

## FEDERALISM CASES IN THE OCTOBER 2004 TERM

*Erwin Chemerinsky\**

Federalism has many connotations; descriptively, it is simply about the relationship between the federal government and the states.<sup>1</sup> We can tie together some of the important cases with regards to business and those traditionally looked at as federalism.

### I. EMINENT DOMAIN

*Kelo v. City of New London*<sup>2</sup> is the primary business case of the Term and is certainly the most important property case of the Term. I also think it is the most widely misreported case. By watching the news you might believe that tomorrow the government is going to take your house to build the next Wal-Mart. However, the government has no more authority to do this after *Kelo* than it had before *Kelo* was decided.

In *Kelo*, the City of New London, Connecticut was

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\* Professor Erwin Chemerinsky is a the Alston & Bird Professor of Law. Professor Chemersinsky is a renowned federal constitutional law scholar and has published extensively in the area of constitutional law. This article is based on a transcript of remarks from the Seventeenth Annual Supreme Court Review Program presented at Touro Law Center, Huntington, New York.

<sup>1</sup> See BLACK'S LAW DICTIONARY (8th ed. 2004), federalism. "Federalism is the distribution of power and legal relationship between the national government and state governments within a federal system of government." *Id.*

<sup>2</sup> *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

economically depressed and decided to create an economic development corporation.<sup>3</sup> The city purchased property from most of the landowners who were willing sellers and used the city's eminent domain power to take from the others.<sup>4</sup> Those who were unwilling to sell their land argued that the government may only take private property for public use, and the economic development of New London was not public use.<sup>5</sup> The Supreme Court, in a five-four decision, held that it was, in fact, public use.<sup>6</sup> Justice Stevens wrote the opinion for the Court and was joined by Justices Souter, Ginsburg, Breyer and Kennedy.<sup>7</sup> Justice Stevens' majority opinion stated that a taking is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public.<sup>8</sup> The Supreme Court articulated this standard in 1954 in *Berman v. Parker*.<sup>9</sup> *Berman* involved concerns of the city of the District of

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<sup>3</sup> *Id.* at 2658-59 (noting that by 1998 the New London's unemployment rate was nearly double the State's unemployment rate and the population was at its lowest since 1920).

<sup>4</sup> *Id.* at 2660.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2664-65 (finding that the City's plan served a public purpose because the comprehensive program was an attempt to rejuvenate the economy through a carefully formulated plan that would benefit the community through the creation of new jobs and increased tax revenue).

<sup>7</sup> *Kelo*, 125 S. Ct. at 2657.

<sup>8</sup> *See id.* at 2664 (“[F]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”).

<sup>9</sup> *Berman v. Parker*, 348 U.S. 26, 33 (1954) (noting that public welfare is a broad concept which represents aesthetic, monetary, and physical values which Congress and its authorized agencies take into account).

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

Columbia regarding some blighted property.<sup>10</sup> The city used its eminent domain power to take the property and then sought to sell it to other private developers.<sup>11</sup> The question considered by the Court in *Berman* was whether the sale of the property to private developers constituted public use.<sup>12</sup> The Supreme Court, in an opinion by Justice Douglas, answered in the affirmative.<sup>13</sup> It held that the sale was public use because the government was acting out of a reasonable belief that the taking would benefit the public.<sup>14</sup>

The Supreme Court followed this decision with *Hawaii Housing Authority v. Midkiff*.<sup>15</sup> In *Midkiff*, the State of Hawaii was concerned with the fact that most of the land in Hawaii was owned by only a few families.<sup>16</sup> The state took title from the landowners, paid the families just compensation, and then sought to distribute ownership among a larger number of people.<sup>17</sup> The landowners were

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<sup>10</sup> *Id.* at 28.

<sup>11</sup> *Id.* at 30.

<sup>12</sup> *Id.* at 31 (explaining that the appellants argued their property was not taken for a public use because it was commercial and would be placed under the management of a private agency to be developed for private use).

<sup>13</sup> *Berman*, 348 U.S. at 35.

<sup>14</sup> *Id.* at 34-35 (finding that the diversified future use was within Congress's power because Congress determined all the property in the area, not just unsightly buildings, was needed to redesign the area to limit blight and the plan was relevant to the maintenance of housing standards).

In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

*Id.* at 33.

<sup>15</sup> *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

<sup>16</sup> *Id.* at 232-33 (stating that since land was in the hand of a few individuals the legislature decided to compel these individuals to break up their estates).

