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Allison H. Eid

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TEACHING NEW FEDERALISM

ALLISON H. EID*

Thanks to the Court's "New Federalism" revival, the concept of federalism—a constitutional norm that was once thought to be judicially unenforceable—now occupies a good deal of the federal judiciary's time.[1] Not surprisingly, the renewed judicial attention to federalism has brought on a revival in legal scholarship on the subject;[2] where the courts go, the commentators (myself included) soon follow.[3] Yet with all of the legal commentary, it seems that an important question remains largely unaddressed—namely, whether, and to what extent, New Federalism affects the teaching of federalism. Most obviously, the "federalism" section of any professor's Constitutional Law syllabus will have grown simply due to the increase in the number of cases. But more fundamentally, with the coming of New Federalism, the *approach* to teaching the concept of federalism must change. To put it simply, the only way to make sense of the New Federalism is to study the old.

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Any study of New Federalism must begin with *United States v. Lopez*,[4] in which the Court, for the first time in almost sixty years, struck down an act of Congress as falling outside of its Commerce Clause authority. Prior to *Lopez*, the Court had said, both implicitly and explicitly, that it had gotten out of the

* Associate Professor, University of Colorado School of Law. I would like to thank Rick Collins, Troy Eid, Pierre Schlag, and Phil Weiser for their helpful comments on earlier drafts of this piece.

1. On judicial enforcement of federalism norms, see generally Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191 (2003) [hereinafter Eid, *Federalism*].

2. *See generally* Mark J. Loewenstein, *The Supreme Court, Rule 10b-5 and the Federalization of Corporate Law*, 39 IND. L. REV. (2005) (commenting on the proliferation of law review articles on the topic of New Federalism).

3. *See* Eid, *Federalism*, *supra* note 1; Allison H. Eid, *The Property Clause and New Federalism*, 75 U. COLO. L. REV. 1241 (2004) [hereinafter Eid, *Property Clause*].

4. 514 U.S. 549 (1995). Certainly there were signs of New Federalism prior to *Lopez*, including, most prominently, *Gregory v. Ashcroft*, 501 U.S. 452 (1991), in which the Court instructed federal courts to avoid statutory interpretations that would raise federalism problems. But, because *Gregory* struck down no statute, it did not have the impact on the legal community that *Lopez* did. *See, e.g.*, Linda Greenhouse, *High Court Kills Law Banning Guns in a School Zone*, N.Y. TIMES, April 27, 1995, at 1.

federalism business.[5] It did so implicitly in 1937, when it upheld the National Labor Relations Act against a Commerce Clause challenge in *NLRB v. Jones & Laughlin Steel Corp.*,[6] after having struck down similar congressional attempts at regulating labor issues (the familiar "switch in time saves nine").[7] It did so expressly in *Garcia v. San Antonio Metro. Transit Auth.*,[8] when it stated that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result"[9]—that is, any limitation would stem from the political process, rather than judicial review of the result of the process.[10] *Garcia* by its own terms only applied to the Tenth Amendment context,[11] but as a practical matter its sentiment extended to federalism issues more generally.[12]

Prior to *Lopez*, then, *Garcia* was the beginning and the end of federalism. The federalism section of the Constitutional Law course I took in law school (six years prior to *Lopez*) focused almost exclusively on the fact that the Court had exited the federalism scene. We certainly debated the question of whether the Court was right or wrong in doing so, but the fact that it had done so was clear. Thus, we spent very little time looking at pre-*Jones & Laughlin* caselaw—a period marked by active judicial enforcement of federalism norms.[13] Nor did we spend much time on post-*Jones & Laughlin* caselaw——

5. For example, the first edition of the Stone et al. Constitutional Law casebook included a section titled "The Purported Demise of Judicially Enforced Federalism Limits on Congressional Power." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 181–212 (1986).

6. 301 U.S. 1 (1937).

7. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down on Commerce Clause grounds the Bituminous Coal Conservation Act of 1935, which, among other things, established local coal boards to administer a code that allowed employees to bargain collectively). For a description of the switch in time, see FRANK FREIDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 221–239 (1990) and William E. Leuchtenburg, *Showdown on the Court*, Smithsonian, May 2005, at 106–13.

8. 469 U.S. 528 (1985).

9. *Id.* at 554.

