THE RISING JUGGERNAUT OF FEDERAL SUPREMACY: A CRITICAL LEGAL EXAMINATION OF *GONZALEZ V. RAICH*

Brendan Hamme

This paper will dissect as well as criticize the Supreme Court's decision in Gonzalez v. Raich*, which effectually grants a federal policing power. It will begin with a socio-historical examination of the fallacy that is cannabis prohibition followed by the Court's treatment of the Supremacy and Commerce Clauses of the Constitution, arguing that the Court erroneously applied established precedent in its decision. Finally, the paper will decry the Court for refusing to address due process claims or humanitarian concerns.*

As the amicus curiae brief filed in *Gonzalez, et al. v. Raich, et al.* by the National Organization for the Reform of Marijuana Laws (NORML) concludes, "if our Constitution means anything, it should mean that 'the war on drugs' cannot be made to be a war on the quality of life of the chronically or terminally ill" (NORML amicus auriae brief 1). Indeed, that is what it should mean. To every American scholar that has ever espoused the principles of 'life, liberty, and the pursuit of happiness,' that is what it means; to every fire-blooded patriot for whom 'give me liberty or give me death' rings as an anthem, that is what it means. That is what it should have meant to the Supreme Court when they decided *Gonzalez v. Raich*.

The Court, departing from established jurisprudential notions of federalism, disregarding the traditionally held respect for states' rights, and with no showing of empathy or compassion for the chronically and terminally ill, instead ruled exactly the opposite, holding that "Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law" (*Gonzalez*). Couching its stinging rebuke of commonsense jurisprudence in terms of the Supremacy Clause and the Commerce Clause, the majority opinion, authored by Justice Stevens, undermines not only the credibility of the six concurring justices, but of our entire legal system. The Court could have ruled quite differently, however. By utilizing a combination of established Commerce and Supremacy Clause precedent and by actually taking into account the substantive due process argument, the Court could (and should) have reinforced the principles of individual liberty, freedom, and local autonomy. Instead, the *Raich* decision, as illustrated by Justice O'Connor in her dissent, essentially bestows upon the federal government the police powers the Supreme Court has long denied it and foreshadows the rising juggernaut of federal supremacy.

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In 1996, the majority of the California electorate voted upon and passed Proposition 215, better known as the Compassionate Use Act, allowing for the medicinal use of marijuana free from criminal prosecution. Since that time, the protections proffered by the act have been repeatedly undermined by the federal government's costly raids on hapless medical users and their caregivers. Respondents Diane Monson and Angel Raich (additionally representing her caregivers) feared prosecution under federal law and the brutal confiscation of their medicine by DEA agents. They, therefore, brought suit against both then Attorney General John Ashcroft and the head of the DEA, Asa Hutchinson, "seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA), to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use" (*Gonzalez*). After their motion for a preliminary injunction was denied by the District Court, Raich and Monson appealed to the Ninth Circuit which, in a 2-1 decision by the Court of Appeals panel, reversed the lower court's ruling. The panel found that Raich and Monson had "demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority" (*Raich*).

The decision of the Ninth Circuit, Justice Stevens notes, assigns critical importance to what it labels as the "separate and distinct" nature of the "class of activities:" specifically, "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" (*Raich*). This distinction, along with a myriad of other more nuanced points, was swept aside by the Supreme Court majority as invalid and inconsequential when it issued its ill-conceived decision.

First, Stevens' contention that "marijuana itself was not significantly regulated by the Federal Government until 1937 when accounts of marijuana's addictive qualities and physiological effects, paired with dissatisfaction with enforcement efforts at state and local levels, prompted Congress to pass the Marihuana Tax Act…" (*Gonzalez*) suffers from a complete lack of socio-historical and socio-economic awareness. In the mid-1930s, mechanical hemp fiber-stripping machines became available, allowing for the conservation of hemp's high cellulose pulp and jeopardizing billions of dollars in profits for the Hearst Paper Manufacturing Division. Jack Herer, in his revolutionary book *The Emperor Wears No Clothes*, notes "in the 1920s and '30s, Hearst's newspapers deliberately manufactured a new threat to America and a new yellow journalism campaign to have hemp outlawed" (31). By propagating bigoted articles and headlines sensationalizing lurid accounts of "voodoo-satanic" rituals fueled by 'marijuana', and "through pervasive and repetitive use," pounding "the obscure Mexican slang word 'marijuana' into the English-speaking American consciousness" while burying the familiar terms cannabis and hemp (31), Hearst created a social climate hostile to cannabis

