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CLAREMONT MCKENNA COLLEGE

AN IN DEPTH LOOK AT GONZALES V. RAICH: THE HISTORY OF MEDICAL MARIJUANA AND THE COMMERCE CLAUSE

SUBMITTED TO

PROFESSOR CHARLES LOFGREN

AND

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FOR SENIOR THESIS

BY

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I. Chapter I. Social, Political, and Medical Background

In 1996, California passed Proposition 215 (the Compassionate Use Act), making marijuana available for medical purposes. Licensed physicians could recommend marijuana for treatment of serious illnesses. Patients were allowed to cultivate, possess, and use marijuana. *Gonzales v. Raich* determined the fate of California's right to allow medical marijuana in spite of federal prohibition. In 2002, California deputy sheriffs and DEA (Drug Enforcement Administration) officials entered Diane Monson's home. Monson used medical marijuana pursuant to Prop 215 and owned six Cannabis plants. DEA officials destroyed the plants pursuant to federal marijuana laws. Monson has a number of illnesses that cause severe back pain and muscle spasms. Her doctor recommended marijuana after a number of medications failed.[1] Angel Raich has suffered from a number of debilitating illnesses, which confined her to a wheelchair. Two anonymous caregivers provided her marijuana free of charge. A few of her illnesses included life threatening weight loss, an inoperable brain tumor, and temporary paralysis.[2] She also used medical marijuana pursuant to Proposition 215. Monson and Raich brought legal action, claiming protection under Prop 215, and that the Controlled Substance Act exceeded congressional authority under the Constitution's commerce clause, and violated the Fifth, Ninth, and Tenth Amendments.[3]

This chapter will discuss the social, political, and scientific history of marijuana that lead up to Prop 215. The story goes back to the late nineteenth century when marijuana was not a widely known drug, and most legislators and middle-class households had never heard of the drug. However, by 1937 the federal government criminalized it. To understand why lawmakers

prohibited marijuana, it is important to understand the drug climate at the turn of the century. In the post Civil War era, overmedication, easy availability of drugs, and a lack of knowledge about the drugs' addictive qualities resulted in high addiction rates for numerous drugs.[4] Doctors perpetuated the addictive culture by using the strongest drugs to treat mild conditions; for example, opium was used to treat fever and diarrhea.[5] By 1884, an estimated 182,215 people were addicted to narcotics, and 782,118, by 1913.[6] This climate instilled a concern surrounding drugs within the general population, and called legislators to action. The 1914 Harrison Act, first of several pieces of legislation, indicated growing public concern.

Marijuana's Social and Political History

Though the Harrison Act did not regulate marijuana, it was the first of several federal acts initiating restrictions on drugs that would eventually include marijuana. The Harrison Act was a reaction to the public concern over high addiction rates to cocaine and opiates. It regulated these narcotics by, first, requiring people who imported, produced, transferred, or in any way handled narcotics to register with the federal government. Second, it heavily taxed these registered persons.[7] Congress thus used its power of taxation to indirectly regulate narcotics. The scope of Congress's constitutional powers had not yet evolved to provide a basis for an outright ban.[8] The Harrison Act left hundreds of thousand drug addicts without a safe, legal supply of drugs. These addicts turned to the streets to purchase their drugs. The sharp and dramatic increase in demand inflated costs, forcing addicts into criminal activity to pay for their drugs. Crime

increased as the demand for expensive illegal narcotics increased. As crime increased, public concern increased, and ultimately, the public began to equate drug usage with criminal activity.[9]

The Uniform Narcotic Drug Act (UNDA) of 1934 made its appearance. By the early 1930s, the majority of the public had not heard of marijuana, but those who had heard of it were uninformed about the drug. Its use was largely confined to Mexican-American communities, but had also infiltrated to Black ghetto areas. The drug hardly appeared in the media; between 1914 and 1927, New York media outlets published four marijuana-related articles.[10] When it did appear in the media, however, newspapers portrayed the drug as dangerous and even murder-inducing. In 1914, the *New York Times* reported that marijuana was as dangerous as morphine and cocaine, and could be used to substitute such drugs.[11] A 1929 article in the *Denver Post* reported a Mexican-American man who murdered his stepdaughter was a marijuana addict.[12] Articles such as this one drew a link between marijuana and crime in the public's mind. To those who had heard of it, marijuana was just as dangerous and crime-inducing as other narcotics.

The act was not federal legislation, but was drafted by the National Conference of Commissioners, and the Federal Bureau of Narcotics encouraged all states to enact it. The committee aimed to identify and outlaw all habit-forming substances. The first two drafts of the bill prohibited marijuana, but the final draft did not.[13] By 1937, thirty-five states adopted the act.[14]

After the UNDA, Congress enacted the Marihuana Tax Act of 1937, requiring that those who imported, handled, or sold marijuana to register with the federal government and pay an occupational tax.[15] Congress aimed at effectively prohibiting the drug through a strict

registration process and heavy taxes. The act also bolstered drug enforcement policy. Congress structured the bill almost identically to the Harrison Act. Public concern over drugs had waned after the passage of the UNDA, and marijuana remained a relatively unheard of drug. The most plausible cause for its passage was an overzealous Federal Bureau of Narcotics (FBN). The FBN commissioner, Harry Ainslinger, campaigned state to state against marijuana.[16] He used articles published by William Randolph Hearst, which denounced marijuana as evil. Hearst led the media opposition to marijuana by portraying it as a drug of violence. Some speculate Hearst's motives were financially based. He possessed heavy financial investments in the lumber and paper industries and saw the production of hemp as a competitive resource thus seeking its prohibition.[17] The Tax Act effectively prohibited marijuana without any empirical evidence to support Congress's claims that the drug causes criminal activity and that school children were using it.[18] Ultimately, the act did not immediately affect usage since so few people knew about the drug to begin with.

Between 1948-1950, narcotic arrests increased by 77 percent, provoking the Boggs Act of 1951. Marijuana arrests increased as well in this time period; however, it is unclear whether this was a result of increased usage or better drug enforcement.[19] Nonetheless, Congress called for harsher penalties for drug violations. The act established uniform penalties for different drugs; possession of marijuana called for the same penalty as possession of heroin. First offense mandated two to five years in a federal penitentiary, second offense: five to ten years, third offense: ten to twenty years, and each offense included a 2,000 dollar fine.[20] The Boggs Act gave the public the perception that marijuana was a hard and dangerous drug, and as a result, narcotics use decreased significantly.[21] The act also opened up the marijuana debate among lawmakers and scientists. During the congressional hearings, legislators brought doctors, crime

prevention specialists, and FBN officials to testify that marijuana acts as a stepping-stone to other drugs, primarily heroin.[22] However, other scientific research differed, in a paper filed during the hearing, Dr. Harris Isabell, Director of Research at the Public Health Services Hospital claimed marijuana was not physically or psychologically addicting. Dr. Isabell said, "Marihuana smokers generally are mildly intoxicated, giggle, laugh, bother no one, and have a good time. They do not stagger or fall, and ordinarily will not attempt to harm anyone."[23] Despite the sharp decrease in usage after the Boggs Act, Congress passed the Narcotics Control Act in 1956, increasing mandatory minimum sentencing and raising the fine per offense to 20,000 dollars.[24]

By the 1960s knowledge of marijuana became ubiquitous; the drug infiltrated middle-class families and college campuses. By 1965, many teenagers and young adults had used the substance, and in 1970, some college campuses reported as high as 70 percent usage among students.[25] People discovered marijuana was not as dangerous as the Boggs Act suggested. It became the drug of the counter-culture, a part of people's lifestyle, and associated with liberal, anti-war political views.[26] Smoking marijuana became a form of political dissent, and many supported the reduction of harsh marijuana penalties.[27] The public discovered that the marijuana trade was not run by criminals, but by casual users: mostly students and young professionals. Criminal organizations found the drug too cheap to invest in. After the outbreak of marijuana usage, the FBN found it difficult to enforce marijuana laws.[28]

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, which abolished mandatory minimum sentencing established by the Boggs Act; possession of drugs became a misdemeanor.[29] Title II, the Controlled Substance Act, separated drugs into

different categories based on medical utility and potential for abuse. Congress classified marijuana as a Schedule I drug, meaning it had no medical utility.[30]

In 1978, Robert Randall discovered a medical use of marijuana: it reduces intra-ocular pressure in the eyes caused by glaucoma. Authorities arrested him for marijuana cultivation and use, but through a series of legal battles he won the right to treat his glaucoma with marijuana. Existing glaucoma medications were not always successful, thus cannabis became a viable alternative medication.[31] As a result of the Randall's legal battles, the federal government instituted the Compassionate Investigational New Drug Program (IND), which allowed thousands of applicants to use marijuana to relieve pain associated with major illnesses.[32]

While public support for marijuana grew between the 70's to the late 90's, it remained unpopular with the federal government. By the early 1980's, thirteen states nonetheless approved laws permitting medical use of marijuana.[33] However, the Reagan and Bush administrations opposed marijuana use, and in 1991, President Bush discontinued the Compassionate IND Program. The president claimed it sent the "wrong signal", since his administration officially opposed marijuana use.[34] By the time President Clinton took office, a Michigan study concluded that over 25 percent of twelfth-graders had smoked marijuana. The nation viewed Clinton as being soft on marijuana policy. Two factors contributed to this notion: Clinton had used marijuana before and he disproved of Bush's drug policy of imprisoning addicts instead of rehabilitating them.[35] The increasing public popularity set the stage for Proposition 215.

California voters passed Prop 215 (Compassionate Use Act) in 1996 by a 56 to 44 percent margin. This ballot initiative allowed patients, with a doctor's recommendation, to

possess, grow, and use marijuana for pain caused by severe illnesses. Dennis Perron, owner of the San Francisco Cannabis Buyer's Club, and Californians for Medical Rights spearheaded the initiative. Most support came from black and white communities. In response to Prop 215, President Clinton confirmed that federal marijuana law would continue to be enforced, and patients receiving medical marijuana would be treated as those using for recreational purposes. The Department of Justice threatened to penalize doctors recommending marijuana to patients. Penalties included revocation of prescription writing abilities and exclusion from Medicaid and Medicare programs.[36]

In 2002, Raich and Monson filed suit against United States Attorney General John Ashcroft and head of the DEA, Asa Hutchinsona, claiming that applying the Controlled Substance Act to intrastate possession and trade of marijuana was unconstitutional. The interstate commerce clause did not extend far enough to regulate the intrastate marijuana trade. Monson and Raich lost in the District Court, however, the Ninth Circuit Court of Appeals reversed the decision, upholding the constitutionality of Prop 215.[37] In 2004, the Supreme Court would decide whether the federal government could regulate the intra-state medical marijuana trade in *Gonzales v. Raich*.