10. For a discussion of the political process theory of federalism enforcement, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,* 54 COLUM. L. REV. 543 (1954); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

11. *Garcia*, 469 U.S. at 536.

12. John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1333–34 (1997) (noting that "[w]hen combined with the Court's post-1930s refusal to enforce limits on the general commerce clause power, [*Garcia*'s process language] suggested that the Court was announcing its intention to withdraw from all questions involving the boundaries between federal and state power").

13. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 238 (1936) (striking down federal coal regulation on the ground that coal production had only an indirect effect on commerce); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding that Congress could not

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a time during which the Court upheld congressional acts against commerce challenges as long as the regulated activity had a "substantial effect" on interstate commerce (which it consistently found to exist).[14] Indeed, we did not even read *Jones & Laughlin* itself. Certainly, an in-depth look at the pre-*Jones & Laughlin* judicial enforcement era may have provided an interesting counterpoint to the then-current regime of judicial nonenforcement. Similarly, consideration of the post-*Jones & Laughlin* era of de facto judicial nonenforcement would have provided an interesting comparison to *Garcia*'s express declaration. But for the most part, the historical cases seemed to have no modern application or legacy.

This all changed with the Court's decision in *Lopez*. Suddenly, the Court was back on the federalism train. But where was that train going, how fast was it moving, and what did it look like? These are the questions that today's Constitutional Law students must ask themselves and answer—and they can do that only with a firm foundation in both pre- and post-*Jones & Laughlin* jurisprudence. In other words, perhaps the best way to understand where the train is going is to look at where it has been.[15]

When confronting the Fifth Circuit's holding that the Gun Free School Zones Act fell outside Congress's commerce authority,[16] the Court in *Lopez* had (at least) three options. First, it could apply the easily satisfied "substantial effects" test and uphold the legislation. Second, it could strike down the legislation using a test garnered from the pre-*Jones & Laughlin* era of judicial enforcement, which would mean overturning some, if not all, of the post-*Jones & Laughlin* cases. Or third, it could preserve the post-*Jones & Laughlin* cases but still strike down the legislation using a new test.

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regulate the working conditions of chicken processors because the chickens being processed were no longer in the "current" or "flow" of interstate commerce); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down federal child labor regulation on the ground that child labor was a purely local issue); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (striking down the Sherman Act as unconstitutionally applied to sugar refining on the ground that the commerce power did not reach "manufacturing").

14. *See, e.g.*,Wickard v. Filburn, 317 U.S. 111, 125 (1942) (upholding federal wheat quotas as applied to Roscoe Filburn, who had grown more wheat than his quota allowed but used the wheat for purely personal, intrastate purposes because such personal consumption had a "substantial economic effect on interstate commerce"); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding federal prohibition on racial discrimination in accommodations); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding federal prohibition on racial discrimination in restaurants); Hodel v. Virginia Mining and Reclamation Assn., Inc., 452 U.S. 264 (1981) (upholding federal regulation of strip mining); Perez v. United States, 402 U.S. 146 (1971) (upholding federal prohibition on loan-sharking).

15. I have made this same argument for a historical approach to tort reform. *See* Allison H. Eid, *Epsteinian Torts: Richard A. Epstein, Cases and Materials on Torts*, 25 SEATTLE U. L. REV. 89 (2001).

16. United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993).

We know, of course, that the Court chose option number three. But constitutional law students will find it difficult to figure out why it did so (or, indeed, to figure out that there were in fact three options from which to choose) without a firm understanding of pre- and post-*Jones & Laughlin* jurisprudence. Without such an understanding, they will simply have to memorize the Court's holding—that is, that gun possession is not "economic activity" and thus falls outside of Congress's commerce authority.[17]

History makes clear to students the challenge facing the Court in *Lopez*. Clearly, the *Lopez* majority was searching for a way to put some teeth back into the Commerce Clause. Chief Justice Rehnquist and Justice O'Connor had dissented in *Garcia*,[18] and the Court personnel had changed a good deal in the decade since the decision had come down.[19] And Congress—lulled into a *Garcia*-induced complacency—had passed a statute that "contain[ed] [no] requirement that the [gun] possession be connected in any way to interstate commerce."[20] In other words, it had provided the Court with an easy target. The *Lopez* majority seemed comfortable jettisoning, sub silentio, *Garcia*'s judicial nonenforcement language—that is, by striking down the legislation as exceeding Congress's commerce authority.[21] But it seemed far more reluctant to cast doubt on post-*Jones & Laughlin* precedent.