and hospitable to prohibitive legislation. This legislation took the form of the Marijuana Tax Act (29), portions of which were later deemed unconstitutional in *Leary v. United States*. The new technology also jeopardized 80% of DuPont's business, which, in 1937, patented processes for manufacturing paper out of wood pulp and plastics from oil and coal (26). Andrew Mellon of the Mellon Bank of Pittsburgh, DuPont's chief financial backer, acting as President Hoover's Secretary of the Treasury, appointed Harry J. Anslinger, his future nephew-in-law, the head of the Federal Bureau of Narcotics and Dangerous Drugs in 1931. With the contrivance of government officials, it is little wonder why the DuPont annual stockholder's report for 1937 anticipated "radical changes" from "the revenue raising power of government…converted into an instrument for forcing acceptance of sudden new ideas of industrial and social reorganization" (29). Anslinger's vehemence was demonstrated when he testified before Congress urging passage of the Marihuana Tax Act saying, 'marijuana is the most violence-causing drug in the history of mankind"' (29). It is interesting to note that Anslinger apparently changed his mind regarding marijuana's violence inducing effects when he lobbied before Congress during Vietnam for more punitive marijuana laws, saying that it would turn the nation into pacifists, incapable of fighting a war (35).

Stevens, oblivious to these critical omissions, continued his discussion of the history of prohibitive drug legislation: "Finally, prompted by a perceived need to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act. Title II of that Act, the CSA, repealed most of the earlier anti-drug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs" (*Gonzalez*). Apparently, the "comprehensive regime" devised by Congress and designed to protect the average American from the 'drug scourge,' consists largely, if not entirely, of the scheduling system-- in which cannabis is classified as a Schedule I drug, having a "high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment" (CSA). Ironically, it was the DEA's own Administrative Law Judge, Francis Young, who concluded (although the head of the DEA ignored and continues to ignore his advice) that "marijuana in its natural form is one of the safest therapeutically active substances known to man" (Herer 57).

In section III of the majority's opinion, Stevens finally begins his juridical analysis of the meaning and scope of the Commerce Clause as applied to the *Raich* case — an analysis that frequently resembles Swiss cheese. Deriding the respondent's challenge as "actually quite limited," Stevens presents the crux of it: "they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause" (*Gonzalez*). Indeed, Raich's legal team never questioned the constitutionality of the CSA on the

whole, but the majority preempts this approach later in the decision anyway, affirming that passage of the CSA was undoubtedly within Congress' power. In Stevens' exposition, he establishes the authority of Congress to regulate, utilizing its 'commerce power,' "activities that substantially affect interstate commerce" under *Perez v. United States* and the earlier precedent of *NLRB* v. *Jones & Laughlin Steel Corp*. He then continues by expounding upon the precedent set in *Wickard v. Filburn*: "In *Wickard*, we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices" (*Gonzalez*). Stevens cites the *Wickard* decision in the context of *Raich*, where the *Wickard* court concluded, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce" (*Wickard*). To this end, the majority concluded, that "while the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety," and Congress thus acted on a rational basis in issuing a blanket prohibition (*Wickard)*.

The Court's analysis here hinges, much as it did during the oral arguments presented by Solicitor General Theodore Olsen, on the concept of "fungibility"— that is the fact that cannabis, with its well-established criminal market, is readily exchangeable for monetary compensation. The Court reasons that because demand is high, even cannabis produced locally for medical use is likely to be drawn into the criminal market (*Gonzalez*). The Supreme Court, in adopting this view, clearly ignores the intended purpose and consequences of the Compassionate Use Act and its follow-up, Senate Bill 420. Allowing for the growth of a personal crop (eliminating the necessity of reliance on, and interaction with, the criminal market among medical users) will result in a decrease in demand on the criminal market and an ensuing drop in prices. This forecloses the Court's position that high prices will lure purportedly medically grown cannabis into black market circulation. Furthermore, because the lucrative black market for cannabis is a direct result of its criminalization, it seems ironic for the Court to appeal to high criminal demand as justification for the continued prohibition of cannabis use.

