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CAN STATE “MEDICAL” MARIJUANA STATUTES SURVIVE THE SOVEREIGN’S FEDERAL DRUG LAWS? A TOKE TOO FAR

M. Wesley Clark, JD, LL.M.*

I. INTRODUCTION

This article explores whether, and to what extent, federal authorities can enforce the federal Controlled Substances Act [CSA]¹ against state and local governments acting under color of a conflicting state or local law. The question is both important and timely, inasmuch as state and local jurisdictions have been enacting legislation in conflict with the CSA to permit personal use amounts of drugs (particularly marijuana) for professed pain-relief, other medical needs, and most importantly, because of the Supreme Court’s June 2005 six to three decision in *Gonzales v. Raich*.²

II. OVERVIEW

The clear import of federal law supports the view that the CSA, as well as implementing regulations, trump, preempt, and are “supreme” to contrary state and local laws.³ As an initial observation, note that Chief Justice Marshall remarked in *Gibbons v. Ogden*:

[that as] to such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, . . . [i]n every such case, the act of Congress . . . is supreme;

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1. *Comprehensive Drug Abuse Prevention and Control Act of 1970*, Pub. L. No. 91-513, Title II (i.e., §§ 100-709), 84 Stat. 1236 (1970). Title II of the Act is denominated the *Controlled Substances Act*. Although the bulk of the CSA is codified at 21 U.S.C. §§ 801-904, a relatively small number of its provisions are scattered elsewhere within the U.S. Code.

2. 125 S. Ct. 2195 (2005); *see also infra* note 37.

3. U.S. CONST. art. VI, cl. 2, provides, in pertinent part, that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” *See also* *Pearson v. McCaffrey*, 139 F. Supp.2d 113, 121 (D.D.C. 2001) (“Even though state law may allow for the prescription or recommendation of medicinal marijuana within its borders, to do so is still a violation of federal law under the CSA.”).

and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.⁴

As one constitutional law scholar, Professor Lawrence Tribe, said, “[u]nder the Supremacy Clause of Article VI, state action must give way to federal legislation where a valid ‘act of Congress fairly interpreted is in actual conflict with the law of the State.’”⁵ That scholar further observed that

[t]he Supreme Court typically divides preemption analysis into three categories . . . (1) “express preemption,” where Congress has in so many words declared its intention to preclude state regulation of a described sort in a given area; (2) “implied preemption,” where Congress, through the structure or objectives of its enactments, has by implication precluded a certain kind of state regulation in the area; and (3) “conflict preemption,” where Congress did not necessarily focus on preemption of state regulation at all, but where the particular state law conflicts directly with federal law, or otherwise stands as an obstacle to the accomplishment of federal statutory objectives.⁶

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4. 22 U.S. (9 Wheat.) 1, 211 (1824). See also 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1173 (3d ed. 2000) (quoting *Ogden*, 22 U.S. (9 Wheat.) at 211); *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 384 (1963) (“[T]he law of the State, though enacted in the exercise of powers not controverted, must yield’ when incompatible with federal legislation.” (quoting *Ogden*, 22 U.S. (9 Wheat.) at 211)).
 5. TRIBE, *supra* note 4, at 1179 (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912) (dictum)). Continuing, Professor Tribe asserted: “[r]egulations duly promulgated by a federal agency, pursuant to a valid congressional delegation, have the same preemptive effect.” *Id.* (paraphrasing holding reiterated in *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)).
 6. TRIBE, *supra* note 4, at 1176-77. See also *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

[S]tate law is pre-empted under the Supremacy Clause . . . in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law. . . . Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively. Such an intent may be inferred from a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” . . . Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found preemption where it is impossible for a private party to *comply* with both state and federal *requirements* . . . or where state law stands as an *obstacle* to the accomplishment and execution of the *full purposes* and *objectives* of Congress.

Id. (citations omitted) (emphases supplied).

Observe that in instances where Congress has chosen not to, or failed to, address preemption within a federal statute's confines, the Supreme Court will look to "whether challenged state action . . . 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"⁷ Professor Tribe adds that

a state action may be struck down as an invalid interference with the federal design either because it is in substantive conflict with the operation of a federal regulation or program . . . or because, whatever its substantive impact, it intrudes jurisdictionally upon a *field* that Congress has validly reserved for exclusively federal regulation⁸

Other commentators have similarly concluded that "[b]eginning with Chief Justice Marshall's opinion in *M'Culloch v. State of Maryland*,⁹ the Supreme Court has implied a *responsibility* for invalidating state laws which *appear* to conflict with federal law or policy."¹⁰ Two issues, the second of which touches on the matter before us, were paramount in *M'Culloch*; namely, whether the United States could establish a national bank even though the Constitution does not specifically enumerate the power to create one, and whether a branch of the national bank located in Maryland could properly be taxed by the state.¹¹ After concluding that Congress could properly enact all laws which are "necessary and proper," although not specifically enumerated, to fulfill its constitutionally assigned responsibilities, Chief Justice Marshall next turned to the state taxation question, noting that "a power to create implies a power to preserve" from whence it follows that "a power to destroy, if wielded by a different hand, is hostile to, and in-

7. TRIBE, *supra* note 4, at 1176 (quoting, in part, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (holding that the federal Alien Registration Act preempted a Pennsylvania state alien registration act because the federal scheme was comprehensive, and "the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution")). The *Hines* Court went on to say that:

in considering the validity of state laws in the light of treaties or federal laws touching the same subject, [we have] made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency, violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or exclusive constitutional yardstick.

Id. Further, "[i]n principle, a United States treaty or international agreement may also be said to occupy a field and preempt a subject, and supersede State law or policy even though that law or policy is not necessarily in conflict with the international agreement" RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. e (1987).

8. TRIBE, *supra* note 4, at 1177 (emphasis added).

9. 17 U.S. (4 Wheat.) 316 (1819).

10. 3 Chester James Antieau & William J. Rice, *Modern Constitutional Law* 33 (2d ed. 1997) (emphases added).

11. 17 U.S. (4 Wheat.) 316 (1819).

compatible with these powers to create and to preserve."¹² The Chief Justice also said that "where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."¹³ Continuing in this vein, the Chief Justice added that

no principle . . . can be admissible, which would defeat the legitimate operations of a supreme government. It is the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.¹⁴

Maryland acknowledged that states may not "directly resist" the national bank, but argued that it was only seeking to exercise its "acknowledged powers [of taxation] upon it."¹⁵ The Chief Justice easily disposed of this contention, commenting that whereas the citizens of Maryland could empower their state government with the authority to levy taxes upon that over which it had jurisdiction, only the people of the whole United States could confer the power to tax a *national* entity:

[t]he sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but . . . it [does not] extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States[.] . . . Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.¹⁶

The result is that

[w]e are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from repugnancy between a right in one government to pull down, what there is an ac-

12. *Id.* at 426.

13. *Id.*

14. *Id.* at 427. Professor Tribe contends that areas of the law where it is clear that Congress is constitutionally preeminent over the states are areas where "Congress has complete authority to define the distribution of federal and state regulatory power over what is conceded to be interstate commerce . . . suppression of sedition, debtors' rights in federal bankruptcy, and patent and copyright regulation." TRIBE, *supra* note 4, at 1173-74. He concludes that "[s]o long as Congress acts within an area delegated to it, the preemption of conflicting state or local action . . . flow[s] directly from the substantive source of whatever power Congress is exercising, coupled with the Supremacy Clause of Article VI . . ." TRIBE, *supra* note 4, at 1172.

15. *M'Culloch*, 17 U.S. (4 Wheat.) at 427-28.

16. *Id.* at 429.

knowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve.¹⁷

Further, the Court reasoned that

[t]he attempt to use it [the state's power of taxation] on the means employed by the government of the Union [the national bank], in pursuance of the constitution, *is itself an abuse*, because it is the usurpation of a power which the people of a single state cannot give.¹⁸

[T]he states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.¹⁹

III. DISCUSSION AND ANALYSIS

A. *Preemption: Conflicting, Supplemental and Occupying the Field*

Normally, the first task to be addressed would be to discern the scenario with which we are faced: are state "medical" marijuana laws, such as California's Proposition 215,²⁰ in *conflict* with the CSA, do they *supplement* it, or do they encroach upon a federally occupied *field*? In this case, Congress has provided us with a rather straightforward answer by apparently combining more than one category, particularly the first and the third, and providing us with a hybrid, as section 903 of Title 21 of the United States Code provides that

[n]o provision of this subchapter [21 U.S.C. §§ 801-904] shall be construed as indicating an intent on the part of the Congress to *occupy the field* in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.²¹

17. *Id.* at 430.

18. *Id.* (emphasis added).

19. *Id.* at 436.

20. Proposition 215 was codified as the Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2005).

21. 21 U.S.C. § 903 (2001). This provision was originally enacted as the Controlled Substances Act, Title II, Pub. L. No. 91-513, § 708, 84 Stat. 1236 (1970). The legislative history for H.R. 18583, 91st Cong. (1976), the bill which became law, does not shed much additional light on section 708. See H.R. REP. NO. 91-1444, at 60 (1970), *reprinted in* 1970 U.S.C.A.N. 4566, 4629. The legislative history simply states that "[t]his section provides that title II of the bill [the Controlled Substances Act] is not intended to occupy the field (including criminal penalties) to the exclusion of any otherwise valid State law unless there is a direct and positive conflict between the

Put differently, where a “positive conflict” exists between the CSA and state law such that “the two cannot consistently stand together,” the CSA “shall be construed” as evidencing Congressional intent to “occup[y] the field” in which the CSA provision operates “to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State. . . .”²² There can be no more obvious example of statutes in conflict than where one statute prohibits what the other statute *affirmatively*²³ professes to permit; where two laws “cannot consistently stand together.” The purpose of section 903, it is submitted, was not to restate the constitutional doctrine of federal preemption, but to make clear that Congress did not intend to be the sole occupant of the controlled substance field so long as state regimes on the subject were merely concurrent²⁴ with,

latter and a provision of this title, so that the two cannot consistently stand together.” H.R. REP. NO. 91-1444, at 60, *reprinted in* 1970 U.S.C.C.A.N. 4566, 4629.

22. 21 U.S.C. § 903 (2000).

23. As opposed to mere silence on the subject.

24. *See, e.g.,* *People v. Sheppard*, 432 N.Y.S.2d 467, 468 (1980) (“Although the Drug Enforcement Administration is a federal agency, concurrent jurisdiction with the State is intended under 21 U.S.C.A., section 903.”); *Hartford v. Tucker*, 621 A.2d 1339, 1341 (Conn. 1993) (“[T]he antipreemption provision of the Controlled Substances Act, evidences the fact that Congress specifically considered the issue of concurrent state proceedings and decided to allow them.”). Furthermore, in *United States v. Lanza*, the Supreme Court considered the propriety of prohibition-related liquor charges brought against defendants by both the United States and the state of Washington. 260 U.S. 377, 378-79 (1922). In *Lanza*, there was no question that the state of Washington and the federal government had concurrent jurisdiction. *Id.* at 381. Indeed, with respect to prohibition, the Eighteenth Amendment commanded concurrent jurisdiction. *See* U.S. CONST. amend. XVIII, § 2. Yet, according to the *Lanza* Court, the existence of concurrent power “does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.” 260 U.S. at 380 (quoting the National Prohibition Cases, 253 U.S. 350, 387 (1920)). The *Lanza* Court continued in this vein, finding that “[e]ach may, without interference by the other, enact laws to secure prohibition, with the limitation that *no legislation can give validity to acts prohibited by the amendment.*” *Id.* at 382 (emphases supplied). Moreover, in *Stubblefield v. Ashcroft*, which involved an Oregon “medical” marijuana statute similar to California’s Proposition 215, the plaintiffs sought a permanent injunction, whereupon the United States filed a motion to dismiss. *See* The Findings and Recommendations for *Stubblefield v. Ashcroft*, No. 03-6004-TC, *available at* <https://ecf.ord.uscourts.gov/> (D. Or. filed Mar. 24, 2003). The Magistrate Judge recommended that the Government’s motion be granted because the Oregon statute was in “direct conflict” with the CSA and therefore, the state statute could not stand: “[i]t [was] the state law which must give.” *Id.* at 6, 13. Further, the Oregon law “clearly [could not] be seen as directly allowing a viable challenge to federal enforcement of the CSA.” *Id.* at 6-7. If the Oregon statute stayed in force, it could arguably be “seen as an attempt to alter federal law (i.e., the CSA), it fails as a conflicting statute which is prohibited by not only the Supremacy Clause but by the very terms of § 903.” *Id.* at 8.

and not inconsistent with, the federal scheme as enunciated by the CSA.

