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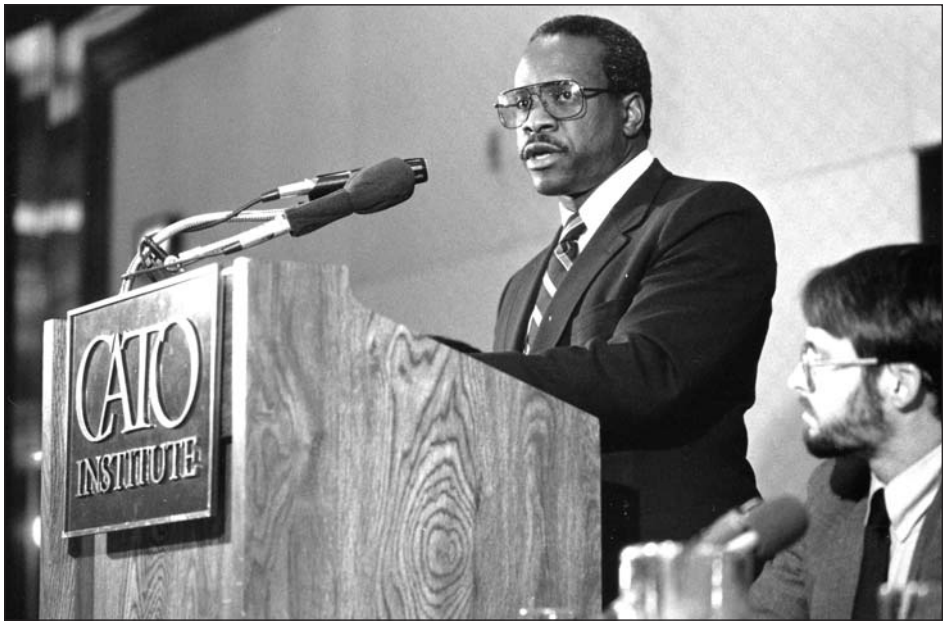
Abandoning the Limits on Federal Power

by Clarence Thomas



Clarence Thomas, shown here at a Cato Institute conference in 1988, ended the 2004–2005 Supreme Court term with two stirring dissents in cases involving federalism (reprinted here) and property rights.

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

Respondents' local cultivation and consumption of marijuana is not "Commerce . . . among the several States." By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution's limits on federal power. The majority supports this conclusion by invoking, without explanation, the Necessary and Proper Clause. Regulating respondents' conduct, however, is not "necessary and proper for carrying into Execution" Congress' restrictions on the interstate drug trade. Thus, neither the Commerce Clause nor the Necessary and Proper Clause grants Congress the power to regulate respondents' conduct.

The Commerce Power

As I explained at length in *United States v. Lopez* (1995), the Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines. The Clause's text, structure, and history all indicate that, at the time of the founding, the term "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture. Throughout founding-era dictionaries, Madison's notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term "commerce" is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange. The term "commerce" commonly meant trade or exchange (and shipping for these purposes) not simply to those involved in the drafting and ratification processes, but also to the general public.

Even the majority does not argue that respondents' conduct is itself "Commerce among the several States." Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California—it never crosses state lines, much less as part of a commercial transaction. Certainly no evidence from the founding sug-

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This is the text of Justice Clarence Thomas's dissent from the Supreme Court's ruling in the case of Gonzales v. Raich *(previously* Raich v. Ashcroft*) handed down June 6, 2005. Citations and footnotes have been omitted. Unattributed quotations are from earlier opinions of the Supreme Court.*

In This Issue

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gests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.

On this traditional understanding of "commerce," the Controlled Substances Act (CSA) regulates a great deal of marijuana trafficking that is interstate and commercial in character. The CSA does not, however, criminalize only the interstate buying and selling of marijuana. Instead, it bans the entire market—*intra*state or interstate, noncommercial or commercial—for marijuana. Respondents are correct that the CSA exceeds Congress' commerce power as applied to their conduct, which is purely *intra*state and noncommercial.

Roger Pilon, director of Cato's Center for Constitutional Studies, and Cato president Ed Crane welcome Clarence Thomas to the Cato Institute for a lunch with the center's scholars in 1997.

Necessary and Proper?

More difficult, however, is whether the CSA is a valid exercise of Congress' power to enact laws that are "necessary and proper for carrying into Execution" its power to regulate interstate commerce. The Necessary and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power. Nor is it, however, a command to Congress to enact only laws that are absolutely indispensable to the exercise of an enumerated power.

In *McCulloch v. Maryland* (1819), this Court, speaking through Chief Justice Marshall, set forth a test for determining when an Act of Congress is permissible under the Necessary and Proper Clause:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

To act under the Necessary and Proper Clause, then, Congress must select a means that is "appropriate" and "plainly adapted" to executing an enumerated power; the means cannot be otherwise "prohibited" by the Constitution; and the means cannot be inconsistent with "the letter and spirit of the [C]onstitution." The CSA, as applied to respondents' conduct, is not a valid exercise of Congress' power under the Necessary and Proper Clause.