The Court, for consistency and logic's sake, may have been better off espousing the line of reasoning posited by Solicitor General Olsen during oral arguments — that the removal of the class of medical cannabis users from the criminal market would result in a decrease in demand in California, lowering prices there, and through proximity, surrounding states. This situation makes it a market impacting interstate commerce that falls under Congress' authority to regulate. That analysis also falls prey to logical criticism, however. Justice Scalia,

grilling Olsen in a manner that betrayed his ultimately concurring opinion, illustrated the logical inconsistencies of this position during oral arguments: "Congress doesn't want interstate commerce in marijuana. And it seems rather ironic to appeal to the fact that home-grown marijuana would reduce the interstate commerce that you don't want to occur in order to regulate it" (*Raich*). It should go without saying that cases decided on logically fallacious premises do not make for good precedent, nor can it be said that they instill faith in the legal system.

Returning to the discussion of the applicability of the *Wickard* precedent, Justice Stevens rejects all three of the following contentions by Raich's attorney that the *Wickard* case is inapplicable here: "(1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) *Wickard* involved a "quintessential economic activity"– a commercial farm – whereas respondents do not sell marijuana; and (3) the *Wickard* record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices" (*Gonzalez*). To the first point, the opinion offers that simply because "the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the Court's analysis" (*Gonzalez*). This first retort is seemingly made in good faith, and is, on its face meritorious. Yet at the same time, the point that respondents sought to illustrate is buried beneath the cunning semantic formulation — that the Agricultural Adjustment Act was, unlike the CSA regarding medical cannabis patients, narrowly tailored to fit within the bounds of the Commerce Clause, excluding operations small enough as to play an insignificant role in interstate commerce. Although that fact may not have made it into the official analysis, it seems unlikely that the relative scope of the act was lost on the justices when they considered the case and issued their final ruling.

To the second point, Stevens states, "Moreover, even though Wickard was indeed a commercial farmer, the activity he was engaged in – the cultivation of wheat for home consumption – was not treated by the Court as part of his commercial farming operation" (*Gonzalez*). Again, it is hard to believe that, even if it never found its way into the majority opinion as a rationale, the Court was unaware of Wickard's profession as a wheat farmer when it conducted its review. Whereas in *Wickard*, his reliance on his sizeable personal bumper crop, absent his commercial farming operation, would "forestall his return to the market," no such corollary exists in the context of the *Raich* case. Even taking into account the Court's earlier erroneous premise that individual ethics will inevitably bow to the temptations of the profit motive, it seems preposterous to purport that any terminally ill individual would be in the business of buying and selling street level cannabis absent use on their part. Any other construction of the situation results in an incomplete syllogism.

Finally, Stevens dismisses the third distinguishing factor between the

cases – the extensive Congressional findings establishing a causal link between local production and the national market in *Wickard* (lacking in *Raich*) – by asserting that "we have never required Congress to make particularized findings in order to legislate" (*Gonzalez*). Still, Stevens seemed compelled to purport "we have before us findings by Congress to the same effect" (*Gonzalez*) just to prove a point. However, instead of proving his point, he left himself open to attack by Justice O'Connor in her dissenting opinion in the case. O'Connor elucidates on the exact nature of those findings where Stevens remains silent:

> "The Court refers to a series of declarations in the introduction to the CSA saying that (1) local distribution and possession of controlled substances causes 'swelling' in interstate traffic; (2) local production and distribution cannot be distinguished from interstate production and distribution; (3) federal control over intrastate incidents 'is essential to effective control' over interstate drug trafficking. These bare declarations cannot be compared to the record before the Court in *Wickard*" (*Gonzalez*).

