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States’ Right to Initiative: Medicinal Marijuana

By Weishan Gu

Summary

This paper addresses the issue of legalizing medical marijuana. The author highlights the conflicting balancing act that state and federal laws fight to have with one another in regards to the legalization process.

Introduction

The rivalry between federal and state government has persisted for centuries and has been crucial in laying the ground work for modern politics; whether it be in Supreme Court cases such as the infamous Dred Scott v. Sanford or the more recent Brown v. Board, the precarious relation between federal and state government has repeatedly been defined in court. Most recently, the doctrine of dual federalism has been tested in the 2005 Supreme Court case Gonzales v. Raich, which entails a conflict between California’s local marijuana laws and Federal marijuana laws. Even though marijuana possession has been illegal since the 1930s, doctors in certain states have been recently prescribing it to patients out of medical necessity. In what can be considered as a bold social experiment, the people of California successfully initiated laws to prescribe and regulate medical marijuana in 1996; people from the states of Alaska, Colorado, Maine, Montana, Nevada, Oregon, and Washington soon followed suit, voting for similar kinds of laws. However, the recent medical marijuana reforms have been undermined by the Supreme Court in the decision of Gonzales v. Raich, which holds that possession of marijuana is illegal even if a state has approved it for medicinal use. Although the ruling unconditionally forbids marijuana possession, it does not strike down the states’ initiatives regarding medicinal marijuana, thereby leaving the federal and state government ambiguous in how to interact with each other and enforce its laws. This controversy has drawn attention to the question of whether the right to use medical marijuana is a fundamental right held by an individual. The Supreme Court decision conceives even deeper questions regarding citizens’ right to initiative and states’ right to legislate its own healthcare policy. In this article, I argue that the people have a right to initiative in creating legislating with regarding medicinal marijuana.

Not only does this paper address the conflict between balancing federal and state power, but it also examines an extremely controversial debate involving medical marijuana that has arisen from our society’s changing values and ideology. My research primarily focuses on the health and social effects created by the use of marijuana, weighing both the positives...
and negatives of marijuana use with recent medical studies and clinical trials. will first explore the history of marijuana use and the circumstances that led to its ban in the United States. Using appropriate statistical evidence and the opinions of medical experts, ranging from congressional reports to DEA hearings, I will qualify whether medical marijuana is safe to prescribe given certain conditions are met. After validating the legitimacy of medicinal marijuana, I will explore the constitutional question of whether a state’s regulation of marijuana is in conflict with federal statute by analyzing the reasoning behind Gonzales v. Raich. Through the synthesis of different opinions, spanning the majority and dissenting opinions from Raich and other precedents from recent cases that apply, I will determine whether the Supreme Court interpreted federal power too broadly.

Relevant Circumstances Surrounding Federal Marijuana Laws

In order to fully understand Gonzales v. Raich, one must explore the relevant circumstances surrounding federal marijuana laws. The United States government has marijuana categorized as a schedule I drug. By criteria of the scheduling process, the federal government is implying that marijuana has “no currently accepted medical use in treatment”. However, this statement is incredibly controversial; there exist a plethora of evidence and arguments for both sides. With the growing prevalence of medicinal marijuana use and new studies and clinical trials that did not exist when the drug was scheduled, the question of whether physicians have the right to prescribe medical marijuana inevitably becomes significant. Marijuana has been historically used to treat illness and pain. The earliest documented usage of marijuana dates back to 2737 B.C. in China. Ever since then marijuana has historically been used to treat a variety of diseases from hay fever to insomnia in all parts of the world, including Africa, Europe, and the United States (National Commission of Marihuana and Drug Abuse). With marijuana’s long and widespread history of usage, the question arises: why is it illegal?

