id.* at 128.

regulate a farmer's production of wheat in excess of the quota imposed upon him by the Agricultural Adjustment Act of 1938, even though the farmer had grown the wheat only for his personal use. The Court reasoned that though Mr. Filburn's "own contribution to the demand for wheat may be trivial by itself" that fact alone was "not enough to remove him from the scope of federal regulation where . . . his contribution, taken together with that of many others similarly situated, is far from trivial."¹⁵² The Court also noted that by growing his own wheat, Mr. Filburn would no longer need to purchase wheat on the open market.¹⁵³ Therefore, Mr. Filburn's conduct could further be regulated because he was obstructing the Act's purpose of stimulating trade by growing his own grain.¹⁵⁴ *Wickard* stands for the proposition that no matter how personalized or local an economic actor's conduct might be, if her conduct, multiplied, would affect interstate commerce, it may fall under Congress's regulatory control.

The Court's *Wickard* analysis was subsequently invoked in *Maryland v. Wirtz*,¹⁵⁵ which introduced the "enterprise concept" of Commerce Clause review. Simply put, the *Wirtz* Court held that Congress could, in legislation, list certain categories of enterprises it felt were sufficiently widespread so as to affect interstate commerce in and of themselves.¹⁵⁶ An enterprise is so defined if, among other specifications, it "has employees engaged in commerce or in the production of goods for commerce."¹⁵⁷ If an employer were engaged in such an enterprise, her employees were automatically protected by the Fair Labor Standards Act. Instead of looking at an individual actor's conduct and determining if it, in the aggregate, affects interstate commerce, under *Wirtz*, the Court could simply look to see if an employer was engaged in a certain type of activity and find the link to interstate commerce inherent therein.

1. *Civil Rights Legislation and the Commerce Clause*

The Court's post-New Deal decisions intimated the Court's approval of the Commerce Clause as a source of federal authority to enact what may be termed social legislation, laws that have a substantial, though perhaps secondary, effect on relations among people. As the country moved into the Civil Rights era, the Commerce Clause was called upon for this purpose once again when Congress relied upon it to craft the Civil Rights Act of 1964.¹⁵⁸ Congress's authority to enact the Civil Rights Act's public

152. *Id.* at 127-28.

153. *See id.* at 128.

154. *See id.*

155. 392 U.S. 183 (1968).

156. *See id.* at 188.

157. 29 U.S.C. § 203(s)(1)(A)(i) (1994).

158. Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975(a)-1975(d), 2000(a)-2000(h)(6)).

accommodations provisions was challenged in *Heart of Atlanta Motel, Inc. v. United States*.¹⁵⁹ The Court unanimously upheld the statute as a proper extension of the Commerce Clause, noting that the plaintiff, whose discriminatory practices were in question, solicited patronage for his motel from outside the state. Furthermore, the motel was easily accessible from interstate highways, and seventy-five percent of its patrons came from out of state.¹⁶⁰

The Court took this logic one step further in *Katzenbach v. McClung*,¹⁶¹ where it found Ollie's Barbecue to be an active participant in interstate commerce because approximately fifty percent of the produce used in its cooking had come from other states. The Court further articulated its hands-off Commerce Clause standard in this case, stating that "where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."¹⁶² This "rational basis" test was echoed in the Court's 1981 decision in *Hodel v. Virginia Surface Mining and Reclamation Association*,¹⁶³ which upheld a challenge to the Surface Mining Control and Reclamation Act of 1977 on grounds that once the Court has determined Congress has acted rationally in adopting a regulatory scheme, "[t]he judicial task is at an end."¹⁶⁴

2. Criminal Legislation and the Commerce Clause

This era of judicial leniency also proved fertile ground for the enactment of federal criminal legislation under the Commerce Clause. In 1961, Congress passed the Interstate and Foreign Travel in Aid of Racketeering Enterprise Act (the Hobbs Act)¹⁶⁵ which established federal causes of action against anyone who performs a criminal act while "travel[ing] in interstate or foreign commerce" or uses any "facility in interstate or foreign commerce" with intent to commit a criminal act.¹⁶⁶ The statute's broad language allowed federal law enforcement agents to gain jurisdiction over a "bad actor" simply through that person's incidental contact with a highway

159. 379 U.S. 241 (1964).

160. *See id.* at 243.

161. 379 U.S. 294 (1964).

162. *Id.* at 303-04. The use of the Commerce Clause as the basis for civil rights legislation ultimately provided a stronger foundation than the Equal Protection Clause had before. For a discussion of the drawbacks and benefits of finding the basis for such legislation in the Commerce Clause, see Anthony B. Ching, *Travelling Down the Unsteady Path: United States v. Lopez, New York v. United States and the Tenth Amendment*, 29 LOY. L.A. L. REV. 99, 136 (1995); Anna Kampourakis & Robin C. Tarr, Note, *About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light of Lopez*, 11 ST. JOHN'S J. LEGAL COMMENT. 191, 196-98 (1995).

163. 452 U.S. 264 (1981).

164. *Id.* at 276.

165. Pub. L. No. 87-228, 75 Stat. 498 (codified as amended at 18 U.S.C. § 1952(a)-(c) (1994)).

166. 18 U.S.C. § 1952(a).

or a train. Previous federal criminal statutes enacted under the Commerce Clause had at their heart the purpose of maintaining the facilities of interstate commerce. In contrast, this statute served only as a gateway to federal jurisdiction to prosecute organized crime violations.¹⁶⁷

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations (“RICO”) statute,¹⁶⁸ which established as a federal offense participation in or association with “a pattern of racketeering activity” by anyone “employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce.”¹⁶⁹ Professor Sanford Kadish marks the advent of RICO in 1970 as heralding a “new approach in defining crime.”¹⁷⁰ He notes RICO’s exceedingly vague language, which makes it a crime for any person associated with an “enterprise” to participate, directly or indirectly, in that enterprise’s affairs through a “pattern of racketeering,” defined as committing two or more of a long list of crimes within ten years.¹⁷¹ Crimes had traditionally been defined “in terms of an action at some particular time and place.”¹⁷² Thus, RICO’s broad language takes federal criminal jurisdiction to a new level of expansiveness.

The Supreme Court most memorably weighed in on congressional ability to use Commerce Clause-based authority to regulate local criminal activities affecting interstate commerce in the case of *Perez v. United States*.¹⁷³ In *Perez*, the Court upheld provisions of the Consumer Credit Protection Act that prohibited loan sharking activities as part of Congress’s attack on the activities of organized crime. Alcides Perez was convicted of using “violence or other criminal means” (in this instance, threats of castration and broken legs) to enforce collection on a loan he had made to a local butcher.¹⁷⁴ Justice Douglas, writing for the Court, included extensive reports of congressional findings as to the evils wreaked upon the national

167. See St. Laurent, *supra* note 22, at 73-74 (noting that while the original federal mail fraud statute was meant to preserve the integrity of the mail service, the Travel Act and its progeny were meant to allow federal jurisdiction as a means of assisting local enforcement in the prosecution of organized crime and thus required only an attenuated connection to the facilities of interstate travel).

168. Pub. L. No. 91-452, 84 Stat. 941 (codified as amended 18 U.S.C. §§ 1961-1968 (1994)).

169. 18 U.S.C. §§ 1961-1962.

170. Sanford H. Kadish, *supra* note 55, at 971.

171. See *id.* (citing 18 U.S.C. § 1961 (1), (4)-(5)).

172. *Id.* As Kadish notes, “[w]hat makes matters worse is that Congress enacted a variety of related legislation—for example, laws criminalizing money laundering and enterprises engaged in financial crimes—which adopted the basic RICO innovations, and, in the case of money laundering, even expanded them.” *Id.* (footnotes omitted). In addition, Professor Kadish observes that the money laundering statute, 18 U.S.C. § 1956 (1994), unlike RICO, allows prosecution without Justice Department approval and includes an even more extensive list of crimes upon which its jurisdiction may be invoked. See Kadish, *supra* note 55, at 971 n.159.

173. 402 U.S. 146 (1971).

174. *Id.* at 147-48.

economy by “the indispensable ‘money-mover’ of the underworld,”¹⁷⁵ the loan shark. He then briefly recounted the history of Commerce Clause jurisprudence, placing emphasis on the importance of congressional findings in establishing adequate jurisdiction under the Commerce Clause.¹⁷⁶ The Court held that the congressional findings made it clear that “[e]xtortionate credit transactions, though purely intrastate, may . . . affect interstate commerce.”¹⁷⁷ Even if a single, intrastate instance of crime was too insubstantial to merit federal jurisdiction, the Court held that if the type of crime could be categorized as a national problem, and the effects of individual instances of that type of crime, in aggregate, merited congressional attention, the Commerce Clause provided sufficient constitutional basis to mark each instance of that crime as a federal cause of action.¹⁷⁸ In this way, the Court brought the aggregation theory of *Wickard* and the enterprise concept of *Maryland v. Wirtz* into the arena of criminal law. The validation of these principles expanded Congress’s criminal law jurisdiction, laying the groundwork for the flood of federal criminal law statutes to follow.

Dissenting in *Perez*, Justice Stewart decried the dissolution of the line between state and national activity. His dissent foreshadowed the arguments of today’s critics of the federalization of crime, firmly asserting that while aggregation principles may be acceptable in a purely economic context, they may not be transferred to criminal law.¹⁷⁹ Justice Stewart noted that

under the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.¹⁸⁰

Justice Stewart continued, expressing his disapproval of applying the logic of *Wickard*, *Heart of Atlanta*, and *Katzenbach* in a criminal setting:

[I]t is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have

175. *Id.* at 149 (citations omitted).

176. *See id.* at 150-54.

177. *Id.* at 154.