It is key to keep in mind that Congress, when it was considering the CSA, believed that the Act and already existing state controlled substance laws were “mutually supporting.”²⁵ It is submitted that to the extent that a state law ceases to be mutually supporting, a “positive conflict” exists and the two regimes can no longer “consistently stand together.” The intent or function of the CSA *at this point*, therefore, would then be to occupy the field and trump or preempt the non-supporting state law.²⁶ It would seem, then, that the CSA establishes a standard, a threshold of control over drug-related behavior which contemplates overlapping regulation by the States, but only to the extent that these fifty sovereigns are not more permissive.²⁷

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25. Included within House Report 1444 were recommendations of two commissions established by successive Presidents and the actions taken in response to those recommendations. H.R. REP. NO. 91-1444, at 16, *reprinted in* 1970 U.S.C.C.A.N. 4566, 4581-582. The President's Commission on Law Enforcement and the Administration of Justice was established in 1966 by President Lyndon Johnson and chaired by Nicholas deB. Katzenbach. *Id.*, 1970 U.S.C.C.A.N. at 4582. The Commission prepared a report entitled *The Challenge of a Free Society*, which addressed the growing concerns of both drug trafficking and drug abuse in the United States. 91st Cong., *The Challenge of Crime in a Free Society*, ch. 8 (1967). The report outlined eight recommendations to help improve the drug problem facing the nation, which the House Interstate and Foreign Commerce Committee, author of House Report 1444, addressed. *Id.* at 216, 220-21, 223, 225, 231. “With the enactment of this bill [the CSA], virtually all of these recommendations of the . . . Katzenbach Commission will have been implemented in whole or in part through legislation, reorganization plans, or administrative action” H.R. REP. NO. 91-1444, at 16, *reprinted in* 1970 U.S.C.C.A.N. 4566, 4582. One of the Katzenbach Commission's recommendations was that “[t]hose States which do not already have adequate legislation should adopt a model State drug abuse control act similar to the Federal Drug Abuse Control Amendments of 1965.” *Id.* at 22, 1970 U.S.C.C.A.N. at 4588. The Interstate and Foreign Commerce Committee responded, noting that “[a] Model State Drug Abuse Act has been developed and recommended to the States. Revisions will, of course, be necessary to conform that model to this act, *since the reported bill and State laws are designed to be mutually supporting.*” *Id.* (emphasis added).
26. H.R. REP. NO. 91-1444, at 1, 22, *reprinted in* 1970 U.S.C.C.A.N. 4566, 4566, 4567, 4588.
27. Compare with the federal-state electronic surveillance scheme enunciated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title III, 82 Stat. 197, 211 (1968). States need not pass any electronic surveillance scheme statutes, but if they do, the legal regime constructed is allowable *only* if it is at least as restrictive as Title III. S. REP. NO. 90-1097, at 98 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2122, 2187. The legislative history of Title III provides that “[t]he State statute must meet the minimum standards reflected as a whole in the proposed chapter [i.e., 18 U.S.C. ch. 119 (2000)]. The proposed provision [18 U.S.C. § 2516 (2) (2000)] envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.” S. REP. NO. 90-1097, at 98, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2187. Referring to Title III, the Senate Report also said that “[t]he need for comprehensive, fair

It is clear that Congress views any state drug legalization attempts to be in conflict with and preempted by the CSA.²⁸ Seven years ago, almost three decades after enactment of the CSA, Congress expressed its view in the Omnibus Consolidated and Emergency Supplemental Appropriations Act that:

(3) pursuant to section 401 of the Controlled Substances Act, it is illegal to manufacture, distribute, or dispense marijuana . . . ; (5) marijuana . . . [has] not been approved by the Food and Drug Administration to treat any disease or condition; (6) the Federal Food, Drug and Cosmetic Act already prohibits the sale of any unapproved drug, including marijuana . . . ; (11) Congress continues to support the existing federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana . . . for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration²⁹

Elsewhere in the aforementioned Act, Congress again expressed its "sense," specifically "finding:"

(5) Efforts to legalize or otherwise legitimize drug use present a message to the youth of the United States that drug use is acceptable. . . . (7) The courts of the United States have repeatedly found that any State law that conflicts with a federal law or treaty is preempted by such law or treaty. (8) The Controlled Substances Act (21 U.S.C. 801 et seq.) strictly regulates the use and possession of drugs. (9) The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances³⁰ . . . similarly regulates the use and possession of drugs. (10) Any attempt to authorize under State law an activity prohibited under such Treaty or

and effective reform setting uniform standards is obvious . . . [g]uidance and supervision must be given to State and federal law enforcement officers. This can only be accomplished through national legislation." S. REP. NO. 90-1097, at 69, *reprinted in* 1968 U.S.C.C.A.N. 2122, 2156. *See also infra* pp. 32-34.

28. *See* Cathryn L. Blaine, Note, *Supreme Court "Just Says No" To Medical Marijuana: A Look at United States v. Oakland Cannabis Buyers' Cooperative*, 39 HOUS. L. REV. 1195, 1218-219 (2002) ("Except for use in an approved research project, § 841 of the CSA prohibits the distribution of marijuana. The CSA does not exempt the distribution of marijuana to seriously ill persons for their personal medical use. Therefore, based on the Supremacy Clause, the CSA preempts any State Law.").
29. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Div. F, 112 Stat. 2681, 2681-760 through 2681-761. Importantly, Division F of the statute is entitled "*Not Legalizing Marijuana for Medicinal Use.*" *Id.* at 2681-760.
30. Dec. 20, 1988, S. TREATY DOC. NO. 101-4 (1989).

the Controlled Substances Act would conflict with that Treaty or Act.³¹

Congress further expressed its “sense” that “the several States, and the citizens of such States, should reject the legalization of drugs through legislation, ballot proposition, constitutional amendment, or any other means”³²

B. Constitutionality

1. Statute Properly Founded Upon Commerce Clause³³ Power

It is black letter law that the Constitution, a document of enumerated powers, is deliberately structured so that all powers reside in the people.³⁴ Certain powers, however, have been specifically bestowed by the people upon the three branches of the federal government or have otherwise been left to reside with the states.³⁵ Initial inquiry

31. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Div. F, 112 Stat. 2681, 2681-759.

32. *Id.* at 2681-758. Notably, subtitle B is named *Rejection of Legalization of Drugs*. *Id.* Congress’ continuing and clear opposition to the legalization of marijuana was again expressed as recently as 2003 in the Consolidated Appropriations Resolution, Pub. L. No. 108-7, Div. C., Title III, § 126, 117 Stat. 107, 126 (2003), which provides:

(a) None of the funds contained in this Act may be used to enact or carry out any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 802) or any tetrahydrocannabinols derivative.

(b) The Legalization of Marijuana for Medical Treatment Initiative of 1998, also known as Initiative 59, approved by the electors of the District of Columbia on November 3, 1998, shall not take effect.

The Resolution further imparts: “[n]one of the funds made available in this Act may be used for any activity that promotes the legalization of any drug or other substance included in schedule I of the schedules of controlled substances established by section 202 of the Controlled Substances Act (21 U.S.C. 812).” *Id.* at § 511(a). For further discussion of Initiative 59 as well as the legislation and litigation surrounding it, see *Marijuana Policy Project v. D.C. Bd. of Elections and Ethics*, 191 F. Supp.2d 196, 199 (D.D.C. 2002), *rev’d*, 46 F. App’x 633, 634, 2002 WL 31098381 (D.C. Cir. 2002).

33. “The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States” U.S. CONST. art. I, § 8, cl. 3.

34. See 16 Am. Jur. 2d *Constitutional Law* § 3 (1998).

35. See U.S. CONST. amend. X.

The purpose of the division of powers between the federal and state governments pursuant to the Tenth Amendment is to protect the liberty of individual citizens from excessive concentration of power in a central government. By the terms of the Constitution, certain powers are entrusted to the federal government alone, while others are reserved to the states, and still others may be exercised by both the federal and state governments.

16A AM. JUR. 2D *Constitutional Law* § 222 (1998).

“The United States Constitution contains an enumeration of powers expressly granted by the people to the federal government.” *Id.* at § 223. “Because the federal powers derive from such a grant from the people, it is

must resolve whether the CSA is Constitutional; specifically, does the act stem from one or more of the enumerated powers the people have bestowed upon Congress?³⁶ The answer is clear: yes. The weight of case law in this area is overwhelming.³⁷ As but one example, in *United States v. Visman*,³⁸ a California marijuana grower creatively appealed his federal controlled substance conviction claiming, in part, that “there is no reasonable basis to assume that plants rooted in the soil affect interstate commerce,” and that “Congress does not have the authority to regulate intrastate illegal conduct that affects interstate commerce.”³⁹ The Ninth Circuit easily disposed of the appellant’s arguments by noting that Congress, anticipating arguments such as *Visman*’s, set forth “findings and declarations”⁴⁰ at the CSA’s outset which made it clear that there is an inextricable “nexus between mari-

axiomatic that the United States is a government of limited, enumerated, and delegated powers” *Id.* In other words, the federal Constitution is an enabling, and not a restraining, instrument. *Id.* Further: “It has been said that in the peculiar dual form of government in the United States, each state has the right to order its own affairs and govern its own people except so far as the federal Constitution expressly or by fair implication has withdrawn that power.” *Id.* at § 226.

Yet, “[w]hile the Tenth Amendment has been characterized as a truism and a tautology, it is not without significance, since it expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the states’ integrity or their ability to function in a federal system.” *Id.* See also *Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 431 (2002) (holding that “pre-emption proscriptions” in a federal transportation statute did “not bar a state from delegating, to municipalities and other local units, state’s authority to establish safety regulations governing motor carriers of property, including tow trucks”).

36. “Thus, Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the federal government.” 16A AM. JUR. 2D at § 235.
37. See, e.g., *Pearson v. McCaffrey*, 139 F. Supp.2d 113, 122 (D.D.C. 2001) (denying an application for a preliminary injunction enjoining federal officials from initiating civil, criminal, or administrative proceedings against those involved in the medicinal use of marijuana pursuant to state laws). See also 21 U.S.C.A. § 801, 118 n.1 (2000) (Note on Constitutionality). The Supreme Court, however, did not rule directly on the matter until June 2005, when it decided *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). For example, in *United States v. Oakland Cannabis Buyers’ Coop.*, the Court declared: “[n]or are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress’ power under the Commerce Clause.” 532 U.S. 483, 494 n.7 (2002).
38. 919 F.2d 1390 (9th Cir. 1990).
39. *Id.* at 1392.
40. These findings and declarations state, in pertinent part, that:
- (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—
- (A) after manufacture, many controlled substances are transported in interstate commerce,

juana and interstate commerce,” and following, that “federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.”⁴¹ And second, by recognizing that the U.S. is party to an international agreement mandating the regulation of controlled substances within the U.S.⁴² The appellate court noted that “[t]he Supreme Court has instructed that Congress may regulate those wholly intrastate activities which have an effect upon interstate commerce,” and importantly, “[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.”⁴³ Concluding, the court held

that Congress may constitutionally regulate intrastate criminal cultivation of marijuana plants found rooted in the soil. [The court deferred] to Congress’ findings that controlled substances have a detrimental effect on the health and general welfare of the American people and that intrastate drug activity affects interstate commerce. [And] that local criminal cultivation of marijuana is within a class of commerce.⁴⁴

(B) . . .

(C) . . .

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

21 U.S.C. § 801 (2000).

41. *Visman*, 919 F.2d at 1392 (citing 21 U.S.C. § 801 (6)).

42. See Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1411, 520 U.N.T.S. 204; *Protocol Amending the Single Convention on Narcotic Drugs*, Mar. 25, 1972, 26 U.S.T. 1443, 976 U.N.T.S. 3.