Medical Marijuana Research

This part of the chapter will provide a brief history of scientific research on marijuana, and the Institute of Medicine's report on marijuana. Overall, in the development of marijuana policy, most lawmakers simply ignored contemporary marijuana research. During *Gonzales v.*

Raich, however the Supreme Court, the petitioner, and respondent relied heavily on these findings. It is important to understand the development of the scientific and medical knowledge of marijuana to compare and contrast what the scientific evidence said about marijuana with what the government and the public thought about the drug. Lawmakers and the public feared marijuana until the 1960s, but that fear did not stem from sound marijuana research. Most marijuana research, prior to the Boggs Act of 1951, reported mild effects, but differed with modern medical marijuana research. Modern research found different medical benefits than early research.

In 1912, Victor Robinson's book, *An Essay on Hasheesh*, was one of the first scientific reports on marijuana. It was published when marijuana was a relatively unknown substance and two years prior to the Harrison Act. Robinson reported that the habitual use of marijuana caused a bloated face, weak limbs, and deterioration of mind. Immediate marijuana effects included increased heart rate, quickened or slowed breathing, increased appetite, increased urine quantity, and increased uterus contractions. He claimed medical benefits included the treatment of depression, hysteria, vomiting, cough, and a cure for morphine addiction.[38] Some of Robinson's findings align with modern medical marijuana research; however, his data suggested a crude understanding of marijuana's effects. Robinson's study was one of the earliest to suggest a medical use of marijuana. In fact, marijuana had already been used for medical purposes as early as 1860, when the Ohio State Medical Society reported medical marijuana as treatment for pain, inflammation, and cough. Medical marijuana was also used in the early 1900s. The Squibb Company invented Cholordyne, a mixture of marijuana and morphine, to treat stomach pain.[39] However, by the 1930s, scientific research, debate among lawmakers, and newspaper articles

suggested that marijuana was no longer used for medical purposes. To confirm this, in 1942, the *U.S Pharmcopoeia* removed marijuana from its list of medications.[40]

Scientific marijuana research from the 1930s to 1950s focused on the drug's danger to society. The public perception of marijuana ranged from a murder-inducing drug, a stepping-stone to other illicit drugs, a cause of criminal activity, to a substitute for other illicit drugs. Some contemporary marijuana research substantiated these fears, while others claimed the opposite. The Panama Canal Zone Governor's Committee studied marijuana's effects and possible links to crime. It found marijuana was not habit-forming and did not negatively affect the user. In comparison to alcohol, marijuana caused much less criminal activity.[41] In 1934, Dr. Walter Bromberg, a senior psychiatrist, examined 2,216 felony inmates. He concluded that marijuana did not promote crime, explaining the users who caused criminal activity were already mentally pre-disposed to causing crimes. However, not all reports supported marijuana. Eugene Stanley, the New Orleans District Attorney, wrote an article, "Marihuana as a Developer of Criminals". The article suggested marijuana gave criminals a "false courage" to commit crimes, thus linking usage with criminal activity. However, Stanley did not use empirical evidence to support his claims.[42] The Journal of American Medical Association claimed marijuana caused hallucinations, physical deterioration, and dementia.[43] Overall, marijuana research conducted around the 1930s was inconclusive. In the 1950's, the Boggs Act instigated new marijuana research. As previously discussed, Dr. Harris Isabell's research concluded that marijuana was an innocuous substance that did not develop dependence or cause criminal activity.

The Nixon administration's war on drugs dominated the federal government's drug policies during the 1960s. Nixon fervently opposed marijuana on moral grounds. He organized a committee to scientifically prove the drug's evil and uselessness. Nonetheless, his commission

called marijuana a "rather unexciting compound", that when used intermittently caused no physical or psychological damage. The commission even went as far as to imply that marijuana should be legal until the government could prove why it should be criminalized. Outraged by the results, Nixon denounced his own commission, and continued to claim marijuana decayed society and morality.[44] During the 1960s, the federal government's perception of marijuana still lagged contemporary scientific research.

In 1997, the Executive Branch again turned to science when the White House Office of National Drug Control Policy requested the Institute of Medicine, a part of the National Institutes of Health (NIH), to report on marijuana's medical efficacy. The Institute's findings were integral to the arguments made by both parties and the Supreme Court. The report concluded that marijuana has potential medicinal value, however, because of the harmful effects of smoking, it suggested a rapid-onset, non-smoked delivery system. The report admitted marijuana does not perform as well as other medications, but a subpopulation of patients react poorly to certain medications and respond well to marijuana. The Institute found no evidence suggesting marijuana was a gateway drug.[45] However, despite positive research, the Clinton administration condemned medical marijuana, and opposed Proposition 215.

The Institute of Medicine analyzed marijuana's potential for medical use in several categories: pain, chemotherapy, malnutrition, spasticity, movement disorders, epilepsy, and glaucoma. Primarily, it found benefit in alleviating pain, preventing nausea and vomiting associated with chemotherapy, and preventing wasting syndrome associated with AIDS. The report found marijuana unable to treat muscle spasms and movement disorders, and found it not as effective as modern medications in treating glaucoma. Randall and others, first, used marijuana to treat glaucoma in the 1970s, however, by the 90's new medications treated intra-

ocular pressure much more effectively. According to the Institute, marijuana is only effective against glaucoma in high doses, and even then, the effects are short-lived.[46]

The Institute of Medicine established certain parameters for medical marijuana and how it could be useful in the treatment of chemotherapy, wasting syndrome associated with AIDS, and pain. Chemotherapy causes nausea and vomiting. Marijuana may be used as a substitute for anti-emetic medications, if the patient responds poorly to alternative medications. Orally ingested anti-emetic medication may be ineffective if the patient vomits it out, and the medication leaves the system. Smoked marijuana could serve as an alternative since it cannot be vomited out, and its effects occur immediately. However, due to the harmful effects of smoking, the Institute suggested a rapid-onset delivery device, for example, a cannabinoid inhaler. Wasting syndrome symptoms include nausea, appetite loss, pain, and anxiety. There are medications that, individually, perform better than marijuana in treating these symptoms. However, some patients react poorly to these medications, and no single medication treats these symptoms as well as marijuana does collectively. In regards to pain, the analgesic effects of marijuana would successfully treat pain associated with spinal cord injuries, peripheral neuropathic pain, central post-stroke pain, chronic pain, and insomnia.[47] According to the Institute of Medicine, these are the ways marijuana may be used medically. In conclusion, the Institute suggested the development of a rapid onset delivery device for THC because smoking marijuana produces harmful effects. These harmful effects include abnormalities in cells lining the respiratory tract, possible risk of cancer, and possible withdrawal and dependence. However, patients using smoked marijuana for relief should not suffer because a safe THC delivery device has not been invented.[48]

In response to the Institute of Medicine, Barry McCaffrey, the director of the White House National Drug Control Policy condemned smoked marijuana. He said,

> "No clinical evidence demonstrates that smoked marijuana is good medicine. The National Institute of Health (NIH) has examined all existing clinical evidence from both animal and human research in order to determine the efficacy of smoked marijuana. It has concluded that there is no clinical evidence to suggest that smoked marijuana is superior to currently available therapies for glaucoma, weight loss and wasting associated with AIDS, nausea and vomiting associated with cancer chemotherapy, muscle spasticity associated with multiple sclerosis or intractable pain."[49]

Furthermore, in his response, he claimed marijuana was a gateway drug, and that children who used it were 85% more likely to use cocaine than children who had not used the drug.[50] He concluded that marijuana should remain a schedule I drug, that Prop 215 violated federal law, and was unnecessary because Marinol, a schedule II drug, contains the active compound in marijuana, and is effective in treating wasting syndrome. McCaffrey butchered the Institute of Medicine's research. First, the Institute of Medicine said smoked marijuana provided relief from certain illnesses thus possessed medical value. Second, marijuana may not be superior to existing medications; however, some patients reacted poorly to these medications. Marijuana treated a wide range of symptoms better than any single medication did. Third, the Institute found no causal connection between marijuana use and other hard drugs. McCaffrey's report disagreed with all of the Institute of Medicine's marijuana findings. According to McCaffrey, Marinol is superior to marijuana in treating vomiting and nausea since it comes in pill form thus does not harm the heart, lungs, and immune system like smoking does.[51] He ignored the possibility the pill may be vomited, and ignored that Marinol cost up to 17 dollars a pill.[52] The Food and Drug Administration (FDA) held marijuana to a different standard than other drugs.

Marijuana had to outperform all existing medications in-order to prove its medical value. Marijuana was the exception; no other drug has to do that. For example, Prozac (fluoexetine) must only prove that it relieves depression; the FDA did not compare its efficacy to other anti-depressants.[53]

Conclusion

Public concern over drug abuse combined with a lack of marijuana knowledge caused lawmakers to prohibit the drug in 1937. Increased drug abuse between 1948 and 1950, caused legislators to increase marijuana possession penalties. During this time, public marijuana use and knowledge was low. Lawmakers lumped marijuana with harder drugs, such as heroin and cocaine, into anti-drug legislation. During the 60s, marijuana use increased significantly, penetrating the middle class and college campuses. In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, defining marijuana as a substance with no medicinal value. In 1978, Robert Randall discovered marijuana effectively combats symptoms of glaucoma. The federal government opened the Compassionate Investigational New Drug Program, allowing thousands of applicants to treat their illnesses with marijuana. The new program created a contradiction in the federal government's stance on marijuana. This contradiction would continue through the passage of Prop 215. Clinton condemned California's Prop 215. Despite condemning state marijuana programs, the Clinton administration re-opened the Compassionate IND Program after Bush closed it, and Vice President Gore's sister participated in Tennessee's medical marijuana program for her chemotherapy.[54]

Gonzales v. Raich was a product of a collision between state and federal marijuana policies. It would decide over the constitutionality of the Controlled Substance Act and Proposition 215, and how much Congress could regulate under the interstate commerce clause. The federal government seemed to irrationally oppose medical marijuana use, scientific research, and nearly all their arguments against marijuana contained holes. Nixon ignored his own marijuana research committee's own findings. In 1988, the DEA did not take the advice of its own chief administrative law judge, who said marijuana "is one of the safest therapeutically active substances known to man."[55] Clinton opposed Prop 215 yet reopened the federal government's compassionate use program. McCaffrey gave a skewed account on the Institute of Medicine's suggestion for medical marijuana. California voters disagreed with the federal government's conclusions over the medical value of marijuana when they passed Prop 215. Angel Raich and Diane Monson sued the federal government for protection from prosecuting state authorized medical marijuana users. The Supreme Court had to decide the fate of California's medical marijuana program in *Gonzales v. Raich.*

