COURTS OR THE LEGISLATURES? MARIJUANA POLICY IN GEORGIA AND THE UNITED STATES

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Who is to decide? This is the fundamental question facing a democratic republic. A separation of powers is widely accepted in western democracies with legislatures making laws, executives implementing the law, and judges interpreting and applying laws to actual cases and controversies brought before them. But when does the judicial role depart from judging and impermissibly lurch into the realm of policymaking which most people agree is a legislative function?

This article examines such questions in reference to recent experience in the Republic of Georgia and the United States regarding the legal status of marijuana. In both countries courts and legislatures have taken decisive and controversial actions regarding the status of cannabis in society. But in so doing, have the judicial and legislative branches respected separation-of powers-principles, or have the lines been the two branches become blurred?

RECENT DEVELOPMENTS IN GEORGIA

On July 30, 2018, the Constitutional Court of Georgia considered a complaint brought by Zurab Japaridze and Vakhtang Megrelishvili challenging provisions of Article 45 of the country's Administrative Offenses

Code.[1] Japaridze and Megrelishvili argued that the use of marijuana does not threaten to undermine public order. Autonomous individuals, they contended, should be free to evaluate the health risks of using marijuana and make their own decisions on whether to partake.[2] They also tackled contentions that marijuana is often a gateway drug that leads users to more dangerous substances such as methamphetamine and cocaine. Urging that marijuana should be treated no differently than other recreational drugs such a cigarettes and alcohol, they averred that the sanctions in place did not promote a legitimate government interest.

The government of Georgia countered that the provisions concerning marijuana furthered the state's interest in promoting the wellbeing of individuals and society as a whole.[3] Government lawyers stressed the need to protect young people from the health effects of marijuana. The government acknowledged an individual's right to personal development, but pointed out that this right is not absolute and that it may be limited by legislation when it endangers the rights of others or implicates important public interests.[4] Consequently, the government contended that the sections of Article 45 in dispute were properly enacted.

The Constitutional Court examined the sanctions in light of Article 16 of the Georgian Constitution which states that "[e]veryone has the right to free development of his/her personality."[5] The Court ultimately concluded that the use of marijuana is protected under Article 16 and that the state's efforts in protecting individuals against possible ill effects were unwarranted.[6] The Court announced that the restriction on the use of marijuana was over broad and not proportionate to any legitimate state end.[7] The court proclaimed that when the state unnecessarily punishes conduct, true justice is impaired. In making this ruling, the Court stressed that constitutional texts are living and dynamic and must be interpreted in light of societal development and changes in attitude.[8]

The ruling only concerned the consumption of marijuana. The Court did not strike down prohibitions on cultivation and sale.[9] Moreover, the state may still impose penalties where the consumption of marijuana creates a risk to third parties. Under proper circumstances, penalties would be appropriate for consumption in schools, on public buses, in the presence of small children, etc.[10]

In response to the decision, the Georgian Parliament adopted amendments to the marijuana regulatory regime.[11] Parliament has prohibited the use of marijuana for people under 21 and has banned the use of marijuana in multiple locations. The law specifically prohibits the use of marijuana by government employees or private sector workers when performing official duties. Driving an automobile under the influence of marijuana is also prohibited.

Many supporters of the Constitutional Court's decision believe that Parliament's new laws are inconsistent with the Court's interpretation of Article 16. Others have accused the Court of overstepping its bounds. The Georgian Orthodox Church has been very vocal in its criticism and even suggested that the Court should be abolished. Archpriest Andria Jagmaidze, speaking on behalf of the church, said that the judges of the Constitutional Court "had no right" to make such an important decision on behalf of 4 million Georgians.[12] In essence, he raised the issue of who is to decide such critical policy matters.

Nine judges serve on Georgia's Constitutional Court.[13] Three members are appointed by the President of Georgia, three members are elected by the Parliament, and three members are appointed

1 **Notes:** *Jarparidza & Megrelishvili v. Parliament of Georgia*, § I.2 (July 30, 2018). There is no official English translation of this judgment. For purposes of this article I have relied on a translated version via a publically available, online translation application.
2 *Id.* § I.5
3 *Id.* § I.10.
4 *Id.* §I.9.
5 Geo. Const. chap. 2, art. 16.
6 *Jarparidza & Megrelishvili v. Parliament of Georgia*, § II.32 (July 30, 2018).
7 *Id.* § II.36.
8 *Id.* § II.40.
9 *Id.* § II.3.
10 *Id.* § II. 35.
11 OC Media, Georgia 'Tightens Noose' on Cannabis after Constitutional Court Legalises Use, December 6, 2018, https://oc-media.org.
12 Thea Morrison, Clerics Demand Abolition of Constitutional Court after Marijuana Legalization, August 2, 2018, http://georgiatoday.ge.
13 Geo. Const. chap. 5, art. 88.2.

by the Supreme Court. The judges serve 10-year terms and their decisions are final and not subject to an appeal. The purpose of the Court is ensuring the supremacy of the constitution and protection of the rights enumerated in the document. Any person may bring a case before the Constitutional Court if their rights and liberties protected by Chapter 2 of Georgia's Constitution have been violated.

