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

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## INTRODUCTION

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

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

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1. Carol A. Pratt, *Efforts to Legalize Physician-Assisted Suicide in New York, Washington and Oregon: A Contrast Between Judicial and Initiative Approaches—Who Should Decide?*, 77 OR. L. REV. 1027, 1032 (1998).

2. *Id.* at 1082 (summarizing those states that used the Oregon Act as a model for their own legislative efforts, though none of those efforts have yet succeeded).

3. *Id.* at 1093-97.

4. Petitioner's Supplemental Memorandum in Support of Motion for a Preliminary Injunction at 2, Oregon v. Gonzalez, 126 S.Ct. 904 (2006) (No. CV01-1647-JO), *available at* http://www.doj.state.or.us/hot_topics/pdf/trib3484.pdf .

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

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

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

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

5. *Id.*
6. *Id.*
7. 126 S. Ct. 904 (2006).
8. *Id.* at 922.
9. *Id.*
10. OR. REV. STAT. § 127.800-995 (2005).
11. U.S. CONST. art. I, § 8, cl. 3.

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

## II. OREGON DEATH WITH DIGNITY ACT BACKGROUND

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

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

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

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

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

15. U.S. CONST. art. I, § 8, cl. 1.

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

17. *Id.*

18. *Id.*

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

*Natural Resource Defense Council, Inc*.[20] Under that theory, if Congress has delegated legislative authority to a particular executive or administrative agency, then the courts would defer to a reasonable interpretation of a congressional statute by the agency.[21] However, the Court declined to apply *Chevron* to the case.[22]

The Attorney General provided two specific justifications for the Court's deference. First, the Attorney General stated that when Congress gave him the power to control drugs, that included the power to determine legitimate purposes for those drugs.[23] The Court disagreed, holding that the Attorney General was granted only limited power to add or remove specific drugs from a category under the comprehensive drug schedule created by Congress.[24] Second, the Attorney General stated that Congress gave him the power to de-register any physician who acted inconsistently with the public interest.[25] The Court disagreed with this theory as well. The Court noted that the Attorney General had only limited power to de-register a physician and could do so only after significant procedures were followed.[26] The Court reasoned that, by following the Attorney General's logic, the Attorney General could use this revocation power to criminalize an entire class of actions by simple interpretation. The Court stated that it "would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to de-register a single physician or schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity outside 'the course of professional practice' . . . ."[27]

Finally, the Court concluded that the entire scheme of the CSA was inconsistent with the Attorney General's interpretation that the federal government is the sole regulator of the medical practice.[28] The Court noted that the Attorney General, in revoking a physician's registration, must look to the state licensing agency and consider its recommendations.[29] Further, the Court found that Congress

20. 467 U.S. 837 (1984).
21. *Id*. at 843-44; United States v. Mead Corp., 533 U.S. 218 226-27 (2001).
22. *Oregon*, 126 S.Ct. at 916.
23. *Id*. at 917.
24. *Id*.
25. *Id*. at 917-18.
26. *Id*.
27. *Id*.
28. Gonzales v. Oregon, 126 S.Ct. 904, 925 (2006).
29. *Id*. at 923.

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

## III. CONSTITUTIONAL QUESTIONS

### *A. Commerce Clause*

The Court did not address any constitutional issues in *Gonzales v. Oregon* because resolution of the statutory interpretation question made constitutional analysis unnecessary.[34] However, if the Court had not found a way to adjudicate the case on non-constitutional grounds, the Court would have searched for a source of congressional power to enact the CSA.[35] The most logical choice for the basis of congressional power is the Commerce Clause, which vests Congress with the power to regulate commerce among the several states.[36] Congress' use of this power to regulate the interstate market of drugs is well supported by older cases such as *Wickard v. Filburn*[37] and more recent cases such as *Gonzales v. Raich*.[38] This section explores whether the ODWDA sets up an intrastate market as California did in *Gonzales v. Raich*. It then turns to the question of whether the prescriptions under the ODWDA are economic activity and, even if they are not, whether Congress may regulate them anyway.

