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# Drugged

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## Drugged

by Carl E. Schneider

The Supreme Court's recent decision in *Gonzales v. Oregon*, like its decision last year in *Gonzales v. Raich* (the "medical marijuana" case), again raises questions about the bioethical consequences of the Controlled Substances Act. When, in 1970, Congress passed that act, it placed problematic drugs in one of five "schedules," and it authorized the U.S. attorney general to add or subtract drugs from the schedules. Drugs in schedule II have both a medical use and a high potential for abuse. Doctors may prescribe such drugs if they "obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him." The attorney general may deny or revoke a doctor's registration if registration would be "inconsistent with the public interest." In evaluating "the public interest," the attorney general considers, among other things, "conduct which may threaten the public health and safety." In 1971 the attorney general issued a regulation requiring that prescriptions for controlled substances "be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."

So far, so good; this is all common ground. The issues *Gonzales v. Oregon* presents had their origins in 2001, when Attorney General Ashcroft promulgated an "Interpretive Rule" which "determine[d] that assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 CFR Sec. 1306.4 (2001),

and that prescribing, dispensing, or administering federally controlled substances violates the CSA. Such conduct by a physician . . . may 'render his registration . . . inconsistent with the public interest.'"

The Interpretive Rule did not preempt Oregon's legalization of assisted suicide, but it did impede assisted suicide, since controlled substances are the standard means of assistance. Oregon therefore asked the federal courts to keep the attorney general from enforcing his rule. The case eventually reached the Supreme Court. What was the Court's task?

A common public expectation was that the Supreme Court would—finally—decide whether assisted suicide is good policy. That, however, is not the Court's job. There are some areas of law in which some courts *are* supposed to consider and decide what public policy should be. These are the areas in which state courts have inherited the "common law" authority of English courts, areas like the law of property, of contracts, and of torts (civil wrongs). In those areas, English courts made law before Parliament had become an effective legislature. That authority persisted even when Parliament came into its own, and that authority was inherited by American state courts. In common law areas, courts principally apply precedent, but when necessary they are expected to think in policy terms. Even in those areas, of course, judicial decisions can be overridden by the legislature.

The federal courts, however, have (basically) not inherited the common law power to make public policy. For our purposes, the federal courts have only two tasks—to interpret the Constitution and to interpret federal statutes.

So, was the Court's assignment in this case to decide whether the Interpretive Rule exceeded the federal government's constitutional authority? It could have been. The federal government's power is not plenary; it has only the authority the Constitution accords it. Oregon claimed that the attorney general's interpretation of the CSA exceeded constitutional bounds and trespassed too far on the authority of the states.

Nevertheless, *Gonzales v. Oregon* was—basically, essentially, apparently—not decided on constitutional grounds. Why? What did the Court think its task was? "The question before us," Justice Kennedy wrote for the majority, "is whether the Controlled Substances Act allows the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure." The Court was saying that the attorney general's authority is not coterminous with the federal government's authority. He has only the powers he is statutorily accorded. He thought the CSA gave him the authority to issue his rule. Oregon disagreed.

If the issue was the meaning of the CSA, did the Court just consult the statute's language? No. Administrative agencies of the federal government regularly interpret the statutes from which they derive their authority. Agencies become expert in their work and in the law that regulates it, and courts routinely defer to their expertise in both areas. So when an agency's interpretation of the law under which it operates is challenged, courts may defer to it. But when should they defer, and how much? The Court has developed several "canons of construction" to guide it in matching the level of deference to the particulars of the situation. These canons of construction are intended to help the regulators, the regulated, and the courts reach sensible, consistent, and pre-

dictable conclusions about an agency's authority.

Thus, at the heart of *Gonzales v. Oregon* was a debate between Justice Kennedy's six-justice majority opinion and Justice Scalia's three-justice minority opinion about which canon of construction was appropriate and what it meant in the circumstances. In discussing opinions in this column, I ordinarily describe them in enough detail to make their reasoning clear. Here, however, that detail is prohibitively abundant. To my way of thinking, Justice Scalia's characteristically sharp and lively opinion has the better of the argument, but it did not command a majority, and that's what counts.

