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Comment

369 THE GROWING DEBATE ON MEDICAL MARIJUANA: FEDERAL POWER VS. STATES RIGHTS*Alreen Hussein [FN1]**Copyright (c) 2001 California Western School of Law; **Alreen Hussein**

I. Introduction

Seventy-year old Bob lives with his wife Jane in San Diego, California. [FN1] Ten years ago, Bob was diagnosed with lung cancer and he must undergo chemotherapy for treatment. [FN2] Although the chemotherapy fights the cancer, it also causes many unpleasant side effects, including nausea and vomiting. [FN3] As a result, Bob must take more medications to fight off the numerous side effects caused by the necessary treatment. For many years, Bob took Zofran to help his nausea and vomiting. Zofran must be administered intravenously, it is expensive and it alleviates symptoms in only fifty-six percent of cases. [FN4] In 1996, however, California passed Proposition 215 (titled the Compassionate Use Act) by popular initiative. [FN5] The Compassionate Use Act permits seriously ill Californians to obtain and use marijuana for medicinal purposes, and allows the patient or the primary caretaker to cultivate the plant. [FN6] Marijuana is inexpensive and eliminates some of the most painful side effects of chemotherapy in almost eighty percent of cases. [FN7] Like many seriously ill patients, Bob chooses to smoke marijuana to deal with his disease and its accompanying discomfort and pain, and his primary caretaker, Jane, cultivates the plant. After Bob smokes the marijuana plant, his nausea and vomiting subside or even cease. Because California voters decided to distinguish between recreational and medical uses of marijuana when they passed Proposition 215, Bob will not be prosecuted for using this illegal substance and Jane will not be prosecuted by the State of California for cultivating the plant. However, federal law does not make such a distinction. As a result, the Attorney*370 General of the United States intends to prosecute Jane for cultivating the marijuana plant and Bob for smoking it. Under the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 (the Controlled Substances Act), [FN8] marijuana may not be cultivated or smoked for any purpose. Congress, claiming authority from the Commerce Clause, established a regulatory scheme in the Controlled Substances Act. Controlled substances are placed in one of five "Schedules" depending on each substance's potential for abuse, the extent to which each may lead to psychological or physical dependence, and whether each has a currently accepted medical use in the United States. [FN9] The obvious conflict between these two regulatory schemes leads to an inevitable clash and a question of significant federalist proportions: Does the Federal Government have the power to override a state initiative passed by a majority of California citizens?

This year alone, an estimated 552,200 Americans will die of cancer and 1,220,100 more Americans will be diagnosed with cancer. [FN10] Numerous bouts of vomiting and nausea following treatment are the most common side effects associated with chemotherapy. [FN11] Moreover, by the end of June 2000, 753,907 people were reported to be suffering from AIDS [FN12] and 113,167 people were reported to be living with HIV in the

United States. [FN13] AIDS wasting *371 syndrome, [FN14] nausea, and vomiting are commonly associated with the disease. [FN15] Marijuana is widely considered to be an extremely effective medicine to assist with those common side effects associated with cancer, chemotherapy, and AIDS. [FN16] Marijuana also helps ease some of the suffering associated with ailments such as glaucoma, epilepsy, multiple sclerosis, paraplegia, quadriplegia, and chronic pain. [FN17] Yet, the federal government has placed marijuana in Schedule I with drugs having no medical benefits such as LSD and heroine. Consequently, under federal law physicians cannot prescribe marijuana. [FN18] Instead, patients are prescribed pharmaceutical drugs such as Zofran, which costs hundreds of dollars more, and must be administered intravenously. [FN19] Morphine and cocaine may be prescribed under the Controlled Substances Act, although both may be habit forming and have a potential for fatal overdose. [FN20] Despite the lack of harmful effects associated with marijuana, federal law prohibits the medical use of marijuana, a substance that has been around for more than five thousand years.

