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SCALIA’S RAICH CONCURRENCE: A SIGNIFICANT DEPARTURE FROM ORIGINALIST INTERPRETATION?

I. INTRODUCTION

In the recent case of Gonzales v. Raich, the Supreme Court upheld the Controlled Substances Act (“CSA”) through which Congress prohibited the medicinal use of marijuana, even if such use was limited to intrastate, noncommercial use. The CSA is a comprehensive set of federal regulations that makes it unlawful “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance.” In support of its decision, the majority relied upon a broad interpretation of the Commerce Clause that is congruent with the vast majority of nearly seventy years of Commerce Clause jurisprudence, with the exception of the more recent decisions of United States v. Morrison and United States v. Lopez. Additionally, the Court emphasized the similarities between Congress’s regulation of home-grown marijuana under the facts of Raich, and its regulation of home-grown wheat in Wickard v. Filburn, a 1942 decision in which the Court upheld a federal statute regulating wheat

1. 545 U.S. 1 (2005).
2. Id. at 26; see also id. at 21–22 (discussing appellant’s arguments).
4. Raich, 545 U.S. at 15–18.
5. U.S. CONST. art. I, § 8, cl. 3.
6. See United States v. Morrison, 529 U.S. 598, 610 (2000) (acknowledging that there has been a clear “pattern of analysis” regarding cases that address Congress’s authority to regulate activities that “substantially affect[] interstate commerce”). See generally Eric R. Claeys, Raich and Judicial Conservatism at the Close of the Rehnquist Court, 9 LEWIS & CLARK L. REV. 791 (2005) (acknowledging that Lopez and Morrison signaled a “New Federalism” in Commerce Clause cases of the Rehnquist Court).
7. 529 U.S. 598 (striking down a provision of the Violence Against Women Act, which provided a federal remedy for victims of gender-motivated crimes because Congress lacked authority to enact such a provision even under an expansive view of Commerce Clause power due to the “noneconomic” nature of the activity being regulated).
8. 514 U.S. 549, 551 (1995) (holding that Congress had exceeded its constitutional authority by enacting the Gun-Free School Zones Act of 1990 under the Commerce Clause because determining that possession of a gun within a school zone affected interstate commerce required accepting a chain of inferences).
9. Raich, 545 U.S. at 18–19.
production as a valid exercise of Congress's power pursuant to the Commerce Clause.11

Justice Antonin Scalia filed a concurring opinion in Raich, concluding that Congress had the authority to regulate the medicinal use of marijuana, even if it encompassed wholly intrastate activity, through a differing constitutional interpretation.12 His position was that according to the Necessary and Proper Clause,13 Congress has the power to effectuate the laws that it has enacted through constitutionally enumerated powers by passing further laws, even if those laws are not themselves derived from enumerated constitutional authority.14

Scalia's concurrence appears to mark a departure from his self-described "originalist" approach to constitutional interpretation15 and his hostility toward the idea of an "evolving" Constitution.16 This departure appears contrary to Scalia's well-known originalist approach to constitutional interpretation.17

This Note addresses the contrast between the approach of Scalia's Raich concurrence and his originalist constitutional interpretation in other areas of the law. Part II provides an overview of Scalia's Raich concurrence and his reliance on the Necessary and Proper Clause.18 Part III considers Scalia's Commerce Clause jurisprudence by assessing recent cases interpreting Congress's commerce power. Part IV contemplates Scalia's originalist approach in other areas of the law, including equal protection, due process, and cruel and unusual punishment jurisprudence. Finally, Part V focuses on whether Scalia's

11. Id. at 127–29.
12. 545 U.S. at 35 (Scalia, J., concurring).
13. U.S. CONST. art. I, § 8, cl. 18 ("[Congress has the power] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").
14. Raich, 545 U.S. at 35 (Scalia, J., concurring).
17. See Randy E. Barnett, Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism, 75 U. CIN. L. REV. 7, 13–14 (2006) (claiming that Scalia follows originalism only when it will produce the outcome he desires). But see Claey, supra note 6, at 794–95 (discussing that Scalia has generally ascribed to what is described as a "judicial minimalist" approach, which may allow for a determination that Scalia has remained consistent in his interpretations).
18. See Raich, 545 U.S. at 33–42 (Scalia, J., concurring).
Raich concurrence is a significant departure from his originalist judicial philosophy and, if so, what that departure implies regarding Scalia’s position in future Supreme Court cases involving the Commerce Clause.

II. JUSTICE SCALIA’S COMMERCE CLAUSE ANALYSIS AND HIS RELIANCE UPON THE NECESSARY AND PROPER CLAUSE

Scalia’s Raich concurrence states that Congress has the authority to regulate the intrastate possession and use of marijuana for medicinal purposes, but he does not justify this exercise of authority through the same means as the majority opinion. Specifically, Scalia finds that Congress’s power cannot be found in the Commerce Clause alone, but rather is derived from the convergence of the Commerce Clause and the Necessary and Proper Clause.

In cases addressing the Commerce Clause, the Supreme Court has continually reiterated that there are three categories under which Congress can regulate commerce: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) local activities that substantially affect interstate commerce. Scalia concluded in his Raich concurrence that this third category does not fit within Congress’s power under the Commerce Clause, but rather Congress must derive its power in this area from another constitutional provision.

Scalia in his own words answered by “resort[ing] to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause,” which allows Congress to enact laws that carry out any of its enumerated powers. Furthermore, Scalia found that if

19. Id. at 33.
20. Id. at 34. The idea that it is through the Necessary and Proper Clause that Congress has obtained its power in the more recent Commerce Clause cases has been acknowledged by Justices on the Court in recent decades. See, e.g., id.; Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 585–86 (1985) (O’Connor, J., dissenting).
24. 545 U.S. at 34 (Scalia, J., concurring).
26. U.S. CONST. art. I, § 8, cl. 18. The Necessary and Proper Clause allows Congress to effectuate the laws that it has enacted under other enumerated constitutional powers through
Congress has such power through the Necessary and Proper Clause, this power is not limited to laws regulating intrastate commerce or areas that “substantially affect interstate commerce.” Scalia’s interpretation of the Necessary and Proper Clause in this context conveys an even broader grant of congressional power than has been offered in previous Commerce Clause cases.