The Movement to Ban Medical Marijuana

The movement to ban marijuana in United States was a controversial one that was laden with political interests and propaganda. Certain business tycoons saw marijuana, particularly hemp (marijuana for industrial use), as a danger to their business assets and future profits. According to a February 1938 article in Popular Mechanics, “hemp will produce every grade of paper and government figures estimate that 10,000 acres devoted to hemp will produce as much paper as 40,000 acres of average pulp land.” William Randolph Hearst and Du Pont Corporation stood to lose billions from the potential industrialization of hemp. Hearst owned vast acres of timber for his publishing company while Du Pont was trying to patent new technology to process wood into pulp paper; the industrial use of hemp would have rendered their paper products obsolete. It is no wonder that they would have every interest to destroy that which could potentially devastate their business fortune. Therefore, they pursued unethical methods in removing hemp from the commercial market such as yellow journalism, racism, and political corruption. There was no credible evidence or thorough research to suggest that marijuana was any more harmful than the only two more used drugs at the time, alcohol and nicotine. It seems like marijuana was banned more for political and business interests than the health concern it creates. In fact, the DEA’s administrative judge Francis Young stated in 1992, “Marijuana, in its natural form, is one of the safest therapeutically active substances known to man. By any measure of rational analysis marijuana can be safely used within a supervised routine of medical care.” However, no
Weishan Gu  

States Right to Initiative - 15

one knew this kind of information because there was little credible research or medical trials done on marijuana at the time. Taking advantage of public ignorance, Hearst used yellow journalism to create specious arguments of the dangers of marijuana, which he compared to the harder drugs such as cocaine and heroin. Furthermore, his newspapers took hemp and created a new name, “Marihuana”. This was an example of another clever strategy Hearst employed; by using this Spanish word, he was able to associate “Marihuana” with the influx of Mexican immigrants. By preying on the public’s anti-Mexican sentiment, he successfully ruined the image of hemp. With such powerful political influence and persuasive propaganda, Hearst easily instilled irrational fear in the public and had marijuana banned by 1937.

The Effects: What You Should Know

Even though it is illegal in the United States, marijuana has legitimate medical value and its use in treatment has been backed by many authoritative and reputable sources. When the Controlled Substance Act was enacted in 1970, marijuana was classified as a schedule I drug along with heroin, LSD, and peyote. Schedule I drugs are by definition, “a drug that is currently listed in schedule I, if it is undisputed that such drug has no currently accepted medical use in treatment in the United States and a lack of accepted safety for use under medical supervision” (21 USC 812). However, in the past half century, research and tests have shown that marijuana indeed has accepted medical use in treatment.

The internationally respected medical journal from the U.K., The Lancet, said in a 1995 article that, “The smoking of cannabis, even long term, is not harmful to health… cannabis per se is not a hazard to society but driving it further underground may well be.” Furthermore, the Institute of Medicine of the National Academy of Sciences has also found, “marijuana’s therapeutic potential in decreasing the intraocular pressure for glaucoma patients, controlling the severe nausea and vomiting associated with chemotherapy, acting as an anticonvulsant, relaxing muscles and thus counteracting spasticity problems, and other uses.” These reports confirm that marijuana is useful and beneficial to people suffering from unbearable pain and discomfort. Although there are many other drugs that can kill pain, treat nausea, and induce sleep, many patients contend that the other drugs do not work as well as marijuana. While opioids and benzodiazepines do effectively treat pain and anxiety, their long term use is far more dangerous than that of smoking marijuana. Unlike opioids and benzodiazepines, which have alarmingly worsened side effects with increased dosage, marijuana and its prolonged use does not build up quick tolerance and its withdrawal symptoms are comparatively mild.

Even though marijuana is criticized for its potential of abuse, it is not physically addictive nor is it lethal. Most prescription drugs create physical dependence and some drugs, such as morphine, are lethal even in small doses; on the contrary, excess use of marijuana will merely put a patient to sleep. Even with legal derivatives of THC such as Marinol (pill) in the market, physicians continue to prescribe marijuana because they believe smoking the plant material delivers the THC to the patient more effectively. According to a 1991 Harvard study, doctors seem to affirm that synthetic THC is not as effective in treatment as inhaled marijuana: “As a group, respondents considered (smoked) marijuana to be somewhat more effective than the legally available (oral) synthetic THC (Marinol) and roughly as safe.” Because smoking the material delivers the THC instantly, it is more effective in rapid relief than oral dosage. Furthermore, the study included a survey in which 48% of the doctors stated that they would prescribe marijuana if it were legalized. Even with the recent support of a significant
portion of the medical community, medicinal marijuana is still frowned upon by the politicians. Only three years ago, the Supreme Court ruled that marijuana possession is illegal, with or without a medical license.