Again, history explains why. The Court majority notes, for example, that *Jones & Laughlin* and subsequent cases

> ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. . . . But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.[22]

In other words, the Court was not going back to the pre-*Jones & Laughlin* days—at least not expressly. But students cannot evaluate whether going back

17. United States v. Lopez, 514 U.S. 549, 567 (1995).

18. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (Powell, J., dissenting, joined by Burger, C.J., Rehnquist, J., and O'Connor, J.).

19. By the time *Lopez* came around, Justice Rehnquist had been elevated to Chief Justice with the departure of Chief Justice Burger, and had been replaced by Justice Scalia. Additionally, Justice Powell had been replaced by Justice Kennedy. These changes, however, simply swapped a *Garcia* opponent for a *Garcia* opponent. The fifth vote for the federalism revival came with the appointment of Justice Thomas, a *Garcia* opponent who replaced Justice Marshall, a *Garcia* supporter. *Lopez*, 514 U.S. at 549.

20. *Lopez*, 514 U.S. at 551.

21. *See* Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001) (suggesting that "the Rehnquist Court has implicitly rejected [*Garcia*'s judicial nonenforcement language] by rejuvenating the judicial protection of federalism").

22. *Lopez*, 514 U.S. at 556.

to the pre-*Jones & Laughlin* days would indeed be a bad thing (or whether the Court was actually returning to that era, as the dissenters claimed)[23] without exposure to that historical caselaw.

History also explains how the majority comes to employ the "economic activity" test. Recognizing that there must be "outer limits" to the commerce power, the Court felt obligated to give some idea of their whereabouts.[24] It thus faced the challenge of preserving precedent embracing the "substantial effects" test while limiting the "substantial effects" test itself. The majority found its limiting principle by asking the following question: What do the intrastate consumption of homegrown wheat (*Wickard v. Filburn*),[25] accommodation of interstate guests (*Heart of Atlanta Motel v. United States*),[26] the use of interstate supplies by restaurants (*Katzenbach v. McClung*),[27] intrastate loan-sharking (*Perez v. United States*),[28] and intrastate strip mining (*Hodel v. Virginia Surface Mining & Reclamation Ass'n*),[29] all have in common?[30] Answer: They all involve "economic activity."[31] With the "economic activity" test, the Court managed not to overturn a single case (at least not expressly), while at the same time finding a standard that packed some punch. But without a familiarity with *Wickard, Heart of Atlanta, Katzenbach, Perez,* and *Hodel,* students cannot determine whether (as the dissenters claimed) those cases were preserved in name only.[32]

An understanding of the pre-*Jones & Laughlin* era also gives much needed context to Justice Kennedy's concurring opinion, which was joined by Justice O'Connor.[33] Justice Kennedy suggests that "[t]he history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era . . . gives me some pause about today's decision[.]"[34] Students need to know what that "judicial struggle" looked like in order to understand why Justice Kennedy seemed so intent in avoiding it.

They need to know, for example, about *Carter v. Carter Coal Co.*, in which the Court struck down labor regulations in the coal industry as beyond Congress's commerce authority on the ground that coal production had only an

23. *Id*. at 608 (Souter, J., dissenting); *id*. at 627–28 (Breyer, J., dissenting).

24. *Id*. at 557.

25. 317 U.S. 111 (1942). For an extended history of Roscoe Filburn's struggle with wheat production, see Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719 (2003).

26. 379 U.S. 241 (1964).

27. 379 U.S. 294 (1964).

28. 402 U.S. 146 (1971).

29. 452 U.S. 264 (1981).

30. United States v. Lopez, 514 U.S. 549, 559–60 (1995).

31. *Id.*

32. *Id*. at 628 (Breyer, J., dissenting).

33. *Id*. at 568–83 (Kennedy, J., concurring, joined by O'Connor, J.).

34. *Id*. at 568 (Kennedy, J., concurring).