30. Controlled Substances Act, 21 U.S.C. § 903 (2006).

31. *Id.*

32. *Oregon*, 126 S.Ct. at 925.

33. *Id.*

34. *See* Communist Party of the U.S. v. Subversive Activities Control Bd., 351 U.S. 115, 122 (1956) ("This non-constitutional issue must be met at the outset, because the case must be decided on a non-constitutional issue, if the record calls for it, without reaching constitutional problems.").

35. *See* Gibbons v. Ogden, 22 U.S. 1, 197 (1824) ("[T]he sovereignty of Congress, though limited to specified objects, is plenary as to those objects . . . .").

36. U.S. CONST. art. I, § 8, cl. 3.

37. 317 U.S. 111 (1942).

38. 545 U.S. 1, 125 S.Ct. 2195 (2005).

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

It appears that the easiest answer to the constitutional question of whether Congress has the authority to determine a legitimate medical purpose would be found in the case of *Gonzales v. Raich*.[39] In that case, the Court heard arguments that the CSA preempted states from allowing marijuana to be used for medical purposes, even when the marijuana was grown and used entirely within intrastate commerce.[40] The Court held that Congress had the power to regulate intrastate commerce that would affect interstate commerce to the point of destroying the regulatory scheme enacted by Congress.[41] The Court easily found the existence of a well-defined illegal market for marijuana.[42] Because the market was interstate in nature, Congress could regulate it and even enact law to eliminate the market.[43] Because Congress desired to eliminate the interstate market, Congress could reach the intrastate market so as to close "a gaping hole" in the total regulatory scheme encompassed within the CSA.[44]

This same rationale might apply to the ODWDA. Congress concluded that the complete regulation of drugs is necessary to protect and maintain the health and welfare of American residents.[45] Further, Congress concluded that the comprehensive regulation of drugs is necessary to distinguish between those that have a legitimate medical purpose, and those that do not, so as to prevent the improper use of drugs and a deterioration of American health.[46] Due to these findings, Congress provided for the orderly dispensation of drugs with useful purposes and prohibited the dispensation of drugs with no legitimate medical purposes.[47] Therefore, in the constitutional regulatory scheme presented by the CSA, Congress has the power to

39. *Id.*

40. *Id.* at 2206-08.

41. *Id.*

42. *Id.* at 2206.

43. *Id.* at 2208.

44. *Id.* at 2209.

45. Controlled Substances Act, 21 U.S.C. § 801(1) (2006).

46. 21 U.S.C. § 801(2) (2006).

47. 21 U.S.C. § 812(a)(1) (2006) (prohibiting the distribution of drugs in schedule I of the CSA, because they have a high risk of abuse and dependency and no legitimate medical purpose).

declare certain drugs off-limits and to tightly control the distribution of other drugs. In this scheme, Congress should be able to define legitimate medical purposes in order to preserve its comprehensive regulatory scheme.[48]

However, this argument does not completely address the issue raised by the ODWDA. First, the ODWDA does not challenge the comprehensive scheme encompassed in the CSA. Instead, the ODWDA requires that the physician who dispenses the drugs be certified to do so by both the Oregon Board of Medical Examiners and the Drug Enforcement Agency.[49] By creating this requirement, the ODWDA ensures that a physician will not dispense drugs in contravention of the schedules set forth in the CSA.[50] Therefore, the ODWDA does not endanger the comprehensive federal regulatory scheme as the respondents did in *Raich*.[51] Instead, ODWDA works within the scheme of CSA and only allows for the use of drugs that already have a legitimate medical purpose. Oregon simply extends the definition of legitimate medical purpose to include a quantity sufficient for a person to end his life.