**Gonzalez v. Raich**

In 2005, *Gonzales v. Raich* held that Congress has the ultimate power to outlaw marijuana possession despite certain state laws that allow medicinal marijuana possession. The case started as a suit for injunctive and declaratory relief on behalf of the two parties, Diane Monson and Angel Raich, when they were arrested for possession of marijuana despite having medical marijuana permits in the state of California. The defendant, Angel Raich, argued that the seizure of her marijuana constituted a violation of the Commerce Clause, which grants Congress the power to regulate interstate commerce and activities that significantly affect interstate commerce. This clause is the life line of the Controlled Substances Act, which is tantamount to the bible of federal drug regulation. She argues that her cultivation of a few marijuana plants does not fall under the category of interstate commerce nor does her activity substantially affect interstate commerce. Due to her allergies to many other types of drugs, she also argues that marijuana was the one drug that most effectively alleviated her severe pain; her doctor testified under oath that without marijuana, Raich could die in excruciating pain. However, the government argued that while her individual case may warrant medical necessity, recognizing the use of medical marijuana would make the Controlled Substances Act almost impossible to enforce. Because a single exception would greatly undermine the law’s authority, which in turn would undermine the health of the nation, medical marijuana should not be legal. The Court ruled 6-3 in favor of the government, stating that the federal government does have the right to regulate marijuana through the Commerce Clause because her personal cultivation of marijuana could possibly leak into the black market and cross state lines, thus making her activity one that affects interstate commerce.

**Medical Marijuana and California**

However, the legal question regarding medical marijuana in California is not as clear cut as it may seem. While the court has made it apparent that medical marijuana is illegal, it did not address California’s state initiative, better known as Proposition 215. The aftermath in California since the ruling has been interesting; medical marijuana patients continue to grow and purchase marijuana from the state despite the possibility of arrest by federal agents. The state authorities are still obligated to recognize the law that its own citizens passed, thus medical marijuana use continues. Many states have this kind of balloting, which involves people, instead of legislators, passing a law themselves by petitioning and voting on it during elections. This right to initiative is a fundamental right given by the Constitution in the 10th amendment, which says: “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” This amendment distinctly draws the line regarding sovereignty between the two spheres of government.

The constitution mentions nothing about the field of medical marijuana; therefore, California has the right to legislate its own policy in this field. However, the result of Raich seems to contradict the spirit of the 10th amendment. By enforcing its own drug policy, the Controlled Substances Act, the federal government indirectly overrules Proposition 215. But the ruling in Raich did not invalidate Proposition 215. Consequently, the federal government is also bound to respect California state law unless there is necessity in which federal
law should prevail. The rest of my paper will judge whether or not there is such necessity.

It is undeniable, especially from historical standpoint and conventional practice, that a state has the obligation to guide the overall public welfare of its citizens, meaning it has the right to legislate on public health, police power, and morals of its citizens. California’s Proposition 215 is merely an extension of the state of California legislating its public health policy. *Gonzales v. Raich* takes account two recent cases that involved the Commerce Clause and its application to federal law. In *United States v. Lopez*, the court ruled against the Gun-Free School Zones Act of 1990, citing that the federal government lacked authority to apply the Commerce Clause on an activity that is non-economic in nature.

While marijuana is a commodity, California’s healthcare policy is not. By regulating marijuana, the federal government is interfering with California’s public health; medical marijuana is more than a commodity, it is a means by which seriously ill patients use to survive. Justice O’Connor seems to agree that medical marijuana falls outside the intended scope of the Commerce clause in her dissenting opinion as she writes, “This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently… the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.” The significance of allowing medical marijuana to be used in California is the protection of health care experimentation through avant-garde methods. For the federal government to take a state’s right to attend to its public health, Congress must justify its action.

