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Limiting Raich

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FOREWORD: LIMITING *RAICH*

by
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INTRODUCTION

On Monday, November 29th, 2004, at 10:30 a.m., I rose to argue the case of *Gonzales v. Raich*[1] in the Supreme Court on behalf of Angel Raich and Diane Monson. On Monday, June 6th, 2005, at 10:00 a.m., the Court announced its decision. Even today it is painful to read the opinions in the case. I am saddened for my clients, and the thousands like them, whose suffering is alleviated by the use of cannabis for medical purposes, as recommended by their physicians and permitted by the laws of their states, but who are nevertheless considered criminals by the federal government. I am saddened for the millions of voters in the ten states who enacted compassionate relief laws to allow these seriously ill persons to obtain cannabis without becoming criminals, at least under state law. And I am saddened for the Constitution, which established a system of limited and enumerated powers that had been virtually eliminated since the 1940s before being partially revived in the cases of *United States v. Lopez*[2] and *United States v. Morrison*.[3]

My sadness was only slightly mitigated by the clear and ringing endorsement of our position in the dissenting opinions of Justices O'Connor (joined by the Chief Justice and by Justice Thomas) and Thomas. These stand as testimony to the plausibility, nay the correctness, of the approach we urged upon the Court. With their opinions in the *United States Reports*, none dare call our claims frivolous, completely impractical, or inevitably doomed. When a theory gains the support of three justices with so disparate approaches to the Constitution, it could just as easily have gained the support of two more justices inclined to put a commitment to federalism above a commitment to national power. In assessing the long-term effect of this undeniable defeat for federalism, then, we must remember that, in the history of the Supreme Court, the future has often been presaged by cogent dissenters who later came to be considered more principled than the majority.[4]

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[1] Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[2] United States v. Lopez, 514 U.S. 549 (1995).

[3] United States v. Morrison, 529 U.S. 598 (2000).

[4] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1857) (Curtis, J., dissenting), Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting), Korematsu v. United States, 323 U.S.

Nevertheless, with its decision in *Raich*, six justices at once dashed the hopes of medical cannabis users and those who believe in the value of federalism to protect individual liberty. Given this setback, what hope is left for the principle of limited national power, so staunchly endorsed by the late-Chief Justice Rehnquist in his opinions in *Lopez* and *Morrison*? Will the New Federalism survive the demise of its greatest champion?[5]

The superb articles in this Symposium do little to raise hopes. They argue alternatively that *Lopez* and *Morrison* never comprised a serious federalism revival, that the doctrines announced by these cases were too unstable to have lasted, or that little, if anything, of these cases survives the Court's ruling in *Raich*. In this Foreword, I do not mean to take issue with any of these contentions, except perhaps the last, and I urge serious students of the Constitution to read each and every article in this issue. Instead, I intend to describe how a future majority of the Supreme Court, once again willing to apply the "first principles"[6] *announced by the Chief Justice* in *Lopez* and reaffirmed in *Morrison*—principles that no Supreme Court in our history has ever expressly disclaimed—can limit the Court's decision in *Raich*. Where there is a will to do so, there is certainly a way.

THE WAY

In considering what is left of federalism after *Raich* and how a future Court can limit the reach of the decision, we need to isolate three distinct issues: first, the difference between "facial" and "as-applied" challenges; second, the distinction between "economic" and "noneconomic" conduct; and, third, the scope of the "broader regulatory scheme" doctrine.

Facial Challenges Survive Intact

In one important respect, the holdings of *Lopez* and *Morrison* survive completely intact: a statute that is on its face entirely outside the powers of Congress described by the Commerce and Necessary and Proper Clauses is unconstitutional.[7] Given that this proposition was doubted by both courts and scholars for the more than fifty years during which the Court failed to find that Congress had exceeded its powers—even once—this is no small matter. In this regard, it is highly significant that the majority opinion in *Raich* took pains to

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214 (1944) (Jackson, J., dissenting).

[5] One cannot help but wonder if the Chief Justice's weakened condition may have prevented him from forging the sort of consensus that enabled federalism to prevail in *Lopez* and *Morrison*.

[6] *Lopez*, 514 U.S. at 552 ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

[7] *See* Gonzales v. Raich, 125 S. Ct. 2195, 2231 n.3 (2005) (Thomas, J., dissenting) ("Because respondents do not challenge on its face the CSA's ban on marijuana, 21 U.S.C. §§ 841(a)(1), 844(a), our adjudication of their as-applied challenge casts no doubt on this Court's practice in *United States v. Lopez* and *United States v. Morrison*. In those cases, we held that Congress, in enacting the statutes at issue, had exceeded its Article I powers.") (citations omitted).

remain, however unfaithfully, within the framework of both *Lopez* and *Morrison*. Given what we know about the persistent resistance of the four dissenters in those cases, we can be confident that there were not five votes to reverse them. Distinguished though they were in this "as-applied" challenge to the Controlled Substances Act, the cases themselves remain authority in future facial challenges to statutes more closely resembling the Gun Free School Zones Act and the Violence Against Women Act.