Specifically, Scalia noted two instances in which Congress has the power to regulate intrastate activities (whether these activities are economic or not): (1) when Congress is facilitating interstate commerce by eliminating obstructions to the market or (2) when Congress is restricting commerce by eliminating possible stimulants to the market. Here, Congress was eliminating an entire market—the market for marijuana. Therefore, in Scalia’s view, Congress has the power to regulate all activities that might frustrate Congress’s attempts to eliminate this market. Scalia also focused on the connection between the regulation of the marijuana market and the broad regulatory scheme governing the market for all controlled substances, legal and illegal.

The only limitation Scalia places on this “necessary and proper” power is that the regulation be “reasonably adapted” to a legitimate end under Commerce Clause power. The application of this standard indicates a departure from Scalia’s generally unfavorable view of malleable standards of interpretation that leave open the possibility that individual Justices will rely upon their personal preferences.

Scalia explains the extent of his broad interpretation of Necessary and Proper Clause power, finding that when Congress encroaches upon another constitutional principle, such as state sovereignty, the law is not an appropriate exercise of Congress’s power. Yet, Scalia quickly

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27. *Raich*, 545 U.S. at 34–35 (Scalia, J., concurring).
28. *Id.* at 35.
29. *Id.* at 40.
30. *Id.* at 40–41.
31. *Id.* at 37.
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dismisses the possibility that the congressional authority exercised in this case violates state sovereignty by explaining that state sovereignty cannot be found simply by asserting that an area of law has traditionally been left to state regulation. 34 Scalia further undercuts state sovereignty by suggesting that Congress need not trust states to effectively enforce their own regulations. 35 However, Scalia applied this limitation on Congress’s Commerce Clause power when he drafted the majority opinion in Printz v. United States, 36 finding that when a law enacted to carry out Commerce Clause power violates principles of state sovereignty as established in the Tenth Amendment, 37 such a law is not proper.

Scalia’s arguments for congressional power in his Raich concurrence do not conform to the principles of constitutional interpretation he has expounded in other decisions. First, his emphasis on an extremely broad interpretation of congressional power, especially in the Commerce Clause context, does not comport with his emphasis on reading the Constitution as it was meant when enacted. 39 Certainly, the Framers did not understand the Commerce Clause power to include congressional authority to regulate wholly intrastate non-economic activities. 40

Second, Scalia’s Raich 41 concurrence further strays from the idea first emphasized by Justice Marshall that Congress’s powers are “defined, and limited.” 42 Scalia’s reliance upon the flexible standard of “reasonably adapted . . . to a legitimate end” 43 is also in contravention to his interpretive philosophy. Although Scalia has sometimes acquiesced to the use of such a malleable rule when adhering to stare decisis, 44 he has also indicated his frustration with this type of standard

34. Id. at 41.
35. See id.
37. U.S. CONST. amend. X.
40. See, e.g., Raich, 545 U.S. at 58–59 (Thomas, J., dissenting) (explaining the historical context of the Commerce Clause power); United States v. Lopez, 514 U.S. 549, 596 (1995) (Thomas, J., concurring) (noting that no cases prior to the New Deal interpreted the Commerce Clause so broadly).
41. 545 U.S. at 33 (Scalia, J., concurring).
43. Raich, 545 U.S. at 37 (Scalia, J., concurring).
even while applying it himself. In his Raich concurrence, Scalia shows no such frustration. Rather, he embraces the standard and, notably, was the only Justice to apply it with full force.

III. OVERVIEW OF RECENT COMMERCE CLAUSE CASES AND JUSTICE SCALIA'S POSITIONS IN THOSE DECISIONS

Before the decision in Gonzales v. Raich, scholars contemplated that a new Commerce Clause philosophy may be emerging in the Supreme Court, indicating a more restrictive view of congressional power and a move back toward the Lochner era interpretation. Two recent decisions seemed to upset the Court's longstanding and increasingly expansive interpretation of Congress's Commerce Clause power, exemplified by such cases as NLRB v. Jones & Laughlin Steel Corp. and Wickard v. Filburn. These cases were United States v. Lopez and United States v. Morrison; in both cases, the majority found that Congress had exceeded its authority under the Commerce Clause. Prior to Lopez and Morrison, the Supreme Court had not found such a congressional violation of Commerce Clause authority in the nearly seventy preceding years of Commerce Clause jurisprudence.

45. Id. at 608 (noting that in determining whether capital punishment as used for minors is cruel and unusual punishment the Court considers, “in accordance with [its] modern (though in [his] view mistaken) jurisprudence, whether there is a ‘national consensus’”); see also Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting) (“I have generally rejected tests based on such malleable standards as ‘proportionality,’ because they have a way of turning into vehicles for the implementation of individual judges' policy preferences.”).

46. The majority opinion explained the standard of review it was applying as whether “Congress had a rational basis for concluding” that respondents' activities would substantially affect interstate commerce. Raich, 545 U.S. at 19. While both analyses are essentially applying differing interpretations of the rational basis test, it is Scalia's concurrence that actually reiterates the “appropriateness standard.” For the proposition that Scalia was the only Justice on the Supreme Court to correctly decide Raich, see generally The Supreme Court, 2004 Term—Leading Cases, 119 HARV. L. REV. 169 (2005) (determining that the majority opinion failed to reconcile Lopez and Morrison with the return to broader application of the Commerce Clause through the “substantial effects” test used in Raich).

47. 545 U.S. 1.


49. 301 U.S. 1 (1937).

50. 317 U.S. 111 (1942).


52. 529 U.S. 598 (2000).
A. United States v. Lopez

In *Lopez*, a high school student challenged the Gun-Free School Zones Act of 1990, which made it a federal offense for anyone to possess a firearm within a school zone. The majority opinion, written by Chief Justice Rehnquist, found that Congress did not have the power under the Commerce Clause to enact such a statute because the possession of a firearm was not "connected in any way to interstate commerce." The Court went on to determine that, even with a broad interpretation of Commerce Clause power, there are limits on Congress's authority. Ultimately, the majority concluded that to find that the possession of a firearm within a school zone "sufficiently affected interstate commerce" required too many intermediary inferences to justify such regulation, and that this provision was primarily a criminal statute—an area of law traditionally left to state regulation under the "police power."

