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Stopping the Gray Market

Federalism and California's Medical Marijuana Laws

Ethan Ranis

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An exploration of the several difficulties faced in the implementation of California's Proposition 215, which attempted to make marijuana legal in the state. As Proposition 215 went directly against federal law, the focus is on the federal-state interaction that followed. The paper argues that the principles of federalism could be applied to further interactions in order to improve state law, instead of attempting to suppress medical marijuana or leaving California's flawed system to its own ends.

1. Introduction: The Problems of Medical Marijuana in California

In 1996, Proposition 215, now known as the Compassionate Use Act (CUA), passed by popular initiative in California. The new law stated plainly that:

...seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana...¹

In one swift stroke, the use of marijuana for virtually any medical purposes became legal in the state of California. Beyond this, the law mostly encouraged the state government not to interfere with these new standards, and exempt users and their caregivers from state prosecution. While this seems simple enough in principle, Proposition 215 would spend the next fifteen years facing problems with implementation, forcing the state government to create one major revision and several more minor ones, spawning scores of court cases and facing constant interference from the federal government. At the heart of these problems were the facts that Proposition 215 was vaguely worded and did not come packaged with any clear method for creating statewide implementation, faced a significant amount of backlash from those who felt morally opposed to it, and went directly against federal law, leading to a complex and problematic interaction between the state and federal government.

Under federal law, marijuana in any form is completely illegal for use or possession, even if intended for medical purposes. In the Controlled Substances Act (aka CSA, originally passed as the Comprehensive Drug Abuse Prevention and Control Act of 1970), marijuana and its derivatives are placed under Schedule I, meaning that it's illegal for all forms of use, including medical purposes.² Most other drugs in Schedule I are more lethal or mind-altering; the

¹ (County of San Diego v. San Diego NORML)

² 21 USC. Ch 13 aka "The Controlled Substances Act" <http://uscode.house.gov/download/pls/21C13.txt>

category includes powerful opiates such as heroin and morphine, as well as hallucinogens such as LSD and peyote. Marijuana is quantifiably the least dangerous drug in Schedule I,³ as well as potentially the most medically useful: the drug has both analgesic and anti-inflammatory powers, as well as anti-emetic and appetite-stimulating effects.⁴

Passing Proposition 215 forced California's legislature to flagrantly ignore the CSA, legalizing something under state law that was made illegal by the federal government. Yet despite several cases of medical marijuana usage making their way into higher level courts, including a few high profile Supreme Court cases such as *US v. Oakland Cannabis Buyer's Cooperative* and *Raich v. Gonzales*, no decision has fully reconciled federal and state law. Similarly, any effort by Congress to acknowledge the situation beyond public condemnation and investigative hearings has fallen by the wayside. As of 2011, the federal response has been limited to numerous raids on California users and dispensaries executed by the DEA. Even this was suspended as of a 2009 missive from attorney general Eric Holder instructing the DEA to focus their attention away from medical marijuana users/dispensaries.⁵

Beyond conflicting with federal legislation, burgeoning medical marijuana policy in California also had several intrinsic flaws. The Compassionate Use Act began life as extraordinarily broad, vague legislation that was so substantially problematic for local law enforcement that, seven years later, the State Senate passed an additional set of laws known as the Medical Marijuana Program act (MMP), stipulating additional rules that created identification cards for medically exempt users and legalized sale and transport of medical

³ (Gerber 80-81)

⁴ (Shohov 58-61)

⁵ (C. Johnson)

marijuana throughout the state.⁶ Even after this, each county was still given a wide berth to interpret the law as they chose, leading to wildly inconsistent implementation throughout the state.⁷

Most importantly, the Compassionate Use Act ultimately did not perform the way voters intended. Popular support for medical marijuana has consistently been strong in California, but support for outright legalization has never solidified. Proposition 19, another initiative that would have legalized all forms of marijuana use (including recreational use), failed by an eight percent margin last year.⁸ The people have thus created a clear distinction between approval for medical versus non-medical use, and the implementation of the CUA should have followed a similar path.

Yet numerous accounts have claimed that obtaining the requisite identification card for medical use is a less than rigorous process. An article in the *New Yorker* describes one person's process of obtaining the card:

[The recommender] began a fifteen-minute interview, asking me about my reasons for wanting the drug. "How long have you been under the care of a psychiatrist?" he asked me, writing down the answer on a notepad. I provided him with a bill from my psychiatrist in New York, along with proof that I was currently living in California. He then quizzed me about my brief and unsatisfactory experiences with prescription medications for anxiety and depression, and my history of illegal drug use. Deciding that I was a suitable candidate for a medical marijuana recommendation, Dr. Dean took my money and provided me with a quick tutorial on strains of pot—indica offered a "body high," whereas sativa was "more heady and abstract"—along with a signed letter certifying that I was a patient under his care.⁹

An article in the *Washington Post* described a similar experience:

"Medical marijuana, right here, right now," chants a barker on the Venice Beach Boardwalk, outside the doorway of the Medical Kush Beach Club. "Get legal, right now."

It really is that easy, the barker explains. Before being allowed to enter the upstairs dispensary and "smoking lounge," new customers are directed first to the physician's waiting room, presided over by two

⁶ (County of San Diego v. San Diego NORML)

⁷ (Samuels)

⁸ (California Proposition 19, the Marijuana Legalization Initiative (2010))

⁹ (Samuels)

young women in low-cut tops. After proving state residence and minimum age (21), customers see a doctor in a white lab coat who for \$150 produces a "physician's recommendation".¹⁰

Most damningly, a blogger in *Mother Jones* described a "race" between him and his spouse to obtain medical marijuana. While his wife had chronic arthritis, he was relatively free of maladies. While the author went to an advertised clinic, his wife asked her general practitioner for assistance. The author received his recommendation in "less than 90 seconds,"¹¹ while his wife was unsuccessful.

The ballots in California speak for themselves; intrastate medical marijuana was supposed to be tightly controlled, distributed only to those with a serious illness who could benefit from the treatment. The drug should have been managed like any other dangerous pharmaceutical (e.g. Vicodin, Percoset, Adderall) with a distinct potential for abuse. Tight controls and prescription requirements could have eliminated this issue, if not necessarily some of the confusion surrounding enforcement of the new laws. Instead, Proposition 215 and its associated responses created a gray market, a system where people with legitimate medical concerns were often stymied in their attempts to get medicine while those who were willing to resort to shadier tactics could easily obtain a "pot card" even if they had no medical need for one.

This paper proposes that the principles of federalism could be the key to solving California's medical marijuana problems – as a lack of federalism is one of the reasons they began. Federalism holds that the states should have a measure of independence from the federal government, whose powers should be limited to more national affairs. Incapable of encroaching on state powers to the extent of forcing California to repeal the law, the federal government did everything short of that, threatening physicians with the removal of their licenses, arresting numerous medical marijuana users and publicly decrying the legislation even as twelve other

¹⁰ (Vick)

¹¹ (Harkinson)

states adopted similar provisions. This interference effectively chilled the actions of legitimate physicians even more than they might have been otherwise, leaving less qualified “caregivers” to recommend the drug in their place. The CUA’s evolution from vague mandate to haphazard identification system came as a result of numerous complications both on a local and state level, but much of the existence of the gray market can be blamed upon the federal response to the law.

Essentially, the problems with medical marijuana in California arose as an intersection of poorly-written legislation and botched federal intervention. That said, the problems in California’s system were hardly unsolvable, and had the federal government taken a role in attempting to iron out those issues instead of steadfastly denying medical marijuana’s existence, perhaps the gray market could have been avoided. In fact, this paper argues that such a change is still possible. At this point, instead of attempting to block the medical marijuana movement or simply surrendering to the problematic system that is in place, the federal government could attempt to guide it – to help create the tightly regimented distribution system that the law called for through the use of established agencies such as the FDA, without mandating throughout the nation that medical marijuana be treated unequivocally as either legal or illegal.

However, such a change is extraordinarily unlikely to come from either the legislative or executive branches; the past forty years of the war on drugs have proven the issue to be politically intractable. However, there is still one way that the federal government could change its stance towards medical marijuana, one tied into an important shift in recent judicial thought. As both medical necessity and due process-based arguments failed to move the courts, the most recent cases about medical marijuana have centered around a renewed emphasis on states’ rights under the Tenth Amendment. While *Raich v. Gonzales* (2005) seemed to put an end to this argument by broadening the Commerce Clause, a further case, *Santa Cruz v. Holder*, was being

pursued before Holder announced the shift in DEA policy. *Santa Cruz* might have forced Congress's hand in such a significant way as to reorient the entire federal policy towards medical marijuana. This paper explores the possibilities for such a shift by examining recent changes in the Court's use of constitutional federalism and its treatment of the Commerce Clause, in conjunction with a thorough look at the history of medical marijuana in the US, particularly in California.

2. A Brief History of Marijuana Prohibition

Just over a century ago, marijuana was actually an ingredient in a number of pharmaceutical tonics and cures. The plant was formerly included in the *United States Pharmacopoeia* until the creation of numerous statutes that banned or taxed the substance.¹² Of course, this was roughly cotemporaneous with the era in which cocaine was an active ingredient in Coca-Cola, so this information should be taken with a grain of salt. Regardless, it's important to note that marijuana was actually criminalized far later than most other drugs; the first major action against it came with the Marijuana Tax Act of 1937.

Early Prohibition

Prior to the Tax Act, during the 1920s, "...twenty-one states had also restricted the sale of marijuana as part of their general narcotics articles, one state had prohibited its use for any purpose, and four states had outlawed its cultivation."¹³ Much of this flurry of state legislation was a direct result of the Harrison Narcotic Tax Act of 1914 and the Uniform State Narcotic Drugs Act of 1934, when Congress provided strong encouragement for the states to ban harder

¹² (Shohov 41)

¹³ (Bonnie and Whitebread II 1010-1011)

drugs such as cocaine and opium.¹⁴ After state legislatures banned the hard drugs (and alcohol, under Prohibition) they began to worry about which drugs would be used as “substitutes”:

The early laws against the cannabis drugs were passed with little public attention. Concern about marijuana was related primarily to the fear that marijuana use would spread, even among whites, as a substitute for the opiates and alcohol made more difficult to obtain by federal legislation.¹⁵

Racism was also a major factor in many of the early state bans; one Montana newspaper wrote after its own state legislature passed a regulatory measure:

Marihuana is Mexican opium, a plant used by Mexicans and cultivated for sale by Indians. "When some beet field peon takes a few rares of this stuff," explained Dr. Fred Fulsher of Mineral County, "He thinks he has just been elected president of Mexico so he starts out to execute all his political enemies."¹⁶

Even in these early state bans, the roots of national marijuana prohibition are apparent: ignorance as to the drug’s actual effects, racism against its perceived users, and the continual implication of marijuana in the larger war on hard drugs.