Furthermore, O'Connor continues by reiterating the concurring judgment of Chief Justice Rehnquist in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc*: "[S]imply because Congress may conclude a particular activity substantially affects interstate commerce does not necessarily make it so." At least for one dissenting justice, the arguments put forth by respondents did not fall entirely on deaf ears.

In order to justify their decision given contemporary Commerce Clause jurisprudence, the Court had to dismiss as inapplicable the precedents established by both *United States v. Lopez* (in which the Court struck down a federal ordinance criminalizing the possession of a handgun near school premises) and *United States v. Morrison* (in which the Court struck down federal legislation to provide remedies for domestic battery). Two issues alone allowed the majority to distinguish between the constitutional principles necessarily espoused in *Lopez* and *Morrison*, those of traditional federalism/deference for the policing power of the state government, and those that the Court would champion in *Raich*.

The first distinction that Justice Stevens addresses is that the respondents seek, not the invalidation of a statute in its entirety as an unconstitutional exercise of Congress' Commerce Clause authority, but rather the excision of a class of individuals from enforcement of a "concededly valid statutory scheme" (*Gonzalez*). As Stevens says, "This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." However, Justice Thomas rightfully asserts in the face of this logic that "if the majority is correct that

Lopez and *Morrison* are distinct because they were facial challenges to 'particular statute[s] or provision[s],' then congressional power turns on the manner in which Congress packages legislation"– a sole statute enacted by Congress to ban the intrastate possession of cannabis would fall outside the bounds of congressional power, while effectually the same statute, embedded within another, constitutional law would be within Congress' power to enact. Such an implicit result invalidates any meaningful restrictions placed on Congress by the Necessary and Proper clause.

The question then pivots on whether or not the class in question is indeed within the reach of federal power; Justice Thomas, who authored one of the two written dissents issued in the case, was not so easily convinced. Beginning his jurisprudential journey with *McCulloch v. Maryland*'s command – "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional" (*McCulloch*) – Thomas simultaneously calls into serious doubt both the necessity and the propriety of refusing medicinal access to cannabis to the sick and dying where access to which will not hinder the government's attempt to stamp out recreational use and abuse nationwide. "Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich," concludes Thomas. "That is, unless Congress' aim is really to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana" (*Gonzalez*). Indeed, according to Thomas, whether or not the defined 'class of activities' comes under federal jurisdiction turns on the level of generality employed by the person defining – employing a low level of generality, or a high degree of specificity will result in the definition reached by the Ninth Circuit Court of Appeals for the class 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" – and subsequently, a ruling that finds the federal government distinctly out of its element.

The second distinguishing factor identified by Stevens, on the other hand, delineates between economic and non-economic activity. With the majority opinion employing the definition of 'economic' from Webster's dictionary, Thomas' dissent notes that "to evade even that modest restriction on federal power, the majority defines economic activity in the broadest possible terms as the 'the production, distribution, and consumption of commodities'" (*Gonzalez*). Thomas' chronicle of the history of the commerce clause that follows should give us pause: "There is an inexorable expansion from 'commerce,' to 'commercial' and 'economic' activity, and finally to all 'production, distribution, and consumption' of goods or services for which there is an 'established...interstate market.' Federal power expands, but never contracts, with each new locution." Justice O'Connor raised a similar cry of

alarm when she said "to draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow – a federal police power." Such rejections were made on the basis of the traditional police powers of the state "to define the criminal law and to protect the health, safety, and welfare of their citizens."

Paradoxically, it was Justice Stevens himself who said just a few short years earlier in *U.S. v. Oakland Cannabis Buyers' Co-op* that "this Court, as a federal institution, must show respect for the sovereign states that comprise our federal union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a state have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country." Justice O'Connor's dissent highlights this principle as she recapitulates a point made by Scalia in his concurring opinion: "Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment" (*Gonzalez*). Later, she invokes James Madison's pledge of joint sovereignty in the Federalist Papers to evidence the original intent of the founders:

> "The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite...The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State" (Madison 292-293).