Furthermore, the Court alluded to the notion that interpreting the Commerce Clause power too broadly could lead to valid congressional regulation of nearly all aspects of law, including family law. Scalia joined the majority in this case and declined to provide a concurring opinion, leading one to conclude that he agreed with the majority's analysis of the Commerce Clause power without reference to the Necessary and Proper Clause.

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53. 514 U.S. 549.
55. *Lopez*, 514 U.S. at 551.
56. Id. at 557.
57. Id. at 567–68.
58. See id. at 567.
59. Id. at 564. The argument used in this case is the often-used "slippery slope" argument, which suggests that the Court must step in to place limits on certain powers or rights before they are expanded too far. See, e.g., Lawrence v. Texas, 539 U.S. 558, 601–02 (2003) (Scalia, J., dissenting) (noting that if the Court invalidates state sodomy laws then the door is opened to question whether bans against same-sex marriage must also be invalidated); Romer v. Evans, 517 U.S. 620, 648–49 (1996) (Scalia, J., dissenting) (analogizing the issue of sexual orientation and laws criminalizing sodomy with laws that criminalize polygamy and suggesting that prohibition of criminal sodomy laws could lead to prohibition of laws criminalizing polygamy).
60. 514 U.S. at 550.
61. See id.
B. United States v. Morrison

Scalia again joined with the majority in *Morrison*, striking down a provision of the Violence Against Women Act that created a federal civil remedy for gender-motivated crimes. The majority opinion, again authored by Chief Justice Rehnquist, found that, much like the causal connection in *Lopez*, the conclusion that gender-motivated crimes “substantially affect interstate commerce” was tenuous. Additionally, the Chief Justice implied that the Supreme Court needed to respond to the expanding interpretation of the Commerce Clause by restricting congressional power because the federal government was beginning to usurp all areas of law and threaten state autonomy in traditionally state-regulated areas.

The majority emphasizes not only the distinction between economic and non-economic activities, but also that between national and local authority. Scalia again declined the opportunity to provide an opinion on the subject and instead joined the majority, indicating that he agreed with the Commerce Clause analysis as presented and did not feel that further explanation was required.

Because Scalia did not provide commentary on either of these important decisions, and what appeared to be the beginning of a new trend in Commerce Clause jurisprudence, these cases do not provide a strong basis for extracting Scalia’s Commerce Clause philosophy.

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64. *Morrison*, 529 U.S. at 615.
65. *See id.*
66. *Id.* at 613, 615 (stating that a classification of an activity as economic is not a prerequisite to regulating intrastate activities, but that the case law to date has only regulated economic activities).
67. The fact that Justice Scalia joined the majority in both of these opinions is not surprising and follows the trend in Supreme Court decisions in which Chief Justice Rehnquist and Justices Scalia and Thomas agreed on the determination of issues and often joined the opinions of one another. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 607 (2005) (Scalia, J., dissenting; opinion joined by Rehnquist, C.J., and Thomas, J.); *Lawrence v. Texas*, 539 U.S. 558 586 (2003) (Scalia, J., dissenting; opinion joined by Rehnquist, C.J., and Thomas, J.); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting; opinion joined by Rehnquist, C.J., and Thomas, J.); *see also The Supreme Court, 2003 Term—Nine Justices, Ten Years: A Statistical Retrospective*, 118 HARV. L. REV. 510, 516–18 (2004) (providing statistics on the Justices’ voting patterns from 1994–2003 and determining that during this period on average Scalia and Rehnquist were aligned in 78% of the decisions, Scalia and Thomas were aligned in 86.7% of the decisions, and Rehnquist and Thomas were aligned in 79.4% of the decisions). In addition, Justices Scalia and Thomas voted together as much as 97.7% in a given year. *Id.* at 516.
Deciphering his Commerce Clause jurisprudence is paramount in
determining whether Scalia strayed from his “originalist” approach or if
such an originalist analysis comports with the result reached in Scalia’s
Raich68 concurrence.

IV. JUSTICE SCALIA’S JURISPRUDENCE: THE ORIGINALIST APPROACH

The “originalist” approach, as described by Scalia, is the only way to
approach constitutional interpretation to ensure that judges are not
reading their subjective views into the Constitution.69 The theory
behind originalism, or as Scalia sometimes refers to it, textualism,70 is to
“begin with the text, and to give that text the meaning that it bore when
it was adopted by the people.”71 Scalia has been known to refer to a
dictionary that was published at the time in which the statute or
constitutional Amendment was enacted to discover the meaning
attributed to the term at that time.72 Scalia recognizes the Court-created
principle of stare decisis as an exception to his originalist approach.73
This adherence to stare decisis comports with Scalia’s claim that the law
must be predictable and that predictability actually restrains judges
because “[i]f the next case should have such different facts that my
political or policy preferences regarding the outcome are quite the
opposite, I will be unable to indulge those preferences . . . .”74 However,
in a recent opinion, Scalia stated, “I do not myself believe in rigid
adherence to stare decisis in constitutional cases . . . .”75

Scalia has also reiterated that his interpretive philosophy does not
include the theory that the Constitution changes with time no matter
how many judges and legislators subscribe to that theory.76 In fact,
Scalia has sharply criticized those who follow the idea of a living

68. Gonzales v. Raich, 545 U.S. 1, 33 (2005) (Scalia, J., concurring).
69. Scalia, supra note 15.
70. SCALIA, supra note 32, at 23.
71. Scalia, supra note 15.
72. See Tennessee v. Lane, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting) (reciting the
definition of “enforce” as found in two separate dictionaries published in 1860, the time at
which the Fourteenth Amendment was adopted). Justice Scalia’s use of dictionaries for
constitutional interpretation has been criticized by scholars. See, e.g., Ellen P. Aprill, The
73. SCALIA, supra note 32, at 140; see also Scalia, supra note 16, at 861 (“[A]lmost every
originalist would adulterate [originalism] with . . . stare decisis.”).
(1989).
76. See Scalia, supra note 15.
Constitution, and at a recent Federalist Society gathering stated that "you would have to be an idiot to believe that."77 Instead, Scalia places a premium on the power of the electorate to change laws through the democratic process, fearing that judicial decision-making deprives the electorate of the opportunity to democratically shape laws.78

To fully appreciate Scalia's originalist approach to constitutional interpretation, it is necessary to consider his jurisprudence in separate areas of constitutional law—specifically in the areas of equal protection, due process, and cruel and unusual punishment—with examples of the application of his interpretive philosophy.