Organizations such as the National Organization for the Reform of Marijuana Laws (NORML) and the Alliance for Cannabis Therapeutics (ACT) have been trying to reschedule marijuana from a Schedule I drug to a Schedule II drug for years, but Congress refuses to take action. [FN21] Even one of the Drug Enforcement Agency's (DEA) [FN22] own administrative law judges, Francis L. Young, said, "It would be unreasonable, arbitrary and capricious for DEA to continue to stand between those sufferers and the benefits of this substance." [FN23] In conclusion, Judge Young recommended the Administrator to *372 transfer marijuana from Schedule I to Schedule II, thereby making it available for prescription. [FN24] Judge Young's recommendation was ignored by the Administrator, and marijuana was not rescheduled. [FN25] Consequently, citizens of various states have reclassified marijuana using the initiative process. [FN26]

The federal government, through the Controlled Substances Act, denies terminally ill patients an inexpensive and effective treatment for their ailments. Congress argues that marijuana affects interstate commerce, and thus Congress can regulate its use and production through its power under the Commerce Clause. [FN27] In two recent Supreme Court decisions, however, the Court has said Congress has the power to regulate only those economic activities having a substantial effect on interstate commerce. [FN28]

This Comment argues that the federal government has exceeded its authority under the Commerce Clause by regulating a non-economic activity. [FN29] Those who cultivate and use marijuana for medical purposes are not affecting interstate commerce. Medical marijuana is locally grown, is not sold, nor is the marijuana permitted to be transported across state lines. Part II discusses the federalization of crime through the use of the Commerce Clause and associated problems. Part III lays out the history of medical marijuana. Part IV considers the current debate between the States and the Federal Government with regard to the issue of medical marijuana. Part V reviews the fundamental constitutional principle of federalism [FN30] and whether the Federal Controlled Substances Act can preempt the California Compassionate Use Act and other state laws permitting marijuana to be used for medicinal purposes. Part VI examines federal authority under the Commerce Clause prior to 1995. Part VII explores federal authority under the Commerce Clause after 1995, and argues that in light of the principles established by the Supreme*373 Court in *United States v. Lopez* [FN31] and *United States v. Morrison*, [FN32] it would appear that Congress has exceeded its enumerated powers in regulating the medical use of locally grown marijuana. This Comment concludes by addressing how marijuana can be used legally for medical purposes without affecting the overall regulatory scheme.

II. Federalization of Crime Under the Commerce Clause

Even though the “police power” is one that has been traditionally left to the states, in the last quarter of the twentieth century the federalization of crime has increased tremendously as a response to public concern surrounding a variety of issues. [FN33] Federalization of crime is leading us down a path where we are developing a federal police power, a power the framers never intended, and one which they repeatedly granted to the States. [FN34] Public concern in the 1960’s about organized crime, drugs, violence, and other societal ills gave rise to federal legislation in matters involving local conduct, which had been previously left to the States. [FN35] Between 1995 and 1998, there was a thirty percent increase in criminal case filings. [FN36] In 1998 alone, there was a fifteen-percent increase in criminal case filings at the federal level and in 1999 there was another four-percent jump. [FN37] The federalization of crime is a response to highly publicized events rather than genuine need. [FN38] By passing such legislation, Congress seeks to attain popularity with its constituents, appearing as though it is solving problems. [FN39] In spite of this, the federalization of crime “causes serious problems to the administration of justice in this country.” [FN40] Federalization upsets the balance between the state and federal *374 system created by the Constitution; it has an adverse impact on the federal judicial system; and it creates different results for defendants who have committed the same crime. [FN41]

Considering criminal cases require more judicial resources, are often complex, and are accorded top priority by the Speedy Trial Act, [FN42] a disproportionate amount of federal resources are consumed by criminal cases, resulting in fewer resources for civil trials. [FN43] Federal laws often overlap with state laws, as is the case with the Controlled Substance Act. [FN44] As a result, an offender selected to be federally prosecuted will be subjected to a much harsher penalty than another prosecuted under the parallel state law. [FN45]