The second reason that *Raich* does not completely solve the problem posed by the ODWDA is that the states have a specific role to play within the comprehensive regulatory scheme of the CSA:[52] to define legitimate medical purposes.[53] The CSA specifically recognizes the historical role states have in regulating the substantive aspects of the practice of medicine and does not interfere with that role.[54] The CSA provides that a practitioner must register with the state in order to get a CSA registration.[55] Additionally, the CSA requires the Attorney General to consider a state regulatory agency's determination of ability to practice medicine when granting a registration.[56] Finally, the CSA has a non-preemption clause that specifically prohibits the inference that Congress is completely

48. Gonzales v. Raich, 545 U.S. 1, 22, 125 S.Ct. 2195, 2208-09 (2005).

49. OR. REV. STAT. § 127.815(L)(A) (2006) (requiring the physician to comply with the Drug Enforcement Agency rules and regulations).

50. *Id.*

51. *Raich*, 125 S.Ct. 2195.

52. *Oregon*, 126 S.Ct. at 923; *see* Controlled Substances Act, 21 U.S.C. § 903 (2006).

53. *Oregon*, 126 S.Ct. at 923.

54. 21 U.S.C. § 903.

55. 21 U.S.C. § 802(21).

56. 21 U.S.C. § 823(2).

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

This is different from the situation in *Raich* because, in that case, California was challenging a specific designation by Congress that marijuana could not be distributed by a physician because it was in Schedule I of the CSA.[58] California's marijuana law directly conflicted with the CSA and was not an attempt by California to regulate the practice of medicine, but rather to legitimize a drug that was declared illegitimate by Congress.[59]

To the contrary, the ODWDA provides for the administration of drugs in accordance with the schedule of the CSA.[60] Physicians simply administer a higher dosage sufficient to achieve death rather than a low dosage that would only relieve pain.[61] There is nothing in the ODWDA indicating that Oregon is permiting physicians to administer drugs in contravention of CSA schedules. Instead, the ODWDA provides that physicians writing prescriptions and dispensing drugs under the ODWDA must comply with all requirements of their DEA registration, which includes following the rules for different schedules under the CSA.[62]

Therefore, Oregon is not challenging a comprehensive federal regulatory scheme. Rather, Oregon is working within the federal scheme and merely providing expanded state regulation on the definition of legitimate medical purpose. Oregon is specifically allowed to do this under the CSA, because the CSA provides a non-preemption clause that allows for and expressly contemplates state involvement in defining legitimate medical purpose.[63] The CSA also provides for further participation by the states, because in changing the schedule of drugs under the CSA, the Secretary of Health may make scientific findings regarding legitimate medical purposes by relying on experts, which can include states.[64] Therefore, Oregon is merely expanding the definition of legitimate medical purpose which it is able to do under the CSA scheme.

57. 21 U.S.C. § 903 (2006).
58. Controlled Substances Act, 21 U.S.C. § 812(c).
59. Gonzales v. Raich, 545 U.S. 1, 7 (2005).
60. OR. REV. STAT. § 677.474(1) (2006).
61. OR. REV. STAT. § 127.815(L)(A).
62. OR. REV. STAT. § 127.815(L).
63. 21 U.S.C. § 903 (2006).
64. *See* Gonzales v. Oregon, 126 S.Ct. 904, 920 (2006).

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

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

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

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

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

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

The biggest obstacle to validating this argument is found in later Commerce Clause cases. *United States v. Morrison* and *United States v. Lopez* significantly curtail the ability of Congress to reach into intrastate activity to protect a comprehensive scheme.[75] These two cases are the first significant limitation on Congress' authority under the Commerce Clause since the start of the New Deal era.[76] In these cases, the Court found that even though there was a potential effect on interstate commerce, there must also be a substantial effect on commerce.[77]

In *United States v. Lopez*, the Court analyzed a federal criminal statute on Commerce Clause grounds.[78] The statute in question was the Gun-Free School Zones Act, which prevented the carrying of a gun within one thousand feet of a school.[79] Lopez brought a gun to school and was arrested and convicted under this statute.[80] Because Congress based its power to pass the act on the Commerce Clause, the Court had to determine whether criminalizing the act of carrying a gun to a school fell within that enumerated power.[81] The Court listed three categories of activity that Congress could regulate under the

71. *Id*. at 114.