<sup>17</sup> *Id.* at 233-34.

furious, claiming that the taking was not for public use.<sup>18</sup> The Supreme Court unanimously sided with the State of Hawaii.<sup>19</sup> In an opinion by Justice O'Connor, the Supreme Court stated that the taking was for public use because the government was acting out of a reasonable belief that the taking would benefit the public.<sup>20</sup> The Court said that the government acted reasonably in believing that the distribution of ownership among a large number of people in the state would be beneficial, and therefore the Court concluded that that the test for public use was met.<sup>21</sup>

In *Kelo*, the City of New London believed that creating an economic development corporation would generate over 1,000 new jobs and spur additional economic growth.<sup>22</sup> Justice Stevens concluded his opinion by saying there are limits on the government's eminent domain power that come through the political process.<sup>23</sup> Certainly, cities can choose not to take property for these purposes

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<sup>18</sup> *Id.* at 234-35.

<sup>19</sup> *Id.* at 245.

<sup>20</sup> *See Mitkiff*, 467 U.S. at 245 (noting that the legislature enacted the Land Reform Act to lessen the evils created by concentrated property ownership, which is a legitimate and rational public purpose).

<sup>21</sup> *Id.* at 245.

<sup>22</sup> *Kelo*, 125 S. Ct. at 2658.

<sup>23</sup> *Id.* at 2668 (noting that courts determine whether the public use requirement is satisfied; it not within a court's authority to review boundary line locations or project sizes, such decisions are left to the legislative branch).

Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. . . .

. . . This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution.

*Id.* at 2688 (quoting *Berman*, 348 U.S. at 35-36).

and states can adopt laws limiting what is public use.<sup>24</sup> However, under the United States Constitution, the intentions of the City of New London met the requirements of public use.<sup>25</sup> Justice Kennedy wrote a concurring opinion in which he stressed that there are limits on the government's ability to take private property.<sup>26</sup> He said that the government's taking of property from one private property owner to enrich another private property owner, without any public benefit, would not constitute public use.<sup>27</sup> Justice Kennedy also included, however, that only rational basis review would be appropriate and therefore the actions of the city would be allowed so as long as the government acted reasonably.<sup>28</sup>

This case produced a firestorm of protest. A group in New Hampshire gathered money to buy Justice Souter's house, saying that they would show him what public use means.<sup>29</sup> Delaware adopted a statute in June of this year, stating that takings for economic development purposes are not for public use.<sup>30</sup> There is a bill that has been introduced in the Congress by Texas Senator John Cornyn that says no federal funds can be used for takings, which are for

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring) (explaining that a rational-basis review standard under the Public Use Clause, similar to the rational-basis review under the Equal Protection Clause, would create limitations).

<sup>27</sup> *Id.* (explaining that a taking would not be for the public use under a rational-basis review standard if it favors a particular private party with merely incidental public benefits).

<sup>28</sup> *Id.* at 2670 (noting that the instant case survived the rational basis review because the legislature developed a plan designed to enhance the local economy and not serve the interests of a few private citizens).

<sup>29</sup> *See Rosa Brooks, Open Season on Private Property: Let the Seizure Begin*, THE RECORD (Bergen County, N.J.), Aug. 4, 2005, at L11; *see also* Dan Glaister, *Activists Take Campaign to Top Judge's Elegant Domain*, THE GUARDIAN (London), Jan. 23, 2006, at 18.

<sup>30</sup> DEL. CODE ANN. Tit. 29, § 9505 (15) (2005).

economic development purposes.<sup>31</sup> It is important to note, however, that for all of the attention that this decision has received, it did not change the law. The standard for public use before *Kelo* was that a taking is considered public use so long as the government has a reasonable belief the taking will benefit the public.<sup>32</sup> The standard for public use after *Kelo* is exactly the same.

## II. DORMANT COMMERCE CLAUSE

The second area of federalism I want to talk about is the Dormant Commerce Clause. The Dormant Commerce Clause is the principle that state and local laws are unconstitutional if they place an excessive burden on interstate commerce.<sup>33</sup> I want to alert you to *Granholm v. Heald*,<sup>34</sup> an interesting Dormant Commerce Clause case from last Term.

*Heald* involved a Michigan law, which allowed only in-state wineries to ship wine directly to consumers through the mail.<sup>35</sup> However, out-of-state wineries were precluded from doing so.<sup>36</sup> *Swedenburg v. Kelly*<sup>37</sup> was a companion case to *Heald* and involved an identical New York law, which allowed New York wineries to ship wine directly to consumers in New York through the mail but

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<sup>31</sup> Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. (2005).

<sup>32</sup> See *Haw. Hous. Auth.*, 467 U.S. at 243-45; see *supra* text and accompanying notes 20-21.

<sup>33</sup> *Granholm v. Heald*, 125 S. Ct. 1885, 1907 (2005) (Stevens, J., dissenting).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1893.

<sup>36</sup> *Id.* (noting that under MICH. COMP. LAWS ANN. §§ 436.1113(7), 436.1607(1) (West 2001) wholesalers may only sell their goods to in-state retailers).

