THE COMMERCE OF PHYSICIAN-ASSISTED SUICIDE: CAN CONGRESS REGULATE A "LEGITIMATE MEDICAL PURPOSE"?

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INTRODUCTION

In 1994, Oregon became the first state in the union to allow physicians to write prescriptions for life-ending drugs for terminally ill patients.[1] The proponents of the initiative heralded the passage as an unqualified success for the rights of terminally ill patients and it quickly became a model for other states trying to enact statutes to permit physician-assisted suicide.[2] However, opponents challenged the law in court. Three years later, the Ninth Circuit declared the law valid.[3] Those supporting death with dignity heaved a collective sigh of relief that the law finally was allowed to go into effect.

However, after the attempted repeal, Oregon's Attorney General became concerned that physicians issuing life-ending prescriptions might violate the federal Controlled Substances Act (CSA). Oregon sent a letter to Attorney General Reno to request her determination of whether physicians would violate the CSA, even in compliance with the Oregon Death With Dignity Act (ODWDA).[4] Attorney General Reno declared that Congress did not give the Attorney General the

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1. Carol A. Pratt, *Efforts to Legalize Physician-Assisted Suicide in New York, Washington and Oregon: A Contrast Between Judicial and Initiative Approaches—Who Should Decide?*, 77 OR. L. REV

authority under the CSA to regulate state medical practices.[5] In 2001, Attorney General Ashcroft reversed that position and issued an interpretive directive declaring that issuing prescriptions for life-ending medications was not a "legitimate medical purpose" under the CSA.[6]

In 2006, the United States Supreme Court (the Court) declared that the Attorney General does not have the power to determine whether physician-assisted suicide is a legitimate medical purpose in the narrowly decided case of *Gonzales v. Oregon*.[7] The Court based its ruling on standard grounds of statutory interpretation and looked to whether the CSA delegated law-making authority to the Attorney General such that his interpretation of the CSA received deference in accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[8] The Court determined that the CSA did not give any power to the Attorney General to determine the definition of a legitimate medical purpose and therefore held that the Attorney General had violated the statute.[9]

However, the Court did not reach the broader constitutional question. The Court did not decide whether Congress itself had the power to determine the definition of a legitimate medical purpose. By limiting its analysis to the statutory interpretation issue, the Court avoided the difficult question of whether Congress, which has only enumerated powers, could intrude into the states' authority to determine public policy regarding the health of their citizens.

This comment examines whether Congress has the power to intrude into the domain of the states and declare whether physician-assisted suicide is a legitimate medical purpose. Secondly, both the Commerce Clause power and the Spending Clause power will be examined to determine the constitutional basis for such congressional action if Congress did try to preempt states from enacting physician-assisted suicide laws. This will start with a brief analysis of the Court's decision to uphold the ODWDA[10] as valid in light of the CSA. The comment continues by looking to the Commerce Clause[11]

5. *Id.*
6. *Id*.
7. 126 S. Ct. 904 (2006).
8. *Id*. at 922.
9. *Id.*
10. O

to see if Congress can establish its authority under the Commerce Power. Specifically, this analysis examines the principles outlined in *Wickard v. Filburn*[12] to determine if they apply to this case, especially given the recent Court cases of *United States v. Lopez*[13] and *United States v. Morrison*.[14] Next, the Spending Power[15] is examined to determine if Congress can use that power to provide for a national definition of "legitimate medical purpose." This concludes that Congress has power over the distribution of lethal prescriptions drugs to terminally ill patients under the Commerce Clause because it is economic activity that substantially affects interstate commerce. Additionally, Congress has the power to regulate the distribution of lethal prescriptions drugs to terminally ill patients under the Spending Clause because placing conditions on the states' receipt of federal health funds is a valid exercise of Congress' authority to tax and spend.