A. Equal Protection Guarantees

Scalia has emphasized throughout his Equal Protection Clause jurisprudence that this provision of the Constitution should be read as it was understood when enacted following the Civil War. He has indicated that the Court has read too many provisions into the Equal Protection Clause, including the idea that equal protection encompasses discrimination based on gender and age.79 Additionally, Scalia believes that "substantive due process"80 was fabricated by the Court and provides judges with the power to inform the public of its "fundamental liberties" that are actually based upon Justices' subjective beliefs.81

This idea that the Equal Protection Clause should be read more narrowly than the Court's current interpretation is apparent when considering Scalia's dissenting opinion in United States v. Virginia.82 In that case, the Court determined that Virginia had violated the Equal Protection Clause by maintaining Virginia Military Institute ("VMI") as

78. This has been Justice Scalia's greatest criticism of areas such as abortion and cruel and unusual punishment. See, e.g., Roper v. Simmons, 543 U.S. 551, 607 (2005) (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part).
79. Scalia, supra note 15.
80. See U.S. CONST. amend. XIV, § 1. Substantive due process, as opposed to procedural due process, has been interpreted by the Court to guarantee that individuals will not be deprived of certain individual liberties. This interpretation has lead to most of the liberties found in the Bill of Rights being protected against state action, whereas the Bill of Rights originally only restricted actions by the federal government. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923).
81. Scalia, supra note 15.
an all-male university. Additionally, Virginia failed to provide a comparable alternative for women and had sustained this gender classification based upon generalities regarding the physical and psychological differences between men and women.

Scalia, the sole dissenter in Virginia, concluded that Virginia and VMI had an interest in maintaining an all-male military institute and further, that the Constitution remains silent regarding educational matters generally and single-sex education specifically. Therefore, in Scalia’s view, the Court acted by reading popular opinion into the equal protection interpretation rather than basing its decision on constitutional principles and allowing the democratic process to determine issues regarding education.

Scalia further emphasized that traditionally, education has been offered through single-sex institutions rather than coeducational institutions; thus, Scalia found more support for maintaining single-sex institutions than coeducational institutions in this country. He reasoned that VMI should have full power to continue its current practice in furtherance of this United States educational tradition. Scalia subscribes to the idea that rights and opportunities can be changed, even if the practice has not been deeply rooted in United States traditions, as long as it is achieved through the democratic process and not by the judiciary. However, Scalia also embraces the idea that the Court can change the standards and principles that it applies to certain areas of the law as long as it is moving back towards the more “individual rights based” era when rational basis scrutiny was applied to nearly all categories of law.

This narrow reading of the Equal Protection Clause has been further expounded upon by Scalia through his commentary. For example, Scalia has asserted that when enacted, the Equal Protection Clause did

83. Id. at 540.
84. Id. at 540–41.
85. Virginia was decided by a 7–1 vote, as Justice Thomas did not participate in this decision. Id. at 518 (Ginsburg, J., writing for the majority).
86. Id. at 567 (Scalia, J., dissenting).
87. Id. at 570.
88. Id.
89. Id. at 569–70.
90. See id. at 570.
91. See id. at 574–75.
not apply to women, or otherwise the Nineteenth Amendment\textsuperscript{92} would have been superfluous.\textsuperscript{93} To apply the Equal Protection Clause to classes other than race, Scalia believes the Court has essentially furthered the idea of a "Living Constitution," which he claims confuses the public and is an undesirable result because the Framers drafted an unchanging Constitution to protect society from its quickly changing values.\textsuperscript{94}

Scalia's interpretation in this area is unsettled. First, he claims that the Equal Protection Clause should be interpreted only as it was understood in 1868, when the Fourteenth Amendment was adopted.\textsuperscript{95} He further establishes that the Equal Protection Clause only guarantees against a denial of equal protection of the laws and does not guarantee specific rights; he then concludes that what constitutes a violation of equal protection remains subject to interpretation.\textsuperscript{96} The claim that what constitutes a violation of equal protection is subject to interpretation does not conform with Scalia's idea that equal protection should be interpreted as it was meant when this Amendment was adopted\textsuperscript{97} because an "originalist" would provide the answer by determining the original meaning of the words when they were adopted without subjective interpretation.\textsuperscript{98}

### B. Due Process and Individual Liberties

According to Scalia, under an originalist theory, individual liberties consist of those that have been embedded in the "history and tradition" of the United States.\textsuperscript{99} He goes even further to note that other Justices on the Court attempt to create new liberties by resorting to the idea of a "Living Constitution" and by reading into the Constitution the whims of society.\textsuperscript{100} The plurality opinion in \textit{Michael H. v. Gerald D.}, authored by Scalia,\textsuperscript{101} and Scalia's dissent in \textit{Lawrence v. Texas}\textsuperscript{102} express Scalia's narrow interpretation of individual liberties.

\begin{itemize}
\item \textsuperscript{92} U.S. CONST. amend. XIX, §1 (guaranteeing the right to vote to all citizens regardless of gender).
\item \textsuperscript{93} SCALIA, \textit{supra} note 32, at 47.
\item \textsuperscript{94} See id.
\item \textsuperscript{95} Id. at 148.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id.
\item \textsuperscript{98} See Scalia, \textit{supra} note 15.
\item \textsuperscript{99} Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (Scalia, J., writing for a plurality).
\item \textsuperscript{100} SCALIA, \textit{supra} note 32, at 39.
\item \textsuperscript{101} 491 U.S. 110.
\end{itemize}
In *Michael H.*, the Court upheld a California statute that established that if a married woman gives birth to a child while married and cohabitating with her husband, then the husband is presumed to be the father of the child.\textsuperscript{103} This presumption was upheld against a claim of the asserted biological father, who attempted to establish paternity, and who had blood test evidence that demonstrated with strong probability that he was in fact the biological father.\textsuperscript{104}

Scalia, in the plurality opinion, established that procedural due process ensures only certain procedural guarantees before an individual may be deprived of liberty and that under substantive due process only those liberties that are deeply embedded in tradition deserve protection as "fundamental liberties."\textsuperscript{105} Specifically, Scalia interpreted the liberty interest in this case narrowly, finding that the question was "whether the relationship between persons in the situation of Michael and Victoria [the daughter] ha[de] been treated as a protected family unit under the historic practices of our society, or whether on any other basis it ha[de] been accorded special protection."\textsuperscript{106}