On the other hand, even facial challenges have been undermined by *Raich* to the extent its treatments of the economic-noneconomic distinction and the "broader regulatory scheme" doctrine have made it harder to sustain such challenges. The expansive definition of economic activity could adversely affect facial challenges, but the broader regulatory scheme doctrine was probably always nascent, as it was mentioned in *Lopez* itself.[8] I comment further on these two theories below.

What of the viability of as-applied challenges after *Raich*? While making such challenges less likely to prevail, because of its expanded construction of federal power, the Court never denies that such challenges can be brought. *Wickard v. Filburn*,[9] *Heart of Atlanta Motel v. United States*,[10] and *Katzenbach v. McClung*[11] were all as-applied challenges. While *Raich* now joins this unsuccessful list, in none of these cases did the Court ever deny the *availability* of such a challenge. If a future Court wishes to make such challenges easier to sustain or confronts a set of facts to which the power of Congress under the Commerce Clause may not constitutionally be applied, *Raich* will provide no precedent against so ruling.

In *Raich*, the government offered two arguments for why the Congress could reach the activity in question while respecting the precedents of *Lopez* and *Morrison*. First, they argued that the activity in question was economic in nature and thus conformed to the distinction emphasized in *Morrison*. Second, it argued that, even if the conduct at issue was noneconomic, it could still be reached because doing so was essential to a broader regulatory scheme that could be undercut unless the conduct was covered. In *Raich*, the Court principally relied on the second of these claims, while also accepting a significantly altered version of the first. I now turn to the future implication of both aspects of the Court's decision.

The Larger Regulatory Scheme Doctrine

The government contended that *Lopez* implicitly recognized an exception to the generalization of *Morrison* that limits the substantial effects doctrine to intrastate activities that are economic in nature.[12] In *Lopez*, Justice Rehnquist

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[8] *See Lopez*, 514 U.S. at 561.

[9] Wickard v. Filburn, 317 U.S. 111 (1942).

[10] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[11] Katzenbach v. McClung, 379 U.S. 294 (1964).

[12] *See* United States v. Morrison, 529 U.S. 598, 611 (2000) ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial

asserted that the Gun Free School Zone Act was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[13] From this single statement, the government constructed an exception to the holding in *Morrison* that limited the reach of Congressional power under the "substantial effects" doctrine to intrastate economic activity. According to this proposed exception, Congress can reach wholly intrastate noneconomic activity if doing so is an essential part of a larger regulation of economic activity that could be undercut unless such intrastate noneconomic activities were included in the scheme.

Although we resisted the recognition of this exception in our brief, we argued that it was nevertheless "essential" to reach our class of activities to enforce the CSA.[14] By oral argument, our stance had changed. In order to defend our claim that the relevant class in our as-applied challenge was "cannabis cultivated and used for medical purposes as authorized by state law," we decided to embrace rather than resist the "larger regulatory scheme" exception. This then enabled us to contend that it was *not* essential to the larger regulatory scheme of the CSA to reach the class of activities with our particular characteristics. Not only was our class small in size as compared with the larger market for recreational marijuana, but its potential size was confined by the requirement that use be for medical purposes. Additionally, the fact that it was regulated and restricted by state law effectively separated this class from the broader illegal market.[15]

In *Raich*, the majority accepted the existence of the "larger regulatory scheme" exception to *Morrison*, though this doctrine could just as easily be considered a fourth distinct rationale for evaluating the reach of the Commerce and Necessary and Proper Clauses, in addition to the three identified in *Lopez*.[16] In other words, in addition to the "substantial effects" rationale for reaching intrastate activity that is economic in nature per *Morrison*, Congress may also

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effects on interstate commerce, the activity in question has been some sort of economic endeavor.").

[13] 514 U.S. at 561.

[14] Brief for Respondents at 35, Gonzales v. Raich, 125 S. Ct. 2195 (2005) (No. 03-1454) ("Nothing in *Lopez* suggests that, by this single sentence, the Court was providing an escape route by which Congress may expand its powers to reach wholly intrastate *non*economic activity with no substantial effect on interstate commerce.").

[15] Transcript of Oral Argument at 36, Gonzales v. Raich, 125 S. Ct. 2195 (2005) (No. 03-1454) ("But a limiting principle . . . was identified by the Court in *Lopez* in which the government is asserting that if it's an essential part of a broader regulation of economic activity to reach this activity, then it may be reached.").