178. The Court noted that “loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike,” *id.* at 157, and “[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power ‘to exerce, as trivial, individual instances’ of the class.” *Id.* at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

179. *Id.* at 157 (Stewart, J., dissenting).

180. *Id.*

an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.¹⁸¹

Echoes of Justice Stewart's dissenting opinion are found in *Lopez* and *Morrison*, and in public statements made by politicians and Article III judges alike, bemoaning the expanse of federal criminal jurisdiction. Yet at the time it was handed down, the *Perez* opinion opened the way for congressional criminal legislation on almost any subject, no matter how local the crime or its effects.

IV

FORK IN THE ROAD: *Lopez* AND THE TREND TOWARD GREATER PROTECTION OF FEDERALISM

The reasoning of the *Perez* opinion set the tone for Congress's actions in the realm of criminal law for the next decade and a half, as the floodgates to federal criminal laws were thrown open and a wash of new legislation poured through. It was into this jurisprudential landscape, in which the Supreme Court had invalidated only one congressional action for exceeding the Commerce Clause's boundaries in sixty years, that the Court dropped the bomb of its opinion in *United States v. Lopez*.¹⁸² The opinion, handed down on April 26, 1995, struck down a politically popular section of the Crime Control Act of 1990,¹⁸³ the Gun-Free School Zones Act of 1990,¹⁸⁴ which, among other things, made it a crime to "knowingly . . . possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."¹⁸⁵

A. *The Lopez Decision*

Alfonso Lopez, Jr. was an unlikely candidate to cause the dawning of a constitutional moment. Lopez, a senior at Edison High School in San Antonio, Texas, arrived at school one morning with a .38 caliber gun and five bullets concealed on his person.¹⁸⁶ Following an anonymous tip, school officials confronted Lopez, who confessed to carrying the weapon. He said he had brought the gun to school for delivery after school to a friend, who

181. *Id.* at 157-58.

182. 514 U.S. 549 (1995).

183. Pub. L. No. 101-647, 104 Stat. 4789, 4844-45 (codified in scattered sections of U.S.C.).

184. Pub. L. No. 101-647, 104 Stat. 4844 (codified as amended at 18 U.S.C. §§ 921, 922, 924).

185. *Id.* § 922(q)(2)(A). A "school zone" was defined by the act as being actually upon the grounds of any school, public or private, or within 1000 feet of the grounds of any school. *Id.* § 921(a)(25).

186. See *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

planned to use the gun in a “gang war.”¹⁸⁷ For his services as a courier, Lopez was to receive forty dollars.¹⁸⁸

Lopez was charged under a Texas state statute, on the books for over a hundred years, that made it a felony to carry a gun on school grounds.¹⁸⁹ The state dropped charges a day later, however, when the Assistant U.S. Attorney for the district made it known that federal charges would be brought.¹⁹⁰ Lopez was indicted under the Gun-Free School Zones Act (“GFSZA”).¹⁹¹ The trial court convicted Lopez and sentenced him to six months in prison.¹⁹² Lopez appealed his conviction to the United States Court of Appeals for the Fifth Circuit on the sole grounds that the GFSZA exceeded Congress’s legislative reach.¹⁹³ The Fifth Circuit reversed his conviction, holding that “[b]road as the commerce power is, its scope is not unlimited, particularly where intrastate activities are concerned,”¹⁹⁴ and noting that Lopez’s conviction bore no connection at all to interstate commerce.¹⁹⁵ The Supreme Court granted certiorari, and issued its historic ruling.

The *Lopez* Court invalidated the GFSZA by holding that it “neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce,” and therefore “exceeds the authority of Congress ‘[t]o regulate Commerce . . . among the several states.’”¹⁹⁶ This holding highlights *Lopez*’s most important features. First, Congress may regulate three categories of commercial activity: that which uses the channels of interstate commerce, that which employs the instrumentalities of interstate commerce, and that which “substantially affects” interstate commerce.¹⁹⁷ The Court held that the GFSZA did none of the above. In addition, the GFSZA did not have a “jurisdictional element which would ensure, through case-by-case inquiry, that the [criminal act] in question affects interstate commerce.”¹⁹⁸ Such a “jurisdictional hook” would have required as an element of the prosecution’s prima facie case that the gun in question had been transported in or substantially affected interstate commerce in some manner. Finally, the Court noted a lack of legislative findings that would have helped the Court to judge whether or

187. *Id.*

188. *See id.*

189. *See* Deborah Jones Merritt, *Commercel*, 94 MICH. L. REV. 674, 694 (1995).

190. *See id.*

191. *See Lopez*, 2 F.3d at 1345.

192. *See id.*

193. *See id.*

194. *Id.* at 1361.

195. *See id.* at 1368.

196. *United States v. Lopez*, 514 U.S. 549, 551 (1995) (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 3).

197. *See id.* at 558-59.

198. *Id.* at 561.

not the activity in question substantially affected interstate commerce.¹⁹⁹ Taken together, these factors led the Court to observe that to uphold the GFSZA, “we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”²⁰⁰ After over half a century of allowing Congress to exercise just such a power, the Court finally said “no” and decided to rein in the “Hey, you-can-do-whatever-you-feel-like Clause.”²⁰¹

The decision “thundered down the hallways of the nation’s top law schools . . . like a bowling ball run amok.”²⁰² Battle lines were quickly drawn between scholars who viewed the *Lopez* decision as “the opening cannonades in the coming constitutional revolution” and those who saw it as “just a hiccup in the great saga of American constitutional law.”²⁰³

To Congress, *Lopez* provided an immediate warning shot, indicating that, however distended the Commerce Clause had become over the years, it still drew a firm line between the roles of nation and state. *Lopez* showed that this line could not be automatically crossed by the magical incantation, “in interstate commerce.”

B. *The Impact of Lopez*

After the initial waves of reaction to the *Lopez* decision in the academic community had subsided,²⁰⁴ practitioners set about the task of testing *Lopez*’s edges, determining the case’s actual impact upon future litigants. Within eight months of *Lopez*’s decision, more than eighty challenges to federal Commerce-Clause-based criminal statutes were filed in district courts.²⁰⁵ Four years after *Lopez* was handed down, that number had grown to 566 cases filed in federal courts.²⁰⁶ The most high-profile of these cases involved other types of hot-button criminal issues, including arson,²⁰⁷ failure to pay child support,²⁰⁸ the blocking of abortion clinic entrances,²⁰⁹

199. See *id.* at 562-63.

200. *Id.* at 567.

201. Hon. Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL’Y 1, 5 (1995).

202. Nina Totenberg, *Supreme Court Rules Ban on Guns Near Schools Invalid*, MORNING EDITION, Apr. 27, 1995, available in 1995 WL 2958158.

203. *Id.* (quoting Prof. Bruce Ackerman).

204. The impact of *Lopez* upon the academy cannot be understated. A Westlaw search conducted four years after the decision reveals 1,322 published scholarly articles discussing *Lopez*.

205. See Andrew Weis, Note, *Commerce Clause in the Cross-Hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431, 1432 (1996).

206. Westlaw search conducted by author, April 3, 1999.

207. See, e.g., *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995).

208. See, e.g., *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995), *United States v. Murphy*, 893 F. Supp. 614 (W.D. Va. 1995); *United States v. Hampshire*, 892 F. Supp. 1327 (D. Kan. 1995).

and violence against women.²¹⁰ While many commentators had, perhaps hopefully, dismissed *Lopez* as a one-time scolding of Congress by the Court,²¹¹ the decision showed substantial staying power in the lower courts, if only in the sheer volume of cases filed citing *Lopez* as a new criminal defense.

1. Not a Hiccup: United States v. Morrison

The most recent and highly anticipated evaluation of a federal criminal statute under *Lopez* is the Supreme Court's consideration of the Violence Against Women Act of 1994²¹² ("VAWA") in *United States v. Morrison*.²¹³ VAWA ensures the right of all persons in the United States "to be free from crimes of violence motivated by gender"²¹⁴ and provides for enforcement of this right by creating a private cause of action for any person who is the victim of such a gender-motivated violent act.²¹⁵ The plaintiff in *Morrison*, Christy Brzonkala, alleged that while she was a student at Virginia Polytechnic Institute two fellow classmates raped her. Ms. Brzonkala claimed that after the rape, the defendants said "You better not have any f***ing diseases" and "I like to get girls drunk and f*** the s*** out of them," and that both statements demonstrated the gender motivation of defendants' violent act.²¹⁶ When Ms. Brzonkala learned that Virginia Polytechnic Institute would not be disciplining her attackers, she brought suit against her university under VAWA.²¹⁷ When defendants argued the statute was invalid under the Commerce Clause and Fourteenth Amendment, the United States intervened on Ms. Brzonkala's behalf.²¹⁸ After hearing Ms. Brzonkala's case, the Fourth Circuit struck down the

209. See, e.g., *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995).

210. See, e.g., *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) (*en banc*), cert. granted *sub nom.* *United States v. Morrison*, 527 U.S. 1068 (1999).

211. See Totenberg, *supra* note 202 ("In effect, Congress was daring the Court here and I think the Court accepted the dare. It said, 'OK. If you're going to pass a law that makes no effort to even meet the minimal requirements we've imposed in the past about linkage to commerce, that we're going to bring down the curtain.' And I don't think it is a sea change." (quoting Prof. Laurence Tribe)).

212. 42 U.S.C. § 13981 (1994).

213. 2000 WL 574361 (U.S.).

214. 42 U.S.C. § 13981(b) (1994).

215. See *id.* § 13981(c).

216. *Brzonkala v. Virginia Polytechnic Institute & State University*, 169 F.3d 820, 827 (4th Cir. 1999).