Congress has exercised its power over interstate commerce to criminalize trafficking in marijuana across state lines. The Government contends that banning Monson and Raich's *intra*state drug activity is "necessary and proper for carrying into Execution" its regulation of interstate drug trafficking. However, in order to be "necessary," the *intra*state ban must be more than "a reasonable means [of] effectuat[ing] the regulation of interstate commerce." It must be "plainly adapted" to regulating interstate marijuana trafficking—in other words, there must be an "obvious, simple, and direct relation" between the *intra*state ban and the regulation of interstate commerce.

On its face, a ban on the *intra*state cultivation, possession, and distribution of marijuana may be plainly adapted to stopping the interstate flow of marijuana. Unregulated local growers and users could swell both the supply and the demand sides of the interstate marijuana market, making the market more difficult to regulate. But respondents do not challenge the CSA on its face. Instead, they challenge it as applied to their conduct. The question is thus whether the *intra*state ban is "necessary and proper" as applied to medical marijuana users like respondents.

Respondents are not regulable simply because they belong to a large class (local growers and users of marijuana) that Congress might need to reach, if they also belong to a distinct and separable subclass (local growers and users of state-authorized, medical marijuana) that does not undermine the CSA's interstate ban. The Court of Appeals found that respondents' "limited use is distinct from the broader illicit drug market," because "th[eir] medicinal marijuana . . . is not intended for, nor does it enter, the stream of commerce." If that is generally true of individuals who grow and use marijuana for medical purposes under state law, then even assuming Congress has "obvious" and "plain" reasons why regulating *intra*state cultivation and possession is necessary to regulating the interstate drug trade, none of those reasons applies to medical marijuana patients like Monson and Raich.

California's Compassionate Use Act sets respondents' conduct apart from other *intra*state producers and users of marijuana. The Act channels marijuana use to "seriously ill Californians" and prohibits "the diversion of marijuana for nonmedical purposes." California strictly controls the cultivation and possession of marijuana for medical purposes. To be eligible for its pro-

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gram, California requires that a patient have an illness that cannabis can relieve, such as cancer, AIDS, or arthritis, and that he obtain a physician's recommendation or approval. Qualified patients must provide personal and medical information to obtain medical identification cards, and there is a statewide registry of cardholders. Moreover, the Medical Board of California has issued guidelines for physicians' cannabis recommendations, and it sanctions physicians who do not comply with the guidelines.

This class of *intra*state users is therefore distinguishable from others. We normally presume that States enforce their own laws, and there is no reason to depart from that presumption here: Nothing suggests that California's controls are ineffective. The scant evidence that exists suggests that few people—the vast majority of whom are aged 40 or older—register to use medical marijuana. In part because of the low incidence of medical marijuana use, many law enforcement officials report that the introduction of medical marijuana laws has not affected their law enforcement efforts.

These controls belie the Government's assertion that placing medical marijuana outside the CSA's reach "would prevent effective enforcement of the interstate ban on drug trafficking." Enforcement of the CSA can continue as it did prior to the Compassionate Use Act. Only now, a qualified patient could avoid arrest or prosecution by presenting his identification card to law enforcement officers. In the event that a qualified patient is arrested for possession or his cannabis is seized, he could seek to prove as an affirmative defense that, in conformity with state law, he possessed or cultivated small quantities of marijuana intrastate solely for personal medical use. Moreover, under the CSA, certain drugs that present a high risk of abuse and addiction but that nevertheless have an accepted medical use—drugs like morphine and amphetamines—are available by prescription. No one argues that permitting use of these drugs under medical supervision has undermined the CSA's restrictions.

But even assuming that States' controls allow some seepage of medical marijuana into the illicit drug market, there is a multi-billion-dollar interstate market for marijuana. It is difficult to see how this vast market could be affected by diverted medical cannabis, let alone in a way that makes regulating *intra*state medical marijuana obviously essential to controlling the interstate drug market.

To be sure, Congress declared that state policy would disrupt federal law enforcement. It believed the across-the-board ban essential to policing interstate drug trafficking. But as Justice O'Connor points out, Congress presented no evidence in support of its conclusions, which are not so much findings of fact as assertions of power. Congress cannot define the scope of its own power merely by declaring the necessity of its enactments.

In sum, neither in enacting the CSA nor in defending its application to respondents has the Government offered any obvious reason why banning medical marijuana use is necessary to stem the tide of interstate drug trafficking. Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress' aim is really to exercise police power of the sort reserved to the States in order to eliminate even the *intra*state possession and use of marijuana.