It was upon these fundamental tenets of federalism that our country was founded and indeed upon which much of our modern jurisprudence is formulated. O'Connor, although expressing her lack of support for medical cannabis from a legislative and citizen's perspective, concedes "but whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case" (*Gonzalez*).

The most frustrating aspect of the *Raich* case, however, is not the Supreme Court's reliance on erroneously applied precedent, nor their blatant disregard for the principle of dual sovereignty, but rather their declination to address the substantive due process challenge raised by the respondents – for it may have been this challenge that ultimately prevailed. Stevens' only remark regarding the challenge is in his concluding section: "These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases" (*Gonzalez*). In 1928, in his

now famous dissent in *Olmstead v. United States*, Justice Brandeis observed:

> "They [the founding fathers] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

NORML's amicus curiae brief, filed in support of Angel Raich, establishes that "the Court has repeatedly cited *Olmstead* and considered 'the right to be let alone' as a part, not only of the Fourth Amendment, but also the First, Fifth, and Fourteenth Amendments, not to mention the Ninth Amendment" (20-21). Furthermore, NORML's brief identifies a key point in the argument against prohibition where medicinal use is concerned: the Court's recognition of "a substantive due process right to be free from pain and suffering in *Cruzan*…it naturally flows from that case that there also is a parallel right for patients in chronic pain or the terminally ill to alleviate pain and suffering *when they want to live*" (23).

Justice Harlan maintained in *Poe v. Ullman* that the liberty referred to in the Declaration of Independence "is not a series of isolated points picked out in terms of …the freedom of speech, press, and religion; …the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints…" (NORML amicus brief 23-24). As recently as *Planned Parenthood v. Casey* and *Lawrence v. Texas*, the court has eloquently expounded upon the role of essential liberty; in *Casey*, the Court ruled that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State" (*Planned Parenthood*).

By framing the issue as a matter of esoteric legal terminology, such as the meanings of necessary and proper and commerce, rather than as a struggle for essential liberty, the Supreme Court surreptitiously buries the underlying human drama, and necessarily completes the disconnect between the law and the people it supposedly represents. Justice Stevens himself notes that although "the case is made difficult by respondents' strong arguments that they will suffer irreparable harm…The question before us…is not whether it is wise to enforce the statute in these circumstances" (*Gonzalez*). This disconnect, with the Justices insulated not only from public opinion but from humanitarian concerns as well, allows the concurring Justices to sleep at night, content despite their knowledge that they effectively sentenced Angel Raich to death (it was

well established in her medical records that she would not live long without access to cannabis; nor was this fact denied by the government in the record (Declaration of Angel Raich 1) at the whim of the Department of Justice.

WORKS CITED

Controlled Substances Act. 84 Stat. 1242, 21 U. S. C. §801 *et seq*, §812(b)(1).

Declaration of Angel Raich. <http://news.findlaw.com/hdocs/docs/drugs/raichashcrft102502angl.pdf>.

Gonzalez, et al. v. Raich et al., 352 F.3d 1222 (2005).

Herer, Jack. *The Emperor Wears No Clothes*. Austin, Texas: AH HA Publishing, 2000.

Madison, James. The Federalist Papers No. 45. C. Rossiter ed. 1961.

NORML Amicus Curiae Brief <http://www.norml.org/pdf_files/brief_bank/NORML_Legal_Brief_Bank_Amicus_Raich.pdf>.

Olmstead v. United States, 277 U.S. 438, 478 (1928).

Opinion from the Ninth Circuit Court of Appeals. <http://www.angeljustice.org/downloads/ninthcircuitdecision.pdf>.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850-851 (1992).

Poe v. Ullman, 367 U.S. 497, 542-43 (1961).

Raich v. Ashcroft, 352 F. 3d (2004).

U.S. Department of Justice, Drug Enforcement Agency. "In the Matter of Marijuana Rescheduling Petition." Docket No. 86-22. September 6, 1988.

United States v. Oakland Cannabis Buyer's Co-op, 532 U.S. 483 (2001).

Whitebread, Charles. "The History of the Non-Medical Use of Drugs in the United States." Speech to the California Judges Association 1995 annual conference.