

LEGAL ISSUES IN MEDICINE

Jumping Frogs, Endangered Toads, and California's Medical-Marijuana Law

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Mark Twain wasn't thinking about federalism or the structure of American government when he wrote "The Celebrated Jumping Frog of Calaveras County."¹ Nonetheless, he would be amused to know that today, almost 150 years later, the Calaveras County Fair and Jumping Frog Jubilee not only has a jumping-frog contest but also has its own Frog Welfare Policy. The policy includes a provision for the "Care of Sick or Injured Frogs" and a limitation entitled "Frogs Not Permitted to Participate," which stipulates that "under no circumstances will a frog listed on the endangered species list be permitted to participate in the Frog Jump."² This fair, like medical practice, is subject to both state and federal laws. Care of the sick and injured (both frogs and people) is primarily viewed as a matter of state law, whereas protection of endangered species is primarily regulated by Congress under its authority to regulate interstate commerce.

Not to carry the analogy too far, but it is worth recalling that Twain's famous frog, Dan'l Webster, lost his one and only jumping contest because his stomach had been filled with quail shot by a competitor. The loaded-down frog just couldn't jump. Until the California medical-marijuana case, it seemed to many observers that the conservative Rehnquist Court had succeeded in filling the commerce clause with quail shot — and had effectively prevented the federal government from regulating state activities. In the medical-marijuana case, however, a new majority of justices took the lead out of the commerce clause so that the federal government could legitimately claim jurisdiction over just about any activity, including the practice of medicine. The role of the commerce clause in federalism and the implications of the Court's decision in the California medical-marijuana case for physicians are the subjects I explore in this article.

THE COMMERCE CLAUSE

The U.S. Constitution determines the areas over which the federal government has authority. All other areas remain, as they were before the adoption of the Constitution, under the authority of the individual states. Another way to say this is that the states retain all governmental authority they did not delegate to the federal government, including areas such as criminal law and family-law matters. These are part of the state's "police powers," usually defined as the state's sovereign authority to protect the health, safety, and welfare of its residents. Section 8 of Article I of the Constitution contains 18 clauses specifying delegated areas (including the military, currency, postal service, and patenting) over which "Congress shall have power," and these include the commerce clause — "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Until the Great Depression (and the disillusionment with unregulated markets), the Supreme Court took a narrow view of federal authority that could be derived from the commerce clause by ruling consistently that it gave Congress the authority only to regulate activities that directly involved the movement of commercial products (such as pharmaceuticals) from one state to another. Since then, and at least until 1995, the Court's interpretation seemed to be going in the opposite direction: Congress was consistently held to have authority in areas that had almost any relationship at all to commerce.

GUNS IN SCHOOLS AND VIOLENCE AGAINST WOMEN

Under modern commerce clause doctrine, Congress has authority to regulate in three broad

categories of activities: the use of the channels of interstate commerce (e.g., roads, air corridors, and waterways); the instrumentalities of interstate commerce (e.g., trains, trucks, and planes) and persons and things in interstate commerce; and “activities having a substantial relation to interstate commerce.”³ The first two categories are easy ones in that they involve activities that cross state lines. The third category, which does not involve crossing a state line, is the controversial one. The interpretation question involves the meaning and application of the concept of “substantially affecting” interstate commerce.

In a 1937 case that the Court characterized as a “watershed case” it concluded that the real question was one of the degree of effect. Intrastate activities that “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions” are within the power of Congress to regulate.⁴ Later, in what has become perhaps its best-known commerce-clause case, the Court held that Congress could enforce a statute that prohibited a farmer from growing wheat on his own farm even if the wheat was never sold but was used only for the farmer’s personal consumption. The Court concluded that although one farmer’s personal use of homegrown wheat may be trivial (and have no effect on commerce), “taken together with that of many others similarly situated,” its effect on interstate commerce (and the market price of wheat) “is far from trivial.”⁵