[16] *See Lopez*, 514 U.S. at 558–59:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

(citations omitted).

reach intrastate activity—whether economic or not—if doing so is essential to a larger regulatory scheme that could be undercut unless the activity is reached.

Although the Court rejected our argument that it was not essential to reach the class of activities in our case, in the future, *Raich* could easily be limited to its facts. That is to say, a future court could find that, while it may have been essential to the larger regulatory scheme constituted by the CSA to reach the medical use of cannabis permitted by state law—especially in light of the fungible nature of the commodity being cultivated[17]—this claim may not be true in a future case. In other words, Raich could be construed simply as having adopted a limited "fungible goods" rationale for why it is essential to the larger prohibition of a national market in a commodity that even the local cultivation and possession of such a commodity also be reached.

The tougher issue for a future Court seeking to limit *Raich* is the level of scrutiny to be used to make the assessment that reaching an intrastate noneconomic activity is "essential." The majority in *Raich* adopted the most deferential version of the rational basis test. This is, perhaps, the most dangerous aspect of the Court's holding (and Justice Scalia's concurrence). Any heightened scrutiny provided by *Lopez* and *Morrison* could be evaded by a traditional rational basis approach to determining whether it is "essential" to reach the intrastate activity in question.

On the other hand, in *Raich*, Congress did make explicit findings in the CSA that it needed to reach all such controlled substances. All a future Court need do to reconcile *Raich* with *Lopez* is to stress that these congressional findings satisfy the heightened rationality review implicit in *Lopez*.[18] This characterization of *Raich* would explain why the Court spent so much effort justifying, as opposed to merely reciting, the conclusion that Congress had offered in its "findings."

The level of scrutiny to be afforded the conclusion that it is "essential" to a larger regulatory scheme to reach wholly intrastate noneconomic activity is one of the less well-theorized or defended aspects of the Court's opinion in *Raich*. In essence, it simply asserted that this was the appropriate level of scrutiny, a conclusion that seemed also to be assumed without analysis or defense by Justice Scalia in his concurrence. If *Raich* has a point that is vulnerable to future revision by the Court, this is it. It would be simple for a future Court to declare: "But of course the determination of 'essential' cannot be solely within the discretion of Congress to reach, lest the doctrine swallow the enumerated powers scheme. In *Raich*, it really was rational to consider the intrastate

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[17] *See* Gonzales v. Raich, 125 S. Ct. 2195, 2206 (2005) ("[R]espondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.").

[18] *See* United States v. Morrison, 529 U.S. 598, 614 (2000):

> As we stated in *Lopez*, "'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" Rather, "'[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" (citations omitted).

possession and cultivation of cannabis to be essential to the larger regulatory scheme." Such a reinterpretation of *Raich* would be especially warranted given that the term "essential" suggests a higher standard than Marshall's interpretation of "necessary" in *McCulloch*.[19]

The Economic-Noneconomic Distinction

In *Lopez*, the Court noted that the activity in question—possessing a gun within one thousand feet of a school—was not an economic activity. In *Morrison*, the Court stressed that, in all its Commerce Clause decisions utilizing the "substantial effects" doctrine, the underlying activity was economic in nature.[20] Although the relevance of this fact was questioned by Justice Breyer in his dissent,[21] a requirement that intrastate activity reached under the "substantial effects" doctrine be economic in nature could be viewed as a judicially administrable criterion by which the necessity of reaching such activity pursuant to the Necessary and Proper Clause can be assessed.[22] In other words, when Congress reaches inside a state to regulate or prohibit wholly intrastate activities because of their effect on interstate commerce, requiring that these activities be economic in nature provides some assurance that doing so is a truly necessary means to effectuate the permissible end of regulating interstate commerce.

In *Raich*, the government contended that the cultivation of cannabis was economic in nature because it affects the illicit market in marijuana and substitutes for a product available in the illegal market which Congress sought to prohibit.[23] We strongly resisted this contention, arguing that if an activity was economic simply because it substitutes for a market product or service or because it affects an economic market, then any activity could be deemed to be economic and the reason for the Court invoking the economic/noneconomic distinction would be defeated.

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[19] McCulloch v. Maryland, 17 U.S. 316, 413 (1819) ("If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another.").

[20] *See Morrison*, 529 U.S. at 611.

[21] *See Morrison*, 529 U.S. at 657 (Breyer, J., dissenting) ("[W]hy should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting *cause*?").

[22] *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 625 (2002) ("[L]imiting Congress to the regulation of local *economic* activity ensures that such regulations will, in most circumstances, be plainly adapted and really calculated to achieve some legitimate end connected with the interstate economy.").

