

**GONZALES V. OREGON –  
Under The Influence of Drugs and the Commerce Clause  
Dean Petkanas – February 5, 2007**

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**INTRODUCTION**

Gonzales v. Oregon (formerly Oregon v. Ashcroft), 368 F.3d 1118 (9th Cir. 2004), cert. granted, 125 S. Ct. 1299 (2005)<sup>1</sup>, asked the Supreme Court to decide whether the Controlled Substances Act (as amended, the “CSA”), did so permit the acting Attorney General to prohibit a state approved practice of physician assisted suicide. Plain and simple, the case was an authority issue and the use of power. The larger implications come from the interpretations from the Supreme Court on who has the balance of power and authority in integrally related issues. Prior to Oregon the Supreme Court heard a spate of cases where the Federal Government’s authority was directly challenged in the Court’s interpretation of the Commerce Clause. While the Court in Oregon seemed to sidestep that very issue, if it weren’t for its decision in Washington v. Glucksberg, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)<sup>2</sup> – a due process case of intervening interests upon statutory governance – the very same issues in Oregon would have been firmly underexposed under the New Federalist Court’s interpretation of the Commerce Clause. Make no mistake about any of the underlying cases, including Oregon – they are all issues of authority and balancing of power. The Court’s decision in Oregon reads like a well choreographed ballet in which the movements carefully side-step the Court’s prior interpretations on Congressional legislature, the Commerce Clause and underlying constitutionality of that legislature.

A careful evaluation of the underlying cases – United States v. Lopez, 514 U.S. 549 (1995)<sup>3</sup>; United States v. Morrison, 529 U.S. 598 (2000)<sup>4</sup>; United States v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483 (2001)<sup>5</sup>; Gonzales v. Raich, 545 U.S. 1 (2005)<sup>6</sup>; and Washington v. Glucksberg, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), reveals that the priority of social issues is not sometimes what it seems. These cases point out that the Supreme Court’s opinions as to statutory interpretation from State legislature to Congressional acts become nothing more than a social teeter on a see-saw of political logic, determining which laws are valid and which are not. This is a powerful tool to have but has dire consequences to the constituents of a democracy which entrust law making to be drawn to fit exactly what is statutorily intended to meet the needs of the people.

This evaluation takes into account the very cases cited in Oregon and summarized herein, which altogether taken, reason why Oregon is more than just a balance of power case between the States and the Federal Government, but as much on balance the sustenance of the Court’s New Federalist logic and their own throne of power. In the full analysis, it is a clear cross section into the ideology and thinking of the modern day Court and their New Federalist views.

## BACKGROUND & HISTORY

Giving rise to the *Oregon* case at bar before the U.S. Supreme Court, in 1994, voters in the State of Oregon approved Oregon Ballot Measure 16, legalizing physician-assisted suicide and retained this measure by a sizeable vote in support of Measure 16 during 1997 in a referendum hoisted upon the voters during a by-term election in 1997 attempting to repeal the law. The Oregon law, the Death with Dignity Act (“DWDA”), passed in 1994 and sustained in 1997 permits physicians to prescribe a lethal dose of medication to a patient agreed by two doctors to be given (as a prescription to the patient for self-administration) provided the patient is deemed to be within six months of dying from an incurable condition. Since the passing of the Oregon statute on assisted euthanasia, over 200 citizens of the State have voluntarily elected to end their lives under law.

*Oregon*, maybe one of the most important cases of early 21<sup>st</sup> century America. It rolls forward canon such as *McCulloch v. Maryland*, *Wickard v. Filburn* and a host of other Supreme Court rulings on State’s sovereign rights in apparent opposition to Federal law. *Oregon* breaks the conundrum of mutually exclusive designs on the Court’s very interpretation of the Commerce Clause, even though the Court gave very limited weight to its mention in the Court’s opinion. An examination of the dissenting opinions in *Oregon* by Justice Scalia and more notably Justice Thomas – both considered and viewed without pause as conservatives – gives a clear indication of how difficult New Federalist ideals are to offering consistent rationale with respect to the balance of issues in *Oregon* and predecessor cases. Now, faced with the same issue, but having a dividing line in the dogma of long standing conservative legislature in the governance of controlled substances and narcotics, Justices Scalia and Thomas would, in relation to their prior perspectives, reveal some interesting and contradictory ideals in their dissenting opinions in *Oregon*. Also joining Justices Scalia and Thomas in the dissent, was the newly appointed Chief Justice John Roberts, Jr., presiding over his first Supreme Court case.

The case in *Oregon*, apart from its political muddlings and intrigue derived from the split opinions of the Court, the case presented itself as a three-headed llama. All three heads emerge out of the long standing separation of powers debate between the sovereign rights of a State to govern its citizens and the Federal Government’s rights to govern the same citizens otherwise. The first issue in *Oregon*, and not necessarily how the Court addressed them in order of importance, is whether or not State law violates any Federal legislature in the prescription of narcotics / controlled substances under the Commerce Clause. The second is whether or not an administrative official acted beyond his authority in issuing an Interpretive Rule under the CSA and so interfered with a State’s rights to govern its citizens. And lastly, while not a legal issue, revolves around euthanasia and/or the right of a patient to receive physician assistance in ending their own life with narcotics.

In 2001, U.S. Attorney General John Ashcroft issued an Interpretative Rule which sought to ban the prescription of drugs scheduled under the CSA for use in physician assisted suicide and stating that prescribing scheduled drugs to assist suicide was not a

legitimate medical purpose. As in the case of *Oregon*, barbiturates / narcotics, are the most commonly prescribed drugs for assisted suicide, and are scheduled as class 2 controlled substances.<sup>7</sup> Under this Interpretative Rule, doctors prescribing these drugs for assisted suicide were alleged to be in violation of a Federal law, the CSA. Doctors continuing to prescribe narcotics in contravention to the CSA pursuant to the Attorney General's issuance of the Interpretative Rule underlying the CSA could be denied the right to write all prescriptions. In conjunction with his Interpretative Rule, Attorney General Ashcroft issued a directive to the Drug Enforcement Administration to go after and prosecute physicians who prescribed drugs for this purpose, even though doing so was completely legal in the State of Oregon.

In the ongoing tug-of-war underlying separation of powers the Court's decision in *Oregon* provides for the threshold and bright-line of a federal official's administrative authority with respect to the construals of congressional legislature and intent. However, the future might show that *Oregon* was just as important in bringing forth changes in public policy and also amendments in the classification and/or legalization of controlled substances. Not to be lost in the potential shifting of public policy issues are such factors as the weight of moral suasion on perceived societal norms; the weight of theocratic propoundance for the public's interest; the weight of the government's propoundance for public safety; the Government's taxing authority; and the dividing line between intra-state and inter-state commerce. What effects on the virtue of these factors might be caused by the Court's decision in *Oregon*? Aside from the briefs filed on behalf of the Respondents and the Petitioner, a total of twenty-eight additional distinctive briefs were filed from various *amici curiae*, with perspectives from theological, institutional, academic and political forums.

Yet in all of the above, the key and central point of focus for the Supreme Court's decision in reviewing the Attorney General's actions (first, Attorney General John Ashcroft, followed by Attorney General Alberto Gonzales), was the Interpretative Rule withing the CSA, as amended. Such as it was, the case cut through the authority of an Federal administrative official to the interpretation of Congressional intent. What did Congress intend and how far can an administrative official stretch his or her own interpretation on how to reach said congressional intent was the question on prosecuting a violation under the CSA and the Interpretative Rule.

### **History of Drug Enforcement and the "War on Drugs" in America**

It is important to understand that genesis and subsequent legislation passed over the epic, "War on Drugs" in America has, at different times, given full power and point to criminal prosecution of licensed professionals acting in their capacity as highly trained and academically achieved practitioners of medicine. By the same token, such discretion to prosecute claims under the battery of "War on Drugs" legislature, the fully matured laws regarding controlled substances in America have become somewhat of a driving force in the discretionary use, by administrative officials and agencies, of the so-called, "Interpretive Rule". Dating back approximately ninety years prior to *Oregon*, and the passage of the modern day CSA, the U.S. Government had enacted The Harrison

Narcotics [Tax] Act of 1914 (the “Harrison Act” or the “Act”) as a means to control certain drugs as trade. Specifically, this was –

*“[An Act] to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes .”*<sup>8</sup>

The Harrison Act itself had rather inauspicious beginnings as it was born from post Spanish-American war operations in the Philippine Islands. After the Spanish-American War, a team of U.S. State and War Department delegates were sent to the Philippine Islands as part of its post-war governance of these islands. In so incorporating the Philippine Islands under U.S. rule, the United States inherited a whole system for licensing narcotics addicts and supplying them with opium legally under a system established under Spanish rule. A War Department Commission of Inquiry was appointed under the Right Reverend Charles H. Brent, Episcopal Bishop of the Philippine Islands, to study alternatives to the Spanish system. After taking evidence on programs of narcotics control throughout the Far East, the Brent Commission recommended that narcotics should be subject to international rather than merely national control.<sup>9</sup>

One could say that its beginnings were grounded in moral suasion to rid the world of the onset of opiate abuses. However, since the Spanish system incorporated an orderly distribution, there was an economy of drugs at work – hence the proposition of trade was at the forefront of the drug distribution model. Great Britain was already at work, pushing opium to the Far East in return for silver bullion. Under pressure from a variety of sources, theologically and economically driven, President Theodore Roosevelt called for an international convention to attempt to resolve the rising problem of opium trade, most notably geared towards China and the Far East, including the newly adopted U.S. governed Philippine territories. Three conventions were held and in 1912 the international community adopted the Hague Convention of 1912, otherwise known as the International Opium Convention (the “IOC”). It was the IOC treaty that acted as the precursor to the Harrison Act. The IOC, not to be confused with the International Olympics Committee, was the treaty that provided, among other things, that –

*“[T]he contracting Powers shall use their best endeavours to control, or to cause to be controlled, all persons manufacturing, importing, selling, distributing, and exporting morphine, cocaine, and their respective salts, as well as the buildings in which these persons carry such an industry or trade.”*<sup>10</sup>

At the time, the chief proselytizer before the U.S. Senate regarding the Harrison Act was Secretary of State, William Jennings Bryan. Secretary of State Bryan was known to be, a man of deep prohibitionist and missionary convictions and sympathies. Among the many hats worn by Bryan included his being a three time Democratic Party nominee for President, a devout Presbyterian, a strong proponent of popular democracy, an outspoken critic of banks and railroads, a leader of the silverite movement in the 1890s, a peace advocate, a prohibitionist, an opponent of Darwinism, and one of the most

prominent leaders of the Progressive Movement and Democratic Party at that time. At the time of the scribing of the Act, Bryan urged that the law be promptly passed to fulfill United States obligations under the new international treaty.<sup>11</sup> It is interesting to note that the passion to which Bryan affixed to his speech in front of the U.S. Senate with respect to the Harrison Act. One of the more resounding criticisms of that day regarding opium trade with China was the plundering of silver bullion by Great Britain from China in return for opium. The *Silverite Movement*, championed by Bryan, argued that using silver would inflate the money supply and mean more cash for everyone, which they equated with prosperity. Considering Bryan's interest in the value of silver, and other factors, including his advocacy on prohibition and his commanding presence as an orator, placed him front and center on the issue for passage before the U.S. Senate.<sup>12</sup>

One could easily say that the point of the Harrison Act was to create a vehicle of income for the U.S. Government by regulating revenues derived from the sale of a certain class of drugs produced from naturally occurring resources. Chapter one of the Act stated that it was to –

*“provide for the registration of, with collectors of internal revenue, and to impose a special tax on all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes.”*<sup>13</sup>

As long as you were properly licensed, whether pharmacist, physician, importer or manufacturer, and you paid the U.S. Government the special tax, you were in the controlled substances business. In fact, the Harrison Act went further to provide an exemptions to licensing and tax provisions, provided the participant in the manufacture of drugs using the natural sources outlined in the Act limited themselves to –

*“preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin in one avoirdupois ounce.”*<sup>14</sup>

Part of the economics ruse, the Act was also a means for the monitoring the distribution of opium, morphine, heroin, and other drugs-in small quantities over the counter, and in larger quantities on a physician's prescription. With respect to the physician's involvement, authority and recognition as a medical practitioner, the Act clearly defined by Section 2(a) of the Act, spelling out the physician's ability to prescribe such drugs if needed.<sup>15</sup> As a result of its legal underpinnings, not unlike many pieces of legislative enactment, it is unlikely that a single legislator realized in 1914 that the law Congress was passing would later be decreed a prohibition law. The effects of this policy were almost immediately visible. Not only were drug habituals rushing to local hospitals for a fix, there was a black market emerging that didn't exist prior to the enactment which also led to a spate of criminal activity. Additionally and more importantly, as a result of the language in the act regarding the physician, law enforcement officials were now armed with fodder as the Act exempted the physician acting *“in the course of his*

*professional practice only.*<sup>16</sup> Thus setting the tone on terminology that describes a practice that became debatable.