Subsequently, Congress passed the Marijuana Tax Act of 1937, which essentially extended the Harrison legislation, placing restrictive taxes and fines upon the sale and transfer of any of the elements of the marijuana plant.¹⁷ Nothing about marijuana was made specifically illegal on the federal scale; the goal was simply to control its usage by making it prohibitively expensive. Marijuana possession, sale and use would not become a federal crime until the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

The Controlled Substances Act

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, one assumes at both President Richard Nixon’s urging and in response to backlash over the drug craze of the 1960s. The Act essentially created a list of acceptable uses for known drugs, making

¹⁴ *Ibid.*

¹⁵ *Ibid.* 1021

¹⁶ *Ibid.* 1014

¹⁷ *Ibid.* 1062

their consumption federal crimes if used inappropriately (e.g. a substance that was limited to medical use being used recreationally). While some medical experts were invited to testify about marijuana, the bill was crafted by attorneys, who created the scheduling system and assigned substances to each tier. Schedule I, the tier that marijuana was placed in, provides that:

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.¹⁸

Schedules II-V indicate lower potentials for abuse, greater medical potential, and higher levels of accepted safety. The Schedule list hasn't changed significantly over the ensuing years. The DEA has remained in charge of overseeing and enforcing the CSA. Several attempts were made to lower marijuana's place on the list of Schedules; one of the most notable of these occurred in 1988, at an internal hearing on medical marijuana within the DEA. The presiding administrative judge, Francis L. Young, actually determined the drug should be rescheduled:

Judge Young recommended that [marijuana] be placed on Schedule II, so that it could be prescribed by physicians under controlled circumstances, noting that "the evidence in this record clearly shows that marijuana has been accepted as capable of relieving the distress of great numbers of very ill people, and doing so with safety under medical supervision. It would be unreasonable, arbitrary and capricious for DEA to continue to stand between those sufferers and the benefits of this substance in light of the evidence in this record."¹⁹

Young's recommendation would have completely eliminated the conflict between medical marijuana supporters and federal law, while retaining the illegal nature of recreational use. However, the administrator of the DEA declined Young's recommendation, and no changes to the scheduling were made.

¹⁸ 21 USC. Ch 13 aka "The Controlled Substances Act" <http://uscode.house.gov/download/pls/21C13.txt>

¹⁹ (Bock 225)

Presidential Policies Through The Years

The beginning of major presidential opposition to marijuana usage of all forms can be found in the presidency of Richard M. Nixon. Among the numerous taped conversations recorded during Nixon's presidency are several that find him excoriating marijuana as the drug of choice for hippies and Jews.²⁰ Nixon created the National Commission on Marijuana and Drug Abuse in 1970,²¹ whose very name indicated the causal link it intended to find. However, two years later, the Commission returned with a report that "while marijuana was not entirely safe, its dangers had been exaggerated."²² The drug was not physically addicting, and reports of so-called "amotivational syndrome" and marijuana use acting as a "gateway" drug were not entirely accurate. Nixon never acted on the report, and in 1974 a Senate Judiciary Committee assembled to attack its findings.²³

Gerald Ford essentially continued Nixon's policies. Jimmy Carter initially attempted to undo some of the harsher provisions against marijuana use, but his initiatives were roundly rejected by Congress, and negative public reaction caused him to quickly reverse course.²⁴ Ronald Reagan brought the war on drugs to impressive new heights, and allegedly assembled studies to deliberately seek out "something wrong with marijuana."²⁵ George H.W. Bush continued his predecessor's stringent policies.

The Clinton presidency provided an interesting turning point; Bill Clinton was the first president to have admitted to using marijuana, despite his caveat that he "didn't inhale." The worry of looking "soft on drugs" actually pushed Clinton toward much greater efforts to pursue

²⁰ (Baum 46, 54)

²¹ (Bock 149)

²² *Ibid.* 149.

²³ *Ibid.* 150.

²⁴ (Gerber 28-32)

²⁵ *Ibid.* 41

an aggressive anti-drug agenda,²⁶ which extended to his attitude about medical marijuana. In the wake of Proposition 215 he announced that federal law was still firmly in place and that California's provisions were still illegal.²⁷ Only after Clinton was nearing the end of his presidency did he suggest in an interview that he supported decriminalizing marijuana.²⁸ George W. Bush also admitted to various forms of drug use in his earlier years, but his administration stepped up the number of raids on medical marijuana facilities.²⁹ The DEA shut down somewhere between 30 and 40 dispensaries over the course of his presidency.³⁰

Barack Obama continued the recent pattern of presidents who admitted to using marijuana in their youth, but his public stance differed in a crucial way: he actually supported medical marijuana. In his 2007 campaign he publicly mentioned that he thought medical marijuana could be viewed as no different from morphine in palliative effects.³¹ When in office, he made good on those views and encouraged the executive branch to redirect their efforts away from medical users and towards preventing youth from abusing substances. Obama's directive led to a 2009 memo from Deputy Attorney General David Ogden that officially directed the Department of Justice's resources away from medical marijuana users, focusing instead on illegal trafficking:

As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.³²

²⁶ *Ibid.* 49-51

²⁷ *Ibid.* 121

²⁸ *Ibid.* 54

²⁹ (Gerber 131)

³⁰ (A. Johnson)

³¹ *Ibid.*

³² (Russo)

The Ogden memo was seen as a turning point for many medical marijuana users in California, even causing the ACLU to suspend a major lawsuit, *Santa Cruz v. Holder*, the outcome of which could have drastically changed the situation in California.³³ Yet the letter did not change the permanent stance of the federal government towards state law; it merely created a sort of détente between federal and state forces while redirecting resources towards greater efficiency in pursuing illegal trafficking. Removing the focus from medical marijuana was hardly the same as endorsing the state programs, and the impermanence of this solution means that it could theoretically change as soon as Obama leaves office, should the next president be unfavorable towards medical marijuana.

Actual Medical Effects of Marijuana

With all of the overheated claims about marijuana usage from both detractors and supporters, it is easy to forget some of the reasons medical marijuana was considered useful to begin with. In 1997 the NIH published a study detailing some potential medical benefits to use of the drug, including:

- Relief from nausea
- Reduction of intraocular pressure
- Reduction of muscle spasms
- Relief from chronic pain.³⁴

The potential use for many of these capabilities should be readily apparent. Marijuana's appetite-stimulating and anti-emetic properties are extraordinarily useful for chemotherapy patients. The reduction of intraocular pressure can help relieve glaucoma symptoms, and the reduction of muscle spasms indicates usefulness in treating multiple sclerosis patients. However,

³³ (County of Santa Cruz, et al., v. Eric H. Holder, Jr. - Joint Stipulation of Dismissal Without Prejudice)

³⁴ (Shohov 11)

it is worth noting that most patients in California claim the last (and most general) effect, relief of chronic pain, as their reason for seeking treatment.³⁵

Also notable in the ongoing struggle to regulate medical marijuana is a brief period where the government experimented with its own “Compassionate Use” program, dispensing medical marijuana cigarettes to patients with glaucoma.³⁶ The program was initially quite small, but once it was publicized demand for participation greatly increased. The government subsequently shut down the program to all new users and gradually cut off the production of the cigarettes. Regardless, the federal program was still a source of contention in later court cases that claimed equal protection conflicts, and thus became a fairly essential part of the federal government’s history with regard to medical marijuana.

Marijuana vs. Marinol

Further complicating the issue was the creation of synthesized THC; dronabinol, marketed by pharmaceutical companies as Marinol. Delta-9-tetrahydrocannabinol is supposedly the main active ingredient in marijuana, and Marinol was thus supposed to have the same analgesic properties in an easily-controlled, orally ingested pill, completely eliminating the need for medical marijuana. Unfortunately, the realities of Marinol’s performance did not live up to its promise.

Key among issues was the standardized dosage present in Marinol. THC has a wide variety of effects among users, and differing amounts can achieve radically different results; many dronabinol users complained of feeling incapacitated, when a smaller amount of marijuana usage would have had less impairing effects. Furthermore, Marinol’s slow onset time (roughly 2-3 hours) made it much more difficult to use for immediate discomfort than inhalation of

³⁵ (U.S. Dept. of Justice)

³⁶ (Newbern 1590)

marijuana, the effects of which are present for most users in under fifteen minutes. More seriously, dronabinol's pill format meant that the majority of the drug was filtered out by the liver before actually working its way into the bloodstream, and in doing so anywhere from 60-80 percent of the active dose was removed before taking effect.³⁷ Finally, THC is just one chemical in marijuana, and may actually be less effective in isolation than it is when combined with the whole,³⁸ particularly for users who are taking marijuana for anti-inflammatory effects.³⁹

Regardless, Marinol was taken by the federal government as the acceptable medical substitute for marijuana. While marijuana remained in Schedule I, Marinol was rescheduled to Schedule III, denoting:

- A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.
- B) The drug or other substance has a currently accepted medical use in treatment in the United States.
- C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.⁴⁰

Marijuana and Marinol contain the same active substance, yet there is a world of difference between their descriptions in the CSA. While marijuana was still considered a dangerous, easily abused drug, Marinol was deemed safe for medical treatment and non-habit-forming.

Marijuana's Role in the Drug War

One key reason for the hostility of the federal government towards marijuana is its place in the larger War on Drugs. Marijuana is perhaps the most commonly used illegal substance in the United States, far more so than cocaine or heroin. When justifying increased spending on

³⁷ (Bock 233)

³⁸ (Shohov 27)

³⁹ Many of the anti-inflammatory properties of marijuana can be found in *Cannabis indica*, a strain that has noticeably less THC than its more commonly cultivated cousin, *Cannabis sativa*.

⁴⁰ 21 USC. Ch 13 <http://uscode.house.gov/download/pls/21C13.txt>

anti-drug programs, the DEA and Congress have a tendency to point to overall figures of illegal drug users currently in the United States instead of breaking the statistics down by category. Without marijuana users, these figures would be far lower.⁴¹ Thus, many commentators have suggested that much of the opposition from marijuana stems from the government's need to maintain the war on drugs, essentially using the statistical inflation from marijuana users to fuel opposition to the more dangerous substances.

3. Proposition 215 and Reactions

Proposition 215 was hardly the first medical marijuana bill proposed in California; two previous bills had actually been drafted by the state legislature before Governor Pete Wilson vetoed them and ended the process.⁴² The passing of Proposition 215 and the immediate and long-term difficulties of its implementation continued to show a state government that was at odds with itself as well as the people. In many ways this can be accounted for by the political diversity of the state of California – the largest of the United States, separated into 58 different and often largely autonomous counties.⁴³

This diversity made the frustratingly imprecise nature of the Compassionate Use Act's verbiage subject to a huge range of interpretations. While those who crafted 215 ostensibly created "at least 20 drafts" that were submitted to the state legislative counsel's office for revision,⁴⁴ the ultimate law was still problematically vague, leading to massive problems with implementation that were only compounded by difficulties created by the DEA. This section

⁴¹ (Bock 179)

⁴² (Gerber 94-95)

⁴³ (Bock 47)

⁴⁴ *Ibid.* 14

examines the creation of the initiative, and its subsequent impact on the state of California over the next fifteen years.