[1] Brief for Petitioner, *Gonzales v. Raich* No. 03-1454 filed August 2004; available at *Landmark Briefs and Arguments for the Supreme Court of the United States: Constitutional Law 2004 Term Supplement*. Edited by Gerhard Casper and Kathleen Sullivan. Vol. 343 (Bethesda: Maryland, LexisNexis, 2005) 99-101
[2] Brief for Resondent, *Gonzales v. Raich* No. 03-1454 filed October 2004; available at *Landmark Briefs and Arguments for the Supreme Court of the United States: Constitutional Law 2004 Term Supplement*. Edited by Gerhard Casper and Kathleen Sullivan. Vol. 343 (Bethesda: Maryland, LexisNexis, 2005) 152
[3] ibid 7
[4] The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition. Richard J. Bonnie and Charles H. Whitehead, II. *Virginia Law Review.* Vol. 56, No. 6 October 1970 987
[5] *Drugs in America.* Edited by David F. Musto. (New York, New York University Press, 2002) 211
[6] Earleywine, Mitch. *Understanding Marijuana: A New Look at the Scientific Evidence.* (Cary, NC: Oxford University Press, 2002) 987
[7] Bonnie and Whitehead 987
[8] ibid 989
[9] ibid 988
[10] ibid 1018
[11] ibid 1017
[12] ibid 1016
[13] ibid 1030-32
[14] ibid 1034
[15] ibid 1063
[16] ibid 1053
[17] Earleywine 24
[18] Bonnie and Whitehead 1058
[19] ibid 1068
[20] ibid 1063-1068
[21] ibid 1076-77
[22] ibid 1073
[23] ibid 1072
[24] ibid 1077
[25] ibid 1096-97
[26] ibid 1096-1101
[27] Gerber, Rudolph J., *Legalizing Marijuana Drug Policy Reform and Prohibition Politics* (Westport: Praeger, 2004) 18-19
[28] Bonnie and Whitehead 1096-1101
[29] Gerber 20
[30] Earlywine 168
[31] ibid 15
[32] Gerber 48
[33] ibid 92
[34] ibid 92

[35] ibid 49
[36] ibid 94, 121-122
[37] Carol Mithers. (2004, November 14) The Plaintiff; Angel Raich found a 'miracle' in medical marijuana. Now she's asking the Supreme Court to uphold her right to smoke it: [HOME EDITION]. *Los Angeles Times*, p.MAG.20. Retrieved April 25, 2011, From Los Angeles Times. At www.proquest.com
[38] Musto 405-406
[39] Earleywine 14
[40] ibid 142
[41] Bonnie and Whitehead 1043-44
[42] ibid 1044
[43] ibid 1045
[44] Gerber 22-25
[45] ibid
[46] Marijuana and Medicine: Assessing the Science Base A summary of the 1999 Institute of Medicine Report. Stanley J. Watson; John A. Benson; Janet E. Joy. Archives of General Psychiatry. Vol. 57 No. 6, June 2000 at archpsych.ama-assn.org
[47] ibid
[48] ibid
[49] Musto 536
[50] ibid 535
[51] Musto 537
[52] Mithers
[53] Earleywine 154
[54] Gerber 121
[55] Mithers

II. Chapter II. Legal Background

Gonzales v. Raich posed the question of whether under the interstate commerce clause, Congress can regulate the noncommercial, intrastate medical marijuana possession and cultivation. The government contended the federal Controlled Substance Act (CSA) applied to the use of medical marijuana, thus making California's Prop 215 invalid under the Supreme Court. The legal background of *Raich* involves four Supreme Court cases: *Wickard v. Filburn (1942), Perez v. United States (1971), United States v. Lopez (1995),* and *United States v. Morrison (2000)*. These pivotal cases ruled on the extent to which Congress could regulate commerce. The federal government could only regulate intrastate activity under certain circumstances. First, the activity must have been of an economic nature. Second, Congress must have produced certain findings that the regulated activity affects interstate commerce. Third, the court must determine that the regulated activity "substantially" affected interstate commerce, which is Congress's constitutional domain. Fourth, the federal statute must limit its reach to a specific set of cases.[56] The four listed Supreme Court cases delineated congressional authority over intrastate commerce. The District Court ruled against Raich, but in 2003, the Ninth Circuit Court of Appeals reversed the decision.[57] The Ninth Circuit Court of Appeals ruled that by these four circumstances that the CSA did not apply to California's medical marijuana trade.

The decisions in *Wickard, Perez, Lopez, and Morrison* defined the reach of the interstate commerce clause. The Constitution grants Congress the power to "regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes…"[58] In *Wickard v. Filburn*, the Agricultural Adjustment Act (AAA) of 1938 authorized the Secretary of Agriculture

to set wheat production quotas for personal use. Roscoe Filburn, an Ohio Dairy Farmer, exceeded the production limit. Filburn contended that his wheat production was purely intrastate, and did not enter the stream of commerce, thus making the AAA application to his wheat production unconstitutional.[59] However, the Supreme Court ruled against Filburn. The court reasoned if a thousand farmers acted as Filburn, then, the wheat production would affect both supply and demand of the interstate market. This would make Filburn's activity subject to federal regulation under the commerce clause. This is known as the aggregation theory.[60] *Wickard* established the precedent that Congress could regulate an intrastate activity if it had a "substantial effect" on interstate commerce. The Supreme Court ruled that Filburn, according to the aggregation theory, could "substantially" affect interstate commerce, thus upholding the AAA's constitutionality.[61] In light of *Wickard*, the Supreme Court ruled that marijuana use and cultivation "substantially" affected interstate commerce.

In *Perez v. United States (1971),* the Supreme Court affirmed precedent that Congress could regulate intrastate activity that "substantially" affected interstate commerce. The case challenged the Consumer Credit Protection Act, which outlawed credit loan sharking. The Court reasoned that extortionate credit transactions "substantially" affect interstate commerce because loan sharking promoted criminal organizations.[62] Criminal organizations belonged to a "class of activities" that "substantially" affected interstate commerce, thus, the federal government could regulate this intrastate activity.[63] *Perez* affirmed *Wickard's* precedent that Congress could regulate intrastate activities, and in doing so, developed the principle of "class of activities". It broadened the scope of Congress's power to regulate intrastate commercial activities.

In *United States v. Lopez (1995)*, the Supreme Court limited the scope of Congress's power under the interstate commerce clause. The Court affirmed that Congress could regulate

intrastate activities that "substantially" affect interstate commerce, but added that the regulated activity must be economic in nature.[64] In 1992, Alfonso Lorenzo brought a handgun to Edison High School, and in doing so, violated the Gun Free School Zones Act of 1990 (GFSZA), which prohibited possession of firearms within a school zone.[65] The Court decided that firearms in school zones did not "substantially" affect interstate commerce, even if *Wickard's* aggregation theory was applied, and the GFSZA did not regulate an economic activity. The Supreme Court determined the GFSZA did not affect interstate commerce, and was not an economic activity. Therefore, the Court declared it unconstitutional.[66] Congress could only regulate the "channels" and "instrumentalities" of commerce, and activities that "substantially" affected interstate commerce.[67] These activities that "substantially" affected commerce could be intrastate activities, although had to be economic in nature.

United States v. Morrison (2000) was the last Supreme Court case before *Raich* that shaped the scope of the interstate commerce clause. The case ruled on the constitutionality of the Violence Against Women Act of 1994, which allowed victims of gender-motivated crimes to seek civil suits against attackers. The Supreme Court struck down the Violence Against Women's Act because there was no empirical evidence that gender-related crime affected commerce, and gender-related crime is not an economic activity. Congress produced evidence linking gender-related crime to commerce, however, the Supreme Court rejected these findings. This proved important since it showed that it was not enough for Congress to produce findings linking regulated activities to commerce. They also had to survive judicial scrutiny.[68] *Morrison* affirmed the commerce clause precedents of previously discussed court cases, and gave the Ninth Circuit Court a set of standards for deciding *Raich v. Ashcroft.*

Morrison established several standards. First, the statute must regulate an economic activity. Second, there must be congressional findings linking the regulated activity to interstate commerce. Third, the regulated activity must "substantially" affect commerce. Finally, the statute must limit its reach to a certain number of cases. The constitutionality of the Controlled Substance Act hinged on the interstate commerce clause, which states Congress has the power to, "regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes…"[69] The Controlled Substance Act makes it illegal to, "manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute, or dispense, a controlled substance."[70] The government contended that the CSA invalidated California's Prop 215, which allowed for the medical use of marijuana upon doctor recommendation. The Ninth Circuit Court of Appeals reviewed the standards of the commerce clause, and the validity of applying the CSA to medical marijuana use.

Perez ruled that Congress could regulate "class activities" which "substantially" affected interstate commerce. Previous federal court cases ruled that drug trafficking belonged to a "class of activities" that affected interstate commerce, thus subjected to congressional regulation. The Ninth Circuit Court ruled that the, "intrastate, noncommercial cultivation and possession" of medical marijuana, is a different "class of activities" than drug trafficking.[71] Medical marijuana proved different from drug trafficking because, first, it pursued and adhered to the principles of health and safety according to licensed physicians. Second, the market for medical marijuana in California was much smaller than the market for illicit substances. Third, the medical marijuana market was non-commercial and purely intrastate.[72] The Ninth Circuit Court relied on *United States v. McCoy (9th Circ. 2003)* in its evaluation of medical marijuana's "class of activities". *McCoy* invalidated a federal statute illegalizing the intrastate possession of child pornography

without the intention to distribute across state lines. The federal government could not regulate the intrastate possession of child pornography.[73] Much like *McCoy*, the Ninth Circuit Court ruled that the federal government could not regulate the intrastate possession and use of medical marijuana on the premise of regulating interstate commerce. Ultimately, medical marijuana belonged to a different "class of activities" than drug trafficking, and was not subject to federal regulation under the commerce clause.

Next the Ninth Circuit Court decided whether or not the CSA regulated an economic activity, pursuant to *Lopez*. It decided medical marijuana use was not an economic activity.[74] Patients did not purchase the medical marijuana; it was provided to them. Black's Law Dictionary defines commerce as the "exchange of goods and services."[75] Therefore, the Court decided that Prop 215 was not an economic activity, thus not subject to regulation under the commerce clause.

The Ninth Circuit Court determined whether or not the legislative findings supported the link between the use of medical marijuana and interstate commerce. *Morrison* established that congressional findings are subject to judicial scrutiny.[76] Congressional findings supported a causal relation between drug trafficking and interstate commerce. However, when Congress made these findings, the medical marijuana "class of activities" did not exist. Therefore, congressional findings could not be applied to medical marijuana. Furthermore, the Ninth Circuit determined the medical marijuana trade did not belong to the drug trafficking "class of activities".[77] In conclusion, congressional findings supporting the link between drug possession and use and interstate commerce did not apply to medical marijuana. In regards to the last standard of evaluating the commerce clause, the Ninth Circuit determined that the CSA did not limit its reach to a discreet number of cases.[78]

After reviewing these commerce clause standards, the Ninth Circuit Court of Appeals, in a 2-1 decision, ruled in favor of Raich, claiming the CSA did not apply to California's intrastate medical marijuana activity in light of the limited scope of the commerce clause. They decided distribution of medical marijuana could not be categorized as an economic activity. It belonged to a "class of activities" separate from drug trafficking. The congressional findings linking drug use to interstate commerce did not apply to medical marijuana use. For these reasons, Congress's interstate commerce power did not support the application of the Controlled Substance Act to California's medical marijuana use. On April 20, 2004, the Attorney General and DEA Administrator requested certiorari from the Supreme Court, and on June 28, 2004, the Supreme Court granted the writ of certiorari. The government brought their case to the Supreme Court, where the fate of California's medical marijuana use would be decided.