217. See Linda Greenhouse, *The Court on Federalism: Women Lose Right To Sue Attackers In Federal Court*, N.Y. TIMES, May 16, 2000, at A1.

218. See *id.* The challenge mounted in *Brzonkala* pertains only to the civil penalty provisions enacted to ensure VAWA's enforcement. See *Morrison*, 2000 WL 574361 at *4-5. Further, the Court's consideration of petitioners' argument that the civil penalty section of VAWA be upheld under Congress's remedial power under Section 5 of the Fourteenth Amendment is beyond the scope of this Comment.

civil enforcement portions of VAWA as being enacted in violation of the bounds of Congress's power under the Commerce Clause.²¹⁹

Congress passed the Violence Against Women Act with overwhelming approval from the states.²²⁰ When VAWA came under the Supreme Court's scrutiny, thirty-six states filed amicus briefs in support of its upholding.²²¹ Yet the law had been a particular target of Chief Justice Rehnquist. In a 1998 speech, he had called VAWA one of "the more notable examples" of laws that unduly expanded the jurisdiction of the federal courts" and warned that with it on the books, our system would look "more and more like the French government, where even the most minor details are ordained by the national government in Paris."²²² In the end, it was Justice Rehnquist's vision of VAWA that prevailed in the Court's opinion. In a 5-to-4 decision, the Supreme Court upheld the Fourth Circuit's opinion and ruled that VAWA could not be sustained under the Commerce Clause, precisely because it tread upon what the Court saw as the protected realm of the states.²²³ Justice Souter noted the irony of the Court's position in light of the line-up of its amici, writing in his dissenting opinion that "the states will be forced to enjoy the new federalism whether they want it or not."²²⁴

Writing for the majority, Chief Justice Rehnquist began his opinion with a staunch reaffirmation of the *Lopez* opinion. Quoting extensively from that decision, Rehnquist first asserted that *Lopez* stood for the principle that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."²²⁵ He then continued, however, to note that *Lopez* "emphasized . . . that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds."²²⁶ Those bounds, the Court concluded, were clearly exceeded by VAWA.

After establishing that petitioners sought to uphold VAWA as a regulation of activity that substantially affects commerce, the Court considered VAWA by strictly applying the factors it laid out in evaluating the Gun Free School Zones Act in *Lopez*.²²⁷ First, the Court asked if the activity

219. *Brzonkala*, 169 F.3d at 820.

220. See Linda Greenhouse, *Battle on Federalism*, N.Y. TIMES, May 17, 2000, at A18 (noting that when VAWA was pending in Congress, attorneys general from 38 states supported its passage).

221. See *id.* Only one state, Alabama, filed an amicus brief asking that VAWA be struck down.

222. Greenhouse, *supra* note 220, at A18.

223. See *Morrison*, 2000 WL 574361 at *3.

224. *Id.* at *29.

225. *Id.* at *6.

226. *Id.*

227. See *id.* at *7.

prohibited by VAWA was economic in nature.²²⁸ As Rehnquist wrote, “*Lopez’s* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”²²⁹ “Simple possession,” for example, is not an economic activity.²³⁰ Nor, the Court continued, can the effects of noneconomic activity be aggregated to prove substantial effect upon interstate commerce.²³¹ To apply such an aggregation analysis, the activity in question must be economic per se. Under such a test, the Court quickly concluded that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”²³²

Second, the Court noted that VAWA contains “no express jurisdictional element” that might limit its reach to economic activity, or violence against women that manifested an express link to interstate commerce.²³³ In discussing this element, the Court seems particularly perturbed that

Congress might overlook the warning it gave in *Lopez*. Rehnquist writes, “Although *Lopez* makes it clear that such a jurisdictional element would lend support that [VAWA] is sufficiently tied to interstate commerce, Congress elected to cast [VAWA’s] remedy over a wider, and more purely intrastate, body of violent crime.”²³⁴ Such legislative insouciance, the Court seems to say, will not be tolerated.²³⁵

Third, the Court held that the legislative findings used in drafting VAWA are insufficient to demonstrate a sufficient link to interstate commerce. In *Lopez*, the Court had faced a statute passed in the absence of thorough congressional findings. VAWA, however, was passed with a voluminous congressional record detailing the myriad effects of violence against women on American life, facts that are horrifyingly recounted in Justice Souter’s dissenting opinion.²³⁶ The Court held, however, that “the existence of congressional findings is not sufficient, by itself, to sustain the

228. *See id.*

229. *Id.*

230. *Id.* at *8 (quoting *United States v. Lopez*, 514 U.S. 549, 559-60 (1995)).

231. *See id.* at *9.

232. *Id.*

233. *Id.* at *8.

234. *Id.* at *10.

235. The Court, however, denied certiorari to a challenge to VAWA’s criminal provisions, which do contain a jurisdictional element that makes it a crime to cross state lines for the purpose of engaging in domestic violence or stalking. *See Greenhouse*, *supra* note 217, at A1.

236. *See Morrison*, 2000 WL 574361 at *18-20. For example, “battering ‘is the single largest cause of injury to women in the United States’ Arrest rates may be as low as 1 for every 100 domestic assaults [C]lose to half a million girls now in high school will be raped before they graduate [A]lmost 50 percent of rape victims lose their jobs or are forced to quit because of the crime’s severity.” *Id.* (citations omitted).

constitutionality of Commerce Clause regulation.”²³⁷ Recitation of a litany of evidence will not serve to justify Congress’s actions in passing a statute if the Court does not agree with Congress’s logical path from data to statute. Rather, the Court held, “whether 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, and can be settled finally only by this Court.”²³⁸ Congress’s findings, it seems, will be subject to a standard heightened from rational basis review.

In the case of VAWA, the Court held that Congress’s findings are less persuasive because “they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution’s enumeration of powers.”²³⁹ That method is the attenuated causation standard upheld in such Civil Rights era cases as *Heart of Atlanta* and *Katzenbach*—a standard upheld under rational basis review.²⁴⁰ To accept a theory under which substantial effects upon interstate commerce would be derived from “potential victims traveling interstate, from engaging in employment in interstate business . . . [and] from diminishing national productivity,” the Court holds, would be to erase the line between nation and state.²⁴¹ For example, the Court asserted, if Congress could regulate gender-motivated violence, it could regulate “murder or any other type of violence, since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.”²⁴² Such an invasion upon the traditional domain of state law enforcement would be, in the Court’s view, intolerable. What might have been acceptable in recent decades is no longer so.

Finally, the Court held that VAWA cannot be maintained—as *Lopez* could not be maintained—under a “costs of crime” rationale.²⁴³ Again, allowing such an attenuated rationale behind Congress’s actions would be to allow the federal government to usurp what lies in the traditional realm of the states. As the Court wrote, “[t]he Constitution requires a distinction between what is truly national and what is truly local.”²⁴⁴ The Court terms this bright-line separation “one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has

237. *Id.* at *10.

238. *Id.* (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

239. *Id.*

240. *See supra*, Part III.B.I.

241. *Morrison*, 2000 WL 574361 at *10-*11.

242. *Id.* at *10.

243. *Id.* at *9.

244. *Id.* at *11 (quoting *United States v. Lopez*, 514 U.S. 549, 568 (1995)).

always been the province of the States.”²⁴⁵ Nor may Congress demonstrate the interstate nature of violent conduct by means of an aggregation theory.²⁴⁶ Congress may not exercise a general police power that encroaches upon the states’ authority.

The *Morrison* majority opinion’s treatment of the Commerce Clause issue is brief and almost cursory in its exposition. What it does establish is that the principles articulated in *Lopez* will serve as the standards for future evaluation of Congress’s Commerce Clause authority. Moreover, the Court will maintain its dedication to a bright-line separation between the realms of federal and state power. Allowing federal regulation of potentially intrastate activity will require a concrete showing that the activity is economic in nature, and that it substantially affects interstate commerce. The Court will no longer give a great degree of deference to Congress in providing such proof. If such a showing cannot be made in a manner that passes the Court’s scrutiny—not by aggregating the effects of non-economic activity, or depending upon a “costs of crime” rationale—regulation of that activity will be left to the states. As the majority opinion concludes, “Petitioner Brzonkala’s complaint alleges that she was the victim of a brutal assault If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.”²⁴⁷

Writing in dissent, Justice Breyer articulates the difficulties of finding a “meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress.”²⁴⁸ Justice Breyer notes the haziness of the economic versus noneconomic distinction, especially in the context of criminal legislation, asking “Does the local street corner mugger engage in ‘economic’ activity or ‘noneconomic’ activity when he mugs for money?”²⁴⁹ If an activity affects interstate commerce, Breyer asks, why should its noneconomic or local nature be at issue?²⁵⁰ “This Court,” he writes, “has long held that only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant.”²⁵¹ Moreover, Breyer argues that the economic versus noneconomic distinction loses force when combined with the Court’s long-standing and reaffirmed rule that Congress may regulate items that have crossed state lines. He writes, “[I]n a world where most everyday products or their component parts cross interstate boundaries,

245. *See id.*

246. *Id.*

247. *Id.* at *17.

248. *Id.* at *31.

249. *Id.*

250. *See id.*

251. *Id.* at *32.

Congress will frequently find it possible to redraft a statute using language that ties the regulation to the interstate movement or some relevant object, thereby regulating local criminal activity or, for that matter, family affairs.”²⁵² Because the rules the Court has attempted to articulate finely parsing Congress’s Commerce Clause powers have “achieve[d] only random results” and “do little to further the important federalist interests that called them into being,” Breyer argues that the Court must cede its evaluation of what truly affects interstate commerce and what does not erode the balance between nation and state to the body more able to meet that charge: Congress.²⁵³ In so doing, he resurrects the arguments of *Garcia v. San Antonio Metropolitan Transit Authority*, which put forth the theory that issues of federalism are best left to the political branches.²⁵⁴ In this arena, Justice Breyer asserts, the Court must defer to Congress.