The Creation and Passing of Proposition 215

In the wake of the two vetoes on state legislature medical marijuana bills, Dennis Peron, a gay rights activist and longtime supporter of medicinal marijuana use, assembled a number of other marijuana activists and decided to craft an initiative for a statewide medicinal use law:

They wanted something similar to the law just passed by the state legislature, which provided a defense in court for people who had a doctor's recommendation for a small list of diseases against marijuana possession charges, along with a preamble to explain the purposes and intention of the new law and a bit wider latitude for patients than the legislature had approved.⁴⁵

Proposition 215 soon found some powerful, if controversial support in the form of billionaires George Soros and Dan Lewis, each of whom contributed significantly to the campaign for the initiative.⁴⁶ Soros reportedly added his support because he believed that government could not accomplish the goal by itself; notably, he was not in favor of legalizing recreational use, just medical marijuana.⁴⁷ However, detractors of the initiative would often point to Soros' contribution as one more way that the campaign was deceiving the voters,⁴⁸ using the money of wealthy, out-of-state elites.

The campaign focused on urban areas and emphasized the beneficial effects for cancer and AIDS victims.⁴⁹ Ultimately the initiative passed with 56 percent of the vote, a substantial margin of victory.⁵⁰ California's initiative process then ensured that the text as written immediately became law. The CUA's key text is replicated here:

⁴⁵ *Ibid.* 14

⁴⁶ (Gerber 94)

⁴⁷ *Ibid.* 101

⁴⁸ (Bock 29)

⁴⁹ (Gerber 94)

⁵⁰ (Bock 28)

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.⁵¹

There are a number of notable places where the text of the law is vague, confusing or fails to indicate how a measure should be brought about. Much of this wording was intentional on the part of the authors. For example, subsection (B) purposefully doesn't use the word "prescription" but rather "recommendation," in order to avoid conflicts with federal prescription laws.⁵² These recommendations did not have to be submitted to a state entity; indeed there were no "particular examination requirements" for screening.⁵³ For those that did receive recommendations, the law did not clarify how medical users could obtain marijuana (a state distribution system is merely "suggested"), whether or not its transportation or sale was legal, or what amount of possession was acceptable for a user. The CUA also relied heavily on the idea of the "primary caregiver" as the person who could obtain and cultivate marijuana for a patient. Scott Imler, one of the people who helped craft the act, spoke about the idea of the primary caregiver:

⁵¹ (County of San Diego v. San Diego NORML)

⁵² (Bock 8-9)

⁵³ (Shohov 94)

"When we used the term "primary caregiver" as best I can remember we had in mind a family member or a close friend, perhaps a wife, husband, lover, in-law, son or daughter. Of course, we hoped that eventually marijuana would be made available through ordinary drug stores, but we didn't expect that to happen right away because of federal jurisdiction over the prescription system. So we figured that some patients would grow it, some would have friends grow it, and there would be an interim distribution system like the San Francisco Buyers club for some patients."⁵⁴

Regardless of the intentions of the authors, the looseness of the term would become a major point of contention as the courts increasingly focused on its meaning when deciding medical marijuana cases. Were primary caregivers allowed to serve more than one client? Could a distribution center count as a primary caregiver? Or perhaps the state itself?

Most notable is the fact that the law doesn't set a definite list of diseases/symptoms that are acceptable for treatment with medical marijuana, ending an exhaustive list of possible causes with the open-ended indication for "any other illness for which marijuana provides relief." This stipulation is one of the key reasons the gray market emerged with such force in California, while remaining relatively subdued in other states with more narrowly defined medical marijuana statutes. In California, people would seek marijuana recommendations to treat everything from chronic back pain, to insomnia, to depression.

The State Government Reacts

Proposition 215's first big hurdle came in the form of a few key state personnel who were rabidly against it. There were general complaints and doubts about the law from law enforcement. Orange County Sheriff Brad Gates originally co-chaired the "No on 215" committee,⁵⁵ and continued to criticize the law, arguing that "the information didn't allow the voters to see all the facts."⁵⁶ Several local sheriffs and officers freely admitted that they had no

⁵⁴ *Ibid.* 15

⁵⁵ (Bock 21)

⁵⁶ *Ibid.* 54

idea what they'd do if the law passed, and many said they would keep enforcing the old standards.⁵⁷ Members of the LAPD told reporters that they would continue working directly with the DEA, as federal law superseded any state developments.⁵⁸

Perhaps the new law's most important opponent was Dan Lungren, California's attorney general at the time. Lungren called the law "a disaster," and stated that this was simply the first step towards legalizing marijuana for recreational use. Once the initiative was actually in the books, Lungren convened a committee to discuss implementation of the new law. One of their first actions was to create a directive attempting to set up new guidelines for law enforcement officers dealing with marijuana use. The language of the directive was highly restrictive and did not actually require law enforcement officers to ask if users had a medical reason for taking the substance.⁵⁹ Lungren actually met personally with a number of law enforcement representatives in December 1996, in a fruitless attempt to limit the causes medical users could claim and to suggest additional statutes to control usage.⁶⁰

The battle over implementation essentially stalled out the process for refining medical marijuana policy in California. No one, not even the law's supporters, could seem to agree on where authority should have stemmed from: Should decisions have been made locally, on a county-by-county basis, or should the state legislature have drafted further laws to assist in the process of implementation?⁶¹ Was it simply a matter of those who were interested meeting their goals without interference? Ultimately, development of the law and its stipulations didn't really occur until the term of Attorney General Bill Lockyer, Dan Lungren's replacement. Until Lockyer took over, the only clarification of the law that was requested by the state government

⁵⁷ *Ibid.* 28

⁵⁸ (Samuels)

⁵⁹ (Bock 61)

⁶⁰ *Ibid.* 56

⁶¹ *Ibid.* 72

was an attempt to change the wording of a statute prohibiting intrastate transportation of marijuana to include the phrase “except for medical uses” – which was denied.⁶² During the entirety of Lungren’s term, nearly no progress had been made in resolving the difficulties of Proposition 215.

Lockyer’s term would prove to be a turning point in the intrastate conflict on medical marijuana use. Where Dan Lungren had been opposed to the initiative from the start, Lockyer was cautiously in favor of medical marijuana. The new attorney general assembled a task force on medical marijuana in 1999 to attempt to work out various flaws in implementation.⁶³ Lockyer understood that further work on Proposition 215 would be difficult without the cooperation of the federal government, and traveled to meet drug czar Barry McCaffrey in Washington. McCaffrey demanded more research before medical marijuana could be considered effective treatment. When Lockyer subsequently suggested that California could do some state-sponsored research into the matter, McCaffrey threatened him with federal prison.⁶⁴

Lockyer’s efforts to reform medical marijuana use within the state were subsequently scaled back, and led to the creation of the Medical Marijuana Program Act.

National Reactions

In the immediate wake of Proposition 215’s success, Bill Clinton rushed to make a formal announcement that federal laws were still in place.⁶⁵ Clinton’s drug czar, Barry McCaffrey, formally spoke out against the initiative in California, saying “This is not medicine... this is a ‘Cheech and Chong’ show.”⁶⁶ Substantial federal fines and penalties were still present for all medical users, much less cultivators and distributors, who were at significant

⁶² *Ibid.* 102

⁶³ *Ibid.* 107

⁶⁴ (Bock 113)

⁶⁵ (Gerber 121)

⁶⁶ (Bock 57)

risk.⁶⁷ Direct federal action against medical marijuana users and distributors in California would soon become a more frequent occurrence once the DEA stepped up their activities within the state. The White House ordered a fresh set of reports on medicinal or therapeutic uses for marijuana from the Institute of Medicine; when the report concluded in 1999 that there were potential medical uses “well-suited for certain conditions such as chemotherapy-induced nausea and vomiting and AIDS wasting,” it was generally ignored.⁶⁸ McCaffrey continued to champion the use of Marinol in the illegal drug’s stead.⁶⁹

Regardless, over the next few years numerous other states, including Washington, Alaska and Oregon would pass their own (albeit more structured/restrictive) medical marijuana statutes.⁷⁰ Even as the number of states flagrantly contradicting federal drug law grew in number, some members of the 105th Congress still aimed to stop the spread of medical marijuana, with two bills known as the “Medical Marijuana Deterrence Act of 1997” (HR 1265) and the “Medical Marijuana Prevention Act” (HR 1310), the first of which would have denied certain federal benefits for criminal convictions in states that allowed medical marijuana, and the second of which would give the U.S. attorney general greater power to suspend recommending physicians’ licenses.⁷¹ A meeting of a House subcommittee on the matter even asked Barry McCaffrey to campaign against further state initiatives; McCaffrey declined.⁷²

Not all members of Congress were in opposition to the medical states’ actions. In 2002, Representative Barney Frank of Massachusetts championed the lone bill that was pro-medical marijuana, legislation that would reschedule marijuana to Schedule II, calling it the “Medical

⁶⁷ (Shohov 121-123)

⁶⁸ (Bock 110)

⁶⁹ *Ibid.* 111

⁷⁰ Shohov 95-102 contains numerous tables that indicate higher levels of restrictions in these states than in California.

⁷¹ (Shohov 75)

⁷² (Bock 212)

Marijuana in the States Act” (HR 1782).⁷³ The bill never received so much as a preliminary hearing in committee.⁷⁴ Essentially, Congress forestalled any action either for or against medical marijuana.

While the controversy over the laws continued, they were never formally overruled in court, and as a result the conflict continued with a series of federal-state interactions designed to suppress medical marijuana legislation’s effect without directly intervening against it on the legislative or judicial front.

Federal Response I: Physician Licenses

The first manner in which the DEA attempted to stifle medical marijuana was to threaten to revoke licenses for any physicians who prescribed or recommended medical marijuana.⁷⁵

Compounded with the already dubious nature of prescribing a federally illegal drug, this effectively chilled most certified medical authorities, preventing them from recommending the substance even if they thought its use was indicated. Between control over physician licenses and prescription law, the federal government essentially locked down any respectable, “white market” means of accessing a supply of medical marijuana, cueing the creation of less official ways to bypass the federal stranglehold.

Nearly immediately after the announcement, a group of California physicians and their seriously ill patients filed suit against Barry McCaffrey, initiating a seven-year-long legal battle that would come to be known as *Conant v. Walters* (2002). Both the American Medical Association and California Medical Association asked the plaintiff, Dr. Conant, to drop the suit,

⁷³ (Shohov 75-76)

⁷⁴ (Bock 110)

⁷⁵ (Gerber 121)

worrying that it would only reflect poorly on the profession.⁷⁶ The *Conant* case eventually came to be about free speech above anything else. The Ninth Circuit eventually decided that the government could not infringe on physicians' free speech rights either by revoking their licenses or conducting investigations of them based on any recommendation of marijuana,⁷⁷ and filed an injunction against any further attempts to do so. The decision notably excluded physicians who "aid and abet the actual distribution and possession of marijuana."⁷⁸

The AMA subsequently released guidelines to advise physicians on how to deal with the subject of medical marijuana, counseling against recommending it or assisting patients in obtaining it, but allowing that doctors could discuss the risks and benefits of treatment with their patients.⁷⁹ The AMA's reaction seems indicative of the medical profession in California as a whole; the subject of medical marijuana was still considered fairly taboo even after *Conant* was decided in the physician's favor, and there was continuing worry that signing forms from marijuana cooperatives would leave doctors open to federal enforcement actions.⁸⁰ The potential federal response effectively continued to chill legitimate medical recommendations from doctors, despite being overturned in court.

