



States' Rights versus the Commerce Clause: California's Marijuana Medical Use Law

Gonzales v. Raich

Virginia A. Edwards
Senior Attorney

On June 6, 2005, the United States Supreme Court ruled in a 6-3 decision that Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana even when such activity is allowed under California's medicinal marijuana law. The case represents a classic conflict between federalism and states' rights, as well as how far the Commerce Clause reaches into the traditional realm of the states' rights to define state criminal law and to protect the health, safety, and welfare of their citizens.

Background

Federal Law

As part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, the Controlled Substances Act (CSA)¹ created a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the CSA. Marijuana is classified as a Schedule I substance, the most stringently controlled class of drugs under federal law, based on its high potential for abuse, the lack of currently accepted medical uses, and the absence of accepted safe uses in

medically supervised treatments. Schedule I substances can only be supplied, possessed, or administered in exceptional circumstances for limited authorized research.

California Law

California voters passed Proposition 215, the Compassionate Use Act of 1996.² The law exempts from prosecution physicians who prescribe, as well as patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician licensed in the state. Subsequent amendments to the act establish a registration program for patients to receive state-issued identification (ID) cards that verify eligibility and facilitate law enforcement. In addition to California, ten states (Alaska, Colorado, Hawaii, Maine, Montana, Maryland, Nevada, Oregon, Vermont, and Washington) have removed impediments and state-level criminal penalties for the cultivation, possession, and use of marijuana for medical purposes. Most of these states have also established a registry program for patients to obtain valid documentation of their eligibility.

Virginia Law

Virginia is among a handful of states, including Arizona, Connecticut, New Hampshire, and Louisiana, that have only symbolic medical marijuana laws.³ The laws are symbolic because they only allow patients access to marijuana by obtaining a valid prescription directly from a licensed physician. Under federal law, however, physicians cannot prescribe marijuana and pharmacies cannot dispense the drug because there is no legal supply of marijuana to fill the prescription.

Virginia's regulation of marijuana dates back to 1936 when the General Assembly criminalized the cultivation and growth of marijuana in the Commonwealth. The statute provided, in pertinent part, that:

All varieties of cannabis and mariahuana [sic] (when not used in accordance with a physician's direction) are hereby declared dangerous, detrimental to the public health and a nuisance, and their cultivation or growth within the limits

of the State of Virginia is hereby declared unlawful and prohibited.

However, nothing in this Act shall be construed as applying to licensed growers, licensed manufacturers of drugs and medicinal supplies, licensed wholesalers of drugs, owners of licensed pharmacies, licensed hospitals or other licensed institutions for the care of the sick under the supervision of a licensed physician, or to registered wholesale or retail pharmacists, or to licensed physicians, dentists and veterinarians who are registered, licensed and authorized to practice their professions under the laws of the State of Virginia when cannabis (and similar plants) or the parts, preparation and compounds thereof are grown, possessed, purchased, sold, delivered, distributed, transported or prescribed for medicinal purposes.⁴

Subsequently, the General Assembly amended its controlled substances laws to conform with the CSA's restrictions on marijuana. In 1979, during an era when states believed that the federal government would relax policies concerning marijuana, the General Assembly enacted § 18.2-251.1, which allows the possession of marijuana for medicinal purposes "pursuant to a valid prescription issued by a medical doctor in the course of his professional practice" and only "for the treatment of cancer or glaucoma."

Facts of the Case

Angel Raich and Diane Monson are California residents who used marijuana for medical purposes in accordance with the terms and conditions of the Compassionate Use Act. During an investigation on August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration discovered the cultivation of homegrown marijuana at Monson's home. Although county officials concluded that Monson's use of marijuana was lawful under California law, federal agents seized and destroyed Monson's six cannabis plants.

Monson and Raich brought an action against the Attorney General of the United States and the head of the Drug Enforcement Agency to prevent them from enforcing the federal CSA and interfering with the plaintiffs' cultivation and possession of marijuana for medical purposes. The District Court denied the plaintiffs a preliminary injunction against federal enforcement agents and the Court of Appeals for the Ninth

Circuit reversed the District Court's decision. The Ninth Circuit determined that there was a strong likelihood of a successful challenge to the CSA's application to the state-sanctioned and regulated activities of Monson and Raich. The Court found that their activities—"the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to California law"—constituted a "separate and distinct class of local activities" outside of the reach of the Commerce Clause. The scope of the decision was limited to the application of the CSA to the plaintiffs' particular situation and not to the constitutionality of the CSA's provisions.