Justice Souter’s dissent chronicles a larger shift in the Court’s jurisprudence. In Justice Souter’s view, the Court’s opinions are animated by a rigid vision of federalism that leads the majority to limit national power in favor of state autonomy, whether the states advocate such autonomy or not.²⁵⁵ Just as the Court in the time from 1890 to the New Deal based its decisions upon a vision of laissez faire conservatism,²⁵⁶ so is the Court now molding its decisions to meet a theory of federalism resurrected from long ago. It is this vision of federalism that blinds the majority to the realities of an integrated modern society in which most any activity may have commercial impact,²⁵⁷ just as the pre-New Deal Court could not see the impacts of laissez faire conservatism upon a rapidly industrializing society.²⁵⁸ It is this vision of federalism that allows the Court to trump judgment of Congress and of the amici states that support VAWA’s passage. Justice Souter predicts that adherence to this vision of federalism will lead to the same challenges to the Court’s legitimacy experienced in the wake of the New Deal, when the Court proved slow to recognize the demands of a modern urban society.²⁵⁹ Likewise, Souter argues, the Court is now blindly returning to an economic vision that does not recognize the interdependent nature of the states in modern commerce. The *Morrison* opinion, and the

252. *Id.*

253. *Id.* at *32-33 (“Since judges cannot change the world . . . Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance.”).

254. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985).

255. See *Morrison*, 2000 WL 574361 at *25.

256. See generally ARNOLD PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1960) (discussing the theory of laissez-faire conservatism which underlay many of the Supreme Court’s economic and social policy decisions between 1887 and 1895).

257. See *Morrison*, 2000 WL 574361 at *24.

258. See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998) (arguing that the Court’s abrupt change in attitude towards the New Deal legislation was provoked not by President Roosevelt’s threats of a Court packing plan, but rather by an underlying internal shift in the Court’s economic jurisprudence).

259. See *Morrison*, 2000 WL 574361 at *24.

resurrection of an outdated form of federalism, Souter writes, “can only be seen as a step toward recapturing the prior mistakes.”²⁶⁰

2. “The Federalism of Some Earlier Time”:²⁶¹ Recent Supreme Court Decisions Echoing the Principles of *Lopez*

The Supreme Court’s newfound willingness to use the principles of federalism to limit congressional authority can be seen in numerous post-*Lopez* decisions. Most notably, a series of decisions handed down during the Court’s 1998 October Term—*Alden v. Maine*,²⁶² *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,²⁶³ *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*²⁶⁴—indicate the Court’s willingness to embrace freely the rhetoric and principles of federalism in controversies involving the federal government’s imposition upon states. These cases show *Lopez*’s influence on the Court’s Tenth and Eleventh Amendment jurisprudence. Each case provides another clue as to how far along the path upon which they embarked in *Lopez* the Court is willing to go. In the mixed metaphors of Professor Thomas W. Merrill, “[t]here is a sense in which the Justices have backed themselves into a corner on federalism, and now their chickens are coming home to roost.”²⁶⁵

a. The Eleventh Amendment Decisions

*Seminole Tribe v. Florida*²⁶⁶ marked a shift in the Supreme Court’s thinking on the issue of Congress’s power to abrogate state sovereign immunity under the Eleventh Amendment. *Seminole Tribe* overruled the Court’s 1989 *Pennsylvania v. Union Gas Company*²⁶⁷ decision, which stood for the short-lived principle that Congress could abrogate the Eleventh Amendment by using statutes passed under the Commerce Clause to allow a private citizen to file suit against a state in federal court. In *Seminole Tribe*, the Court held that Congress lacked power under the Indian Commerce Clause to pass a statute that would allow recovery of damages by a private party against a state.²⁶⁸ The Court reasoned that

260. *Id.* at *24.

261. *Morrison*, 2000 WL 574361 at *29.

262. 119 S. Ct. 2240 (1999).

263. 119 S. Ct. 2199 (1999) [hereinafter *Florida Prepaid*].

264. 119 S. Ct. 2219 (1999) [hereinafter *College Savings Bank*].

265. Linda Greenhouse, *High Court Faces Moment of Truth in Federalism Cases*, N.Y. TIMES, March 28, 1999, at A34.

266. 517 U.S. 44 (1996).

267. 491 U.S. 1 (1989).

268. See *Seminole Tribe*, 517 U.S. at 47.

[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.²⁶⁹

Seminole Tribe, therefore, further limits the scope of legislative power Congress may derive from the Commerce Clause.

The Court continued to rely upon the Eleventh Amendment to limit congressional power over the states in *Alden v. Maine*.²⁷⁰ *Alden*, perhaps the most widely heralded decision of the 1998 October Term, involved a suit brought by state-employed probation officers against the state of Maine for overtime pay under the Fair Labor Standards Act. The Court dismissed the employees' claims, holding that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."²⁷¹ Interestingly, the Court framed this issue not by invoking the immunity of the states from prosecution under the Eleventh Amendment,²⁷² but rather by highlighting Congress's lack of delegated power to exercise control over the states in this way.²⁷³ The opinion takes as its constitutional baseline a vision of state autonomy and limited congressional power, especially in the governance of and accountability to a state's citizens, that is significantly more pronounced than in the Court's pre-*Lopez* decisions. This heightened baseline allows the Court to reach a holding that, when taken in the context of a century of sovereign immunity jurisprudence, is surprisingly restrictive of Congress's legislative power.

The twin cases of *College Savings Bank* and *Florida Prepaid* follow the logic of *Alden's* holding, further entrenching the limits on Congress's ability to subject a state to various types of liability. In *College Savings Bank*, a bank which provided loans for college education sued the Florida Prepaid Postsecondary Education Board for unfair competition under the Lanham Act. The Court held that the Trademark Remedy Clarification Act, which subjects states to suit under the Lanham Act, did not validly abrogate a state's sovereign immunity from suits brought by individuals.²⁷⁴

269. *Id.* at 72-73.

270. 119 S. Ct. 2240 (1999).

271. *Alden*, 119 S. Ct. at 2246.

272. The Eleventh Amendment holds that states are immune from suits "commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

273. *See Alden*, 119 S. Ct. at 2247.

274. Congress may grant, by statute, an individual standing to bring suit against a state under the Fourteenth Amendment. In its *City of Boerne v. Flores*, 521 U.S. 507 (1997) opinion, the Court limited

The Court also held that Florida Prepaid had not constructively waived its immunity from suit by actively participating in interstate commerce, as College Savings Bank had alleged.²⁷⁵ Considering the theory of constructive waiver under a dormant Commerce Clause analysis, the Court held that stripping states of their sovereign immunity when they act as market participants would help further the goal of dormant Commerce Clause jurisprudence—that of preventing states acting in the market from gaining unfair advantage against private competitors. However, Justice Kennedy writes:

Permitting abrogation or constructive waiver of the constitutional right only when these conditions exist would of course limit the evil—but it is hard to say that that limitation has any more support in text or tradition than, say, limiting abrogation or constructive waiver to the last Friday of the month.²⁷⁶

This represents a clear shift in the Court's willingness to use the Commerce Clause as a basis for infringing on the states' autonomy, where previously the fact that Florida Prepaid engaged in any amount of interstate commerce, no matter how negligible, would likely have been enough to bring it into federal court. The Court here chose to discount the importance of interstate commerce to the issue at hand. *Lopez* strikes again.

Florida Prepaid involved a suit brought by College Savings Bank against Florida Prepaid for patent infringement under the Patent and Plant Variety Protection Remedy Clarification Act ("the Act").²⁷⁷ The defendant, Florida Prepaid, argued that the Act's abrogation of sovereign immunity was unconstitutional under *Seminole Tribe*. The Court held that the Act was not narrowly tailored to address a Fourteenth Amendment violation, as required under *City of Boerne v. Flores*.²⁷⁸ Justice Rehnquist, writing for the Court, placed special emphasis on the fact that Congress had not given adequate consideration to state-law remedies for potential patent infringement before enacting a federal cause of action.²⁷⁹ In so doing, the Court implies that Congress should look first to a state's ability to protect the interests of its citizens before creating an additional federal remedy. It finally holds

Congress's power to grant such standing by narrowly reading Section 5 of the Fourteenth Amendment to provide such power only for the enforcement of constitutional rights.

275. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2226 (1999).

276. *Id.* at 2230.

277. 35 U.S.C. § 271 (2000).

278. 521 U.S. 507, 525 (1997); See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2207 (1999) (citing *City of Boerne*, 521 U.S. at 525).

279. Reviewing congressional testimony given before the enactment of the Patent Act, he writes that "[t]he primary point made by these witnesses . . . was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent law." *Florida Prepaid*, 119 S. Ct. at 2209.

