

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The top bulb has a dark blue cap, and the bottom bulb has a light blue cap. The globe is shown in a light blue color, with continents and oceans visible. The hourglass is centered on the page.

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*Gonzales v. Raich: Congress's Power Under the Commerce Clause to Regulate Medical Marijuana*

Todd B. Tatelman, American Law Division

June 17, 2005

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# ***Gonzales v. Raich*: Congress's Power Under the Commerce Clause to Regulate Medical Marijuana**

**Todd B. Tatelman**  
Legislative Attorney

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## Summary

In *Gonzales v. Raich*, the Supreme Court was presented with a conflict between California's state law, permitting the medicinal use of marijuana, and the federal Controlled Substances Act (CSA). The Ninth Circuit had found the federal law unconstitutional "as applied," concluding that its enforcement against medicinal users was beyond Congress's enumerated power to regulate interstate commerce. The Supreme Court reversed, concluding that Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would substantially affect conditions in the interstate market. The Court, in reaching its decision, specifically relied on *Wickard v. Filburn* (1942), which held that Congress could aggregate the impact of individual actors on the interstate market to find a substantial impact on interstate commerce.

## Background

The dispute in *Gonzales v. Raich* involved a conflict between California’s Compassionate Use Act<sup>1</sup> and the federal Controlled Substances Act (CSA).<sup>2</sup> In August 2002, after federal agents seized and destroyed the respondent’s medicinal marijuana plants, suit was brought in the Northern District of California seeking both declaratory and injunctive relief against the U.S. Attorney General preventing the prosecution of medicinal users pursuant to the CSA.<sup>3</sup> Respondents argued that “as applied” to their specific situations the CSA exceeded Congress’s authority under the Commerce Clause and, therefore, was unconstitutional.<sup>4</sup> The district court denied the motion, concluding that the respondents could not establish a likelihood of success on the merits.<sup>5</sup>

## Ninth Circuit’s Decision

The Ninth Circuit Court of Appeals, relying on the Court’s recent Commerce Clause decisions in *United States v. Lopez*<sup>6</sup> and *United States v. Morrison*, (*Lopez/Morrison*)<sup>7</sup> held that, “as applied” to the respondents, the CSA exceeded Congress’s power under the Commerce Clause.<sup>8</sup> In so holding, the court constructed a narrow affected class of activity, namely, the “intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law.”<sup>9</sup>

With this narrowly defined class of activity, the court proceeded to apply the four factor *Lopez/Morrison* test.<sup>10</sup> With respect to the first factor—whether or not the activity is commercial

<sup>1</sup> Cal. Health & Safety Code § 11362.5 (1996) (allowing the use of marijuana for medical purposes upon the recommendation of a licensed physician).

<sup>2</sup> 21 U.S.C. § 841(a)(1) (2003) (classifying marijuana as a “Schedule I” controlled substance and as such making it illegal to “manufacture, distribute or dispense, or possess with the intent to manufacture, distribute, or dispense a controlled substance” unless provided for in the statute).

<sup>3</sup> See *Raich v. Ashcroft*, 248 F. Supp.2d 918 (N.D. Cal. 2003).

<sup>4</sup> *Id.* at 919.

<sup>5</sup> *Id.* at 931.

<sup>6</sup> *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun Free School Zones Act of 1990 did not either by itself, or in the aggregate, substantially affect interstate commerce and, therefore, was beyond the scope of Congress’s authority under the Commerce Clause).

<sup>7</sup> *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act, on the grounds that it regulated “non-economic activity” and was therefore beyond the scope of Congress’s power to regulate interstate commerce).

<sup>8</sup> See *Raich v. Ashcroft*, 352 F.3d 1222, 1228 (9<sup>th</sup> Cir. 2003). While the Supreme Court has previously addressed issues relating to the CSA in light of California’s medical marijuana statute, it did not decide the case on Commerce Clause grounds. See *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 494 n.7 (2001) (“Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress’ power under the Commerce Clause”).