II. OREGON DEATH WITH DIGNITY ACT BACKGROUND

The Court used narrow statutory interpretation grounds to uphold the validity of the ODWDA as it stood against the federal CSA. The Court first questioned whether the interpretive rule issued by the Attorney General was an interpretation of the agency's own rule.[16] The Attorney General contended that the issued rule was such an interpretation and that the Court should defer to the substance of the interpretation.[17] However, the Court found that the rule was not an interpretation of an agency regulation because the Attorney General used the language of the CSA itself rather than the language of his regulations.[18] Therefore, the Court did not defer to the Attorney General.[19]

The Attorney General then contended that the rule defining a legitimate medical purpose was an agency interpretation of a statute and should be accorded deference under *Chevron U.S.A., Inc. v.*

12. 317 U.S. 111 (1942).

13. 514 U.S. 549 (1995).

14. 529 U.S. 598 (2000).

15. U.S. CONST. art. I, § 8, cl. 1.

16. Gonzales v. Oregon, 126 S. Ct. 904, 915 (2006).

17. *Id.*

18. *Id.*

19. *See* Auer v. Robbins, 519 U.S. 452 (1997) (setting forth theory that an agency's interpretation of its own ruling is to be accorded deference by courts).

specifically did not intend to preempt state regulation of any subject matter "which would otherwise be within the authority of the State"[30] unless the two provisions specifically conflicted with each other.[31] Therefore, the Court held that states had a significant role to play and that Congress did not intend to abrogate that role.[32] Further, the Court concluded that the Attorney General went beyond the scope of his authority in attempting to abrogate that role.[33]

III. CONSTITUTIONAL QUESTIONS

A. Commerce Clause

The Court did not address any constitutional issues in *Gonzales v. Oregon* because resolution of the statutory interpretation question made constitutional analysis unnecessary.[34] However, if the Court had not found a way to adjudicate the case on non-constitutional grounds, the Court would have searched for a source of congressional power to enact the CSA.[35] The most logical choice for the basis of congressional power is the Commerce Clause, which vests Congress with the power to regulate commerce among the several states.[36] Congress' use of this power to regulate the interstate market of drugs is well supported by older cases such as *Wickard v. Filburn*[37] and

1. The ODWDA does not set up an intrastate market that conflicts with the current CSA scheme.

It appears that the easiest answer to the constitutional question of whether Congress has the authority to determine a legitimate medical purpose would be found in the case of *Gonzales v. Raich*.[39] In that case, the Court heard arguments that the CSA preempted states from

regulating the field of medicine.[57] Therefore, so long as a state does not contravene the schedules of the CSA, Congress does not interfere with state regulation.

This is different from the situation in

2. Prescriptions filled under the ODWDA constitute economic activity that Congress can regulate.

The current scheme set forth in the CSA does not resolve the question of whether Congress could change the CSA and provide a complete determination of legitimate medical purpose and exclude any state regulation in the area. The Court states that Congress has the power to set "uniform national standards" for the regulation of health and safety in *Oregon*, but fails to explain why Congress has this power.[65] Additionally, the Court does not explain what power Congress can use to set these standards.

Presumably, the Court is relying upon the Commerce Clause for the source of congressional power. If this is the case, the argument is a familiar one. Because Congress finds that drugs flow through interstate commerce, then Congress can regulate that flow using the interstate Commerce Clause.[66] Additionally, because Congress is trying to provide a uniform system of management, Congress must be able to reach into intrastate commerce to enforce its uniform system. Congress has found that physicians prescribe drugs for a variety of legitimate medical purposes.[67] Oregon has made one of the legitimate medical purposes physician-assisted suicide. Physician-assisted suicide would increase the amount of drugs flowing in interstate commerce because more drugs are needed to end a life than to diminish pain. Because that increased flow could disrupt the comprehensive regulatory scheme enacted by Congress, Congress can define "legitimate medical purpose" to protect its comprehensive scheme.