43. *Visman*, 919 F.2d at 1392-93 (quoting, in part, *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

44. *Id.* (alteration to original) (citation omitted). See also *Proyect v. United States*, 101 F.3d 11, 14 (2d Cir. 1996) (“We therefore join the Fourth Circuit and the District of Maine in rejecting the claim that § 21 U.S.C. 841(a)(1), by criminalizing the act of growing marijuana solely for personal consumption, is unconstitutional [and] find that § 21 U.S.C. 841(a)(1) represents a valid exercise of the commerce power.”); *United States v. Correa*, No. 97-20010-01, 1999 WL 155967, at *2 (D. Kan. Jan. 14, 1999) (“Congress can properly regulate intrastate drug activities pursuant to its powers under the Commerce Clause.”); *United States v. Leshuk*, 65 F.3d 1105, 1112 (4th

Although the weight of authority still remains overwhelmingly supportive of the Commerce Clause as a constitutional basis for *all* of the CSA,⁴⁵ a Ninth Circuit panel, different from the one that decided *Visman*, muddied the waters when it decided *United States v. Raich*, determining that the “intrastate, noncommercial cultivation” and use of marijuana for medicinal purposes, when done in conformance with California Proposition 215 and when based upon a physician’s recommendation, were outside the pale of a CSA grounded upon the Commerce Clause.⁴⁶

Consequently, the two to one⁴⁷ Ninth Circuit panel directed the U.S. District Court for the Northern District of California to enter a preliminary injunction against both the Attorney General and the

Cir. 1995) (“[E]ffective control of the interstate [drug] problems requires the regulation of both intrastate and interstate activities, [and] [t]his Court, as well as other courts, has relied upon these findings in concluding that Congress may regulate intrastate drug activities under the Commerce Clause.”); *United States v. Smith*, 920 F.Supp. 245, 247-48 (D. Me. 1996) (“[E]ven as applied to a defendant who did not engage in interstate commerce, the constitutionality of [21 U.S.C. § 841(a)(1)] does not depend upon whether the particular defendant engaged in interstate commerce.”) Further, the court believed that “section 841 [was] a constitutional use of Congress’ power to regulate commerce.”); *Kuromiya v. United States*, 37 F. Supp. 2d 717, 724 (E.D. Pa. 1999) (“[T]he CSA, specifically as it pertains to marijuana, has a connection with interstate commerce sufficient to invoke federal power,” and “[t]his conclusion would be no different even if plaintiffs could demonstrate the marijuana in individual cases did not travel across state lines.”); *Stubblefield*, No. 03-6004-TC at 9 (stating that the argument that the CSA exceeds Congress’ Commerce Clause power “has long been foreclosed in all federal circuits . . .”). See generally ROBERT L. BOGOMOLNY, MICHAEL R. SONNENREICH, & ANTHONY J. ROCCOGRANDI, A HANDBOOK ON THE 1970 FEDERAL DRUG ACT 10, 63-4 (1975). In addition to congressional commerce and taxing powers as constitutional bases for federal drug laws, Congress’ obligation to protect national health and welfare serves as another base. See, e.g., *Narcotics Legislation: Investigation of Juvenile Delinquency in the United States*, Hearings on S. 1895, S. 2590 and S. 2637 Before the Subcommittee to Investigate Juvenile Delinquency, 91st Cong. 210 (1969) [hereinafter *Hearings*] (statement of John N. Mitchell, Att’y Gen. of the United States). Even assuming *arguendo* that the Commerce Clause is not a proper constitutional underpinning for the CSA, a treaty can also serve as a constitutional basis for federal drugs laws, as “[a] treaty valid under the Constitution affords a constitutional basis for an act of Congress to implement the treaty, *even if Congress would not have the power to enact such a law in the absence of the treaty.*” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 CMT. J (1987) (emphasis added).

45. See, e.g., *United States v. Bramble*, 103 F.3d 1475, 1479 (9th Cir. 1996); *United States v. Tisor*, 96 F.3d 370, 375 (9th Cir. 1996); *United States v. Kim*, 94 F.3d 1247, 1249-50 (9th Cir. 1996); *Visman*, 919 F.2d at 1393; *United States v. Montes-Zarate*, 552 F.2d 1330, 1331 (9th Cir. 1977); *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972).
46. 352 F.3d 1222, 1228, 1233 (9th Cir. 2003), *vacated*, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).
47. The dissenting opinion was authored by a Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit sitting by designation.

DEA Administrator based upon the “unconstitutionality” of the CSA in the context of the specific facts of the case.⁴⁸

Two California patients and associated “caregivers” [the appellants] argued that the Commerce Clause could not properly support the criminalization of their activities, which were purely intrastate in character.⁴⁹ They claimed the Supreme Court deliberately left this issue undecided in its relatively recent decision, *United States v. Oakland Cannabis Buyers’ Cooperative*.⁵⁰ The Ninth Circuit specifically found that the patients and caregivers had “demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress’ Commerce Clause authority.”⁵¹

Angel Raich was “diagnosed with more than ten serious medical conditions, including an inoperable brain tumor . . .” and was “using marijuana as a medication for over five years, every two waking hours of every day.”⁵² Her doctor even claimed that in her condition, “foregoing marijuana treatment may be fatal.”⁵³ The second patient, Diane Monson, suffered from “a degenerative disease of the spine” causing severe back pain and “constant, painful muscle spasms.”⁵⁴ Monson’s doctor contended that “alternative medications have been tried and are either ineffective or produce intolerable side effects.”⁵⁵ Whereas Monson grew her own marijuana, two anonymous caregivers, John Doe Number One and John Doe Number Two, had been giving Raich her marijuana for free.⁵⁶ In the Ninth Circuit’s view, however, this giving, providing, or transferring of marijuana did not constitute the proscribed distribution or even possession with intent to distribute.⁵⁷ “Although the Doe appellants are providing marijuana to Raich, there is no ‘exchange’ sufficient to make such activity commercial in character.”⁵⁸ The Does, as care-giving marijuana growers, claimed to have used only “soil, water, nutrients, growing equipment,

48. *Raich*, 352 F.3d at 1226, 1235.

49. *Id.* at 1228.

50. *Id.* at 1234 (citing *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 497) (2002)).

51. *Id.* at 1227.

52. *Id.* at 1225.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1228-29. In particular, the Ninth Circuit stated that the “class of activities” at issue in *Raich*, “the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law [,] . . . does not involve sale, exchange, or distribution.” *Id.* 21 U.S.C. § 802(11) defines “distribute” to mean “to deliver (other than by administering or dispensing a controlled substance). . . .” “Deliver” or “delivery” means “the actual, constructive, or attempted transfer of a controlled substance” 21 U.S.C. § 802(8) (2000).

58. *Raich*, 352 F.3d at 1230 n.3.

supplies and lumber originating from or manufactured within California.”⁵⁹ DEA agents seized six of Monson’s marijuana plants on August 15, 2002.⁶⁰

The district court denied the motion for a preliminary injunction, believing that an insufficient likelihood of success on the merits had been established,⁶¹ but the Ninth Circuit disagreed.⁶² Even though the Ninth Circuit had previously upheld attacks upon the CSA that had been based upon claims that the Commerce Clause was being misapplied, none of those previous cases involved “the use, possession, or cultivation of marijuana for medical purposes.”⁶³ The court went even further, holding that the patients’ and the caregivers’ actions constituted a “*separate and distinct class of activities*: the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient’s physician pursuant to valid California state law.”⁶⁴

The court applied a four-factor test to determine that the patients’ and caregivers’ activities did not “substantially affect” interstate commerce in a manner that Congress could constitutionally regulate:

- (1) whether the statute regulates commerce or any sort of economic enterprise; (2) whether the statute contains any “express jurisdictional element that might limit its reach to a ‘discrete set’ of cases; (3) whether the statute or its legislative history contains “express congressional findings” regarding the effects of the regulated activity upon interstate commerce; and (4) whether the link between the regulated activity and a substantial effect on interstate commerce is ‘attenuated.’⁶⁵

Examining the first factor, the court concluded that the “cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity. Lacking sale, exchange or distribution, the activity does not possess the essential elements of commerce.”⁶⁶

59. *Id.* at 1225.

60. *Id.* Notably, although the DEA was properly identified in the case caption as the Drug Enforcement *Administration*, the DEA was erroneously identified in the body of the opinion as the Drug Enforcement *Agency*.

61. *Raich v. Ashcroft*, 248 F. Supp.2d 918, 931 (N.D. Cal. 2003), *rev’d*, 352 F.3d 1222, *vacated*, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

62. *Raich*, 352 F.3d at 1227.

63. *Id.*

64. *Id.* at 1228.

65. *Id.* at 1229 (citing *United States v. Morrison*, 529 U.S. 598, 610-12 (2000)).

66. *Id.* at 1229-30. Overlooked in this and subsequent cases is the fact that there was distribution: John Does #1 and #2 gave Raich the marijuana she consumed. *Id.* at 1225. 21 U.S.C. § 802 (11) (2000) states that “distribute” means to “deliver a controlled substance.” 21 U.S.C. § 802(8), in turn, tells us that “deliver” or “delivery” means “the actual, constructive, or attempted transfer of a controlled substance” The *Raich* dissent persuasively ar-

The Ninth Circuit whisked by the second factor, noting without explanation that the “relevant portions of the CSA” contained no “such ‘jurisdictional hook’ that would limit the reach of the statute to a discrete set of cases that substantially affect interstate commerce.”⁶⁷

The Ninth Circuit also breezed by the third consideration, namely Congress’ particularly expressed intent and understanding that intrastate marijuana activities are indistinguishable from those occurring interstate such that both are subject to regulation under the Commerce Clause.⁶⁸ The court noted that such congressional findings “do not specifically address the class of activities at issue here” because in the facts before the court, there was no trafficking or distribution.⁶⁹ The court added that just because Congress, by virtue of the Commerce Clause, said that the CSA applied to activities that appear to be purely intrastate in nature “does not necessarily make it so.”⁷⁰ Whether the CSA “affect[s] interstate commerce sufficiently to come under the constitutional power of the Congress to regulate” it is a matter for the courts to ultimately determine.⁷¹

Turning to the last factor, the court found that, indeed, “the link between the regulated activity and a substantial effect on interstate commerce is ‘attenuated.’”⁷² In conclusion, the Ninth Circuit held that “[o]n the basis of our consideration of the four factors, we find that the CSA, as applied to the appellants, is likely unconstitutional.”⁷³

It is difficult, if not impossible, to square *Raich* with *Visman* for many of the reasons cogently set forth in Judge Beam’s dissent.⁷⁴ *Raich* is a stretch and even more so given that nowhere in *Raich* does the majority discuss any other independent constitutional bases for the CSA, such as the treaty power of the federal government.⁷⁵ Further, the reach of *Raich* is hard to know:⁷⁶ What is the difference, given the Ninth Circuit’s Commerce Clause disquisition, between the truly in-

gued that the majority misread and misapplied *Wickard v. Filburn*, 317 U.S. 111 (1942). *Raich*, 352 F.2d at 1235. But whether the activity at issue constitutes “commerce” is immaterial. Among other things, *Wickard* advises that even if the activity in question is “local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress [pursuant to the Commerce Clause] if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’” 317 U.S. at 125.

67. *Raich*, 352 F.3d at 1231 (citation omitted).

68. *Id.* at 1233 n.7.

69. *Id.* at 1232.

70. *Id.* (quoting *Morrison*, 529 U.S. at 614).

71. *Id.* (quoting and citing *Morrison*, 529 U.S. at 614).

72. *Id.* at 1232-33.

73. *Id.* at 1234.

74. *Id.* at 1235-43 (Beam, J., dissenting).

75. See discussion *infra* Part III.B.2.

76. How many federal statutes regulating so-called “intrastate” activities are grounded upon the Commerce Clause and, based upon *Raich*, 352 F.3d

trastate cultivation and use of marijuana for personal pleasure instead of for pain alleviation? And if there is a difference, when did it fall to courts to make an exception to plainly expressed statutory language?⁷⁷ And did the Ninth Circuit really mean to suggest that transferring a controlled substance, albeit both grown and delivered intrastate, is also beyond the CSA?