<sup>9</sup> See *Raich*, 352 F.3d at 1228-29 (stating that “this limited use is clearly distinct from the broader illicit drug market—as well as any broader commercial market for marijuana—insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce.”).

<sup>10</sup> Taken together, the Court’s decisions in *Lopez* and *Morrison* established a four factor test to determine whether a federal statute or regulation has a substantial effect on interstate commerce: (1) whether the regulated activity is commercial or economic in nature; (2) whether an express jurisdictional element is provided in the statute to limit its reach; (3) whether Congress made express findings about the effects of the proscribed activity on interstate commerce and; (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated. See (continued...)

or economic in nature—the court concluded that the narrow class of activity in this case could not be considered commercial or economic in nature.<sup>11</sup> The court next considered whether the CSA contains an express jurisdictional element that would limit its reach to those cases that substantially affect interstate commerce. With no stated analysis, and apparently persuaded by the reasoning of a district court opinion, the court concluded that “[n]o such jurisdictional hook exists in the relevant portions of the CSA.”<sup>12</sup>

With respect to whether the legislative history contains congressional findings regarding the effects on interstate commerce, the court was able to cite findings relating to the effect that intrastate drug trafficking activity would have on interstate commerce.<sup>13</sup> While admitting that the legislative history lends support to the constitutionality of the statute under the Commerce Clause, the court proceeded to diminish the importance of these findings by arguing that they were not specific to either marijuana or the medicinal use of marijuana, but rather related to the general effects of drug trafficking on interstate commerce.<sup>14</sup> In addition, the court referred to language in *Morrison*, discussing the limited role of congressional findings.<sup>15</sup> Moreover, the court referenced Ninth Circuit precedent concluding that the first and fourth prongs of the *Morrison* test—whether the statute regulates an economic enterprise and whether the link is attenuated—are the most significant factors to the analysis.<sup>16</sup>

Finally, with respect to whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated, the court expressed doubt that the interstate effect of homegrown medical marijuana is substantial. Citing authority questioning the validity of the federal government’s claim of an effect on interstate commerce,<sup>17</sup> the court concluded that “this factor favors a finding that the CSA cannot constitutionally be applied to the class of activities at issue in this case.”<sup>18</sup>

The United States Supreme Court granted *certiorari* specifically on the question of whether the power vested in Congress by both the “Necessary and Proper Clause,” and the “Commerce Clause” of Article I includes the power to prohibit the local growth, possession, and use of marijuana permissible as a result of California’s law.<sup>19</sup> The Court, in an opinion by Justice Stevens, reversed the Ninth Circuit’s decision and held that Congress’s power to regulate

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*Morrison*, 529 U.S. at 610-12.

<sup>11</sup> *Raich*, 352 F.3d at 1230 (stating that the “cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity”).

<sup>12</sup> *Id.* at 1231 (citing *County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1209 (N.D. Cal. 2003)).

<sup>13</sup> *Id.* at 1232 (citing 21 U.S.C. § 801, which states that “federal control of intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents such as traffic.”).

<sup>14</sup> *Id.* at 1232.

<sup>15</sup> *Id.* (citing *Morrison*, 529 U.S. at 614).

<sup>16</sup> *Id.* at 1232-33 (citing *United States v. McCoy*, 323 F.3d 1114, 1119 (9<sup>th</sup> Cir. 2003)).

<sup>17</sup> *Id.* at 1233 (quoting *Conant v. Walters*, 309 F.3d 629, 647 (9<sup>th</sup> Cir. 2002) (stating that “[m]edical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce. Federal efforts to regulate it considerably blur the distinction between what is national and what is local.”) (Kozinski, J., concurring)).