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"indirect" effect on commerce.[35] They need to read *A.L.A. Schechter Poultry Corp. v. United States*, in which the Court struck down federal work condition regulations as applied to chicken processors where the chickens being processed were no longer in a "current" or "flow" of interstate commerce.[36] They need to be familiar with *Hammer v. Dagenhart*, in which the Court invalidated the Child Labor Act on the ground that child labor was a "purely local" issue,[37] and *United States v. E.C. Knight Co.*, in which the Court found that the Sherman Act as applied to sugar refining was unconstitutional because the Commerce Clause did not reach "manufacturing."[38] They need to understand that such devices as the "stream of commerce" metaphor and distinctions between "direct" and "indirect" effects on commerce, "purely local" and national issues, and "manufacturing" and "commerce" were keeping the federal government from accomplishing important objectives.[39]

This same history sheds light on Justice Thomas's concurring opinion, in which he argues that the "substantial effects" test is inconsistent with constitutional text and should be reconsidered.[40] What would a world look like if Congress did not have the authority to regulate all that substantially affected commerce? Again, the pre-*Jones & Laughlin* caselaw becomes vital in answering this question (or at least in raising another—namely, whether the expansion of commerce authority should have been accomplished via constitutional amendment, as presumably Justice Thomas would have preferred).

A consideration of constitutional federalism does not, of course, end with the commerce cases. On the contrary, with the Court setting limitations on the commerce power, other sources of congressional authority—for example, section 5 of the Fourteenth Amendment, the Spending Clause,[41] and the Treaty Power[42]—naturally increase in importance (in legal scholarship as well as the

35. 298 U.S. 238 (1936).

36. 295 U.S. 495 (1935).

37. 247 U.S. 251 (1918).

38. 156 U.S. 1 (1895).

39. Additionally, students should be familiar with the fact that the Court during this period upheld federal regulations, including intrastate train rates in *Houston, East & West Texas Railway Co. v. United States* (the Shreveport Rate Cases), 234 U.S. 342 (1914), and the interstate sale of foreign lottery tickets in *Champion v. Ames* (the Lottery Case), 188 U.S. 321 (1903). The important question they must face is how to differentiate, if possible, these cases from the cases in which the federal regulation was struck down.

40. United States v. Lopez, 514 U.S. 549, 587–89 (1995) (Thomas, J., concurring).

41. U.S. CONST. art. I, § 8, cl. 1. For a discussion on the importance of the Spending Clause, see Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003), and the *Chapman Law Review Spending Clause Symposium*, 4 CHAP. L. REV. 1 (2001).

42. U.S. CONST. art. II, § 2, cl. 2. For an argument that the Violence Against Women Act, struck down on commerce grounds in *Morrison*, could have been sustained as an exercise of the

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classroom).[43] Again to return to the Constitutional Law class I took in law school, we spent no time on the Spending Clause or the Treaty Power, and we covered section 5 only briefly. Congressional power was synonymous with the commerce power. In a post-New Federalism age, by contrast, Congress must think harder about the source of its authority (as must constitutional law students). In sum, teaching New Federalism means teaching the Commerce Clause—and beyond.

In the end, it is my hope that students will leave Constitutional Law courses with a greater understanding of the contours and focus of New Federalism if they are armed with historical context.[44] But I also hope that historical context will give them something more—namely, the basis for answering the question "why do we care?"

After a class or two on New Federalism, students start asking why it matters whether the federal or state government has the authority to regulate guns within 1000 feet of schools,[45] pools of water used by migratory birds,[46] the use of marijuana for medical purposes,[47] or the amount of damages to be

Treaty Power, see Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 166–67 (2000).

43. Another example is the Property Clause. U.S. CONST. art. IV, § 3, cl. 2. Commentators have turned to the Property Clause in the wake of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), in which the Court seemed poised to limit the reach of the Commerce Clause in the environmental context. *See generally*, Eid, *Property Clause*, *supra* note 3.

44. This historical approach is possible with some casebooks but not with others. Casebooks by Stone et al. (which I use), Brest et al., Chemerinsky, and Massey use *Lopez* as a principal case and contain extensive historical materials, including excerpts of most, if not all, of the cases mentioned above. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 185–229 (5th ed. 2005); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 355-69, 464–76, 512–33 (4th ed. 2000); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 106–59 (2001); and CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 147–89 (2d ed. 2005). By contrast, casebooks by Cohen et al. and Choper et al., do not include *Lopez* as a major case (instead opting for the follow-on case of *United States v. Morrison*, 529 U.S. 598 (2000)), and thus in my view minimize the impact of *Lopez*'s break with the past. JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 69–108 (9th ed. 2001); WILLIAM COHEN ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 162–93 (12th ed. 2005). Additionally, Cohen et al. uses Justice Kennedy's historical summary in *Lopez* "in lieu of more extensive treatment of [historical] developments." COHEN ET AL., *supra* at 163.