<sup>37</sup> 125 S. Ct. 1885 (2005).

forbade out-of-state wineries to ship wine directly to consumers in New York through the mail.<sup>38</sup> The issue was whether the laws of Michigan and New York violated the Dormant Commerce Clause.<sup>39</sup>

Above all, the purpose of the Dormant Commerce Clause is to stop protectionist state legislation.<sup>40</sup> Clearly, these laws should be considered protectionist state legislation because they give a big benefit to in-state businesses and deny out-of-state businesses that same benefit. The Supreme Court agreed, and by a five-to-four margin held that the Michigan and New York laws violated the Dormant Commerce Clause.<sup>41</sup> Justice Kennedy wrote the opinion for the Court stating that when there is a protectionist state law, it has to meet the most exacting scrutiny.<sup>42</sup> The Court found that the New York law was of a protectionist nature and therefore discriminated against out-of-staters.<sup>43</sup> The Court rejected the argument that Michigan and New York had a sufficiently important interest to justify the discrimination.<sup>44</sup>

The four dissenting Justices focused on the Twenty-First

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<sup>38</sup> *Id.* at 1894.

<sup>39</sup> *Id.* at 1895.

<sup>40</sup> *Id.* at 1895-96 (explaining that the Dormant Commerce Clause seeks to diminish rivalries in trade animosity and exclusivity between in-staters and out-of-staters).

<sup>41</sup> *Id.* at 1907 (finding that New York and Michigan did not justify the need for discriminating against out-of-state wine producers).

<sup>42</sup> *Heald*, 125 S. Ct. at 1907 (noting that the exacting scrutiny standard is satisfied if a State proves nondiscriminatory alternatives are unworkable).

<sup>43</sup> *Id.* (holding that the New York law protects in-state wine producers by allowing direct shipments of in-state wine, and simultaneously discriminates against out-of-state wine producers by prohibiting direct shipments of out-of-state wine).

<sup>44</sup> *Id.* at 1905-07 (rejecting New York and Michigan's argument that shipment to out-of-state wineries would undermine their ability to police underage drinking, while decreasing tax revenue, and endangering the health and safety of its citizens).

Amendment.<sup>45</sup> The Twenty-First Amendment was the provision used to repeal prohibition.<sup>46</sup> Section 2 of the Twenty-First Amendment gives the states the power to regulate the sale of alcoholic beverages.<sup>47</sup> Michigan and New York argued that the provision of the Twenty-First Amendment gave them the authority to discriminate against out-of-state businesses.<sup>48</sup>

However, there was a flaw in the states' argument. Imagine if a state adopted a law pursuant to its Twenty-First Amendment authority, prohibiting a particular minority group from purchasing alcoholic beverages. Surely that would be unconstitutional. The state could not use its Twenty-First Amendment power in a way to deny equal protection.<sup>49</sup> Accordingly, the Supreme Court held in a case called *44 Liquormart v. Rhode Island* that a state could not use its Twenty-First Amendment power in a way that violates the First Amendment.<sup>50</sup> *44 Liquormart* involved a Rhode Island law that prohibited the advertisement of alcoholic beverage products.<sup>51</sup> The

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<sup>45</sup> *Id.* at 1907-08 (Stevens, J., dissenting); *id.* at 1919 (Thomas, J., dissenting).

<sup>46</sup> *Id.* at 1902 (majority opinion).

<sup>47</sup> *Heald*, 125 S. Ct. at 1902 (noting that Section 2 of the Twenty-First Amendment authorizes states to maintain a uniform system for controlling liquor via regulations but does not permit non-uniform laws designed to discriminate against out-of-staters).

<sup>48</sup> *Id.* at 1904.

<sup>49</sup> *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996) (“[T]he text of the Twenty-first Amendment supports the view that, while it grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limit whatsoever on other constitutional provisions.”).

<sup>50</sup> *Id.* at 516 (holding that the Twenty-First Amendment does not enable the States to ignore other constitutional provisions, specifically the First Amendment).

<sup>51</sup> *Id.* at 489-91 (stating that the Rhode Island legislature implemented two statutory prohibitions against advertisements regarding the retail prices of alcoholic beverages); R.I. GEN LAWS § 3-8-7 (1987) states in pertinent part:

No manufacturer, wholesaler, or shipper from without this state and no holder of a license issued under the provisions of this title and chapter shall cause or permit the advertising in any manner whatsoever of the



state claimed it had authority to do so under the Twenty-First Amendment.<sup>52</sup> The Supreme Court rejected that argument and held that a state cannot violate the First Amendment while regulating the sale of alcoholic beverages under the Twenty-First Amendment.<sup>53</sup> The opinion of the majority stated that the state could not use its Twenty-First Amendment authority in a manner that violates the Constitution.<sup>54</sup>

Another Dormant Commerce Clause case, which is pending this Term, is *Cuno v. DaimlerChrysler Inc.*<sup>55</sup> In this case the State of Ohio adopted a tax structure that gave tax benefits to out-of-state businesses willing to locate in Ohio.<sup>56</sup> These same tax benefits were not available to businesses that were already located in Ohio.<sup>57</sup> This is an increasingly common trend across the country. State and local governments, in an attempt to lure new business, give tax breaks that existing businesses do not get. The issue in *Cuno* was whether a state

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price of any malt beverage . . . wine or distilled liquor offered for sale in this state . . . .