Confusion and Court Cases

Slowly but surely, California's current "system" of medical marijuana acquisition and distribution began to fall into place. Rural areas such as Humboldt County emerged as prime areas to grow the plant,⁸¹ while inner city distribution centers such as the Oakland Cannabis Buyer's Club rose to prominence as places to acquire the drug as well as partake of it. Urban

⁷⁶ (Bock 59)

⁷⁷ (*Conant v. Walters*)

⁷⁸ *Ibid.*

⁷⁹ (Bock 59)

⁸⁰ *Ibid.* 66

⁸¹ (Samuels)

areas eventually began to approve zoning for dispensaries and cannabis co-operatives, and the gray market was gradually established. Theoretically this meant seriously ill patients would now have greater, if not exactly legitimate, access to their medicine; it also opened the door for many more people who claimed illness to obtain the substance.

Most of the early problems on a purely intrastate level originated from the logistics of law enforcement. Early medical users had no form of identification; when police officers pulled them over for transporting marijuana, they could claim a medical defense but had no proof. As a result, officers tended to make arrests and then let the courts sort out the problems, further clogging the courts with hundreds of marijuana possession cases.⁸² Individual officers were also often stymied by the legislation. One report tells of an officer who assisted a medical patient in moving his plants indoors after the patient provided proof of medical need, and subsequently returned to arrest him the next day.⁸³ Furthermore, sheriffs in some counties refused outright to recognize the new laws: one deputy remarked after an arrest, “Proposition 215 does not apply in Placer County.”⁸⁴

Indeed, county-by-county implementation would prove to be another major issue. In the absence of a generalized statewide plan for implementation, each county set a different level of strictness for what constituted medical need, how much possession was allowed, and whether or not dispensaries were prohibited. As a result the regulations for use of medical marijuana varied wildly across the state; it was entirely possible to obtain a recommendation in one county and be denied in another, or engage in behavior considered appropriate in Los Angeles that was prohibited in Sacramento. In terms of medical marijuana, California was less a unanimous state than a Balkanized set of zones.

⁸² (Bock 117)

⁸³ *Ibid.* 90

⁸⁴ *Ibid.*

At this time several crucial early cases went before the California state courts. Notable among them was *People v. Peron*, an action initiated against one of the people who crafted 215 and a proprietor of the San Francisco Cannabis Buyer's Club for selling marijuana at said establishment;⁸⁵ *People v. Trippet*, a case that dealt with transporting marijuana and possession in large quantities that was cleared;⁸⁶ and *People v. Young*, a case that went directly against *Trippet* by saying that the Compassionate Use Act did not provide an affirmative defense for transportation of the drug.⁸⁷ These court cases, especially the contradiction inherent in the *Trippet* and *Young* decisions, show exactly how problematic the vagaries of the CUA proved to be. By failing to establish the legality of sale, possession amounts, or transportation of marijuana, the CUA left innumerable holes which AG Lungren could use to poke holes in the already ramshackle infrastructure of intrastate medical marijuana. Without specific stipulations, the California courts were left to sort out many of the smaller cases in any way they could.

The Medical Marijuana Program Act

The state legislature responded to the problem of distinguishing medical and recreational users by crafting The Medical Marijuana Program Act in 2003. The program asked each county to set up a system to register medical marijuana users and provide them with identification cards, which could then be displayed by official users who were questioned by police officers. The act also provided an affirmative defense for users who were apprehended while transporting marijuana, a defense that was made retroactive in *People v. Wright*.⁸⁸

The MMP had its own fair share of problems. Asking each county to develop their own registration system further hybridized medical marijuana rules across the state: although the

⁸⁵ (People ex rel. Lungren v. Peron)

⁸⁶ (People v. Trippet)

⁸⁷ (People v. Young)

⁸⁸ (People v. Wright)

identification system was fairly uniform, county control over who received a card created numerous different requirements to obtain one in any given area of California. Furthermore, some counties resented the imposition and additional costs required by the MMP, leading to the county of San Diego actually suing the state to be released from these obligations in an action that eventually failed.⁸⁹

The MMP helped solve the thorny issue of law enforcement's ability to distinguish between medical and non-medical users, but it did so at a price: the identification system merely helped reinforce the gray market. Numerous dubious agencies sprang up advertising themselves as easy providers of identification cards. Once the "patient" had an ID card, there was no further check on their ability to obtain or possess marijuana. The MMP amounted to a quick patch for a piece of legislation that was full of holes and served to solidify an already problematic system instead of fixing it.

Federal Response II: Raids on Dispensaries and Individuals

After facing a judicial injunction in its attempts to block physicians from recommending marijuana, and perhaps realizing that the market had found a way around that problem, the DEA began to initiate raids on individual dispensaries, seizing their materials and assets and shutting them down. These raids usually did not involve the arrests of the dispensary owners or patients, just the seizure of assets and/or the shutdown of normal operations.⁹⁰ Many of these operations were targeted at finding those who cultivated the plants for the dispensaries:

“What is the information that the D.E.A. wants from the people they detain in these raids?” a man asked.

⁸⁹ (County of San Diego v. San Diego NORML)

⁹⁰ (Samuels)

“They want to know who is in charge and where the medicine comes from,” Duncan answered. “They want growers.” Patient records were untouched. “They left all the concentrates,” he added, describing the aftermath of the raid on the Los Angeles Caregivers and Patients Group.⁹¹

In addition to physical raids, the Department of Justice would often seek to enjoin the dispensaries from selling or distributing marijuana (as in the landmark case *US. v. Oakland Cannabis Buyers’ Cooperative*).⁹² The dispensaries attempted to fight back using the courts as well. These cases tended to hurt as opposed to help the co-ops’ cause, ultimately stripping a number of presumptive defenses from both patients and staff facing federal law suits (these will be explored in greater detail in Section 4 of this paper). They also failed to stop the DEA, not even producing an injunction against the shutdowns. Instead, the DEA’s success in court only emboldened them; in the immediate wake of the Oakland Cannabis Buyers’ Club case, the federal government raided the Los Angeles Marijuana Resource Center, a dispensary supplying nearly 1000 patients, three-quarters of whom had AIDS.⁹³

DEA raids on dispensaries became the primary federal tactic in the war on medical marijuana in California; these were supplemented by numerous raids on the homes of individuals, usually those who grew the substance in large quantities. In contrast to the dispensary raids, these individuals were often arrested as well. Such was the case for the home of Diane Monson, who together with Angel Raich grew marijuana to ease complicated medical conditions; the DEA destroyed all six of the plants the duo were cultivating, leading to another landmark case, *Raich v. Gonzales*.⁹⁴

During George W. Bush’s administration alone almost 200 raids were conducted in California.⁹⁵ The fact that medical marijuana continued to exist and even thrive is indicative of

⁹¹ *Ibid.*

⁹² (United States v. Oakland Cannabis Buyer's Cooperative)

⁹³ (Shohov 131)

⁹⁴ (Gonzales v. Raich)

⁹⁵ (Vick)

the ultimate futility of this effort to expunge the drug from the state. Ultimately, the DEA's efforts were simply unsuccessful and financially wasteful.

Past the Ogden Memo

The 2009 memo from Deputy Attorney General David Ogden set up what essentially amounts to détente between the medical marijuana states and the Department of Justice. Eric Holder, the attorney general, promised that DEA raids on medical marijuana dispensaries would end.⁹⁶ In response, the ACLU dropped a major medical marijuana lawsuit that might have created more permanent change in federal policy (*Santa Cruz v. Holder*, which will be discussed in detail in the next section).⁹⁷ A shaky peace between medical marijuana users and the Obama Administration has been established.

Why, then, should medical marijuana in California still be considered an issue? The conflict has ended (at least for the time being), but the intrinsic problems in the CUA and MMP remain, and are actually increasing in the wake of the Obama administration's decisions; applications for medical marijuana retail outlets surged in the wake of Holder's statement on the DEA.⁹⁸ The sheer volume of new establishments means they are more likely meant to profit off individuals who are not in dire need of the drug, as opposed to a sincere desire to aid sick patients. The gray market continues to exist in California, and now that the federal government has ceased to oppose it, expansion is inevitable. Instead of merely giving up on the issue of medical marijuana, the time has come for the federal government to guide its development, ensuring a uniform standard while preventing the de facto legalization of recreational marijuana use.

⁹⁶ (A. Johnson)

⁹⁷ (County of Santa Cruz, et al., v. Eric H. Holder, Jr. - Joint Stipulation of Dismissal Without Prejudice)

⁹⁸ (Vick)

4. Medical Marijuana in the Courts

As difficulties with both federal and local law enforcement mounted, California medical marijuana users increasingly fought back by bringing their cases to the courts. Initial cases, particularly those that only went as far as the California Court of Appeals, tended to rely upon a combination of the CUA's stipulations and the Fourteenth Amendment – either the Equal Protection or Due Process clause, specifically the doctrine of medical necessity. As these arguments were disqualified, and the focus increasingly shifted to blocking DEA interference, the arguments increasingly appealing to the idea of federalism. In the wake of the Supreme Court's turn away from broad Congressional powers in *U.S. v. Lopez* and *U.S. v. Morrison*, the issue of medical marijuana became firmly entangled with that of Congress' Commerce Clause powers. Despite the Court's backpedaling in *Raich v. Gonzales*, the issue of whether the federal government can properly intervene in California's medical marijuana experiment still has unresolved aspects, aspects that might have come to light in *Santa Cruz v. Holder* had the case not been abandoned after the Ogden memo. This section explores the evolution of medical marijuana defense and the corresponding judicial response.

Equal Protection and Substantive Due Process

Many medical marijuana users facing prosecution initially sought remedies under the Equal Protection Clause of the Fourteenth Amendment. A number of these centered around the federal government's own short-lived compassionate use program, with the obvious argument that allowing some users to obtain medical marijuana while others were forbidden to use it was unconstitutional as well as blatantly hypocritical. In *Kuromiya v. United States*, the plaintiffs did

just that, presenting a claim of violation of equal protection because the government allowed only a small number of users into the federal program.

Kuromiya, however, ran into the same problem most equal protection and substantive due process cases do – the issue of fundamental rights. If the court believes that there's a fundamental right at stake, the issue is subject to strict scrutiny – the government must meet the burden of proof that its actions were absolutely necessary. However, if there is no fundamental right or liberty interest present, the courts will use rational basis review, where the government merely needs to have a reasonable explanation for their actions. *Kuromiya* fell under rational basis review, and the government had a rational basis to withhold marijuana supplies:

Specifically, the government decided to terminate the program altogether, citing among its reasons "bad public policy, bad medicine, . . . the existence of alternative treatments" and a need to "balanc[e] the government's desire to avoid distributing marijuana to increasing numbers of individuals with the interests of those who had already relied upon the drug." The court's opinion turned upon this last distinction between those who have used marijuana medicinally with the government's blessing for many years, and those that had not. Despite the "obviou[s] tension between the government's repeated statements that marijuana has not been proven to provide any beneficial results and its decision to continue supplying it to eight individuals for medical needs," the government could, the court ultimately held, treat these two groups of people differently, as the government could treat a problem bit by bit, or treat only one aspect of a problem at a time.⁹⁹

The failure of the equal protection argument in *Kuromiya* (perhaps one of the only successful arguments that could be made about unequal treatment with regard to medical marijuana on the federal level) suggests that equal protection claims would not be a good defense for medicinal marijuana users.