[t]he [Act's] apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime. These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe*.²⁸⁰

Much as the Court disapproved of Congress's attempt to replicate Texas's own criminal laws with the Gun Free School Zones Act, the Court in *Florida Prepaid* again ordered Congress to let the states fashion their own legislative remedies before bringing federal lawmaking power into play.

b. The Tenth Amendment Decisions

The fundamental principles of federalism espoused by the Court in *Lopez* and in its recent Eleventh Amendment decisions are also seen in the Court's modern Tenth Amendment decisions, such as *New York v. United States*,²⁸¹ and *Printz v. United States*.²⁸² These decisions placed limits on the Court's earlier holding in *Garcia*.²⁸³ The *Garcia* Court held that the federal government could impose wage and hour regulations upon municipal workers, regardless of the fact that doing so affected the states acting as states, because the role of the states in regulating traditional areas of state concern would be maintained by safeguards inherent in the political process.²⁸⁴ In other words, if Congress asserts authority that would be proper under the Commerce Clause when applied to private organizations, then its application of the same regulation to a state is of no consequence. In *New York v. United States*, however, the Court held that Congress could not force states to adopt a plan for the disposal of radioactive waste. To do so, the Court held, would be to impermissibly "'commandeer the legislative processes of the States.'"²⁸⁵ Five years later, the Court held, in *Printz*, that Congress could not compel local law enforcement officers to perform background checks as part of the provisions of the Brady Bill's handgun regulations.²⁸⁶ Both these decisions mark a shift in the Court's Tenth Amendment jurisprudence, marking a clear policy that the federal government's attempts to force the states, acting as states, to enact or enforce legislation would be held invalid. That Justice Rehnquist included such a reference to this logic in the *Lopez* decision may indicate a merging of these two lines of precedent and a manifestation of a larger philosophical

280. *Id.* at 2211.

281. 505 U.S. 144 (1992).

282. 521 U.S. 898 (1997). *Printz*, of course, was not yet under the Court's consideration when the *Lopez* decision was authored.

283. 469 U.S. 528 (1985).

284. *See id.*

285. *New York*, 505 U.S. at 161 (alteration in original) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

286. *Printz*, 521 U.S. at 935.

shift of the Court towards maintaining state control over traditional state functions.

V

APPLYING THE VALUES OF *LOPEZ* AND ITS PROGENY TO THE CASE OF MEDICAL MARIJUANA

The Court's recent federalism decisions demonstrate that whatever *Lopez*'s ultimate impact may be, that decision brought to the forefront a core set of values the Court will consider when deciding cases involving assertions of federal authority over the states. What are these values, and how do they play out in the context of state-legalized medical marijuana use? After *Lopez*, can the federal government still prosecute individuals for possession of marijuana if the drug does not travel in interstate commerce? While the courts are certainly far from answering "no" to this query, after *Lopez*, it is certainly an appropriate question to ask. The following Part considers the fundamental principles of *Lopez* and later federalism decisions, reaching the conclusion that, while some medical marijuana use might remain subject to federal prosecution even after *Lopez*, there are instances in which federal prosecution would offend the values that lie at the heart of the Court's recent holdings.

California's Compassionate Use Act legalizes the use of marijuana for medical purposes "where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of an illness."²⁸⁷ The statute also exempts from prosecution any patient or patient's primary caregiver who "possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."²⁸⁸ The statute is silent as to the purchase or transportation of marijuana for medical use, stating only that it encourages "the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need."²⁸⁹ This Part considers medical marijuana use under *Lopez* in the specific context of a patient who, upon her physician's recommendation, cultivates marijuana only for her personal use.

A. *First Principles*

"We start with first principles," wrote Chief Justice Rehnquist as he began the majority opinion in *United States v. Lopez*,²⁹⁰ foreshadowing the tone of the originalist argument to follow. "The Constitution creates a

287. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West Supp. 1999).

288. *Id.* § 11362.5(d).

289. *Id.* § 11362.5(b)(1)(C).

290. 514 U.S. 549, 552 (1995).

Federal Government of enumerated powers,”²⁹¹ he continued, and “a healthy balance of power between the States and Federal Government will reduce the risk of tyranny and abuse from either front.”²⁹² In all of its recent federalism decisions, the Court seems to be traveling in a retrograde pattern. It is returning to its earliest constitutional holdings, unearthing their ideas of nation and state. A majority of the Justices are looking to the past while moving toward the future, embracing earlier, more limited visions of federal rights. It is these first principles the Court would likely apply in determining whether federal drug laws can constitutionally limit medical use of marijuana that states have specifically legalized.

1. *A Proximate Relationship to Commerce*

As noted earlier,²⁹³ in the *Lopez* majority opinion, Justice Rehnquist traces the greatest hits of the Court’s Commerce Clause jurisprudence to determine that an activity must “substantially affect” interstate commerce for it to fall under the Commerce Clause. In so doing, he is resurrecting a more restrictive causation standard for evaluating acts that rely on the Commerce Clause for their jurisdiction.²⁹⁴ Justice Rehnquist devotes special attention to establishing *Wickard v. Filburn* as a proper exercise of Commerce Clause authority over intrastate activity.²⁹⁵ While dubbing the case “perhaps the most far reaching example of Commerce Clause authority,”²⁹⁶ he notes that even this tenuous extension of the doctrine “involved economic activity in a way that the possession of a gun in a school zone does not,”²⁹⁷ because the law there in question was designed to regulate the volume and price of wheat entering the national market.²⁹⁸ In *City of Boerne v. Flores*, the Court narrowed Congress’s ability to exercise constitutional power over the states under the Fourteenth Amendment to a narrowly defined group of evils that violate the Equal Protection Clause;

291. *Id.*

292. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

293. *See supra* Part IV.A.

294. Deborah Jones Merritt analogizes the meaning the Court assigns the “substantial effect” test to the idea of proximate cause in tort law. *See Merritt, supra* note 189, at 697. In her words,

the relationship between the regulated activity and interstate commerce must be strong enough or close enough to justify federal intervention, just as the concept of proximate cause means that a defendant’s negligence must be closely enough related to the plaintiff’s injury to justify forcing the defendant to bear the costs of the injury. Both of these judgments are qualitative ones, resting on a host of contextual factors, rather than simple quantitative calculations.

Id. at 679 (footnote omitted). Under this sort of analysis, Congress becomes similar to a plaintiff in a tort action, and bears the burden of proof to demonstrate the close nexus between the action and interstate commerce. It is a sort of enhanced rational basis test, requiring a clear demonstration that interstate commerce and the regulated activity are substantively linked. *See id.* at 682.

295. *See Lopez*, 514 U.S. at 560-61.

296. *Id.* at 560.

297. *Id.*

298. *Id.*

similarly, in *Lopez* and *Morrison*, the Court narrows the category of actions over which Congress may exercise its power under the Commerce Clause. Only those enterprises that Congress can demonstrate are substantially tied to commerce will qualify. The Court is thus returning to a “first principle,” an earlier vision of a limited role for Congress regulating states with federal law.

The *Lopez* Court identifies many deficiencies in the Gun-Free School Zones Act (“GFSZA”) that make it an impermissible extension of Congress’s ability to regulate interstate commerce. First, the Court distinguishes the GFSZA from previously upheld statutes by the fact that it does not, in the Court’s opinion, have much to do with commerce.²⁹⁹ Nor is it, as was the case in *Wickard* and *Wirtz*,³⁰⁰ part of a larger regulatory scheme that would be effectively undermined if de minimis instances of the activity it sought to control were exempted from regulation.³⁰¹ Rather, the Court emphasized, the GFSZA is a criminal statute, regulating individual conduct which may, or may not, intersect with the stream of commerce.³⁰² Quite importantly, in making this point, the Court engages in an extended footnoted discussion regarding the federalization of criminal law.³⁰³ Perhaps articulating in legal terms the political arguments he had made in other forums,³⁰⁴ Chief Justice Rehnquist states that “[u]nder our federal system, the ‘States possess primary authority for defining and enforcing the criminal law.’”³⁰⁵ He thus defines the prosecution of crime as an area of traditional state concern, alluding to the discussion set out in Justice Kennedy’s concurrence.³⁰⁶

More importantly, Justice Rehnquist is separating economic activity from crime, thereby indicating that many criminal acts will not have the necessary proximity to commerce to be regulated under the Commerce Clause and will not pass the test. This distinction between economic and criminal activity articulated in *Lopez* is heightened in *Morrison*, as the Court places express emphasis on the economic nature of the regulated activity.³⁰⁷ As Justice Rehnquist writes, “Both petitioners and Justice Souter’s dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.”³⁰⁸ The Court rearticulates its position from *Lopez*

299. *See id.* at 561.

300. 392 U.S. 183 (1968).

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

302. *See id.*

303. *See id.* at 561 n.3.

304. *See, e.g.*, Rehnquist, *supra* note 44.

305. *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

306. *See infra* Part V.B.1.

307. *See United States v. Morrison*, 2000 WL 574361 (U.S.) at *8.

308. *Id.*

that “simple possession,” though it may be criminal, categorically is not an economic activity, regardless of the fact that such conduct may “in this interdependent world of ours ha[ve] an ultimate commercial origin or consequence.”³⁰⁹ The Court is breathing new life into Justice Stewart’s *Perez* dissent.³¹⁰

Next, the Court discusses the GFSZA’s lack of a “jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”³¹¹ Without statutory language clearly explicating the nexus between the conduct in question and interstate commerce, Congress could, the Court remarks, regulate “mere possession” of guns.³¹² This regulation, again, would upset the balance of powers between Nation and State. The Court’s insistence upon a clear articulation of a link between an activity’s regulation and Congress’s power to regulate interstate commerce is made clear by the Court’s chastising of Congress for excluding such a hook from VAWA in the *Morrison* opinion. Again, the Court is reining Congress in, distinctly specifying what it will require to uphold broad-sweeping legislation.³¹³

Also of significance to the Court’s invalidation of the GFSZA is Congress’s inability to refer to specific legislative findings demonstrating the effect of gun possession in a school zone upon interstate commerce.³¹⁴ While the Court concedes that presentation of legislative findings is not essential to a successful Commerce Clause argument, in hard cases, where the link between the act in question and interstate commerce is not readily apparent, such findings would help the Court determine Congress’s purpose in passing the Act.³¹⁵

In *Morrison*, the Court takes its new vision of legislative oversight one step further, requiring not only the presence of legislative findings, which were copiously provided in the enactment of VAWA, but also that such findings be made in a manner acceptable to the Court.³¹⁶ This requirement of insight into Congressional motive comes in sharp contrast to the earlier array of post-New Deal Commerce Clause cases in which the Court repeatedly held that Congress’s rationale in constructing a statute need not be questioned, so long as the end be rationally related to interstate commerce. Indeed, the Court in *Morrison* casts a shadow upon the precedent of rational basis review expressed in *Heart of Atlanta* and *Hodel*,³¹⁷

309. *Id.* (quoting *Lopez*, 514 U.S. at 559-60).

