Law and the Public's Health

GONZALES V. RAICH: IMPLICATIONS FOR PUBLIC HEALTH POLICY

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On June 6, 2005, the United States Supreme Court decided *Gonzales v. Raich*,[1] a case that addressed the constitutionality of the federal Controlled Substances Act (CSA) as applied to individuals who grow marijuana for personal and medical use under California's Compassionate Use Act (CUA).[1,2] The Court's decision has important implications for the long-standing "federalism" debate under U.S. law, which focuses on the limits of federal power under the Constitution and which has dominated much of the Court's writings in recent years. Because states' power to set public health policy is deeply affected by the course of this debate,[3] this installment of *Law and the Public's Health* is devoted to a discussion of *Gonzales v. Raich* and its implications.

THE CASE

Congress enacted the CSA as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[4] The CSA establishes a rigorous regulatory system relating to the classification, manufacture, distribution, possession, and dispensing of any controlled substance.[5] The Act classifies all controlled substances into five separate schedules based on certain factors: their accepted medical uses, their potential for abuse, and their effects—both physical and psychological. Despite evidence regarding marijuana's potential to relieve pain, both Congress and succeeding Administrations have elected to leave cannabis subject to a total prohibition under Schedule I of the Act, without provision for legal use. Under the CSA, the manufacture, distribution, or possession of marijuana constitutes a criminal violation.[5]

The state of California, along with "at least nine states,"[6] enacted the CUA in response to the health needs of seriously ill individuals.[7] The CUA legalizes the medical use of marijuana by authorizing personal use for medicinal purposes when recommended by a physician. Both Angel Raich and Diane Monson are California residents who used physician-recommended marijuana to manage their conditions.

The United States Justice Department under the Clinton Administration took the position that the CSA did not apply to Schedule I drugs such as marijuana in states with medical use laws. However, the Bush Administration adopted a contrary position that, state law notwithstanding, any personal possession of marijuana, even for medical reasons and without any evidence of sale or commercial purposes, amounted to a criminal violation of the CSA. In effect, the Bush Administration eliminated its predecessor's medical use exception. Federal agents then raided Raich's and Monson's homes and seized and destroyed all of Monson's cannabis plants grown for personal use.

Raich and Monson then sued to enjoin enforcement of the CSA, arguing that, as applied to them, the CSA amounted to an unlawful exercise of Congressional power under the Commerce Clause of the United States Constitution, which authorizes Congress to regulate interstate commerce. The plaintiffs' position was that state-sanctioned personal cultivation of physician-recommended medical marijuana amounted to purely *intra*-state, legal, and non-commercial activity and that Congress lacked the power to prohibit such conduct. The plaintiffs lost at trial; however, the United States Court of Appeals for the 9th Circuit enjoined application of the CSA, recognizing state-sanctioned medical marijuana use as a "separate and distinct class of activities" that lay outside the purview of the Act.[8,9] In considering the plaintiffs' Constitutional claims, the Court of Appeals relied on recent Supreme Court decisions that appeared to bar Congress from reaching purely local conduct. In the first case, *U.S. v. Lopez,* the Court struck down the Guns-Free School Zones Act of 1990, a federal law barring the carrying of guns near schools.[10] In the second case, *U.S. v. Morrison*, the Court invalidated the Violence Against Women Act of 1994, a federal law that made violent acts against women a federal crime.[11]

Writing for a five member Majority, Justice John Paul Stevens, joined by Justices Kennedy, Souter, Ginsberg, and Breyer, reversed the Court of Appeals. (Justice Scalia concurred with the results but on somewhat different grounds). The Majority (including Justices who typically are considered more "liberal") ruled that, despite the fact that the plaintiffs' conduct was intra-state and involved state-sanctioned medical activities, the Commerce Clause nonetheless vests Congress with the power to reach purely personal and intrastate conduct. Justice Stevens noted,

> The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally.[9]

Indeed, in considering the fundamental Constitutional question raised by the Bush Administration's decision to enforce the CSA in medical marijuana situations, the Majority referred to the considerable evidence supplied over the years, which tended to show that marijuana should not be treated as a Schedule I controlled substance (illegal under all circumstances) but should instead be reclassified as a Schedule II substance (permissible under certain circumstances). In the Majority's view, the scientific wisdom of the law was irrelevant; what mattered was whether the law was minimally rational. In this regard, the Majority pointed out that Congress might have concluded that despite the science, the danger of abuse was so great that cannabis needed to remain a totally prohibited substance. (Again, whether this is a reasonable conclusion is irrelevant for Constitutional law purposes; what matters is whether the law is minimally rational.)

The Majority also concluded that it was irrelevant that

the use in this particular case was totally intrastate and involved no commercial trade as such. The Majority pointed to long-standing precedent: a seminal case involving Congress' Commerce Clause powers titled *Wickard v. Filburn*.[12] A World War II–era case involving the power of Congress to impose wage and price controls to prevent inflation, *Wickard* involved the sanctioning of a farmer under the Agricultural Adjustment Act (AAA) for growing excess wheat beyond federally permissible limits for personal consumption. Under the principle of *Wickard,* the Majority argued that Congress could reach even personal and non-commercial intrastate use of a good or product. The proper test of the reaches of Congress' power is not whether the product is meant to move in commerce but whether its production and use has a "substantial economic effect on interstate commerce";[12] it is the nexus between the conduct and commerce that gives Congress the power to act. The fact that the product in *Wickard* involved a legal commercial commodity was irrelevant in the Majority's view; the only relevant issue was that the proscribed conduct was part of a far broader law aimed squarely at interstate commerce. In essence, the Majority allowed the larger interstate purpose of the Act to swallow up conduct that, considered on its own, might have been unrelated to commerce.