Substantive due process arguments, relating to the unenumerated rights protected by the Due Process Clause of the Fifth Amendment, have been somewhat less high-profile. In part this has been because fundamental liberty interests related to medicine have been becoming steadily less successful in court:

⁹⁹ (Newbern 1596)

Outside the context of abortion... courts have hesitated to recognize fundamental rights related to medical treatment. Particularly, courts have denied that patients possess a fundamental right to choose a particular method of treatment for their illnesses...¹⁰⁰

Key cases such as *Washington v. Glucksberg* (1997), where the Court decided there was no such thing as a “right to die” in the matter of patient-assisted suicide, and *United States v. Rutherford* (1979), where cancer patients were not allowed to use an experimental treatment banned by the FDA, indicate a growing reluctance by the judicial branch to acknowledge patient rights where they may conflict with other authority. There is a high probability that substantive due process cases brought by medicinal marijuana users would be treated similarly.

The National Organization for the Reform of Marijuana Laws (NORML) did file an amicus brief in *U.S. v. Oakland Cannabis Buyers Cooperative* (a case discussed in greater detail below) that suggested that medical marijuana use for cases that would otherwise prove debilitating or fatal was part of a fundamental “right to life.” The Supreme Court explicitly did not address the issue of substantive due process in their opinions, denying that they needed to worry about constitutional avoidance (in other words, dealing with constitutional shortcomings in the law such as Fifth Amendment violations) in the face of the failure of medical necessity:

Because we have no doubt that the Controlled Substances Act cannot bear a medical necessity defense to distributions of marijuana, we do not find guidance in this avoidance principle. Nor do we consider the underlying constitutional issues today. Because the Court of Appeals did not address these claims, we decline to do so in the first instance.¹⁰¹

As a result, substantive due process may still be a significant argument for those patients who are so debilitated that they cannot lead a manageable life without medicinal marijuana. However, this defense has fallen out of usage in the wake of more decisive cases relating to medical necessity and the Commerce Clause, each of which would provide broader defenses to those who are not critically ill if they proved successful in court.

¹⁰⁰ *Ibid.* 1591

¹⁰¹ (*United States v. Oakland Cannabis Buyer's Cooperative*)

Medical Necessity

The few faint stabs at using equal protection theory to support medical marijuana use failed, thus leading defendants to try a new tactic using the doctrine of medical necessity – the idea that they had to use medical marijuana in order to save their lives/guarantee their welfare, which in turn justified breaking the law. Medical necessity was frequently used in state courts for arguments in cases such as *People v. Trippett* (1997). When the Department of Justice sued to shut down the Oakland Cannabis Buyers' Co-op, their primary defense was that the actions they'd taken in distributing medical marijuana patients were also medically necessary.

Far from accepting this defense, the Supreme Court proceeded to tear it to pieces. Justice Thomas's majority opinion began by questioning the use of necessity doctrine in the first place:

We note that it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute. A necessity defense "traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." (United States v. Bailey(1980)). Even at common law, the defense of necessity was somewhat controversial... And under our constitutional system, in which federal crimes are defined by statute rather than by common law... it is especially so. As we have stated: "Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference."¹⁰²

More importantly, when looking to the CSA, the Court decided that the wording of the Schedule system specifically worked against any concept of medical necessity, noting that "a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act. The statute, to be sure, does not explicitly abrogate the defense. But its provisions leave no doubt that the defense is unavailable."¹⁰³

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

According to Thomas, Schedule I of the CSA made a “determination of values”¹⁰⁴ indicating that marijuana had no acceptable medical use, thus rendering any medical necessity defense moot. Necessity defenses crumble in the face of statute, and, as the Court stated:

For marijuana (and other drugs that have been classified as "schedule I" controlled substances), there is but one express exception, and it is available only for Government-approved research projects, § 823(f). Not conducting such a project, the Cooperative cannot, and indeed does not, claim this statutory exemption.¹⁰⁵

While the decision was a unanimous 8-0 (Justice Breyer recused himself, as his brother had delivered one of the majority opinions from the lower courts), Justice Stevens did write a concurrence that left some opening for individuals who wished to claim medical necessity, insisting that the Court’s holding was actually quite narrow: “Lest the Court's narrow holding be lost in its broad dicta, let me restate it here: ‘[W]e hold that medical necessity is not a defense to *manufacturing and distributing* marijuana. [emphasis in original]’”¹⁰⁶ Stevens felt that casting doubt on any necessity defense that does not have explicit statutory support was excessive, as well as overbroad. His appeal to narrowness also recognized some key principles of federalism:

The overbroad language of the Court's opinion is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to "serve as a laboratory" in the trial of "novel social and economic experiments without risk to the rest of the country."¹⁰⁷

Regardless, the Court’s supposedly narrow holding had wide-reaching effects on the use of medical necessity defenses, even on individuals. Two patients, “Todd McCormick and Peter McWilliams, who suffered from bone cancer and AIDS respectively...”¹⁰⁸ were brought into district court on federal drug charges. The district court judge, George King, ruled that neither

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ (Newbern 1597)

defendant could use a medical necessity defense – thus depriving them of any and all evidentiary claims about their medical conditions, reasons for using the drug, or the existence of the Compassionate Use Act.¹⁰⁹

Even if, as Stevens indicated, the Court’s holding in *US v. OCBC* was intended to be a narrow one, Thomas’ opinion effectively eviscerated the medical necessity defense for all medical marijuana patients as well as distributors. If supporters of medical marijuana wanted to defend themselves against federal charges, they would need a new argument.

The Commerce Clause – Background

The end of medical necessity forced medical marijuana proponents to consider other strategies. As most of the resistance to usage was now coming from out of state, there was a definite logic in choosing the doctrine of federalism – the notion that the federal government should have limited powers, with the remaining governing force issuing from state and local authority. As Justice Kennedy wrote in *U.S. Term Limits v. Thornton* (1995):

The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.¹¹⁰

Article I, Section 8 of the Constitution enumerates Congress’s only powers, with all other powers being delegated to the states as independent entities, as further guaranteed by the 10th Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹¹¹ Yet among these enumerated powers (including both major international duties such as declaring war and more minor national ones such as establishing post offices,) one eventually emerged as the de facto

¹⁰⁹ *Ibid.* 1598

¹¹⁰ (Stone, Seidman and Sunstein 164)

¹¹¹ US Constitution, 10th Amendment

way for Congress to impose laws upon the states: the ability to regulate interstate commerce, frequently called the Commerce Clause.¹¹²

The first expansion of the Commerce Clause came with *Gibbons v. Ogden* (1824), where a majority opinion by Chief Justice John Marshall found that commerce was more than mere exchange, but also everything involved in that process, including navigation, noting that “Commerce, undoubtedly, is traffic, but it is something more: it is intercourse.”¹¹³ This definition broadened the notion of the Commerce Clause beyond the strictest definition of mere trade of goods to include all the surrounding processes that were necessary for doing so, but ultimately retained the essential character of the limitations on Congress.

A far more major expansion would occur in the 20th century, beginning with the case *NLRB v. Jones & Laughlin Steel Corp* (1937). The case found the federal National Labor Relations Board accusing the Jones & Laughlin Steel Corporation of unfair labor practices.¹¹⁴ Here the Supreme Court made its first differentiation between “direct” and “indirect” effects on commerce, and which effects Congress could control. Determining whether or not the references to interstate commerce were at the heart of the law or “merely colorable,” the Court wrote:

...[The Act’s] terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power.

... Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise.¹¹⁵

The “close and intimate” relation between intrastate and interstate was actually found to exist in the specifics of the steel factory in question, after respondents contested the direct

¹¹² US Constitution, Article I Section 8.

¹¹³ (*Gibbons v. Ogden*)

¹¹⁴ (*NLRB v. Jones & Laughlin Steel Corp.*)

¹¹⁵ *Ibid.*

relation of the NLRB's provisions to interstate commerce, and the Court upheld the NLRB. Much like *Gibbons v. Ogden*, the *NLRB* Court held that the Commerce Clause gave the government the power to protect interstate commerce from all manner of "burdens and obstructions," even those that weren't purely transactional. Even as it widened the scope of Commerce's power, *NLRB* noted the dangers of unlimited Congressional power, noting that:

This power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.¹¹⁶

Following closely from *NLRB*, *Wickard v. Filburn* (1942) cemented the Commerce Clause's nearly invulnerable position which it held for most of the 20th Century. *Wickard* came after numerous Supreme Court cases that held New Deal legislation to be unconstitutional. In a dramatic reversal, *Wickard* held a tremendously invasive financial policy to be legal because of its tangential effect on interstate commerce.

Filburn was a small farmer who regularly set aside a portion of his own wheat to feed his cattle. The Agricultural Adjustment Act of 1938 allotted him a certain quota of wheat production that he was not allowed to exceed. When Filburn produced wheat over the quota, despite the wheat being solely for farm consumption, the government still asked for a stiff penalty fee for the excess crops. Filburn argued that since the crops were exclusively for his own private use, they were not involved in interstate commerce, and Congress had no constitutional authority to penalize him.

The Supreme Court made clear that they were no longer as interested in restricting Congress, holding that while previous discussion centered around whether or not states' actions

¹¹⁶ *Ibid.*

were infringing upon the Commerce Clause by regulating economic action between each other, the affirmative powers of the clause could also be explored:

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference, instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood...¹¹⁷

The Court held that Congress' commerce powers could be extended not just to the actual acts of commerce between the states, but also to anything that *affected* interstate commerce.¹¹⁸

The notion that intrastate activities could have a fundamental impact on interstate commerce gave Congress a constitutional way to enact legislation on virtually any topic. This new freedom is what led to the variety of federal criminal statutes established over the course of the 20th century, including the CSA. The question of whether or not the law actually dealt with a subject that had a substantial effect on commerce only became an issue when the Court finally began to limit Commerce Clause powers in *United States v. Lopez* (1995).

Lopez dealt with a high-school student who carried a loaded handgun to school with him, thus violating the Gun-Free School Zones Act of 1990, "which forbids 'any individual

¹¹⁷ (Wickard v. Filburn)

¹¹⁸ To support this, Justice Marshall quoted another opinion in *United States v. Wrightwood Dairy Co* (1942): *The present Chief Justice has said in summary of the present state of the law: "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."*

knowingly to possess a firearm at a place that [he] knows . . . is a school zone. . . .”¹¹⁹ As a result, Lopez was brought before a federal grand jury, who found him guilty of knowingly carrying a handgun onto school grounds. When Lopez appealed, the Supreme Court opened a completely new chapter on the Commerce Clause and the limits of federal criminal statutes.

