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Upholding Medi-Pot Measure Would Undercut Civil Rights Laws

By Timothy J. Dowling

What do marijuana, bald eagle feathers, domestic violence, guns near schools and homegrown wheat have in common?

They all were topics of conversation at the Nov. 29 Supreme Court oral argument in *Ashcroft v. Raich*, a Commerce Clause challenge to the application of our federal drug laws to medical marijuana.

The state's Compassionate Use Act authorizes medical-marijuana use when approved by a physician. But the disparate subjects raised at the argument show that the case has implications far beyond marijuana, including our nation's civil rights laws, environmental safeguards, safety standards, minimum-wage laws and other basic protections.

Before analyzing these broader ramifications, I note that they mean little to the lead plaintiff, Angel Raich, and understandably so.

The 39-year-old Oakland resident suffers from an inoperable brain tumor and a host of other medical maladies. After unsuccessfully trying 30 medications to alleviate her suffering, Raich turned to marijuana, and her condition greatly improved. Raich smokes it in a pipe, eats it with her food and applies it to her body as a salve, consuming nine pounds a year. Her doctor believes that, without marijuana, Raich might well waste away and die.

Raich sued to prevent enforcement of the federal Controlled Substances Act against her. One intriguing argument advanced by Raich is that the federal drug laws violate her fundamental right to avoid severe suffering. In the 1997 assisted-suicide case, *Washington v. Glucksberg*, five justices suggested that avoiding intolerable agony might be a constitutionally cognizable liberty interest.

Throughout the Raich case, however, this argument has taken a back seat to the Commerce Clause challenge, which the 9th U.S. Circuit Court of Appeals adopted.

One can only speculate on why a legal theory expressly mentioned by a majority of the Supreme Court has played second fiddle to a much more ambitious Commerce Clause theory. Perhaps it's because the fundamental-rights argument would help only those who, like Raich, could credibly claim that they need marijuana to avoid severe suffering. A victory rooted in the avoidance of physical torment might leave a large portion of the medical-marijuana movement without legal recourse.

Another reason for the Commerce Clause focus might be that Raich's lead attorney is professor Randy Barnett, a staunch libertarian whose writings argue for an extremely narrow view of Congress' Commerce Clause authority.

Barnett urges a restoration of what he calls the "lost Constitution," and he views the Commerce Clause as limited to trade, a reading that would threaten hundreds of federal protections.

Whatever the reason for its prominence in the case, and however satisfying the Commerce Clause victory was in the 9th Circuit, the theory ran into a buzz saw at the Supreme Court.

This should have been no surprise. Longstanding precedent makes clear that Congress may regulate economic conduct where it rationally concludes that the conduct, when aggregated with similar activity by others, has a significant effect on interstate commerce.

Moreover, a court may not excise a subclass of conduct from otherwise legitimate regulation simply because the impact of the subclass is small. To be sure, in recent years the court has imposed modest limits on Congress' Commerce Clause authority. In *United States v. Lopez* (1995), it struck down a federal ban on the possession of guns near schools. Five years later, in *United States v. Morrison*, the court invalidated federal laws addressing gender-related violence.

But both cases are distinguishable because they involved noneconomic activity, and both reaffirmed the entire line of modern Commerce Clause precedent.

The precedents reaffirmed in *Lopez* and *Morrison* easily support the federal ban as applied to Raich. Congress found that local production and distribution of marijuana, heroin and other controlled substances swell interstate drug traffic. Congress also concluded that differentiating the controls applying to intrastate and interstate drug traffic is impractical and that locally produced drugs could be diverted easily to the interstate market.

It further determined that regulation of intrastate drug traffic is essential to the effective control of the interstate drug market. These findings might be debatable, but they are not irrational. Not even the state of California, in defending its Compassionate Use Act as amicus curiae, pushed the Commerce Clause argument.

Barnett tried to avoid the controlling precedents by arguing the production and distribution of marijuana at issue is noneconomic because it does not involve actual sales. But his position is contradicted by standard economics texts (not to mention dictionaries), which define economic activity to include the production and distribution of valuable commodities, even absent a sale.

Justice Antonin Scalia pressed Barnett on whether his position would render unconstitutional federal bans on the possession of ivory, bald eagle feathers, and artifacts made from endangered species.

Barnett responded that Raich is different because California has, through its law, effectively isolated medical-marijuana use from the interstate market. But Justice Stephen G. Breyer questioned whether courts should second-guess Congress' judgment that state regulatory schemes are ineffective against the diversion of a fungible product like marijuana to the interstate market.

Scalia also pressed Barnett as to whether the case is controlled by *Wickard v. Filburn*, the 1942 ruling that upheld congressional authority to regulate the production and consumption of homegrown wheat. Barnett stressed that *Wickard* involved regulation of a farm, a commercial enterprise.

But Scalia accused Barnett of not being faithful to *Wickard's* rationale, which did not turn on the commercial nature of the farm but instead on Congress' power to regulate so long as the regulated activity, when combined with similar conduct by others, significantly affects interstate commerce.

Because tens of thousands of potential medical-marijuana users are in California and elsewhere, allowing local production for these users would pose large risks to Congress' effort to ban marijuana from interstate commerce.

Justice John Paul Stevens went to the heart of the analysis by asking how to define the relevant class of activities being regulated for purposes of gauging interstate impacts. Barnett argued that the relevant class should be limited to locally produced marijuana for medicinal purposes.

But the court has never allowed Commerce Clause claimants to define the relevant class in such a self-serving way. Rather, it defers to Congress' definition — here, the production, distribution and use of controlled substances — so long as the regulated class is rational.

For example, when the Supreme Court upheld the federal ban on racial discrimination by restaurants in *Katzenbach v. McClung* (1964), it did not allow the restaurant challenging the law, Ollie's Barbecue, to redefine the relevant class to include only small, family-owned restaurants in Birmingham, Ala., that had no record of serving interstate travelers.

Instead, the court considered whether discrimination at the much broader class of restaurants covered by our civil rights laws could be viewed as substantially affecting interstate commerce. Allowing claimants to redefine the relevant class would undercut most federal protections.

In his concurring opinion in *Lopez*, Justice Anthony M. Kennedy wrote that "the Court as an institution and the legal system as a whole have an immense stake in the stability of our commerce clause jurisprudence as it has evolved to this point." In Kennedy's words, this immense stake "counsels great restraint" in entertaining Commerce Clause challenges. That view will provide little solace to Raich, but it should give great comfort to those who value our federal civil rights laws, environmental protections and other community protections.

Timothy J. Dowling is chief counsel of the Washington, D.C.-based Community Rights Counsel, which filed an amicus brief in support of the federal government in *Ashcroft v. Raich*.