After passage of the Harrison Act, the above referenced was read and interpreted by law enforcement officers to mean that a doctor could not prescribe opiates to an addict to maintain his addiction. The interpretive assumption was, given that addiction was not deemed a disease (an argument rivaled and opposed by time tested research and defined by practically every alcohol and drug rehabilitation counseling service in the U.S.), the argument inferred that the addict could not be a patient, therefore opiates dispensed to or prescribed for him by a physician were not being supplied in the course of his professional practice. The Harrison Act while intended to provide for a regulated sale of narcotics was turned into a law prohibiting narcotics prescriptions even under a physician's care (not theretofore illegal). As recounted in 1972 by Edward Brecher, Editor of Consumer Reports Magazine –

*“Many physicians were arrested under this interpretation, and some were convicted and imprisoned. Even those who escaped conviction had their careers ruined by the publicity. The medical profession quickly learned that to supply opiates to addicts was to court disaster.”*<sup>17</sup>

The “War on Drugs” in America was now underway and with a momentum towards an unknown destiny, yet with an exceptional and frenzied bipartisan influence. Several years after the passage of the Harrison Act, the intended affects backfired in the face of lawmakers who passed the bill and to the surprise of most every representative on Capitol Hill. There were now more users, pushers and illegal underground markets resulting from the Act than had been anticipated at the time of passage. Subsequently, this brought out the brightest minds at the time to tackle this issue including congressional leaders, educational and institutional research and the Secretary of the U.S. Public Health Service. The findings were astounding.

- *“Opium and other narcotic drugs (including cocaine, which Congress had erroneously labeled as a narcotic in 1914) were being used by about a million people.”*<sup>18</sup>
- *“The ‘underground’ traffic in narcotic drugs was about equal to the legitimate medical traffic.”*<sup>19</sup>
- *“The ‘dope peddlers’ appeared to have established a national organization, smuggling the drugs in through seaports or across the Canadian or Mexican borders, especially the Canadian border.”*<sup>20</sup>
- *“The wrongful use of narcotic drugs had increased since passage of the Harrison Act. Twenty cities, including New York and San Francisco, had reported such increases. (The increase no doubt resulted from the migration of addicts into cities where black markets flourished.)”*<sup>21</sup>

In 1922, a case went before the U.S. Supreme Court that would foreshadow the issue of statutory construction with respect to a Federally legislated act. The case was *U.S. v. Behrman*, 258 U.S. 280, 66 L. Ed. 619, 42 S. Ct. 303 (1922)<sup>22</sup>. In *Behrman*, a demurrer to the indictment was sustained in the district court and the case was appealed to the United States Supreme Court.<sup>23</sup>

Dr. Morris Behrman was charged under the Harrison Act for violations in so unlawfully prescribing 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine, to a patient with the intent that the patient (described in the indictment as an addict) would use the same by self-administration in divided doses over a period of several days. In his opinion for the majority of the Court in *Behrman*, Justice Day recited the indictment in part which charged that –

*[Dr. Behrman] “did unlawfully sell, barter, and give to Willie King a compound, manufacture, and derivative of opium, to wit, 150 grains of heroin and 360 grains of morphine, and a compound, manufacture, and derivative of coca leaves, to wit, 210 grains of cocaine, not in pursuance of any written order of King on a form issued for that purpose by the Commissioner of Internal Revenue of the United States...”*<sup>24</sup>

The prosecutorial logic behind Dr. Behrman’s indictment was to set a future standard to charge any physician prescription a violation, regardless of intent and regardless of statutory waiver to the physician’s better judgment. If it sounds familiar, the very same issue was at work in the underlying prosecution in *Oregon* by Attorney Generals Ashcroft and Gonzales.

Since Dr. Behrman gave his patient an extended prescription with the instruction to take partial amounts daily, the indictment charged that regardless of his judgment and intent to practice his profession, the quantities that were prescribed were done so indiscriminately to an addict. Therefore, if it were wrong for Dr. Behrman to give such an extended prescription of narcotics in so dealing with the symptoms of addiction in the course of physician prescribed care, it would also be wrong for any doctor to give any amount of any addicting drug for the same purpose.<sup>25</sup> Gone was the protection of good faith for a medical professional acting in his or her capacity in caring for his or her patients. Even more startling was the fact that Dr. Behrman was convicted despite the prosecution’s stipulation that Dr. Behrman had indeed prescribed the narcotics in order to treat and cure his patient.<sup>26</sup>

The actual length of Justice Day’s recitation of the charges in the indictment is an extraordinary convolution of facts that could make any juror or court wonder – *exactly what did Dr. Behrman do outside his professional capacity and exactly how did he violate the CSA?* It is any wonder how the Supreme Court in *Behrman* even reached its verdict. However, the conclusion that Dr. Behrman distributed narcotics to Mr. King in an indiscriminate manner in violation of the Harrison Act was apparently seen as far reaching to the dissenting justices’ holding for the minority in *Behrman*.<sup>27</sup>

Justice Oliver Wendell Holmes wrote the minority's dissenting opinion, joined by Justice James McReynolds and Justice Louis Brandeis. The dissenting opinion in *Behrman* was ominous as to the statutory construction and interpretation issues that are present in *Oregon*. Justice Holmes and his colleagues dissenting in *Behrman* recognized that Dr. Behrman acted within the definitions of the Harrison Act as a physician and that prescribing drugs scheduled under the Act was not a violation and concluded that Dr. Behrman acted "*in the regular course of his practice and in good faith.*"<sup>28</sup> More importantly, the minority recognized that "*the Government preferred to trust to a strained interpretation of the law rather than to the finding of a jury upon the facts.*"<sup>29</sup>

The decision in *Behrman* was handed down March 27, 1922. Thereafter, law enforcement officials went on sweeping raids upon physicians' homes and their offices, threatening doctors who had anything further to do with drug addicts, and sending many of them off to prison. Gone from the treatment room and physician's office was the patient (now called addict) and emerging was now the addict (now called criminal). The addict, now called criminal would begin packing the prison systems along with medical professionals who allegedly violated the law.<sup>30</sup> Interpretation of Congress' intent in so drafting the first drug law in America now took on an entirely new meaning. Yet, despite the continued failure of the drug enforcement policies in America, surprisingly, congress sharpened its pencil and responded by tightening up the Harrison Act. In 1924 a law was enacted prohibiting the importation of heroin altogether, including a ban against heroin for medicinal use. And the Supreme Court would have another opportunity to hear a case on this subject matter in *Linder v. U.S.*, 268 U.S. 5 (1925).<sup>31</sup>

Sometime in 1924, Dr. Charles Linder, wrote a prescription for four tablets of cocaine and morphine to Ida Casey, a requesting patient who claimed she was suffering excruciating pain from an undisclosed stomach ailment. The patient was addicted to drugs and was planted by the Department of Treasury to entrap prescribing physicians in their practice of palliative care and pain management. During the trial, the woman claimed that she disclosed to Dr. Linder that she was indeed an addict. Dr. Linder was indicted, convicted, sentenced, and lost his intermediate appeal to the Circuit Court. The Linder case was brought before the U.S. Supreme Court in one of its earliest rulings on the constitutionality of the Harrison Act. The unanimous opinion in *Linder*, was written by Justice McReynolds, one of the dissenters three years earlier in *Behrman*. The opinion of the Court in *Linder* set forth, unambiguously and with depth and clarity, what was supposed to become the controlling interpretation of the federal law.<sup>32</sup>

Justice McReynolds wrote the opinion of the Court, in part –

*"Obviously, direct control of medical practice in the states is beyond the power of the Federal Government... ...[W]hat constitutes bona fide medical practice must be determined upon consideration of evidence and attending circumstances. Mere pretense of such practice, of course, cannot legalize forbidden sales, or otherwise nullify valid provisions of the statute, or defeat such regulations as may be fairly appropriate to its enforcement within the proper limitations of a revenue measure."*<sup>33</sup>

At the conclusion of the opinion, Justice McReynolds further underlined the limits of Federal authority when he stated –

*“...[F]ederal power is delegated, and its prescribed limits must not be transcended even though the end seems desirable. The unfortunate condition of the recipient certainly created no reasonable probability that she would sell or otherwise dispose of the few tablets entrusted to her; and we cannot say that by so dispensing [268 U.S. 5, 23] them the doctor necessarily transcended the limits of that professional conduct with which Congress never intended to interfere.”<sup>34</sup>*

Even the strong language delivered in the opinion from a united court in in *Linder* was not enough to change the pattern of drug enforcement in America. Throughout the next eighty years there would be many iterations and extensions of the original Harrison Narcotics Tax Act of 1914. Such changes to the original Act included amendments in 1924; The Porter Act of 1930; The Marijuana Tax Act of 1937 (the “MTA”) and amendments to the MTA; the Boggs Act of 1951; and the Daniel Act of 1956, leading to enacted legislature known as the Narcotics Control Act of 1956.<sup>35</sup> The Narcotic Control Act of 1956 (the “NCA”), was signed by President Eisenhower on July 18, 1956. The NCA was rushed through Congress faster than quick could get ready and there were practically no debates or questions raised in its passage. In one fell swoop, the NCA brought into the law exaggerated new presumptions, new rules on possession of marijuana, and other amendments to the MTA.<sup>36</sup>

The NCA increased the minimum and maximum penalties for all drug offenses to two to ten years, five to twenty years, and ten to forty years for succeeding convictions; increased the fine in an categories to \$20,000; and imposed five-to-twenty years upon first conviction for any smuggling or sale violation, and ten-to-forty years thereafter, with a separate penalty of ten to forty years or any sale or distribution by a person over eighteen to a minor, and from ten years to life, or death when a jury so recommended, if the drug was heroin.<sup>37</sup> The NCA also bootstrapped an extraordinary measure on the loss of freedom in that no addict, drug user, or drug offender should be allowed to enter or leave the United States without registering as such prior to leaving the country. Thus anyone who had ever been convicted of any drug violation, as well as anyone who was currently an addict or user was required to register and obtain a special certificate when leaving the United States, surrendering the same upon re-entry. Failure to do so was met with the possibility of fines and/or imprisonment.<sup>38</sup> For added measure the NCA simultaneously amended the immigration laws to make narcotic offenses grounds for the exclusion or deportation of aliens, and to preclude courts from recommending against deportation in proceedings involving convicted narcotic offenders. It also established that heroin, historically to that point, a class 2 drug, would now thereafter under the NCA could not be distributed for any purpose whatsoever except scientific research. Medical use was prohibited and if needed could only be granted by special approval from the Secretary of the Treasury.<sup>39</sup>

After the NCA, Congress passed the Drug Abuse Control Act of 1965 – a law enacted to ration methamphetamines and other illicit drugs (narcotics that would

thereafter be pushed through the expanding black market for drugs). The irony of the economics born to the black market for drugs is just that. The origin of the drug laws in America were allegedly created with the purpose of collecting tax money from the prescribing of narcotics. Instead, trillions of dollars have gone into the hands of unregistered offenders and lost from the American treasury. In addition, the failure of the entire system has given rise to a history of law enforcement corruption in illegal drug cooperatives, dirty money, graft, and corrupt political agendas which also require attention to the very laws that have created their existence.

Morphing from the creation of a taxing system into a prison and law enforcement system, all the constant political pressure regarding the “War on Drugs” ran with virtual uninterrupted failure from 1914 to 1969. Yet despite the volume of medical, law enforcement and scientific journals speaking to this failure, by 1970, federal laws regarding controlled substances, were recreated once again and brought about what is in present state, as amended, the Controlled Substances Act of 1970 (the “CSA”). Not to be lost in what may very well have been the turning point in further enactment of restrictions on controlled substances (the passage of the CSA), was a much publicised case Leary v. United States, 395 U.S. 6 (1969).

In 1965, Prof. Timothy Leary was crossing the U.S. Mexican border into Texas when, during a border check, his daughter was caught with marijuana. After taking responsibility for possession of the controlled substance, Prof. Leary was convicted in the Federal District Court of possession under the MTA (the Marijuana Tax Act of 1937) and sentenced to 30 years in jail. Prof. Leary then appealed and lost his appeal in the Federal Circuit Court of Appeals and took his case on certiorari to the Supreme Court in 1968. In 1969, the Supreme Court ruled against the Government and in favor of Prof. Leary. The Marijuana Tax Act was declared unconstitutional based on Prof. Leary’s claims that the MTA, as written required a degree of self incrimination, thus violating Leary’s and others of the Fifth Amendment rights. In line with the Supreme Court’s decision, the decisions of the lower courts were reversed and remanded for reconsideration and Leary’s marijuana possession convictions were subsequently overturned.<sup>40</sup>

The Leary case is an important case as it directly challenged the MTA on constitutional grounds after more than thirty years of prosecutions under that Federal act. As a result of the Government’s defeat in Leary, and President Nixon’s sensitivity to narcotics, (quoted by Nixon as “*America’s public enemy number one*”), additional designs on drug enforcement were clearly eminent. In an attempt to make good on his campaign promise to be tough on crime, the Nixon administration created and pushed Congress to pass the CSA. This legislation is the foundation on which the modern drug war exists.<sup>41</sup> “*When Congress enacted the CSA in 1970, one of its aims was to unify what had been the ‘plethora of legislation’ controlling narcotics and dangerous drugs into ‘one piece of legislation.’ H. Rep. No. 91-1444, 1970 U.S.C.C.A.N. 4566, 4571.*”<sup>42</sup>

In stark contrast to one another, the New Federalist dogma on allowing states to govern without a meddlesome Federal Government was, in the not so distant future, to be

in conflict with the underpinnings of the U.S. Government's "War on Drugs". One of the chief proponents of New Federalism would be Chief Justice William Rehnquist, a Nixon associate justice appointee to the Supreme Court in 1971. At the tail end of Rehnquist's career on the Supreme Court, the issue of state sovereignty and its rights to govern its citizens would be put into a mutually exclusive box within the framework of the New Federalism as well as judicial rulings on controlled substances and legislative interdiction.