[56] Raich v. Ashcroft. No. 03-15481. United States Court of Appeals for the Ninth Circuit. 16 Dec. 2003. Print.15-16
[57] Carol Mithers. (2004, November 14) The Plaintiff; Angel Raich found a 'miracle' in medical marijuana. Now she's asking the Supreme Court to uphold her right to smoke it :[HOME EDITION]. *Los Angeles Times*, http://www.proquest.com/ retrieved April 25, 2011
[58] See "The Constitution of the United States," Article 1, Section 8 in Raich v. Ashcroft. No. 03-15481. United States Court of Appeals for the Ninth Circuit. 16 Dec. 2003. Print 10
[59] Coenen, Dan T., *Constitutional Law: The Commerce Clause* (Foundation Press, New York, 2004) 83-84
[60] ibid 85-86
[61] ibid 84-86
[62] Zeigler, Donald H. "The New Activist Cout." *American University Law Review* (1996). *LexisNexis Academic and Library Solutions*. 31 Mar. 2011. Web
[63] Smith, Rachel Elizabeth. "UNITED STATES v. LOPEZ: REAFFIRMING THE FEDERAL COMMERCE POWER AND REMEMBERING FEDERALISM." *The Catholic University Law Review* (1996). *LexisNexis Academic and Library Solutions*. Web. 31 Mar. 2011
[64] Coenen 105
[65] ibid 102-103
[66] Kmiec, Douglas W. "ENUMERATED POWERS AND UNENUMERATED RIGHTS: Gonzales v. Raich: Wickard v. Filburn Displaced." *Cato Institute Cato Supreme Court Review* (2004). *LexisNexis and Library Solutions*. 31 Mar. 2011. Web.
[67] Coenen 103
[68] Howard, Ambre. "CURRENT EVENTS: UNITED STATES V. MORRISON 529 U.S. 598 (2000)." *American University Journal of Gender, Social Policy & the Law* (2001)
[69] See "The Constitution of the United States," Article I, Section 8.
[70] Raich v. Ashcroft. No. 03-15481. United States Court of Appeals for the Ninth Circuit. 16 Dec. 2003 3
[71] ibid 12
[72] ibid 13
[73] See *United States v. McCoy,* 323 F.3d 1114 (9th Cir. 2003)
[74] Raich v. Ashcroft 16
[75] See Black's Law Dictionary (7th ed. 1999) in Raich v. Ashcroft
[76] Raich v. Ashcroft 23
[77] ibid 22
[78] Ibid 23

III. Chapter III. Review of the Supreme Court Briefs

In the Supreme Court briefs, the government argued that the Controlled Substance Act applied to California's medical marijuana laws in four major points, which addressed all but one of *Morrison's* four standards of commerce clause application. They do not discuss the "jurisdictional hook" element of the CSA. First, The government claimed that activities permitted by Proposition 215 substantially affected interstate commerce. Second, the CSA established a comprehensive drug control system. Third, Congress could regulate the "intrastate manufacture, free distribution, and possession of marijuana". Fourth, they disputed the Ninth Circuit Court of Appeal's decision that medical marijuana belongs to its own separate class of activities. This is the framework the government argued against Proposition 215; however, the government introduced new evidence and arguments that the Ninth Circuit's opinion did not use. Points one and three are very similar in nature. Point one used legal precedent to argue why Prop 215 violated constitutional federal law. Point three focused on the establishment of a comprehensive drug control policy. The government argued that California's medical marijuana falls within this drug policy, and regulation of medical marijuana was essential in regulating the this drug policy, thus making the regulation of medical marijuana constitutional under the commerce clause. Raich and Monson argued within *Morrison's* commerce clause framework, but added the argument that by allowing the application of the CSA to California's medical marijuana policy, the court would effectively undermine federalism. Raich and Monson agreed with the Ninth Circuit Court's analysis of *Morrison's* four commerce clause standards; however, they introduced new arguments and evidence for each standard.

I. Is California's medical marijuana policy an intrastate activity that substantially affects interstate commerce?

Wickard v. Filburn (1942) established that Congress could regulate intrastate activity if that activity substantially affected interstate commerce. The government argued Congress could regulate the intrastate cultivation and possession of marijuana under the commerce clause and the necessary and proper clause because it substantially affected interstate commerce. The government relied on similarities in *Wickard* to prove medical marijuana bore a substantial effect on interstate commerce.[79] In *Wickard*, Filburn's wheat production was not commercial in nature meaning it did not involve the exchange of goods or services. The wheat was for personal use and not regarded as commerce. However, the Supreme Court ruled that even though Filburn's wheat did not enter the stream of commerce, it was subject to regulation under the interstate commerce clause.[80] The government drew on similarities between Filburn's wheat in *Wickard* and Raich's marijuana. Raich's marijuana was for personal use and did not enter the stream of commerce. So, if the Supreme Court ruled that the noncommercial, personal use of wheat affected interstate commerce, the same could be applied to medical marijuana. The government made certain to differentiate the object of regulation in *Wickard* with that in *Lopez*, since the Supreme Court ruled against the commerce clause's power in *Lopez*. In *Wickard,* Congress regulated an interstate activity, whereas in *Lopez*, it regulated a non-economic activity.[81] The government argued that by virtue of similarity with the *Wickard* case, medical marijuana substantially affects interstate commerce, thus subject to regulation by Congress.

Raich and Monson countered this argument by explaining three differences between *Wickard* and *Raich* that voided The government's argument that intrastate medical marijuana use affected interstate commerce. First, they argued the Agricultural Adjustment Act only applied to farmers producing wheat above a certain quantity quota. So, Congress determined that wheat quantity below a certain quota was not subject to the AAA because they did not affect interstate commerce. The CSA did not exempt small quantities of substances. It assumed that all quantities of controlled substances affect interstate commerce.[82] Second, *Wickard* involved an economic activity, whereas medical marijuana did not. The federal government allotted Filburn's farm 6.6 tons of wheat for production and sales; Filburn exceeded this quota by double. Raich and Monson did not partake in commercial activity. They only produced enough marijuana to support their personal medical needs, and have not participated in a commercial market.[83] Third, the *Wickard* court required Congress to provide evidence that Filburn's overproduction of wheat substantially affected the market. Congress provided the statistic: in the aggregate, nearly 30% of the nation's production of wheat is consumed on the farm on which it was grown.[84] This figure proved that in aggregate, Filburn and farmer who practiced the same home-consumption of wheat adversely affected the supply of the interstate wheat market.

Raich and Monson asked the Supreme Court to hypothetically overlook the fact that California's medical marijuana was not an economic activity. Even if it was part of a class of activities subject to interstate commerce, no evidence existed saying it substantially affected interstate commerce.[85] In California, the GAO determined the percentage of the population of medical marijuana users in four California districts. All four districts had less than one half of a percent registered medical marijuana users. Raich and Monson argued that if the rest of California's districts had similar statistics that medical marijuana could not have a substantial

effect on interstate commerce. California's medical marijuana use was ineffectual compared to the estimated 10.5 billion dollar nationwide marijuana market in 2000.[86] Raich and Monson defended against the government's *Wickard* argument, and provided medical marijuana use statistics to show that Proposition 215, even in the aggregate, did not substantially affect the national marijuana market.

II. Does the CSA establish a comprehensive drug control system that regulates medical marijuana?

The government argued that the Congress under the commerce power could regulate commercial marijuana activity. According to the government, all marijuana activity is commercial in nature and passes through foreign and interstate trade channels.[87] The CSA intended to create a comprehensive and "closed" system for drug production, transportation, and distribution. The system banned all controlled substances, Schedules II-V, unless Congress gave specific authorization for the distribution of said substances. The CSA banned schedule I substances outright. All other distributors of controlled substances violated the federal law.[88] The government argued that the CSA had the constitutional right to establish a comprehensive drug control system because marijuana often passed over state and national lines. To prove that the marijuana market often flowed through interstate and foreign commerce, the government relied on statistics from the *Illicit Drug Prices* in the December 2003 issue of Narcotics Digest Weekly. The article listed the prices for a type of Canadian marijuana in all fifty states. In short, all marijuana cultivation and possession was a part of a larger commercial marijuana market. This interconnected marijuana market penetrated the channels of interstate and foreign

commerce. By virtue of the commerce clause, the CSA created a comprehensive and "closed" controlled substance system to regulate all aspects of the marijuana market, including simple possession and use.

Raich and Monson asserted that the comprehensive system argument violates the basic principles of federalism. If the argument were applied to everything, states would lose their ability to exercise basic police powers.[89] Raich and Monson cited *NLRB v. Laughlin Steel Corp. (1937)* saying a balance must be found between the federal and state powers.[90] They also cited *Lopez* and *Morrison* as two examples of when Congress used the commerce clause to regulate policy traditionally left under state control. Furthermore, *Whalen v. Roe (1977)* declared states have the power to regulate medicine and drug administration. *Linder v. United States (1925)* ruled that the federal government could not directly regulate medical practices.[91] These cases established boundaries between federal and state power. Raich and Monson used these past Supreme Court decisions to say that Congress could not regulate drug and medicine policies.

To further condemn the comprehensive system argument, Raich and Monson claimed a history of federal deference to state law. The court in *Parker v. Brown (1943)* decided the Sherman Act applied as long as it did not interfere with contemporary state laws. In the legislative history, if Congress did not delineate its intentions of overriding state law, the court must assume the Sherman Act did not invalidate contemporary state contract laws.[92] In light of *Parker*, Raich and Monson claimed that Congress should have to notify its intent of overriding state action, pursuant to *Gregory v. Ashcroft (1991)*.[93] The decision in *Parker* can be applied in *Raich*. The CSA's legislative history did not show any intention of abating state drug control; therefore, California should be able to continue their compassionate use program.[94]

III. Can Congress regulate an intrastate, noncommercial activity?

The government used the comprehensive system argument, hypothetical situations, and congressional findings to link California's medical marijuana program to interstate commerce. The argument hinged on the idea that medical marijuana fell within the broader class of activities of "controlled substances." Previous Supreme Court cases found that Congress may regulate the class of activities known as "controlled substances" because they substantially affect interstate commerce: a principle pursuant to *Perez*. The government argued that medical marijuana was a "controlled substance," and therefore subject to federal regulation under Congress's comprehensive and "closed" system. However, they did not support this claim until part IV. Under the assumption that medical marijuana is a "controlled substance, they used congressional findings to provide evidence linking that class of activities to interstate commerce. Then, the government listed possible hypothetical situations where California's medical marijuana may affect interstate commerce. Finally, they claimed medical marijuana undermines the CSA and its comprehensive system and poses a threat to public health.