The Controlled Substances Act is an example of the federalization of crime. Under the Act, Congress makes it unlawful for any person to knowingly or intentionally manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. [FN46] Despite new evidence, the federal government has refused to reclassify marijuana, instead continuing to classify it in the same category with heroin and LSD. Marijuana has been classified as a Schedule I controlled substance, meaning marijuana is alleged to have a “high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and “a lack of accepted safety for use of the drug or substance under medical supervision.” [FN47] Consequently, because marijuana is a Schedule I drug, doctors cannot dispense marijuana to any patient outside of a strictly controlled research project that has been registered with the Drug Enforcement Administration (DEA) and approved by the Food and Drug Administration (FDA). [FN48] On the other hand, physicians may lawfully distribute controlled substances placed in Schedules II through V. [FN49] Congress grants the Attorney General the power to determine whether or not marijuana should be rescheduled to Schedule II, which would allow the substance to be prescribed to those in need. [FN50] Since *375 1972 the National Organization for Reform of Marijuana Laws (NORML), the Alliance for Cannabis Therapeutics (ACT), and other groups have been petitioning the courts for hearings to reschedule marijuana, but all attempts have failed. [FN51]

Limiting federal jurisdiction over drug related offenses would ease the burden on federal courts. Prosecutors would be able to focus on more pressing issues, and the penalties for drug offenses would be more equal. [FN52] Thus, by federalizing more and more crimes, we seem to be losing the fundamental principle of federalism.

III. The History of Medical Marijuana

Evidence suggests marijuana was used five thousand years ago under the reign of the Chinese Emperor Chen

Nung. [FN53] People used it for a variety of reasons, including treating malaria, inducing sleep, stimulating appetite, and relieving headaches. [FN54] In the West, marijuana was not introduced as a medicine until the mid-nineteenth century. [FN55] W.B. O'Shaughnessy was the first Western physician to research and document the medical benefits of *376 marijuana. [FN56] Soon thereafter, doctors in both England and the United States were prescribing marijuana to their patients. [FN57] As a response, the Federal Bureau of Narcotics under Harry Anslinger organized a campaign, portraying marijuana users as violent, crazed criminals. [FN58] This campaign against marijuana led to the enactment of the Marijuana Tax Act in 1937. [FN59] Marijuana was taxed at one dollar per ounce regardless of whether it was used for recreational or medicinal purposes. [FN60] Although the original purpose of the Marijuana Tax Act was to deter recreational drug use, it led to much more. [FN61]

As recreational use increased in the 1960s, Congress reacted by passing the Controlled Substances Act in 1970. [FN62] As previously stated, marijuana is placed in the most restrictive category and classified as having no medicinal benefits, which consequently does not allow doctors to prescribe the medication to their patients. [FN63] Morphine and cocaine, however, are placed into Schedule II, even though the risk of addiction and fatal overdoses is much greater. [FN64] A synthetic opium-based painkiller, made by Winthrop Pharmaceuticals, was rescheduled to Schedule IV even though testimony indicated hundreds of cases of addiction, a number of overdose deaths, and much evidence of abuse. [FN65] Attempts began to reschedule marijuana as a Schedule II drug so it could be legally prescribed. [FN66] Hearings were held before the Bureau of Narcotics and Dangerous Drugs. [FN67] Even though marijuana is not addictive or lethal, the government refuses to transfer marijuana to Schedule II. [FN68]

Notwithstanding the federal government's legitimate concern in regulating the use of marijuana, the law should distinguish between recreational and medicinal use. The Controlled Substances Act has been able to distinguish between the medical and recreational use of morphine and cocaine without encountering any serious enforcement problems. [FN69] There is a legitimate *377 health interest in smoking marijuana that must be recognized for persons suffering from AIDS, cancer, multiple sclerosis, glaucoma, and other serious illnesses, who need to use the substance to help alleviate some of their ailments. [FN70] Accordingly, there should be a distinction made between those in need of the medication, and those solely using it for recreational purposes, as there is for other controlled substances. [FN71]

The federal government argues it does not want to send the wrong message to America's youth by legalizing marijuana for medicinal purposes. [FN72] However, under initiatives passed in California and other states allowing marijuana use for medicinal purposes, persons engaged in recreational use or sales would still be subject to criminal penalties. [FN73] Hence, the only message being sent to America's youth is that a medical patient has access to all available medications, including marijuana. Furthermore, the federal government claims that allowing marijuana for medicinal use would increase the availability, and thus increase the risks of widespread drug use. [FN74] According to the aforementioned state initiatives, a person in need of marijuana could only obtain the amount prescribed by their physician. Individuals who possess or cultivate marijuana for other purposes would still be prosecuted. [FN75] Accordingly, it would not increase the amount on the streets because it would not be sold on the streets. If anything, such initiatives would reduce the amount on the streets as medical patients could legally obtain the medication, and not be forced to turn to the illegal drug markets.