In his dissent, Judge Beam chastised the two-judge majority for its inability to reconcile the facts before it with *Wickard*.⁷⁸ *Wickard*, a unanimous decision, was a case rooted in the regulatory control of the nation's economy during the Depression.⁷⁹ Roscoe Filburn was an Ohio dairy and wheat farmer.⁸⁰ Federal law permitted the establishment of national wheat production quotas in order to avoid wild swings in the price farmers would receive for their crops,⁸¹ and the imposition of fines upon those exceeding their individual farms' allotment of the national quota.⁸² Filburn sued the Secretary of Agriculture, and others, seeking, among other relief, a declaratory judgment that the quota, as applied to his farm's excess wheat production, was unconstitutional because the regime imposed pursuant to federal statute and regulation could not properly be based upon the Commerce Clause as applied to him.⁸³ Filburn asserted that the excess wheat he had grown during 1941 was intended for internal consumption on his Ohio farm.⁸⁴ As the Supreme Court understood the federal statutory scheme, the system of wheat production quotas and fines "extend[ed] federal regulation to production not intended in any part for *commerce*

1222, were open to attack (at least in the Ninth Circuit) prior to *Gonzales v. Raich*, 123 S.Ct. 2195 (2005)?

77. Chief Justice Marshall "made emphatic the embracing and penetrating nature of [the federal commerce power] by warning that effective restraints on its exercise must proceed from political rather than from judicial processes." *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (citing *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824)).
78. "It is simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in *Wickard v. Filburn*." *Raich*, 352 F.3d at 1235 (citing *Wickard*, 317 U.S. 111).
79. 317 U.S. 111.
80. *Id.* at 114.
81. *Id.* at 115.
82. *Id.* at 117.
83. *Id.* at 113-44.
84. *Id.* at 114. In particular, the Court stated:

[i]t has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

Id. *Wickard* was assessed a fine of \$117.11 for his overage, yet he refused to pay the fine. *Id.* at 115.

but wholly for consumption on the farm.”⁸⁵ Filburn contended that the “production and consumption of wheat” in the circumstances of his case were “local in character, and their effects upon interstate commerce [were] at most ‘indirect.’”⁸⁶

Justice Jackson, writing for the Court observed that “the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation.”⁸⁷ Indeed, the commerce power “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.”⁸⁸

The justices were not persuaded with the contention that Filburn’s activity was “local” and therefore could not constitute “commerce” and determined that Congress could indeed reach such activity in appropriate circumstances.⁸⁹ The Court also thought little of Filburn’s argument that the effect of his crop upon the total market was miniscule, stating, “[t]hat appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”⁹⁰ The Court recognized the potential that “home-consumed” wheat might *nevertheless* enter the market during a period of high prices which would then have the unwanted effect of price dampening.⁹¹ “The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.”⁹² The record before it, added the Court, left “no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose”⁹³ Finally, echoing Chief Justice Marshall’s comments noted earlier,⁹⁴ the Court said that “[t]he conflicts of economic interest . . . are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves

85. *Id.* at 118 (emphasis added).

86. *Id.* at 119.

87. *Id.* at 122.

88. *Id.* at 124 (quoting *United States v. Wright Wood Dairy Co.*, 315 U.S. 110, 111 (1942)) (emphasis added).

89. *Id.* at 125.

90. *Id.* at 127-28.

91. *Id.* at 128-29.

92. *Id.* at 128.

93. *Id.* at 128-29.

94. *See supra* text accompanying notes 12-14.

to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.”⁹⁵

As noted above, the Ninth Circuit’s opinion in *Raich* was vacated and remanded by the Supreme Court in a six-to-three decision in June 2005.⁹⁶ When considering the Court’s opinion, it is important to recognize that there was only a single issue before it:

The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution “to make all Laws which shall be necessary and proper for carrying into Execution” its authority to “regulate Commerce with foreign Nations, and among the several States” includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.⁹⁷

Thus, given the posture of the case in the circuit below, other bases upon which to undermine (i.e., Ninth or Tenth Amendment infirmities)⁹⁸ or support (i.e., Treaty Clause power)⁹⁹ the CSA—which had been surfaced by, respectively, detractors and supporters of the federal ban on “medical” marijuana—were not presented in order to garner the Court’s evaluation.¹⁰⁰ “[R]espondents’ challenge [was] actually quite limited.”¹⁰¹

Considering over a century of Commerce Clause case law, the Court cautioned (in what perhaps could be viewed as a mild admonishment to the Ninth Circuit) that its earlier decisions on the Commerce Clause could not be “viewed in isolation.”¹⁰² Taking that body of decisions together, the Court found that there are but “three general categories of regulation in which Congress is authorized to engage under its commerce power,” the last of which was relevant to the instant case; that is, Congress’ “power to regulate activities that substantially affect interstate commerce.”¹⁰³

Recall that Judge Beam’s vigorous dissent in *Raich* concluded that the panel majority’s position simply could not be squared with *Wick-*

95. *Wickard*, 317 U.S. at 129.

96. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

97. *Id.* at 2198-99. “The question before us, however, is not whether it is wise to enforce the statute under these circumstances; rather, it is whether Congress’ power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally.” *Id.* at 2201. The Court then immediately asserted: “The CSA is a valid exercise of federal power” *Id.*

98. *See infra* part III.B.3.

99. *See infra* part III.B.2.

100. *Gonzales*, 125 S. Ct. at 2204-05.

101. *Id.* at 2204.

102. *Id.* at 2205.

103. *Id.* The other two Commerce Clause “general categories of regulation” where Congress could properly regulate are with regard “the channels of interstate commerce” as well as “the instrumentalities of interstate commerce, and persons or things in interstate commerce.” *Id.*

ard.¹⁰⁴ The Supreme Court quickly sided with Judge Beam, turned to *Wickard*, and noted that it and other decisions “firmly establishe[d] Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”¹⁰⁵ Quoting from earlier cases as far back as 1927, Justice Stevens, writing for the court, observed that “[w]hen Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class” such that “the *de minimis* character of individual instances arising under that statute is of no consequence.”¹⁰⁶ Continuing in this vein, Justice Stevens said, restating somewhat: “[t]hat the regulation ensnares some purely intrastate activity is of no moment.”¹⁰⁷ This is in keeping with the Court’s earlier pronouncement that “[a]s we have done many times before, we refuse to excise individual [*e.g.*, purely intrastate] components of that larger [*e.g.*, interstate] scheme.”¹⁰⁸

According to the majority, the *Wickard* opinion provides “that Congress can regulate a purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”¹⁰⁹ As was the case with the home-consumed wheat in *Wickard*, Congress had, with respect to the CSA, a “rational basis”¹¹⁰ for the statute; that is, a concern “that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.”¹¹¹

The *Gonzales* “medical” marijuana consumers unsuccessfully attempted to distinguish the facts of their case from *Wickard* by arguing, among other things, that the farm in *Wickard* was engaged in a “quin-

104. *Raich v. Ashcroft*, 352 F.3d 1222, 1235 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

105. *Gonzales*, 125 S. Ct. at 2205 (citing *Perez v. United States*, 402 U.S. 146, 151 (1971) and *Wickard*, 317 U.S. at 128-29).

106. *Id.* at 2206 (citation omitted). “Our decision in *Wickard* is of particular relevance.” *Id.* (citation omitted). “The similarities between this case and *Wickard* are striking.” *Id.*

107. *Id.* at 2209.

108. *Id.*

109. *Gonzales*, 125 S. Ct. at 2206.

110. *Id.* at 2208. The Court also stressed that it “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.” *Id.* Further:

[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.

Id. at 2209 (footnote omitted).

111. *Id.* at 2207.

tessential economic activity;" a "commercial farm" engaged in the sale of products grown as part and parcel of that activity.¹¹² The "medical" marijuana consumers thus argued that, unlike *Wickard*, they sold nothing and thus did not engage in monetarily-focused or monetarily-oriented activity."¹¹³ That distinction, the Court allowed, was "factually accurate" but nonetheless does "not diminish the precedential force of this Court's reasoning."¹¹⁴

Even if the agricultural activity at issue in *Wickard* more easily demonstrated a "causal connection between the production for local use and the national market," something not necessarily evident in the case at bar, the *Gonzales* Court observed that it nevertheless had before it "findings by Congress to the same effect."¹¹⁵

Supreme Court cases respondents cited as precedent in support of their argument, *United States v. Lopez*,¹¹⁶ and *United States v. Morrison*,¹¹⁷ were inapposite because, with respect to the statutes at issue in each of those decisions, there was no regulation of any economic activity.¹¹⁸ If the focus of the laws were otherwise, such as in the case of the CSA, the outcome would be as the Court has previously concluded: "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."¹¹⁹

As with the agricultural business regulated by statute in *Wickard*, the Court concluded that activities the CSA governs are also "quintessentially economic;" in that "[t]he CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market."¹²⁰

Next, the Court turned from its evisceration of the respondents' arguments to a dissection of the positions advanced by the Ninth Circuit to support the outcome sought by the "medical" marijuana con-

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 2208 (referring to 21 U.S.C. §§ 801(1)-(6) (2000)).

116. 514 U.S. 549 (1995). The *Lopez* Court ruled that the Gun-Free School Zones Act of 1990 exceeded Congress' Commerce Clause authority and was thus unconstitutional. See 18 U.S.C. § 922(q)(1) (2000).

117. 529 U.S. 598 (2000). *Morrison* held that the civil remedy section of the Violence Against Women Act (VAWA) exceeded Congress' Commerce Clause authority and was thus unconstitutional. *Id.* at 602 (The VAWA was codified at 42 U.S.C. § 13981 (2000)). Subtitle C of Title IV enacted as the Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, § 40301, 108 Stat. 1796, 1941 (1994). Title IV was denominated the Violence Against Women Act of 1994. § 40001, 108 Stat. at 1902. Pub. L. No. 103-322 itself was named the Violent Crime Control and Law Enforcement Act of 1994. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

118. *Gonzales*, 125 S. Ct. at 2211. See discussion of regulation of economic activity in *Lopez*, 514 U.S. at 560 and *Morrison*, 529 U.S. at 613.

119. *Gonzales*, 125 S. Ct. at 2210 (quoting *Lopez*, 514 U.S. at 560).

120. *Id.* at 2211.

sumers.¹²¹ As recited earlier, recall that the two-to-one panel in *Raich v. Ashcroft* was able to dodge the sweep of the Commerce Clause by simply declaring that the respondents' conduct did not equate to commerce; being that, in conformance with State law, "cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity."¹²² This discrete class of activities, the Ninth Circuit reasoned, was simply beyond the pale of what the Constitution's drafters had in mind when the Commerce Clause was crafted.¹²³ Taking this argument on, the Supreme Court emphasized that the issue to be parsed was *not* whether federal criminalization of such conduct was wise, but

whether Congress' contrary policy judgment, i.e., its decision to include this narrower 'class of activities' within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class . . . compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court of Appeals was an essential part of the larger regulatory scheme.¹²⁴

The *Gonzales* Court stated that the fact that the nature of the conduct in which Raich and Monson were engaged was an "essential part of the larger regulatory scheme" (i.e., the CSA), can be concluded by first breaking down the Ninth Circuit's contentions into two parts and then systematically refuting them.¹²⁵ First, the fact that the respondents' marijuana had been prescribed by physicians, which arguably transmuted the marijuana into "medicine" (and thus in a class apart), is of no moment because "[t]he CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses."¹²⁶ The Court added that the "medicinal" use of marijuana by respondents is an insufficient discriminator to justify extracting such use from the CSA's coverage, being that "[t]he mere fact that marijuana—like virtually every other controlled substance regulated by the CSA—is used for medicinal purposes cannot possibly

121. *Id.*

122. 352 F.3d at 1229. By this same suspect logic, one would be forced to conclude that the "cultivation, possession, and use of marijuana" for *recreational* purposes is also outside the reach of the Commerce Clause. *Id.* Thus, the argument must follow, that Raich's two "caregivers" could quite properly cultivate marijuana in any amount and provide it to her for reasons of personal enjoyment.

123. *Id.* at 1227-28.