The "wholly intrastate manufacture, free distribution, and possession of marijuana" belonged to a class of activities that affect the interstate marijuana market. The regulation of intrastate medical marijuana is necessary and proper in regulating the interstate marijuana market.[95] The government relied on *Lopez* and congressional findings to prove the link between intrastate drug activity and interstate commerce. First, *Lopez* permitted Congress to ban intrastate activity if it substantially affected interstate commerce. Second, congressional findings

concluded that locally distributed drugs were often transported over state lines, or drugs cultivated locally were often transported over state lines thus making drugs subject of interstate regulation.[96] Also, local possession of controlled substances increased the local supply of those drugs, which increased the local demand. An increase in the local supply and demand of drugs caused an increase in the supply and demand of the drug trafficking market. The government claimed that if the federal government could not regulate intrastate drug activity, the supply and demand for interstate markets would increase dramatically.[97]

The government laid out hypothetical situations or possible problems with intrastate medical marijuana possession and how it could affect interstate markets. First, medical marijuana cultivators could produce more marijuana than is medically needed. With this surplus, cultivators could sell it, inflating black market supply, and affecting interstate commerce.[98] Second, the government argued that medical marijuana use replaces use of other legitimate drugs, which has an adverse effect on the markets for lawful medications.[99] Third, law enforcement could not distinguish between marijuana that was cultivated and used solely within the cultivator's home state, and marijuana that has breached interstate lines. The latter argument claimed that all drug activity is indistinguishable, and falls into the class of activities of "controlled substances".[100] This last problem posed a threat to the comprehensive drug control system the CSA purportedly creates. The "closed" system allowed for a means to produce, transport, and distribute controlled substances under "strict control" for medical purposes. It combated drug abuse and diversion, which is selling, prescribed substances into the black market.[101] Medical marijuana use undermined this "closed" system because it allows the cultivation and use of a Schedule I drug, not subject to federal regulation.[102] California's

medical marijuana affected interstate commerce in the previously enumerated ways, and thus he government argued the federal government should regulate it.

Raich and Monson used *Morrison's* four standards to argue why the intrastate, noncommercial use of medical marijuana does not affect interstate commerce. They attacked The government's comprehensive system argument, use of congressional findings, and hypothetical situations. According to Raich and Monson, the comprehensive system argument violated federalism, and proved too expansive by nature. The congressional findings did not apply to the subclass of activities of medical marijuana. Raich and Monson dismissed the The government's hypothetical arguments because no evidence existed suggesting they would happen.

According to Raich and Monson, the CSA was unconstitutional in its application to Prop 215 under *Morrison's* four commerce clause standards. First, California's medical marijuana was not an economic activity because there is no exchange of goods or services, and the marijuana cultivation was not part of a business. Raich and Monson used the following analogy: if a homeowner plants flowers in their backyard, he or she is different than a person who runs their own nursery and sells flowers. For The government, the homeowner who planted his or her own flowers would be engaging in economic activity.[103] Second, the CSA did not have a "jurisdictional element" that limits its application to a specific set of cases.[104] Third, congressional findings cannot be applied to intrastate medical marijuana use. These findings prove too broad by focusing on all "controlled substances". Congress claimed most controlled substances pass through the channels of interstate or foreign commerce; however, these findings do not inform on whether marijuana under Proposition 215 enters interstate or foreign commerce.[105] Raich and Monson said, "It is undisputed that the cannabis used by Raich and

Monson for medical purposes does not move, is never transported, and has never flowed through interstate commerce."[106] Fourth, the government incorrectly categorized California's medical marijuana into the class of activities of all "controlled substances" which flowed through interstate commerce. The government argued that *Morrison's* four standards did not uphold the CSA's application to Proposition 215.

According to Raich and Monson, the CSA's purported comprehensive system proved too expansive and encompassing, infringed on states' rights, and effectively destroyed federalism.[107] The government's arguments in favor of a link between medical marijuana and interstate commerce stressed three points: patients could violate state law by diverting their medication into commerce, the state cannot adequately enforce marijuana laws because they cannot decipher intrastate marijuana from interstate marijuana, and every marijuana violation substantially affects interstate commerce.[108] In truth, Raich and Monson argued the small number of medical marijuana users in California cannot substantially affect the marijuana black market. They also argued medical users did not use the black market because the quantity and quality of the drug is unknown.[109] Furthermore, there was no evidence to suggest medical marijuana cultivators would divert their surplus marijuana to the black market, and California already has laws prohibiting diversion.[110] Raich and Monson produced more evidence against the link between the federal comprehensive drug system and simple possession of marijuana. The San Francisco DEA specifically targeted marijuana trafficking that exceeded 1000 pounds or 500 plants. In 1999, only 1.2% of 38,288 of federal marijuana arrests were for simple possession of marijuana.[111] According to Raich and Monson, these were the reasons why California's medical marijuana policy did not substantially affect interstate commerce.

IV. Did medical use of marijuana distinguish it from other marijuana which was subject to federal regulation?

The government agued the Ninth Circuit was wrong in saying that the medical use of marijuana put the drug into a different class of activities than drug trafficking. The fact that marijuana was used for medical purposes was irrelevant to the case. Prop 215 did not create a separate class of activities. Medical marijuana belonged to the larger class of activities known as drug trafficking. The government argued this was because Raich and Monson's marijuana use was economic by nature. According to *Proyect v. United States (2nd Circ. 1996)*, federal courts must determine if something falls under the commerce clause by its class of activity.[112] Medical marijuana was not different than the illicit marijuana market for two reasons. First, the government relied on the similarities between Raich and *Wickard*, which have already been discussed. Second, they pointed out that when the DEA destroyed Monson's plants, she had to resort to buying marijuana on the illegal market. Raich and Monson were cultivating a product that would otherwise be obtained through an interstate market.[113] Finally, the government used the comprehensive system argument to invalidate the importance of the medical nature of marijuana. The CSA's "closed" system accounted for the medical nature of controlled substances. Marijuana is a schedule I drug, meaning it has no medical purpose, and California undermined the system by producing and distributing it to patients.[114] The CSA requires physicians to register under it, so a recommendation from a licensed physician cannot exclude medical marijuana from the CSA's reach.[115]

Part four of The government's argument revisited most of the points made in the first three parts of their argument. Raich and Monson's four standard argument already addressed the

economic nature and class of activity of medical marijuana. However, Raich and Monson addressed the medical necessity of marijuana in the last part of the their argument. According to the Doctrine of Necessity, people are permitted to break certain laws if it is necessary, meaning no reasonable alternative exists. Raich's physician predicted she would die without smoked marijuana and no alternative medication would substitute effectively.[116] Furthermore, Raich and Monson argued withholding Raich from marijuana use violated her Fifth Amendment rights. The due process clause guarantees a basic right to life, and Raich may very well die without marijuana. Under this argument, the Fifth Amendment protects the right to marijuana use.

Conclusion

In their brief, the government created a four part argument. First, they claimed California's medial marijuana did not substantially affect interstate commerce because of the similarities between *Raich* and *Wickard.* In *Wickard*, Congress regulated a home-grown commodity, wheat, for personal use under the jurisdiction of the commerce clause. In *Raich*, Raich and Monson cultivated and used marijuana within their homes, and their drug never entered the stream of commerce. If Congress could regulate the wheat in *Wickard*, it could regulate the marijuana in *Raich*. Second, The government argued the CSA created a comprehensive system for regulating controlled substances including marijuana. This idea relied on the claim that controlled substances often flow through interstate and foreign channels of commerce. Therefore, Congress under the commerce power could create a comprehensive system to regulate these controlled substances. Third, California's medical marijuana fell under

the class of activities of "controlled substances" which affected interstate commerce. The federal courts did not judge the link between a single activity and interstate commerce; rather, the link between the class of activities that incorporates single activity and interstate commerce. Congressional findings supported the link between controlled substances and interstate and foreign commerce based on the assumption that drugs during production, transportation, and distribution would pass through interstate or foreign borders. Thus controlled substances as a class of activities were subject to federal regulation. Fourth, California's medical marijuana fell under the class of "controlled substances" because it is an economic activity, and the medical nature of the drug is irrelevant to its class of activity. Raich and Monson cultivated a product for which a developed interstate market already existed. The CSA regulated this market, and denied the medical validity of marijuana since it is categorized as a schedule I drug.

Raich and Monson argued California's medical marijuana did not substantially affect interstate commerce according to *Morrison's* four standard analysis, and violated the basic principles of federalism. First, Raich and Monson's activity was not an economic because Raich and Monson did not pay for their marijuana. Second, congressional findings support link between controlled substances and interstate commerce, but do not support the link between the intrastate cultivation and use of marijuana and interstate commerce. Third, medical marijuana did not belong to the class of activities of drug trafficking, but constituted a separate class of activities that did not affect interstate commerce. Fourth, the CSA did not limit its reach to a discrete number of cases. Finally, Raich and Monson claimed there was a tradition of federal deference to state law. Federal legislation should not override state policy, unless Congress intended to. The Supreme Court reviewed the facts of the case, and published its Opinion of the Court on June 6, 2005.