Framing the "liberty" interest at stake in this manner inherently prevented Scalia from concluding that such an interest was fundamental because, without such technology as blood tests, claims such as this could not have "traditionally" arisen. Justice Brennan's dissenting opinion contemplated the broader liberty interest at stake, determining that there is a fundamental interest in parenthood, generally. This parenthood interest has been protected through several other Supreme Court decisions and requires at least the procedural safeguards that Scalia assures that the Due Process Clause provides.\textsuperscript{107}

Reading the liberty interest narrowly does, however, comport with Scalia's textualist approach because this approach seeks to determine the understanding of the text at the time it was written. As Scalia assures, the presumption of marital children was a deeply embedded tradition that could not easily be overcome, at least at the time the Fourteenth Amendment was adopted and likely when the Constitution was adopted.\textsuperscript{108} Furthermore, it certainly would have been rare for such

\textsuperscript{103} 491 U.S. at 113.
\textsuperscript{104} Id. at 114.
\textsuperscript{105} Id. at 120–22.
\textsuperscript{106} Id. at 124.
\textsuperscript{107} Id. at 136, 139–40 (Brennan, J., dissenting).
\textsuperscript{108} Id. at 124–25 (Scalia, J., writing for a plurality).
a parental situation as in the case of Michael H. to arise, and Scalia thought that this parental situation was still extraordinary even at the time the case was decided. Therefore, he remains true to his texturalist approach in this case by reading this liberty interest narrowly.

In another individual liberty and due process case, Lawrence v. Texas, Scalia wrote a dissenting opinion and again narrowly defined the liberty question. In Lawrence, the Court struck down a Texas statute that criminalized homosexual sodomy, determining that individuals had a liberty interest in making decisions about their personal relationships and conducting private behavior in their own homes.

Scalia, however, did not consider the question to be a privacy issue—an issue that has gained and continues to receive support within the Supreme Court and that covers such areas as family decisions, contraception, abortion, and similar issues. Instead, he framed the issue as a right to engage in homosexual sodomy. He supported his position by emphasizing that statutes criminalizing sodomy have a long tradition in United States society and were in effect when the Constitution, the Bill of Rights, and the Fourteenth Amendment were adopted. Collectively, these facts helped support the Court's decision in Bowers v. Hardwick, which upheld a statute criminalizing sodomy.

If the issue in Lawrence is framed as a right to engage in homosexual sodomy, then an originalist approach would deem the statute unconstitutional because the right is not fundamental or deeply rooted in society. Alternatively, if one asserts that the right at issue is in fact a right to privacy or a right to be free from governmental interference in personal choices regarding relationship matters, it would be difficult to find that such rights were not deeply rooted in society.

Furthermore, Scalia criticized the majority opinion for failing to comply with the principle of stare decisis. He claims that the Court applied illogical principles in overruling the controversial Bowers decision because it based the determination upon the highly contested

109. Id. at 113.
111. Id. at 567.
113. Lawrence, 539 U.S. at 586 (Scalia, J., dissenting).
114. Id. at 596 (citing Bowers v. Hardwick, 478 U.S. 186, 192–94 (1986)).
116. Lawrence, 539 U.S. at 587 (Scalia, J., dissenting).
nature of the issue within society. Instead, he argues that in this instance, the Court must maintain its original position because the traditions of criminalizing sodomy are deeply rooted in society. In the context of abortion, however, a traditionally more “liberal” area, Scalia endorses refraining from applying stare decisis and encourages the Court to reconsider its finding of a fundamental liberty.

It is unclear whether Scalia’s position on the application of stare decisis in these two contexts can be reconciled with his interpretive theory of originalism because this principle appears to apply in the context of homosexual sodomy, but not in the case of abortion. Scalia acknowledges that stare decisis is a way for originalists to continue to change and shape the law through individual preferences, but claims that through self-restraint, it should not be utilized in this manner. It remains unclear whether Scalia would maintain such self-restraint in his application of the principle of stare decisis if given the opportunity to review similar questions.

C. Cruel and Unusual Punishment

In another context, that of the Eighth Amendment, Scalia has offered an originalist approach to determining what constitutes “cruel and unusual” punishment. Scalia concluded that to interpret this amendment correctly, the Court must determine the understanding of that phrase at the time in which it was adopted by the Framers. This interpretive technique has proven contradictory for Scalia because he has applied, and continues to apply, the Court’s interpretation of cruel and unusual punishment, which requires a search into society’s “evolving standards of decency.”

Despite Scalia’s textualist approach, which requires an adherence to the text of the Constitution and the original understanding of its words, he has continually applied the Court’s “evolving standards of decency”

117. See id.
118. See id. at 596.
119. See id. at 587–91.
120. See SCALIA, supra note 32, at 140.
121. U.S. CONST. amend VIII.
122. Scalia, supra note 16, at 864 (noting that he may be a “faint-hearted originalist” because if an issue of public flogging was used as a method of punishment he could not uphold it).
formulation of the Eighth Amendment to modern cases. Scalia does cite disapproval of this standard, but he did not espouse contention with it until he drafted a dissenting opinion in the recent case of *Roper v. Simmons*. In that case, the Court found that the execution of criminal defendants under the age of majority constituted cruel and unusual punishment in violation of the Eighth Amendment.

In more recent Supreme Court decisions, the Court has reiterated that it will consider what constitutes cruel and unusual punishment under the Eighth Amendment in light of the “evolving standards of decency” of society. This standard requires a searching determination of the new values of a dynamic electorate and appears to inherently contradict Scalia’s theory of interpretation, which requires adherence to the original understanding of the phrase “cruel and unusual.” Scalia’s application of this evolving standard is in direct opposition to his originalist philosophy of constitutional interpretation.

Scalia, however, continues to apply the standard of an evolving understanding of the terms “cruel” and “unusual” in capital punishment cases. For example, in the case of *Stanford v. Kentucky*, Scalia drafted the plurality opinion, which determined that execution of criminal defendants over the age of sixteen, but under the age of eighteen, did not constitute cruel and unusual punishment and thus was not in violation of the Eighth Amendment.