R.I. GEN LAWS § 3-8-8.1 (1987) provides in pertinent part:

No newspaper, periodical, radio or television broadcaster or broadcasting company or any other person, firm or corporation with a principal place of business in the state of Rhode Island . . . shall accept, publish, or broadcast any advertisement in this state of the price or make reference to the price of any alcoholic beverages . . . .

<sup>52</sup> *44 Liquormart*, 517 U.S. at 514-15 (arguing that the Twenty-First Amendment, which delegates the power to prohibit commerce involving alcohol to the States, supports the allowance of the statutes).

<sup>53</sup> *Id.* at 489, 516 (concluding that Rhode Island's prohibitions against the advertising of the retail price of alcoholic beverages were an abridgement of speech and a violation of the First Amendment).

<sup>54</sup> *Id.* at 516 (“[T]he Amendment does not license the States to ignore their obligations under other provisions of the Constitution.” (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984))).

<sup>55</sup> 386 F.3d 738 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 36 (2005).

<sup>56</sup> *Id.* at 741.

<sup>57</sup> *Id.* at 749.

violates the Dormant Commerce Clause if it gives benefits to out-of-state businesses in order to induce them to locate in-state, when those same benefits are not available to in-state businesses. This is a very difficult question because from one perspective this clearly violates the Dormant Commerce Clause.

The Dormant Commerce Clause is about stopping protectionist legislation as well as stopping states from competing against one another to gain business.<sup>58</sup> That is exactly the situation in *Cuno*. States are engaging in a type of competition that the Dormant Commerce Clause was designed to stop. On the other hand, there is the argument that what the Dormant Commerce Clause is really concerned with is a state discriminating against out-of-staters.<sup>59</sup> The rationale behind this is that when a state discriminates against out-of-staters, it is harming those who are not represented in that state's political process.<sup>60</sup> Thus, when New York discriminates against out-of-state wineries, the out-of-state wineries are helpless to protect themselves because they are not represented in the New York political process.<sup>61</sup> However, if New York wants to hurt its own

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<sup>58</sup> See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (expressing that a state may not be in a "position of economic isolation"); Sara Sachse, *United We Stand – But For How Long? Justice Scalia and New Developments of the Dormant Commerce Clause*, 43 ST. LOUIS L.J. 695 (1999) (stating that in support of the ideal of national unity, the dormant commerce clause prohibits protectionist legislation).

<sup>59</sup> See *Granholt v. Heald*, 125 S. Ct. 1885, 1895 (providing that where a statute treats out-of-staters differently, the statute violates the commerce clause).

<sup>60</sup> See Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D.L. REV. 844, 849 (2004) (noting that the dormant commerce clause has been applied to "protect politically powerless interests").

<sup>61</sup> See *Heald*, 125 S. Ct. at 1891-92 (holding that the laws should be invalidated due to their discriminatory nature towards out-of-state wine distributors and "the Twenty-first Amendment did not give the States complete freedom to regulate where other constitutional principles are at stake"). New York and Michigan imposed state laws regulating the sale of wine from out-of-state wineries. The regulations allowed in-state wineries to directly sell

businesses, such in-state businesses can protect themselves through the political process. It then follows that there is no reason to be concerned about Ohio hurting its own businesses to help out-of-state business. *Cuno* will be argued early in 2006 and is a fascinating and particularly important case with regard to the Dormant Commerce Clause.

### III. COMMERCE CLAUSE

The third aspect of federalism I want to discuss concerns the scope of Congress' Commerce Clause power. The major case in this area from last Term was *Gonzalez v. Raich*.<sup>62</sup> I will put this case in a broader context and then discuss it relative to this Term's Commerce Clause cases. There is no doubt that the greatest change that took place during the Rehnquist Court Era was in the area of federalism. The Court, in the name of federalism, narrowed the scope of Congress' Commerce Clause authority.<sup>63</sup> From 1937 to 1995, not one federal law was struck down for exceeding the scope of

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wine to consumers and disallowed the out-of-state wineries from doing so; in effect, disadvantaging the out-of-state wineries. *Id.*

<sup>62</sup> 125 S. Ct. 2195, 2199. California residents who availed themselves of marijuana for medicinal purposes brought suit seeking injunctive and declaratory relief "prohibiting the enforcement of the federal Controlled Substances Act (CSA) . . . to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use," claiming that the enforcement of the law would violate the commerce clause. *Id.* at 2200.