MARIJUANA IN THE UNITED STATES

The United States faced a similar watershed constitutional moment on marijuana legalization in *Gonzales v. Raich* (2005).[14] The question presented in *Raich* was whether Congress, using its power to regulate interstate commerce, may prohibit the medicinal use of cannabis via the federal Controlled Substances Act ("CSA")-even if the cannabis at issue is grown using only implements and supplies made or originating in a single state, never crosses state lines, and never is sold in a market transaction.

The *Raich* case originated in the state of California, which passed a Compassionate Use Act in 1996. Under the Act, a patient or his primary caregiver may possess or cultivate cannabis solely for the personal medicinal use of the patient as directed by a physician. Under this law, Angel Raich and Diane Monson used cannabis for medicinal purposes. Raich suffered from an inoperable brain tumor, seizures, paralysis, chronic pain, life-threatening weight loss, and many other ailments. Monson's afflictions included chronic back pain and muscle spasms caused by a degenerative disease of the spine. Their physicians concluded that Raich's and Monson's pain could not be relieved with ordinary medication and thus prescribed marijuana.

The cannabis prescribed had been beneficial for both women. Raich, for example, was once confined to a wheelchair and was able to walk after a successful marijuana treatment. She was also able to maintain her weight because of renewed appetite triggered by the cannabis

Despite Raich's and Monson's compliance with California law, in 2002 federal drug enforcement agents besieged Monson's home. A three-hour standoff ensued that resulted in the agents confiscating and destroying all six of her cannabis plants.

Denying the constitutionality of the federal law as applied to them, Raich and Monson filed an action in federal court. A United States District Court denied relief, but the Ninth Circuit Court of Appeals reversed, holding that the women demonstrated a strong likelihood that the Controlled Substances Act as applied to them was an unconstitutional exercise of federal power. The federal government ultimately appealed to the Supreme Court.

The Commerce Clause, in pertinent part, provides that Congress has the authority "[t] o regulate commerce with foreign nations, and among the several States, and with the Indian Tribes."[15] At the time of the Constitution's framing, commerce was understood as "intercourse, exchange of one thing for another, interchange of anything; trade; traffic."[16] It was not a synonym for "economic activity" or agriculture.

With inclusion of the commerce power in the Constitution, the Framers did not contemplate restrictions on cannabis or any other home-grown crop. Rather, the purpose behind the regulation of interstate commerce was creation of a free-trade zone within the United States. Alexander Hamilton predicted in *Federalist* No. 11 that an "unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions."[17] Picking up on the theme in *Federalist* No. 42, James Madison noted that the main purpose of the Commerce Clause "was the relief of the States which import and export through other States, from improper contributions levied on them by the latter."[18] A union without internal trade barriers, the Framers reasoned, would permit the states to take advantage of division of labor and promote peace.

14 545 U.S. 1 (2005)

15 U.S. Const. art. I, § 8, cl. 3.

16 Samuel Johnson, *A Dictionary of the English Language* (3d ed. 1765).

17 *Federalist* No. 11, p. 53 (Alexander Hamilton) (Buccaneer Books, ed. 1992). *The Federalist Papers* were a series of newspaper pieces that argued in favor of ratification of the Constitution of 1787.

18 Federalist No. 42, p. 214 (James Madison) (Buccaneer Books, ed. 1992).

In response to Anti-Federalist (those who opposed ratification of the American Constitution) fears that the Commerce Clause would permit the federal government to interfere with local, intrastate matters, Hamilton specifically noted in *Federalist* No. 17 that the Clause would have no effect on "the administration of private justice . . . , the supervision of agriculture and of other concerns of a similar nature."[19] The cultivation of six cannabis plants for personal medicinal use would thus seem to be beyond the reach of Congress.

Original intent of the Framers aside, a pure textualist approach yields the same result. As a textual matter, "agriculture" or "economic activity" cannot be read into "commerce." As Richard Epstein, a law professor at New York University, has observed, logic dictates that "commerce" means the same thing in relation to the several states, foreign nations, and Indians.[20] The Clause would make no sense if we substituted the word "agriculture" for "commerce": Congress shall have the power "[t]o regulate agriculture with foreign nations, and among the several States, and with the Indian Tribes." Obviously, Congress cannot regulate the crops grown in foreign countries or in Indian Territory. It naturally follows that Congress cannot regulate the agriculture in the several states either. But Congress can regulate the interstate traffic in agricultural commodities or the importation of such commodities from foreign countries. This would be consistent with the Dr. Johnson's definition of commerce as intercourse and Madison's and Hamilton's emphasis on goods crossing state borders.