IV. The Growing Debate

On November 5, 1996, California residents voted to decriminalize marijuana for medicinal purposes by

passing Proposition 215, entitled the Compassionate Use Act. [FN76] Under this Act, the people of the State of California declared the purpose of the Act was:

***378** To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health, would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. [FN77]

Soon after this proposition was passed, non-profit cannabis [FN78] dispensaries began to form throughout the state, providing marijuana to seriously ill patients upon a doctor's recommendation. [FN79] Unfortunately, under the Federal Controlled Substances Act, it is unlawful for any person knowingly or intentionally to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. [FN80]

The federal government, unable to revoke doctors' licenses to prescribe controlled substances if the doctor prescribes marijuana, [FN81] and unwilling to accept the decisions of California citizens, filed a motion for a preliminary injunction against medical cannabis dispensaries that were providing marijuana to seriously ill patients. [FN82] On May 13, 1998 the United States District Court for the Northern District of California granted the United States' motion for a preliminary injunction. [FN83] Shortly thereafter, the Court granted members of the Oakland, Marin and Ukiah medical cannabis cooperatives motion to intervene. [FN84] The United States filed a motion to dismiss the complaint-in-intervention and the District Court granted the motion. [FN85] Emphatically, on September 13, 1999, the United States Ninth Circuit Court of Appeals reversed the motion and remanded it back to the District Court. [FN86] The Ninth Circuit held:

The government . . . has yet to identify any interest it may have in blocking the distribution of cannabis to those with medical needs, relying exclusively on its general interest in enforcing its statutes. It has offered no evidence to rebut OCBC's [Oakland Cannabis Buyers' Cooperative] evidence that cannabis is the only effective treatment for a large group of seriously ill individuals, and it confirmed at oral argument that it sees no need to offer any. It simply rests on the erroneous argument that the district***379** judge was compelled as a matter of law to issue an injunction that is coextensive with the facial scope of the statute. [FN87]

On remand, the District Court merely modified the injunction; it did not dismiss it. The District Court held the injunction did not apply to the distribution of cannabis by the Oakland Cannabis Buyers' Cooperative to patients who:

(1) suffer from a serious medical condition, (2) will suffer imminent harm if the patient-member does not have access to cannabis, (3) need cannabis for the treatment of the patient-member's medical condition, or need cannabis to alleviate the medical condition or symptoms associated with the medical condition, and (4) have no reasonable legal alternative to cannabis for the effective treatment or alleviation of the patient-member's legal medical condition or symptoms associated with the medical condition because the patient-member has tried all other legal alternatives to cannabis and the alternatives have been ineffective in treating or alleviating the patient-member's medical condition or symptoms associated with the medical condition, or the alternatives result in side effects which the patient-member cannot reasonably tolerate. [FN88]

Dissatisfied with the ruling, the United States subsequently filed both a petition for certiorari and an application for stay with the United States Supreme Court. On August 29, 2000 the United States Supreme Court gran-

ted the application for stay, prohibiting dispensaries in California from distributing marijuana to those persons in need until “[f]inal disposition of the appeal by the United States Court of Appeals for the Ninth Circuit and further order of the court.” [FN89] More importantly, on November 27, 2000 the Supreme Court granted certiorari to resolve the question of whether the Controlled Substances Act bars a medical necessity defense to the Act's prohibition against manufacturing and distributing marijuana. [FN90] If the Supreme Court follows *380 their decisions in Lopez and Morrison, they should hold that the Controlled Substances Act does not bar a medical necessity defense because the Commerce Clause does not grant Congress the authority to do so.