Opening with a discussion of enumerated powers, Chief Justice Rehnquist’s majority opinion went all the way back to *Gibbons v. Ogden* to argue for inherent limitations on the Commerce Clause, including a quotation that’s notable for all purely intra-state matters:

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.¹²⁰

In *Lopez*, Rehnquist drew a line in the sand on what could reasonably be considered related to commerce in legislative action, noting that “[e]ven Wickard, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.”¹²¹ In short, the Court found no link between the Gun-Free Schools Act and economic activity:

Section 922(q) is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.¹²²

¹¹⁹ (United States v. Lopez)

¹²⁰ (Gibbons v. Ogden)

¹²¹ (United States v. Lopez)

¹²² *Ibid.*

Although Justice Breyer authored a dissent where he argued that the negative effects on education that the law prevented could be tantamount to interstate commerce, Rehnquist rejected this with a slippery slope argument:

...if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, a fortiori, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," cf. post, at 9, and that, in turn, has a substantial effect on interstate commerce.¹²³

The opinion, much like *NLRB*, did not establish a formal test for what would count as linked to interstate commerce, but nevertheless the Court thought “[these formulations] point[ed] the way to a correct decision of this case.”¹²⁴

Lopez was considered a milestone by those in favor of greater limits on federal power. After all, the case marked only “the second time [the Court] had struck down a federal criminal statute since 1936.”¹²⁵ Yet not everyone thought that *Lopez* was the beginning of a new era of judicial restriction on federal power; the specificity of the opinion combined with the lack of a substantial test made many believe it was “just a hiccup in the great saga of American constitutional law.”¹²⁶ *Lopez*’s staying power would eventually be established five years later with *United States v. Morrison* (2000).

Antonio Morrison was a member of the Virginia Tech football team, who admitted to assaulting and raping a young woman at his college. The woman, Christy Brzonkala, dropped out of school after Virginia Tech allowed Morrison to return from suspension, and proceeded to sue Morrison under the Violence Against Women Act of 1994 (VAWA). VAWA, along with providing funding for victims of gender-motivated violence, allowed civil rights suits against

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ (Newbern 1583)

¹²⁶ *Ibid.*

perpetrators. In a 5-4 decision, the majority, once again led by Rehnquist, overturned the civil remedy portion of the law, holding it outside of Congress' powers under both the Commerce Clause and the Fourteenth Amendment.

Rehnquist directly cited *Lopez* as the precedent for the decision that VAWA lacked a fundamental relation to interstate commerce, despite the government's claim of indirect effects from a perceived lack of safety on the victim's part. The majority opinion bluntly stated:

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.¹²⁷

The opinion once again backed this limiting of federal power in the context of a slippery slope. Rehnquist worried that allowing VAWA as part of the Commerce Clause "...would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."¹²⁸ *Morrison* effectively doubled down on the notion that Congress could not regulate non-economic criminal activity – that was a job the Constitution left to the states.

Both the Gun-Free School Zones Act and Violence Against Women Act were "by and large supported by the states in which they operated,"¹²⁹ with the lawsuits against them being brought by individuals and not the states. The states did not protest the additional federal legislation, which tended to duplicate existing state laws, yet the majority felt compelled to limit the legislative branch back to its enumerated powers. The renewed emphasis on states' rights

¹²⁷ (U.S. v. Morrison)

¹²⁸ *Ibid.*

¹²⁹ (Kreit 1792)

and corresponding federal limitations led to a flood of Commerce Clause challenges to federal laws;¹³⁰ among them an attempt to end the federal stranglehold on medical marijuana.

Gonzales v. Raich

In the wake of the end of medical necessity, numerous scholars began to suggest that the Commerce Clause could provide a remedy for state medicinal marijuana patients looking to end the DEA's interference in their actions. Alistair E. Newbern wrote a cautiously optimistic piece in the *California Law Review* suggesting that "after *Lopez* and *Morrison*, the federal government's authority to regulate intrastate use of marijuana for medicinal purposes is not the foregone conclusion it once was."¹³¹ Others were more dubious; Charles Doyle argued that the Controlled Substances Act "including its proscriptions on the cultivation, distribution and possession of marijuana, appears to be within the Congress' Commerce Clause powers as described in *Lopez* and *Morrison*."¹³² There was only one way to determine whether the Rehnquist Court's newfound dedication to federalism would extend to medical marijuana: a case would have to test the defense in court.

The first major Commerce Clause challenge to DEA authority came with *Gonzales v. Raich* (2005), a case that was seen as the Court's follow-up to *Lopez* and *Morrison*. The case began with plaintiffs Angel Raich and Diane Monson, two Californian women who suffered from serious medical ailments that they were treating with marijuana. Raich's doctor attested that her illness could well be fatal were it not for marijuana treatment.¹³³ In 2002, both county sheriffs and DEA agents closed in on Monson's home. While the county officers decided the six

¹³⁰ (Newbern 1607)

¹³¹ *Ibid.* p. 1575

¹³² (Shohov 127)

¹³³ (*Gonzales v. Raich*)

cannabis plants Monson was growing were legal under California law, the federal officers seized and destroyed them. Raich and Monson sued for a preliminary injunction under the Commerce Clause, arguing “that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeded Congress' authority under the Commerce Clause.”¹³⁴ The federal government countersued, and the case went through the lower courts, a process that generated wildly disparate opinions before finally making it to the Supreme Court.

Noting the lower courts’ reliance on *Lopez* and *Morrison* in those opinions that validated a Commerce Clause challenge, Justice Stevens’ opinion (in a notable reversal of the federalism he endorsed in *United States v. Oakland Cannabis Buyers’ Cooperative*) instead turned to *Wickard v. Filburn* as the appropriate precedent for the case. Stevens called the similarities between *Wickard* and *Raich* “striking”:

Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses ..." and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets.¹³⁵

Although *Wickard* and *Raich* both involved the purely local cultivation/consumption of goods that Congress intended to control on a national scale, the differences between the cases are easily apparent from Stevens’ own statement. Because medical marijuana is a technically illegal product, Congress’ interest in managing its prices outside of Monson’s home was much more tenuously linked to interstate commerce than the supposed “aggregate behavior” that was a central component of *Wickard*. While it is true that marijuana prohibition traditionally aims to

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

make “the drug expensive and difficult to obtain,”¹³⁶ the purely local character of Monson and Raich’s consumption should have erased any pretense of effect on national markets. The two were using the drugs they grew themselves, not selling the products.

Stevens’ opinion justified the comparison by arguing that medical marijuana could be “drawn into” the interstate market:

The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety.¹³⁷

The majority opinion did take care to distinguish *Raich* from *Lopez*, arguing that the Controlled Substances Act was more closely tied to economic activity, and that the scheduling system itself was an “essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”¹³⁸ The Court still refused to establish a test for what could and could not be considered economic, instead using a 1966 Webster’s Dictionary to provide a definition, calling it “the production, distribution, and consumption of commodities.”¹³⁹ This, of course, is an immensely broad definition, as other scholars have noted:

Almost any human activity involves the “distribution” or “consumption” of a commodity, if not its production. Having dinner at home surely involves the “consumption” of a commodity – food. Similarly, giving a birthday present to a friend surely involves the “distribution” of a commodity. Any such activity involving production, consumption or distribution can now be regulated by Congress so long as its aggregate effect has a “substantial” impact on interstate commerce; and it is hard to deny that the aggregate impact of eating and gift-giving on interstate commerce is indeed substantial.¹⁴⁰

¹³⁶ (Room, Fischer and Hall 53)

¹³⁷ *Ibid.*

¹³⁸ (Gonzales v. Raich)

¹³⁹ *Ibid.*

¹⁴⁰ (Somin 10)

Tossing aside Rehnquist's fears of a slippery slope towards limitless federal power, the majority opted for the broadest possible definition of what economic activity could mean, and proceeded to back it up by resurrecting the idea of a "rational basis" as all that was needed for Congress to relate their legislation to interstate commerce. The Court claimed that they "...need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding."¹⁴¹ The highly permissive nature of the rational basis test was a far cry from the strict nature of *Lopez* and *Morrison*, each of which implied that findings of fact would be the crucial element when Congress attempted to link legislation to economic activity. Use of a rational basis test did not require such findings, only that Congress had a "rational basis" to make the decisions it did – once again removing a potential control on federal power.

Even Justice Scalia seemed to think the majority's broadening of the Commerce Clause was unacceptable, filing a concurrence where he argued the government's case could only be made under the Necessary and Proper clause. Scalia repeatedly insisted that this would be a more limited method of justifying congressional power with only the vaguest justification of what would make it so:

Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective.¹⁴²

Given the broader interpretation of a "market" that the majority endorsed, Scalia's vision of the Necessary and Proper Clause as an alternative to Commerce Clause powers seemed rather irrelevant.

¹⁴¹ (Gonzales v. Raich)

¹⁴² *Ibid.*

The majority opinion featured other broad opinions beyond what could be regulated under the Commerce Clause. While the Court of Appeals argued that there might be a sub-class of users that were purely intrastate, medical and in accordance with state law, Stevens' opinion argued that there was no statutory exemption for that class, and Congress did not have to create one – once again defending the legislation under the umbrella of “rational basis” theory. Indeed, Justice Stevens heavily implied that such an exemption would prove problematic, as he believed medicinal marijuana would flood into the normal market:

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious.¹⁴³

Given how loose the Compassionate Use Act's terms are, perhaps this fear was justified, but that still does not change the essential character of Stevens' statement. The implication was that state law was not sufficiently controlling medical marijuana, and that as a result, it was leaking into the recreational market. The majority opinion basically accused the state government of not doing its job well enough, while making a generalized and baseless assumption about the medicinal marijuana movement as a whole.

Justices Thomas, O'Connor and Rehnquist all dissented, with O'Connor and Thomas each writing separate dissents. O'Connor's dissent was a stirring endorsement of stricter limitations on Congress in the name of federalism, citing Justice Brandeis' legendary opinion in *New State Ice Co. v. Liebmann*:

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government... One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a

¹⁴³ *Ibid.*

single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹⁴⁴

O'Connor, despite acknowledging that she would not have personally voted for medical marijuana, nonetheless insisted on California's right to act as a laboratory in the manner Brandeis suggested. She reacted furiously to the majority's removal of limitations on federal powers. Much of her dissent suggested that the Court was not following the same reasoning that informed *Lopez*, but rather warping it to its own ends:

Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme.¹⁴⁵

O'Connor went on to say that the decision rendered *Lopez* as "nothing more than a drafting guide," in that it meant Congress could have achieved fundamentally the same aims constitutionally just by using different wording.¹⁴⁶ By implying that the *Raich* decision utterly defanged *Lopez*, she further called the Court to task for denying precedent.

While Justice O'Connor acknowledged the difficulties of analyzing Commerce Clause cases in such a way that would produce a meaningful test – even admitting that the specifics of each law could come into play in a way that would make uniform standards difficult to accomplish – she still railed against the Court's definition of what could be considered economic, arguing that the definition the Court gave allowed a "federal police power":

The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market.¹⁴⁷

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

O'Connor disagreed with the majority opinion across the board, also believing that it was possible to create a dual-class distinction between medical and non-medical users. Justice Thomas, writing a separate dissent as well as joining O'Connor's opinion, was somewhat more moderate, mostly arguing against Scalia's interpretation of the Necessary and Proper Clause and suggesting tighter adherence to enumerated powers. He also defended California's ability to administrate itself against Justice Stevens' suggestion that medicinal marijuana would leak into recreational markets:

We normally presume that States enforce their own laws, and there is reason to depart from that presumption here: Nothing suggests that California's controls are ineffective...