This argument is based on *Wickard v. Filburn*.[68] In that case, Congress created a comprehensive regulatory scheme to stabilize wheat prices to help pull farmers out of the Great Depression.[69] For the scheme to be effective, Congress gave the Secretary of Agriculture the power to determine how much wheat an individual farmer could grow for sale in the wheat markets.[70] When Filburn grew more than his allotment, the Secretary enforced a penalty

65. *Id*.
66. Gonzales v. Raich, 545 U.S. 1 (2005).
67. *Oregon*, 126 S.Ct. at 915.
68. 317 U.S. 111, 63 S.Ct. 82 (1942).
69. *Wickard*, 317 U.S. at 115.
70. *Id.*

against Filburn.[71] Filburn sued, claiming that because the extra wheat that he grew was for intrastate use only, Congress could not regulate it.[72] The Court disagreed and held that because Congress was trying to regulate an entire market, Congress could prevent extra wheat being grown because even though Filburn's "own contribution to the demand for wheat may be trivial . . . his contribution, taken together with that of many others similarly situated is far from trivial."[73] Additionally, the Court held that Congress could regulate wheat even if grown "wholly outside the scheme of regulation [because it] would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."[74]

Commerce Clause. The first category is the "channels of interstate commerce."[82] The second category is the "instrumentalities of commerce or persons or things in interstate commerce even though the threat may come only from intrastate activities."[83] The final category included those activities that have "a substantial relation to interstate commerce."[84]

over that activity.[92] The Court thus looked to the actual activity being regulated—preventing criminal violence against women—and determined that such activity was not economic in nature.[93] Therefore, the Court struck down the Violence Against Women Act and held that Congress violated the commerce power by trying to regulate noneconomic activity.[94]

Regulation of medicine is also at the intersection of economic and noneconomic activity. It is well established that states have authority to regulate the practice of medicine within their borders.[95] It is also firmly established by *Raich* that, through the CSA, Congress has the power to regulate the movement of drugs in interstate commerce.[96] Additionally, Congress can regulate the manner in which the drugs are transported in interstate commerce by, inter alia, requiring uniform labeling or uniform shipping.[97] However, it is not clear whether Congress has the ability to regulate the use of the drugs once they leave interstate commerce and are prescribed by a doctor. If the act of prescribing the drugs is considered noneconomic activity,

registering people to distribute drugs.[99] In granting the registrations, the Attorney General can determine whether the applicant has complied with applicable state law and other applicable public health requirements.[100] The CSA does not indicate whether the Attorney General has the power to determine what those public health requirements are, as the Court found in *Gonzales v. Oregon*.[101] However, a different question is presented if Congress were to pass an amendment to the CSA that stated: "The Attorney General shall revoke the license of any person who prescribes a lethal amount of a drug to a terminally ill person." Then the question becomes whether the act of prescribing is economic activity.

In *Oregon*, the Court indicated that it thought the act of prescribing a drug is economic activity.[102] The Court stated that Congress can "provide uniform national standards" in the area of health and safety, even though those areas were "primarily and historically a matter of local concern."[103] The suggestion that Congress has this power indicates that the Court views health and safety as economic activity that substantially affects interstate commerce, thus falling within that type of activity that Congress can regulate under *Lopez* and *Morrison*.[104]

This view is further supported by

affecting commerce. Further, the Court would be within precedent if it found a substantial effect on commerce, even if the actual activity was relatively small.[108]

Arguably, the economic aspect of the prescription ends when the drugs are delivered to the pharmacy. The actual writing of the prescription is not economic activity and thus it is outside the scope of congressional regulation.[109] This characterization attempts to draw a line between the act of buying the drugs and the act of prescribing the drugs.[110] However, that view is not a constitutionally legitimate understanding of economic activity. Regardless of why any doctor prescribes a drug, the patient still pays money in order to purchase the drug. That, by any definition, is economic activity. Because the exchange of money for a product is economic activity, even though that purchase is conducted in intrastate commerce, it has the potential to substantially effect interstate activity and is therefore within the scope of Congress's Commerce Clause power to regulate. [111]

3. Even if prescriptions are not economic activity, Congress can regulate those prescriptions under the Necessary and Proper Clause.