310. *See supra* notes 179-181 and accompanying text.

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

312. *See id.* at 562 (discussing *United States v. Bass*, 404 U.S. 336 (1971)).

313. *See Morrison*, 2000 WL 574361 at *10; *see also supra* notes 231-233 and accompanying text.

314. *See Lopez*, 514 U.S. at 562-63.

315. *See id.*

316. *See Morrison*, 2000 WL 574361 at *10 (“But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”).

317. *See supra* notes 158-164 and accompanying text.

noting that “[i]n these cases, Congress’ findings are substantially weakened by the fact that they rely so heavily upon a method of reasoning we have already rejected as unworkable if we are to maintain the Constitution’s enumeration of powers.”³¹⁸ The rejected method of reasoning is the sort of aggregation theory upheld in those cases as the basis for Congress’s Commerce Clause authority. Again, the Court is severely limiting Congress’s power to act.³¹⁹

Possession of marijuana for medical use falls into what *Lopez* defines as the third category of commerce power, that of regulating “those activities having a substantial relation to interstate commerce.”³²⁰ Therefore, its amenability to federal regulation will turn on the quality of the relationship between medical marijuana use and interstate commerce. The Controlled Substances Act, by its own terms, does not contain a jurisdictional element. Rather, the CSA makes it unlawful for any person “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”³²¹ While it is certainly unlikely that the Court would consider striking down the entire CSA under a *Lopez* analysis, the absence of a jurisdictional hook does make it necessary to demonstrate explicitly the connection between an individual defendant’s marijuana use and interstate commerce. If a defendant can demonstrate that the drug in question was obtained locally and not through interstate commerce, the government’s ability to prosecute its use is weakened. Tracing the genealogy of a marijuana plant to find a time when its ancestors may have crossed state lines would surely be the “piling of inference upon inference” the *Lopez* decision rejected.³²²

Analysis of an individual’s medical marijuana use on a case-by-case basis does not fare any better. Does the decriminalized conduct constitute economic activity, such that it would fall into the narrow category of intra-state activities Congress may now regulate? Surely the sale of marijuana, whether for profit or not, constitutes commercial conduct. After all, money changes hands between vendor and purchaser, and sellers might compete for a better price. But is the cultivation of marijuana for personal use

318. *Id.*

319. The idea of requiring a significant link to interstate commerce for an act to fall under the Commerce Clause is repeated throughout the Court’s 1998 October Term decisions. The Court overturned *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964) in *College Savings Bank* by stating that even though using states’ tangential relation to interstate commerce to waive their sovereign immunity would help eliminate a perceived evil, the connection to interstate commerce was too attenuated to base such a substantial constitutional action upon it. *See College Savings Bank*, 119 S. Ct. 2219, 2228 (1999). The Court’s opinion in *Alden* further emphasizes that certain areas of state autonomy exist, as the Court stresses that the Commerce Clause applies only to a limited range of activities, presumably those with a substantial relationship to interstate commerce. *See Alden v. Maine*, 119 S. Ct. 2240, 2256 (1999).

320. *Lopez*, 514 U.S. at 558-59.

321. 21 U.S.C. § 841(a)(1) (1994).

322. *Lopez*, 514 U.S. at 567; *see also infra* Part V.B.2.

“commercial”? To decide so would require an extension of the *Wickard* analysis, on the theory that when considered in the aggregate, every person who grows marijuana at home and does not participate in the national drug market constitutes a sufficiently significant impact on interstate commerce to justify federal criminal control. But the Court has established *Wickard* as the farthest reach of the Commerce Clause’s powers in *Lopez*, and, in *Morrison*, has virtually eviscerated its holding. Under *Morrison*, an aggregation theory will not be applied to activities that themselves are not economic, even though they may be closely linked to economic activities. Growing marijuana for personal use may not qualify. Additionally, the Compassionate Use Act and every other recently enacted medical marijuana initiative provide for limits on the amount of marijuana an individual may procure or possess for treatment of their condition, quelling arguments that a national market would be affected.³²³ And, as Judge Smith noted in *Conant v. McCaffrey*, the number of medical marijuana users who obtain the drug through conduct protected under the Compassionate Use Act is too small to have significant impact upon the national drug trade.³²⁴ Finally, the home-grown wheat consumption at issue in *Wickard* detracted from a national market the government was trying to maintain as part of the New Deal legislation. The interstate and international drug trade which might be affected by home cultivation of marijuana would, if anything, be reduced because of the reduced demand for commercially available marijuana. Thus, the effect, if any, would be to diminish the very market that the government is trying to eliminate. The comparison pales. Under the Court’s modern analysis, a much stronger connection is required to encroach on the province of the state.

2. *The Piling of Inference Upon Inference*

Another way in which the *Lopez* Court emphasizes the narrow range of activities Congress may regulate under the Commerce Clause is through a line of reasoning commentators have termed the “non-infinity principle.”³²⁵ The government argued in *Lopez* that possession of a firearm at school could lead to violent crime, which might then affect the national economy in two ways: (1) spreading the cost of insuring against such crime throughout the population, and (2) discouraging travel to areas where violent crime exists.³²⁶ The government also argued that the threat of guns in school reduces students’ ability to learn and, thereby, reduces

323. See *supra* note 16.

324. 172 F.R.D. 681, 694 n.5 (N.D. Cal. 1997).

325. This phrase was coined by Kopel & Reynolds. See Kopel & Reynolds, *supra* note 25, at 69 (“The second analytic principle that *Lopez* offers is one this Article calls the ‘non-infinity principle.’ In other words, for a Commerce Clause rationale to be acceptable under *Lopez*, it must not be a rationale that would allow Congress to legislate on everything.”).

326. See *Lopez*, 514 U.S. at 563-64.

levels of worker education and productivity, which negatively impacts on commerce.³²⁷ The Court announced these arguments, but neither credited nor discounted them. Rather, the Court seems to hinge its rejection of the GFSZA on the fact that the government, in its zeal to prove that guns in school zones affect interstate commerce, has proved too much.³²⁸ As the Court laments, “[u]nder the theories that the Government presents in support of [the GFSZA], 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.”³²⁹

Thus, the Court, while refusing to overturn the aggregation theory it had laid out in *Wickard* so many years earlier, seems to be drawing a line in the sand. Rejecting the Government’s arguments, the Court writes that “we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”³³⁰ While the Court continues to maintain that “the de minimis character of individual instances arising under [a regulatory scheme that bears a substantial relation to commerce] is of no consequence,”³³¹ *Lopez* establishes that there is a point at which the attenuation must stop. For a statute to invest Congress with the authority to regulate an activity under the Commerce Clause, it must clearly indicate what Congress cannot regulate under that statute: what activities, within that class, do not substantially affect interstate commerce, and, therefore, fall outside the Clause’s reach. Again, this principle is repeated in cases like *Alden*, and *City of Boerne*, in which the Court stresses the limited, non-plenary nature of Congress’s power to regulate conduct, be it in the realm of interstate commerce, sovereign immunity, or constitutional rights. Moreover, the Court is explicit in *Morrison* that such inferential reasoning on Congress’s part will no longer pass under judicial review.³³² Rather, Justice Rehnquist writes that given the aggregation theories advanced in *Morrison* to justify Congress’s actions, “the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority seems well founded.”³³³ The Court will not defer to such findings.

This facet of the *Lopez* decision is of great significance to the medical marijuana debate. Under the non-infinity principle, there must be some aspect of controlled substance use that Congress cannot regulate as a

327. *See id.* at 564.

328. *See id.*

329. *Id.*

330. *Id.* at 567.

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

332. *United States v. Morrison*, 2000 WL 574361 (U.S.) at *10.

333. *Id.*

federal crime. That line should be drawn at purely intrastate conduct that is legal under a state's own laws. Otherwise, the federal government has created an intrastate police power that, under *Lopez*, belongs solely to the states. Moreover, if federal prosecution of medical marijuana use is viewed as congressional regulation of health care, Congress could, then, maintain a watchdog position over all choices by physicians of which drugs to prescribe to their patients. *Lopez* and its progeny do not allow regulation without boundaries, and state-legalized medical marijuana use seems a logical place to draw the line.

B. Drawing the Line Between National and State Police Power

1. Traditional Areas of State Concern

Justice Kennedy begins his concurring opinion in *Lopez* by citing the Federalist proposition that “two governments accord more liberty than one,”³³⁴ but notes that for this epigram to ring true, “citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.”³³⁵ In Kennedy's view, the role of the Court in ensuring the correct application of the system is to guard against the intrusion of the federal government into regulation of areas which should be left to the states. Without such active maintenance of that balance, “the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”³³⁶

Kennedy's opinion hinges on this traditional division of roles between federal and state government. He seems to concede that possession of a gun in a school zone could, in the modern, highly-interdependent economy, have a substantial effect upon interstate commerce.³³⁷ What makes the GFSZA an impermissible extension of the power to regulate interstate commerce for Kennedy is not necessarily that the chain of inference between gun and marketplace stretches long, but that the statute which attempts to link the two does so through the sphere of education, a “traditional concern of the States.”³³⁸ In Kennedy's view, when Congress's invocation of the commerce power creates implications for such traditionally state-regulated areas, the Court has a “particular duty,” a sort of heightened standard of review, to ensure the Federal government has not reached too far.³³⁹ As noted *supra*, this division of what is truly national

334. United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J. concurring) (discussing THE FEDERALIST No. 51).

335. *Id.* at 576-77.