124. *Gonzales*, 125 S. Ct. at 2211.

125. *Id.* at 2211-12 (citing *Raich*, 352 F.3d at 1229).

126. *Id.*

serve to distinguish it from the core activities regulated by the CSA."¹²⁷

Second, the fact that the respondents' use of marijuana was in conformance with California law carried no weight with the majority, as it stated: "[t]he Supremacy Clause unambiguously provides . . . federal power over commerce 'is superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be."¹²⁸

Raich and Monson also argued that their circumstances were outside the scope of the CSA's "larger regulatory scheme" because their intrastate activity is one both "isolated" as well as "policed" by California and thus "entirely separated from the market."¹²⁹ The Supreme Court was unimpressed, commenting that "[t]he notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected."¹³⁰ Such a rational rejection could be based upon the commonsense realization that exempting California "medical" marijuana users like Raich and Monson from the CSA's reach

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.¹³¹

Such an inevitable increase of the marijuana supply in the California market would, when combined with that to be expected from the eight or so other "medical" marijuana states, lead to the quite rational conclusion, one which Congress could have reached, "that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial."¹³²

2. Statute Properly Founded Upon Treaty Clause Power

In addition to the Commerce Clause, the supremacy of the CSA over state enacted amendments like Proposition 215 is supported by the incontrovertible preeminence of the federal government in the

127. *Id.* at 2212.

128. *Id.* (quoting, in part, *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968) (quoting *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 426 (1925))).

129. *Id.* at 2213 (quoting Transcript of Oral Argument at 27, *Ashcroft v. Raich*, 352 F.3d 1222 (No. 03-1454)).

130. *Id.* at 2213.

131. *Id.* at 2214.

132. *Id.* at 2215.

field of international relations.¹³³ The President makes treaties which subsequently enter into force upon the consent of two-thirds of the Senate.¹³⁴ Once consented to, treaties are unquestionably the “supreme law of the land” and trump any contrary state statutes.¹³⁵ As noted earlier, “[t]he U.S. is a party to the Single Convention on Narcotic Drugs, 1961”¹³⁶ which, by a number of accounts, mandates the enactment and implementation of U.S. domestic legislation.¹³⁷ In fact, Congress made note of the treaty in its findings and declarations with respect to the CSA,¹³⁸ but interestingly the Single Convention does not regulate marijuana uniformly in all instances.¹³⁹ “The Single

133. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-17 (1936).

134. U.S. CONST. art. II, § 2, cl. 2.

135. U.S. CONST. art. VI, cl. 2.

136. 21 U.S.C. § 801(7) (2000). Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204.

137. *See, e.g.*, John C. Lawn, *The Issue of Legalizing Illicit Drugs*, 18 HOFSTRA L. REV. 703, 709 & n.43 (1990). Mr. Lawn was the Drug Enforcement Administration (DEA) Administrator from 1985-1990.

If the United States created a legal market in . . . marijuana . . . it would also violate international treaties [including the Single Convention] to which the United States is a signatory. . . [and] [u]nder these treaties, the United States is obligated to establish and maintain effective controls on those substances covered by the treaties. . . . In order to fulfill the United States' obligations under the Single Convention Treaty, domestic legislation must be enacted and implemented.

Id. *See also* *United States v. Noriega*, 746 F. Supp. 1506, 1515 (S.D. Fla. 1990) (“[T]he United States has an affirmative duty to enact and enforce legislation to curb illicit drug trafficking under the Single Convention on Narcotic Drugs.”) (citation omitted).

138. 21 U.S.C. § 801(7). *See also* 21 U.S.C. § 811(d) (2000). “The bill also specifically recognizes our international obligations under the Single Convention of 1961 and will allow the United States to immediately control under the schedules of the bill drugs hereafter included under schedules of the Single Convention upon the recommendation of the World Health Organization.” H.R. REP. NO. 91-1444, at 6 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4572.

139. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1408, 520 U.N.T.S. 204. Specifically, the convention does not require that the parties enact domestic legislation to restrict marijuana in every case. THE SECRETARY GENERAL, COMMENTARY ON THE SINGLE CONVENTION ON NARCOTIC DRUGS, 1961 at 276, U.N. Sales No. E.73.XI.1 (1973) [hereinafter COMMENTARY]. This is because the degree of control within the treaty scheme varies depending upon the portion of the cannabis plant involved. *Id.* at 276, 312-13. Indeed, the Convention does not even use the word “marijuana.” The treaty defines cannabis as “the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated.” Single Convention on Narcotic Drugs, *supra* note 42, at 1409. Thus, “[t]he leaves of the cannabis plant, when not accompanied by the tops of the plant, are not ‘cannabis,’ and being listed neither in Schedule I nor in Schedule II are not ‘drugs’ in the sense of the Single Convention.” COMMENTARY at 315. Article 28 of the Single Convention provides

Convention is not self-executing, but works through the constitutional and legal systems of its signatory nations."¹⁴⁰ Inasmuch as the Single Convention was not a self-executing treaty, domestic legislation was

that "[i]f a Party permits the *cultivation* of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy." Single Convention on Narcotic Drugs, *supra* note 42, 18 U.S.T. at 1421, 520 U.N.T.S. at 240 (emphasis added). Furthermore, the Single Convention does not apply to cannabis *cultivation* that is "exclusively for industrial purposes (fibre and seed) or horticultural purposes." Single Convention on Narcotic Drugs, *supra* note 39, 18 U.S.T. at 1421, 520 U.N.T.S. at 240. The third paragraph in Article 28 states that "[t]he Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the *leaves* of the cannabis plant." Single Convention on Narcotic Drugs, *supra* note 39, 18 U.S.T. at 1421, 520 U.N.T.S. at 206 (emphasis added). This would suggest that the convention parties contemplated the legal traffic and proper use of cannabis leaves. "Parties are not bound to prohibit the consumption of the leaves for non-medical purposes, but only to take the necessary measures to prevent their misuse." COMMENTARY at 316. "The convention does not specify any mandatory controls the parties must adopt as to the leaves." Nat'l Org. for the Reform of Marijuana Laws (NORML) v. Ingersoll, 497 F.2d 654, 658 (D.C. Cir. 1974). "[T]he descheduling of those marihuana mixtures containing only leaves (no flowers or resins) would be actions consistent with our international obligations." Petition to decontrol marihuana; Interpretation of Section 201 of the Controlled Substance Act of 1970, Op. Off. Legal Counsel 1, 14 (1972).

Article 22, which is a "[s]pecial provision applicable to *cultivation*," leaves the issue of control over the cultivation of marijuana to the unfettered judgment of each treaty party: "[w]henver the prevailing conditions in the country . . . render the prohibition of the cultivation of . . . the cannabis plant the most suitable measure, in its opinion, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic, the Party concerned shall prohibit cultivation." Single Convention on Narcotic Drugs, *supra* note 39, 18 U.S.T. at 1419, 520 U.N.T.S. at 232. "[T]he authors of article 22 did not consider that any diversion whatever constitutes *ipso facto* a problem of *public* health and welfare, but only one which is sufficiently large to present such a problem. A Party is therefore not bound to prohibit cultivation if the drug in question is diverted only in relatively minor quantities." COMMENTARY at 275.

But what is marijuana? Marijuana is a "mixture of leaves, stems, and flowering tops of the Indian hemp plant," *Cannabis sativa*, smoked or eaten for hallucinogenic and pleasure-giving effects. GROLIER INC., THE ENCYCLOPEDIA AMERICANA, 317-18 (1998).

The psychoactive ingredient of marijuana, tetrahydrocannabinol (THC), is concentrated in the flowering tops. *Id.* at 317. Marijuana is defined in the CSA as "all parts of the plant *Cannabis sativa L.*, whether growing or not. . . . Such term does not include the mature stalks of such plant, or fiber produced from such stalks. 21 U.S.C. § 802(16) (2000). The DEA has changed its definition of THC; no longer does the definition only consist of the naturally occurring variety restricted as emanating from (arguably) only the "plant *Cannabis sativa L.*" but is now said to derive from plants "of the *genus Cannabis* (*cannabis plant*)," as well as "synthetic equivalents of the substance contained in the cannabis plant." 21 C.F.R. § 1308.11(d) (30) (2005).

140. United States v. Feld, 514 F. Supp. 283, 288 (E.D.N.Y. 1981).

necessary so that the U.S. could satisfy its international legal obligations manifested by and in the treaty.¹⁴¹ For example, it is clear that 21 U.S.C. §§ 841, 952 and 955 are among the penal provisions that the United States has adopted to effectuate its treaty obligations under the Single Convention.¹⁴² Of necessity, Congress had the Single Convention in mind as a foundational underpinning for the CSA:

“The bill [H.R. 18583, *ie.*, the CSA] also specifically recognizes our international obligations under the Single Convention of 1961 and will allow the United States to immediately control, under the schedules of the bill drugs hereafter included under schedules of the Single Convention upon the recommendation of the World Health Organization.”¹⁴³

Furthermore, the Department of Justice Office of Legal Counsel (OLC) concluded in a 1972 opinion written to DEA’s predecessor agency that “full compliance with our obligations under the Single Convention could not be achieved unless marihuana is listed under Schedule I or Schedule II of the [CSA].”¹⁴⁴

The command of the “drug” treaty following the 1961 Single Convention was clearer with regard to the parties’ prohibition of psychotropic substances. Tetrahydrocannabinol (THC), the “physiologically active chemical . . . from hemp plant resin that is the chief intoxicant in marijuana”¹⁴⁵ is in Schedule I of the Convention on Psychotropic Substances.¹⁴⁶ With respect to Schedule I substances, the treaty parties are to “prohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific

141. “If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement.” Restatement (third) of foreign relations law of the united states § 111 cmt. h (1987).

142. *Feld*, 514 F. Supp. at 288 (citing *United States v. LaFroschia*, 354 F. Supp. 1338, 1341 (S.D.N.Y. 1973) and *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972)). In *La Froschia*, the court stated that, there is an alternative ground [to Congress’s constitutional authority to regulate commerce with foreign nations] for upholding the constitutionality of the [Controlled Substances] Act. The United States is a party to the Single Convention . . . which binds all signatories to control persons and enterprises engaged in the manufacture, trade and distribution of specified drugs. Marihuana is so specified. . . . It is clear that these provisions [*e.g.*, 21 U.S.C. § 811(d)] justify the placement of marihuana in Schedule I [of the CSA] because of the United States’ treaty obligations.

La Froschia, 354 F. Supp. at 1341.

143. H.R. REP. NO. 91-1444, at 6, 28 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4572.

144. Op. Off. Legal Counsel, *supra* note 138.

145. 68 Fed. Reg. 14,114 n.1 (Mar. 21, 2003) (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1999)).

146. Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 328. The treaty entered into force in the U.S. on July 15, 1980, a decade after passage of the CSA.

establishments which are directly under the control of their Governments or specifically approved by them"¹⁴⁷

Not only is the federal government obligated under this international drug treaty regime, but the individual states are as well.¹⁴⁸ "As law of the United States, international law is also the law of every State, is a basis for the exercise of judicial authority by State courts, and is cognizable in cases in State courts, in the same way as other United States law."¹⁴⁹

The International Narcotics Control Board (INCB), "the independent and quasi-judicial monitoring body for the implementation of the United Nations international drug control conventions . . . established in 1968 in accordance with the Single Convention on Narcotic Drugs, 1961,"¹⁵⁰ underscored its understanding that the United States would continue to make sure that state laws would not be inconsistent with the cannabis circumscriptions contained in the three major international drug conventions in its 2002 annual report.¹⁵¹ In this report, "[t]he Board notes that, in several states in the United States, discussions on liberalizing or legalizing cannabis continue," and that "[t]he Board appreciates that the Government continues to ensure that national laws in line with the international drug control treaties are enforced in all states."¹⁵² This suggests that, at least from the INCB's perspective, the United States would fall out of compliance with the international drug conventions should the individual states enact marijuana legislation inconsistent with the manner in which the drug is treated in the CSA.

3. Ninth and Tenth Amendments

Another argument favored in unsuccessful assaults upon the CSA stems not from the contention that it is an invalid legislative attempt to implement Commerce Clause powers,¹⁵³ but rather, that it is an

147. *Id.*, 32 U.S.T. at 553, 1019 U.N.T.S. at 182-93.