In this plurality opinion, Scalia acknowledged that the Court has departed from the original understanding of the phrase “cruel and unusual punishment” by applying an “‘evolving standards of decency that mark the progress of a maturing society’” standard. He contends that the Court has included appropriate safeguards upon this modifiable interpretation by allowing only those punishments that have gained “national consensus” to apply. Scalia admits that under an original reading of cruel and unusual punishment, imposition of capital punishment on criminal defendants under the age of majority would

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125. 543 U.S. at 607–08 (Scalia, J., dissenting).
126. Id. at 575.
129. Id. at 380.
130. Id. at 369 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).
131. Id. at 370–71.
surely not violate this standard because capital punishment theoretically could have applied to defendants as young as the age of seven.\textsuperscript{132}

Scalia then goes on to apply the modern standard to determine if the petitioner's claim can be maintained. He ultimately concludes that the national consensus does not consider application of capital punishment to defendants under the age of eighteen, but over the age of sixteen, to constitute cruel and unusual punishment.\textsuperscript{133} In support of this conclusion, Scalia determines that only fifteen of the thirty-seven states that have capital punishment have outlawed it for crimes committed by defendants sixteen years old or younger, and only twelve of those states have laws prohibiting the application of capital punishment to seventeen-year old defendants.\textsuperscript{134} Therefore, there was not enough evidence to demonstrate the degree of national consensus required to rule that capital punishment for defendants under the age of eighteen is cruel and unusual punishment.\textsuperscript{135}

In another Eighth Amendment case, Scalia concluded that the prevailing national consensus did not consider that the imposition of capital punishment upon mentally retarded defendants constituted cruel and unusual punishment. Scalia began his dissenting opinion in this case, \textit{Atkins v. Virginia},\textsuperscript{136} by stating that the Eighth Amendment jurisprudence of the Court has no support in the actual text of the Constitution.\textsuperscript{137} However, Scalia does address the issue presented by considering the national consensus standard, even though he believes this analysis has no textual support.\textsuperscript{138}

Scalia's failure to apply the principles of textualism in this context is wrought with several problems. First, extracting a national consensus view for a term found within the Constitution certainly does not find support within the text of the Constitution itself. As Scalia has stated, when the Constitution remains silent on an issue, the Court should not entertain the issue.\textsuperscript{139} Furthermore, by accepting and applying this

\begin{itemize}
  \item \textsuperscript{132} Id. at 368.
  \item \textsuperscript{133} Id. at 370–71, 380.
  \item \textsuperscript{134} Id. at 370–71.
  \item \textsuperscript{135} See id.
  \item \textsuperscript{136} 536 U.S. 304, 337 (2002) (Scalia, J., dissenting).
  \item \textsuperscript{137} Id. Another example where Scalia interpreted a provision that has no basis in the text of the Constitution occurs in \textit{Printz v. United States}, where Scalia admitted that "there is no constitutional text speaking to this precise question," but proceeded to interpret whether the federal government can compel state officers to participate in the administration of federal programs. 521 U.S. 898, 905 (1997).
  \item \textsuperscript{138} \textit{Atkins}, 536 U.S. at 341–44.
\end{itemize}
standard of Eighth Amendment jurisprudence, Scalia is either attempting to adhere to his stated philosophy by applying stare decisis as an exception to the textualist approach, or he has abandoned the principles of textualism in this context altogether.

If Scalia is adhering to the exception to originalism, that of stare decisis, by applying the "evolving standards" interpretation, there is a further problem. Either Scalia is applying stare decisis to uphold previous decisions, or he is applying stare decisis on the grounds of the method of interpretation laid out by a previous Court. In this particular context, he must be applying stare decisis to adhere to the interpretive philosophy that has been reiterated in other contexts because if he relied on stare decisis to uphold individual decisions, there would be a conflict between national consensus and previous Court rulings.

Scalia has found that the Court has departed from its philosophy by considering something less than a national consensus to strike down laws. Under Scalia's analysis, only the states that have capital punishment laws should be considered in this national consensus. In Roper v. Simmons, Scalia expounded upon this idea of only applying the consensus of states that continue to implement capital punishment in his determination of national consensus. Scalia filed a dissenting opinion in Roper, in which he first criticized the Court for relying upon the "evolving standards of decency" analysis and then went on to determine that the fact "[t]hat 12 states favor no executions says something about consensus against the death penalty, but nothing—absolutely nothing—about consensus that offenders under 18 deserve special immunity from such a penalty."

This distinction is misplaced, especially when the goal appears to be to extract the views of an entire nation of people. The views of those in states that do not implement capital punishment certainly should be considered in the national consensus, or they would effectively be removed from participation in shaping national views. This result appears "absurd," even though Scalia refuses to tolerate absurd

140. See SCALIA, supra note 32, at 140.
143. Id. at 608 (Scalia, J., dissenting) (stating that the Court relies upon the evolving standards of decency analysis, which is "in accordance with our modern (though in my view mistaken) jurisprudence").
144. Id. at 611.
constructions of constitutional provisions. Actually, the states that outlaw capital punishment altogether indicate that capital punishment should not be imposed for any crime on anyone, which includes those under the age of eighteen. If the democratic process is the correct way to determine these matters (an idea to which Scalia claims that he ascribes), then the democratic process must speak in national terms when a national consensus is sought.

Scalia’s cruel and unusual punishment jurisprudence leaves much unanswered when attempting to decipher how an originalist approach in this context would proceed. He claims to adhere to the original meaning of the terms “cruel and unusual” at the time the Bill of Rights was adopted. However, Scalia has applied the “evolving standards of decency” analysis to cases, including within a plurality opinion that he authored. Although Scalia expresses disdain for this changing interpretation of the Constitution, he refuses to simply apply his originalist standard and instead continues to consider the cases under the changing standard.

One is left to assume that Scalia has faltered in his adherence to his stated approach or that he is somehow complying with the exception to originalism, stare decisis. However, applying stare decisis does not actually comply with Scalia’s interpretive philosophy because he either upholds previous decisions that were not decided using the textualist approach or upholds and applies a non-textualist interpretation of the law in new cases.