Amidst the renewed political craze around the "War on Drugs", in the latter part of 1970, an amusing anecdotal incident occurred within the three ringed circus regarding drug enforcement in America. On December 21, 1970, Elvis Presley paid a visit to President Richard M. Nixon at the White House in Washington, D.C. This meeting between "The King" and President Nixon resulted from a handwritten note from Elvis Presley to President Nixon asking that Elvis receive the designation of "Federal Agent-at-Large" in the Bureau of Narcotics and Dangerous Drugs.<sup>43</sup> What is painfully and dreadfully ironic about both Rehnquist's and Presley's involvement to the "War on Drugs" is that on the flip side, they both suffered with habitual abuse of certain derivative drugs that had their genus in narcotics found under class 2 of the CSA.

Since 1970, legislators along the way attempted to carve their own initials into a national policy that had already seen failure in great measure from time *in memoriam*. By the mid 1990's, a new modern day use of controlled substances for medicinally prescribed purposes took root in certain states. In 1996, fifty-six percent of voters in California passed Proposition 215, legalizing the growing and use of marijuana for medical purposes. The passing of Proposition 215 and other state's enacted legislature on legalizing prescription of controlled substances for medical purposes has created significant legal and policy tensions between the Federal and State governments. Irrespective of state law, the U.S. Government's Criminal Justice Division; the Department of Treasury and other federal law enforcement agencies have not deterred in their thrust to prosecute under the CSA.<sup>44</sup>

During congressional sessions in 1997, certain member of Congress, including Sen. Orrin G. Hatch (R-Utah) and Rep. Henry Hyde (R-Ill.) tried to pass edict, not law, in so charging the Drug Enforcement Administration with the authority under the existing CSA to use its tactical force to invalidate Oregon's DWDA. Under congressional pleading, the DEA would chase after doctors who assisted suicide by prescribing lethal drugs and so charge them criminally under the CSA. Then acting Attorney General Janet Reno refused to prosecute on the grounds that the CSA did not authorize such federal intervention in state matters. During congressional session in 1998 and 1999, in response to Attorney General Reno's refusal, several members of congress, most notably Republican lawmakers, banded together and introduced amendments to the CSA as new legislation. These bills failed to pass.<sup>45</sup>

The contemporary version of the CSA had all it needed and most importantly, an element of discretionary authority that could be used by any Federal administrative official, something it had lacked in earlier years. The use of the Interpretive Rule and its

prior issuance has been made pursuant to 21 U.S.C. 811, 812, and 871(b). Sections 811 and 812 authorize the Attorney General to establish the schedules in accordance with the CSA and to publish amendments to the schedules in the Code of Federal Regulations, part 1308 of title 21. Section 871(b) authorizes the Attorney General to promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient enforcement of his functions under the CSA. These functions vested in the Attorney General by the CSA have been delegated to the Administrator and Deputy Administrator of DEA.<sup>46</sup>

In November 2001, then acting Attorney General John Ashcroft took matters into his own hands with respect to dealing with the Oregon DWDA. Pursuant to 21 U.S.C. 811, 812, and 871(b), Attorney General Ashcroft issued an Interpretive Rule under the CSA which sought to bar the use of controlled substances for physician assisted suicides. Ashcroft declared that “*assisting suicide is not a ‘legitimate medical purpose’ within the meaning of the law.*”<sup>47</sup> Upon close examination of the code which gives rise to the use of power and discretion in issuing an Interpretive Rule, it is disconcerting to observe that such discretion extends so far that it could prevent judicial review in certain cases.<sup>48</sup> While Attorney Generals Ashcroft and Gonzales did not reclassify any of the prescribed narcotics<sup>49</sup> in *Oregon*, the broad discretion given to them it is what brings us to the above styled case before the Supreme Court. From *Linder* to *Oregon*, the old adage holds true – the more things change, the more they stay the same.

## THE CORPUS OF GONZALES V. OREGON

### Euthanasia and Physician Assisted Suicide

Euthanasia is a word derived from the greek word euthanatos (oo-tha-natos) or good-death, “thanatos” meaning death. The term was derived to describe a practice of terminating life in a person or an animal that was perceived to be in a miserable state of lifelong intollerable pain and in so terminating that life by means as painless as possible. Not unlike Socrates, who chose death over painful unending humiliation by drinking an overdose of poison hemlock, many would come after Socrates with far more dire physical circumstances to which they would be afforded the option of euthanasia.

Plato, a student and attendant at the time of Socrate’s passing, described the death scene as follows –

*“He walked about and, when he said his legs were heavy, lay down on his back, for such was the advice of the attendant. The man who had administered the poison laid his hands on him and after a while examined his feet and legs, then pinched his foot hard and asked if he felt it. He said ‘No’; then after that, his thighs; and passing upwards in this way he showed us that he was growing cold and rigid. And again he touched him and said that when it reached his heart, he would be gone. To this question he made no reply, but after a little while he moved; the attendant uncovered him; his eyes were fixed.”<sup>50</sup>*

The mid to late 1800's gave rise to medical uses in anesthetics. Morphine was one of the first in a class of drugs that was used for this purpose. In 1848, a surgeon named John Warren published his findings in a journal titled "*Etherization; With Surgical Remarks*". In the journal, Warren documented that ether might be used "*in mitigating the agonies of death*".<sup>51</sup> Warren described using ether on a ninety year old woman to help treat and alleviate what he described as "*the pain of mortification (and pain) of the abdomen with convulsive twitchings of the limbs, with perfect relief.*"<sup>52</sup>

In 1866, in the British Medical Journal, Joseph Bullar reported using chloroform to palliate pain during the deaths of four patients. Drs. Warren and Bullar allegedly never recommended using ether, chloroform, or morphine to end a patient's life. However, Warren and Bullar did suggest it be used constructively to relieve "*the pains of death*". Similarly, history has noted the use of morphine on the battlefield and such was introduced during the U.S. Civil War, to relieve pain and also to palliate pain during death.<sup>53</sup> Sometime in 1870, Samuel Williams, a layperson, discussed the topic of euthanasia at the Birmingham Speculative Club. He came to the conclusion that not only could the use of certain classes of drugs be used to relieve pain of dying patients, but also to bring about a quick painless end to a person dying in pain.<sup>54</sup>

At the turn of the century, the debate on euthanasia began to receive coverage from the press and was brought to the forefront of political forums. In 1906, or thereabouts, Charles Eliot Norton, a renowned Harvard professor, delivered a speech advocating euthanasia.<sup>55</sup> Dr. Norton's position on euthanasia drew attention from the public and inspired an Ohio resident, Anna Hill to co-author a bill drafted for passage in the Ohio State Legislature. The bill was called "*An Act Concerning Administration of Drugs etc. to Mortally Injured and Diseased Persons*". Ms. Hill had good reason to promote euthanasia. Her mother was terminally ill and suffering with Cancer. The New York Times reported on the bill, carried editorials condemning both the bill and Norton's role in inspiring it, and published charged letters for and against euthanasia. Amidst hysteria in the media and legislature over the idea of legalizing euthanasia, Hunt's bill was rejected by the Ohio legislature, 79 to 23.<sup>56</sup>

Thereafter euthanasia failed to gain any momentum, morally, medically or politically. It wasn't until 1987 that euthanasia would again become an issue of debate on many fronts. The *Mercitron* (mercy machine which administered CO<sup>2</sup>) and *Thanatron* (death machine which administered lethal drug/chemical doses) were devices which were invented by Dr. Jack Kevorkian. After successfully promoting his services, between 1990 and 1998, Dr. Kevorkian consulted and assisted in the suicide of over one hundred terminally ill patients. All the cases were voluntary with the only assistance coming from Dr. Kevorkian's help in attaching the intravenous section of the mechanisms to the patient. The patients were left to self administer by activating the devices which carried the lethal dose of gases/drugs/chemicals to the patient.<sup>57</sup>

## Deathless In Oregon 1994

Oregon Ballot Measure 16 in 1994 established Oregon's DWDA which legalized physician assisted dying with certain restrictions, making Oregon the first U.S. state and one of the first jurisdictions in the world to officially do so. The measure was approved during the general election on November 8, 1994. The final tally showed 627,980 votes (51.3%) in favor, and 596,018 votes (48.7%) against.<sup>58</sup> Pursuant to the Oregon DWDA a consenting adult of sound legal mind being a resident of the State of Oregon and having been diagnosed with a terminal illness by an attending physician may legally ask his or her attending physician for a prescription that, if taken, would be a lethal dose of medication, thus ending one's own life by self-administration. Two sworn witnesses, a second medical diagnosis, *compos mentus* and a cooling off period of fifteen days between the first and final prescription are tenets of the DWDA. The patient has the right to rescind the request at any time. The DWDA protects physicians in the State of Oregon from liability for providing the lethal prescription for a qualified terminally ill patient.<sup>59</sup>

## Physician Assisted Suicide and The Supreme Court

In another odd coincidence in the realm of the subject matter – while legal under Oregon's DWDA – physician assisted suicides were statutorily impermissible in the State of Washington, neighboring just to the north. The separate and distinct interests of a State's rights to govern its citizens are clearly more dividing than the State line a few miles north of Faloma and the Columbia River.<sup>60</sup> In 1997, the Supreme Court presided over *Washington v. Glucksberg*, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). The case before the Court begged to ask the question – *Did the State of Washington's ban on physician assisted suicide violate the U.S. Constitution's Fourteenth Amendment (Due Process Clause) by denying terminally ill patients of legal and sound mind the right and liberty to choose death over life?*<sup>61</sup>

The case began as a suit brought by Dr. Harold Glucksberg against the State of Washington. Dr. Glucksberg, joined by four other physicians and three terminally ill patients sought to invalidate a Washington State law banning physician assisted suicide on constitutional grounds. The law passed in the State of Washington had made criminal, the promotion, act and/or assistance of physician or third party assisted suicide “*by those who knowingly cause or aid another person to attempt suicide.*”<sup>62</sup> The Federal District Court ruled in favor of the Plaintiffs and thereafter, the State of Washington filed its appeal with the Ninth Circuit, which affirmed the lower court's ruling. The State of Washington then took its case to the Supreme Court on Certiorari. Incidentally, the three Plaintiff-terminally ill patients died prior to the final resolution of their case.

In *Glucksberg*, the Court ruled that [the] States had sovereign interests in justifying their bans on physician assisted suicide. Included in those interests were issues pertaining to the sanctity of all human life; ensuring the integrity of the medical profession under the laws of the State of Washington; and preventing terminally ill patients from succumbing to the pressure to end their lives predicated upon the mere existence of physician assisted suicide. The Supreme Court ruled in favor of the State of

Washington and punted on the Constitutional issue. Deeming the facts of the case complex, the court concurred unanimously that the Constitution does not dictate one answer or another. Writing for the majority in *Glucksberg*, Chief Justice Rehnquist observed –

*“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”*<sup>63</sup>

The morality of the issue was basically left out in the open for public debate. What was not debatable, however was the Federalist view of State’s rights to govern its citizens, even in the face of the strength of the Fourteenth Amendment. The Court ruled 9-0 in *Glucksberg* in favor of the State of Washington.

### **Interpreting The S/he Said**

*Oregon*, in its simplest form – as a States rights case – was nevertheless, just as complex as *Glucksberg* and made more so complex by that very case. As mentioned earlier, twenty eight *amici* briefs were filed *in toto* in *Oregon*. Two briefs of significance came from the International Task Force on Euthanasia and Assisted Suicide (the “ITFEAS”) in Support of Defendants/Appellant (Attorney General Alberto Gonzales); and the Cato Institute in Support of Respondents (State of Oregon).

The ITFEAS argued that such directives, from two equally qualified Attorney Generals should be weighed differently on balance of public policy and safety. In other words, the Oregon public is deemed sovereign and self assured in its local governance under the Reno interpretation but no so under the Ashcroft/Gonzales directives.

