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## ***Ashcroft v. Raich: Whither Federalism?***

**by George C. Leef**

Article I, Section 8, of the U.S. Constitution provides that “Congress shall have the power to prohibit citizens from consuming or ingesting any substance that it deems hazardous to the health, safety, or morals of the people.” On the basis of that grant of authority, Congress has carefully investigated the effects of numerous substances and has chosen to ban the sale and use of some, such as marijuana, on the grounds that they have no beneficial uses whatsoever.

There are just two problems with the above paragraph. First, the Constitution does *not* contain any such language, although Congress acts as though it does. Congress simply was not given any constitutional authority to decide what substances people may consume, whether for medical purposes or any other reason.

Second, while marijuana (and many other drugs) is banned by federal law, it is *not* true that it has no beneficial effects or is necessarily harmful. For anyone who believes in freedom, the Constitution, or both, the criminalization of drugs that haven’t been approved by some federal agency is deeply troubling, a manifestation of Big Brotherism in a country supposedly devoted to individual liberty.

Those words are inspired by a current case under consideration by the Supreme Court, *Ashcroft v. Raich*. Oral arguments were heard on November 29, 2004, and the decision should be released in the spring of 2005. It is literally a matter of life and death for one of the parties, Angel Raich, and figuratively a matter of life and death for the concept of federalism, which has seen a few flickers of life in recent years, but will be dealt a crushing setback if the Court hands the government a win in the case.

It is hard to imagine more sympathetic plaintiffs than Angel Raich and Diane Monson. Both women suffer from painful, debilitating medical conditions that cannot be treated with conventional (that is to say, government-approved) drugs. Their lives have, however, been greatly improved by the use of marijuana, prescribed by their doctors. Angel’s doctor has stated under oath that her life would be endangered by a discontinuation of marijuana use, owing to the severity of her cancer, seizures, and wasting syndrome. Marijuana allows her to overcome the

pain and come as close as possible to living a normal life. Diane Monson's doctor has stated under oath that without marijuana she would be immobilized by her chronic back pain and spasms. All that either of them is asking of the federal government is to be left alone.

Angel and Diane are just two of the people who have benefited from the medical use of marijuana, which was approved by California voters in 1996. Proposition 215, known as the Compassionate Use Act, legalized the use of marijuana if prescribed by a physician. The reason that California (and several other states) acted in this fashion is that a federal law, the Controlled Substances Act (CSA), makes it a crime for anyone to possess or use marijuana. Believing that they could and should carve out an exception for cases where marijuana is prescribed by a doctor for treatment of illness, California voters approved the very limited medical-necessity provision.

The federal government is not supposed to have plenary authority to enact just any law it may desire, but rather is supposed to be limited in its powers to the few that are expressly enumerated in Article I, Section 8. But, thanks to the "liberal" interpretation of the Constitution (especially the General Welfare and Commerce clauses) adopted in the 1930s and 1940s, federal power has expanded enormously, with Congress now controlling many areas of life the Framers never intended it to, such as telling people what things they are not allowed to consume. Laws such as the Compassionate Use Act are, therefore, instances of the states attempting to regain, albeit imperfectly through a mandatory prescription requirement, a modicum of the freedom wrongfully taken from their residents by Congress.

Relying on the Compassionate Use Act, Angel takes marijuana grown for her by two unpaid helpers, using only resources from California — seeds, soil, water. Diane Monson is able to cultivate her own plants, which she consumes herself. Neither is engaged in "commerce" at all. Their actions are vitally important to their well-being and harm no one. So naturally, the federal government found it necessary to prosecute them.

### **Protecting federal power**

In September 2001, agents of the federal Drug Enforcement Agency (DEA) raided the homes of numerous California users of medical marijuana and their caregivers, confiscating their plants. The U.S. Department of Justice had decided that, notwithstanding state law, the federal crusade against the use of marijuana couldn't tolerate even the slightest relaxation. Angel Raich, Diane Monson, and others like them had to be denied the drug they desperately needed lest the entire federal drug-control apparatus be undermined.

After the raids, attorneys for Angel and Diane fought back with a lawsuit seeking to enjoin federal agents from interfering with their ability to obtain and use marijuana. The suit, filed October 9, 2002, charged that Attorney General John Ashcroft and the DEA administrator, Karen Tandy, had violated the constitutional rights of the plaintiffs. The district court judge refused to grant the injunction, but on appeal to the Ninth Circuit Court of Appeals, the plaintiffs met with

success. The Ninth Circuit granted the injunction and the federal government immediately appealed to the Supreme Court, which agreed to hear this important case.

The federal government maintains that California's Compassionate Use Act is illegal because it interferes with enforcement of the CSA, which is supposedly a valid regulation of interstate commerce. Raich's attorneys are not arguing that the CSA itself is unconstitutional, although a strong argument can be made that forbidding the sale and use of a product is not a "regulation of interstate commerce" as that phrase was understood at the time the Constitution was written. (The drafters were concerned about individual states' blocking trade crossing their borders and they meant to prevent it; they were not thinking that Congress needed authority to dictate to the people what they could and could not consume.) Rather, their argument is that, since the growing and the use of marijuana by medical-necessity patients such as Angel and Diane entails no interstate commerce, Congress has no power to control it. And that argument would seem to be a "no-brainer." Growing something for your own use (or having others grow it for you) would seem to be as far removed from interstate commerce as, for example, making and playing a homemade flute for your personal enjoyment.