The 1995 case that seemed to presage a states’ rights revolution (often referred to as “devolution”) involved the federal Gun-Free School Zones Act of 1990, which made it a federal crime “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”³ In a 5-to-4 opinion, written by the late Chief Justice William Rehnquist, the Court held that the statute exceeded Congress’s authority under the commerce clause and only the individual states had authority to criminalize the possession of guns in school.³

The federal government had argued (and the four justices in the minority agreed) that the costs of violent crime are spread out over the entire population and that the presence of guns in schools threatens “national productivity” by

undermining the learning environment, which in turn decreases learning and leads to a less productive citizenry and thus a less productive national economy. The majority of the Court rejected these arguments primarily because they thought that accepting this line of reasoning would make it impossible to define “any limitations on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”³

In 2000, in another 5-to-4 opinion written by Rehnquist, using the same rationale, the Court struck down a federal statute, part of the Violence against Women Act of 1994, that provided a federal civil remedy for victims of “gender-motivated violence.” In the Court’s words:

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. . . . Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.⁶

The Court, specifically addressing the question of federalism, concluded that “the Constitution requires a distinction between what is truly national and what is truly local. . . . Indeed, we can think of no better example of the police power, which the Founders denied to the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”⁶

MEDICAL MARIJUANA IN CALIFORNIA

The next commerce-clause case involved physicians, albeit indirectly, and the role assigned to them in California in relation to the protection of patients who used physician-recommended marijuana from criminal prosecution. The question before the Supreme Court in the recent medical-marijuana case (*Gonzalez v. Raich*) was this: Does the commerce clause give Congress the authority to outlaw the local cultivation and use of marijuana for medicine if such cultivation and use complies with the provisions of California law?⁷

The California law, which is similar to laws

in at least nine other states, creates an exemption from criminal prosecution for physicians, patients, and primary caregivers who possess or cultivate marijuana for medicinal purposes on the recommendation of a physician. Two patients for whom marijuana had been recommended brought suit to challenge enforcement of the federal Controlled Substances Act after federal Drug Enforcement Administration agents seized and destroyed all six marijuana plants that one of them had been growing for her own medical use in compliance with the California law. The Ninth Circuit Court of Appeals ruled in the plaintiffs' favor, finding that the California law applied to a separate and distinct category of activity, "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law," as opposed to what it saw as the federal law's purpose, which was to prevent "drug trafficking."⁸ In a 6-to-3 opinion, written by Justice John Paul Stevens, with Justice Rehnquist dissenting, the Court reversed the appeals court's opinion and decided that Congress, under the commerce clause, did have authority to enforce its prohibition against marijuana — even state-approved, homegrown, noncommercial marijuana, used only for medicinal purposes on a physician's recommendation.

The majority of the Court decided that the commerce clause gave Congress the same power to regulate homegrown marijuana for personal use that it had to regulate homegrown wheat.⁶ The question was whether homegrown marijuana for personal medical consumption substantially affected interstate commerce (albeit illegal commerce) when all affected patients were taken together. The Court concluded that Congress "had a rational basis for concluding that leaving home-consumed marijuana outside federal control" would affect "price and market conditions."⁷ The Court also distinguished the guns-in-school and gender-violence cases on the basis that regulation of drugs is "quintessentially economic" when economics is defined as the "production, distribution, and consumption of commodities."⁷

This left only one real question open: Is the fact that marijuana is to be used only for medicinal purposes on the advice of a physician, as

the Ninth Circuit Court had decided, sufficient for an exception to be carved out of otherwise legitimate federal authority to control drugs? The Court decided it was not, for several reasons. The first was that Congress itself had determined that marijuana is a Schedule I drug, which it defined as having "no acceptable medical use." The Court acknowledged that Congress might be wrong in this determination, but the issue in this case was not whether marijuana had possible legitimate medical uses but whether Congress had the authority to make the judgment that it had none and to ban all uses of the drug. The dissenting justices argued that personal cultivation and use of marijuana should be beyond the authority of the commerce clause. The Court majority disagreed, stating that if it accepted the dissenting justices' argument, personal cultivation for recreational use would also be beyond congressional authority. This conclusion, the majority argued, could not be sustained:

One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire [drug] regulatory scheme is entitled to a strong presumption of validity.⁷