But even assuming that States' controls allow some seepage of medical marijuana into the illicit drug market, there is a multibillion-dollar interstate market for marijuana. It is difficult to see how this vast market could be affected by diverted medical cannabis, let alone in a way that makes regulating intrastate medical marijuana obviously essential to controlling the interstate drug market.¹⁴⁸

Of course, Justice Thomas' and O'Connor's dissents were just that – dissenting opinions that did not change the outcome. Growing medical marijuana was still illegal under the CSA, and now even the exceptions suggested in Justice Stevens' dissent in *US v. Oakland Cannabis Buyers' Cooperative* seemed exhausted. While the Court stopped short of eviscerating the substantive due process defense that it left similarly untouched in prior cases, if individual conduct could count as economic activity in the aggregate, then Congress (and by extension the DEA) had Commerce Clause authority to enact the CSA against anyone who possessed medical marijuana in the state of California.

Santa Cruz v. Holder

As *Gonzales v. Raich* went into appeal, another pitched battle was being fought in the courts, this one over the shutdown of a dispensary. In 2002, the DEA raided the Wo/Men's

¹⁴⁸ *Ibid.*

Alliance for Medical Marijuana (WAMM), seizing plants and harvested marijuana as well as detaining several of its patients.¹⁴⁹ In response, WAMM, in conjunction with the highly supportive city of Santa Cruz, sued for a preliminary injunction against the government's behavior in much the same manner that Raich and Monson did for *Gonzales v. Raich*. Filing an extensive complaint listing the suing patients' numerous maladies, WAMM and Santa Cruz presented a list of possible actions, among them substantive due process and Commerce Clause claims.¹⁵⁰ Yet they also went to the unprecedented step of claiming a cause of action under the Tenth Amendment:

DEA seizure of medical marijuana violates the Tenth Amendment by preventing the State of California from implementing a duly enacted statute, the Compassionate Use Act of 1996. Such seizures commandeer the police power of the State of California and its political subdivisions, including the County of Santa Cruz, over the health and safety of California citizens.¹⁵¹

The accusation of commandeering was a fresh attack on the “federal police power” that Justice O'Connor feared. While few laws had been invalidated under the commandeering principle until the 1990s, the case of *New York v. United States* (1992) initiated a brief wave of cases where statutes were overturned for forcing states to enact federal regulations.¹⁵² Whether cases such as *New York v. US* and its follow-up, *Printz v. United States* (1997) are actually applicable to cases where the DEA enforced regulations is questionable; both of those cases dealt primarily with situations where the federal government compelled the state to enforce a law, as opposed to intervening directly, as the DEA did in California. The DEA certainly *superseded* California's police power, but federal agents carried out the actions, not county officials, so the charge of commandeering would appear to be less than founded.

¹⁴⁹ (Santa Cruz v. Holder)

¹⁵⁰ (FindLaw Legal News and Breaking Documents) 25-27

¹⁵¹ *Ibid.* 29

¹⁵² (Printz v. United States)

The federal government moved to dismiss the suit, and Judge Jeremy Fogel of the District Court relented, citing *Glucksberg*, the then-pending *Raich* and the difficulty of a Commerce Clause challenge as reasons that the case could fail on the merits of the actions.¹⁵³ WAMM appealed to the Ninth Circuit, who eventually asked Fogel to reconsider the case in light of *Raich*, prompting the plaintiffs to create a second complaint arguing that the federal government's strategies had the ultimate effect "rendering California's medical marijuana laws impossible to implement and thereby forcing California and its political subdivisions to recriminalize medical marijuana."¹⁵⁴ This time, when the government once again moved to dismiss, Fogel changed his opinion and argued that, if in fact there was deliberate subversion, then the plaintiffs' claims could be cognizable:

If Plaintiffs can prove that Defendants are enforcing the CSA in the manner alleged, a question as to which the Court expresses no opinion, they may be able to show that Defendants deliberately are seeking to frustrate the state's ability to determine whether an individual's use of marijuana is permissible under California law. A working system of recommendations, identification cards and medicinal providers is essential to the administration of California's medical marijuana law. The effect of a concerted effort to disrupt that system at least arguably would be to require state officials to enforce the terms of the CSA.¹⁵⁵

From there, the case would ostensibly have proceeded to a full case where the merits would be discussed. However, just a few months later, U.S. Attorney General Eric Holder made the public announcement of a shift in DOJ policy, followed by the Ogden memo. In response, the plaintiffs dropped the lawsuit, dismissing it without prejudice, although guaranteeing that they could reinstate the case if the DEA no longer held to Ogden's terms:

The parties further stipulate and agree that if Defendants withdraw, modify or cease to follow the Medical Marijuana Guidance, this case may be reinstated in its present posture on any Plaintiffs' motion, although if any Plaintiff seeks to reinstate this case, Defendants reserve the right to argue that they have not withdrawn, modified or ceased to follow the Medical Marijuana Guidance, and that this case is moot.¹⁵⁶

¹⁵³ (Judge_Fogels_Decision.pdf)

¹⁵⁴ (santacruzvgonzalesfogelrulingagainstgovmotiontodismiss.pdf)

¹⁵⁵ *Ibid.*

¹⁵⁶ (santacruzvholder_stipulationdismissal_20100121.pdf)

The reactivation clause essentially means that as long as the DEA leaves the cooperatives alone, the case will continue to exist in legal limbo, waiting for the potential change in federal policy that would make it necessary. The détente between the Obama Administration DOJ and the medical marijuana community was official.

What Remains Unresolved?

As the dust settled on the numerous cases the courts processed relating to the Compassionate Use Act, a number of prospective defenses for patients, caregivers and cultivators stood eviscerated. Equal protection, medical necessity and Commerce Clause arguments had all been heard and deemed inadequate by the Supreme Court. By the time of the Ogden Memo, however, there were still a few possible actions left untouched, that could be resurrected should the DEA ever return to its offensive against the CUA.

Substantive due process arguments were repeatedly put forth but never considered by the courts. Their success seems unlikely with the Court's history in *Rutherford* and *Glucksberg*, but there is nonetheless a possibility that the defense could be revived for seriously ill patients whose health will decline extraordinarily without medical marijuana. *Santa Cruz* included a substantive due process claim that wasn't seriously considered, but it's always possible that another case could bring it to the fore.

The Tenth Amendment commandeering charge that *Santa Cruz* put forth was also never put to the test in court. Given how the courts have treated more plausible arguments such as those relating to the Commerce Clause, it seems a bit of a stretch to believe that they would seriously consider the federal government's actions to be beyond a rational basis. Regardless, were the DEA to reinstate raids, *Santa Cruz* would be reinstated as well, and the case could conceivably reach the Supreme Court. Given the roughly ten year gap that would likely transpire

between *Raich* and whenever *Santa Cruz* finished the appeals process, the Supreme Court could have a different set of justices with different opinions; many of the justices who decided *Raich* (among them both Stevens and O'Connor) have already retired. In other words, whether or not the positive defenses remaining to medical marijuana users are effective is still an unknown, and cannot really be predicted unless the cases against the government are reactivated.

5. What Can the Federal Government Do?

The Ogden memo left the situation in California largely unresolved – by simply abandoning their previous strategies against medical marijuana, the federal government essentially left the issue entirely up in the air, creating no useful precedents or even truly any decision-making beyond a simple truce with the medical marijuana users. From here, future administrations could make any number of decisions to change the federal government's stance towards medical marijuana – and some would be more productive than others.

Option One: Continued Détente

The easiest option to pursue is the one that's already in place. The federal government could continue to abide by the terms of the Ogden memo, and dedicate DOJ and DEA resources to other pursuits instead of hounding medical marijuana dispensaries and users. There are definite upsides to this policy: conserving the government's limited resources for targets that might actually have a legitimate effect on the war on drugs is certainly one of these, and the détente forgoes further lawsuits and court cases a la *Santa Cruz*. Those who truly need medical marijuana are left unmolested.

Yet the uneasy truce set up between the executive and California has many drawbacks. For one, each new administration still has the option to undo the Ogden memo and resume the raids and lawsuits against medical marijuana in California, leading to a troubling lack of permanence for the *détente*. Much worse, however, is that the truce doesn't do anything about the flaws in California's legislation.

By simply leaving the issue alone, the federal government hasn't stopped the prevailing tendencies towards the gray market. Applications for retail outlets selling marijuana "surged" in the wake of Holder's announcement.¹⁵⁷ Centers offering easy access to "pot cards" are bound to proliferate even further. Despite the announcement, doctors have not radically changed their stance towards prescribing medical marijuana. So the situation is still fundamentally the same as it was in the early 2000s: recreational users who just want an identification card from a potentially illegitimate source are still more likely to obtain one than legitimate patients who talk to their general practitioner.

There are still little to no limits on who can be considered an eligible patient. There are still fundamental differences from county to county as to enforcement of the rules as well as identification card systems. The truce that the Ogden memo provides might be good for current users and for a beleaguered justice system, but it does nothing to solve the fundamental problems of the CUA. Medical marijuana laws in California are still a crazy quilt of vague language, patchwork legislation and haphazard court decisions. And the fundamental tension between state law and federal law will still exist for patients who wish to travel outside the state, let alone between counties. So far, *détente* hasn't caused further harm, but it hasn't solved any problems.

¹⁵⁷ (Vick)

Option Two: Returning to Raids

A return to DEA crackdowns and subversion of California law is still possible at any time. While it's doubtful that the DEA would be able to accelerate beyond the usual dispensary shutdowns and federal criminal arrests that characterized earlier attempts to control medical marijuana, such efforts still further complicate attempts to safely provide actual patients with the medicine they need. Patients who actually do need medical marijuana – those suffering from AIDS, cancer, or glaucoma for example – would still likely find themselves facing harassment. This technique also leads to further law enforcement expenses, hundreds of court-clogging cases, and the redirection of resources away from the more crucial targets that Holder and Ogden have suggested.

Finally, if the federal government were to begin a fresh effort to work against Proposition 215, they would likely have to deal with the pending preliminary injunction given to *Santa Cruz v. Holder*, then wait while the case works its way through the court system before beginning a new round of enforcement. All of these problems would reemerge with the renewed implementation of a system that never did very much to control medical marijuana in the first place. DEA crackdowns only led to the creation and eventual thriving of the gray market; a resurgence of those tactics will not make it go away.

Legalizing Medical Marijuana

Perhaps the least likely path for the future of medical marijuana, and also the one with the greatest potential to change the current situation, is the federal government somehow allowing medical marijuana in the states. In the process of doing so, one would hope that marijuana would be rescheduled, firmer guidelines would be set in place for which patients could use the drug, and doctors would finally feel free to prescribe the drug in a more official distribution

system. If legal guidelines like these were set in place and offered as substantial carrots for states to work with the federal government instead of against it, a legitimate “white market” could replace the current gray market infrastructure in California.