V. APPLICATION OF THE ORIGINALIST APPROACH TO SCALIA’S CONCURRING OPINION IN GONZALES V. RAICH

Whether Scalia conformed to his method of interpretation when he drafted his concurring opinion in Gonzales v. Raich remains unanswered. In considering Commerce Clause jurisprudence, it is
important to note that the initial conception of the Constitution was that the powers of the federal government were to be few and defined. This view has been reiterated throughout Supreme Court jurisprudence. In the early cases addressing Congress's Commerce Clause power, the Supreme Court interpreted Congress's power narrowly, especially if it related to economic matters or police powers. For example, in the early Civil Rights Cases, the government did not defend the passage of a broad law that regulated individual actors' conduct under a Commerce Clause theory because Congress's power under this Clause had not been contemplated for use in this manner. Justice Marshall interpreted Congress's power under the Commerce Clause more broadly in Gibbons v. Ogden, emphasizing that Congress had the power to regulate waters, even if they would partially affect only intrastate matters. Yet, applying this broader interpretation leaves limits upon Congress's power with respect to non-commercial activities. Even after Justice Marshall drafted this decision, it was not relied upon by Congress or the Supreme Court in the cases that followed.

The modern interpretation of congressional Commerce Clause power did not emerge until 1937. In NLRB v. Jones & Laughlin Steel Corp., the first case to provide such a broad interpretation of Congress's Commerce Clause power, the majority established the three categories under which Congress can regulate interstate commerce, which are still applied today. Due to the date of this decision, it cannot be asserted that this broad interpretation of Commerce Clause power was contemplated as the original understanding when the Constitution was adopted.

Therefore, it seems that if Scalia were to adhere to the meaning of the Constitution's text when it was written, he would follow a relatively

152. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
154. See 109 U.S. 3 (1883). It is important to note that Congress passed similar legislation in the Civil Rights Act of 1964, which was upheld by the Court under Congress's Commerce Clause power. See, e.g., Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964); 42 U.S.C. § 2000(a) (1964).
156. See id.
158. See id.
narrow interpretation of commerce power as the early cases would indicate.60 This narrow interpretation seems to conform to his decision to join the majority in the cases of Lopez61 and Morrison,62 where in both cases the Court struck down statutes enacted under Congress's Commerce Clause power as overly broad and thus in violation of the Constitution. The majority in those cases did not necessarily define the Commerce Clause narrowly; however, the majority did determine that a limitation of the Commerce Clause power was necessary in order to protect federalism.63

The interpretation of the Necessary and Proper Clause, on the other hand, has historically been broad. The first case to address the Necessary and Proper Clause was McCulloch v. Maryland;64 however, this case was not decided until nearly thirty years after the Constitution had been adopted, so whether this decision can truly offer an understanding of the original meaning of this Clause seems unlikely under Scalia's originalist standards.65 Nevertheless, for the purpose of its argument, this Note shall assume that McCulloch66 does provide the original understanding of the Necessary and Proper Clause at the time it was adopted.

In McCulloch,67 the majority opinion interpreted congressional powers broadly, but it also gave the term "necessary" an expansive definition by determining that Congress was not limited by those actions that are "absolutely indispensable" to carrying out its powers, but rather that "necessary," in this context, included all actions that are "suitable" to its purpose.68 Therefore, the majority granted Congress wide latitude in enacting laws to carry out its other constitutional powers.

Assuming that McCulloch69 provides insight into the original understanding of this Clause, Scalia's extremely broad reading of the Necessary and Proper Clause in his Raich70 concurrence does comply

160. See id.; see also United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (finding that the Court's application of the "substantial effects" test is inconsistent with the original interpretation of the Commerce Clause).
161. 514 U.S. 549.
162. 529 U.S. 598.
163. See id. at 614-16; 514 U.S. at 564-65.
166. 17 U.S. (4 Wheat.) 316.
167. Id.
168. See id.
169. Id.
170. Gonzales v. Raich, 545 U.S. 1 (2005).
with his originalist interpretation of this Clause. By determining that Congress is not constrained by the powers that are explicitly enumerated within the Constitution, Scalia adheres to the interpretation that Congress may implement all “suitable” means to carry out its laws.\textsuperscript{171}

However, another aspect of Scalia’s broad interpretation of the Necessary and Proper Clause contradicts his originalist approach. Specifically, the Court’s reliance upon a broader reading of the term “necessary,” and not the definition that would have been found in a dictionary of that time, does not comport with Scalia’s reliance upon the ordinary meaning of words at the time in which they were adopted.\textsuperscript{172} The majority opinion in \textit{McCulloch}\textsuperscript{173} explicitly rejected the ordinary meaning of the term necessary and instead determined that it should be interpreted to include more than the powers that are “indispensable to the existence of a granted power.”\textsuperscript{174}

Scalia has also rejected reliance upon the Necessary and Proper Clause when that reliance would violate principles of federalism.\textsuperscript{175} In \textit{Printz v. United States}, Scalia, writing for the majority, rejected the argument that Congress could require state officers to conduct background checks for the sale of handguns through the Commerce Clause, as applied by the Necessary and Proper Clause.\textsuperscript{176} In fact, Scalia determined that if Congress has passed a law that infringes upon state sovereignty, then it is not a law that is “proper” to carry into execution Congress’s commerce power.\textsuperscript{177} Scalia went even further to state that “[e]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts . . . . it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”\textsuperscript{178}

\textsuperscript{171} See id. at 39.

\textsuperscript{172} See generally SCALIA, supra note 32; Scalia, supra note 16; Aprill, supra note 72 (criticizing Justice Scalia’s reliance upon different dictionary definitions of words and also his failure to rely upon definitions when they do not comport with his preferred interpretation); Thomas W. Merrill, \textit{The Making of the Second Rehnquist Court: A Preliminary Analysis}, 47 ST. LOUIS U. L.J. 569, 604–20 (2003) (arguing that Scalia has acted strategically while on the bench to pursue his own goals of effectuating changes within the Court’s jurisprudence).

\textsuperscript{173} 17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{174} Id. at 325.


\textsuperscript{176} See generally 521 U.S. 898.

\textsuperscript{177} See id. at 932.

\textsuperscript{178} Id. at 924 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).
Such a federalism argument can be and was made in *Raich*, finding that allowing the federal government to act in this context prevents states from making individual decisions regarding its citizens' health and welfare. Furthermore, the regulation in *Raich* did just what Scalia claimed the Necessary and Proper Clause could not do—regulate an individual state's regulation of interstate commerce by prohibiting states from individually regulating certain markets.