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. d (1986).

149. *Id.* Note that should a state supreme court have occasion to rule on the validity of a state statute in the face of a treaty with contrary, "repugnant" provisions, the case would be reviewable by the U.S. Supreme Court, on writ of certiorari. 28 U.S.C. § 1257 (2000).

150. Mandate and Functions, <http://www.incb.org/incb/mandate.html> (last visited Nov. 11, 2005).

151. Report of the International Narcotics Control Board for 2002, Operation of the international drug control system at 11, http://www.incb.org/incb/en/annual_report_2002.html (2002). *See also* Report of the International Narcotics Control Board for 2002, Analysis of the world situation at 44 n.302, http://www.incb.org/incb/en/annual_report_2002.html (2002).

152. Report of the International Narcotics Control Board for 2002, Analysis of the world situation at 44 n.302, http://www.incb.org/incb/en/annual_report_2002.html (2002).

153. *See, e.g.*, *United States v. Visman*, 919 F.2d 1390, 1392-93 (9th Cir. 1990) (citing *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1221 (9th Cir.

outright contravention of the Ninth¹⁵⁴ and Tenth¹⁵⁵ Amendments.¹⁵⁶ As easily as courts have dispelled the Commerce Clause attacks, so too have they handily dismissed arguments on these grounds.¹⁵⁷ For example, in *United States v. Kuromiya*, the court asserted that “[t]he fundamental problem with the . . . argument is that ‘the Ninth Amendment has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation’” and “as there is no constitutional provision by which one can discern a fundamental right to possess, use, grow, or sell marijuana, it is equally untenable to claim that there is a Ninth Amendment right violated by its criminalization.”¹⁵⁸ Further, the *Kuromiya* court stated that “so long as the passage of a federal criminal statute is a valid exercise of congressional commerce power, no violation of the Tenth Amendment occurs.”¹⁵⁹

C. State/Local and Federal Law in Conflict

1. Impermissible Interference

Having definitively concluded that the CSA reflects the proper exercise by Congress of an enumerated constitutional power – commerce power¹⁶⁰ – we next turn to an examination of whether state and local laws permitting personal use of marijuana for alleged therapeutic purposes are an impermissible interference, by whatever definition or

1972) (holding that Congress may constitutionally regulate intrastate drug activity due to its effects on interstate commerce)).

154. U.S. CONST. amend. IX. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” *Id.*
155. U.S. CONST. amend. X. “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.” *Id.*
156. *See, e.g.,* *United States v. Kuromiya*, 37 F. Supp. 2d 717, 725 (holding that the CSA is constitutional in light of the Ninth and Tenth Amendments).
157. *Id.* *See also* *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996) (holding that the plaintiffs lacked Ninth Amendment standing to challenge the Violent Crime Control and Law Enforcement Act of 1994).
158. *Kuromiya*, 37 F. Supp. 2d at 725 (quoting *Reno*, 98 F.3d at 1125) (discussing constitutionality of the CSA). *See also* *The Findings and Recommendations for Stubblefield v. Ashcroft*, No. 03-6004-TC at 11, available at <https://ecf.ord.uscourts.gov/> (D. Or. filed Mar. 24, 2003).
159. 37 F. Supp. 2d at 725. Other Constitutional provisions have also been used, without success, as a basis for contesting the CSA’s legality. Specifically, “[t]he CSA has been attacked on various constitutional grounds, including the Privileges and Immunities Clause, the Commerce Clause, the First, Ninth, and Tenth Amendments, as well as Equal Protection and Due Process.” Blaine, *supra* note 28, at 1210. *See also* *Stubblefield*, Civ. No. 03-6004-TC at 10-12 available at <https://ecf.ord.uscourts.gov/> (D. Or. Mar. 24, 2003) (holding that the CSA violates neither the Ninth or Tenth Amendments, nor the Due Process Clause).
160. *Kuromiya*, 37 F. Supp. 2d at 725.

classification, with the CSA. The conclusion seems too easy. The application of such state and local laws of necessity – constituting a regime – not only implicate federal law, but contravene it as well. The law is well settled, being that “[t]he Supreme Court has [sic] stated that a federal statute may pre-empt state law . . . where either (a) compliance with both state and federal law is impossible, or (b) a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁶¹

The Supreme Court, albeit in the context of alien registration, had occasion to consider whether a state statute could stand in the face of a federal law, the latter having been enacted to make a “harmonious whole” of the alien registration regime, and passed pursuant to the national government’s “full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”¹⁶² The Court asserted that the test to be applied was whether the state “law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁶³ The Court concluded that the state alien registration statute could not be enforced and that the ruling of the court below, which had enjoined application of the state law, would be affirmed.¹⁶⁴

In *Straight Creek Bus v. Saylor*,¹⁶⁵ a bus company, Bell Coach Lines, doing business in Kentucky during World War II could not commence operations without first securing both a “certificate of war necessity” from the Federal Office of Defense Transportation (ODT) and a certificate of convenience and necessity from the Kentucky Division of Motor Transportation (DMT).¹⁶⁶ If operations were not begun within sixty days after receiving the state certificate, however, the governing statute provided that the certificate “shall become null and void.”¹⁶⁷ A competitor of Bell’s [the appellant], who wanted to provide services over the same bus routes at stake, brought the matter to the attention of the DMT director that Bell had not begun operating after the requisite sixty days, and thus sought a determination that Bell’s certificate be nullified as provided by state law.¹⁶⁸

Bell protested, claiming that it had been advised by “Federal authorities charged with the responsibility of issuing gasoline and approving public transportation operations” not to start operations until further notice.¹⁶⁹ Bell had heeded this advice, as it did not want to jeopardize its future chances to secure rationed gas, tires, etc. if it actually began

161. 16A AM. JUR. 2D *Constitutional Law* § 243 (1998).

162. *Hines v. Davidowitz*, 312 U.S. 52, 63, 73 (1941).

163. *Id.* at 67.

164. *Id.* at 74.

165. 185 S.W.2d 253 (Ky. Ct. App. 1945).

166. *Id.* at 253-54.

167. *Id.* at 254.

168. *Id.* at 253-54.

169. *Id.* at 254.

bus service.¹⁷⁰ Bell, therefore, simply waited and did nothing.¹⁷¹ Thus, Bell was presented with a classic Hobson's choice, because if it had begun service pursuant to the Kentucky certificate, the carrier would be contravening the caution that it wait.¹⁷² The Court of Appeals of Kentucky found no conflict, because securing a Certificate of War Necessity from the federal government "cannot plausibly be said . . . [to] suspend[] a state statute which commands nothing to the contrary, but merely withdraws a privilege . . ." ¹⁷³ In the course of reaching this conclusion, and importantly for our purposes, the justices also remarked that "since the federal Constitution is the supreme law of the land, a federal enactment authorized by that instrument prevails over a state statute and *suspends* the operation of the latter when its enforcement would necessitate or *sanction* the performance of an act prohibited by the former."¹⁷⁴

This is precisely the issue with which we are confronted: State and local "medical" marijuana initiatives sanction conduct that the CSA prohibits and because of the supremacy clause, they cannot stand in the face of federal law to the contrary.¹⁷⁵ For example, one recent law review Note reached the same conclusion, stating, "the California Compassionate Use Act¹⁷⁶ and the federal CSA are in direct conflict. . . . The CSA does not exempt the distribution of marijuana to seriously ill persons for their personal medical use. . . . Therefore, based on the Supremacy Clause, the CSA preempts any contrary state law."¹⁷⁷

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* (emphasis added). *Straight Creek Bus* was cited with approval not too long ago, in the Opinions of the Attorney General of Kentucky. 95-33 Op. Atty. Gen. Ky. 2-126 to 2-127 (1995). "[I]f the laws or public policy of the states comes into conflict with the federal statutes . . . the state law must yield. The prohibition of a federal statute may not be set at naught . . . by state statutes . . . and the extent and nature of the legal consequences of an act which is made unlawful by federal law are determined by that law, conflicting state policy or law notwithstanding." 81A C.J.S. *States* § 24 (1977).

175. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2212 (2005).

176. CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2005).

177. Blaine, *supra* note 28, at 1218-19. Note that the case Blaine is discussing, *United States v. Cannabis Cultivators Club*, confusingly seems to speak out of both sides of the mouth while discussing the ramifications of the California Compassionate Use Act. 5 F. Supp. 2d 1086, 1100 (N.D. Cal. 1998), *rev'd*, 532 U.S. 483 (2001) (The Compassionate Use Act was added by initiative measure, Proposition 215, § 1, approved November 1996). On the one hand, the court says that the "[d]efendants are correct that Proposition 215 does not conflict with federal law . . . because on its face it does not *purport* to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from the California drug laws." *Id.* at 1100 (emphasis added); *cf.* Marijuana Policy Project v. D.C. Bd. of Elections and Ethics, 191 F. Supp. 2d 196, 206-07 (D.D.C. 2002), *rev'd*, 46 Fed. Appx.

2. Mere Enactment of State Medical Use Statute vs. Affirmative Conduct Consistent with State Statute

An argument can be made that medical use statutes, in and of themselves, depending upon how they are drafted, do not pose a conflict with the CSA.¹⁷⁸ A conflict comes into being, so the argument goes, only when a person affirmatively acts or does what the medical use statute permits, thus not running afoul of the state or local law,

633, 2002 WL 31098318 (D.C. Cir. 2002). Yet with its next breath, the California federal court also says that

[n]otwithstanding the operative language of Proposition 215, its declared purpose . . . suggests that California's voters want to exempt medical marijuana from prosecution under federal, as well as state law, even if that is not what they enacted. A state law which purports to legalize the distribution of marijuana for any purpose, however, even a laudable one, nonetheless directly conflicts with federal law, 21 U.S.C. § 841(a).

Cannabis Cultivators Club, 5 F. Supp. 2d at 1100 (emphasis added). The court's second interpretation is in line with *Straight Creek Bus*, 185 S.W.2d at 254 and *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425-26. See also BOGOMOLNY, *supra* note 43, at 143; stating:

There is no question that a state can remove all criminal sanctions for drug sale or possession without coming into conflict with the federal law. *The problem will come when a state attempts to deregulate a given drug and permits its sale contrary to the federal law. More likely than not, this will be deemed a positive conflict and the state law will fall.* Thus, in the regulatory area, states are left with the option of not legislating at all or legislating in a manner which conforms with federal law. (Emphasis added).

Note that in *Cannabis Cultivators Club*, the district court issued a preliminary injunction pursuant to 21 U.S.C. § 882(a) preventing various cannabis clubs, also including the Oakland Cannabis Buyers' Cooperative (OCBC), from distributing marijuana to patients claiming a medical need. 5 F. Supp. 2d at 1104, 1106. Section 882(a) authorizes "enjoin[ing] violations" of the CSA. See 21 U.S.C. § 882(a) (1999). Among other things, OCBC then moved the district court to modify the injunction to permit the distribution of cannabis to patients with a doctor's certificate, indicating that marijuana was a "medical necessity" for the patient. *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1111 (9th Cir. 1999) (per curiam). The district court denied the motion believing that such equitable powers as it possessed were insufficient to override the CSA. *Id.* The Ninth Circuit did not vacate the injunction, but remanded with instructions "to reconsider [OCBC's] request for a modification that would exempt from the injunction distribution to seriously ill individuals who need cannabis for medical purposes." *Id.* at 1115. The district court proceeded as urged, modifying its preliminary injunction to accommodate medical necessity, whereupon the United States successfully petitioned for certiorari. *United States v. Oakland Cannabis Buyers' Coop.*, No. C98-0088, 2000 WL 1517166 (N.D. Cal. July 17, 2000). The Supreme Court reversed, holding that medical necessity is not an exception to the CSA's prohibition against the "manufacture and distribution" of marijuana. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486 (2001).

