

Joint Justice

Yes,
federal
power is
limited.

BY JULIE M. CARPENTER

Angel McClary Raich had dwindled to 93 pounds after years of medical treatment. She was confined to a wheelchair with chronic pain. In some desperation, she began using marijuana on her doctor's advice. Her doctor says that she has tried all other alternatives; either they don't work, or the side effects are worse than her symptoms.

It's her doctor's undisputed opinion that without marijuana, Raich may die. With it, she is out of the wheelchair, managing her pain, and keeping her weight up by keeping her food and medications down.

California law allows her to grow and possess medical cannabis on her doctor's advice. Federal law says she is committing a crime. Who wins this tug of war?

The Supreme Court will hear oral argument on Nov. 29 in *Ashcroft v. Raich*, the injunctive action Raich and others brought to avoid federal drug enforcement against them.

CAN'T REGULATE EVERYTHING

Unlike the states, Congress does not have the power to directly regulate public welfare, including the practice of medicine. In *United States v. Lopez* (1995) and *United States v. Morrison* (2000), the Supreme Court emphasized that the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." It confirmed that Congress may not use a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." (In those cases, the Court concluded that Congress could not prohibit possession of a gun near a school or criminalize gender-based violence.)

Yet the Drug Enforcement Administration argues that Congress' national power over interstate commerce allows it to prohibit

local California patients from possessing their own state-authorized medicine in California.

Raich's medical cannabis has never entered commerce, interstate or otherwise. Two caregivers grow it in California solely for her medical use there. The marijuana is never sold, bartered, or otherwise exchanged, and it never crosses state lines. Can Congress really regulate, as interstate commerce, this kind of intrastate, noneconomic, medical possession?

The DEA says yes, because the "aggregate effect" of sick patients growing their own marijuana "substantially affects" interstate commerce. It relies heavily on *Wickard v. Filburn* (1942), in which the Court held that federal wheat limits applied to wheat used entirely on the grower's farm.

But that case was inherently economic. Roscoe Filburn planted wheat as a business, producing and selling about 6.6 tons a year. An additional six tons he planted beyond his government allotment were also business-related, since he would otherwise have had to purchase those six tons from others to feed his cattle and poultry and to reseed the following year. Thus, the use of the wheat was commercial, not personal.

Here, like the student possessing a gun near a school in *Lopez*, sick patients possessing their own home-grown cannabis for their own medical use aren't engaged in any economic or commercial activity. They are not buying, selling, or exchanging; their marijuana cannot substitute for other marijuana. In short, under California law, a sick patient grows and possesses his own cannabis outside any market.

Because the activity here is non-economic, Supreme Court precedent does not allow Congress to aggregate the effects of that activity to somehow find an effect on interstate commerce. If Congress could do that, virtually any activity could be federally regulated.

MORE THAN THE FEDS

Justice Louis Brandeis famously observed, "It is one of the happy incidents of the federal system 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."

Ten states (including Montana, whose voters just re-elected George W. Bush with 59 percent of the vote and approved medical cannabis with 62 percent) have chosen to weigh the risk of abuse versus the therapeutic benefits of cannabis differently from the DEA. This experiment, limited to the states that have chosen it, presents no risk to other states. And it presents no risk to interstate commerce, since Congress remains free to regulate marijuana actually involved in interstate commerce.

The DEA's disdain for state disagreement about medical cannabis suggests strongly that it cares less about ensuring the smooth course of commerce among the states and more about insisting that its view of medical practice—no marijuana ever—prevails.

Interestingly, other federal entities disagree. The congressionally chartered Institute of Medicine has concluded that

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"there are some limited circumstances in which we recommend smoking marijuana for medical purposes." And for 30 years the federal government has provided medical cannabis to a limited group of patients under an investigational new-drug compassionate-use program.

So the dispute is not really about whether marijuana has any medical value. It is about who decides whether patients can use it. To be true to the principles of federalism adopted in the Constitution, Congress should not, in the

name of administrative and prosecutorial convenience, usurp this state authority.

Finally, whatever the Court decides about the commerce clause is not the end of this case. The plaintiffs have also argued, with substantial support from the medical community, that they have a fundamental liberty interest in protecting their lives and avoiding unnecessary suffering.

If that due process right is recognized (and at least five members of the current Court have indicated it may well be), then neither state nor federal law may

prohibit patients from using medical cannabis necessary to protect their health and lives. If so, Raich would still receive the medical treatment her doctor prescribed and perhaps avoid returning to her wheelchair.

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