V. Federalism

In order to secure individual liberty and prevent tyranny, “the Constitution divides authority between federal and state governments for the protection of individuals.” [FN91] Not wanting an all-powerful centralized government and wishing to maintain state sovereignty, the Constitution declares the Federal government to be one of enumerated powers. [FN92] Consequently, when Congress wishes to act, it must articulate from which article in the Constitution it derives its authority to act. Powers not entrusted to the Federal Government are placed in the hands of the states through the Tenth Amendment. [FN93] Realizing conflicts could arise between federal and state laws, Article VI declares the Constitution the supreme law of the land. [FN94] As a result, a constitutionally valid federal law preempts any state law in conflict with an established federal law. [FN95]

The issue of federal power versus states rights has resurfaced with the passage of initiatives allowing medical use of marijuana. In direct conflict with the Controlled Substances Act, nine states have laws declaring that persons with a medical need to smoke marijuana will not be prosecuted for possession or cultivation of the substance. [FN96] Mere conflict between state law with the federal law, however, does not mean that the state law is preempted. From the perspective of past Supreme Court rulings, the Controlled Substances Act may very well be unconstitutional. It exceeds the authority granted to Congress under the Commerce Clause because it is not regulating the use of channels for interstate commerce, it is not regulating and protecting the instrumentalities of interstate commerce, nor the persons or things in interstate commerce, and it is not regulating activities substantially affecting interstate commerce. [FN97] If the founding fathers wanted all fifty states to be the same and abide by the *381 same laws, they would not have created the idea of federalism. All states are affected differently by marijuana use, and there needs to be a place for experimentation on whether legalizing it for medical patients will work. Wyoming, for example, does not necessarily need to have a law allowing marijuana for medicinal purposes as only one out of every 100,000 persons in Wyoming suffers from AIDS. [FN98] For California, however, it is necessary because almost twenty out of every 100,000 persons suffer from AIDS. [FN99] Given the diversity in the needs of citizens of different states, the regulation of marijuana is best left as a matter of local determination. Moreover, because possession and local cultivation of marijuana is not an economic activity, Congress does not have the power to regulate it under the Commerce Clause.

According to the framers, the internal functions of the nation were to be maintained by the States. [FN100] Thus, they did not grant the federal government a national police power; [FN101] instead, the “police power” [FN102] was to be retained by the States. [FN103] Nevertheless, even without an express grant of “police power,” Congress passes criminal laws relying on the Commerce Clause for authority, [FN104] and the Controlled Substances Act is an example of such a law. Congress claims that because it has the power to regulate interstate commerce, it has the power to regulate marijuana use and possession because of the amount of drugs flowing through interstate commerce. [FN105] Although drug trafficking is of national concern, federal legislation controlling drug use and possession casts aside the intent of the framers and the fundamental idea of feder-

alism. [FN106] Federal laws controlling drug trafficking having interstate or international characteristics can be viewed as being more effective than state laws because of the priority drug enforcement receives at the federal *382 level, the degree of enforcement efforts, and the amount of resources at the federal level. [FN107] Conversely, these laws are not effective at the local level when dealing with small drug cases, [FN108] as they merely burden the courts with matters that could be effectively managed by state courts.

Congress has exceeded the power given to it under the Commerce Clause, and when the legislature goes beyond its enumerated powers, the judiciary must act to limit it. [FN109] Although prior to 1995 the Supreme Court did not invalidate a single piece of legislation regulating private activity as exceeding Congress's power under the Commerce Clause, the Court in *United States v. Lopez* and *United States v. Morrison* acknowledged definite boundaries as to the reach of Congress's power under the Commerce Clause. Congress cannot regulate activities that are not commercial in nature, even if it provides a substantial amount of legislative findings claiming the affect of the local activity on interstate commerce. [FN110] Consequently, after the Supreme Court decisions in *Lopez* and *Morrison*, the Controlled Substances Act in its attempt to control medical marijuana is not a valid exercise of Congress's power under the Commerce Clause because the medical use of marijuana is not an economic activity. It is a health measure passed by some states allowing its citizens access to viable health benefits. Health laws are distinct from laws regulating commerce, because they are a “police power” and as such a purely internal matter. [FN111]

Additionally, “States possess primary authority for defining and enforcing the criminal law’ . . . [and] [w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a ‘change in the sensitive relation between federal and state criminal jurisdiction.’” [FN112] In the instant case, California has a law criminalizing persons who possess and cultivate marijuana. [FN113] The ballot initiative passed in California merely creates an exception*383 to the existing state law regarding the use, possession, and sale of marijuana. Allowing the federal government to prohibit states from making their own criminal laws is a violation of the fundamental principle of federalism created by the Constitution.