<sup>63</sup> See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (concluding that the Gun Free School Zone Act was unconstitutional on the grounds that the statute was involving non-economic activity and was lacking the jurisdictional element); *United States v. Morrison*, 529 U.S. 598, 605, 627 (2000) (finding that Congress did not have the power under the Commerce Clause to enact a statute which provided for a civil remedy for victims of gender-motivated crimes); see also Jeff L. Massey, Article, *Swanson Mining Reconsideration: Is Section 7 of the Wild and Scenic Rivers Act Constitutional Under the Supreme Court's New Commerce Clause Jurisprudence?*, 8 HASTINGS W.-N.W. J ENV. L. & POL'Y 95 ("The Rehnquist Court has revitalized federalism and subjected federal laws to greater scrutiny.").

Congress' Commerce Clause power.<sup>64</sup> Then, in 1995 the Court decided *United States v. Lopez*.<sup>65</sup> In *Lopez* the Court declared the Gun Free School Zone Act, a federal law making it a federal crime to carry a firearm within a thousand feet of a school, unconstitutional.<sup>66</sup>

Five years later in *United States v. Morrison*,<sup>67</sup> the Supreme Court declared that the civil damages provision of the Violence Against Women Act was unconstitutional.<sup>68</sup> This provision authorized victims of gender-motivated violence to sue for damages in federal court.<sup>69</sup> The Court held that the legislation exceeded the scope of Congress' Commerce Clause authority.<sup>70</sup> With its decision in *Morrison*, the Court narrowed Congress' power under Section 5 of the Fourteenth Amendment, revised the Tenth Amendment limit of federal power, and greatly expanded sovereign immunity.<sup>71</sup>

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<sup>64</sup> See *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (upholding a statute regulating the production and consumption of wheat finding that Congress's power over interstate commerce "is plenary and complete in itself"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (concluding that it was within Congress's power to enact a statute prohibiting racially discriminatory conduct, stating "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze" (quoting *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949))).

<sup>65</sup> *Lopez*, 514 U.S. 549.

<sup>66</sup> *Id.* at 567 (stating that the possession of a gun in a local school zone was not considered economic activity that could substantially affect interstate commerce).

<sup>67</sup> *Morrison*, 529 U.S. 598 (2000).

<sup>68</sup> *Id.* at 627 (finding that Congress's Section 5 power "does not extend to the enactment" of the statute).

<sup>69</sup> *Id.* at 605; 42 U.S.C. § 13981 (providing that "persons within the United States shall have the right to be free from crimes of violence motivated by gender.").

<sup>70</sup> *Morrison*, 529 U.S. at 617, 619 (holding that Congress's commerce clause power does not enable Congress to enforce such a provision because it relates to "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

<sup>71</sup> *Id.* at 625-26 (rejecting the argument that the provision should be enforced pursuant to Congress's power under Section 5 of the Fourteenth Amendment because the statute is directed at individuals who have engaged in gender motivated crimes and does not address state officials or actors) (reiterating that "prophylactic legislation under § 5 must have a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" (citing *Florida Prepaid Postsecondary Ed. Expense Bd. v.*

Recently, however, there have been developments that go against the trend set forth in *Lopez* and *Morrison*. For the last few Terms every federalism case argued before the Supreme Court has been decided against the state's rights position and in favor of federal power.<sup>72</sup> There are several examples of cases where the Supreme Court has come down on the side of federal power. These cases include: *Pierce County v. Guillen*,<sup>73</sup> where the Court unanimously upheld a federal law that said when a local government does a traffic study, whatever it learns is exempt from discovery;<sup>74</sup> *Sabri v. United States*,<sup>75</sup> where the Court upheld a federal criminal statute making it a federal crime for local governmental officials to receive bribes if that local government receives any federal funds;<sup>76</sup> *Nevada Department of Human Resources v. Hibbs*,<sup>77</sup> where the Court held that a state government can be sued in federal court for violating the family leave provision of Family Medical Leave Act;<sup>78</sup> and *Tennessee v. Lane*,<sup>79</sup>

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Coll. Sav. Bank, 527 U.S. 627, 639)).

<sup>72</sup> See *Sabri v. United States*, 541 U.S. 600, 605 (2004) (finding that "Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare . . ."); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (holding that the statute was within Congress's enforcement power because it was "congruent and proportional to its remedial object"); see *Raich*, 125 S. Ct. 2195 (2005) (reinforcing Congress's commerce clause power noting that there existed a rational basis for Congress to find that there was a substantial affect on interstate commerce).

<sup>73</sup> 537 U.S. 129 (2003).