178. See, e.g., Blaine, *supra* note 28, at 1218-19 (stating the CSA only dominates state statutes when the language used prevents both statutes from co-existing).

but violating only the CSA.¹⁷⁹ As an example, California Proposition 215 in part and by its terms offers marijuana possessors, patients, and primary caregivers absolution from *California drug laws*¹⁸⁰ that would, in the absence of Proposition 215, otherwise criminalize their conduct.¹⁸¹

Assuming it to be the case that there is no “actual” conflict between statutes like Proposition 215 and the CSA until one affirmatively performs an act in conformance with the state law which, at one and the same time, nevertheless constitutes a CSA violation, where does that leave us? Let us submit that the difference is one without a meaningful distinction because the federal *government* can always successfully prosecute the CSA violator regardless of whether the moment of conflict arises at the time the state statute is enacted or at the time the subject possesses or “cultivate[s]” marijuana.¹⁸² Put differently, a CSA violation stands alone, and it is irrelevant whether the conduct that it prohibits is consistent with or also in conflict with Proposition 215.¹⁸³

The only reason that we can fathom why it might matter whether laws like Proposition 215 are, at their moment of enactment, in conflict with the CSA is that one could argue that such statutes are void *ab initio*. The Supreme Court of Pennsylvania had occasion to consider the viability of a conviction for violation of a state sedition law in the face of the defendant’s argument that it was preempted by the federal sedition statute, the Smith Act, addressing the same subject matter.¹⁸⁴ The defendant argued that enactment of the federal law automatically *suspended* operation of its Pennsylvania counterpart.¹⁸⁵ The Pennsylvania court agreed, quashed the state indictment, and in the course of its analysis looked at the disparate sentencing schemes in the two statutes, the state statute being much harsher.¹⁸⁶ Using language applicable *a fortiori* to the CSA-Proposition 215 schism, the Pennsylvania Supreme Court said,

179. *Id.* at 1219.

180. “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.” CAL. HEALTH & SAFETY CODE § 11362.5(d) (West 2005).

181. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 11257-58 (West 1991).

182. *See* 21 U.S.C. § 844(a), (c) (1999). *See also* Gonzales v. Raich, 125 S. Ct. 2195, 2212 (2005) (“[T]he CSA would still impose controls required by California law.”).

183. *U.S. v. Oakland Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1100 (N.D. Cal. 1998).

184. *Commonwealth v. Nelson*, 104 A.2d 133, 136 n.2, 139 (Pa. 1954), *aff’d*, 350 U.S. 497 (1956). At the time of this ruling, the Smith Act was codified at 18 U.S.C. §§ 2384-85 (1948).

185. *Nelson*, 104 A.2d at 137 (emphasis added).

186. *Id.* at 136, 139.

[s]uch a disparity [20 yrs. v. 6-10 yrs. for a Smith Act violation] in the sentences prescribed for the same offense, if multiplied by further like instances from other States, could not help but confuse and hinder the attack on sedition which calls for uniform action on a national basis. Uniformity in the range of sentences imposable throughout the country for sedition against the Government of the United States is assured only by the exclusive use of the federal statute.¹⁸⁷

D. *Enjoining the Operation of State Statutes*

There is precedent for the proposition that the federal government can successfully institute a suit against a state whose laws permit what federal enactment and the Constitution prohibit. In *United States v. Mississippi*¹⁸⁸ the Attorney General filed a complaint against the state of Mississippi, three members of the state's Board of Election Commissioners, and six county Registrars of Voters seeking, in part, an order to restrain the continued enforcement of Mississippi state constitutional provisions and laws that had the cumulative effect of "hampering and destroying the right of Negro citizens of Mississippi to vote," in contravention of both federal law, 42 U.S.C. § 1971(a), Article I of the United States Constitution, as well as the Fourteenth and Fifteenth Amendments.¹⁸⁹

The lower court dismissed the federal complaint,¹⁹⁰ and the Supreme Court, completely unimpressed with Mississippi's arguments

187. *Id.* at 139. Although conceded *supra* that states have concurrent jurisdiction with the U.S. regarding controlled substances, this does nothing to dissipate the strength of the argument that the country cannot have statutory schemes covering the same subject area which move in different if not opposite directions.

188. 380 U.S. 128 (1965).

189. *Id.* at 130. 42 U.S.C. § 1971(a)(1) (2000) presently provides that all U.S. citizens "otherwise qualified by law to vote . . . shall be entitled and allowed to vote . . . without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State . . . to the contrary notwithstanding."

Taken together the state laws imposed literacy standards upon voter applicants that could be interpreted and applied totally at the discretion of voting officials resulting in the registration of a large number of white applicants and very few blacks. *Mississippi*, 380 U.S. at 131-32. The consequent voter registration figures were completely out of line with the racial proportional representation or makeup in the population as a whole. See Frank Hobbs and Nicole Stoops, *Demographic Trends in the 20th Century* at 93, <http://www.census.gov/prod/2002pubs/censr-4.pdf> (Nov. 2002) (stating the population of Mississippi was 43.5% black in 1950).

The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by . . . any State on account of race, color, or previous condition of servitude [and that] [t]he Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, §§ 1, 2.

190. *United States v. Mississippi*, 229 F. Supp. 925, 958 (D.C. Miss. 1964).

and the lower court's logic, reversed and remanded.¹⁹¹ Contrary to the state's position, the justices found that, 1) there was statutory language permitting the federal government's suit,¹⁹² 2) the state of Mississippi could be, and was properly made, a defendant in the lawsuit in accordance with the particular terms of 42 U.S.C. § 1971(c),¹⁹³ and 3) that Congress had the constitutional power pursuant to the Fifteenth Amendment, and was not barred by the Eleventh Amendment, to properly make Mississippi a defendant.¹⁹⁴ With regard to the last point, the Supreme Court said that neither the Eleventh Amendment nor "any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States."¹⁹⁵ This is so, even in the absence of any Congressional enactment specifically authorizing or permitting such a suit.¹⁹⁶ In particular, "[t]he United States in the past has in many cases been allowed to file suits in this and other courts against States, with or *without specific authorization from Congress.*"¹⁹⁷

Perhaps an even more compelling case that would lend credence to federal efforts to enjoin state "medical" marijuana laws, which the *Mississippi* Court cited, is *United States v. California*.¹⁹⁸ In an original jurisdiction cause of action, the federal government sued the state in the Supreme Court claiming that California had improperly sold leases permitting private companies to extract mineral deposits, as well as petroleum and natural gas off its coast.¹⁹⁹ The United States claimed that the surface below the nation's territorial sea belonged to the federal government and not to California.²⁰⁰ The state countered, con-

191. *Mississippi*, 380 U.S. at 144.

192. *Id.* at 138. "Section 1971 was passed by Congress under authority of the Fifteenth Amendment to enforce the Amendment's guarantee, which protects against any discrimination by a State, its laws, its customs, or its officials in any way." *Id.* (citing 42 U.S.C. § 1971(c) (2000)).

193. *Id.* at 139-42. Section 1971(c) provides that racially discriminatory acts engaged in by State personnel "shall also be deemed that of the State and the State may be joined as a party defendant." This language is quoted in *Mississippi*, 380 U.S. at 139.

194. *Id.* at 140. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by *Citizens* of another State. . . ." U.S. CONST. amend. XI (emphasis added).

195. *Mississippi*, 380 U.S. at 140.

196. *Id.*

197. *Id.* (emphasis added) (citation omitted).

198. 332 U.S. 19 (1947). The Supreme Court characterized the nature of the federal government suit as a prayer "for a decree declaring the rights of the United States in the area as against California and *enjoining* California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States." *Id.* at 23 (emphasis added).

199. *Id.* at 22.

200. *Id.* At the time of suit, the territorial sea claimed by the United States extended "three nautical miles outward from the shore." *Id.* at 24 n.1.

tending that the three mile "ocean belt" was within California's original boundary when it was admitted as a state to the union.²⁰¹

In support of its case, California surfaced a number of intriguing arguments, one being that the litigation was not properly before the court inasmuch as it presented "no case or controversy in a legal sense, but only a difference of opinion between federal and state officials."²⁰² The Supreme Court quickly disposed of this argument, asserting that while the State's characterization was not necessarily incorrect, the nature of the action was

far more than that. . . . The difference involves the conflicting claims of federal and state officials as to which government, state or federal, has a superior right to take or authorize the taking of vast quantities of oil and gas underneath that land. . . . Such concrete conflicts as these constitute a controversy in the classic legal sense, and are the very kind of differences which can only be settled by agreement, arbitration, force, or judicial action. . . . [There exist] conflicting claims of governmental powers to authorize [the seabed's] use.²⁰³

California had argued, unsuccessfully, before the Supreme Court that "the Attorney General has not been granted power either to file or maintain [the suit]."²⁰⁴ The Supreme Court concluded otherwise, plainly stating that

Congress has given a very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government rights and properties. . . . An Act passed by Congress and signed by the President could, of course, limit the power previously granted the Attorney General to prosecute claims for the Government. . . . But no Act of Congress has amended the statutes which impose on the Attorney General the authority and duty to protect the Government's interests through the courts.²⁰⁵

201. *Id.* at 23.

202. *Id.* at 24. This position is similar to the claim that "medical" marijuana laws are not truly in conflict with the CSA until such time as an individual commits an act consistent with the state law which will at the same moment constitute a CSA violation. Also, like the *California* facts, the "medical" marijuana landscape is a conflict in government powers as to which sovereign has overriding, supreme authority to regulate marijuana.

203. *Id.* at 24-25.

204. *Id.* at 26.

205. *Id.* at 27-28 (citing, in part, *In re Cooper*, 143 U.S. 472, 502-03 (1892)). In discussing where and how Congress gave a "broad authority to the Attorney General to institute and conduct litigation," the Supreme Court made reference to 5 U.S.C. §§ 291 and 309—neither of which exist in Title 5 today—and a number of earlier decisions of the Court, including *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888). *Id.* at 27. In *San Jacinto Tin Co.*, the Attorney General brought an action against San Jacinto and two other

The justices soon turned to the merits of the case, but before doing so, commented upon the roles or “hats worn” by the United States in pursuing this cause of action against California.²⁰⁶ One of these roles appears to be closely akin to the reasoning underlying the federal government’s motivation for attempting to enjoin or invalidate state “medical” marijuana laws: protection of the nation’s citizenry.²⁰⁷ Thus, one such guise assumed by the United States, is its assertion of “the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean.”²⁰⁸

Important for a “medical” marijuana preemption argument is the conclusion that although both the federal government and the states have concurrent subject matter jurisdiction in the area, to the extent a conflict exists, there can only be one supreme sovereign and that must be the national government.²⁰⁹ In *California*, the State contended that it properly exercised aspects of its authority out to three miles from the low tide mark.²¹⁰ The Supreme Court swept this argument aside, stating: “[c]onceding that the state has been authorized to exercise local police power functions in the part of the marginal belt within its

companies, alleging that land patents issued by the U.S. were improperly procured by dint of a survey that had been fraudulently conducted. 125 U.S. 274-75. Consequently, the federal government prayed that the survey and patent be “set aside, vacated, and annulled.” *Id.* at 275. One of the issues raised by the defendant was whether the Attorney General even had the authority under statute or the Constitution to commence the action. *Id.* at 274. The Supreme Court first looked to the predecessor, Revised Statutes § 346, of present day 28 U.S.C. § 501 (2000). *Id.* The present day statute is similarly worded to its ancestor, providing that “[t]he Department of Justice is an executive department of the United States at the seat of Government.” 28 U.S.C. § 501 (2000). Upon consideration of this legislation, the Court observed:

There is no very specific statement of the general duties of the Attorney General, but it is seen from the whole chapter referred to that he has the authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States. . . . If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its courts for relief . . . the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States.

San Jacinto Tin, 125 U.S. at 278-79. The current version of 28 U.S.C. § 518 derives from former 5 U.S.C. § 309. See 28 U.S.C. § 518(b) (2000) (Historical and Revision Notes). 28 U.S.C. § 518(b) states “[w]hen the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested. . . .”).

206. *California*, 332 U.S. at 29.