*“Certainly, the interpretation expressed in the Ashcroft Directive - that prescribing federally controlled substances to cause drug induced death is inconsistent with public health and welfare - is not erroneous or inconsistent with the regulation. Attorney General Ashcroft, in his directive, did not create a new regulation. As discussed above, he merely construed the textual phrases contained in the regulation. The fact that Attorney General Reno construed the phrase differently did not prevent Attorney General Ashcroft from making a different interpretation of that regulation, nor did it require Attorney General Ashcroft to do so only after notice and comment. Deference should be given to the Ashcroft Directive.”*<sup>64</sup>

### **The Moral Majority Has Two Sides**

The ITFEAS argued that while the whole issue of Statutorily governed physician assisted suicide was “*dangerous for society and bad public policy...*”, they further went on to suggest that following the Ashcroft directive would not nullify the Oregon DWDA or prevent physician assisted suicide under the Act.<sup>65</sup> However, the Ashcroft directive

sought to do just that very thing. Considering that prescribing certain narcotics, while classified by the CSA, are the most humane form of inducing death in the patient, what other choices are there?

On examination during oral arguments in *Oregon*, Justice O'Connor drew close to this distinction by effectively asking Solicitor General Paul Clement for the Appellant – how does the Appellant's argument range on the limits of practicing medicine when prescribing a controlled substance in carrying out a death penalty to an inmate; and how is it any different in violating the CSA than a physician prescribing the same for a patient?<sup>66</sup> The question begged to be asked of the Ashcroft directive under the ITFEAS *amicus* argument and the Solicitor General's response is what would you rather a patient choose as the design of their own death – electrocution, bludgeoning, hanging, caustic muscle twisting toxic poisoning, asphyxiation, or firing squad?

An opposing *amicus* brief was filed by The Cato Institute in support of the State of Oregon and co-Respondents. The Cato Institute's argument described in their brief, cut right across the ITFEAS' contravening logic and shot straight to the bright-line issue for the Supreme Court. Certainly there were many social and ruling issues at stake in *Oregon* not to be dismissed. There were issues on public welfare regarding euthanasia, controlled substances, the commerce clause and constitutional sovereign rights. However, no issue was more aptly stated as the priority than the proclamation made in the Cato Institute's brief.

*“This case requires the Court to determine the limits of federal power and the extent of state sovereignty in the area of professional medical judgment – an area of professional regulation to which ‘States lay claim by right of history and expertise.’ United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy and O'Connor, JJ., concurring). Here, an unelected regulatory agent of the executive branch of the Federal Government has attempted to void, through administrative action, not one but two ballot referenda duly conducted by the citizens of a sovereign state who sought to secure for themselves the right to obtain medical advice and assistance at the end of life. The two referenda at issue, enshrined in Oregon's “Death With Dignity Act,” are part of an intense, morally charged debate as to which there is no national consensus, as is evidenced by the Court's several opinions in Washington v. Glucksberg, 521 U.S. 702 (1997). Oregon's law may be unorthodox, and even unique, but it has twice been endorsed by substantial majorities of Oregon voters.”<sup>67</sup>*

The Cato Institute's brief set forth a flawless logic and the trump undercard the Supreme Court could use to avoid a main event embarrassment that *Oregon* posed front and center as a New Federalist case revolving around the Commerce Clause and narcotics. In the end, what means are justified? A reminder left by the Court for its decedents by which they could judge came from Justice Holmes in *Linder*, whereby he viewed this very issue, regarding the restraining physicians in their practice of medicine and the prescribing of narcotics for palliative care as “[A] strained interpretation of the law...”<sup>68</sup>

## The Commerce Clause – Ruling the Mutually Exclusive Day

On balance with Lopez, the cases that followed – Morrison, Oakland Cannabis, Raich, and Oregon form a decent brain teaser. The Lopez decision and follow through with Morrison created two very disquieting precedents that set a jurisprudant tone that Federal enforcement of laws under the Commerce Clause in so forcing states to comply in contravention to its own laws is unconstitutional. But as the other cases indicate, that seems to be only a selective precedent used out of convenience to fit the curve of conservatism.

### The Loop in Lopez

In May 1992, the Respondent, Alfonso Lopez, Jr., a 12th grade student at Edison High School in San Antonio, Texas at the time, carried a concealed .38 caliber handgun and five bullets into the high school. After he was confronted by the local authorities, he was arrested and charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged Respondent by complaint with violating the Gun Free School Zones Act of 1990<sup>69</sup>, Title 18 United States Code § 922 (q)<sup>70</sup> (otherwise known as Federal Code – Crimes and Procedure – Firearms – Unlawful Acts).

This law was codified with the charge that “*The Congress finds and declares that*” – among other things, “*crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem*”; “*crime at the local level is exacerbated by the interstate movement of drugs, guns and criminal gangs*”; and “*firearms move easily in interstate commerce...*”. There can be no doubt that the legislators who drafted and enacted this act identified not only the problem but the means to enforce the problem. The legislative section ends by stating that “*the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation’s schools by enactment of this subsection.*”<sup>71</sup>

Respondent Lopez’s legal defense argued that the Federal law under which Lopez was convicted was unconstitutional. The Supreme Court decided for Respondent Lopez. The Lopez case was a landmark. It was the first time in fifty years that the Supreme Court decided that Congress did not possess the authority to legislate under the Commerce Clause. Apparently, Congressional intent is a matter of Supreme Court interpretation even if it is clearly black and white, and even when the stakes can be a matter of life and death. Drugs, not unlike guns, are a multi-billion dollar business in the United States. The Commerce Clause logic of guns = no commerce clause authority (in Lopez) to drugs = yes commerce clause authority (in Raich) is completely beyond understanding.

Towards the end of Justice Stevens’ opinion in Raich, he wrote for the majority the following –

*“Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in Wickard v. Filburn and the later cases endorsing its reasoning foreclose that claim.”*

It leaves one to guess that the magnitude of a commercial market for marijuana in the U.S., much less for the rest of the world, is exceedingly more gigantic than that of firearms and ammunition.

### **Follow the Leader**

In *Morrison*, the socio-economically destructive and disfunctional issues were rape and assault. The *Morrison* decision looms even larger than *Lopez* as there is clearly an aggregate effect with respect to social disorder and violence. Sadly, *Morrison*, on its face is a complete miscarriage of justice. In and of itself, where the ends were never justified and the means were indiscriminate to a victims rights, *Morrison* remains a poor judicial decision where on balance, the Supreme Court failed to use its political discretion as it chose to in other cases.

In 1994, the U.S. Congress enacted legislature penned the Violence Against Women Act of 1994 (the “VAWA”), which, among other parts, contained a provision under Section 42 of the United States Code § 13981 to provide federally charged civil remedies to victims of gender based violence, irrespective if criminal charges are ever filed or sustained.<sup>72</sup>

In 1995, a student at Virginia Tech named Christy Brzonkala filed a complaint against Antonio Morrison and James Crawford, alleging they both raped and assaulted her over a period of about thirty minutes. Virginia Tech conducted a hearing on Brzonkala’s complaint where Morrison admitted having sexual contact with her despite the fact that she had twice rejected him and said “no” to his advances. College proceedings failed to punish Crawford, but initially punished Morrison with a two year suspension. After appealing to the schools administration and Provost, Morrison’s case was inexplicably dropped and his suspension was lifted. Brzonkala then filed suit against Morrison and Crawford in the U.S. District Court for the Western District of Virginia on the grounds that the attack against her violated 42 U.S.C. § 13981 and Title IX of the Educational Amendments of 1972 (20 U.S.C. § 1681 – 1688). At this point the U.S. Government intervened to support the VAWA’s constitutionality. The District Court discharged both claims and held that Congress lacked the authority to uphold the VAWA under either the Commerce Clause or the Fourteenth Amendment. Subsequently, the case was taken up on appeal where a divided panel of the Federal Circuit Court of Appeals reversed the lower court’s decision and reinstated both of Brzonkala’s claims. Thereafter a full Court heard the entire case *en banc* and reaffirmed the lower court’s decision that Congress lacked constitutional authority to enact civil remedies under 42 U.S.C. § 13981. The Supreme Court granted certiorari on constitutional grounds.<sup>73</sup>

The Supreme Court's decision in *Morrison* overturned the civil rights part of the Violence Against Women Act of 1994. The VAWA was passed by Congress to give the Federal Government a trump card in protecting citizens and allow victims to sue their attackers in Federal court. Whether its genesis was fictional or not, Congress raised alleged facts of statistical evidence that showed a pattern of apathy from the State level in failure to prosecute violent (including sexual assault) crimes against women as often as crimes against men. In spite of what justices Breyer and Souter described as “*a mountain of evidence*” that violence against women does so affect interstate commerce, the Court majority ruled that VAWA exceeded congressional power under the commerce clause and the equal protection clause of the Fourteenth amendment. Where there is apparent failure to recognize that violence does impact interstate commerce can be seen in the microcosm of Brzonkala's withdrawal from matriculating at Virginia Tech.

The VAWA is easily seen as a support mechanism for failures at the State level to enforce and uphold laws to protect victims and provide for assurances to the general public that crimes will not go unpunished. It is for the same reason that out of market consumers will feel uninhibited when shopping in upscale neighborhoods. However, if certain assurances were not in place to police the dangers, the flows of commerce might otherwise be disaffected.

There in *Morrison*, States rights rule over Congressional legislature making violent acts against women a non-starter unless it says so otherwise. What commerce clause? What equal protection? Against the backdrop of *Lopez*, balancing the Physician prescriptions for controlled substances to treat their patients, including the Congressionally classified marijuana (exempt from medical use other than Government sponsored research) are seemingly more illegal and governed to Federal intervention than gun toting teenagers. Add, assault, battery and rape in *Morrison* and you have a crumbling foundation of the efficacy of interpreting powers under the Commerce Clause irrespective of economic or non-economic foundation. In both *Lopez* and *Morrison* even though the defendants were charged to have violated a Federal law and evidence supported these charges, both cases prove that the Supreme Court picks and chooses the threshold of elasticity in the Commerce Clause to determine which of Congress' laws are constitutional and which are not. In this it weilds an extraordinary amount of power that can easily go beyond reason.

One final note on violence and commerce. It is clearly blind to suggest that families across America are not looking at public schools very differently these days. There is a reason for this and it has more to do with safety than the quality of teaching. Despite the cost of private schooling or home schooling, families are choosing to pay the price for decisions like *Lopez*.

### **Courting Drugs**

When looking squarely at the case *Gonzales v. Raich* 545 U.S. 1 (2005), one sees another teetering triangle of Supreme Court logic relating to the balance of powers under the Commerce Clause. *Raich* is an important case in the flux of constitutional and

statutory construction revolving around the physician prescription and use of controlled substances for medically warranted purposes. Unlike *Oregon* (while having controlling arguments underlying the Commerce Clause), the Supreme Court would rationalize making its 6-3 majority decision in favor of the Federal Government in *Raich* on the scales and interpretation of the Commerce Clause and not any ethereal conclusions that allude to the same.

The story behind *Raich* started with California Proposition 215, passed in 1996, a State act legalizing the medical use of marijuana.<sup>74</sup> California's Compassionate Use Act authorizes limited marijuana use for medicinal purposes. At the time of the action, Respondents Diane Monson and Angel Raich were California residents who both use doctor-recommended marijuana for serious medical conditions. California was one of nine states that allowed medicinal use of marijuana. California's Compassionate Use Act allows limited use of marijuana for medicinal purposes. Pursuant to the medically warranted prescription for marijuana, Raich's physician stated that "*without marijuana, [Raich] would be in excruciating pain and could die.*"<sup>75</sup>

Acting under the authority of the CSA, federal agents from the U.S. Drug Enforcement Administration (the "DEA"), confiscated and destroyed all six of Diane Monson's cannabis plants. Monson and Raich brought an action against the government seeking declaratory relief and an injunction against the DEA prohibiting the enforcement of the CSA on the grounds that such enforcement was a violation of the Commerce Clause. Respondent's constitutional charge regarding the Commerce Clause and other constitutional claims were denied by the Federal District Court at trial and their request for injunctive relief was denied. Monson and Raich took their case up on appeal to the Ninth Circuit Court, which then reversed the lower court's decision against Monson and Raich. The Ninth Circuit Court of Appeals held that the Respondents, Monson and Raich had established and demonstrated a strong likelihood of success on the claim that the CSA is an unconstitutional exercise of Congress' Commerce Clause.