336. *Id.* at 577.

337. See *id.* at 580 (“In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.”).

338. *Id.*

339. *Id.* at 581.

and truly local is the animating theory of the Court's *Morrison* decision.³⁴⁰ The Court notes that another pitfall of allowing an aggregation theory of reasoning is that it could "be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childbearing on the national economy is undoubtedly significant."³⁴¹ The Court has indicated its clear willingness to rein in the power of Congress when it impinges upon what it holds to be a traditional area of state concern.

As discussed *supra*, intrastate crime control, traditionally, is a classic realm of state concern.³⁴² So, too, is health care.³⁴³ States are "major regulators, payers, and providers of [health] care,"³⁴⁴ and devote approximately twenty percent of their budgets to health care and health-related programs.³⁴⁵ Moreover, states have traditionally been left to fashion their own policies regarding the delivery of health care in such vital areas as abortion and neonatal care.³⁴⁶ Medical marijuana use, therefore, stands squarely at the intersection of two traditional state concerns, health care and crime, intensifying the states' interest in maintaining control over its regulation, and intensifying the judicial scrutiny under which the propriety of congressional action over these realms should be judged.

2. *Laboratories of Democracy*

Justice Brandeis, writing in dissent in *New State Ice Company v. Liebmann*,³⁴⁷ famously wrote that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."³⁴⁸ In making this statement, Justice Brandeis coined a poetic phrase for the idea that the states should be able to test out their own solutions to problems state officials observe in their constituencies. His words also imply that states have the inherent authority to diverge from national solutions proposed for these problems, should those solutions prove ineffective within the state's borders. States have recently attempted to serve as laboratories in enacting unique proposals for

340. See *supra* notes 239-246 and accompanying text.

341. *United States v. Morrison*, 2000 WL 574361 (U.S.) at *11.

342. See *supra* notes 34-35 and accompanying text; see also *Morrison*, 2000 WL 574361 at *11 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.").

343. See Fernando R. Laguarda, Note, *Federalism Myth: States as Laboratories of Health Care Reform*, 82 GEO. L.J. 159, 160 (1993).

344. *Id.*

345. See *id.* at 170.

346. Cf. Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 800 (1997).

347. 285 U.S. 262 (1932).

348. *Id.* at 311 (Brandeis, J., dissenting).

health care reform, proposals that fell flat when they were held federally preempted under ERISA.³⁴⁹ However, Congress has recently become again enamored of the idea of states developing their own solutions for national woes. The much-heralded “end of welfare as we know it” has consisted of returning benefit provision to the states, to be formulated as each state sees fit.³⁵⁰ Perhaps another effect of the *Lopez* movement towards increased state authority will be a return to Justice Brandeis’ vision of fifty independent laboratories yielding their best results for the nation.

Indeed, the Court seems to have embraced such a vision in *Florida Prepaid*, where it chastised Congress for failing to allow local remedies to take effect before enacting a federal remedy for patent infringement.³⁵¹ Moreover, Justice Kennedy’s *Lopez* concurrence³⁵² demonstrates his advocacy of such a return by citing the numerous proposals introduced in various states to deal with the problem of guns in schools, from provisions of amnesty, to rewards for informants, to fining parents whose children carry guns in the classroom.³⁵³ Were the GFSZA to be enforced, Kennedy asserts, the states could not attempt such novel solutions, most of which would be impossible to efficiently initiate on a federal level in order to determine their effectiveness.³⁵⁴ While such an imposition of the federal government upon the states is not as great as the requirements of *New York* and *Printz*, which compelled the states to action, the deprivation of a traditional privilege is “nonetheless significant.”³⁵⁵ This imposition requires the Court, as watchdog of the balance between state and federal powers, to step in and right the scales.

Congress’s initiative to fight the war on drugs on a purely national level has not produced its intended benefits. Though illegal drug use may be “our national affliction,”³⁵⁶ it is perhaps not an affliction best treated on a national scale. The majority of federal drug arrests do not involve the importing of large shipments of illegal substances, or intricate conspiracies maintained for their distribution. Rather, the majority of federal drug arrests involve minor street crimes.³⁵⁷ Street crime is the traditional province of state law enforcement and is ineffectively prosecuted by a national law

349. See generally Laguarda, *supra* note 343, at 179-89 (describing the failed attempts of Hawaii and Oregon to enact state health care reform).

350. Jonathan Alter, *Washington Washes Its Hands*, NEWSWEEK, Aug. 17, 1996, at 42.

351. See *Florida Prepaid*, 119 S. Ct. 2199, 2207 (1999).

352. See *supra* Part II.B.2; see also *infra* Part V.C.

353. See *Lopez*, 514 U.S. 549, 582 (1995) (Kennedy, J., concurring).

354. See *id.* at 583.

355. *Id.*

356. Kadish, *supra* note 55, at 973.

357. See Erica L. Johnson, “A Menace to Society”: *The Use of Criminal Profiling and Its Effect on Black Males*, 38 How. L.J. 639, 640 (1995) (noting that a majority of the approximately 1.2 million federal drug arrests made each year are for mere possession).

enforcement regime.³⁵⁸ The failure of the war on drugs demands exploration of new solutions, and on the state level, countless new solutions are being implemented every day. These include such programs as needle exchanges, which are banned on the federal level; drug courts, which monitor defendants' rehabilitation efforts rather than send them to prison; and sentencing programs which require, instead of time in a jail cell, daily testing of a defendant's urine for drugs.³⁵⁹ The list should also include state decriminalization of medical marijuana.

Programs such as these embody the very essence of Justice Brandeis' words when he wrote of the importance of maintaining the states as laboratories of democracy—the ability of fifty separate communities to test fifty methods of dealing with a problem, the most effective of which may be adopted by the federal government. In light of recent federal government-commissioned studies proclaiming the medical benefit of marijuana³⁶⁰ and the introduction of a bill by Representative Barney Frank to reclassify marijuana as a Schedule II drug for the purpose of allowing medical use,³⁶¹ Congress will be under increasing pressure to give this issue serious consideration. Allowing the states to conduct their own experiments with legalization for medicinal use by not enforcing federal drug laws in this arena might prove to be the ideal solution for Congress to delay implementing change on a national level while awaiting the results of the states' initiatives.

C. *Stare Decisis*

Joining the *Lopez* majority opinion, Justice Kennedy begins his concurrence by noting his reluctance to limit the power available to Congress under the Commerce Clause, occasioned by the “history of . . . judicial struggle” to maintain a vital Commerce Clause jurisprudence during the United States' transition from a state-based to a national economy.³⁶² From the Court's past decisions, Kennedy derives two lessons. First, he concludes that attempts to determine the reach of the Commerce Clause through the application of content-based formulas have led to imprecise decision-making.³⁶³ Second, he implores the Court to consider that, above all, the stability achieved through *stare decisis* is crucial to maintaining a workable interpretation of the Commerce Clause, and reminds the Court of

358. See ABA TASK FORCE REPORT, *supra* note 28, at 18.

359. See, e.g., Sam Libby, *State Is in Forefront of Changing Drug Laws*, N.Y. TIMES, Sept. 6, 1998, at C14 (discussing Connecticut's innovative programs); Joyce Purnick, *Another View of the War Against Drugs*, N.Y. TIMES, May 23, 1996, at B1 (discussing Maryland's drug treatment policies).

360. See Sheryl Gay Stolberg, *Government Study of Marijuana Sees Medical Benefits*, N.Y. TIMES, Mar. 18, 1999, at A1.

361. See Medical Use of Marijuana Act, H.R. 1782, 105th Cong. (1997).

362. *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring).

363. See *id.*

the impracticality of delving into the past to resurrect early Commerce Clause principles applicable only to a horse-and-buggy way of life.³⁶⁴ The Court, however, has not shied away from engaging in a bit of historical revisionism where its Commerce Clause cases are concerned. *Seminole Tribe* and *College Savings Bank* both overrule precedent that had contributed to the foundation of Congress's broad Commerce Clause power.³⁶⁵ The Court does not appear to be afraid of change in this area.

Justice Thomas, for example, is more than ready to return to a nineteenth-century way of life, at least insofar as the Commerce Clause is concerned. In Justice Thomas' view (a view which he voices again in his *Morrison* concurring opinion³⁶⁶) the *Lopez* decision is the clarion call of revolution, the first step in returning a misguided path of precedent to its untainted origin. While Justice Thomas joins the majority opinion, he indicates that he does not consider the "substantially affects" test a proper demarcation of Congress's power to regulate commerce among the several states. Rather, Thomas casts his eye "toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence."³⁶⁷ For Thomas, such a shift entails returning to the definition of "commerce" known to the Constitution's framers—a definition that included "selling, buying, and bartering, as well as transporting for these purposes" and very little else.³⁶⁸ Thomas hinges his concerns on the fact that "commerce" was not modified in the text of the Commerce Clause. If we can expand the definition of the Commerce Clause by including a "substantially affects" provision, why may we not do the same to Congress's power to regulate the armed forces or collect taxes and so slide down the slippery slope to a monolithic federal power?³⁶⁹ Justice Thomas concludes his concurrence by arguing that a return to the Framers' original understanding of the Commerce Clause would not be a radical revision of a century's worth of precedent. Rather, it is the twentieth-century modification of the Commerce Clause that is the radical departure from "our long-held understanding of the limited nature of federal power."³⁷⁰ *Lopez* is simply the first tentative step in erasing a misguided jurisprudential tangent and returning to the Framers' original wisdom.