**Congress, Supreme Court, and Medical Marijuana**

Congress’ justification for enacting the Controlled Substances Act lies in its right to regulate interstate commerce. The majority opinion of *Gonzales v. Raich* rationalizes its decision based on that the federal government has the right to regulate even intrastate marijuana in California because it is an activity that can substantially affect interstate commerce. This decision is extremely controversial since it entails a broad extension of the scope of Commerce clause. On one hand, Congress has the right to do what is necessary and proper to promote the moral and social welfare of the nation. But on the other hand, the Constitution and Bill of Rights strictly lay out certain government powers and limits them.

The ninth amendment of the Constitution guarantees protection for enumerated rights, those that are not explicitly mentioned, of the people. It ultimately boils down to whether the right to medical marijuana is a enumerated right. Although I have tried to clarify the answer to this question in the previous paragraph, this debate is still being contested. However, it would be hard to deny that this extension of the Commerce Clause inevitably detracts from California’s right to initiative. Taking away a state’s right to legislate in matters that is not prescribed to the federal government is a clear violation of the tenth amendment. Unless the federal government has an overwhelmingly compelling governmental interest in the welfare of its citizens, as it did in the freedom of speech case regarding pornography in *Miller v. California*, it should not take away a guaranteed constitutional right. Randy Barnett, a law professor at Georgetown, responds to ruling of Raich by commenting in his law review article, “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.” His thoughts are just a sample of that by many more respectable scholars and professionals who have been left confused by the Court’s sketchy ruling.
When the Supreme Court took away this guaranteed constitutional right in the Raich case, the Court gave equivocal reasoning that many people question. Justice Stevens writes, “Marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market.” Although it is true that medicinal marijuana may enter the illicit market and cross state borders, the holistic impact of individual plants and personal amounts to the black market is negligible. In a technological era where communication and transport is easily accessible and convenient, there exist few items that are bound by distance and location. Justice Clarence Thomas disagrees in his dissenting opinion by saying, ‘Certainly no evidence from the founding suggests that "commerce" included the mere possession of a good or some personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.” With regulations in medical licensing and quantity an individual may possess, the exchange of marijuana can be categorized as intrastate commerce that does not significantly affect interstate commerce. A limit on the amount a patient may possess helps restrict the marijuana for personal use, while applying for a medical license screens for those who truly need it for treatment. Strict regulation of medical licensing and limits on quantity turns medicinal marijuana into a personal activity, which is ultimately intrastate.

**Implementation and Regulation Needs Improvement**

*Gonzales v. Raich* is a case that touches much more than it appears to on the surface, and the lack of confidence by the public behind the Court’s decision subjects this case to much more scrutiny. The case poses the question of how much power the Commerce Clause grant does to Congress; the constitutional question of whether the Controlled Substances Act interferes with California’s right to initiative raised by this case is equally tough to answer. I believe that presenting and analyzing the Raich case indirectly brings the controversial subject of medical marijuana to the forefront of the nation’s conscience.

No matter what evidence advocators and opponents present, the question of whether medical marijuana should be legal will remain disputable. The aftermath of the Raich decision has caused people to ponder: if the Commerce Clause was incorrectly applied, what repercussions would it have for California medical marijuana laws? I hope my paper has presented not only an alternative view of the Raich opinion, but also a fresh perspective into the scope of medical marijuana law and its recent controversy. While marijuana has many positive aspects, it is still a drug and has its negative side effects as well. No one can deny the loss to society resulting from the widespread abuse of marijuana. While question of whether legalizing medicinal marijuana will ultimately benefit or harm society is still under speculation, it is evident war on drugs is not becoming any cheaper. Regardless of the government’s policy, the demand for marijuana will always exist. Not only did *Gonzales v. Raich* exacerbate a conflict between state and federal rights, but it also failed to address California’s individual laws regarding medicinal marijuana. This has created a conflict between DEA agents and local marijuana dispensaries; the DEA agents actively pursue medical marijuana dispensaries and patients, who are people merely claiming a right their state has given them. Few can deny that this system is inefficient and should be reformed.

**Bibliography**