The thread of logic for the bounds of sustaining the argument against the Commerce Clause was that their growth of marijuana and the statutory authority to which they governed themselves –

*"...applied to the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law."*<sup>76</sup>

Not surprisingly, the Ninth Circuit Court of Appeals cited *Lopez* and *Morrison* as their authorities on the balance of its decision – cases that held firmly on restraining federal power seeking to reign over local activities that are constitutionally beyond its reach. The Supreme Court, however, basically said "not so fast". In *Raich*, the Supreme Court ruled 6-3 in favor of the Attorney General based on the premise that under the authority vested to the U.S. Government through the Commerce Clause, Congress may ban the use of marijuana even where states approve its use for medicinal purposes. Among other issues, the Court sustained the means and prosecution under the Controlled

Substances Act as an exercise of federal power. According to Justice Stevens' writing of the Court's opinion –

*“[Congress] could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.”<sup>77</sup>*

The majority did not address the substantive due process claims raised by Respondents Monson and Raich. Instead, the focus was squarely upon the throes of New Federalist views on the Government's new found authority under a Commerce Clause lit up by the Court's interpretation of the same in Lopez and Morrison. Turning the focus on ideology, it is important to look at the concurrence in Raich from Justice Antonin Scalia.

Justice Scalia wrote, in part –

*“I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to Respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.”...*

*...“Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”<sup>78</sup>*

What then, of Lopez and Morrison? Justice Scalia's concurrence aimed to differentiate the decision from the controversial results of Lopez and Morrison. Although Scalia voted in favor of limits on the Commerce Clause in the Lopez and Morrison decisions, he said that his understanding of the Necessary and Proper Clause caused him to decide for the Government citing the Commerce Clause as the ruling instrument of authority in Raich for the following reason –

*“Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. As Lopez itself states, and the Court affirms today, Congress may regulate non-economic intrastate activities only where the failure to do so “could ... undercut” its regulation of interstate commerce. ... This is not a power that threatens to obliterate the line between “what is truly national and what is truly local.” Lopez”<sup>79</sup>*

In other words, gun toting, rape and assault are local activities never to be confused as non-economic intra-state activities that Congress may or may not have intended to regulate under the sweeping authority of the Commerce Clause, and to wit, the nine that sit on the high court left to decide what Congress intended as to what is local

and what is not. In an effort to protect his New Federalist court and the fifty year precedent in that arose out of *Lopez*, a muted majority, including Chief Justice Rehnquist and Justice Thomas joined Justice O'Connor's dissent, citing –

*“In my view, the case before us is materially indistinguishable from Lopez and Morrison when the same considerations are taken into account.”*<sup>80</sup>

## **Smoke Signals from Oakland**

*United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), was a major case that preceded Raich and became a major setback for state legislature, citizen's right to govern themselves, physician warranted prescriptions of medicinal marijuana, statutory interpretation and the Commerce Clause. Unfortunately for the Respondents, the Commerce Clause argument before the Supreme Court was a non-starter as this issue was theretofore never raised at the Circuit Court of Appeals.<sup>81</sup> Thus *Oakland* became a case of straight federal authority under the CSA versus California Proposition 215 (the “CUA” – the Compassionate Use Act).

The Oakland Cannabis Buyers' Cooperative (the “OCBC”) was organized in California, legally created under Proposition 215, to “provide seriously ill patients with a safe and reliable source of medical cannabis information and patient support.” In order to become a member, a person must provide a note from a treating physician assenting to cannabis therapy for a medical condition listed on the Medicinal Cannabis User Initial Questionnaire. Those conditions range from severe disabilities such as multiple sclerosis and cerebral palsy to relatively minor conditions such as menstrual cramps.<sup>82</sup> In *Oakland* the Supreme Court rejected the Respondents' common-law medical necessity defense to crimes enacted under the federal Controlled Substances Act of 1970, regardless of their legal status under the laws of states such as California that recognize a medical use for marijuana.

In January 1998, the U.S. Government sued the OCBC to stop the cultivation and distribution of marijuana in violation of federal law. The Government based its argument on the provisions of the Controlled Substances Act, which forbade the distribution, manufacture, and possession with intent to distribute or manufacture a controlled substance (including marijuana). The lawsuit began in the U.S. District Court for the Northern District of California, and came before Federal District Court Judge Charles Breyer. Judge Breyer, the brother of Supreme Court Justice Stephen Breyer, concluded that the Government would likely prevail on the merits, and issued the injunction. The Ninth Circuit reversed. It held that medical necessity was a legally cognizable defense to charges under the Controlled Substances Act. Accordingly, the district court could have fashioned an injunction that was more limited in scope than a total ban on distributing marijuana. The Ninth Circuit ordered the district court to consider the criteria by which OCBC could distribute marijuana under the rubric of medical necessity. The Government then asked the U.S. Supreme Court to review the case.<sup>83</sup> When the case came before the Court, Justice Stephen Breyer recused himself from deciding the case because his brother Charles had been the district judge in the case.

In its arguments under the common-law theory of defense in this case, the OCBC contended that the Controlled Substances Act was susceptible of a medical necessity exception to the ban on distribution and manufacture of marijuana. The Court concluded otherwise. Since 1812, the Court had held that there were no common-law crimes in federal law. That is, the law required Congress, rather than the federal courts, to define federal crimes. The Controlled Substances Act did not recognize a medical necessity exception. Thus a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act. According to Justice Breyer, when Congress passed the Controlled Substances Act, Congress made a value judgment that marijuana had “*no currently accepted medical use.*” It was not the province of the Court to usurp this value judgment made by the legislature. Thus, it was wrong for the Ninth Circuit to hold that the Controlled Substances Act did contain a medical necessity defense. It was also wrong for the Ninth Circuit to order the District Court to fashion a more limited injunction that would take into account the fact that marijuana was necessary for certain people to obtain relief from symptoms of chronic illnesses.<sup>84</sup>

But, here again, post-*Lopez* and post-*Morrison*, according to the Supreme Court’s interpretations of legislature and the intertwinings of the Commerce Clause, Congress is deemed to have made a poor set of rules in its value judgments on guns near schools and violent crimes against women, yet under the Supreme Court’s New Federalist rulings in *Raich* and *Oakland*, Congress got it squarely right on the money regarding marijuana. Later, in *Oregon*, a nearly parallel case, two of the Supreme Court justices presiding in the majority in *Raich* – Justice Scalia and Justice Thomas – would later return in offering dissenting opinions for the minority, yet abandoning their former New Federalist views in *Lopez* and *Morrison*.

### **Commerce Clause & Federal Powers**

Despite States rights issues on the medical practice of prescribing marijuana, long held to have no medical value whatsoever by politicians, it could be federally restrained as to its prescription and distribution under the Commerce Clause (see: *Gonzales v. Raich*; and *U.S. vs. Oakland Cannabis*). Granted marijuana was not apparently at issue in *Oregon*, yet it may have been part of the palliative care leading to euthanasia in this and other instances under the ODWA. Other highly potent controlled substances were targeted by the U.S. Attorney General in the issuance of the Interpretive Rule in *Oregon*. The Attorney General’s rationale in so seeking a ban on the use of other classified controlled substances for physician assisted suicides was based upon the fiction that a physician’s prescription was not medically warranted for such events and purposes. The entirety of the case in *Oregon* turned on this very issue and the width of an administrative official’s permissible latitude for enforcement under a legislative act (the CSA and the issuance of an Interpretive Rule). However, it is equally noteworthy to bring to light what Petitioner, Respondents and *amici* have discussed regarding the constitutional powers vested in the hands of the Federal Government through the Commerce Clause.

In *Oregon* Solicitor General Clement’s oral arguments touched on Oregon being an *a fortiori* case under the New Federalist Court’s Commerce Clause ruling in *Raich*,<sup>85</sup>

the Supreme Court didn't seem so moved to jump on the proverbial see-saw. The Solicitor General's Commerce Clause argument spoke to the bigger problem at hand – the class of activities that Congress decides to regulate is difficult, even for the Supreme Court to interpret with consistency. The judicial history of the Commerce Clause of the U.S. Constitution (Article I, section 8, paragraph 3) can be divided into three eras: the first 150 years after the Constitution went into effect in 1789; the 1937–1995 period; and 1995 and beyond.<sup>86</sup> As history has taught us, the thresholds of interpretation of the Commerce Clause are driven by changes in society.

*“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”*

The balance of controversial issues governed through U.S. history by the use and interpretation of these sixteen words have helped define the balance of power between the Federal Government and individual states.<sup>87</sup> In the landmark case, *United States v. Lopez*, established the tone of jurisprudence with respect to future Commerce Clause related cases. Only time will tell whether or not the three narrow tenets of Rehnquist's court create the framework to judge consistently in parallel cases –

*“[that] Congress has the power to regulate only (i.) the channels of commerce; (ii.) the instrumentalities of commerce; and (iii.) action that substantially affects interstate commerce.”<sup>88</sup>*

This writer seems to think otherwise. *Oregon* is an important case in the full evaluation of a very raw Commerce Clause lanced by the decisions in *Lopez* and *Morrison* and followed up in confusion fashion in deciding *Oakland Cannabis* and *Raich*. A close look at *Oakland Cannabis* side by side with *Oregon* does beg to ask the question – does one grade classification from 1 to 2 make a threshold of difference in granting interpretive and intervening authority to the government under the CSA? Some might say this is a rhetorical question. Be that as it may, the question itself bears examination. In *Oakland Cannabis* and *Raich*, the court found Federal law to be valid and constitutional, even though marijuana had been grown and consumed within a single state, so legalizing the activities, yet never having crossed state lines to be considered a part of interstate commerce.

## THE SUPREME COURT ON GONZALES V. OREGON

With all the hoopla surrounding the prior cases, the question before the Supreme Court was –

*“Whether the Attorney General has permissibly construed the Controlled Substances Act, 21 U.S.C. 801 et seq., and its implementing regulation to prohibit the distribution of federally controlled substances for the purpose of facilitating an individual's suicide, regardless of any state law purporting to authorize such distribution.”<sup>89 90</sup>*

## Interstate Trafficking of Euthanasia?

The Court's full opinion in Oregon, contains only eight references to the Commerce Clause. All eight, are found in the dissenting opinions – five times in Justice Scalia's opinion and three times in Justice Thomas' opinion. Yet, in all that, and without a single word of commerce in Justice Kennedy's opinion for the Court, a decent amount of attention was spent on this issue in the Respondent's and the *amici* briefs and it was certainly addressed by the Court during the oral arguments. In a humorous exchange between Justice Breyer and Robert M. Atkinson, Sr. Asst. Attorney General for the State of Oregon, Justice Breyer brandished the anvil and drew laughter from the courtroom towards the end of the exchange<sup>91</sup> –

Justice Breyer – *“Now, suppose I think that the AG does have the power to stop Congress from gutting the Act. All right? Now, on that, do I have... if I believe that, on that assumption, do I have to decide this case against you?”*

Mr. Atkinson – *“No.”*

Justice Breyer – *“And if not, why not?”*

Mr. Atkinson – *“There are at least two reasons for that, Justice Breyer. The first is the commerce clause question, which we believe to be...”*

Justice Breyer – *“Suppose, on the commerce clause question, I... on assumption, I don't agree with you, either... then do I have to decide?”*

Mr. Atkinson – *“I'm starting to be backed into a corner.”*

Despite only referencing six times in his brief for the Petitioner, Solicitor General Clement felt strongly enough to twice rally his senses as to the invocation of the Commerce Clause in Oregon. In both instances, during oral arguments he stated that Oregon was an *a fortiori* case in parallel with Raich pursuant to Congressional authority under the Commerce Clause. Just prior to closing, Solicitor General Clement closed his argument at the end of the proceedings by saying that *“This case is to Raich as the regulation of farming would be to Wickard against Filburn. It is a much different situation. Congress' Commerce Clause power is more robust here.”*<sup>92</sup>

In the opinion for the majority in Oregon, written by Justice Kennedy, the underpinnings of the Commerce Clause are far less considered on balance as to the court's reasoning regarding the overall constitutional battle of powers between the Federal Government and the States. What is of interest is how the Court's opinion in Oregon shifted from a peppering of prior interpretations of the Commerce Clause salted by Lopez to a needling on an Administrative Official's interpreted authority. But if this is true and the Administrative Official's conduct is governed by the CSA, then what is different between Oakland Cannabis and Oregon? And, if the Commerce Clause was

used as a dividing instrument of jurisprudence, what then is different between Raich and Oregon?

Such inconsistencies may say more about an Administrative Official's conduct and the Supreme Court's rulings beneath the surface. Considering that Attorney General Alberto Gonzales was on a short list of nominees and thought to be a strong replacement of Chief Justice Rehnquist on the High Court. Certainly Attorney General Gonzales would be known – as was his former, Attorney General John Ashcroft – as men who would follow the political pace and the Supreme Court. One would think that these Attorney Generals would certainly present authority expressed by the Federal Government's rights under the Commerce Clause in parallel with the Rehnquist court's New Federalist reasoning.