Majority Opinion

The Supreme Court heard the case on appeal from the Court of Appeals for the Ninth Circuit. Justice Stevens wrote the majority opinion, joined by Justices Breyer, Ginsburg, Kennedy, and Souter. Justice Scalia filed a separate concurring opinion. Justice Stevens began by reviewing the Court's understanding of the reach of the Commerce Clause as it has evolved in conjunction with the Necessary and Proper Clause under the United States Constitution, stating that no commerce case could be viewed in isolation.⁶ The original purpose of the Commerce Clause was to preclude discriminatory trade barriers among the states. During the last century, in response to an increasingly industrial and interdependent national economy, Congress has become more involved in the regulation of commercial activity.⁷

In modern-era Commerce Clause jurisprudence, the Court allows Congress to regulate (i) the channels of interstate commerce; (ii) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (iii) activities that substantially affect interstate commerce.⁸ In the last category, the Court affirms Congress' power "to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce."⁹ The authority exists even if the purely intrastate activity is not commercial in nature; i.e. produced for sales as long as Congress concludes that failure to regulate the "class of activity would undercut the regulation of the interstate market in that commodity."¹⁰

The Court has on several occasions barred Congress from extending the reach of the Commerce Clause to justify the enactment of "brief, single-subject criminal statute[s]"¹¹ that have no direct connection to the regulation of interstate commerce.¹² In *United States v. Morrison*, the Court found that Congress had exceeded

its authority under the Commerce Clause by creating a civil remedy for gender-motivated crimes of violence. The case was brought by a former student at the Virginia Polytechnic Institute and State University who claimed that she was raped by two varsity football players. Despite congressional findings that gender-motivated crimes had an adverse impact on interstate commerce by deterring potential victims from traveling and transacting business interstate, the Court disagreed and found no such direct causal connection.¹³ The Court viewed the case as a Pandora's Box, stating that if Congress could "regulate gender-motivated violence, it would be able to 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."¹⁴

The Court used the same analysis in *United States v. Lopez* to invalidate the Gun-Free School Zones Act of 1990 that made possession of a gun in a school zone a crime. The Court concluded that the statute was purely criminal in nature because it "did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity."¹⁵

In rendering the *Raich* decision, the Court relied heavily on its earlier decision in *Wickard v. Filburn*.¹⁶ In this case, the Court upheld the constitutionality of the Agricultural Adjustment Act of 1938 in its regulation of the production of wheat to prevent surpluses, and consequently low prices, in the marketplace. The Court found that the excess wheat produced and farmed by Wickard for personal consumption could be prohibited because "when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions."¹⁷

The Court found striking similarities between the *Raich* and *Wickard* cases. Like the farmer in *Wickard*, Monson and Raich were "cultivating for home consumption a fungible commodity for which there is an established, albeit illegal, interstate market."¹⁸ In both cases, the enabling legislation was designed to control the volume of the commodity's supply and demand in the interstate market. Moreover, in both cases, the Court found that Congress had a rational basis for concluding that demand would draw the homegrown commodity into the interstate market and undercut regulation. In the case of *Wickard*, the "diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate

market."¹⁹ In the case of *Raich*, the diversion of homegrown marijuana "tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety."²⁰ The Court concluded that ensnaring a purely local activity was of no moment given the larger scheme of the CSA.²¹ The Court distinguished *Morrison* and *Lopez* because the criminal statutes challenged in those cases fell entirely outside of the Commerce Clause and were improperly usurping state police powers.²²