### ***Wickard v. Filburn***

Yet the government claims to have precedent on its side — the infamous 1942 case of *Wickard v. Filburn*. In that case, an Ohio farmer was prosecuted for having grown too much wheat. Under the Agricultural Adjustment Act, farmers were allowed to grow only a certain quota of wheat (part of the New Deal's absurd idea that reducing production would restore prosperity) and Roscoe Filburn had undoubtedly grown more than he was permitted by the government's agricultural planners. His defense was that, since all of his wheat was consumed on his own farm, there was no interstate commerce involved and therefore his actions were beyond the reach of Congress. A strong argument, indeed.

The government's answer to that argument was very clever: If farmers were allowed the freedom to grow as much wheat as they wanted in *intrastate* commerce, they might purchase less wheat in the *interstate* market. The combined effects of many farmers like Filburn could therefore have a substantial effect on interstate commerce even though their individual actions were no part of it. Thus, from the dubious initial premise that Congress is entitled to dictate national targets for the production of agricultural commodities, an idea the Founders would have scoffed at, we arrive at the conclusion that the government has the power to punish individuals for what they choose to do with their own land. This was a breathtakingly arrogant expansion of federal authority over the citizenry.

Of course, the Supreme Court swallowed the government's argument, hook, line, and sinker. By 1942, the Court was completely dominated by jurists who were enthralled by the concept of central economic planning and convinced that economic freedom was an atavistic

concept with which the government could dispense whenever its “experts” thought that the “public interest” called for it. Equally atavistic to the Court was the notion of limits on the power of Congress. Since central planning was manifestly good and needed, who were nine old men to get in its way by standing up for the Framers’ vision of a federal government limited to just a few powers having nothing to do with economic planning?

In *Ashcroft v. Raich*, the government has staked its argument that states may not enact laws such as the California Compassionate Use Act on the precedent of *Wickard*. It contends that if patients are allowed to use small amounts of marijuana for medical purposes, the government’s ability to enforce the Controlled Substances Act will be undermined, just as allowing farmers to grow as much wheat as they might want to for their own uses supposedly undermined enforcement of the Agricultural Adjustment Act. How would enforcement of the CSA be undermined? Supposedly, some of the marijuana grown for medical patients could end up being sold illegally. So even though the number of patients like Angel and Diane is very small, and there is no allegation that either of them has ever sold any marijuana, the mere possibility that someone might do so is enough for the federal government to say that no one, no matter how serious his medical need for marijuana, should be allowed to have any. In other words, Angel, Diane, and other patients like them should suffer even though they have done nothing wrong, just because it’s conceivable that others might commit an illegal act — the selling of marijuana. Tough for Angel, Diane, and the others.

### **Overruling *Wickard*?**

The case ought to be a humiliating loss for the government. Its reliance on *Wickard* requires a considerable stretching of that already far-fetched decision. As Judge Harry Pregerson noted in his opinion for the Ninth Circuit, in *Wickard* the regulated entity, Filburn’s farm, was at least a commercial enterprise. In this instance, the plaintiffs are just individuals with severe medical problems. There isn’t the faintest hint of any commerce here; even Angel’s two assistants are unpaid. So, Judge Pregerson wrote, to use *Wickard* as a precedent would require a significant expansion of its holding.

Among the many amicus curiae briefs submitted in *Ashcroft* is one by the Institute for Justice and University of Chicago Law School professor Richard Epstein, an expert on the meaning of the Commerce Clause, arguing for the overruling of *Wickard*. Whether the Court will choose to do so is questionable, but it would be a condign justice if an effort to further restrict federalism and individual liberty wound up extinguishing one of the cases that is responsible for the curtailment of both.

More appropriate precedents than *Wickard*, argue the attorneys for Raich, are several recent Court decisions regarding the scope of federal power. For example, in *United States v. Morrison* in 2000, the Court struck down the federal Violence Against Women Act, despite the

government's contention that violence against women could perhaps have some impact on interstate commerce. In that and other recent cases, the Court realized that, since almost every activity could conceivably have some remote effect on interstate commerce, the power of Congress would be effectively limitless if the "any impact on interstate commerce" touchstone were followed — not at all what the Framers intended. The concepts of enumerated powers and federalism cannot be destroyed by misreading one clause in a way that wipes out the clear limits on federal power written into our Constitution.

Lead counsel for Raich is Boston University law professor Randy Barnett. His recent book, *Restoring the Lost Constitution*, is highly relevant to this case. (See my review in the January 2005 issue of *Freedom Daily*.) In his book, Barnett argues that the Constitution should be read with a presumption of liberty. That is to say, federal laws that restrict the liberty of citizens should be presumed invalid unless the government can produce a very persuasive case that an enactment is the least intrusive means for it to accomplish a constitutionally permissible end. If the Court were to look at *Ashcroft v. Raich* through that lens, the government's case would fall flatter than a grape dropped from the top of the Empire State Building.

This case shows how badly the U.S. governmental system is working. State voters should not have to pass referenda that imperfectly restore a tiny sliver of the freedom that has wrongfully been taken from them by statutes such as the Controlled Substances Act. In a truly free nation, government would no more restrict the substances one may ingest than it would restrict the books one may read, the music one may listen to, or the clothes one may wear. Even if Raich prevails, it will do nothing to stop the authoritarian CSA and its government enforcers from continuing to violate the rights of Americans to peacefully go about their lives — except for the few who fall under the medical-necessity statutes in a few states.

A win by the government, however, would cement even more firmly in place the unconstitutional overreaching of Congress under the Commerce Clause. Since there is no prospect of the Supreme Court's ruling against the legality of the Controlled Substances Act in this or probably any other case, the best that defenders of freedom can do is to point to the hideous treatment of Angel Raich and thousands of other drug-war victims to convince voters and elected officials that what we should do is simply call off the drug war just as we called off Prohibition.

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