207. *Id.*

208. *Id.*

209. See *supra* notes 202-07 and accompanying text.

210. *California*, 332 U.S. at 29-30.

declared boundaries, these do not detract from the federal government's paramount rights in and power over this area."²¹¹

Another relevant opinion was written by the Supreme Court in *Philko Aviation v. Shacket*, which involved a conflict between two swindled purchasers of the same aircraft who were seeking to determine title.²¹² The Shackets paid full price, and took possession of, an aircraft in Illinois.²¹³ The seller, a con artist, promised to provide the "paperwork" at a later date but never did.²¹⁴ He then tried to sell the same airplane to Philko Aviation and provided the aircraft title documents to Philko at closing.²¹⁵ Philko's financing bank "recorded the title documents with the Federal Aviation Administration," (FAA) whereupon the Shackets sought to quiet title by commencing a declaratory judgment action.²¹⁶ The Shackets won in the lower courts but the Supreme Court reversed and remanded.²¹⁷

At issue were the procedures required to perfect title to the aircraft.²¹⁸ In the words of the Supreme Court, § 503(c) of the Federal Aviation Act of 1958 prohibited the transfer of aircraft titles "from having validity against innocent third parties unless the transfer [had] been evidenced by a written instrument, and the instrument [had] been recorded with the Federal Aviation Administration."²¹⁹ Philko argued that because it, and not the Shackets, had recorded the sale with the FAA, the airplane was theirs.²²⁰ The Shackets countered, claiming that they acquired title under the Illinois Uniform Commercial Code (UCC), which stated that not only did title transfers not have to be recorded, but they did not even require written evidence of sale if payment was "made and received."²²¹ Writing for the court, Justice White construed § 503(c) to require both an "instrument" evidencing all aircraft transfers and the recordation of that document with the FAA.²²² Thus, "because of these federal requirements, state laws permitting undocumented or unrecorded transfers are pre-

211. *Id.* at 36.

212. 462 U.S. 406, 407-08 (1983).

213. *Id.* at 407.

214. *Id.*

215. *Id.* at 408.

216. *Id.*

217. *Id.*

218. *Id.* at 407.

219. *Id.* (codified at 49 U.S.C. § 44108 (2000)) (citation omitted).

220. *Id.* at 408.

221. *Id.* at 408-09. See ILL. COMP. STAT. ANN. 5/2-201(c) (West 1993).

222. *Philko Aviation*, 462 U.S. at 409-10. Section 503(c) provides:

No conveyance or instrument the recording of which is provided for . . . shall be valid in respect of such aircraft . . . against any person other than the [transferee], his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation.

Id. at 409 (quoting the Federal Aviation Act, 49 U.S.C. § 1403 (1958)).

empted, for there is a direct conflict between § 503(c) and such state laws, and the federal law must prevail.”²²³

The fact pattern seems strikingly similar to the CSA versus “medical” marijuana scenario: Illinois enacted a permissive aircraft transfer regime, and compliance with the State commercial transaction procedures were inconsistent with the federal statutory mechanism for the exact same transaction.²²⁴ But much like the argument that mere existence of “medical” marijuana laws poses no conflict with the CSA unless, and until, a CSA-prohibited transaction actually occurs,²²⁵ if an aircraft owner never transfers a plane in a manner permitted by state law, i.e., absence of a memorializing document and failure to record the transfer instrument with the FAA, the owner is never placed in the position where his or her business transaction will of necessity be conducted in a manner incompatible with federal statutory requirements.²²⁶

Because the legislative history of the Federal Aviation Act evidenced Congressional intent that there be both documentation of all aircraft transfers and recordation of those documents,²²⁷

Congress must have intended to preempt any state law under which a transfer without a recordable conveyance would be valid against innocent transferees or lienholders who have recorded. . . . Any other construction would defeat the primary congressional purpose for the enactment of § 503(c), which was to create ‘a central clearing house for recordation of titles so that a person, wherever he may be, will know where he can find ready access to the claims against, or liens, or other legal interests in an aircraft.’²²⁸

In much the same way, the purpose of the CSA, which included nationwide marijuana criminalization, was certainly not meant *at the same time* to permit or encourage the growing, cultivation, distribution, and use of marijuana within the fifty states at their discretion.²²⁹

223. *Id.* at 410.

224. *See supra* notes 211-22 and accompanying text.

225. *See supra* notes 177-80 and accompanying text.

226. *See supra* note 218 and accompanying text.

227. *Philko Aviation*, 462 U.S. at 410 (citing H.R. REP. NO. 75-2254, at 9 (1938) and H.R. REP. NO. 75-2635, at 74 (1938) (Conf. Rep.)).

228. *Id.* at 410-11 (quoting *To Create A Civil Aeronautics Authority: Hearings on H.R. 9738 Before the H. Committee on Interstate and Foreign Commerce*, 75th Cong. 407 (1938) (testimony of Fred D. Fagg, Director of Air Commerce, Department of Commerce)).

229. The CSA’s purpose, in pertinent part, was “designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States . . . by providing for an overall balanced scheme of criminal penalties for offenses involving drugs.” H.R. REP. NO. 91-1444, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567. In *Campbell v. Hussey*, it was argued that a Georgia tobacco classification regime merely *supplemented* and *did not conflict* with federal standards. 368 U.S. 297 (1961). Yet, the Court held that

That would definitely send mixed signals, a consequence that Congress could not have wished. The Supreme Court specifically held in *Philko* "that state laws allowing undocumented or unrecorded transfers of interests in aircraft to affect innocent third parties are preempted by the federal Act."²³⁰ Similarly, the conclusion is inescapable that state "medical" marijuana laws are preempted by the CSA.²³¹

Another case of interest, *Jones v. Rath Packing Co.*, involved differing state and federal food labeling laws.²³² Joseph Jones, the Director of the Department of Weights and Measures in Riverside County, California, ordered bacon packaged by Rath, and flour packaged by three different milling companies, "removed from sale" for failure to comply with California weight measuring and labeling laws.²³³ The packaging companies responded by successfully suing in the Central District of California seeking both an injunction against Jones, as well as a declaration that the California provisions were preempted by federal standards.²³⁴ The Ninth Circuit affirmed, and so did the Supreme Court.²³⁵

Importantly for our consideration, and after observing that "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict[.]" the Court reiterated the key standard used to determine whether preemption exists in instances of overlapping jurisdiction.²³⁶ The test, or standard, is whether "[the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²³⁷ Of significance to the consideration of the divergence between the CSA statutory purpose and the "medical" marijuana initiatives is the Court's additional remarks; specifically, that examination of the issue demands an understanding of how the two statutory

"Congress, in legislating concerning the types of tobacco sold at auction, pre-empted the field and left no room for any supplementary state regulation concerning those same types." *Id.* at 301. The Court asserted this because the purpose of the federal scheme was to establish a definite, uniform, and official U.S. classification and inspection standard. *Id.* The argument for preemption is, of course, even stronger when a state scheme is inconsistent with a federal standard that is designed to deal "in a comprehensive fashion" with an issue by creating "an overall balanced scheme." H.R. REP. NO. 91-1444, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4567, 4570. "The bill revises the entire structure of criminal penalties involving controlled drugs by providing a consistent method of treatment of all persons accused of violations." *Id.*

230. *Philko Aviation*, 462 U.S. at 412.

231. *See, e.g., Philko Aviation*, 462 U.S. at 410; *United States v. California*, 332 U.S. 19, 36 (1947).

232. 430 U.S. 519 (1977).

233. *Id.* at 522.

234. *Id.* at 523-24.

235. *Id.* at 524.

236. *Id.* at 525-26.

237. *Id.* at 526 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

schemes in fact interoperate (or do not), as opposed to how they may appear and be read in print.²³⁸ In particular, “[t]his inquiry requires us to consider the relationship between state and federal laws as they are *interpreted and applied, not merely as they are written.*”²³⁹

After first concluding that the federal standards preempted the California labeling regime with respect to bacon packaging, the Supreme Court turned its attention to the federal and state approaches regarding the marking of flour packaging.²⁴⁰ The Court determined that the applicable “federal weight-labeling standard for flour [was] the same as it [was] for meat.”²⁴¹ Next, the justices observed that “it would be possible to comply with the state law without triggering federal enforcement action, [the court] conclude[d] that the state requirement [was] not inconsistent with federal law[,]” and therefore, the federal statute did not pre-empt California’s.²⁴² This strongly suggests that if it were not possible to comply with state law absent the “triggering of federal enforcement action,” there would be inconsistency to the point that preemption would result.²⁴³

That lack of inconsistency between the federal and state labeling requirements with respect to flour did not end matters for the Court, which went on to determine that a significant purpose of the federal statute was to “facilitate value comparisons among similar products,” something not possible if the companies followed the California statutory scheme.²⁴⁴ Adhering to state law in this instance “would prevent ‘the accomplishment and execution of the full purposes and objectives of Congress[.]’” an “impermissible” result requiring that “the state law must yield to the federal.”²⁴⁵ The two sovereignties can-

238. *Id.*

239. *Id.* (emphasis added). The Court’s adjuration is particularly relevant in view of the argument that the CSA and “medical” marijuana initiatives do not evidence conflict unless, and until, someone affirmatively engages in an act which, although permitted by a State “medical” marijuana provision, is at the same time a violation of the CSA. See 21 U.S.C. § 903 (2001); See also *supra* notes 25-27 and accompanying text. Conversely, it is claimed, absent such an act the two statutory schemes are not in “conflict.” See 21 U.S.C. § 903 (2001); See also *supra* notes 25-27 and accompanying text.

Admittedly, the facts before the Supreme Court in *Jones* established that the federal statute relating to bacon packaging prohibited labeling “‘requirements in addition to, or different than, those made under’” the act. 430 U.S. at 530 (quoting 21 U.S.C. § 678 (2000)). The Court concluded that this was an “explicit pre-emption provision dictat[ing] the result in the [bacon labeling] controversy between *Jones* and *Rath*.” *Id.* at 530-31.

240. *Jones*, 430 U.S. at 532.

241. *Id.* at 533.

242. *Id.* at 540.

243. *Id.*

244. *Id.* at 541.

245. *Id.* at 543 (quoting, in part, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). See also *Fid. Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141 (1982) (federal *regulations* held to preempt state statute on same subject).

not operate in their own spheres while at the same time exercising their authority in conformity with the other.²⁴⁶

The same logic compels the conclusion that adherence to state "medical" marijuana laws "would prevent 'the accomplishment and execution of the full purposes and objectives of Congress'" as set forth in the CSA,²⁴⁷ and that an action seeking a declaration that the CSA preempts such state laws would properly lie.²⁴⁸

To reiterate, a state law is preempted by a federal statute or regulation properly promulgated thereto, to the extent that the two conflict.²⁴⁹ A conflict exists either when compliance with both the state and federal law is impossible²⁵⁰ or when the state law frustrates Congressional intent, i.e., the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²⁵¹ For our purposes, the CSA prohibits planting, cultivating, growing, harvesting, possessing, and distributing marijuana,²⁵² which, of necessity, is in "conflict" with state laws permitting such conduct.²⁵³

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility, or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

246. *Fidelity*, 458 U.S. at 153 (citation omitted). This is so even if the matter is one that a state, for example, California, in addition to the federal government, is seeking to regulate or control is a subject of particular importance or concern to the state and its people. *See id.* "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Id.* (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). *See also* *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm.*, 461 U.S. 190, 216 n.28 (1983) ("[S]tate law may not frustrate the operation of federal law simply because the state legislature in passing its law had some purpose in mind other than one of frustration.") (citing *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971))). *See also* *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963) ("The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." (citing H.R. REP. NO. 74-1241, at 22-23 (1935) and S. REP. NO. 74-1011, at 15 (1935))).

247. *Jones*, 430 U.S. at 543 (quoting *Hines*, 312 U.S. at 67).

248. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (citing *Fla. Lime*, 373 U.S. at 142-43).

249. *Id.* at 79.

250. *Id.*

251. *Fla. Lime & Avocado Growers*, 373 U.S. at 141 (quoting *Hines*, 312 U.S. at 67).

252. *See* 21 U.S.C. §§ 802(15), (22), 841(a)(1), 844 (2000).

253. *See English*, 496 U.S. at 79.

IV. CONCLUSION

The federal government is well-poised to argue in any forum that, 1) the CSA trumps state laws which provide immunity from state civil and criminal prosecution to “medical” marijuana users and providers and, 2) that the federal government can enforce the CSA against state and local officials acting under a state/local “medical” marijuana law.