The other primary limit to the effect of the California law on interstate commerce is the requirement of a physician's recommendation on the basis of a medical determination that a patient has an "illness for which marijuana provides relief." And the Court's discussion of this limit may be the most interesting, and disturbing, aspect of the case to physicians. Instead of concluding that physicians should be free to use their best medical judgment and that it was up to state medical boards to decide whether specific physicians were failing to live up to reasonable medical standards — as the

Court did, for example, in its cases related to restrictive abortion laws⁹ — the Court took a totally different approach. In the Court's words, the broad language of the California medical-marijuana law allows "even the most scrupulous doctor to conclude that some recreational uses would be therapeutic. And our cases have taught us that there are some unscrupulous physicians who overprescribe when it is sufficiently profitable to do so."⁷

The California law defines the category of patients who are exempt from criminal prosecution as those suffering from cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, and "any other chronic or persistent medical symptom that substantially limits the ability of a person to conduct one or more major life activities . . . or if not alleviated may cause serious harm to the patient's safety or physical or mental health." These limits are hardly an invitation for recreational-use recommendations.⁷ Regarding "unscrupulous physicians," the Court cited two cases that involve criminal prosecutions of physicians for acting like drug dealers, one from 1919 and the other from 1975, implying that because a few physicians might have been criminally inclined in the past, it was reasonable for Congress (and the Court), on the basis of no actual evidence, to assume that many physicians may be so inclined today. It was not only physicians that the Court found untrustworthy but sick patients and their caregivers as well:

The exemption for cultivation by patients and caregivers [patients can possess up to 8 oz of dried marijuana and cultivate up to 6 mature or 12 immature plants] can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious.⁷

Justice Sandra Day O'Connor's dissent merits comment, because it is especially relevant to the practice of medicine. She argues that the Constitution requires the Court to protect "historic

spheres of state sovereignty from excessive federal encroachment" and that one of the virtues of federalism is that it permits the individual states to serve as "laboratories," should they wish, to try "novel social and economic experiments without risk to the rest of the country." Specifically, she argues that the Court's new definition of economic activity is "breathtaking" in its scope, creating exactly what the gun case rejected — a federal police power. She also rejects reliance on the wheat case, noting that under the Agricultural Adjustment Act in question in that case, Congress had exempted the planting of less than 200 bushels (about six tons), and that when Roscoe Filburn, the farmer who challenged the federal statute, himself harvested his wheat, the statute exempted plantings of less than six acres.^{5,7}

In O'Connor's words, the wheat case "did not extend Commerce Clause authority to something as modest as the home cook's herb garden."⁸ O'Connor is not saying that Congress cannot regulate small quantities of a product produced for personal use, only that the wheat case "did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress' reach." As to potential "exploitation [of the act] by unscrupulous physicians" and patients, O'Connor finds no factual support for this assertion and rejects the conclusion that simply by "piling assertion upon assertion" one can make a case for meeting the "substantiality test" of the guns-in-school and gender-violence cases.⁷

It is important to note that the Court was not taking a position on whether Congress was correct to place marijuana in Schedule I or a position against California's law, any more than it was taking a position in favor of guns in schools or violence against women in the earlier cases. Instead, the Court was ruling only on the question of federal authority under the commerce clause. The Court noted, for example, that California and its supporters may one day prevail by pursuing the democratic process "in the halls of Congress."⁷ This seems extremely unlikely. More important is the question not addressed in this case — whether suffering patients have a substantive due-process claim to access to drugs needed to prevent suffering or a valid medical-necessity defense should they be prosecuted for using medical marijuana on a physician's rec-

ommendation.¹⁰ Also not addressed was the question that will be decided during the coming year: whether Congress has delegated to the U.S. attorney general its authority to decide what a “legitimate medical use” of an approved drug is in the context of Oregon’s law governing physician-assisted suicide.^{11,12} What is obvious from this case, however, is that Congress has the authority, under the commerce clause, to regulate both legal and illegal drugs whether or not the drugs in question actually cross state lines. It would also seem reasonable to conclude that Congress has the authority to limit the uses of approved drugs.