72. *Id*. at 113.

73. *Id*. at 127-28.

74. *Id.* at 128-29.

75. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

76. *See Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549.

77. *See Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549.

78. *Lopez*, 514 U.S. at 561.

79. *Id*. at 551.

80. *Id*.

81. United States v. Lopez, 514 U.S. 549, 552 (1995).

Commerce Clause. The first category is the "channels of interstate commerce."[82] The second category is the "instrumentalities of commerce or persons or things in interstate commerce even though the threat may come only from intrastate activities."[83] The final category included those activities that have "a substantial relation to interstate commerce."[84] The Court concluded that the first two categories did not apply to this question. It then concluded that the act of carrying a gun has no effect on commerce, and therefore was outside of the scope of congressional power.[85] The Court also stated that criminal law is a traditional power reserved to the states and, if Congress were to have to power to regulate criminal activity under the Commerce Clause, Congress would be infringing on an historical state power.[86]

The Court continued this line of reasoning in *United States v. Morrison*.[87] In that case, the Court denied Congress the power to pass the Violence Against Women Act insofar as it overruled the authority of states over criminal law, despite substantial findings by Congress demonstrating a detrimental effect on commerce as a result of violence against women.[88] This actually extends the reach of *Lopez*. In *Lopez* there was a question of the adequacy of findings provided by Congress regarding the effect of guns and gun violence on interstate commerce.[89] However, in *Morrison* there was no question about the effect that gender violence had on interstate commerce. In fact, Congress had substantial findings stating that very fact.[90] The Court did not find this persuasive because Congress failed to establish a direct connection between the creation of a private right of action for the victims of gender violence and Congress' Commerce power.[91] Additionally, the Court extended *Lopez* to draw a line between economic and noneconomic activity. The Court stated that if the activity being regulated is economic in nature, Congress has power

82. *Id*. at 558.
83. *Id*.
84. *Id*.
85. *Id*. at 561-62.
86. *Id*. at 561.
87. United States v. Morrison, 529 U.S. 598 (2000).
88. *Id*. at 609.
89. United States v. Lopez, 514 U.S. 549, 562 (1995).
90. *Morrison*, 529 U.S. at 614.
91. *Id*.

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

Regulation of medicine is also at the intersection of economic and noneconomic activity. It is well established that states have authority to regulate the practice of medicine within their borders.[95] It is also firmly established by *Raich* that, through the CSA, Congress has the power to regulate the movement of drugs in interstate commerce.[96] Additionally, Congress can regulate the manner in which the drugs are transported in interstate commerce by, inter alia, requiring uniform labeling or uniform shipping.[97] However, it is not clear whether Congress has the ability to regulate the use of the drugs once they leave interstate commerce and are prescribed by a doctor. If the act of prescribing the drugs is considered noneconomic activity, Congress may not be able to regulate it. If, however, the act of prescribing a drug is considered economic activity, and that act substantially affects interstate commerce, then Congress may regulate that activity.[98]

The CSA currently does not regulate the usage of drugs, only access to the drugs. The Attorney General's authority is limited to

92. *Id*. at 610.

93. United States v. Morrison, 529 U.S. 598, 613 (2000).

94. *Id.* at 619.

95. Dent v. State of West Virginia, 129 U.S. 114 (1889) (the states have general police powers and can exercise them to protect the health and welfare of their citizens); Linder v. United States, 268 U.S. 5, 16 (1925) ("[D]irect control of medical practice in the states is beyond the power of the federal government.").

96. United States v. Lopez, 514 U.S. 549, 558 (1995) ("Congress may regulate the use of the channels of interstate commerce.").

97. *Id*. ("Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce . . .").