VI. The Federal Legislative Power Under the Commerce Clause: pre *Lopez* and *Morrison*

The Constitution of the United States grants Congress the power to regulate Commerce among the several States. [FN114] The Commerce Clause serves as both a source of and a limit on congressional authority. [FN115] The Supreme Court's first interpretation of Congress's commerce power came in the case of *Gibbons v. Ogden*, [FN116] where Chief Justice Marshall observed that commerce “is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.” [FN117] In the very same instance, the court in *Gibbons* also discussed the limitations on Congress' power under the Commerce Clause. The court held Congress' commerce power does not extend to “commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.” [FN118] The court said, “[s]uch a power would be inconvenient, and is certainly unnecessary.” [FN119] Although Congress' authority under the Commerce Clause has changed throughout history, the court recognized early on that the commerce power is not absolute.

From the time *Gibbons* was decided until 1887 when the Interstate Commerce Act was enacted, the Supreme Court was rarely involved with Commerce Clause litigation. [FN120] However, from 1887 to 1937, the Supreme Court began to consider the limits of congressional power under the Commerce Clause, and distinguished “commerce” between the states from other economic activities, such as “mining,” “manufacturing,” and

“production.” [FN121] In 1937, the attitude of the Supreme Court drastically changed in the case of *NLRB v. Jones & Laughlin Steel Corp.*, [FN122] where the Court held Congress could regulate any activity having a “close and substantial relationship” with interstate commerce. [FN123] But even there, the Court recognized limits to Congress’³⁸⁴ authority, explaining that Congress could not extend its authority under the Commerce Clause when the effects on interstate commerce are “so indirect and remote that . . . [it] would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” [FN124] Nevertheless, from 1937 to 1995, the Supreme Court did not invalidate any Congressional regulations of private activity as exceeding the authority granted to it under the Commerce Clause. [FN125]

VII. The Federal Legislative Power Under the Commerce Clause: post Lopez and Morrison

The Supreme Court has begun to realize that Congress is stretching its power under the Commerce Clause too far. Accordingly, the question of Congress’ power under the Commerce Clause has split the justices of the Supreme Court as they attempt to draw a line between what can and cannot be regulated. [FN126] The Commerce Clause, as limited by the Lopez and Morrison decisions, only permits Congress to regulate those activities that are economic in nature. Permitting Congress to regulate everything affecting interstate commerce provides no limitations to the extent of its power. As a consequence, it is necessary for the Supreme Court to decide what matters should be left to the states and what matters should be left to the national government.

United States v. Lopez dealt with the Congressionally-enacted Gun-Free School Zones Act of 1990 (hereinafter the Act), which made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” [FN127] The defendant was first charged under a state law that outlawed guns on school premises, but those charges were dismissed after the defendant was charged with violating the federal Act. [FN128] The defendant challenged his conviction, claiming the Act exceeded Congress’ power under the Commerce Clause. [FN129] The Government, on the other hand, argued possession of a firearm near a school substantially affected interstate commerce because it could ³⁸⁵ result in violent crime, which would affect the functioning of the national economy given that the costs of violent crime would spread throughout the nation and crime would reduce the willingness of individuals to travel to places deemed unsafe. [FN130] Moreover, the Government claimed possession of a firearm near a school would pose a substantial threat to the educational process by threatening the learning environment, which would lead to a less productive citizenry, and in turn have an adverse effect on the nation’s economic well being. [FN131]