<sup>74</sup> *Id.* at 146-47 (concluding that a provision which protects information compiled regarding traffic surveys from being admitted during federal and state trials was within Congress's commerce clause power and therefore Congress had the authority to enact it).

<sup>75</sup> 541 U.S. 600 (2004).

<sup>76</sup> *Id.* at 606 (holding that the provision was "necessary and proper legislation").

<sup>77</sup> *Hibbs*, 538 U.S. at 721.

<sup>78</sup> *Id.* at 740 (finding that the provision was congruent and proportional to the targeted violation).

<sup>79</sup> 541 U.S. 509, 513, 523, 529, 530 (recognizing the correlation between the rights intended on being protected in Congress enacting the provision and the rights enforced and relying on the history of discrimination towards individuals with disabilities).

where the Court held that state governments can be sued in federal court for violating Title 2 of the Americans with Disabilities Act, which prohibits state and local discrimination against people with disabilities in government programs and activities when access to the courts is implicated.<sup>80</sup>

Turning back to *Gonzales v. Raich*<sup>81</sup> from last Term, the Supreme Court, like in the cases mentioned above, came down on the side of federal power.<sup>82</sup> *Raich* involved a federal statute, the Controlled Substance Act, which prohibited the cultivation, distribution, and sale of marijuana.<sup>83</sup> California, like a few other states, had an exemption to its state marijuana law for the medical use of marijuana.<sup>84</sup> Federal authorities caught Angela Raich with six marijuana plants.<sup>85</sup> While, the authorities did not prosecute her, they confiscated the marijuana plants.<sup>86</sup> Raich claimed that used the marijuana plants to alleviate the ill effects of the chemotherapy treatment that she was undergoing.<sup>87</sup> She brought a suit for declaratory judgment to have the federal law declared unconstitutional as exceeding the scope of Congress's Commerce Clause authority.<sup>88</sup> She argued that Congress lacked the power under

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<sup>80</sup> *Id.* at 534-35.

<sup>81</sup> *Raich*, 125 S. Ct. at 2195.

<sup>82</sup> *Id.* at 2208-09 (upholding legislation on the grounds that Congress could rationally conclude that the aggregation of activities regulated by the statute substantially effects interstate commerce).

<sup>83</sup> *Id.* at 2200.

<sup>84</sup> *Raich*, 125 S. Ct. at 2199.

<sup>85</sup> *Id.* (stating that the Drug Enforcement Administration seized Diane Monson's cannabis plants, as opposed to Angela Raich).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

the Commerce Clause to prohibit the cultivation and possession of small amounts of marijuana for medicinal purposes.<sup>89</sup> In a six-to-three decision, the Supreme Court ruled against Raich and upheld the federal statute.<sup>90</sup> Justice Stevens wrote for the majority and was joined by Justices Souter, Ginsburg, Breyer, and Kennedy while Justice Scalia concurred in the judgment.<sup>91</sup> Justice Stevens' majority opinion repeated the three-part test, which permits Congress to act under the Commerce Clause.<sup>92</sup> This test was articulated by the Court in *Lopez* and then repeated in *Morrison*.<sup>93</sup>

First, Congress can regulate the channels of interstate commerce, principally, the places where commerce occurs; second, Congress can regulate the instrumentalities of interstate commerce in persons and things in interstate commerce; third, Congress can regulate activities that have a substantial effect on interstate commerce.<sup>94</sup> Justice Stevens said *Raich* involved the third prong of the test.<sup>95</sup> The question was not whether Angela Raich's marijuana had a substantial effect on interstate commerce, the question was, when looked at cumulatively, does homegrown marijuana have a substantial effect on interstate commerce.<sup>96</sup>

An overlooked but crucial aspect of Justice Stevens' majority

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<sup>89</sup> *Raich*, 125 S. Ct. at 2204-05.

<sup>90</sup> *Id.* at 2209 (holding that the provision directly regulated economic, commercial activity, thus Congress was acting within its power in enacting the law).

<sup>91</sup> *Id.* at 2197.

<sup>92</sup> *Id.* at 2205.

<sup>93</sup> See *Lopez*, 514 U.S. at 558-59; see *Morrison*, 529 U.S. at 608-09.

<sup>94</sup> *Lopez*, 514 U.S. at 558-59.

<sup>95</sup> *Raich*, 125 S. Ct. at 2205.