[79] Brief for Petitioner, *Gonzales v. Raich* No. 03-1454 filed August 2004; available at *Landmark Briefs and Arguments for the Supreme Court of the United States: Constitutional Law 2004 Term Supplement*. Edited by Gerhard Casper and Kathleen Sullivan. Vol. 343 (Bethesda: Maryland, LexisNexis, 2005)103-104
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[81] ibid 110
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[83] ibid 163-164
[84] ibid 164-165
[85] ibid 165
[86] ibid 165-166
[87] Brief for Petitioners 104
[88] ibid 111-112
[89] Brief for Respondents 185
[90] ibid 187
[91] ibid 188-189
[92] ibid 190-191
[93] ibid 191
[94] ibid 192
[95] Brief for Petitioner 114-115
[96] ibid 117
[97] ibid 117-119
[98] ibid 120
[99] ibid 120
[100] ibid 124
[101] ibid 126-127
[102] ibid 126, 129
[103] Brief for Respondent 173-174
[104] ibid 175
[105] ibid 176-177
[106] ibid 177
[107] ibid 185
[108] ibid 182
[109] ibid 178
[110] ibid 178-179
[111] ibid 180
[112] Brief for Petitioner 130
[113] ibid 131-132
[114] ibid 134
[115] ibid 135
[116] Brief for Respondent 196

IV. Chapter IV. Review of the Majority, Concurring, and Dissenting Opinions

On June 6, 2005, the Supreme Court, in a 6-3 decision, reversed the Ninth Circuit Court of Appeal's decision, and upheld the constitutionality of the Controlled Substance Act regulation of California's medical marijuana policy. Justice John Paul Steven delivered the Opinion of the Court. Justice Antonin Scalia wrote a concurring opinion, and Justice Sandra Day O'Connor and Justice Clarence Thomas each dissented. Justice Stevens applied the rational basis test to the constitutionality of the CSA, which stated in effect that if Congress had rational grounds for concluding that medical marijuana use affected interstate commerce, then the activity could be regulated under the interstate commerce clause. Justice Scalia believed the substantial effects test was "misleading".[117] He relied on a textualist interpretation of the interstate commerce clause and the necessary and proper clause to determine that the CSA applied to Raich and Monson's activities. He believed that an activity did not have to "substantially" affect interstate commerce or be of economic nature for Congress to regulate it. Congress need only find necessary and proper to regulate an activity in-order to regulate interstate commerce effectively.[118] His opinion gave a more liberal interpretation of congressional commerce power than Stevens's opinion. Justice Thomas used the same logic as Justice Scalia, by evaluating the commerce clause and necessary and proper clause to determine medical marijuana's legality. However, Justice Thomas believed the scope of the commerce power was too narrow to regulate medical marijuana. He pursued the founder's original understanding of the commerce clause's reach by relying on *McCulloch v. Maryland* and the original definition of commerce. Justice O'Connor believed the majority opinion allowed the federal government to infringe on

California's police powers and disrupted the balance of power between the federal and state governments. She relied on the *Morrison's* four factor test to conclude that the CSA did not constitutionally apply to intrastate medical marijuana use.

Justice Stevens's Opinion of the Court

Justice Stevens decided the CSA constitutionally applied to California's medical marijuana because Congress could rationally conclude medical marijuana could substantially affect the interstate illicit marijuana market. The rational basis relied on three factors: the CSA's findings, the expansive marijuana market, and *Wickard*. Justice Stevens claimed Congress had the power under the commerce clause to regulate intrastate activities that substantially affected interstate commerce. The substantial effects test relied on three points: the economic nature of the activity, congressional findings, and the class of the activity.

Justice Stevens pointed out the similarities between *Raich* and *Wickard* to argue that Congress could regulate the noncommercial aspect of a market as long as it was within a class of activities that would affect the market. He said both Filburn and Raich, "cultivate[d], for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market."[119] In *Wickard,* Congress had a rational basis to believe that home consumption of wheat, in aggregate, could affect the interstate market. In *Raich,* Congress had a rational basis to believe the demand in the interstate drug market may divert medical marijuana into the black market.[120] Then, he attacked Raich and Monsons's three purported differences between *Wickard* and *Raich.* In Raich and Monson's brief, Raich had argued the AAA exempted farming

operations smaller than Filburn's because Congress recognized small farms did not substantially affect interstate commerce. Second, she had claimed the AAA regulated an economic activity, whereas medical marijuana was not. Third, the *Wickard* court had required evidence that wheat affected the interstate market, and there was no evidence saying medical marijuana affected interstate commerce. Justice Stevens's attacked these differences first by maintaining that the AAA regulation's exemption of small farming operations was irrelevant because Congress could still regulate the class of activity that substantially affected interstate commerce. Second, the non-economic claim was irrelevant since in *Wickard,* Congress regulated the noncommercial aspect of Filburn's farm. Third, congressional findings provided evidence that drugs substantially affected interstate commerce.[121] In light of these arguments, Justice Stevens claimed Respondents were wrong in stating that the congressional findings were inapplicable. *Lopez* said Congress did not have to provide "particularized" findings to support their legislation.[122] Therefore, findings supporting the link between controlled substances in general and interstate commerce were sufficient, and Congress did not have to prove medical marijuana, itself, substantially affected interstate commerce. However, Justice Stevens held that the government, in any case, need not prove a substantial effect between medical marijuana and interstate commerce, but only show a rational basis that the former could affect the latter. Concerns of law enforcement of drug-related activities and diversion into illegal channels of commerce provided this rational basis. In addition, Justice Stevens said the necessary and proper clause allowed Congress to regulate medical marijuana use since without regulation it would leave a "gaping hole" in the comprehensive system the CSA created.[123]

In regard to the economic nature of medical marijuana, Justice Stevens differentiated *Raich* from *Lopez* and *Morrison* by claiming the activities from both those cases (possession of

firearms inside a school zone and violence against women) completely fell outside the realm of interstate commerce and were non-economic activities. Justice Stevens deemed medical marijuana "quintessentially economic"[124], and defined economics as the "production, distribution, and consumption of commodities."[125] According to Justice Stevens, marijuana was such a commodity, thus an economic activity, which made congressional regulation of the substance constitutional under the commerce clause.

In regard to medical marijuana's class of activities, Justice Stevens ruled marijuana did belong to a subclass of substances different than other illegal substances. However, the rational basis test still applied to this class of substances because the medical nature of its usage was not a "distinguishing factor" in its regulation.[126] This was because the CSA created a comprehensive regulatory system, which banned marijuana altogether. The fact that marijuana was used for medical purposes did not distinguish it from other controlled substances under the CSA, since the CSA regulated numerous other medically used substances.[127] Justice Stevens concluded that Respondent's claim that California's medical marijuana has "hermetically sealed" itself from the larger illicit market was "dubious"; therefore Congress could rationally reject this idea.[128] So, according to Justice Stevens, medical marijuana did belong to a subclass of activities of controlled substances; however, Congress could rationally believe this class of activities could affect interstate commerce.

The majority opinion decided that Congress could rationally conclude that medical marijuana could substantially affect interstate commerce. Justice Stevens said that *Wickard* established the precedent of regulating noncommercial, intrastate activities. *Raich* differed from *Lopez* and *Morrison* because medical marijuana did not fall out of the realm of commerce completely, and medical marijuana was innately economic. The medical nature of the drug did

not distinguish its use from other drug use because the CSA regulated other medically used controlled substances and banned marijuana use completely. The majority opinion used these reasons to uphold the constitutionality of the CSA's application to California's medical marijuana policy.

Justice Scalia's Concurring Opinion

In his opinion, Justice Scalia sought the "original understanding" of the constitution's commerce clause and necessary and proper clause, and how they applied to the intrastate use of medical marijuana. Justice Scalia wrote the notion that Congress can regulate intrastate activities that substantially affect interstate commerce was wrong. Instead, he argued Congress could regulate purely local activities even if they did not substantially affect interstate commerce. However, the regulation of these purely local activities must be necessary and proper in-order to effectively regulate interstate commerce. Congress could do this two ways: first, Congress could "devise rules for the governance of commerce between the States", or second, Congress could prohibit anything obstructing or stimulating interstate commerce.[129] Under this interpretation, Scalia believed Congress could regulate much more than it could under the substantial effects test. The Cato Institute described Scalia's interpretation as a "leap" forward without a clear limit to the commerce power.[130]

Justice Scalia interpretted *Lopez* and *Morrison* as holding that non-economic activities could not be regulated. He used *Shreveport Rate Cases (1914)* to argue the necessary and proper standard for applying the commerce clause. Then, he said the CSA established a comprehensive

regulatory system that included marijuana, and pursuant to this, Congress may ban all interstate and intrastate marijuana activities. Justice Scalia distinguished *Raich* from *Lopez* and *Morrison.* The statutes involved in *Lopez* and *Morrison* fell completely outside the range of the commerce power, and the arguments that link the statutes and interstate commerce were laced with inferences. *Lopez* and *Morrison* did not dismiss non-economic activities from the reach of the commerce power. Justice Scalia said *Lopez* allowed for the regulation of non-economic activities that somehow "undercut" interstate commerce if not regulated.[131] Also, *Lopez* and *Morrison* differed because they did not decide over a comprehensive scheme such as the CSA, rather they ruled on single statutes.[132]

In support of the necessary and proper clause's application to the interstate commerce power, Justice Scalia wrote that under *United States v. Wrightwood Dairy Co. (1942)*, Congress could regulate commerce in such a way that "it possesses every power needed to make that regulation effective."[133] Justice Scalia argued this was the standard for the reach of the interstate commerce power. He relied on the *Shreveport Rate Cases*, which allowed Congress under the necessary and proper clause to regulate "intrastate transactions" in pursuit of regulation interstate commerce.[134] Under his standard of review, Justice Scalia argued Congress could regulate medical marijuana under the comprehensive regulatory drug system the CSA created.[135] In other words, the regulation of the intrastate, noncommercial use of medical marijuana was necessary and proper for the regulation of the interstate marijuana market. Justice Scalia argued marijuana was a commodity and could not be differentiated between interstate and intrastate, and that the federal government should not have to rely on the state government to enforce drug policies for the sake of federalism.

The expansive nature of the opinion was surprising for the traditionally conservative, textualist Supreme Court Justice. In short, Justice Scalia disapproved of the substantial effects test. Rather, he maintained that Congress could regulate any activity that it deemed necessary and proper in regulating interstate commerce. It did not matter what class of activities the statute belonged to or if it was an economic activity. His opinion hinged on the idea that medical marijuana activities would undermine the CSA's comprehensive regulatory system, thus regulating medical marijuana was necessary and proper for Congress to effectively regulate the comprehensive system. In disapproval of the opinion, The Cato Institute framed Justice Scalia's opinion as regulating a small class of "sick" medical marijuana users were necessary and proper to defend against the illicit drug market. The Institute also showed its surprise for the expansive reading of the commerce power.[136]

Justice O'Connor's Dissenting Opinion

Justice O'Connor dissented from the majority decision. She argued states had the right to experiment with social policy, and the CSA's application to California's medical marijuana policy violated the basic principles of federalism. She applied *Morrison's* four commerce clause standards to argue medical marijuana did not involved interstate commerce. According to O'Connor, states police powers historically "defined criminal activity" and protected the "health, safety, and welfare of citizens."[137] With the enactment of the CSA, the federal government aimed at creating an "all-encompassing" comprehensive regulatory system that outlawed the "possession, distribution, and possession of controlled substances."[138] The government's

comprehensive system argument hinged on the notion that medical marijuana fell within the "controlled substances" class of activity. This system did not differentiate between interstate and intrastate controlled substances; it simply maintained all controlled substances were subject to federal regulation. In her argument that medical marijuana constituted a separate class of activity, Justice O'Connor stated that by allowing Congress to group the intrastate, noncommercial medical marijuana use with the larger class of activities of the illicit drug market, it removed "meaningful limits on the commerce clause."[139] She criticized the majority's holding that *Lopez* and *Morrison* were different because they were single statute instances that fell outside interstate commerce. However, the CSA established a comprehensive, multi-faceted drug law, and that could not isolate certain classes of drug usage. In line with this reasoning, intrastate, noncommercial medical marijuana use fell within the scope of interstate commerce. Justice O'Connor argued this was wrong because it allowed Congress to virtually regulate anything as long as it thought the activity in question was essential in regulating a larger comprehensive system.[140] She argued Congress, under the guise of regulating a comprehensive system, could regulate nearly anything, thus upsetting the balance between federal and state powers.