Proponents of the ODWDA could argue that the act of prescribing is not economic activity. They could argue further that this is an area of regulation that historically has been left to the states and that Congress cannot interfere with this regulation.[112]

Zones act was an impermissible attempt to create a federal crime.[114] If the creation of a federal crime is an impermissible use of the

the states' role in the regulation of medicine. Rather, Congress merely regulates that aspect of medicine that directly affects its regulation of the interstate commerce in drugs.

While this may seem to be direct regulation of noneconomic activity, Congress does have the constitutional power under the Necessary and Proper Clause to regulate such activity if it substantially affects interstate commerce.[126] If each state could determine its own schedules and determine its own legitimate purposes, the whole scheme would be destroyed. A doctor in each state could order different drugs based on the definitions provided by the state. This would lead to abuse of drugs and harm interstate commerce. Thus, this is noneconomic activity that affects interstate activity.

The limit of the Necessary and Proper Clause is that the ends of Congress must be legitimate and plainly within the scope of the Constitution and that the means must be plainly adapted to those legitimate ends.[127] In the situation described above, the ends would be legitimate and constitutional as stated in *Raich*.[128] Further, the means would be plainly adapted to reaching the constitutional goal of preserving the interstate regulation of the drug market. As stated previously, Congress could determine that, by allowing states to determine their own legitimate medical purposes, the states would completely disrupt the regulation of interstate commerce.

Congress drafted the CSA to allow for central determinations of legitimate medical purposes in order to preserve that scheme.[129] Therefore, even if the act of prescribing drugs is noneconomic activity, it still can be regulated by Congress. Further, Congress' invocation of the Necessary and Proper Clause to allow for federal regulation of dosage would not "pile inference upon inference."[130] There exists a connection between the noneconomic activity of prescribing drugs for a state-determined legitimate purpose and the

126. Gonzales v. Raich, 545 U.S. 1, 125 S.Ct. 2195, 2218 (2005) (Scalia, J., concurring).

127. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421-22 (1819).

128. *Raich*

economic activity of interstate drug commerce.[131] This is a direct inference and, as such, is closely tied to the legitimate regulation of interstate commerce. Therefore, federal regulation of prescription dosage is valid under the Necessary and Proper Clause.

B. Spending Power

Congress can also use the Spending Clause to influence state actions.[132] The Spending Clause provides that Congress has the power "to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States."[133] This power is an independent power of Congress and is not limited to simply executing the other powers given to Congress by the Constitution.[134] Thus, for example, if Congress wants to expend money to promote scientific research, Congress is free to do so.[135]

An important corollary of the spending power is Congress' ability to condition receipt of congressional spending.[136] Because Congress is able to put conditions on how recipients use the money, Congress can influence state action that it would otherwise not be able to directly affect.[137] The Court, however, imposes three limitations on Congress' ability to influence state action through the spending clause.[138] First, Congress must spend for "the general

131. *Lopez*, 514 U.S. at 567.

132. South Dakota v. Dole, 483 U.S. 203, 206 (1987). It is worth noting that under the Reconstruction Amendments, Congress has the power to influence state behavior in areas of civil rights. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, § 3.6 (3d ed. 2006). However, this is not applicable because no suspect class is involved, nor is the right to end one's life fundamental. Washington v. Glucksberg, 521 U.S. 702, 728 (1997). Thus, because there is no fundamental right to assisted suicide and because no claim of discrimination against a suspect class is involved, the Reconstruction Amendments are of no help to Congress if it wants to regulate Oregon's behavior.