98. *Id*. at 559-60. This is a two-prong test. First the activity must be determined to be economic. Then the activity must be determined to have a substantial impact on interstate commerce. However, the Court has upheld as substantial impact, the effects of a single restaurant in *Katzenbach v. McLung*, 379 U.S. 294 (1964) and the effects of a single farmer in *Wickard v. Filburn*, 317 U.S. 111 (1942). Thus, for the purposes of this analysis, a single state that allows drugs to be prescribed in lethal amounts will be assumed to be a substantial impact on interstate commerce, especially since other states could also enact a law similar to the ODWDA.

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

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

This view is further supported by the nature of the prescriptions given under the ODWDA. Lethal prescriptions generally are five to six times the amount of a normal prescription.[105] For example, a normal prescription of sorbitol would be for 300mg, whereas a prescription in accordance with the ODWDA would give the patient about 1000-1500mg of sorbitol.[106] Thus, there is an increase in the amount of drugs flowing through interstate commerce. Even though this may not rise to the level of the wheat at issue in *Wickard v. Filburn*,[107] given the less significant impact of small amounts of drugs, the Court could readily interpret this increase as substantially

99. Controlled Substances Act, 21 U.S.C. § 823 (2006).

100. *Id.*

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

102. *Id.* at 923.

103. *Id.* (internal quotations and citations omitted).

104. *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

105. Telephone interview with George Eighmey, Executive Director, Compassion & Choices of Oregon, in Portland, Or. (October 6, 2006).

106. *Id.*

107. Wickard v. Filburn, 317 U.S. 111 (1942).

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

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

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

Proponents of the ODWDA could argue that the act of prescribing is not economic activity. They could argue further that this is an area of regulation that historically has been left to the states and that Congress cannot interfere with this regulation.[112] Because this is an area of historic state regulation, then Congress cannot usurp state regulation by the exercise of its commerce power.[113] The Court supported this argument in *Lopez* by stating that the Gun Free School

108. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that an individual hotel could be regulated by Congress even though it may only have "local" operations because Congress made findings that hotels effect interstate commerce).

109. Eighmey, *supra* note 105.

110. This line is indefensible for the practical reason that a prescription for drugs is useless unless a patient can actually obtain the drugs prescribed. Further, the CSA specifically encompasses those that distribute drugs within its regulatory scheme. 21 U.S.C. § 823(b) (2006) (setting forth the factors the Attorney General must consider in registering any person who *distributes* schedule I or schedule II drugs). Thus, even if the attending physician, in writing the prescription, may be able to avoid the strictures of the CSA, anyone who fills that prescription will not be able to do so.

111. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

112. *See* Dent v. State of West Virginia, 129 U.S. 114 (1889); Linder v. United States 268 U.S. 5, 16 (1925).

113. *See Lopez*, 514 U.S. 549 (1995).

Zones act was an impermissible attempt to create a federal crime.[114] If the creation of a federal crime is an impermissible use of the Commerce Clause, then the regulation of the practice of medicine is also an impermissible extension of the Commerce Clause.

However, this argument does not account for the Necessary and Proper Clause.[115] This clause allows Congress to pass laws that are necessary and proper to execute its granted powers under the Constitution.[116] In this case, because Congress is validly exercising its Commerce Clause power to regulate the interstate movement of drugs, Congress can also pass laws to ensure that the regulatory scheme is effective.[117] These laws can encompass "noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."[118]

It is clear under both *Raich* and *Oregon* that the CSA is a valid exercise of Congress's Commerce power.[119] The CSA is intended to create a comprehensive scheme to regulate the movement of drugs in interstate commerce.[120] To this end, the CSA regulates interstate movement of drugs.[121] That alone is not enough. Congress must also be able to regulate the intrastate activity that would affect its ability to control this interstate market.[122]

Congress recognized that it had the power, under the Necessary and Proper Clause, to determine schedules for drugs.[123] Congress has given the Secretary for Health and Human Services the power to determine if there is a legitimate medical purpose and where to place a particular drug on the schedules created by Congress.[124] A legitimate medical purpose is not strictly economic activity. In fact, that interpretation might infringe on the state's ability to regulate medicine because states are to be free from congressional interference in that instance.[125] However, Congress is not wholesale eliminating