The Majority also distinguished *Lopez* and *Morrison* on the grounds that in neither case was the law aimed at conduct involving commerce. The fatal flaw of both laws according to the Majority was their failure to be grounded in any notion of interstate commerce. Both of the laws, which were declared unconstitutional, were mere "police powers" acts designed to protect public health but without any reference to movement in commerce. The CSA, on the other hand, is aimed squarely at the interstate movement of controlled substances.

Finally, the Majority rejected the notion that the CSA itself did not identify medical marijuana as a separate and distinct activity that lay beyond its reach, since by its very terms, the CSA effectively declared that there *could* be no acceptable medical use of marijuana. For this reason, the California medical use law was in direct conflict with the terms of the CSA and thus fell under principles of "preemption." No matter how valid a state statute may be under the laws and Constitution of a state, where the law comes into direct conflict with federal law, it is superseded under the Supremacy Clause of the Constitution.

Justice O'Connor, accompanied by Chief Justice Rehnquist and Justice Thomas, filed a strongly worded dissent. In the dissenters view, the Majority decision represented a vast expansion of federal powers to intrude into purely state matters:

> One of federalism's chief virtues . . . is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." [citation omitted] . . . This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. . . . Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation.[13]

The dissenters attacked the Majority opinion as a complete departure from the principles of *Lopez* and *Morrison,* arguing that as in both prior cases, the conduct reached in *Raich* involved activities with no nexus to commerce. In Justice O'Connor's view, it was irrelevant that the application of the CSA to personal use for medical purposes came as part of a comprehensive and otherwise legal effort to regulate the movement of controlled substances in commerce; the overall legality of the statute could not save an illegal application of its provisions. The dissent also dismissed the Majority's reliance in *Wickard v. Filburn* on the grounds that the AAA clearly delineated carefully between personal and non-personal use and contained personal use exemptions (none of which applied to the defendant in the case). The reason why the AAA survived its challenge and the CSA should not, according to the dissent, was that unlike the CSA, the AAA clearly tied personal use to commerce and drew specific exceptions.

Justice O'Connor concluded her dissent with the following:

> [T]he Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.[14]

IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

Gonzales v. Raich has important implications for the power of Congress to proscribe personal, non-commercial conduct—including medical conduct—that in the absence of Congressional intervention would be considered legal under state law. Two momentous cases involving this very principle are currently moving through the appeals process and toward the Supreme Court. The first case involves a challenge by Oregon officials to the Bush Administration's efforts to halt the practice of legal assisted suicides under Oregon's Death with Dignity Act.[15] The same Court of Appeals that struck down the CSA as applied to state-sanctioned medical marijuana use also declared that the CSA cannot be used to prohibit legal assisted suicides involving the over-prescribing of a controlled substance.

The second case involves the proscription of certain abortions. In July 2005, the Court of Appeals for the 8th Circuit enjoined as unconstitutional the federal Partial Birth Abortion Ban Act of 2003, because of its failure to provide for a health exception for women.[16] If the Supreme Court reverses this decision (two other cases involving the 2003 Act also are moving through the appeals system) and holds that in certain instances a health exception is not required to make the regulation of abortion Constitutional, then a federal law will criminalize certain medical procedures that may be considered perfectly legal under state law.

Beyond demonstrating the power of Congress to use its Commerce Clause authority to regulate what is considered legal medical practice under the law, *Gonzales v. Raich* also underscores the gap between scientific evidence and the "minimum rationality" test used to analyze the constitutionality of legislation. There is evidence to suggest that cannabis may have useful applications and that the regulation of cannabis presents no greater a challenge than the regulation of other controlled substances. Yet Congress is free to make decisions for reasons other than those embodied in science and evidence, and regularly does so. In this regard, it is the political process itself, rather than the evidence, that acts as a check on Congressional decision-making.

Finally, *Gonzales v. Raich* acts as a reminder of the power of Congress to determine public health policy. In many cases, Congress achieves this goal through the "power of the purse," that is, by enacting spending legislation aimed at inducing states to adopt certain approaches to public health problems. The Public Health Service Act's many state grant programs are evidence of such laws, but on occasion, Congress may intervene with a law that is directly regulatory and aimed at deterring individual conduct considered inimical to the public welfare. While Congress has no broad police powers authority to regulate directly in the name of public health, *Gonzales v. Raich* clarifies the extent to which Congress' power over commerce can be used to achieve the same result.

REFERENCES

1. 125 S. Ct. 2195.
2. 1913 Cal. Stats. ch. 324 §8.
3. Gostin LO. Power, duty and restraint. New York: Oxford University Press; 2003.
4. 21 U.S.C. §§ 801 et. seq.
5. 21 U.S.C. §§ 841(a)(1), 844(a).
6. 125 S. Ct. 2198.
7. Cal. Health & Safety Code § 11362.5.
8. 352 F. 3d 1222 (9th Cir., 2003).
9. 125 S. Ct. 2195, 2201.
10. 514 U.S. 549 (1995).
11. 529 U.S. 598 (2000).
12. 317 U.S. 111 (1942).
13. 125 S. Ct. 2220-2221.
14. 125 S. Ct. 2229.
15. Oregon v. Ashcroft 368 F. 3d 1118 (9th Cir. 2004).
16. Carhart v. Gonzales ___ f 3d ____ (July 8, 2005) 2005 WL 1592942 (8th Cir.).