[23] Brief for the Petitioners at 12, Gonzales v. Raich, 125 S. Ct. 2195 (2005) (No. 03-1454) ("Respondents' conduct is economic activity that is subject to congressional control because it occurs in, and substantially affects, the marijuana market generally. Home-grown marijuana displaces drugs sold in both the open drug market and the black drug market regulated by the CSA."); *id.* at 37 ("[R]espondents' manufacturing, distribution, and possession activities themselves 'involved economic activity' . . . [because they] are producing a fungible commodity for which there is an established market and are doing so for their own use when they would otherwise be participants in a regulated market.").

Going forward, it is very important that the Court in *Raich* failed to rely upon, or even mention, the government's sweeping theory of "economic." Instead, the Court found the activity to be economic relying solely on a single forty-year old dictionary definition. Here is what the majority says, in its entirety:

> Unlike those at issue in *Lopez* and *Morrison,* the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.[24]

As Justice O'Connor observed,[25] no explanation was given for why this particularly broad definition was chosen over several other more narrow definitions. Broad as it is, however, the definition used by the Court is considerably narrower than the theory urged upon it by the government, and the Court's definition of "economic" is far from unlimited. It would exclude any personal conduct that does not involve "the production, distribution, and consumption of commodities." Reading a book, for example, or having sex. So too, most violent crimes, such as the one at issue in *Morrison*, do not involve the production, distribution, or consumption of commodities. As a result, much law that is within the traditional police power of states lies outside this definition of economic, which (according to *Morrison*) cannot be aggregated for purposes of finding a substantial effect on interstate commerce.

Having said this, the Court's declared definition of "economic" is indeed exceedingly broad. A future Court, however, could narrow it in one of two ways. First, a court could decline to consider this single archaic dictionary definition as dispositive. Second, a court could treat the Court's analysis of "economic" activities as dicta in light of its primary reliance upon the "larger regulatory scheme" doctrine that permits Congress to reach noneconomic activity.

It is potentially significant that the Court's proposed definition of "economic" came in its effort to distinguish *Morrison* in Part IV of its opinion, not in its affirmative defense of the constitutionality of the statute in Part III which seems more clearly to echo the "larger regulatory scheme" rationale that was, after all, rooted in *Lopez* itself. Because the "larger regulatory scheme" rationale allows Congress to reach some noneconomic behavior, its effort to

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[24] Gonzales v. Raich, 125 S. Ct. 2195, 2211 (2005) (footnote omitted).

[25] *Id.* at 2224-25 (O'Connor, J., dissenting).

further distinguish *Morrison* via its unwarranted definition of "economic" was unnecessary to decide the case, and therefore was dicta. [26] Perhaps the spirit of *Morrison* is alive after all.

CONCLUSION

Raich looms large now because it came as such a disappointment to those who admired *Lopez* and *Morrison* and hoped these cases presaged a broader New Federalism revolution. But as it recedes into the past, a Court seeking to limit the powers of Congress could resume movement in that direction by a series of baby steps before needing to confront *Raich* head on. If and when it does, the "doctrine" established by the Court in *Raich* will seem remarkably narrow, fragile, and easy to distinguish or subtly modify. Indeed, limiting *Raich* will be far easier for the Court than was any limitation in *Raich* of *Lopez* and *Morrison*—cases that the Court took pains to leave in place despite the hostility towards them shared by at least four of the justices in the majority.

The happy little secret of the two hundred year history of the Commerce Clause and Necessary and Proper Clause is that *no Supreme Court*—not the Marshall Court or even the New Deal Court—has had the guts to say out loud that there are no judicially enforced limits on the powers of Congress under the Commerce Clause and Necessary and Proper Clause and that, as a result, the enumerated powers scheme is hereby judicially repealed. No Court has had the gall to frankly admit it was amending the Constitution. Remember that even the New Deal Court held *Wickard* over for reargument to the following year and declined to issue an opinion that would have ceded all discretion to Congress to define the limits of its powers.[27] Federalism lives as a "first principle" of constitutional law because no Court has had the temerity to kill it outright. And if the New Deal Court could not take that step, neither will a future Court. Provided, of course, that those who value federalism fight to keep it alive inside and outside of the courts despite setbacks of the sort represented by *Gonzales v. Raich*.

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[26] On the other hand, the Court's explicit discussions of the "larger regulatory scheme" doctrine and the definition of "economic" both appear in Part IV of its opinion. *See Raich*, 125 S. Ct. at 2210–11. The argument in the text that the Court's expansive definition of "economic" activity is dicta depends on characterizing its primary argument for the statute's constitutionality in Part III as more closely reflecting the "larger regulatory scheme" doctrine it later explicitly discusses in Part IV.

[27] *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 218 (1998) (describing Justice Jackson's flirtation with an opinion containing, in Jackson's words, a "frank holding that the interstate commerce power has no limits except those which Congress sees fit to observe . . .").