364. See *id.* at 574 ("[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.").

365. See *supra* discussion notes 185-214 and accompanying text.

366. See *United States v. Morrison*, 2000 WL 574361 (U.S.) at *17 (Thomas, J., concurring) ("I write separately only to express my view that the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases.").

367. *Lopez*, 514 U.S. at 585 (Thomas, J., concurring).

368. *Id.*

369. See *id.* at 589.

370. *Id.* at 602.

Under Justice Thomas' vision of the commerce power, the line for decriminalization of medical marijuana is clearly drawn. Congress would be able to regulate the buying, selling, and transporting for the purpose of selling of marijuana. It would not, however, have any authority to regulate the mere possession or use of marijuana. And, following Justice Thomas' radical revision of the history of Commerce Clause jurisprudence, the federal government's authority to regulate drug use at all—whether legalized by the states or not—comes into grave doubt. In all likelihood, Thomas would relegate the prosecution of such intrastate use to the power of the states, national affliction notwithstanding.

Under Justice Kennedy's more tempered view of *stare decisis*, the question is less clear. Certainly, the inability of Congress to regulate one limited form of marijuana use is not a revolution in and of itself, but it does call into question congressional authority under the CSA. The CSA does not contain a jurisdictional element. If *Lopez* is strictly applied, the regulation of drug use must be explicitly tied to interstate commerce. Thus, the CSA would have to be reformed, and two decade's worth of precedent and convictions would be called into doubt. However, there have been other moments in our jurisprudential history when a stream of precedent has suddenly been reversed.³⁷¹ To base an argument against reevaluating the CSA solely on fear of change would be disingenuous at best.

It is perhaps Justice Breyer who best recognizes the possible effects of *Lopez* and its progeny upon the CSA, though his acknowledgment is quite subtle. In discussing the flimsy nature of the economic versus noneconomic distinction, Justice Breyer writes that “[t]he line becomes yet harder to draw given the need for exceptions. The Court itself would permit Congress to aggregate, hence regulate, ‘noneconomic’ activity taking place at economic establishments.”³⁷² Justice Breyer is taking issue with the *Morrison* majority's assertion that it has only allowed an aggregation theory to be employed in regulating economic activity. In support of this statement, Justice Breyer cites to *Heart of Atlanta* and *Katezenbach*, seemingly working to fortify these cases as good precedent in light of the majority's attack upon their aggregation theory reasoning. Breyer then continues to assert that the Court “would permit Congress to regulate where that regulation is ‘an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’”³⁷³ For this proposition, Breyer cites to *Lopez* and then, importantly, to the CSA with the

371. See Kopel & Reynolds, *supra* note 25, at 74 (contending that “[u]ndoing sixty years of wrongly decided cases . . . is just as legitimate as the Court's earlier undoing of many decades' worth of wrongly decided equal protection cases”).

372. *United States v. Morrison*, 2000 WL 574361 (U.S.) at *31.

373. *Id.* (quoting *Lopez*, 514 U.S. at 561).

parenthetical explanation “regulating drugs produced for home consumption.”³⁷⁴ It is as if Justice Breyer hopes, through a simple citation, to signal to the majority that its reasoning in strictly maintaining the categories of “economic” and “noneconomic” might lead to consequences it did not intend; namely, the invalidation of federal power to regulate drug use under the CSA in cases like home consumption, in which economic activity is not expressly involved. Just as Justice Breyer is bolstering the precedent of *Heart of Atlanta* and *Katzenbach*, so too is he holding out the CSA as an exercise of Congress’s power under the Commerce Clause that is in danger under *Lopez* and *Morrison* and, in his view, must be guarded carefully.

D. *The Political Process*

In *Alden*, the Court wrote that “[b]y ‘split[ting] the atom of sovereignty,’ the founders established ‘two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.’”³⁷⁵ The Court continued, “‘The Constitution thus contemplates that a State’s government will represent and remain accountable to its own citizens.’ When the Federal Government asserts authority over a State’s most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.”³⁷⁶ The Court thus contends that a state’s authority over its own political processes must be subverted only in the most limited of instances, so as not to destroy the authority it gains through accountability to its electorate.³⁷⁷ A state’s decision to allocate legislative power to the people through an initiative process, for example, must be given great weight and not be undermined by Congress without good authority.³⁷⁸

Professor Harry Scheiber cites three main arguments in favor of the initiative process.³⁷⁹ First is the “grass-roots” argument, which contends that the initiative process serves to keep government closer to the people it is meant to serve.³⁸⁰ On this view, public opinion is more easily communicated to officials, and government is more responsive to its citizenry, who are themselves better informed.³⁸¹ Second, the initiative process allows for diversity and experimentation among the states, carrying out Justice

374. *Id.*

375. *Alden v. Maine*, 119 S. Ct. 2240, 2265 (1999) (second alteration in original) (quoting *Saenz v. Roe*, 119 S. Ct. 1518, 1527 n.17 (1999)).

376. *Id.* (citation omitted) (quoting *Printz v. United States*, 521 U.S. 898, 920 (1997)).

377. *See id.*

378. *See id.*

379. *See* Harry N. Scheiber, *supra* note 346, at 801-07.

380. *See id.* at 803.

381. *See id.*

Brandies' vision of laboratories of democracy.³⁸² Scheiber notes that with the values of this facet of direct democracy comes the need to be ever vigilant that experimentation does not turn into a tyranny of diversity, in which injustices flow from subnational lawmaking power.³⁸³ Finally, Scheiber notes that government is more competent and efficient when states are left to govern the daily lives of their citizens, with whom state government is more intimately connected.³⁸⁴ Also, decentralizing government regulation of such issues relieves the federal government of creating and implementing an unwieldy national solution, allowing it to perform its duly assigned tasks more efficiently.³⁸⁵

Each of these arguments recalls those voiced by the *Lopez* Court regarding a state's ability to fashion its own criminal remedies without interference by Congress. Should a state's citizenry be dissatisfied with the criminal penalties its legislature enacts, it has, through the election process, a direct means of voicing that dissatisfaction. When a traditional state crime is prosecuted under federal law, that accountability is displaced. Moreover, when, as in the case of medical marijuana statutes enacted by voter mandate, state-legalized crimes are prosecuted federally, the authority given to a state by its voters is effectively taken away by Congress, as the citizens' electoral decisions are invalidated by federal action. When the electorate's voice has been echoed from state to state, as it certainly has in the growing state acceptance of medical marijuana use, the impropriety of such Congressional action, especially under a post-*Lopez* vision of federalism, becomes more acute.

CONCLUSION

Constitutional law scholar Bruce Ackerman speaks of "constitutional moments," spaces in history when "We the People" speak in our highest sovereign capacity.³⁸⁶ As the result of such moments, a new "constitutional regime" is initiated, the broad theories that form the basis of our jurisprudence are shifted, and a new era of judicial thought begins. Commentators, and indeed, Ackerman himself, have posited that the *Lopez* decision is but the first shot fired in a coming constitutional revolution.³⁸⁷ They note as corroborating evidence the fact that the day *Lopez* was argued, November 8, 1994, voters almost unanimously expressed their displeasure with the broad powers of the federal government by unseating Congress's Democratic leadership and installing in its place a slate of politicians who

382. See *id.* at 804-05.

383. See *id.*

384. See *id.* at 806.

385. See *id.* at 806-07.

386. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266 (1991).

387. See Mark Tushnet, *Living In a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845 (1996).

had campaigned on the limited government platform of the “Contract With America.”³⁸⁸ That new Congress began to turn over to the states broad areas of policy which had been under exclusive federal control for decades. In 1996, Congress turned over welfare regulation to the states, relying on the “laboratories of democracy” theory, hoping the states would “mend not end” our national guarantee of minimal economic sufficiency for all citizens.³⁸⁹ Finally, in the 1998 elections discussed *supra*, six states posited their belief that a state drug policy regarding medical marijuana better met the needs of their residents and the regulation of crime in their communities than could federal policy. At some level, change is afoot. But *Lopez* does not provide a clear answer to any constitutional question. Its answer lies in its legacy, in the decisions that will come from the Court later this term, and the decisions that will come after those.³⁹⁰ What *Lopez* does provide is the opportunity once again to ask the question, “Under the Commerce Clause, should the federal government have jurisdiction over this particular area of law?” *Morrison* reaffirms that sometimes the answer will be “no.” That simple shift in constitutional precedent provides an opening through which a vision of effective state legalization of medical marijuana use is possible. This possibility will be presented to the courts and carefully reasoned through, and whatever outcome is reached, such a possibility may be *Lopez’s* greatest impact upon the future of constitutional law.

Plaintiffs seeking the ability to use medical marijuana without the threat of federal prosecution must embrace this prospect that *Lopez* and its progeny have given them and argue that Congress’s regulatory power no longer reaches state-legalized medical marijuana use. In doing so, they must realize that the arguments of federalism need not always imply denial of individual liberties. Indeed, these arguments can just as easily imply greater protection. As the late Justice Brennan wrote,

State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.³⁹¹

Justice Brennan urged states to “step into the breach” and provide to their citizens the rights the federal government had taken away.³⁹² *Lopez* and its

388. *See id.* at 845.

389. Alter, *supra* note 350.

390. *See* Larry Kramer, *What’s a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, 46 CASE W. RES. L. REV. 885, 885 (1996) (“Judicial decisions are not inherently revolutionary; they are not inherently anything. They are what we choose to make them.”).

391. Brennan, *supra* note 1, at 491.

392. *Id.* at 503.

progeny show a Supreme Court laying the foundation to heed Justice Brennan's call. Medical marijuana proponents would be wise to do so as well.