133. U.S. CONST. art. I, §8, cl. 1.

134. United States v. Butler, 297 U.S. 1, 66 (1936).

135. *See* NATIONAL SCIENCE BOARD,

welfare."[139] Second, Congress must unambiguously declare that it is placing conditions on the receipt of federal funds.[140] Third, Congress's conditions must be related "to the federal interest in particular . . . programs."[141]

The problem with this test is that it is very broad and also at odds with the Court's more recent decisions in *Lopez* and *Morrison*.[142] As discussed previously, the Court signaled in those two Commerce Clause cases that it is pulling back on the broad authority of Congress to enact regulations not related to commerce. It appears to be inconsistent for the Court to allow Congress broad spending power authority but not necessarily broad regulatory authority under the Commerce Clause.[143]

Some have argued that the Court will, in a future case, harmonize these two strands of constitutional law.[144] One factor that commentators look to is O'Connor's dissent in *South Dakota v. Dole*.[145] O'Connor did not disagree with the principle set forth in the case.[146] Instead, she disagreed with the application of the principle by finding that the drinking age condition placed on the grant of highway funds was not "reasonably related to the purpose for which the funds [were] expended . . . ."[147] Commentators focus on this language and say that, in the light of *Lopez* and *Morrison*, the Court might be willing to pull back on Congress' broad use of the Spending Clause power.[148]

Professor Baker argues that the Court may be willing to distinguish between "regulatory spending" and "reimbursement spending."[149] The theory is that Congress cannot use its Spending Power to regulate indirectly what it could not do directly under the

unexceptional proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.").

139. *Id*. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640-641 (1937)).

140. *Id*. (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

141. *Id*. (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

142. Mary Pat Theuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y, 303, 325 (2005-06).

143. *Id*.

144. *See, e.g.*, *id*. at 324-25.

145. 483 U.S. 203, 212-18 (1987) (O'Connor, J., dissenting).

146. *Id*. at 212.

147. *Id*. at 213.

148. Theuthart, *supra* note 142, at 324-25.

149. Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1962-63 (1995).

Commerce Clause because the Court has pulled back on the Commerce Clause.[150] Thus, if Congress wants to encourage states to agree with its social policies, then Congress can reimburse states for their efforts to comply with those policy goals.[151] This would be in contrast to the type of regulatory spending in which Congress forces the states to comply or lose funds on which the states already rely.[152]

This argument, however, does not account for past case law regarding the spending power. Further, this theory does not account for the fact that the Court already has a significant limitation on congressional power in place with its *Dole* test. Finally, if Congress required states to refuse to enact or repeal ODWDA-style legislation, that condition would be valid under a stringent *Dole* test because it is significantly related to the purpose of the funds.

Spending Clause jurisprudence makes it clear that Congress can attach conditions on the receipt of federal funds by the states.[153] The Spending Clause is an independent authority of Congress to try to influence states and create national social policy.[154] Also, there does not appear, in the case law, an attempt to differentiate between "regulatory spending" and "reimbursement spending." Instead the only cabin to congressional power under the Spending Clause is the analysis provided in *South Dakota v. Dole*.[155] Therefore, to attempt to further restrict congressional spending power, even in the face of *Lopez* and *Morrison*, is inconsistent with case law providing Congress wide latitude under the Spending Clause.

Additionally, the Court, if it so decides, is able to significantly narrow the Spending Power. One of the factors that the Court set forth in *Dole* is that the spending must be "reasonably calculated to address . . . a purpose for which the funds are expended."[156] It is true that the Court did not fully analyze this requirement in *Dole*.[157] However, this does not prevent the Court from using this germane

150. *Id*. at 1914.

151. *Id*. at 1963.

152. *Id*. at 1966.

153. Massachusetts v. United States, 435 U.S. 444, 461 (1978).

154. United States v. Butler, 297 U.S. 1, 66 (1936) ("It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.").

155. 483 U.S. 203, 207-08 (1987).

156. *Id.* at 209.

157. *Id*. at 213 (O'Connor, J., dissenting).

treatment, including drugs.[162] Those two statutes are much more closely related and, as a result, would survive a stricter interpretation of the germaneness requirement of *Dole*. Thus, Congress is able to use its spending power, even if it cannot use its Commerce Clause power, to eliminate the ODWDA.

IV. CONCLUSION

The Court decided *Gonzales v. Oregon* on narrow statutory