Early Supreme Court precedent supported such a limited definition of commerce. For example, in *Gibbons v. Ogden* (1824)[21], Chief Justice John Marshall denied that Congress could regulate "that commerce . . . which is completely internal" to a state.[22] Using state inspection laws as an example, Marshall observed that the object of such laws "is to improve the quality of articles produced by the labour of a country; to fit them for exportation or, may be, for domestic use. They act upon a subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose."[23] To Marshall, events occurring before goods were shipped across state lines were not commerce subject to congressional regulation.

Over time, various Court decisions expanded the definition of commerce. But the genie did not escape the bottle until 1942 when the High Court considered the constitutionality of the Agricultural Adjustment Act. In *Wickard v. Filburn* (1942)[24], the Court was presented with the question of whether Congress could regulate a farmer's growing of wheat intended solely for consumption on his farm. A local activity, explained the Court, can "be reached by Congress if it exerts a substantial economic effect on interstate commerce."[25] Although the 11.9 acres of wheat in question did not seem to affect interstate commerce, the Court reasoned that the farmer's wheat, "taken together with that of many others similarly situated, is far from trivial."[26] Because the growing of wheat for home consumption by multiple farmers could affect the demand and price of wheat, the acts of a solitary person fall under Congress' power to regulate interstate commerce.

Not surprisingly, the Court's opinion in *Raich* relied heavily on *Wickard*. Similar to growing of wheat for personal consumption, Justice John Paul Stevens noted for the *Raich* majority that "the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety."[27] "[P]roduction of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity."[28] The fact that some purely intrastate activity is captured by the CSA was "of no moment" to Justice Stevens.[29] Raich's and Monson's activities fell within the commerce power.

19 *Federalist* No. 17, p. 80 (Alexander Hamilton) (Buccaneer Books, ed. 1992).
20 Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1393-94 (1987).
21 22 U.S. (9 Wheat.) 1(1824).
22 *Id.* at 194.
23 *Id.* at 203
24 317 U.S. 111 (1942).
25 *Id.* at 125.
26 *Id.* at 128.
27 *Raich*, 545 U.S. at 19.
28 *Id.*
29 *Id.* at 22.

The *Raich* Court offered a broad definition of "economic activity" that signaled expansive powers for the federal government. In prior decisions that somewhat limited Congress' power under the Commerce Clause, the Court noted that the cumulative effects analysis of *Wickard* is only applied if the activity Congress seeks to reach is "economic." The *Raich* majority defined "economics" as "the production, distribution, and consumption of commodities."[30] According to the *Raich* decision, the growing of plants for use at home is economic activity because it involves the production and consumption of a "commodity." Under this reasoning, the growing of a single pepper plant in pot on an apartment balcony is economic activity and thus may be regulated by Congress.

Justice Clarence Thomas, in his dissenting opinion, asserted that the majority opinion opened the door to dangerous results: "If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything-and the Federal Government is no longer one of limited and enumerated powers."[31]

Despite the Supreme Court's decision upholding the Federal Controlled Substances Act as it is applied to marijuana, since 2012 across the country 11 states have decriminalized personal marijuana consumption. The federal government has declined to intervene in these states and has signaled that it will not interfere with the state laws so long as the states implement effective and strong regulatory programs to protect the public health and good order. The states decriminalizing marijuana use do face a risk that federal policy could change and thus bring renewed enforcement of the CSA.

COMPARING AND CONTRASTING GEORGIA AND THE UNITED STATES

While there are similarities in the Georgian and American court situation, there are also key differences. Most obvious is that under the Georgian Constitution, Georgia is declared to be a unitary state. The United States is not a unitary state. The Framers of the U.S. Constitution sought to create a government that was partly national and a partly federal. If a particular power is not delegated by the U.S. Constitution to the federal government, then the states are sovereign and may pass laws consistent with their own constitutions. The broad authority remaining in state governments perhaps explains why, despite the looming threat of the federal CSA, the states continued to chart their own courses regarding marijuana after the *Raich* decision.

A second difference is that the Georgian Constitutional Court struck down provisions of the administrative code while the U.S. Supreme Court in *Raich* upheld the CSA. Of course, in upholding the federal law it effectively nullified the portions of the state Compassionate Use Act relied upon by Monson and Raich in cultivating and smoking cannabis.