FEDERALISM AND ENDANGERED SPECIES

Because *Gonzales v. Raich* is a drug case, and because it specifically involves marijuana, the Court’s final word on federalism may not yet be in. Whether the “states’ rights” movement has any life left after medical marijuana may be determined in the context of the Endangered Species Act. Two U.S. Circuit Courts of Appeals, for example, have recently upheld application of the federal law to protect endangered species that, unlike the descendants of Mark Twain’s jumping frog, have no commercial value. Even though the Supreme Court refused to hear appeals from both of the lower courts, the cases help us understand the contemporary reach of congressional power under the commerce clause. One case involves the protection of six tiny creatures that live in caves (the “Cave Species”) — three arthropods, a spider, and two beetles — from a commercial developer. The Fifth Circuit Court of Appeals noted that the Cave Species are not themselves an object of economics or commerce, saying: “There is no market for them; any future market is conjecture. If the speculative future medicinal benefits from the Cave Species makes their regulation commercial, then almost anything would be. . . . There is no historic trade in the Cave Species, nor do tourists come to Texas to view them.”¹³ Nonetheless, the court concluded that Congress had the authority, under the commerce clause, to view life as an “interdependent web” of all species; that destruction of endangered species can be aggregated, like homegrown wheat; and that the destruction of

multiple species has a substantial effect on interstate commerce.¹³

The other case, from the District of Columbia Court of Appeals, involves the arroyo southwestern toad, whose habitat was threatened by a real-estate developer. In upholding the application of the Endangered Species Act to the case, the appeals court held that the commercial activity being regulated was the housing development itself, as well as the “taking” of the toad by the planned commercial development. The court noted that the “company would like us to consider its challenge to the ESA [Endangered Species Act] only as applied to the arroyo toad, which it says has no ‘known commercial value’ — unlike, for example, Mark Twain’s celebrated jumping frogs [*sic*] of Calaveras County.”¹⁴ Instead, the court concluded that application of the Endangered Species Act, far from eroding states’ rights, is consistent with “the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans.”¹⁴

On a request for a hearing by the entire appeals court, which was rejected, recently named Chief Justice John Roberts — who at the time was a member of the appeals court — wrote a dissent that was not unlike Justice O’Connor’s dissent in the marijuana case. In it he argued that the court’s conclusion seemed inconsistent with the guns-in-school and gender-violence cases and that there were real problems with using an analysis of the commerce clause to regulate “the taking of a hapless toad that, for reasons of its own, lives its entire life in California.”¹⁵ The case has since been settled. The development is going ahead in a way that protects the toad’s habitat.¹⁶

THE FUTURE OF THE COMMERCE CLAUSE

Twain’s short story has been termed “a living American fairy tale, acted out annually in Calaveras County.”¹¹ In what might be termed a living American government tale, nominees to the Supreme Court are routinely asked to explain their judicial philosophy of constitutional and statutory interpretation to the Senate Judiciary Committee. Asked about his “hapless toad” opinion during the Senate confirmation hearings on his

nomination to replace Rehnquist as chief justice, Roberts said: "The whole point of my argument in the dissent was that there was another way to look at this [i.e., the approach taken by the Fifth Circuit Court in the *Cave Species* case]. . . . I did not say that even in this case that the decision was wrong. . . . I simply said, let's look at those other grounds for decision because that doesn't present this problem." These hearings provide an opportunity for all Americans to review their understanding of our constitutional government and the manner in which it allocates power between the federal government and the 50 states. To the extent that this division of power is determined by the Court's view of the commerce clause, a return to an expansive reading of this clause seems both likely and, given the interdependence of the national and global economies, proper.

Of course, the fact that Congress has authority over a particular subject — such as whether to adopt a system of national licensure for physicians — does not mean that its authority is unlimited or even that Congress will use it. Rather, as Justice Stevens noted, cases such as the California medical-marijuana case lead to other central constitutional questions,

as yet unresolved. These questions include whether patients, terminally ill or not, have a constitutional right not to suffer — at least, when their physicians know how to control their pain.¹²

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