45. *Lopez*, 514 U.S. at 549 (invalidating the Gun-Free School Zones Act of 1990 as beyond the scope of Congress's power under the Commerce Clause).

46. *Solid Waste Agency of Northern Cook County*, 531 U.S. at 174 (finding that the "Migratory Bird Rule," an administrative rule giving the U.S. Army Corps of Engineers jurisdiction over intrastate waters used by migratory birds, exceeded the Corps' authority under the Clean Water Act, and suggesting that the rule "would result in a significant impingement of the States' traditional and primary power over land and water use").

47. Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 2909 (2004).

awarded for medical malpractice judgments?[48] At bottom, federalism is a structural concept—a structural concept with substantive effects, to be sure, but a structural concept nonetheless.[49] While students immediately grasp the significance of the rights-based material in Constitutional Law (the Court's substantive due process jurisprudence, for instance) they have a harder time understanding the importance of dividing power between the national and state governments. As Professor Margaret Stewart put it, "I fear most students who come into the class unengaged in structural politics and law remain unengaged, and this suspicion is one of the reasons teaching constitutional law can be frustrating."[50]

That is where historical context comes in again. Certainly the historical foundations of federalism are familiar, but worth repeating. As viewed by the framers, federalism was not an end in and of itself, but rather a means to an end. As Justice O'Connor wrote in *Gregory v. Ashcroft*, the framers understood that ". . . . a healthy balance of power between the States and the Federal Government [would] reduce the risk of tyranny and abuse from either front . . . . In the tension between federal and state power lies the promise of liberty."[51] With this historical explanation in hand, students should ask (and answer) the important question: namely, whether New Federalism actually furthers this "liberty-enhancing" goal.[52]

Take the case of medical marijuana, for example. Prior to New Federalism, the use of marijuana for medical purposes clearly would have had a substantial effect on interstate commerce—anything did. In the New Federalism era, however, the answer is not as easy; indeed, the Ninth Circuit held that the use of marijuana for medical purposes is not "economic activity."[53] The Supreme Court may disagree.[54] Does the conflict between

48. *See* Allison H. Eid, *Tort Reform and Federalism: The Supreme Court Talks, Bush Listens*, HUM. RTS., Fall 2002 at 10 (describing how the Bush Administration is dealing with the federalism issues raised by pending federal medical malpractice legislation).

49. *See* Clarence Thomas, Why Federalism Matters, Remarks at Drake University Law School's Dwight D. Opperman Lecture (Sept. 24, 1999), *in* 48 DRAKE L. REV. 231, 234 (2000) (describing federalism as a "structural safeguard for individual liberty").

50. Margaret G. Stewart, *Notes on Notes*, 21 SEATTLE U. L. REV. 979, 983–84 (1998) (reviewing GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (3rd ed. 1996)).

51. 501 U.S. 452, 458–59 (1991).

52. Numerous commentators have suggested it does not. *See, e.g.,* Eid, *Federalism*, *supra* note 1 at 1191–92. *But see id*. at 1192 (arguing that the Court has been cognizant of federalism values in the New Federalism decisions).

53. Raich v. Ashcroft, 352 F.3d 1222, 1229 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 2909 (2004).

54. Commentators have predicted that, based on the Justices' comments at oral argument, the Court will uphold Congress's authority to make marijuana use illegal, including use for medical purposes. *See*, *e.g.*, Tony Mauro, *Court Watch*, LEGAL TIMES, December 6, 2004, at 12 (noting that "[i]n spite of the conservative majority's interest in strengthening state powers, most

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federal and state authorities over medical marijuana—a conflict imposed by New Federalism——actually enhance liberty? Attention Constitutional Law students: You be the judge.

justices seemed skeptical of the argument that California could defy the federal Controlled Substances Act by allowing surely in-state, noncommercial distributions of marijuana for medical use"); Richard A. Epstein, *Rethink* "*Wickard*," NAT'L L.J., January 17, 2005, at 27 (noting that "the consensus after oral argument is that medical marijuana programs are doomed").

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