114. *Id*. at 561-62.
115. U.S. CONST. art. I, § 8, cl. 18.
116. *Id*.
117. Gonzales v. Raich, 125 S.Ct. 2195, 2217-18 (2005) (Scalia, J., concurring).
118. *Raich*, 125 S.Ct. at 2217 (Scalia, J., concurring).
119. *Id*. at 2211; *See* Gonzales v. Oregon, 546 U.S. 243, 126 S.Ct. 904, 911 (2006).
120. *See generally* Controlled Substances Act, 21 U.S.C. § 801 (2006).
121. 21 U.S.C. § 801(3).
122. *Raich*, 125 S.Ct. at 2218 (Scalia, J., concurring).
123. *See* 21 U.S.C. § 812.
124. 21 U.S.C. § 811(b).
125. *See* Linder v. United States 268 U.S. 5, 17-18 (1925).

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

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

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

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

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

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

128. *Raich*, 125 S.Ct. at 2219 (Scalia, J., concurring).

129. *See generally* 21 U.S.C. § 811(b) (Congress set forth the procedure by which the Secretary of Health and Human Services would determine if a drug had medical purposes and report the results of those findings to the Attorney General for inclusion on the Controlled Stubstance Schedules.).

130. *Raich*, 125 S.Ct. at 2217 (Scalia, J., concurring) (citing United States v. Lopez, 514 U.S. 549, 567 (1995)).

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

### *B. Spending Power*

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

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

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

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

133. U.S. CONST. art. I, §8, cl. 1.

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

135. *See* NATIONAL SCIENCE BOARD, THE SCIENTIFIC ALLOCATION OF SCIENTIFIC RESOURCES 3 (Mar. 3, 2001), http://www.nsf.gov/nsb/documents/2001/nsb0139/nsb0139.pdf.

136. *South Dakota*, 483 U.S. at 207.

137. New York v. United States, 505 U.S. 144, 166 (1992) (holding that although Congress cannot directly regulate state action, Congress can coerce states to conform to congressional desires through the use of the spending clause).

138. South Dakota v. Dole, 483 U.S. 203, 207-08 (1987). It is important to note that the doctrine of unconstitutional limitations does not apply in this case. That doctrine does not allow Congress to place a condition that would limit the exercise of an individual's constitutional rights on the receipt of federal funds. However, because this is an issue of federal-state relations, this doctrine does not apply to this particular condition. *See id.* at 210 (in the case of a state, "the 'independent constitutional bar' limitation . . . stands for the

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

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

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

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

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

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

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

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

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

143. *Id*.

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

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

146. *Id*. at 212.

147. *Id*. at 213.

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

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

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

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

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

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

150. *Id*. at 1914.

151. *Id*. at 1963.

152. *Id*. at 1966.

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

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

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

156. *Id.* at 209.

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

requirement to further restrict congressional spending in the future.[158] Thus, the Court has left itself an opportunity to continue its "new federalism" ideal and can begin scrutinizing the germaneness requirement more closely and invalidate congressional conditions that do not closely relate to the program on which it is spending money. However, this does not mean that the Court must eliminate all regulatory conditions.

Finally, even if the Court does start tightening the germaneness requirement, a law that conditioned the receipt of federal Medicaid and Medicare funds on the prohibition of passing ODWDA-style legislation, would meet that tight standard of germaneness. Congress provides funds to the states to assist them in providing medical services to those that are unable to afford them (Medicaid) and senior citizens (Medicare).[159] The states can use these funds to pay doctors for their services to these populations. Important in this analysis is that those doctors must be licensed with the state and, if they are going to dispense drugs, must comply with the CSA.[160] By requiring states to accept CSA legitimate medical purposes, Congress ties that condition directly to the purpose of these acts: to provide medical and health services to citizens.