The majority opinion, however, has one final twist. The last paragraph suggests that the dissent thought that the CSA "delegates to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice." That is, while the majority showed the federalism issue out the front door at the beginning of its opinion, it snuck that issue in the back door at the end.

Unfortunately, this approach left the Court's federalism argument undeveloped and unconvincing. For one thing, the attorney general was hardly trying "to define general standards of medical practice." Prescribing controlled substances is but a sliver of medicine. Worse, the Court's view of federalism is singularly antique. It has been decades since the regulation of medicine was truly confided to the states. The federal government has long asserted—and the Supreme Court has long accepted—an almost maximally expansive view of federal authority. That view is the legacy of and condition for the New Deal and the civil rights movement. The Court has in two recent cases shown that that authority has *some* limits, but those cases involved statutes on the outmost periphery of the constitutional reach of Congress. And only last year (in *Raich*), the Court reaffirmed the New Deal case (*Wickard v. Filburn*) that most indulgently viewed the power of Congress.

More specifically, the federal government has insinuated itself deep into the fabric of medical care. This is overdetermined and inevitable. First, we now have a national economy nationally regulated, and roughly fifteen percent of that economy is devoted to health care. Much federal regulation that is not aimed at health care—like antitrust law—nonetheless affects it. Second, the federal government is now such a major purchaser of health care—through the Veterans Administration, Medicare, Medicaid, and so on—that its purchasing decisions crucially shape much medical practice. Third, the federal government has routinely conditioned federal funds on the acquiescence of medical institutions to hosts of federal regulations. Many of those regulations penetrate far into the world of medical actors and their patients. Consider the Health Insurance Portability and Accountability Act, that burdensome federal regime for a core part of medical ethics—confidentiality.

Fourth, the federal government has anciently and actively regulated medical care. The CSA itself is an example, but an even older and broader example is the Food and Drug Administration and the army of statutes and regulations that surrounds it. For that matter, would it really violate federalism principles for Congress to institute a program of national health insurance?

This returns me to my starting point. It is understandable that the press and public see cases like *Gonzales v. Oregon* in terms of their policy consequences. After all, they do have policy consequences. And no one supposes that even the justices can purge those consequences and their own preferences from their minds when they decide cases, even though they should and do try, with some success, to do so.

Nevertheless, in America there is a division of governmental labor; different parts of government specialize in different kinds of work. They have responsibility for specific sectors of government and become expert in them. Thus the Supreme Court's *métier* is not to set public policy. It lacks the authority, experience, and information to

do so. The Court's province (in part) is to ensure that the jurisdiction of federal agencies is clearly and predictably established and to resolve disputes about what the Constitution's federalism principles mean. These duties are more important than making a policy choice about assisted suicide, because a great deal in a great many situations turns on the precedent the Court sets in both parts of its special province.

In short, one's view of a case should change according to one's assignment in the governmental division of labor. For example, when Michigan had a referendum on assisted suicide, I was acting as a citizen and quasi-legislator, and I voted no. Were I the attorney general, however, I would not have issued the "Interpretive Rule," largely because prudential (not constitutional) principles of federalism suggest Oregon should be left free to be a laboratory of democracy.<sup>1</sup> Yet were I a justice, I would have voted to uphold that rule because I think the statute authorized it and no constitutional provision prohibits it. Even if I uncompromisingly supported assisted suicide, I would have voted to uphold the rule. I would have done so because I would have wanted to protect the clarity of the canons of construction that the court has devised for analyzing agency authority and to preserve the principles of federalism that have been developed over decades of national debate.

So where are we now? Congress could amend the CSA to make the attorney general's authority to issue his rule plain. If the attorney general reissued the rule, Oregon would be back in court arguing that the rule exceeded the federal government's constitutional authority. At that point, the federalism issue that the Court dealt with obliquely would be directly presented.

1. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J. Brandeis, dissenting).