In regards to medical marijuana's economic nature, she criticized the majority's definition of "economics" on the account that it was too broad, and could encompass any "productive human activity".[141] This dictionary definition of "economics" disguised the real issue: whether medical marijuana was a local or national activity. Raich and Monson possessed and used marijuana; however, they did not interact with commerce making the drug use a noncommercial activity. The justice rejected the notion that noncommercial possession could affect the market by substituting for the commercial use of marijuana. All commercial activity

has noncommercial substitutes, for example charades could be a substitute for movie tickets. She concluded that regulating noncommercial activities because they could affect the demand for commercial goods was unconstitutional and violated the basic principles of federalism.[142]

Justice O'Connor attacked the majority's use of *Wickard*, claiming it was taken out of context and applied unjustly. She said the majority relied on *Wickard* to prove Congress could regulate "any home consumption of a commodity for which a national market exists."[143] According to Justice O'Connor, the Agricultural Adjustment Act (AAA) did not regulate farms producing under a certain quota because Congress, at the time, recognized that those small farms could in no way affect interstate commerce. The AAA regulated farms that produced over six acres of wheat, not a few plants. Therefore, *Wickard* did not automatically allow Congress to regulate anything on a small scale for which an interstate market existed. There was no evidence to support that small amounts of medical marijuana affected interstate commerce or the CSA's comprehensive system.[144] This argument against *Wickard* fits in with *Morrison's* substantial effects test. In this vein, Justice O'Connor argued against the majority's reasoning as to why Congress could regulate the intrastate, noncommercial use of medical marijuana.

Furthermore, Justice O'Connor criticized the link between medical marijuana and interstate commerce by attacking the majority's reliance on *Wickard* and Congress's findings linking drug use to interstate commerce. The *Wickard* court required evidence that farm's home-consumption of wheat affected interstate commerce. The court knew that home-consumption of wheat, in aggregate, affected the market by 20% of wheat supply.[145] This statistic proved a substantial effect on the interstate market. Furthermore, Justice O'Connor said congressional findings linking drug use to interstate commerce was not empirical evidence but "legislative insistence" on the absolute nature of the CSA.[146] Justice O'Connor said there was no empirical

evidence supporting the link between medical marijuana use and interstate commerce; therefore, medical marijuana failed the substantial effects test.

Justice Thomas Dissenting Opinion

Justice Thomas adopted a textualist approach in his decision by determining if it was necessary and proper for Congress to regulate the intrastate medical marijuana in-order to effectively regulate the interstate drug market. He sought the original understanding of the word 'commerce' and the necessary and proper clause to determine the extent Congress's commerce power. In the latter half of his argument, Justice Thomas attacked the majority's reasoning in linking medical marijuana to interstate commerce. 'Commerce' as defined by Madison's notes on the Constitutional Convention, the Federalist Papers, and ratification debates was "trade or exchange (and shipping for these purposes)".[147] Then, Justice Thomas determined the original understanding of the necessary and proper clause as defined by *McCulloch v. Maryland (1819).* Chief Justice Marshall maintained for something to be constitutional under the necessary and proper clause it must maintain "letter and spirit of the constitution", be "appropriate", and "plainly adapted".[148] "Plainly adapted" meant "obvious, simple, and direct relation".[149] Justice Thomas believed by this standard, the CSA did not regulate medical marijuana use because it belonged to a subclass of drug activity that was state-regulated. It was not "obvious" why it was necessary for Congress to regulate medical marijuana use when it did not enter the stream of commerce, users must have a serious illness, users must obtain a physician's approval, and users must give medical information and register for medical marijuana card. On these grounds,

medical marijuana use was a distinguishable class of activities that did not undermine the CSA's comprehensive regulatory system. Therefore, it was not necessary for Congress to regulate medical marijuana use.[150] Justice Thomas found that regulating medical marijuana use was not 'proper' on the basis that it upset federalism. Allowing Congress to regulate medical marijuana infringed on states' general police powers, thus rendering it improper.[151]

In the second half of his dissenting opinion, Justice Thomas rebutted the majority's three arguments as to why the commerce power regulated medical marijuana use: first, medical marijuana substantially affected interstate commerce, second, regulating medical marijuana was "essential" to regulate interstate drug market, third, that regulating the medical marijuana was "incidental" to regulating the interstate drug market.[152] Justice Thomas argued that Congress could not regulate non-economic activities that substantially affect interstate commerce; rather it could regulate activities whose regulation is a necessary and proper means to regulate the interstate market. The justice said the majority expanded the scope of medical marijuana by defining it as the "intrastate manufacture and possession of marijuana", and did not focus on actual evidence linking medical marijuana with interstate commerce.[153] Then, he argued that the majority expanded the definition of economics to the "broadest possible", and that this was a mockery to Madison's idea of limited federalism. Furthermore, Justice Thomas said the Supreme Court should focus on the words present in the Constitution; "economics" was not one of those words. The majority's use of the word "economics", instead of "commerce", further expanded the scope of the commerce power.[154] Justice Thomas argued that by doing this the majority was "rewriting" the commerce power based on the idea that if Congress cannot regulate "the entire web of human activity, Congress will be left powerless to regulate the national economy effectively."[155] Justice Thomas believed that the majority expanded the commerce

clause by using the substantial effects test and definition of "economics" among other tactics to prove that medical marijuana affected interstate commerce.

According to Justice Thomas, regulating intrastate medical marijuana was "essential and incidental" to the CSA's comprehensive regulatory system was unconstitutional. As previously reasoned, regulating medical marijuana use was not "essential" in regulating the CSA's comprehensive scheme according to the necessary and proper clause. Furthermore, Justice Thomas contended that regulating an activity cannot be "purely incidental". Justice Thomas previously explained why California's allowance of medical marijuana did not undermine the comprehensive system. In light of Justice Thomas's argument pertaining to the commerce power thus far, he contended that medical marijuana was noncommercial and purely intrastate; therefore, Congress could not regulate it under the interstate commerce clause.[156]

Conclusion

Justice Stevens's opinion did not rely on any constitutional grounds or firm Supreme Court precedent. The majority merely decided that if Congress could rationally conclude that intrastate, noncommercial medical marijuana use could affect interstate commerce then Congress could regulate it. However, the majority delivered two convincing arguments. First, Congress had to regulate intrastate medical marijuana use to effectively regulate the CSA's comprehensive regulatory system. Second, that *Wickard* allowed Congress to regulate intrastate, noncommercial commodities for personal use. However, the majority opinion ignored Justice O'Connor's point that the wheat production in *Wickard* was on a much larger scale than the marijuana use and

cultivation in *Raich.* The Secretary of Agriculture under the AAA regulated several acres of wheat, whereas in contrast, the DEA only destroyed Monson's six marijuana plants. Justice O'Connor made another stronger argument against *Wickard*; the *Wickard* court had empirical evidence of its effects on interstate commerce. Whereas, in *Raich,* the majority opinion dismissed the need for actual evidence, and said that only a rational basis is needed. Justice O'Connor said the majority's opinion expanded the Congress's power to regulate nearly all "productive human activity".[157] The only clear limit to the commerce power is if the statute in question falls entirely outside the scope of interstate commerce and is not part of a comprehensive regulatory system.

Justice Thomas rooted his argument in powers enumerated by the Constitution, mainly, the interstate commerce clause and necessary and proper clause. In this vein, he made a good point by saying the Constitution does not authorize Congress to regulate "economics", but "commerce". This argument intended to disparage the majority's broad definition of "economics." Like Justice Thomas, Justice Scalia rooted his argument in the Constitution's interstate commerce clause and necessary proper clause. He made a solid, logical argument in saying that Congress can only regulate activities necessary and proper in regulating interstate commerce. However, Justice Scalia failed to explain how intrastate medical marijuana use is necessary and proper in regulating interstate commerce. He merely said Congress could regulate it under the CSA's comprehensive regulatory system. He also stated that the federal government should not have to rely on state law to regulate marijuana in the name of federalism. Justice O'Connor—who rooted her argument in a traditional understanding of federalism and Supreme Court precedent— disagreed with Justice Scalia's statement about federalism. She argued that

an “all-encompassing” comprehensive regulatory system removed “meaningful limits on the commerce clause.”[158]

[117] See *Gonzales v. Raich* 545 U.S 34 (2005)
[118] ibid 34-35
[119] ibid 18
[120] ibid19
[121] ibid 14-17
[122] ibid17-18
[123] ibid 18-19
[124] ibid 22-23
[125] see Webster's Third International Dictionary. Dictionary 720 (1966)
[126] See *Gonzales v. Raich,* 545 U.S 24 (2005)
[127] ibid 24-25
[128] ibid 24-25
[129] ibid 35
[130] Kmiec, Douglas W. "ENUMERATED POWERS AND UNENUMERATED RIGHTS: Gonzales v. Raich: Wickard v. Filburn Displaced." *Cato Institute Cato Supreme Court Review* (2004). *LexisNexis and Library Solutions*. 31 Mar. 2011. Web
[131] see *Gonzales v. Raich* 545 U.S 38 (2005)
[132] ibid 38-39
[133] see *United States v. Wrightwood Dairy Co.* 315 U.S 119 (1942)
[134] see *Shreveport Rate Case* 234 U.S 353 (1914)
[135] *Gonzales v. Raich* 545 U.S 38-39 (2005)
[136] Kmiec
[137] *Gonzales v. Raich* 545 U.S 42-43 (2005)
[138] ibid 45
[139] ibid 45
[140] ibid 49-50
[141] ibid 49
[142] ibid 49-50
[143] ibid 50-51
[144] ibid 51
[145] ibid 51
[146] ibid 54
[147] ibid 58-59
[148] see *McCulloch v. Maryland* 17 U.S 419-421 (1819)
[149] see *Sabri v. United States* 541 U.S 600, 613 (2004)
[150] *Gonzales v. Raich* 545 U.S 63 (2005)
[151] ibid 62-63
[152] ibid 71
[153] ibid 68
[154] ibid 69-70
[155] ibid 70
[156] ibid 73-74
[157] ibid 45
[158] ibid 45

V. Chapter V. What Remains: the Commerce Clause and Medical Marijuana

Gonzales v. Raich was the furthest-reaching interpretation of the commerce clause to date. However, it had little effect on later Supreme Court cases and California's medical marijuana policy. Through April 2011, *Raich* has been cited in thirteen Supreme Court cases since being decided and has not had any significant bearing on those cases.[159] So far it has not been used in other challenges to the commerce power. The Supreme Court has applied different standards of review in commerce clause cases since *Raich*, particularly *United States v. Comstock.* After *Raich*, the Supreme Court reviewed a few cases that challenged the application the CSA to certain drug related activities. *Gonzales v. Oregon* and *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal (UDV)* challenged the CSA and won. These cases strongly resembled *Raich*, but escaped the CSA's comprehensive regulatory system. The Supreme Court applied different standards of review in *Oregon* and *UDV,* thus the CSA did not regulate the drug-related activity in question. The Supreme Court applied the rational basis test in *Raich*, which may explain why it has had little effect on later commerce clause cases. There appears to be no clear reason why the Supreme Court applies the standard of review that they do. However, in the years after *Raich*, the Supreme Court has maintained the expansive nature of the commerce clause.