There are numerous hurdles that would prevent such a system from coming about, not the least of which is reluctance from all three branches of the federal government to do anything about the problem. Numerous bills have come before Congress suggesting a rescheduling of marijuana in the CSA, or some method of allowing states to initiate medical marijuana programs without contravening federal law. Just as many bills have been proposed that would try to penalize those states that had already enacted medical marijuana in an attempt to dissuade other states from creating similar legislation. All of these have failed to leave committee, much less make it onto the floor for a vote.

The legislative branch refuses to touch the issue, and there are a number of possible reasons why. Medical marijuana is a politically sensitive issue – it deals with a cause that is traditionally only the province of the highly liberal or libertarian (marijuana legalization) but it does so in a way that foregrounds the suffering of people with legitimate medical concerns. Even in the best possible political climate, only a very small portion of politicians will want to associate themselves with marijuana legalization – those on the far left, perhaps identified with the progressive movement, or those libertarians who truly believe in small government (a surprisingly rare breed). Yet while no congressman wants to be the one to legalize pot, they certainly do not want to be seen as denying medicine to those who are gravely ill. Essentially, politicians looking to avoid controversy on the medical marijuana issue are damned if they do, damned if they don’t – and as a result, they simply submerge any attempt to deal with the matter in one way or another.

The executive branch has even less incentive to change their stance on medical marijuana. The DEA actually stands to gain so long as marijuana is considered illegal, as this inflates the number of drug users in the United States, creating statistics that are effective in arguing for a larger budget. While medical marijuana users make up just a small fraction of the number of total illegal users, many consider it one more step towards making marijuana use legitimate. Internal efforts at rescheduling the drug have already failed, and it is clear that the DEA's policy only changed when the Attorney General and Department of Justice completely changed their stance. Change seems to come from the top down.

Yet most presidents are unable to afford looking “soft on drugs,” especially those that have tried drugs themselves. This problem preemptively ended any attempt Clinton might have made to alter the DEA's stance on marijuana, despite his personal opinions on the issue. Obama's move towards détente is probably the most any president would dare to risk on the subject; the change attracted surprisingly little press in the midst of far more pressing national issues. The administration also waged a small campaign against Proposition 19, thus solidifying its stance as pro-medical marijuana but anti-legalization.¹⁵⁸ Had the Obama Administration done more towards actually legalizing medical marijuana, their actions might have aroused more controversy. While most presidents have asked for research to determine whether or not marijuana can be a legitimate therapeutic tool, this research is frequently ignored – again, probably because of political concerns. As more and more people try marijuana in their youth – and admit to experimenting with it if they embark upon a political career – it actually becomes less likely that they will push for progressive medical marijuana regulation, due to the contradictory demands of having to look tough on drugs because of their past.

¹⁵⁸ (ACLU)

So, if legalization were considered a legitimate possibility for medical marijuana, where would the impetus for change develop? With the normal routes for political change effectively frozen, the first spark would likely be a court case along the lines of *Santa Cruz* – admittedly itself a situation that will not arise unless the DEA resumes interference in California’s practices. However, should the case come to the Supreme Court, this would be a rare opportunity to revisit an issue under a different legal pretense – the Commerce Clause wasn’t considered a focal point of *Santa Cruz*’s action. To countermand the drastic shift away from federalism that was displayed in *Raich*, the Court could strengthen the Tenth Amendment in an effort to restore states’ rights. Such a decision would strengthen the “laboratory” and “vote with your feet” principles inherent in federalist thinking. The ideal outcome would end by allowing all states with medical marijuana statutes to continue their policies.

The Role of Other States

There is one other way that medical marijuana could be brought to the foreground of national consciousness, potentially forcing the federal government to take action on the issue. Numerous other states have legalized affirmative defenses for medical marijuana that are much more restrictive than California’s, among them Washington, Alaska, and Colorado.¹⁵⁹ Should one of these states move towards a broader law that’s also better structured than California’s, it could bring attention to the evolution of medical marijuana in the states.

The ACLU of Washington is currently looking to pass such a law, and the State Senate has already approved the new bill, which would offer greater protection to dispensaries as well as patients.¹⁶⁰ ACLU-WA has also been working on proposals to distribute marijuana through the

¹⁵⁹ (Shohov 90)

¹⁶⁰ (Valdes)

state's liquor stores¹⁶¹ – a highly controlled method of legalization that would doubtlessly bring attention to marijuana in the states. Such a system would be more immune to complaints of “leaking” into other markets, as Justice Stevens feared in *Raich*. Should the new laws garner national attention, more states might try similar systems, and eventually the public response could force Congress to finally acknowledge medical marijuana statutes in one way or another – and likely create further regulations as to the drug's distribution and use that would change California's system for the better.

Federal Medical Marijuana Statutes?

If a new development such as a court case or other state development occurs, the other branches could choose to react in one of three ways: returning to subversion (note that an unfavorable outcome in court could rule this out), maintaining *détente*, or rescheduling marijuana on the CSA and creating a new framework for the states. Of the three, the most effective choice would be creating a new system that states could choose to adopt. Given the legislature's current attitude towards medical marijuana, a federal statute would have much less permissive language than the CUA, and would likely make greater efforts to control who is given access to medical marijuana. The legislature could then coerce states into implementing its vision of medical marijuana through the usual carrots and sticks applied to federal laws – distribution of funding, eligibility for certain federal programs, etc. Federal backing of medical marijuana in limited circumstances would enable doctors to prescribe cannabis more freely for cases that truly demanded it. Before long, the new rules would allow a white market to overtake and subsume the gray market that the CUA and MMP allowed.

¹⁶¹ Interview with Alison Holcomb conducted Spring 2011.

Of course, the vision of a federally-sanctioned white market outlined above has numerous hurdles towards its becoming a reality, beyond even the requisite court cases and appropriate legislative response. Should marijuana become an official drug approved for medical usage, the FDA would have to set standards for uniform quality and dosage of the substance – something that’s notoriously difficult with cannabis, which produces different reactions in many users.¹⁶² The difficulties of standardization could lead to complications.

Another would be the perennial questions of the legality of growing, possessing, and transporting medical marijuana, and in what quantities. Any framework that would provide an impetus for change would likely be substantially different from California’s current system, and as a result local and state law enforcement would once again have to go through a period of adjustment – not to mention the current medical marijuana users, who would have to change their current system to adopt that of the federal government. Such a situation could potentially lead to further state-federal conflict.

In sum, even the net positive changes that could occur should the federal government begin working *with* the states in regulating medical marijuana instead of against them would be fraught with challenges. Because of the way the situation in California has evolved, with a patchwork of local laws and highly idiosyncratic county enforcement, a uniform standard of the variety that the CUA should have attempted from the beginning will now be difficult to accomplish. Of course, the potential benefits that would come from ending the state-federal conflict and getting rid of the gray market are many, and would likely benefit all those whose suffering could truly be cured by medical marijuana but are currently incapable of obtaining it through the white market, while minimizing the amount of “leakage” to recreational users. The difficulties could be numerous, but that shouldn’t prevent an attempt at trying to resolve them.

¹⁶² (Shohov 28-30)

There are very few systems that would be worse at accomplishing the voters' intent than the one that's currently in place.

6. Conclusion

The Compassionate Use Act began life as faulty legislation: overbroad, under-defined and with no clear strategy for implementation. As a result, the CUA was initially ignored by local law enforcement and the executive branch of the state government. As the counties and courts were left to fill in the gaps, a patchwork quilt of differing rules and regulations developed. These growing pains were only exacerbated by the federal response, which aimed to shut down medical marijuana use in the area through chilling physicians' speech and raiding dispensaries and patients.

Instead of preventing the state from enabling medical marijuana, the federal response merely pushed it out of the hands of more qualified doctors and physicians, helping to create the gray market – a makeshift system of “recommendations” and DIY dispensaries that operate outside the traditional medical establishment, and as a result often sell to those who have less serious needs. The system is anything but controlled. As even transportation quantities and the legality of selling the substance had to be worked out through the California courts, there's been even fewer opportunities to create uniform doses for patients, ensure the quality of materials or even really tightly regulate how one comes to be identified as a medical marijuana user.

Medical marijuana laws became linked to federalism in the Courts through cases like *Raich v. Gonzales* and *Santa Cruz v. Holder*. But while those cases have important implications for Congress' Commerce Clause powers and the commandeering principle in the 21st century, medical marijuana in the states really comes down to the principles of federalism as a whole.

Madison's *Federalist* papers outlined a system where local government would by and large retain most of its powers, and Congress would generally leave these alone in favor of tending to national affairs. Such a system has distinct advantages: the ability for some states to act as "laboratories" for legislation in others, the notion that citizens can "vote with their feet" by moving to states that have the policies they prefer, and the encouragement of direct democracy through citizens organizing initiatives. By pioneering medical marijuana initiatives, California attempted to act as a laboratory, and the federal government worked tirelessly to interfere in any way it could.

This intervention represents another step toward a federal police power at a time when our country needs federalism more than ever. The United States has not been more politically polarized since at least the 1960s. The emergence of radical groups such as the Tea Party within the greater party structure as well as the difficulties the 2008 Congress faced in passing legislation should confirm that the United States is currently experiencing extreme internal divisions. A stronger federal government will only exacerbate these problems. When citizens are possessed of such highly differing opinions, the ability to move to states that support the legislation citizens want – be it medical marijuana support, more gun rights, or legal gay marriage – will go some way towards alleviating those political tensions without forcing the entire nation to make a decision one way or the other. The United States were meant to reflect their name: a collection of smaller jurisdictions with differing policies that could also operate as a nation, as opposed to one massive unified state with uniform laws.

The Ogden memo implicitly went back to some of the principles of federalism by reining in the Department of Justice's activities within the states. Yet the damage had been done: the CUA and MMP's growth was thoroughly stunted by the DEA's continued raids and harassment.

What is now necessary – what may, indeed, have been necessary from the start – is outside guidance in reforming California’s medical marijuana laws to thoroughly establish marijuana as controlled medicine and not a *de facto* legal substance. Such guidance could come from another state creating a more efficient and controlled cultivation/distribution system that gains national support, or from a drastic sea change in government policy that leads to a renewed focus on medical marijuana in the courts.

Either way, the time has come for the federal government to stop creating problems for state medical marijuana programs and start helping them evolve towards a system that can effectively control the substance. Medical marijuana should be easy to obtain for those who truly need it, and kept out of the hands of those who don’t. California’s system has consistently failed to do this, and simply ending the federal war on medical marijuana statutes doesn’t repair the faulty mechanisms in place.

What’s necessary now isn’t just the federalism of non-intervention. The federal government must now offer positive support to the states that have undertaken medical marijuana statutes. Such a law could still support the values of federalism. By leaving states the option of whether or not to create medical marijuana statutes Congress could continue to support choice within the different states. At the same time, rescheduling medical marijuana and providing guidelines for its distribution and use would help states that have approved medical marijuana ensure that they have a more solid legal basis for their programs, and help them control the substance’s spread to create a white market for those in need.

Denying the existence of state medical marijuana statutes has proven ineffective. But if the federal government chooses to embrace them, there’s still a chance to make medical marijuana work in the manner that the voters intended. Non-intervention will not solve the mess

that federal-state interaction in California created, but positive interaction between the state and the federal government has a definite chance of fixing the state's problems.

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