No General "Police Power"

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

In *Lopez,* I argued that allowing Congress to regulate *intra*state, noncommercial activity under the Commerce Clause would confer on Congress a general "police power" over the Nation. This is no less the case if Congress ties its power to the Necessary and Proper Clause rather than the Commerce Clause. When agents from the Drug Enforcement Administration raided Monson's home, they seized six cannabis plants. If the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I powers—as expanded by the Necessary and Proper Clause—have no meaningful limits. Whether Congress aims at the possession of drugs, guns, or any number of other items, it may continue to "appropria[te] state police powers under the guise of regulating commerce."

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

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

Drifting Away from the Text

The majority advances three reasons why the CSA is a legitimate exercise of Congress' authority under the Commerce Clause: First, respondents' conduct, taken in the aggregate, may substantially affect interstate commerce; second, regulation of respondents' conduct is essential to regulating the interstate marijuana market; and, third, regulation of respondents' conduct is incidental to regulating the interstate marijuana market. Justice O'Connor explains why the majority's reasons cannot be reconciled with our recent Commerce Clause jurisprudence. The majority's justifications, however, suffer from even more fundamental flaws.

The majority holds that Congress may regulate *intra*state cultivation and possession of medical marijuana under the Commerce Clause, because such conduct arguably has a substantial effect on interstate commerce. The majority's decision is further proof that the "substantial effects" test is a "rootless and malleable standard" at odds with the constitutional design.

The majority's treatment of the substan-

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tial effects test is rootless, because it is not tethered to either the Commerce Clause or the Necessary and Proper Clause. Under the Commerce Clause, Congress may regulate interstate commerce, not activities that substantially affect interstate commerce—any more than Congress may regulate activities that do not fall within, but that affect, the subjects of its other Article I powers. Whatever additional latitude the Necessary and Proper Clause affords, the question is whether Congress' legislation is essential to the regulation of interstate commerce itself—not whether the legislation extends only to economic activities that substantially affect interstate commerce.

The majority's treatment of the substantial effects test is malleable, because the majority expands the relevant conduct. By defining the class at a high level of generality (as the *intra*state manufacture and possession of marijuana), the majority overlooks that individuals authorized by state law to manufacture and possess medical marijuana exert no demonstrable effect on the interstate drug market. The majority ignores that whether a particular activity substantially affects interstate commerce—and thus comes within Congress' reach on the majority's approach—can turn on a number of objective factors, like state action or features of the regulated activity itself. For instance, here, if California and other States are effectively regulating medical marijuana users, then these users have little effect on the interstate drug trade.

The substantial effects test is easily manipulated for another reason. This Court has never held that Congress can regulate noneconomic activity that substantially affects interstate commerce. To evade even that modest restriction on federal power, the majority defines economic activity in the broadest possible terms as the "the production, distribution, and consumption of commodities." This carves out a vast swath of activities that are subject to federal regulation. If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined," while those of the States are "numerous and indefinite."

Moreover, even a Court interested more in the modern than the original understanding of the Constitution ought to resolve cases based on the meaning of words that are actually in the document. Congress is authorized to regulate "Commerce," and respondents' conduct does not qualify under any definition of that term. The majority's opinion only illustrates the steady drift away from the text of the Commerce Clause. There is an inexorable expansion from "commerce," to "commercial" and "economic" activity, and finally to all "production, distribution, and consumption" of goods or services for which there is an "established . . . interstate market." Federal power expands, but never contracts, with each new locution. The majority is not interpreting the Commerce Clause, but rewriting it.

The majority's rewriting of the Commerce Clause seems to be rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively. The interconnectedness of economic activity is not a modern phenomenon unfamiliar to the Framers. Moreover, the Framers understood what the majority does not appear to fully appreciate: There is a danger to concentrating too much, as well as too little, power in the Federal Government. This Court has carefully avoided stripping Congress of its ability to regulate interstate commerce, but it has casually allowed the Federal Government to strip States of their ability to regulate *intra*state commerce—not to mention a host of local activities, like mere drug possession, that are not commercial.

What Is Reserved to the States?

One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States. Yet this Court knows that "[t]he Constitution created a Federal Government of limited powers." That is why today's decision will add no measure of stability to our Commerce Clause jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter. If stability is possible, it is only by discarding the stand-alone substantial effects test and revisiting our definition of "Commerce among the several States." Congress may regulate interstate commerce—not things that affect it, even when summed together, unless truly "necessary and proper" to regulating interstate commerce.

The majority also inconsistently contends that regulating respondents' conduct is both incidental and essential to a comprehensive legislative scheme. I have already explained why the CSA's ban on local activity is not essential. However, the majority further claims that, because the CSA covers a great deal of interstate commerce, it "is of no moment" if it also "ensnares some purely *intra*state activity." So long as Congress casts its net broadly over an interstate market, according to the majority, it is free to regulate interstate and *intra*state activity alike. This cannot be justified under either the Commerce Clause or the Necessary and Proper Clause. If the activity is purely *intra*state, then it may not be regulated under the Commerce Clause. And if the regulation of the *intra*state activity is purely incidental, then it may not be regulated under the Necessary and Proper Clause.