This is not the inferential tie-in present in *Dole*. While highway safety is important, and highways need to be constructed safely, there is an inferential step between highway funds for the construction of highways and the requirement that states raise their drinking age. Safety, by reducing drunk driving, is important, but it is not directly related to the purpose of the funds, which is to build highways.[161] However, the CSA is designed to give citizens access to those drugs that have a legitimate medical purpose. Medicaid provides for those individuals without the financial resources access to medical

158. A useful analogy would be to the rational basis test for violations of the Equal Protection Clause of the 14th Amendment. The Court generally defers to the legislative findings by legislatures in determining that the ends of the choice are legitimate and the means of the choice are rationally related to those findings. *See* Williamson v. Lee Optical, 348 U.S. 483, 487 (1955). However, the Court has occasionally tightened the requirements under rational basis and concluded that legislation is invalid under the rational basis test. *See* Romer v. Evans, 517 U.S. 620, 635 (1996) ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.").

159. Medicaid Act, 42 U.S.C. § 1396 (2006).

160. 42 U.S.C. § 1396a(9) (2006) (states must establish and maintain regulations for providers of services to recipients under Medicaid).

161. South Dakota v. Dole, 483 U.S. 203, 214-15 (1987) (O'Connor, J., dissenting).

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

## IV. CONCLUSION

The Court decided *Gonzales v. Oregon* on narrow statutory grounds, leaving open the question of whether the Constitution grants Congress the power to define a legitimate medical purpose for the nation. Looking at the current status of the Commerce Clause, it appears that Congress has that power. Although Congress completely regulates the interstate drug market, Oregon is operating within that scheme and thus not attempting to usurp Congress' authority over the market. Instead, Oregon simply allows physicians to use the drugs they are already allowed to prescribe for a different purpose, which Oregon defines. Thus, Congress cannot use the current form of the CSA to regulate physician-assisted suicide among the several states.

Congress, however, regulates the stream of drugs in interstate commerce, and Congress has the power to regulate drugs once they reach the local market. Even though the Court has repeatedly found that states have plenary power to regulate the practice of medicine for the health and welfare of their citizens, Congress can provide for uniform national standards. Current Commerce Clause jurisprudence demonstrates that Congress can regulate *economic* activity that substantially affects interstate commerce. In this situation, the act of prescribing drugs under the ODWDA is economic activity, because a patient pays to receive the drugs. The Court has made clear that such regulations are traditionally within the purview of the states, but Congress can enforce its own policy choices.

Further, even if the act of prescribing drugs is not economic activity, Congress can exercise its Necessary and Proper Clause power to regulate those prescriptions. Because the states, in their regulation of medicine, could create a patchwork of legitimate medical purposes, they could substantially impair Congress' ability to regulate the interstate flow of drugs. In response, Congress can pass laws that are necessary and proper to effectuate its control of that interstate market. It is not important that these regulations touch on

162. 21 U.S.C. § 801(1); 42 U.S.C. § 1396.

noneconomic activity, so long as the ends are constitutional and the means plainly state they relate to those ends. In this situation, the ends are the CSA, which is constitutional, and Congress has plainly stated its intent to use its laws to achieve those ends.

Finally, Congress can exercise its authority under the Spending Clause to regulate indirectly what it cannot regulate directly. Because the Spending Clause is an independent source of authority of Congress, Congress can freely put conditions on the receipt of federal health funds by the states. Even if the Court tightens its use of the rational relation test in *Dole*, the relation between defining a uniform legitimate medical purpose and the payment of funds to give people access to health care will meet that new test.

The ODWDA is safe, for now, under the current regulatory scheme enacted by Congress under the CSA. However, the Court will probably uphold any changes that Congress would make. Therefore, the supporters of the ODWDA need to appeal to Congress to allow Oregon to be a laboratory of democracy and not interfere with the experiment of allowing physician-assisted suicide as a matter of choice for citizens of the state.