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A Government of Limited Powers

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Roscoe C. Filburn owned a small farm in Ohio where he raised poultry, dairy cows, and a modest acreage of winter wheat. Some wheat he fed his animals, some he sold, and some he kept for his family's daily bread. The Agricultural Adjustment Act of 1938 limited the wheat Mr. Filburn could grow without incurring penalties, but his 1941 crop exceeded those limits.

Mr. Filburn sued. He said Claude Wickard, the Secretary of Agriculture, could not enforce the AAA's limits because Congress lacked authority to regulate wheat grown for one's own use. He reasoned: In our federal system, the states have authority to legislate except where the Constitution constrains them, but the federal government may legislate only where the Constitution authorizes it. The Constitution permits Congress to "regulate Commerce with foreign Nations, and among the several States" and may "make all Laws which shall be necessary and proper for carrying into Execution" its Commerce Clause powers. Mr. Filburn thought that growing and eating wheat on his land were acts "local in character" and that "their effects upon interstate commerce are at most 'indirect.'"

Diane Monson lives in California. She has been growing marijuana she takes to treat substantial medical problems. The California Compassionate Use Act of 1996 exempts from criminal liability "patients . . . who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician." However, the federal Controlled Substances Act classifies marijuana as a "Schedule I" drug. Such drugs have a "high potential for abuse" and no "accepted medical use," and it is a federal crime to manufacture, distribute, or possess them.

Diane Monson (with Angel Raich, another patient using marijuana) went to court to argue that Alberto Gonzales, the Attorney General, could not enforce the CSA against her or her doctors because Congress lacks authority to regulate the marijuana she grows for her own use. Ms. Monson argued that the Commerce Clause does not authorize Congress to "prohibit the local cultivation and use of marijuana in compliance with California law."

In 1942, *Wickard v. Filburn* reached the Supreme Court. The Justices agreed that the AAA was constitutional. They quoted Chief Justice Harlan Stone: "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end." Thus, "even if appellee's activity be local and though it may not be regarded as commerce, it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce." Mr. Filburn's wheat affected interstate commerce because it kept him from buying somebody else's wheat. And while his crop was small, its effect, "taken together with that of many others similarly situated, is far from trivial."

On June 6 of this year, Justices decided six to three that Congress may regulate Ms. Monson's marijuana garden. Justice Stevens said for the Court that the Commerce Clause was "the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation." Thus the Commerce Clause power is capacious, and "case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."

The principle of *stare decisis* obliges American courts to decide similar cases similarly. *Raich* virtually *was Wickard.* "Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the AAA controlled the amount of wheat in interstate and foreign commerce, "a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets."

In dissent, Chief Justice Rehnquist and Justices O'Connor and Thomas invoked two recent cases that examined statutes enacted on the authority of the Commerce Clause. In 1995, *United States v. Lopez* held that the Gun-Free School Zones Act of 1990 exceeded Congress's authority. That law made it a crime to have a gun near a school. The Court said that the Act was "a criminal statute that . . . has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms," and the Court therefore held that the Act violated the Commerce Clause. In 2000, *United States v. Morrison* similarly found the Violence Against Women Act of 1994 unconstitutional. That law "created a federal civil remedy for the victims of gender-motivated crimes of violence." Despite "congressional findings that such crimes had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in

Lopez, it did not regulate economic activity."

The majority thought *Lopez* and *Morrison* sufficiently different from *Wickard* and *Raich* that they could be decided differently. The latter cases involved "quintessentially economic" acts—producing, distributing, and consuming commodities that had an established interstate market—while the former cases involved not economic activity, but crimes of violence. The former cases affected interstate commerce proximately; the latter only remotely.

The dissenters, on the other hand, thought *Raich* was closer to *Lopez* and *Morrison* than *Wickard*. They doubted that raising marijuana for one's own medical use is "economic" activity. Even if it is, they said, it is not economic activity that perceptibly affects any national market: "There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market." Problems would arise only if marijuana were diverted to illegal uses. Would that happen? Not in Justice O'Connor's eyes: "We generally assume states enforce their laws." ("'If the law supposes that,' said Mr. Bumble, squeezing his hat emphatically in both hands, 'the law is a ass—a idiot.'")

The dissent, then, thought Congress had not shown that interstate commerce was sufficiently affected. But, the majority said, Congress need not make such a showing. Congress only needs a "rational basis" for anticipating a sufficient effect on commerce. The CSA as a whole plainly affected interstate commerce. It mattered not that, sliced fine enough, individual slivers did not.

More broadly, the majority thought, the dissent "overlook[ed] the larger context of modern-era Commerce Clause jurisprudence." In the early New Deal, the Court used the Commerce Clause (and the Due Process Clause) to savage New Deal legislation. New Dealers protested that the Justices were abusing these ambiguous clauses to promote their own political views and class interests. By the late 1930s, the Court was chastened, and *Wickard* was part of its pledge of repentance and promise of reform. During the civil rights movement, again, Congress wanted to reach intrastate behavior once more. Again it found authority in the Commerce Clause, and again the Court interpreted that authority generously.

"Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question," Tocqueville said. So when judges decide legal questions, they appear to be answering political questions. The press coverage of *Raich*, for instance, regularly treats the case as a ruling on the policy of legalizing marijuana for medical purposes.

Judges see their work differently. They too have limited powers. Their assignment is only to decide whether government has acted within the scope of its constitutional authority. As the *Raich* majority said, "The question before us . . . is not whether it is wise to enforce the [CSA] in these circumstances; rather it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally." As Justice O'Connor said in dissent, "[I]f I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment . . . , the federal principles that have driven our Commerce Clause cases require that room for experiment be protected in this case."

Far from imagining it has resolved the debate over marijuana policy, the *Raich* majority thinks that political question is open: The CSA "authorizes [administrative] procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress."

To the Court, then, *Raich* is not a medical marijuana case any more than *Wickard* was a wheat case. *Raich* is a federalism case. When the Justices received the case, they said, "Wow, here's *Wickard v. Filburn*, an old friend from law school," not "At last, here's the medical marijuana problem." When they read the briefs, heard the oral argument, and drafted their opinions, they were repeatedly brought back to two centuries of cases interpreting the Commerce Clause—to *Wickard*, *Lopez*, *Morrison*, and their kith and kin. The justices had to think and to write in terms of those cases.

Raich and its forebears are about constitutional law in its core sense—about how American government is constituted. Allocating authority between the federal and state governments has been central to the compromises that made a "United States of America" possible, to the battles between Hamiltonians and Jeffersonians, the Civil War, the response to industrialization, the struggle over civil rights, and policy today. Thus Justice O'Connor's dissent begins, "We enforce the 'outer limits' of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government." A federalist vision of states as laboratories of democracy encouraged the Court in *Washington v. Glucksberg* to leave states free to permit or prohibit assisted suicide. Next term in *Gonzales v. Oregon* the Court will assess the Attorney General's authority under the CSA—and hence the Commerce Clause—to regulate the use of drugs for assisted suicide.

Still, the majority and minority in *Raich* may not be desperately far apart. They presumably agree that the Commerce Clause grants Congress impressive scope. They presumably agree that federal power has *some* limits. They disagree within the uncertain borderland surrounding those limits, a borderland they negotiate guided by Delphic-tongued oracles—clauses that are majestically vague and precedents that offer analogies but not rules. *Raich* has now joined *Wickard* as one of those oracles in the unending effort to define the limited powers of the federal government.