Nevertheless, the majority terms this the "pivotal" distinction between the pres-

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Cato senior fellow Randy Barnett, who argued the *Raich* case at the Supreme Court, meets the press in front of the Court after the argument on November 29.

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ent case and *Lopez* and *Morrison*. In *Lopez* and *Morrison*, the parties asserted facial challenges, claiming "that a particular statute or provision fell outside Congress' commerce power in its entirety." Here, by contrast, respondents claim only that the CSA falls outside Congress' commerce power as applied to their individual conduct. According to the majority, while courts may set aside whole statutes or provisions, they may not "excise individual applications of a concededly valid statutory scheme."

It is true that if respondents' conduct is part of a "class of activities . . . and that class is within the reach of federal power," then respondents may not point to the *de minimis* effect of their own personal conduct on the interstate drug market. But that begs the question at issue: whether respondents' "class of activities" is "within the reach of federal power," which depends in turn on whether the class is defined at a low or a high level of generality. If medical marijuana patients like Monson and Raich largely stand outside the interstate drug market, then courts must excise them from the CSA's coverage. Congress expressly provided that if "a provision [of the CSA] is held invalid in one of more of its *applications,* the provision shall remain in effect in all its valid applications that are severable."

Even in the absence of an express severability provision, it is implausible that this Court could set aside entire portions of the United States Code as outside Congress' power in *Lopez* and *Morrison*, but it cannot engage in the more restrained practice of invalidating particular applications of the CSA that are beyond Congress' power. This Court has regularly entertained as-applied challenges under constitutional provisions, including the Commerce Clause. There is no reason why, when Congress exceeds the scope of its commerce power, courts may not invalidate Congress' overreaching on a case-by-case basis. The CSA undoubtedly regulates a great deal of interstate commerce, but that is no license to regulate conduct that is neither interstate nor commercial, however minor or incidental.

If the majority is correct that *Lopez* and *Morrison* are distinct because they were facial challenges to "particular statute[s] or provision[s]," then congressional power turns on the manner in which Congress packages legislation. Under the majority's reasoning, Congress could not enact—either as a single-subject statute or as a separate provision in the CSA—a prohibition on the *intra*state possession or cultivation of marijuana. Nor could it enact an *intra*state ban simply to supplement existing drug regulations. However, that same prohibition is perfectly constitutional when integrated into a piece of legislation that reaches other regulable conduct.

Finally, the majority's view—that because some of the CSA's applications are constitutional, they must *all* be constitutional—undermines its reliance on the substantial effects test. The intrastate conduct swept within a general regulatory scheme may or may not have a substantial effect on the relevant interstate market. "[O]ne *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." The breadth of legislation that Congress enacts says nothing about whether the intrastate activity substantially affects interstate commerce, let alone whether it is necessary to the scheme. Because medical marijuana users in California and elsewhere are not placing substantial amounts of cannabis into the stream of interstate commerce, Congress may not regulate them under the substantial effects test, no matter how broadly it drafts the CSA.

A Blow to Federalism

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern." The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union." Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals. I respectfully dissent. ■

Cato Calendar

Constitution Day
Washington • Cato Institute
September 14, 2005
Speakers include Nadine Strossen, Marci Hamilton, Dan Troy, and Randy Barnett.

Cato Club 200 Retreat
Santa Fe • La Posada de Santa Fe
September 29–October 2, 2005
Speakers include Vernon Smith, Patrick Byrne, and Dr. Jacques Chaoulli.

Global Farm Trade: Ripe for Reform?
***Second Annual Trade Conference Cosponsored with* The Economist**
Washington • Cato Institute
October 6, 2005
Speakers include Clayton Yeutter, Hugo Paeman, and Cal Dooley.

Cato University
The Art of Persuasion: Skills for Everyone
Washington • Cato Institute
October 20–23, 2005
Speakers include Nick Gillespie, Tom G. Palmer, Dan Griswold, and Don Boudreaux.

Monetary Institutions and Economic Development
***23rd Annual Monetary Conference Cosponsored with* The Economist**
Washington • Cato Institute
November 3, 2005
Speakers include Secretary John Snow, Rodrigo Rato, Deepak Lal, Reuven Brenner, and Samuel Brittan.

Perspectives 2005
Houston • Four Seasons
November 8, 2005

Perspectives 2005
Dallas • Crescent Court
November 10, 2005

Perspectives 2005
New York • Waldorf-Astoria
December 9, 2005

18th Annual Benefactor Summit
Phoenix • Royal Palms
March 1–5, 2006

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