Despite his broad interpretation of the Necessary and Proper Clause in *Raich*, Scalia did not find it suitable for consideration in the cases of *Lopez* or *Morrison*. Interestingly, Scalia did not join any of the dissenting opinions in these cases. Most of these dissents found that if the Court was to remain consistent with the broad interpretation of the Commerce Clause, which requires a broad formulation of the Necessary and Proper Clause because it is this Clause that allows Congress to regulate activities that "substantially affect" interstate commerce, then the Court must find that Congress had the power to regulate the activities in both of these cases.

Additionally, Scalia refrained from filing a concurring opinion or from joining one of the concurring opinions in either of these cases. This abstention is notable for two reasons. First, Justice Thomas's concurrence in *Lopez* laid out factors demonstrating that the Commerce Clause was initially read with a narrow interpretation and that the Commerce Clause was only understood to mean "selling, buying, and bartering." Justice Thomas offered a similar concurrence in *Morrison*, reiterating that the Court has strayed far from the original understanding of the Commerce Clause. Justice Thomas seems to offer the "textualist" approach to the interpretation of the Commerce Clause in these opinions; yet, Scalia does not join him in this interpretation. Second, Justices Scalia and Thomas often join one

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179. Gonzales v. Raich, 545 U.S. 1 (2005).
180. Id. at 74 (Thomas, J., dissenting).
184. See *Morrison*, 529 U.S. at 628 (Souter, J., dissenting); *Lopez*, 514 U.S. at 603–04 (Souter, J., dissenting).
185. See *Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549.
186. 514 U.S. 549.
187. Id. at 585–86 (Thomas, J., concurring).
188. 529 U.S. 598.
189. Id. at 627 (Thomas, J., concurring).
another's opinions due to their similar approaches to constitutional interpretation.\textsuperscript{190}

The reason for this discrepancy can only mean that Scalia has applied the exception to the originalist approach by adhering to stare decisis.\textsuperscript{191} This appears to be a plausible explanation for Scalia's broad interpretation of the Commerce Clause, because that has been the trend of the modern Court, and he would be following precedent by doing so. However, this again is at odds with his failure to follow this broad interpretation in the cases of \textit{Lopez}\textsuperscript{192} and \textit{Morrison}\textsuperscript{193}. It is also important to consider that all of the Justices that signed on to the majority opinion in \textit{Raich},\textsuperscript{194} with the exception of Justice Kennedy, also filed dissenting opinions in \textit{Lopez}\textsuperscript{195} and \textit{Morrison}.\textsuperscript{196} This supports the determination that the Justices that adhere to a strict construction of the Commerce power find that Congress did not have the power to regulate in areas that were addressed in \textit{Raich},\textsuperscript{197} \textit{Morrison},\textsuperscript{198} or \textit{Lopez}.\textsuperscript{199} Alternatively, those Justices that follow a broad interpretation of the Commerce power found that Congress had authority to regulate in all three of these areas.\textsuperscript{200}

The discrepancy within his approach suggests that Scalia is not always committed to one of two theories in his Commerce Clause jurisprudence, namely: (1) following his adherence to an original understanding of the terms as they were enacted under a textualist approach or (2) accepting a broad interpretation of congressional power under the Commerce Clause as demanded by stare decisis.

Instead, Scalia will utilize a stricter adherence to a textualist approach when it conforms to his subjective beliefs in other areas, such as his philosophy regarding firearm regulation, which includes a broad interpretation of the Second Amendment.\textsuperscript{201} Alternatively, when the matter at hand concerns the individual use and consumption of

\textsuperscript{190} See supra note 67.
\textsuperscript{191} SCALIA, supra note 32, at 140.
\textsuperscript{192} 514 U.S. 549.
\textsuperscript{193} 529 U.S. 598.
\textsuperscript{194} Gonzales v. Raich, 545 U.S. 1 (2005).
\textsuperscript{195} 514 U.S. 549.
\textsuperscript{196} 529 U.S. 598. \textit{See generally Raich}, 545 U.S. 1; \textit{Lopez}, 514 U.S. 549.
\textsuperscript{197} \textit{Raich}, 545 U.S. 1.
\textsuperscript{198} \textit{Morrison}, 529 U.S. 598.
\textsuperscript{199} \textit{Lopez}, 514 U.S. 549.
\textsuperscript{200} See \textit{Raich}, 545 U.S. 1; \textit{Morrison}, 529 U.S. 598; \textit{Lopez}, 514 U.S. 549.
\textsuperscript{201} SCALIA, supra note 32, at 136–37 n.13.
Scalia's Raich concurrence rests upon a broad interpretation of Congress's Commerce Clause power by establishing that this power is derived from the Necessary and Proper Clause. This interpretation allows for an even broader grant of congressional power than through the Commerce power alone. Although Scalia is known for his "textualist" approach to constitutional interpretation, which requires reading the Constitution as it was understood at the time in which it was written, he departs from his jurisprudence by finding broad congressional power to regulate the intrastate growth and consumption of marijuana for medicinal use.

By examining his constitutional interpretation in other areas of the law, including the Equal Protection Clause, individual rights, and cruel and unusual punishment, it becomes apparent that his textualist interpretation falters in other areas as well. Even though Scalia does establish an exception to textualism, stare decisis, he does not apply this principle consistently either. Rather, Scalia has demonstrated a selective application of this principle, while admitting that through the abuse of this principle Justices are able to shape laws to their individual preferences. Self-restraint of this application is the only safeguard against judicially made law.

Instead of exercising the self-restraint necessary to prevent such an application, Scalia appears to apply stare decisis when it conforms to his views on constitutional principles in other areas of the law and

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202. See Raich, 545 U.S. at 33–35 (Scalia, J., concurring).
203. Id. at 34.
204. SCALIA, supra note 32, at 23–25.
205. Raich, 545 U.S. 33–34 (Scalia, J., concurring).
206. SCALIA, supra note 32, at 139–40.
207. See id.
refraining from, or encouraging the Court to refrain from, applying this principle in other contexts.

To reconcile Scalia’s broad interpretation of Congress’s Commerce Clause power in *Raich* with his otherwise limited view of congressional power and reliance upon democratically elected government to shape the laws, the focus should be on what the law being enacted regulates and how it relates to other constitutional powers and social views, rather than on the principles of his textualist approach.

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