<sup>96</sup> *Id.* at 2208.

opinion was that under the test, it was reasonable for Congress to believe that cumulatively there was a substantial effect on interstate commerce.<sup>97</sup> Justice Stevens based his ruling on a Supreme Court decision from the early 1940's, *Wickard v. Filburn*.<sup>98</sup> *Wickard* involved a federal law that limited the amount of wheat that farmers could grow for their own home consumption.<sup>99</sup> The farmers challenged the law and argued that what is grown for one's family to eat has nothing to do with interstate commerce.<sup>100</sup> The Supreme Court ruled against the farmers and stated that when looked at cumulatively, the growth of the wheat by farmers for home consumption had a substantial effect on interstate commerce.<sup>101</sup> In *Raich*, Justice Stevens noted that the nature of the product, in other words, whether the product was legal, like wheat, or contraband, like marijuana, was not relevant to the question of whether, when looked at cumulatively, there was a substantial effect on commerce.<sup>102</sup>

Not surprisingly, Justices Stevens, Souter, Ginsburg and Breyer voted to uphold this law.<sup>103</sup> Their concern was that if this law was struck down and the commerce power narrowed, the federal environmental laws, as well as federal civil rights statutes, would also

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<sup>97</sup> *Id.* at 2215 (“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>98</sup> *Id.* at 2206 (articulating the similarities between the cases, finding that “like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established . . . interstate market.”); *Wickard*, 317 U.S. 111, 155 (1942).

<sup>99</sup> *Wickard*, 317 U.S. at 115.

<sup>100</sup> *Id.* at 119.

<sup>101</sup> *Id.* at 127-29.

<sup>102</sup> *Raich*, 125 S. Ct. at 2207.

<sup>103</sup> *Id.* at 2197. Justices Stevens, Souter, Ginsburg, and Breyer dissented in every recent case narrowing the scope of the Commerce Clause.



be in jeopardy. Every federal environmental statute was adopted on Commerce Clause authority.<sup>104</sup> In addition, many of the civil rights statutes were also adopted under Congress' Commerce Clause authority.<sup>105</sup> Much more surprising was that Justice Kennedy went along with the majority and Justice Scalia concurred in the judgment.<sup>106</sup> Both had been part of the majority in *Lopez*, *Morrison*, and other cases narrowing the scope of Congress' Commerce Clause power.<sup>107</sup> The best explanation for their votes came in Justice Scalia's opinion. He focused on the Necessary and Proper Clause stating that Congress has the authority under the Commerce Clause to prohibit the shipment in interstate commerce of marijuana.<sup>108</sup> He said, homegrown marijuana could end up being the marijuana that is shipped in interstate commerce.<sup>109</sup> Therefore, to facilitate Congress' Commerce Clause authority, the Necessary and Proper Clause gives authority to stop homegrown marijuana.<sup>110</sup> What may have motivated both Justice Scalia and Justice Kennedy was the concern that if this drug law was struck down then many federal drug laws would then be constitutionally vulnerable.<sup>111</sup>

In looking at the Court's docket this Term, there are many

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<sup>104</sup> See *Nova Chemicals v. GAF Corp.*, 945 F. Supp. 1098 (E.D. Tenn. 1996); see also *United States v. Hartsell*, 127 F.3d 343 (4th Cir. 1997).

<sup>105</sup> See *Burgess v. Cahall*, 88 F. Supp. 2d 319 (Del. 2000) (finding that Congress had a rational basis for creating the Violence Against Women Act pursuant to Commerce Clause authority).

<sup>106</sup> *Raich*, 125 S. Ct. at 2197.

<sup>107</sup> See *Lopez*, 514 U.S. at 549, 568; see also *Morrison*, 529 U.S. at 598.

<sup>108</sup> *Raich*, 125 S. Ct. at 2216.

<sup>109</sup> *Id.* at 2218.

<sup>110</sup> *Id.* at 2216, 2218.

<sup>111</sup> *Id.* at 2219.

important federalism cases.<sup>112</sup> *Gonzales v. Oregon* deals with an Oregon statute that allowed for physician-assisted suicide.<sup>113</sup> It was a voter passed initiative.<sup>114</sup> As soon as the law was adopted, opponents of the physician-assisted suicide went to Attorney General Janet Reno and asked her to issue a directive that would essentially nullify the Oregon law.<sup>115</sup> Under the 1971 Controlled Substances Act, the Attorney General has the authority to suspend the prescription writing power of doctors.<sup>116</sup> Congress created this authority in 1971 because some doctors were issuing large numbers of prescriptions for drugs that ended up as street drugs.<sup>117</sup> Opponents of physician-assisted suicide wanted the Attorney General to use her authority to say that any doctor who participates in the Oregon Death with Dignity Act would lose his or her ability to write prescriptions.<sup>118</sup> The Attorney General claimed that she did not have the authority to issue such a directive and furthermore, the 1971 statute was about street drugs and had nothing to do with physician-assisted suicide.<sup>119</sup> However, when John Ashcroft became Attorney General, he issued exactly that directive, stating that doctors who participated in the Oregon initiative could lose their power to write prescriptions.<sup>120</sup>

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<sup>112</sup> *Cent. Va. Cmty Coll. v. Katz*, 126 S. Ct. 990 (2006); *Gonzales v. Oregon*, 126 S. Ct. 904 (2006); *United States v. Georgia*, 126 S. Ct. 877 (2006).