<sup>18</sup> *Id.*

<sup>19</sup> *Gonzalez v. Raich*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 2195 (2005).

commerce extends to purely local activities that are “part of an economic class of activities that have a substantial effect on interstate commerce.”<sup>20</sup>

## Supreme Court’s Decision

In reaching its conclusions, the Court relied heavily on its 1942 decision in *Wickard v. Filburn*, which held that the Agricultural Adjustment Act’s federal quota system applied to bushels of wheat that were homegrown and personally consumed. *Wickard* stands for the proposition that Congress can rationally combine the effects that an individual producer has on an interstate market to find substantial impacts on interstate commerce.<sup>21</sup> The Court pointed to numerous similarities between the facts presented in *Raich* and those in *Wickard*. Initially, the Court noted that because the commodities being cultivated in both cases are fungible and that well-established interstate markets exist, both markets are susceptible to fluctuations in supply and demand based on production intended for home-consumption being introduced into the national market.<sup>22</sup> According to the Court, just as there was no difference between the wheat Mr. Wickard produced for personal consumption and the wheat cultivated for sale on the open market, there is no discernable difference between personal home-grown medicinal marijuana and marijuana grown for the express purpose of being sold in the interstate market.<sup>23</sup> Thus, the Court concluded that Congress had a rational basis for concluding that “leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.”<sup>24</sup>

Respondents argued that *Wickard* was distinguishable because in the case of wheat the activity involved was purely commercial, and the evidence clearly established that the aggregate production of wheat had a significant effect on the interstate market. Conversely, respondents claimed that the activity at issue in *Raich* is non-commercial—the respondents had never attempted to sell their marijuana—and Congress had made no finding that the personal cultivation and use of medicinal marijuana has a substantial effect on the interstate marijuana market.<sup>25</sup> The Court, however, noted that the standard for assessing the scope of Congress’s power under the Commerce Clause, is not whether the activity at issue, when aggregated, substantially affects interstate commerce; but rather, whether there exists a “rational basis” for Congress to have

<sup>20</sup> *Id.* at 2205 (citing *Perez v. United States*, 402 U.S. 146, 151 (1970)). The final outcome was 6-3 with Justice Stevens writing for himself and Justices Souter, Kennedy, Breyer, and Ginsburg. Justice Scalia, via a separate opinion, concurred only in the Court’s judgment. *See id.* at 2215. Justice O’Connor dissented and filed an opinion that both Chief Justice Rehnquist and Justice Thomas joined in part. *See id.* at 2221. In addition, Justice Thomas filed his own dissenting opinion. *See id.* at 2229.

<sup>21</sup> *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that, economic activity, regardless of its nature, can be regulated by Congress if the activity “asserts a substantial impact on interstate commerce ...”).

<sup>22</sup> *Raich*, 125 S.Ct. at 2207, n. 29. The Court noted that the while the marijuana market is an illegal or illicit market, this fact appears to be of no legal or constitutional significance as Congress’s power arguably encompasses both lawful and unlawful interstate markets. *See id.* (citing *Lopez*, 514 U.S. at 571, (Kennedy, J., concurring) (stating that “[i]n the *Lottery Case*, 188 U.S. 321 (1903), the Court rejected the argument that Congress lacked [the] power to prohibit the interstate movement of lottery tickets because it had power only to regulate, not to prohibit.”).

<sup>23</sup> *Raich*, 125 S.Ct. at 2207.

<sup>24</sup> *Id.* (stating that “we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.”) (internal citations omitted).

<sup>25</sup> *Id.*

concluded as such.<sup>26</sup> The Court, applying this deferential standard, concluded that “Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.”<sup>27</sup> Moreover, the Court affirmed that “Congress was acting well within its authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce ... among the several States.’”<sup>28</sup>

Despite having concluded that under the “rational basis test” Congress had acted within its constitutional authority when it enacted the CSA and applied it to intrastate possession of marijuana, the Court nevertheless had to distinguish *Lopez* and *Morrison*, the Court’s more recent Commerce Clause decisions. The Court concluded that the CSA, unlike the statutes in either *Lopez* (Gun Free School Zones Act) or *Morrison* (Violence Against Women Act), regulated activity that is “quintessentially economic,” therefore, neither *Lopez* or *Morrison* cast any doubts on the constitutionality of the statute.<sup>29</sup> The Court specifically rejected the reasoning used by the Ninth Circuit, concluding that “Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court of Appeals was an essential part of the larger regulatory scheme.”<sup>30</sup>