But the one thing the decisions have in common is the question of who is to decide? What should a court do when faced with broad language such as that found it Article 16 of the Georgian Constitution? A declaration that "[e]veryone has the right to free development of his/her personality" on its face appears almost limitless and could become the source of unbridled judicial power. If a determination of a constitutional violation depends on substantive examination of the wisdom of public policy, is this anything other than what an individual judge personally believes is preferable? Similarly, if commerce is any activity in the aggregate that could substantially affect a national market, are there any limits for the courts, or any other body, to police?

A possible answer to these questions is the doubtful-case rule. It provides some self-imposed limits on the exercise of judicial power yet does not abrogate the principle of judicial review. The classic statement of this rule was penned by Harvard Law Professor James B. Thayer. Writing in 1893 and recognizing a growing tendency in American courts to evaluate the substance of legislative policy determinations, Thayer stressed the necessity for judicial restraint. Thayer argued that the people's representatives should be allowed "a range of choice; and that whatever choice is rational is

30 *Id.* at 25.
31 *Id.* at 58 (Thomas, J., dissenting)

constitutional."[32] The judicial power, according to Thayer, does not extend to policy considerations.[33] In the realm of competing policies, legislative choice should be "unfettered."[34] A duly enacted law, Thayer continued, should not be questioned by the courts unless "it is so obviously repugnant to the constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy."[35]

In other words, under the doubtful-case rule, an act of the legislature should not be struck down absent a firm conviction by the court that clear and uncontroverted constitutional error has been made. In doubtful cases-those where reasonable persons can disagree on constitutionality--the courts should defer to the judgment of elected officials.

For example, if the United States Congress passed a law making it a crime to criticize the federal government, this prohibition would unquestionably violate the First Amendment to the U.S. Constitution, which provides that "Congress shall make no law . . . abridging the freedom of speech."[36] As a co-equal branch of government charged with interpreting laws, the judiciary would be compelled declare such a law void and of no force. Such a ruling would not be judicial activism or policymaking, but an exercise of the judicial function entrusted to the court by the people under the Constitution.

Of course, not all cases and controversies present such a clear dichotomy between permissible and impermissible legislation. In fairness, great American intellects disagreed on the free speech example given above when in 1798 Congress passed and President John Adams signed into law the Sedition Act. This statute prohibited publishing or uttering any "scandalous and malicious writing or writings against the government of the United States."[37] The constitutionality of the Sedition Act was never brought before the Supreme Court because the Act's opponents feared that the Court would not only uphold the statute but praise it as a wise measure.

In sum, the doubtful-case rule requires great self-restraint; a quality in opposition to the modern judicial trend. It is a principle that should be re-examined by judges (such as those on the Georgian Constitutional Court and U.S. Supreme Court) who have no direct accountability to the people. Judges must grasp that policy preferences should be left to agents who must face the people at the time of election. If the people's agents serving in the legislature make a decision not outside the bounds of reason, the courts must let that decision stand. If it is an unwise or a questionable decision, the courts must leave it to the people to make the correction. Unless the bench and bar compel a concerted effort to revive the doubtful-case rule, the judiciary will likely face populous efforts to curb court power.

What if the judges of Georgia's Constitutional Court had rigorously applied the doubtful-case rule to the marijuana issue? Would the result have been the same? Could the judges have concluded that a clear and palpable constitutional violation occurred when both the government and the complainants marshaled competing studies and data? Perhaps it is good policy to allow personal use of marijuana. But policymaking is not typically found in the job description of the judiciary. When legislatures make policy (good or bad) they can be called to account by the people in elections or introduce more enlightened policy choices through new legislation. When judges constitutionalize a policy-in the case liberal drug use-the policy debate ends and a court decision is not so easily changed as a legislative decision.

This is not to say that the Constitutional Court should abdicate all power to Parliament as the Supreme Court did in the *Raich* decision. There is a proper place for judicial review in a constitutional system. Finding the correct balance, whether in Georgia or the United States, remains challenging.

32 James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Har. L. Rev. 129, 144 (1893).
33 *Id.* at 135.
34 *Id.*
35 *Id.* at 142.
36 U.S. Const. amend. I.
37 1 Stat. 596, 596 (1798).

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9. Id. § II.3.
10. Id. § II. 35.
11. OC Media, Georgia 'Tightens Noose' on Cannabis after Constitutional Court Legalises Use, December 6, 2018, https://oc-media.org.
12. Thea Morrison, Clerics Demand Abolition of Constitutional Court after Marijuana Legalization, August 2, 2018, http://georgiatoday.ge.
13. Geo. Const. chap. 5, art. 88.2.
14. 545 U.S. 1 (2005)
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16. Samuel Johnson, A Dictionary of the English Language (3d ed. 1765).
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27. Raich, 545 U.S. at 19.
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