<sup>113</sup> *Id.* at 911.

<sup>114</sup> *Oregon*, 126 S. Ct. at 913.

<sup>115</sup> *Id.* at 912.

<sup>116</sup> 21 U.S.C. § 801 (2005).

<sup>117</sup> *Oregon*, 126 S. Ct. at 913.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 914.

The State of Oregon challenged this directive.<sup>121</sup> A conservative district court judge in Oregon, Judge Jones, and a conservative judge for the Ninth Circuit, Judge Tallman, invalidated the Ashcroft initiative, saying the Attorney General did not have the statutory authority to issue the directive.<sup>122</sup> The Ninth Circuit stated that this was an area traditionally controlled by the state, and if the federal government was going to regulate in this area, there should be a clear statement from Congress authorizing it to do so.<sup>123</sup> This case is pending before the Court and raises fascinating issues of preemption and the Commerce Clause.<sup>124</sup>

#### IV. SOVEREIGN IMMUNITY

Another important federalism case pending this Term is *United States v. Georgia*.<sup>125</sup> The issue here is whether prisoners can sue state governments under Title II of the Americans with Disabilities Act.<sup>126</sup> In *United States v. Georgia*, a prisoner was confined to a wheelchair in a cell that wasn't wheelchair accessible.<sup>127</sup> In addition, the prison facilities, such as the hospital and the library, were also not wheelchair accessible.<sup>128</sup> This case

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<sup>121</sup> *Id.*

<sup>122</sup> *Oregon*, 126 S. Ct. at 914.

<sup>123</sup> *Id.* at 915.

<sup>124</sup> On January 17, 2006 the Supreme Court decided *Gonzales v. Oregon*. The Court, in a 6-to-3 decision, affirmed the Ninth Circuit's holding that the Attorney General did not have the power under the Controlled Substances Act to "bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct." *Id.* at 924. Furthermore, the Court found that the statute simply did not support the Attorney General's contention that it impliedly criminalized assisted suicide. *Id.*

<sup>125</sup> 126 S. Ct. 877 (2006).

<sup>126</sup> *Id.* at 878.

<sup>127</sup> *Id.* at 879.

<sup>128</sup> *Id.*

raises a sovereign immunity question regarding the scope of Congress's power under the Fourteenth Amendment.<sup>129</sup>

Finally, one other federalism case pending before the Court this Term is *Central Virginia Community College v. Katz*.<sup>130</sup> This case involves the issue of whether sovereign immunity applies in Bankruptcy Court.<sup>131</sup> Section 106(a) of the Bankruptcy Act abrogates sovereign immunity.<sup>132</sup> It specifically says states cannot interpose a sovereign immunity defense in Bankruptcy Court proceedings.<sup>133</sup> The issue is whether Congress has the authority to override the Constitution and abrogate the States' sovereign immunity in the Bankruptcy Court context.<sup>134</sup> While the Supreme Court granted certiorari on this issue a few years ago in *Tennessee Student Assistance Corporation v. Hood*,<sup>135</sup> it left the question unresolved.

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<sup>129</sup> On January 10, 2006 the Supreme Court decided *United States v. Georgia*. 126 S. Ct. 877 (2006). The Court held in a unanimous opinion that Title II of the Americans with Disabilities Act abrogates state sovereign immunity. *Id.* at 882. The Court stated that Congress is expressly granted the authority to enforce the "substantive provisions of the Fourteenth Amendment" by allowing for suits against the states, which includes the power to abrogate state sovereign immunity. *Id.* (citing *Ex parte Virginia*, 100 U.S. 330 (1880)). Thus, the Court found that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." *Id.*

<sup>130</sup> 126 S. Ct. 990 (2006).

<sup>131</sup> *Id.* at 994.

<sup>132</sup> *Id.* at 995 n.2.

<sup>133</sup> *Id.* ("Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . ." (quoting 11 U.S.C. § 106(a))).

<sup>134</sup> *Id.* at 994.

<sup>135</sup> *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 443 (2004).

The Court has now granted review again.<sup>136</sup> The case will be argued next month.

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<sup>136</sup> On January 23, 2006 the Supreme Court decided *Central Virginia Community College v. Katz*. The Court, in a 5-to-4 decision, held that Congress' determination to hold the states responsible for proceedings to recover preferential transfers of property was within the scope of its power under the Bankruptcy Clause. *Id.* at 1005. The Court noted that this was not an issue of abrogation of sovereign immunity under the Eleventh Amendment, but rather this conclusion was supported by the history of the Constitutional Convention whereby the states agreed not to assert immunity in a proceedings brought pursuant to 'Laws on the subject of Bankruptcies.' ” *Id.* (citations omitted).