Dissenting Opinions

In a dissenting opinion, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Thomas, defended California's Compassionate Use Act as the state's exercise of its constitutionally reserved right to define state criminal law and to protect the health, safety, and welfare of its citizens. Justice O'Connor questioned whether intrastate cultivation and possession of marijuana for one's own medicinal use could be characterized as economic activity.²³ She asserted that, even if the activity was economic, the government had not shown empirical evidence that homegrown marijuana for medical purposes, in California or elsewhere, had a substantial effect on interstate commerce.²⁴ In a separate dissenting opinion, Justice Thomas found that California had provided adequate controls in the Compassionate Use Act to prevent the diversion of homegrown marijuana into the interstate market.²⁵ The dissenting justices acknowledged the role of the states as "laboratories" to experiment with social and health policies to serve the best interests of their citizens. They also expressed their trust that states could effectively enforce those policies through their traditional police powers.²⁶

In criticizing the conclusions of the Court, Justice O'Connor expressed two major concerns regarding the future implications of *Raich*. First, Justice O'Connor said that the decision "gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision."²⁷ Second, she stated that the "Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach."²⁸

Ramifications

Although the Court's decision did not overturn California's Compassionate Use Act, the decision raised

questions about whether the state can legally conduct a program that assists citizens in violation of federal law.²⁹ On July 8, 2005, the California Department of Health Services suspended the program that issues ID cards to medical marijuana patients because of concerns that issuing cards could cause legal problems for state staff members and cardholders. The Director of Health Services asked the State Attorney General for an opinion regarding the matter. The Attorney General opined that California can issue ID cards to medical marijuana users without state employees facing prosecution for assisting in the commission of a federal crime.³⁰ The Department resumed operation of the program on July 18, 2005.

Conclusion

As currently written, Virginia law governing the use of medical marijuana cannot be implemented unless the federal government changes its policy to allow physicians to prescribe marijuana for medical purposes. Therefore, the *Raich* decision has no immediate impact on the availability of marijuana for medical use in the Commonwealth.

The question remains whether the Court's decision in *Gonzalez v. Raich* opens the door for further usurpation of the states' police powers—to define criminal law and to protect the health, safety, and welfare of their citizens—as suggested by the dissenting justices. Determining what weight the decision will have in future cases is difficult. On the one hand, the Court acknowledged that no Commerce Clause case can be viewed in isolation. However, the Court also recognized that the market for illegal drugs is like no other commodity market because of its unprecedented demand, propensity for corruption, and resiliency in the face of concerted drug enforcement efforts. For this reason, the case may not be a good predictor of the outcome of future cases.

Notes

1. 21 U.S.C. § 801 et seq.
2. Cal. Health & Safety Code Ann. 11362.5 (West 2005).
3. Marijuana Policy Project, "State-By-State Medical Marijuana Laws," updated July 2004, sbs.reporat@mpp.org.
4. 1936 Va. Acts at 361 (codified at § 1693a, Code of Virginia (1936)).
5. *Gonzales v. Raich*, 73 U.S.L.W. 4407, 4409 (2005).
6. *Id.* at 4411.
7. *Id.*
8. *Id.*
9. *Id.* (citing *Perez v. United States*, 402 U.S. 146, 151 (1971) and *Wickard v. Filburn*, 317 U.S. 111, 128-129 (1942)).
10. *Raich* at 4412.
11. *Id.* At 4413.
12. *United States v. Lopez*, 514 U.S. 549 and *United States v. Morrison*, 529 U.S. 598 (2000).
13. *Morrison* at 615.
14. *Id.*
15. *Raich* at 4413.
16. *See* n. 5, *supra*.
17. *Raich* at 4412.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 4413.
22. *Id.*
23. *Id.* at 4419.
24. *Id.*
25. *Id.* at 4425 (Thomas, dissenting).
26. *Id.* at 4411 (O'Connor, dissenting) and at 4425 (Thomas, dissenting).
27. *Id.* at 4420 (O'Connor, dissenting).
28. *Id.* at 4421 (O'Connor, dissenting).
29. California Department of Health Services Press Release 05-39 (July 18, 2005).
30. *Id.*

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E. M. Miller, Jr., Director
R. J. Austin, Manager, Special Projects
Lynda Lee Waddill, Editor

For information contact:
Special Projects
Division of Legislative Services
910 Capitol Street, 2nd Floor
Richmond, VA 23219
(804) 786-3591

<http://dls.state.va.us>