It leads one to believe that the High Court would have easily seen the Government's long standing sovereignty on underlying narcotics issues as in Oregon and granted authority under the Interpretive Rule, but it didn't. One can argue that their reasoning is simply a class 1 narcotic is “no, never”<sup>93</sup> and therefore CSA and Commerce Clause rule the day. But a class 2 narcotic is “okay”<sup>94</sup> and therefore if it is illegal bungee jumping while under the influence of heroin or cocaine, so long as it was issued by a physician's prescription or doesn't abrogate states rights, that's okay. Again, such that the landmark cases in Lopez and Morrison speak to “hands off States rights issues” on Guns and Rape, the Commerce Clause grants sovereignty to the Federal Government and is given full weight by the Supreme Court with respect to Narcotics. What happened in Oregon? It is here where Glucksberg and not classification breaks the see-saw. Raich and Glucksberg, together may well have formed the pregnant negative for future Supreme Court rulings on State's rights under the Commerce Clause with respect to Narcotics. Oregon sealed the deal. It seems by the tale of the tape and the box score, Oregon begged of silence on the very issue.

### **What Raich Had Done For Oregon**

It is interesting to note that in the Cato Institute's *Amicus* brief before the Supreme Court, near the outset of the brief, they attack the very recent ruling in Raich to bring forth an argument to preempt and upend any sustenance of the Commerce Clause. The Cato *amicus* brief stated in part –

*“Arguably, the Court's preference of democratically pedigreed balancing of national and local interests won the day in Raich, which suggested that Congress is the preferred expositor of what is local and national when Congress decides to ‘comprehensively’ regulate an item that travels in interstate commerce.”<sup>95</sup>*

This argument is marked by the fact that in Raich, the controlled substance of marijuana, never left the state. The institute's brief went on to state –

“[Even] assuming, *arguendo*, that such deference was constitutionally proper, there is no basis for extending similar deference to an administrative agency’s interpretation of the scope of federal commerce power.”<sup>96</sup>

From this standpoint, *Raich* becomes one side of a hard bookend on ruling in *Oregon*. The other side becomes the ambiguities of an Administrative Official’s decision against such hard and fast Congressional legislature. In this, the Cato Institute pointed to *Cf. Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159, 173 (2001), whereby the Supreme Court refused to accord deference to administrative decision that is contrary to unambiguous legislative text and imposing a heightened standard of review (where a federal administrative interpretation would interfere with democratic decisions at a state level).<sup>97</sup>

This seems like a solid pair of self-styled handcuffs for a conservative panel of Supreme Court justices that have historically been given to defer to state rights of sovereignty as to the governance of its citizens under its legislature. The Cato Institute placed an exclamation on this issue by citing Justice Brandeis’ dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), whereby Justice Brandeis supported state over federal regulation based upon the inclination for “*a single courageous State to serve as a laboratory... and to try novel social and economic experiments without the risk to the rest of the country.*”<sup>98</sup>

Without posing cost or risk to the rest of the country, the Court’s decision in favor of an administrative official’s interpretation of the Commerce Clause would be unfounded and in conflict also with the Court’s own rulings in *Lopez*, *Morrison*, and *Raich*.

### **What *Glucksberg* Had Done For *Oregon***

In a word, absolutism. *Glucksberg* was a Shaquille O’Neal two handed slam dunk. But is vitally important in drawing the lines of reason around the entirety of the body of cases that so shape the ideals of Rehnquist’s New Federalist court. In *Glucksberg*, State law, State citizens, State governance, there is no challenge according to a 9-0 court. Its all about the State and the boundaries are clearly defined. Narcotics? Euthanasia? Guns, rape, and bungee jumping? Altogether, never make it into the second round.

### ***Oregon* Briefs**

As the centerpiece of their logic, Petitioners cited *United States v. Moore*, 423 U.S. 122 (1975), a case in which the Supreme Court ruled that “*that registered physicians can be prosecuted under 841 when their activities fall outside the usual course of professional practice.*”<sup>99 100</sup>

The *Moore* case revolved around methadone, a class 2 controlled substance that can be legally prescribed by physician’s under the guidelines set forth in the CSA. Is it

any wonder, with the balance of cases underneath Oregon why the Petitioners hardly touched on the Commerce Clause. On the other side, the Respondents made a total of 25 references in one brief for the State of Oregon and with surgical precision cut to the marrow –

*“Consequently, the U.S. Attorney General’s claim to deference in applying the CSA here must surmount to the ‘clear statement’ hurdle because it impinges upon the DWDA at the margins of Congress’ powers under the Commerce Clause.”*<sup>101</sup>

### **Oral Arguments in *Oregon***

During oral arguments in *Oregon*, a large section of time was spent covering the logic under questioning posed by Justices O’Connor, Ginsburg and Stevens. The area of focus centered on the physician’s roll in assisted suicides and the legality in parallel contexts with respect to the CSA and an Administrative Official’s authority.

Justice O’Connor got right to the point on restrictive authority in a question aimed at whether or not an execution of a convicted death penalty convict would place the same burden of violation of the Controlled Substances Act upon an attending physician. Justice O’Connor furthered the notion by asking in parallel how, if at all, a presiding Attorney General could influence the stoppage of execution pursuant to his or her interpretation of the CSA.<sup>102</sup> Justice Ginsburg shot straight for heart of the matter by asking the Solicitor General *“what was the court’s position was in Glucksberg.”*<sup>103</sup> In responding to Justice Ginsburg’s question, Solicitor General Clement related *Glucksberg* to a direct constitutional issue and offered in *Oregon* –

*“that the Federal regulation here, the interpretation of the Attorney General, does not purport to foreclose the issue of assisted suicide.”*<sup>104</sup>

But that is exactly what Federal regulation is seeking to do directly or indirectly when it asks in the very question at the heading of its brief, that the Supreme Court should decide whether or not the Attorney General could –

*“...prohibit the distribution of federally controlled substances for the purpose of facilitating an individual’s suicide...”*<sup>105</sup>

Justice Stevens asked for a public safety distinction in what makes the assisted suicide indistinctive from Dr. Kevorkian who did not prescribe controlled substances, to a physician who engaged in the same practice of assisted suicide, but with prescription of a controlled substance. Solicitor General Clement commented that –

*“[t]he reason I would say that it wouldn’t is, I think you have to read this regulation against a backdrop that for 90 years the Federal Government has been involved in the regulation of controlled substance...”* *“...[A]nd we all know that that is going to have an incidental effect on State regulation...”*

But perhaps the most compelling testimony came in the distinction of authority and the scope to which that authority can operate. Justice Ginsburg again, cuts to the chase on procedure to claim authority<sup>106</sup> –

*“How about the “who”? Is this something... how does it work under the Controlled Substance Act? What authority does the Department of HHS have? What is the division of authority between those two under the Act? The Attorney General, on one hand, and the Department of Health and Human Services, and including the FDA, on the other.”*

Mr. Atkinson – *“Justice Ginsburg, I can’t answer that question in specific respect to this case, because there is no authority in the Controlled Substances Act for anyone to do what has been done here... that is, to focus on the specific medical practice and say, ‘No controlled substance’... can be used for...”*

Justice Ginsburg – *“[But you]...you made a point earlier that the Attorney General has never done this before, has never said, ‘You can’t prescribe particular drugs for’... [has]... that has not been done. You’ve been giving examples of where the FDA ruled that you can’t...”*

Mr. Atkinson – *“That’s correct.”*

Justice Ginsburg – *“...use a drug. And that control is nationwide, no matter what the State medical board thinks, right?”*

Mr. Atkinson – *“Yes. There is... there are... for example, in scheduling of drugs... and the U.S. Attorney General suggests, for example, that he could simply schedule these drugs in a way to... as a way of avoiding the Oregon Act... or voiding the Oregon Act, as it were. And, to do that, he has to get his medical and scientific advice from the Secretary of Health and [Human] Services, and must accept that advice and be bound by it. And certainly, that wasn’t done in this case. So, I hope that answers your question.”*

Justice Ginsburg – *“Who... the consultation, you said, was not with HHS, and it wasn’t with Oregon? Who did the Attorney General consult?”*

Mr. Atkinson – *“To the best of our knowledge, it was solely done within the Department of Justice.”*

### **The Court’s Decision in Oregon**

The Court was in the majority 6-3 in favor of the State of Oregon in its decision. It marked a cross road for a contemporary conservative court previously under Chief Justice Rehnquist to a more moderate and centrist court, seemingly moved to the majority by Justice Kennedy.

Justice Kennedy's opinion regarding the balance of power between states and the Federal Government, reads in near parallel to the *amicus* brief filed by the Cato Institute on behalf of the State of Oregon. The focal points, however were quite a bit different as Justice Kennedy's opinion of the court seemed to focus upon the Interpretive Rule as opposed to the Cato Institute's logic regarding the Supreme Court's prior interpretations under the Commerce Clause.

It is interesting to note in *Gonzales v. Raich* 545 U.S. 1 (2005), the Supreme Court ruled 6-3 in favor of the Attorney General based on the premise that under the Commerce Clause of the United States Constitution, Congress may ban the use of marijuana even where states approve its use for medicinal purposes.

It upheld the validity of Controlled Substances Act as an exercise of federal power because Congress "*could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial*" The majority did not address the substantive due process claims raised by the respondents.<sup>107</sup> Justice Stevens' opinion for the Court for the *Raich* decision said that *Lopez* and *Morrison* don't apply, since marijuana is a popular part of commerce, and that the Commerce Clause applies whether the commerce is legal or not. According to Stevens, *Wickard* was the correct precedent to go by.

### **Scalia's Dissent In Oregon**

Justice Scalia, in a dissent joined by Chief Justice Roberts and Justice Thomas, argued that under the Supreme Court precedent deference was due to the Attorney General's interpretation of the statute. He wrote that "[i]f the term 'legitimate medical purpose' has any meaning, it surely excludes the prescription of drugs to produce death".<sup>108</sup> They shoot horses, don't they?

### **Thomas' Dissent In Oregon**

In addition to joining Justice Scalia's dissent, Justice Thomas also filed a brief dissent in which he argued that the court's majority opinion was inconsistent with the reasoning in *Raich*. Thomas also dissented in that decision, in which five of the six justices in the majority in *Oregon* found broad federal authority under the Controlled Substances Act for Congress to forbid the growth of medical marijuana. Thomas had argued for a more limited congressional power under the Commerce Clause in *Raich*, which focused on intra-state vs. inter-state commerce. In *Oregon*, by contrast, the case was instead a matter of the validity of an executive interpretation of that statute. Perhaps Thomas held to the Rehnquist New Federalist mantra best out of his fellow justices on the high court.

## CONCLUSION

In examining the dissenting opinions, both in Oregon and Raich, Justice Thomas raised issues of a Federal Government overstepping in Raich (which oddly, five of the six justices in the majority in Oregon conversely found broad federal authority under the Controlled Substances Act for Congress to forbid the growth of medical marijuana in Raich, yet decided to ignore similar discretion under the CSA in Oregon). In Raich, Justice Thomas had argued for a more limited congressional power under the Commerce Clause, the focal point in Raich for New Federalism views espoused by the Court in Lopez and Morrison.

In Raich, the Court reasoned as it didn't in Wickard, that the consumption of locally grown [*marijuana for medical purposes*] does so affect the interstate market [*of marijuana*], and hence that the Federal Government may regulate – and prohibit – such consumption. In Raich, the bright-line was and remains the Commerce Clause. However, would the Supreme Court have viewed the case differently, or would the same be true if the controlled substance was heroin and the growth of poppy plants legalized by State legislature? Apparently, this very issue is at work in Oregon with the exception of poppy plants.

In Raich, prior to the Petitioner's writ of certiorari, the Respondents had received injunctive relief from the Ninth U.S. Circuit Court of Appeals so as to continue to receive treatment for their respective medically diagnosed problems by prescription of marijuana. In its opinion, the Ninth Circuit wrote –

*“We find that the appellants have demonstrated a strong likelihood of success on their claim that, as applied to them, the Controlled Substances Act is an unconstitutional exercise of Congress' Commerce Clause authority.”*<sup>109</sup>

Unfortunately for the Respondents in Raich and others similarly situated, the Supreme Court vacated the Ninth Circuit's decision and remanded the case. Where is there a greater burden placed upon the jurisprudence of the Supreme Court as it pertains to this balance beam known as Glucksberg? The weight of social issues in Oregon deals in life, death, pain management, medical practice, State sovereign authority and controlled substances. On the other side of the fence, but a year earlier, lies Raich, which deals in life, pain management, medical practice, State sovereign authority and controlled substances.

The ability for the Attorney General to impose his or her authority on behalf of the Federal Government under the CSA using the Commerce Clause as a lever exists in both Raich and Oregon. However, there is something different at work in both cases. The Supreme Court's ruling in Raich leaves a short arm approach available to the Attorney General as the Court's interpretation of Congress' intent behind the Commerce Clause provides an unambiguous knock out punch of States rights. Again, the conclusions are drawn in the above styled cases by the Supreme Court, irrespective of whether or not the CSA is the legislative mechanism in so knocking out States rights

under the Interpretative Rule. In *Oregon*, Gonzales doesn't have the authority even if the Commerce Clause card is played. In *Raich*, Gonzales rules the day because the CSA has backbone from the Commerce Clause. In *Glucksberg*, the CSA and Commerce Clause are completely buried and seemingly aren't even an issue as States rights rule over all other issues – Commerce Clause, CSA, and the Fourteenth Amendment.

