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ALM

# Joint Justice

## Can a state allow medical marijuana?

### No, Congress has banned it.

BY TIMOTHY J. DOWLING

The central question in *Ashcroft v. Raich*, a commerce clause challenge to federal drug laws as applied to the medical use of marijuana, is not whether to allow such use or whether scarce federal enforcement resources should be employed to seize marijuana plants from those suffering from debilitating illnesses. Rather, the question before the Supreme Court on Nov. 29 is whether federal courts should decide these policy issues through an unduly narrow reading of the commerce clause that would threaten many vital federal protections.

The vast majority of federal environmental safeguards, civil rights laws, safety standards, and other federal protections are rooted in Congress' commerce clause authority. The same is true for most federal criminal laws, including bans on heroin, methamphetamines, and other controlled substances.

As noted by Justice Anthony Kennedy in *United States v. Lopez* (1995), "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.

#### COMFORTABLY CONSTITUTIONAL

The commerce clause, as supplemented by the necessary-and-proper clause (which grants Congress the power to make all laws "necessary and proper" to execute federal authority), has long been interpreted broadly to support the federal regulation needed for our complex society.

Time-honored precedent—reaffirmed in both *Lopez* and *United States v. Morrison* (2000)—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. Under these rulings, a court may not excise a subclass of conduct from otherwise legitimate regulation simply because the impact of the subclass is small.

The federal ban on local marijuana production and distribution at issue in *Raich* falls comfortably within these constitutional bounds. Congress rationally found that local production and distribution of marijuana, heroin, and other controlled substances swell interstate drug traffic. And Congress reasonably concluded that it is impractical to differentiate the controls applying to *intra*state and *inter*state drug traffic, and that regulation of intrastate drug traffic is "essential" to the effective control of the interstate drug market.

These determinations might be debatable, but they cannot be dismissed as irrational, and they should make *Raich* an easy case.

The U.S. Court of Appeals for the 9th Circuit sidestepped Congress' findings, however, by narrowly redefining the relevant class of activity as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician." It then concluded that this redefined class is not economic and thus not subject to aggregation, and that the specific marijuana use at issue in *Raich* has no substantial effect on interstate commerce.

The lower court's errors are twofold. First, as is evident from any economics text, local cultivation and distribution of marijuana, even without a sale, is economic activity. In both *Lopez* and *Morrison*, the Court described the regulated conduct in *Wickard v. Filburn* (1942) as the "production and consumption of homegrown wheat." It concluded that this activity is economic and properly aggregated with similar conduct by others in analyzing the impact on interstate commerce.

## REMEMBER OLLIE'S BARBECUE

Second, and more fundamentally, the lower court's redefinition of the regulated class ignores the bedrock principle that Congress may define and regulate a class of conduct where the definition is rational and the class substantially affects interstate commerce.

For instance, 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. The lower court's analysis in *Raich* contravenes *Katzenbach* and decades of similar precedents.

Likewise, federal regulation of loan sharking, wetlands destruction, and other site-specific activity is not invalid simply because it is possible to redefine the regulated class more narrowly so that the impact appears small. These and many more federal protections would be at risk under the lower court's analysis.

Nor does it matter that California law permits medical marijuana use. The scope of congressional power does not turn on the vagaries of state law. Indeed, allowing state law to trump federal authority would turn the supremacy clause on its head.

To be sure, there are limits on Congress' authority over noneconomic activity, as shown by *Lopez* and *Morrison*, which invalidated federal bans on mere gun possession near schools and gender-related violence. But these cases are easily distinguished from regulation of economic activity, such as drug production and distribution, which must be considered in the aggregate. In view of the tens of thousands of potential medical marijuana users in California and elsewhere, allowing local production and distribution for these users plainly would pose large risks to Congress' effort to ban marijuana from interstate commerce.

Any change to the federal drug statutes should be made by Congress. It should not be forced on the nation by the courts through a cramped reading of the Constitution that threatens federal protections across the board.

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