In supporting its conclusions, the Court noted that, by characterizing marijuana as a “Schedule I” narcotic, Congress was implicitly finding that it had no medicinal value at all. In addition, the Court returned to the fact that medicinal marijuana was a fungible good, thus making it indistinguishable from the recreational versions that Congress had clearly intended to regulate. According to the Court, to carve out medicinal use as a distinct class of activity, as the Ninth Circuit had done, would effectively make “any federal regulation (including quality, prescription, or quantity controls) of any locally cultivated and possessed controlled substance for any purpose beyond the ‘outer limits’ of Congress’[s] Commerce Clause authority.”<sup>31</sup> Moreover, the Court held that California’s state law permitting the use of marijuana for medicinal purposes cannot be the basis for placing the respondent’s class of activity beyond the reach of the federal government, due to the Supremacy Clause, which requires that, in the event of a conflict between state and federal law, the federal law shall prevail.<sup>32</sup>

Finally, the Court responded to the respondent’s argument that its activities are not an “essential part of a larger regulatory scheme” because they are both isolated and policed by the State of California and they are completely separate and distinct from the interstate market.<sup>33</sup> The Court held that not only could Congress have rationally rejected this argument, but also that it “seem[ed] obvious” that doctors, patients, and caregivers will increase the supply and demand for the substance on the open market.<sup>34</sup> In sum, the Court concluded that the case for exemption can

<sup>26</sup> *Id.* at 2208-09 (citing *Lopez*, 514 U.S. at 557; see also *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Perez*, 402 U.S. at 155-156).

<sup>27</sup> See *Raich*, 125 S.Ct. at 2209.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2209-10

<sup>30</sup> *Id.* at 2211.

<sup>31</sup> *Id.* at 2212 (emphasis in original).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 2213.

<sup>34</sup> *Id.* 2213-14 (stating that “[i]ndeed that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just ‘plausible’ as the principal dissent concedes, ... it is readily (continued...)”)

be distilled down to an argument that a locally grown product used domestically is immune from federal regulation, which has already been precluded by the Court's decision in *Wickard v. Filburn*.<sup>35</sup>

Justice O'Connor's dissent focused on the lack of evidence indicating that medicinal marijuana users have a discernable or significant effect on the interstate market which Congress sought to regulate.<sup>36</sup> Moreover, Justice O'Connor, emphasizing the system of "joint sovereignty" espoused by James Madison, argued that this overreaching by the federal government deprives the States of their ability to make their own independent political judgments with respect to the validity of medicinal marijuana laws.<sup>37</sup>

Both Justice Scalia's concurring opinion and Justice Thomas's dissenting opinion focused on the scope and import of the "Necessary and Proper" clause. Justice Scalia's opinion argued that because Congress could rationally have concluded that regulating such intrastate activity would have undercut its objective of prohibiting the sale of marijuana on the interstate market, it was necessary to extend the scope of the CSA to encompass this behavior.<sup>38</sup> On the other hand, Justice Thomas's dissent argues that the "Necessary and Proper Clause" as originally understood cannot be used to expand the scope of Congress's enumerated powers.<sup>39</sup> According to Justice Thomas, by allowing Congress to regulate such intrastate, non-commercial activity the Court has effectively granted the federal government a general police power over the entire country that subverts the Constitution's basic principles of federalism and dual sovereignty.<sup>40</sup>

## Author Contact Information

Todd B. Tatelman  
Legislative Attorney  
ttatelman@crs.loc.gov, 7-4697

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apparent").

<sup>35</sup> *Id.* at 2215.

<sup>36</sup> *Id.* at 2224 (O'Connor, J., dissenting).

<sup>37</sup> *Id.* at 2229 (O'Connor, J., dissenting).

<sup>38</sup> *Id.* at 2220 (Scalia, J., concurring)

<sup>39</sup> *Id.* at 2232 (Thomas, J., dissenting)

<sup>40</sup> *Id.* at 2233-34 (Thomas, J., dissenting)