Clearly, marijuana becomes the focal point. It is seen in Justice Steven's opinion for the majority in *Raich*. In the Petitioner's brief, Solicitor General Paul Clement wrote, "*Subsequent decisions of the Court have further established that the CSA is binding federal law even when it renders unlawful practices deemed permissible under state law. See: Oakland Cannabis*, 532 U.S. 492-493 (upholding federal determination in the CSA that marijuana lacks an acceptable medical use, despite state law purporting to recognize such medical uses)".<sup>110</sup> Given the Court's recent propensity to play the Commerce Clause card for the Federal Government in cases involving narcotics, it is possibly for this reason that the Cato Institute, in its *Amicus* brief placed so much of the emphasis of its argument on the bright-line evaluation of the Commerce Clause and its non-application on intra-state commerce.

Drugs have a funny effect on people, including those not under the influence. Although it isn't a constitutional issue, it is in the ethereal sense – acting as the dividing threshold and bright-line on separation of powers (a deeply rooted Constitutional issue). Of certainty, in prosecution and jurisprudence, it seems marijuana and not the interpretation of intra-state vs. inter-state commerce under the Commerce Clause plays as the political trump card in the fuzzy logic of administering justice. As it was apparent in *Raich* and also in *Oakland*, the marijuana crop was cultivated under the State of California's Proposition 215 and was used specifically within the State. If any reason could be afforded the Attorney General with respect to seeking to enforce the CSA, it would be under the classification of marijuana being a class 1 controlled substance and therefore banned from physician prescription in conjunction with the CSA.

However, such was not the case and the standard to which the Court ruled in *Raich*, along with the dissent from Thomas, draws a distinctive fence around marijuana; the Interpretive Rule and the Commerce Clause. Under *Raich*, the ruling precedent was *Wickard*, and the Supreme Court's interpretation of the Commerce Clause, awarded the Attorney General the authority to regulate the issuance and prescription of the controlled substance, marijuana – despite the State of California's own enacted legislature, legalizing the farming and prescribing thereof.

Under *Oregon*, the ruling precedents seem to stem from *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997); *Auer v. Robbins*, 519 U.S. 452, 461-464 (1997); and *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). While *Auer* and *Chevron* established a threshold for the Attorney General's discretion under the Interpretive Rule of the CSA, *Glucksberg* spoke to perhaps an immediate shift in the Court's ideology on public opinion on assisted suicide. It would be interesting to note, if marijuana was at large in *Oregon*, whether or not the Supreme Court would have shifted its decision based upon the clarity of the CSA schedule and / or

the same issues to which it decided *Raich* and *Oakland*, only a mere one and four years prior to *Oregon*.

### **Confounding Federalism**

Excluding the landmarks *Lopez* and *Morrison*, just to the co-subject matter of drugs, what is the mutually exclusive bridge or threshold of Supreme Court silence on such controversial moral issues? In two cases seventy-three years apart, *Linder* and *Raich*, the Court speaks to government involvement and law enforcement by saying that the state/physician/patient complex is important, yet the results are decidedly different. The same is true for *Glucksberg* and *Oregon*. The state/physician/soon-to-die patient complex are also important and yet again the results are decidedly different (see: Confounding Federalism – “Appendix I”).

In *Linder* the question answered was what does authority to collect taxes have anything to with what amounts of narcotics a physician can prescribe? It seems to be a fundamental right that congress never intended to regulate.

In *Glucksberg*, so long as the right to practice doesn't interfere with State law, even the Fourteenth Amendment can't pierce States rights to ban what laws a majority of its citizens allowed to be enacted.

By the same token, once spoken, State law is protected by New Federalist jurisprudence and therefore collateral attacks seeking strength from the 5<sup>th</sup> and 14<sup>th</sup> Amendments would be considered to be unsustainable by the New Federalist Supreme Court standards on States rights, inclusive of their views on the Commerce Clause.

Ok, what then makes the Commerce Clause so powerful in some instances and powerless in others? Perhaps the latitude comes from its timeless legislative vagary. It is purely elastic to fit the curve of the Government's needs to beat back challenges from era to era. If that is truly the case then in the above styled cases, political agendas can be seen through the veil of Rehnquist's New Federalist court views.

Whichever way the political winds so shift, so shall they be used to justify the ends. By Justice McReynolds logic in *Linder*, how could Justice Stevens rationalize the Court's decision in *Raich*? By Rehnquist's logic in *Lopez* and *Glucksberg*, how could the Court rule against *Raich*? What does national consumption of an illegal drug, that the Government does not receive a dime of revenue from, have anything to do with the ability of the Government to control such commerce it claims to have no commercial control over in the first place? Gone are the old tax related laws to justify commerce. What remains is truly and issue of moral debate on narcotics. Some cases are clearly more equal than others as is the interpretation of the conduct of the physician in the treatment of his or her patients.

## Laying Low In The Weeds

This analysis was written for Oregon, however in a careful review of the history and more importantly the spate of recent decisions revolving around the issues of state governed and state banned physician medical judgment in the prescription of narcotics to patients; state law vs. federal regulation; and the Commerce Clause has led me to conclude that the Court's decision in Oregon was not only strained as to its prior interpretations, but could have consequences on the future of legalizing marijuana in America for palliative care. If the Court has rationalized that it ought not to decide on issues pertaining to rights of life and death where State law exists, then it ought not to decide on issues pertaining to rights of quality of life versus death where state law exists. Oregon, with support from the analysis of its predecessor cases in Glucksberg, Raich and Linder exposes the mutually exclusive logic to which the New Federalist views propounded by the Supreme Court are really nothing new at all.

In Raich Stevens raises Wickard on the non-commercial use of a commodity and the damage federal government's ability to govern the national interest. In Wickard, Roscoe Filburn never operated on State law to avoid the consumption tax on wheat. According to the Court's decision on balance with the Commerce Clause, Filburn's taking of personal consumption without payment does disfranchise the U.S. Government's authority to regulate commerce. The same Court that ruled that Filburn was far reaching in deciding Lopez, and yet it came boomeranging back to Wickard to decide Raich in parallel. The rationale that marijuana, an illegal class 1 drug under the CSA, could not be home grown, for like the wheat in Filburn, the local use of that commodity would undercut the Government's ability to regulate the commerce of that commodity. The question is which is more far reaching, the commercial effects of local personal consumption on national prices to a commodity marked for legal consumption or the commercial effects of local personal consumption on national prices to a banned commodity.

## Changing Values

As seen in Glucksberg, the Rehnquist New Federalist Supreme Court had remained reticent with respect to judging the very issue of the morality of euthanasia. In Glucksberg, the issue of physician assisted suicide was placed completely to the curb as a moral issue that the Court has long held to pass on such judgment and shot straight for the unmitigated New Federalist view of non-interference with State's rights of governance. If the laws of a state did not allow for its citizens to take their own life into their own hands, then even the Fourteenth Amendment was not enough to grant relief for want of Due Process and equal protection. In that realm, they reserve on judging the conduct of the physician, from the point of prescription on through to the purpose associated with such prescription such as physician assisted suicide and simply decide on the grounds of New Federalism – States Sovereignty.

For the Government's argument in Oregon, there was a new wrinkle to privileged authority and that would now envelope the moral issue of physician assisted suicide.

That wrinkle was not so much whether or not a controlled substance was illegally prescribed off schedule. That would be too easy a case. The façade now became whether or not the issuance of a legally and permissible prescription of a scheduled controlled substance had a bona fide and legitimate medical purpose. Since the CSA gave the Attorney General the right and opportunity to issue an Interpretive Rule, any use of a legally permissible drug, not scheduled as a controlled substance could never give rise to such an argument.

In other words, if a physician, in a right to die state, were to prescribe peanut butter laced with Strychnine (gopher bait), all systems would be go. Yet, in the end, upon full examination of the clear bright-line in Glucksberg, the 6-3 majority in Oregon, which produced dissenting opinions from Justices Scalia and Thomas, both of whom were joined by Chief Justice Roberts, seemed to buy into the Government's argument. In so doing, the dissenting justices in Oregon unquestionably abandon their New Federalist robes of the Rehnquist era, for that of the old guard politics regarding drug enforcement and the threat to society. Certainly, as in Glucksberg, where there is a bright white state ban exists regarding physician assisted suicides, the sometimes red or blue morality card gets buried with the dead.

### **Changing Times**

Times have changed and allegedly the Commerce Clause has its elastic purpose to absorb all that time changes. Conversely, I wonder if the unanimous court lead by Justice McReynolds in Linder would have seen things the same way if Dr. Linder was prescribing lethal doses of controlled substances to his patient(s) for the purpose of the patient's self-euthanization.

Times sure have changed but one thing remains, the underpinnings which caused the epiphany of brilliance that penned the First Seven Articles of the Constitution and the Bill of Rights. This is not to say the Constitutions amendments beyond the tenth lacked foresight, but as prohibition has taught the nation's lawmakers, some acts of Congress seem to make no sense at all. The most clever and surviving of the Old Federalist constitutional guard remains that of the Commerce Clause and left to the nine members of the high court to interpret its latitude and reach of governance.

Oddly, in Oregon, the U.S. Attorney General, John Ashcroft, a person of strong federalist convictions would be thought by many to simply follow the path of the New Federalist views supported by decisions passed down from the Rehnquist court era – meaning, leave the States to govern themselves in such matters pertaining to its citizens and enacted laws. This, part in parcel, to other issues in Oregon, are, what when taken together form the dichotomy that makes the Supreme Court's decision in Oregon, far more constitutionally charged than the immediate precedents in Glucksberg and Raich which take on the face of decisions that are more overly balanced on political preferences (i.e. – drug prescriptions vs. sovereign rights). In the view of this writer, simply adding marijuana to the mix, as was the case in Raich, changes the complexity of the issues of Federalism and states rights.

A conclusive analysis of Oregon proves that the ends don't justify the means, and the complexities to which the Supreme Court serves up its tangled logic remains tangled based upon the balance of political views and choices of lesser evils. By the very standard that the Supreme Court adjudged Glucksberg, it also judged in Oregon. Yet the often spoken mantra of moral neutrality, seemed to bleed through and give rise to further evaluation of just what makes some case rationale more equal than others. Here, in Oregon, the thread of political nepotism is unearthed in the dissenting opinions which run counter-intuitively to the decisions by the Court in Morrison, Lopez and to varying degrees in Glucksberg and Raich. The political gambits found in the metrics of these cases speaks to the choice of means under the New Federalist views on a State's sovereign rights and laws, physician assisted suicide and controlled substances. And, to wit, such means are only afforded full and unbiased adjudicative privilege when all other political and moral preferences – much like the stars – are in perfect alignment.

In Glucksberg, every justice had something to add on protecting the New Federalist guard. On point with respect to the moral preferences, Chief Justice Rehnquist perhaps the example of unbiased Federalism wrote what is worth repeating –

*“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”<sup>111</sup>*

Thus in Glucksberg, the court held unanimously to the balance of power belonging to the States under the views of the New Federalist court. Chief Justice Rehnquist passed away on September 3, 2005, approximately one month before the oral arguments commenced in Oregon. One can only wonder, if he were alive, would he, along with two of his most loyal followers, Justices Scalia and Thomas, have abandoned this vanguard perspective which served the New Federalist view on State's rights? Certainly, Chief Justice Roberts, presiding over his predecessor in his first case, didn't see it the New Federalist way.

### **The Drifting Thought**

What is worth repeating many times is the paradox at work in Oregon regarding statutory interpretation. The very effort to use the Interpretive Rule in Oregon to bunker bust State law by both Attorney General Ashcroft and Attorney General Gonzales runs counter-intuitive to the New Federalist political agenda, beliefs and the underpinnings of their pleadings before the high court.

One can say that Oregon and other contemporary cases regarding the public and State's constitutional rights (even those voted upon and enacted via state legislature) are cases which look like they are mere sub-particle in the microcosm of new protectionism in America – a protectionism that limits civilian rights out of passion to overstep bounds of governance brought on by extremism and counter-facing fundamentalism. Oregon and other contemporary cases involving large socially charged issues such as right to life and

death, narcotics and State sovereignty are all coincidentally set forth against the backdrop on the “War Against Terrorism”. This includes passages of laws for the intrusion of privacy (i.e. – The Anti-Terrorism and Death Penalty Act of 1996; The Patriot Act of 2001 and The Financial Anti-Terrorism of 2001); and vague interpretations of law by self proclaimed experts on all matters (including those outside their administrative capacity as government officials). Such fiction, under the guise of protecting Americans, has given rise to executive privilege and pre-emptive wardship over all Americans including the unauthorized right of constitution busting to achieve administrative objectives. Hence the “War on Drugs” continued to receive fuel from anti-terrorism bills, becoming a war within a larger war.