After *Gonzales v. Raich,* Angel Raich challenged the federal government on her right to use medical marijuana again. In 2007, the Ninth Circuit Court of Appeals ruled that federal government has the right to arrest and prosecute those using medical marijuana in compliance with state law. Raich challenged the federal government on the basis that marijuana was a

"medical necessity".[160] Judge Harry Pregerson denied her protection from federal prosecution. However, he stated that if the government criminally prosecuted Raich for marijuana use and possession; she would most likely meet the requirements for medical marijuana necessity.[161]

Even though *Raich* upheld the CSA's application to medical marijuana users, it did not invalidate the state law. Proposition 215 remained intact, although medical marijuana users were subject to federal prosecution.[162] In terms of congressional power, *Raich* opened the commerce clause to virtually limitless power. It did this in three ways. First, it defined "economics" in such a way that it was almost all encompassing. Second, Congress could now regulate non-economic activities as long as regulating said activity was "essential" in regulating a comprehensive regulatory system. Third, Congress did not need actual evidence to support an activity's substantial effect on interstate commerce, but merely a rational basis for assuming the connection.[163] Surprisingly, the Supreme Court did not use precedent established in *Raich* to uphold the expansion of the commerce clause. However, the Supreme Court did uphold the expansion of the commerce clause in other ways.

United States v. Comstock challenged the Adam Walsh Child Protection and Safety Act of 2006. This act established uniform laws regarding sex offender registration. *Comstock* decided the constitutionality of its Title III, which granted the Attorney General the power to commit those deemed "sexually dangerous" to federal custody. In a 7-2 decision, the Supreme Court said Congress had the power to regulate "sexually dangerous" people because of five factors including the necessary and proper clause.[164] These five factors were: the broad nature of the necessary and proper clause, the federal government's historical role regulating policy regarding the mentally ill, the federal government's interest in protecting the public's safety, the act's recognition of states' interests and powers, and act's narrow regulatory scope.[165] The

Supreme Court ruled that in light of these four factors and the necessary and proper clause that the act was constitutional. The court did not mention the commerce clause or a link between the factors and another constitutional enumerated power.[166] Even though the case did not rely on the commerce power, *Comstock* serves as an example of the ever-expanding nature of the federal government. It may even prove more expansive than *Raich*. If the Supreme Court had applied the precedent in *Raich* to the Adam Walsh Child Protection and Safety Act, the act would have proved unconstitutional because it did not fall under "economics" defined as the "production, distribution, and consumption of commodities".[167] While the Supreme Court did not use *Raich* in deciding similar commerce clause and necessary and proper clause cases, it did promote the expansion of federal power.

Even though the Supreme Court found the intrastate, noncommercial use of marijuana fell under the CSA's comprehensive regulatory system, the court ruled in *Gonzales v. Oregon* and *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal (UDV)*, that certain drug related activities were not a part of the comprehensive system. Oregon passed the Death with Dignity Act allowing doctors to prescribe lethal doses of drugs in-order to "facilitate" suicide.[168] Eight justices decided that the CSA did not apply to this activity. Although Justice Kennedy asserted in the Opinion of the Court that the federal government had the right to set national standards regulating the public's health and safety even if those standards pertain to intrastate acts. Furthermore, he said *Oregon* did not determine if the federal government could regulate physician assisted suicides, but that the CSA did not.[169] *UDV* dealt with another challenge to the CSA's comprehensive scheme. As a part of a religious ceremony, members of the UDV church drank a South American herbal tea, which contained the drug, DMT. DMT was a schedule I, hallucinogenic drug. The government challenged the church's right to drink the tea under the

Religious Freedom Restoration Act (RFRA). The government contended that by illegalizing the tea it would protect the health and safety of church members, prevent diversion into illicit channels of drug commerce, and comply with the 1971 United Nations Convention of Psychotropic Substances.[170] The Supreme Court applied strict scrutiny, required by the RFRA, in deciding that the government did not demonstrate a compelling argument in applying the CSA to the ceremonial tea.[171] The court rejected the government's comprehensive system argument and diversion argument that it accepted in *Raich*.[172] Both cases dealt with a small class of individuals using a schedule I substance for personal, medical or religious, reasons. While the cases were similar, the Supreme Court applied a strict scrutiny to *UDV* and the rational basis test to *Raich*. The RFRA required courts to apply a strict scrutiny analysis, meaning the government had to provide compelling evidence as to why the activity should be illegal. No law pertaining to *Raich* required a certain standard of review, thus the Supreme Court could apply the standard of review that they saw fit. These were two examples of cases that avoided federal regulation under the CSA's comprehensive regulatory system on an as-applied basis.

The reason the Supreme Court did not use precedents established in *Raich* in later cases may pertain to its standard of review. An article that evaluated the use of the rational basis test in equal protection clause cases from 1971 to 1996 stated that no case using the rational basis test had a "significant precedential impact on subsequent cases" and that the Supreme Court usually ignores the case after its decision. The article searched for a "predictable pattern" in rational basis Supreme Court cases that dealt with the equal protection clause.[173] The author tried to determine why the Supreme Court used the standard of review that they did. However, the only pattern he noticed was most of the cases dealt with a minority group of people, ranging from the mentally ill to "hippies."[174] The same article said the Supreme Court never explains why it uses

the rational basis test.[175] This analysis may explain, in part, why *Raich* in spite of its powerful commerce clause expansion has not had an impact on later Supreme Court cases. While *Raich's* use in future commerce clause, necessary and proper clause, and CSA cases remained low, it was the first case after *Lopez* and *Morrison* to establish the trend of an expanding federal legislative power.

While *Gonzales v. Raich* allowed for the continued federal prosecution of medical marijuana patients in California, the state's compassionate use programs remained intact. This led to an escalation in tension between the federal and state governments over the medical marijuana issue. In 2009, the federal government prosecuted a man for opening a state-authorized medical marijuana dispensary in the Central Coast. The charges were for distributing over one hundred kilos of marijuana. Jurors found him guilty and he faced a mandatory minimum sentence of five years in a federal penitentiary.[176] However, in October of 2009, the Obama Administration asked federal authorities and the DEA to cease the arrest and prosecution of medical marijuana patients in states that authorized such programs.[177]

After the federal versus state battle of medical marijuana programs cooled, California, in 2010, voted on a ballot initiative that would make the recreational use of marijuana legal. Proposition 19 would allow for twenty-one year and older Californians to possess up to an ounce of marijuana and a small number of plants.[178] The ballot initiative, which received over 600,000 signatures, lost 54% to 46%. Proponents of Prop 19 plan on introducing another ballot initiative to legalize marijuana use.[179] In 2010, the U.S Attorney announced that Prop 19 would not legalize marijuana in California and that federal marijuana laws would be strictly enforced.[180] Medical marijuana is not a resolved issue. Tensions between federal and state governments largely depend on the administration's stance. In recent years, President H.W Bush closed the

federal compassionate use programs; President Clinton re-opened them, but continued the prosecutions of those using medical marijuana under state-authorized programs. President Obama became the first president to cease federal prosecutions on state-authorized users. This suggests that the federal government may take a new stance after the election of a new president. Furthermore, marijuana still carries a social stigma even though the Institute of Medicine's report and similar research show marijuana has therapeutic value for those with severe illness. Despite this, only a minority of states have instituted medical marijuana programs. President Nixon announced the evil of marijuana even after his own commission determined marijuana was a benign substance. Barry McCaffrey ignored the Institute of Medicine's research and reported the opposite of the Institute's findings. In regard to recreational use, the federal government has made it clear that it opposes such state policies. Despite this, California citizens plan to launch another campaign to pass a ballot initiative permitting recreational use. As for the commerce power, the Supreme Court has made no indication it plans to limit its scope. Constitutional law is ever evolving, the fate of the interstate commerce power lies in how far Congress pushes its boundaries and how far the Supreme Court will allow it.

[159] See Shepard's Citations at *LexisNexis Academic and Library Solutions*. Web. 31 April 25, 2011
[160] Eric Bailey. (2007, March 15). Patient loses appeal on medical marijuana :[HOME EDITION]. *Los Angeles Times,*p. B.4. Retrieved April 25, 2011, from Los Angeles Times. www.proquest.com
[161] ibid
[162] Ring Behring. "Constitutional Law—Commerce Clause—California Takes a Hit: The Supreme Court Upholds Congressional Authority over the State-Approved Use of Medicinal Marijuana Gonzales v. Raich, 545 U.S 1 (2005). (2006 Board of Trustees of the University of Arkansas, University of Arkansas at Little Rock Law Review) 28 U. Ark. Little Rock L. Rev. 545
[163] Ilya Somin. "A False Dawn for Federalism: Clear Statement Rules after Gonzales v. Raich (2005, Cato Institute) 2005-06 Cato Sup. Ct. Rev. 113
[164] Lauren E. Marsh. "The Revival of the 'Sweeping Clause': An Analysis on why the Supreme Court Dad to "Breathe New Life" into the Necessary and Proper Clause in United States v. Comstock (2010, American University Washington College of Law) 5 Crim. L. Brief 23
[165] ibid
[166] ibid
[167] ibid
[168] Somin
[169] ibid
[170] see *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* 546 U.S 418 (2006) from *LexisNexis Academic and Library Solutions*. Web. 25 Apr. 2011
[171] ibid
[172] ibid
[173] Robert C. Farrell. "Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans (1999, The Trustee of Indiana University) 32 Ind. L. Rev. 357
[174] ibid
[175] ibid
[176] Scott Glover. (2009, March 7). California; Medical pot charges ban quickly lifted; U.S. attorney declines to say why cases were stopped, then started. *Los Angeles Times,*p. A.3. Retrieved April 25, 2011, from Los Angeles Times. www.proquest.com
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[179] John Hoeffel. 2010. Prop. 19 backers set to try again; Supporters of pot legalization see this year's campaign as a trial run that, if retooled, could win voter approval in '12. *Los Angeles Times*, November 8, http://www.proquest.com/ (accessed April 25, 2011).
[180] The feds say no way; California can pass Prop. 19 and legalize marijuana, but the U.S. government won't go along. by: anonymous 2010. *Los Angeles Times*, October 20, http://www.proquest.com/ (accessed April 25, 2011)

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