

# Supreme Court upholds federal ban on medical marijuana use

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In a much-anticipated ruling, last week, the US Supreme Court overturned a lower court injunction that had prohibited the US Department of Justice from arresting and prosecuting Californians who use marijuana for medical purposes as provided by state law.

The ruling did not invalidate the state law, however, so Californians with a doctor's recommendation can continue to use marijuana without fear of prosecution by local authorities. Federal law enforcement authorities do not have the resources to bring more than a few, token cases, so the decision is not expected to have much practical effect on patients using marijuana for medicinal purposes.

The legal discussions in the four opinions focused on Congressional power to regulate interstate commerce rather than the wisdom of medical marijuana laws or the right of individuals to use such substances free from governmental interference.

Over the last decade, the Supreme Court has sharply limited certain federal authority in relation to the 50 states, including imposing restrictive interpretations on the Commerce Clause, the constitutional provision empowering Congress to regulate "interstate commerce." These recent precedents have been used to gut federal regulation of the workplace, invalidate laws against discrimination, eliminate environmental protections and limit gun control. The recent decision in *Gonzales v. Raich* cuts against that trend by restoring somewhat the more expansive notion of the Commerce Clause used to justify much federal legislation since the New Deal measures of the 1930s.

Marijuana, popular as a recreational drug, is criminalized to varying degrees by all 50 states. These prohibitions are widely flouted, and there is substantial public support for legalization. In addition to the state prohibitions, marijuana is listed as a "Schedule I" drug, along with heroin and other "hard narcotics," in the US

Controlled Substances Act, which means federal law prohibits its cultivation, possession, sale or use for any purpose, including for therapeutic medical treatment.

There is significant debate among medical authorities regarding marijuana's potential benefits, especially in alleviating side effects of cancer treatments and otherwise reducing pain. To make the substance legally available to sick people—most were using it anyway—in 1996, California voters passed the "Compassionate Use Act," legalizing marijuana for patients whose doctors have recommended its use. Because the substance is not commercially available, however, the patients must either grow their own or obtain it from a "caregiver." Ten other states—Oregon, Washington, Maine, Colorado, Nevada, Hawaii, Vermont, Alaska, Maryland and Montana—have similar laws, and Connecticut is considering enacting one.

Medical use of marijuana has widespread public support. For example, in a poll conducted last December for the American Association of Retired Persons (AARP), 72 percent of respondents aged 45 or older agreed that "adults should be allowed to legally use marijuana for medical purposes if a physician recommends it."

Medical marijuana laws are viewed by some, especially Christian fundamentalists, as a ploy to weaken drug enforcement and lay the foundation for its legalization, which they strenuously oppose. Adopting the far right's agenda, former US Attorney General John Ashcroft announced that the Bush administration would actively investigate and prosecute California's medical marijuana users who violate the Controlled Substances Act.

In August 2002, a squad of federal Drug Enforcement Administration agents seized six marijuana plants belonging to Diane Monson of Oroville, California, who uses the substance to alleviate excruciating chronic back pain caused by a congenital degeneration of her spinal column. Joined by Angel Raich of Oakland, who uses marijuana obtained from her "caregivers" to treat her

brain tumor, she sued Ashcroft, seeking an injunction to halt federal raids to enforce the Controlled Substances Act against people acting in compliance with the state medical marijuana law.

The following year, the United States Court of Appeals for the Ninth Circuit applied the two Rehnquist Court precedents limiting the Commerce Clause to uphold the injunction. When Ashcroft retired, Alberto Gonzales, the new attorney general, took his place as the defendant in the case.

The lineup of justices in the 6-3 decision is highly unusual. The majority is made up of the four so-called “liberals”—Associate Justices John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer and David Souter—as well as “swing” Justice Anthony Kennedy and extreme right-winger Antonin Scalia. The other “swing” justice, Sandra Day O’Connor, dissented with right-wingers Chief Justice William Rehnquist and Associate Justice Clarence Thomas.

Both sides wrote in detail about the history of Commerce Clause jurisprudence. During the early stages of Franklin D. Roosevelt’s presidency, the Supreme Court’s narrow construction of federal power under the Commerce Clause was used to rule unconstitutional a series of federal measures intended to alleviate the effects of the Great Depression. Barely averting a constitutional crisis, the High Court’s position shifted dramatically in 1938 when it upheld the Wagner Act, which established the National Labor Relations Board and institutionalized trade unions within a federal legal framework.

In a series of rulings spanning decades, the Supreme Court interpreted the Commerce Clause broadly to uphold expansive federal laws in a variety of contexts, including civil rights laws outlawing discrimination in public accommodations. In 1995, however, the Supreme Court abruptly reversed this trend, overturning by a 5-4 vote the federal ban on possession of firearms around schools. The High Court issued a similar 5-4 ruling five years later, overturning the Violence Against Women Act on Commerce Clause grounds. (See “US Supreme Court rules rape victims cannot sue in federal court”)

The switch of both Kennedy and Scalia in voting accounts for the discrepancy between last week’s decision and the two prior rulings. Both men are openly maneuvering for nomination as Chief Justice to replace Rehnquist, who is suffering from thyroid cancer and is expected to retire once the current court term ends later this month.

The *New York Times* greeted the ruling “with mixed

emotions,” urging Congress to change the laws prohibiting medical marijuana use, while noting the dissenters “want to turn the clock back to before the New Deal, when workers were exploited, factories polluted at will and the elderly faced insecure retirements.”

The *Wall Street Journal*’s editorial pages, on the other hand, condemned the ruling, first in an editorial and then in a vile op-ed piece by Daniel Henninger. After writing: “Liberalism to cancer patients: Drop dead,” Henninger added, “If the Court’s four liberals had ruled in favor of state laws allowing medical marijuana, which federal law forbids, that precedent would have helped conservative efforts to reduce federal clout in other areas, such as environmental authority in the West. Thus Justice Stevens wrote that the Controlled Substances Act, a Nixon-era law, ‘is a valid exercise of federal power, even as applied to the troubling facts of this case.’ Liberals with cancer should take solace in knowing they will be vomiting to save the snail darter.”

The next commerce clause case on the High Court’s agenda arises from Oregon’s physician-assisted suicide law. The US Justice Department claims that law also violates the Controlled Substances Act. The Supreme Court has accepted review and will be issuing a decision next term.

Among the cases remaining to be decided before the end of the term are whether public displays of the Ten Commandments violate the First Amendment’s establishment clause and whether companies that produce Internet file-sharing programs can be held liable for illegal copying by consumers.



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