I am not sure about anything from any of the cases cited around this analysis in *Oregon* other than the following facts drawn from the Courts rationale – Guns are pervasive across all 50 states, but *not* a matter effecting commerce to be so governed (*Lopez*); Rape and assault, while less pervasive than gun toting, has run across all 50 states, but *not* a matter effecting commerce to be so governed (*Morrison*); Drugs, on the other hand are pervasive across all 50 states, yet they *are* a matter effecting commerce to be so governed (*Oakland Cannabis & Raich*); Death, the most pervasive issue facing all of humanity, running across all 50 states and a great certainty to us all is left aside as to be continued in moral debates and *not* a matter effecting commerce to be so governed (*Oregon*); and no matter what, when a State’s citizenship votes to pass a law, that law can not ever be interfered with (*Glucksberg*). Are all of these true?

So there it is, Drugs, more important to legislative interpretation on what affects commerce than Guns, Rape, Assault, Death and State Sovereignty on medical necessity. By all these standards, perhaps, the Supreme Court would be so insightful as to uphold the unconstitutionality of the Federal Government’s claimed authority to collect income taxes. That is why, in part, the Harrison Narcotics Tax Act of 1914 was established in the first place... to collect taxes.

### Confounding Federalism – “Appendix I”

Moral Topic	S. Ct. Case	Winner	Loser	Right Preserved/Lost	Intervening Issues
Physician Assisted Suicide; Prescription of Controlled Substances; and the Commerce Clause	<u>Oregon</u>	People	Fed. Gov't	Preserved – States Rights that physicians can prescribe narcotics to assist in euthanasia.	CSA – Sovereign [Legislative Authority] (States v. Feds)
(same as above)	<u>Glucksberg</u>	State & People	People & Fed. Gov't	Preserved – States Rights that physicians can not prescribe narcotics to assist in euthanasia.	Fourteenth Amendment – Sovereign [Constitutional Authority] (States v. Citizens)
Physician Treated Palliative Care; Prescription of Controlled Substances; and the Commerce Clause	<u>Linder</u>	People	Fed. Gov't	Preserved – People's (States Rights) that physicians can prescribe narcotics to assist in palliative care.	CSA – Sovereign [Taxing/Comm. Authority] (Citizens v. Feds)
(Same as above)	<u>Raich</u>	Fed. Gov't	People & State	Preserved – Gov't Enforcement that physicians can not prescribe narcotics to assist in palliative care.	CSA – Sovereign [Commerce Authority] (State/Citizens v. Feds)
(Same as above)	<u>Oakland Cannabis</u>	Fed. Gov't	People & State	Preserved – Gov't Enforcement that physicians can not prescribe narcotics to assist in palliative care.	CSA – Sovereign [Legislative Authority] (State/Citizens v. Feds)
Gun Toting Teenagers inside, at, or near schools.	<u>Lopez</u>	Anti-Gun Control Lobby and Teenage Gansters	Fed. Gov't	Lost – Gov't Enforcement that guns are prohibited at or near schools.	Gun Free School Zones Act of 1990 – Sovereign [Legislative Authority] (State/Citizens v. Feds)
Civil Rights of Women as victims of violent crime can sue for civil damages and monetary judgment.	<u>Morrison</u>	Rapists & Violent Male Perpetrators	Fed. Gov't	Lost – Gov't Enforcement that women can receive civil awards as victims of violent crimes.	Violence Against Women Act of 1994 (“VAWA”) – Sovereign [Legislative Authority] (State/Citizens v. Feds)

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sub-note #3 - Congressional Record, U.S. House of Representatives, June 26, 1913, p. 2205.
- <sup>12</sup> The “Silverites” argued that using silver would inflate the money supply and mean more cash for everyone, which they equated with prosperity. The gold advocates said silver would permanently depress the economy, but that sound money produced by a gold standard would restore prosperity.  
see: Bimetallism - <http://en.wikipedia.org/wiki/Bimetallism>
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- <sup>15</sup> “Nothing contained in this section shall apply to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only.” – Section 2 (a) of the Harrison Narcotics [Tax] Act of 1914
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<sup>19</sup> IBID

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<sup>22</sup> U.S. v. Behrman, 258 U.S. 280 (1922)  
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<sup>26</sup> “The Addict and The Law”, Ch. 1 – Addiction and the Law, Alfred Lindesmith  
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<sup>27</sup> *U.S. v. Behrman*, 258 U.S. 280 (1922) – Opinion – Justice William R. Day  
*“The indictment charges that the defendant did unlawfully sell, barter, and give to Willie King a compound, manufacture, and derivative of opium, to wit, 150 grains of heroin and 360 grains of morphine, and a compound, manufacture, and derivative of coca leaves, to wit, 210 grains of cocaine, not in pursuance of any written order of King on a form issued for that purpose by the Commissioner of Internal Revenue of the United States; that the defendant was a duly licensed physician and registered under the act; and issued three written orders to the said King in the form of prescriptions signed by him, which prescriptions called for the delivery to King of the amount of drugs above described; that the defendant intended that King should obtain the drugs from the druggist upon the said orders; that King did obtain upon said orders drugs of the amount and kind above described pursuant to the said prescriptions; that King was a person addicted to the habitual use of morphine, heroin and cocaine, and known by the defendant to be so addicted; that King did not require the administration of either morphine, heroin, or cocaine by reason of any disease other than such addiction; that defendant did not dispense any of the drugs for the purpose of treating any disease or condition other than such addiction; that none of the drugs so dispensed by the defendant was administered to or intended by the defendant to be administered to King by the defendant or any nurse, or person acting under the direction of the defendant; nor were any of the drugs consumed or intended to be consumed by King in the presence of the defendant, but that all of the drugs were put in the possession or control of King with the intention on the part of the defendant that King would use the same by self-administration in divided doses over a period of several days, the amount of each of said drugs dispensed being more than sufficient or necessary to satisfy the craving of King therefore if consumed by him all at one time; that King was not in any way restrained or prevented from disposing of the drugs in any manner he saw fit; and that the drugs so dispensed by the defendant were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefore, and were adapted for such consumption.”*  
[http://www.druglibrary.org/schaffer/legal/11920/united\\_states\\_v\\_behrman.htm](http://www.druglibrary.org/schaffer/legal/11920/united_states_v_behrman.htm)

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<sup>28</sup> *U.S. v. Behrman*, 258 U.S. 280 (1922) – Dissenting Opinion – Justice Oliver Wendell Holmes  
“It seems to me impossible to construe the statute as tacitly making such acts, however foolish, crimes, by saying that what is in form a prescription and is given honestly in the course of a doctor's practice, and therefore, so far as the words of the statute go, is allowed in terms, is not within the words, is not a prescription and is not given in the course of practice, if the Court deems the doctor's faith in his patient manifestly unwarranted. It seems to me wrong to construe the statute as creating a crime in this way without a word of warning. Of course the facts alleged suggest an indictment in a different form, but the Government preferred to trust to a strained interpretation of the law rather than to the finding of a jury upon the facts.”

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<sup>31</sup> *Linder v. United States*, 268 U.S. 5 (1925)

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<sup>33</sup> *Linder v. United States*, 268 U.S. 5 (1925)

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Justice McReynolds - “Obviously, direct control of medical practice in the states is beyond the power of the Federal Government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure. The enactment under consideration levies a tax, upheld by this court, upon every person who imports, manufactures, produces, compounds, sells, deals in, dispenses or gives away opium or coca leaves or derivatives therefrom, and may regulate medical practice in the states only so far as reasonably appropriate for or merely incidental to its enforcement. It says nothing of 'addicts' and does not undertake to prescribe methods for their medical treatment. They are diseased and proper subjects for such treatment, and we cannot possibly conclude that a physician acted improperly or unwisely or for other than medical purposes solely because he has dispensed to one of them in the ordinary course and in good faith, four small tablets of morphine or cocaine for relief of conditions incident to addiction. What constitutes bona fide medical practice must be determined upon consideration of evidence and attending circumstances. Mere pretense of such practice, of course, cannot legalize forbidden sales, or otherwise nullify valid provisions of the statute, or defeat such regulations as may be fairly appropriate to its enforcement within the proper limitations of a revenue measure.”

“This opinion related to definitely alleged facts and must be so understood. The enormous quantity of drugs ordered, considered in connection with the recipient's character, without explanation, seemed enough to show prohibited sales and to exclude the idea of bona fide professional action in the ordinary course. The opinion cannot be accepted as authority for holding that a physician, who acts bona fide and according to fair medical standards, may never give an addict moderate amounts of drugs for self-administration in order to relieve conditions incident to addiction. Enforcement of the tax demands no such drastic rule, and if the act had such scope it would certainly encounter grave constitutional difficulties.”

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<sup>49</sup> “Title 21 U.S.C. – Controlled Substances Act – Part B; Section 811”, Temporary Scheduling to Avoid Imminent Hazards to Public Safety - “(h)(1) If the Attorney General finds that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to the requirements of subsection (b) of this section relating to the

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Secretary of Health and Human Services, schedule such substance in schedule I if the substance is not listed in any other schedule in section 812 of this title or if no exemption or approval is in effect for the substance under section 355 of this title. Such an order may not be issued before the expiration of thirty days from -- (A) the date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, and (B) the date the Attorney General has transmitted the notice required by paragraph (4)".  
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<sup>91</sup> *Gonzales v. Oregon* (formerly *Oregon v. Ashcroft*), 368 F.3d 1118 (9th Cir. 2004), cert. granted, 125 S. Ct. 1299 (2005) – Oral Arguments, Pg. 59  
[http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-623.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-623.pdf)

<sup>92</sup> IBID

<sup>93</sup> IBID

<sup>94</sup> IBID

<sup>95</sup> *Gonzales v. Oregon*, 125 S. Ct. 1299 (2005) –  
Brief for the Cato Institute as *Amicus Curiae* in Support of Respondents  
<http://www.cato.org/pubs/legalbriefs/gonzales-oregon.pdf>

<sup>96</sup> IBID

<sup>97</sup> IBID

<sup>98</sup> IBID

<sup>99</sup> 21 U.S.C. 841 (a) (1), which makes it unlawful for "any person" knowingly or intentionally to distribute or dispense a controlled substance, except as authorized by the CSA.  
<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=423&invol=122&friend=nytimes>

<sup>100</sup> *United States v. Moore*, 423 U.S. 122 (1975)  
<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=423&invol=122&friend=nytimes>

<sup>101</sup> *Gonzales v. Oregon* (formerly *Oregon v. Ashcroft*), 368 F.3d 1118 (9th Cir. 2004), cert. granted, 125 S. Ct. 1299 (2005) – Respondent’s Brief  
[http://www.abanet.org/publiced/preview/briefs/pdfs\\_05-06/04-623RespOregon.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs_05-06/04-623RespOregon.pdf)

<sup>102</sup> *Gonzales v. Oregon* (formerly *Oregon v. Ashcroft*), 368 F.3d 1118 (9th Cir. 2004), cert. granted, 125 S. Ct. 1299 (2005) – Oral Arguments, Pg. 59  
[www.supremecourt.us.gov/oral\\_arguments/argument\\_transcripts/04-623.pdf](http://www.supremecourt.us.gov/oral_arguments/argument_transcripts/04-623.pdf)

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<sup>103</sup> IBID

<sup>104</sup> IBID

<sup>105</sup> *Gonzales v. Oregon* (formerly Oregon v. Ashcroft), 368 F.3d 1118 (9th Cir. 2004), cert. granted, 125 S. Ct. 1299 (2005) – Petitioner’s Brief  
[http://www.abanet.org/publiced/preview/briefs/pdfs\\_05-06/04-623Pet.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs_05-06/04-623Pet.pdf)

<sup>106</sup> *Gonzales v. Oregon* (formerly Oregon v. Ashcroft), 368 F.3d 1118 (9th Cir. 2004), cert. granted, 125 S. Ct. 1299 (2005) – Oral Arguments  
[http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-623.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-623.pdf)

<sup>107</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005) – Opinion (Stevens)  
<http://www.law.cornell.edu/supct/html/03-1454.ZO.html>

<sup>108</sup> *Gonzales v. Oregon* (formerly Oregon v. Ashcroft), 368 F.3d 1118 (9th Cir. 2004), cert. granted, 125 S. Ct. 1299 (2005) – Dissent (Scalia)

<sup>109</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005) – Opinion (Stevens)  
<http://www.law.cornell.edu/supct/html/03-1454.ZO.html>

<sup>110</sup> *Gonzales v. Oregon* (formerly Oregon v. Ashcroft), 368 F.3d 1118 (9th Cir. 2004), cert. granted, 125 S. Ct. 1299 (2005) – Petitioner’s Brief  
[http://www.abanet.org/publiced/preview/briefs/pdfs\\_05-06/04-623Pet.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs_05-06/04-623Pet.pdf)

<sup>111</sup> Ashcroft v. Oregon, Telling the States What To Do In Cases of Physician Assisted Suicide, Michael C. Dorf, November 14, 2001.  
[http://writ.news.findlaw.com/scripts/printer\\_friendly.pl?page=/dorf/20011114.html](http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/dorf/20011114.html)