After laying out the history of the Commerce Clause, the Supreme Court in *Lopez* identified three categories of activities that Congress could regulate under the Commerce Clause: (1) Congress can regulate the use of channels of interstate commerce, (2) Congress can regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) Congress can regulate those activities that substantially affect interstate commerce. [FN132] The Court rejected the Government’s arguments and held the Gun-Free School Zones Act exceeded Congress’ power under the Commerce Clause because possession of a gun in a local school zone is not an economic activity substantially affecting interstate commerce. [FN133] In addition, the Court reasoned that Congress did not have the authority to enact the Gun Free School Zones Act because crime control is an area traditionally left to the states, and Congress included no legislative findings of the effect possession of guns near local schools had on interstate commerce. [FN134]

For the first time in almost sixty years, the Supreme Court invalidated a private regulation enacted by Con-

gress as unconstitutionally surpassing its Commerce Clause power. The Court said, “[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” [FN135] Acknowledging language of prior opinions implying approval of this sort of expansion under the Commerce Clause, the Court nevertheless held they would not go any further because no distinction would be left between what is truly local and what is truly national. [FN136]

Similarly, the Controlled Substances Act ‘piles inference upon inference’ with regard to the impact of medical marijuana on interstate commerce. Congress maintains it has the power under the Commerce Clause to regulate all forms of marijuana because:

*386 [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 after manufacture, many controlled substances are transported in interstate commerce, controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and controlled substances possessed commonly flow through interstate commerce immediately prior to such possession. [FN137]

This argument is flawed in several ways. Congress admits some controlled substances might never travel between the states, evidenced by its use of the words “major,” “many,” “usually,” and “commonly.” [FN138] Under the California Compassionate Use Act, the patient or the patient's primary caregivers are the only ones that can cultivate marijuana. [FN139] It does not allow importation from other states, nor export to other states; persons without a prescription who grow marijuana for sales or distribution will still be prosecuted, along with persons who smoke marijuana for recreational purposes. [FN140] Just as the Gun-Free School Zones Act in *Lopez* attempted to punish gun possession, the Controlled Substances Act is trying to punish possession of certain drugs. [FN141] Just as the Court in *Lopez* deemed the Gun-Free School Zones Act unconstitutional, it should do the same with the Controlled Substances Act because it regulates possession of marijuana, which is not an economic activity, and as a result does not fall under Congress' commerce power. Under Congress' Commerce Clause authority, Congress should only be permitted to regulate controlled substances moving through interstate lines. Congress claims activities occurring intrastate have a substantial effect on interstate commerce because those controlled substances manufactured or possessed in a state are sometimes transported in or to another state. [FN142] If so, the federal government should have to prove the marijuana moved interstate to prosecute under the Controlled Substances Act. [FN143] This would be analogous to the requirement of proving that an individual crossed interstate lines in order to prosecute that individual for kidnapping, or proving that an automobile was transported across state lines to prosecute persons for the transporting*387 of stolen vehicles. [FN144] It can also be argued that it is hard to distinguish between marijuana transported intrastate and marijuana transported interstate, and therefore the federal government should rightfully regulate all marijuana. However, in light of the fact that States could have a distinguishable type of marijuana for medicinal purposes, i.e. a specific hybrid, this argument fails as only that hybrid would be permitted, and dispensaries could verify the specific type when a question arose.

The Supreme Court in *Lopez* further stated the Controlled Substances Act was a criminal statute having nothing to do with “commerce” and the Act was not part of a larger regulatory scheme that would be weakened if intrastate activity was not also regulated. [FN145] Similarly, the Controlled Substances Act is a criminal statute and medical marijuana does not affect interstate commerce because the marijuana is not being purchased or transported out of the State.

Another argument that can arise is that although the amount of marijuana cultivated is only for medical patients in need, it nonetheless affects interstate commerce because of its impact on the rest of the marijuana market. In *Wickard v. Filburn*, [FN146] the defendant raised a small acreage of wheat and sold some of it, fed his chicken and livestock, made flour, and then kept the rest. [FN147] The defendant was given notice by the federal government, by means of a statute, of how much he could harvest, but he went over the amount allotted. [FN148] The purpose of the federal statute regulating the amount of harvested wheat was to control the amount of wheat moving into interstate commerce, thereby preventing surpluses and shortages and stabilizing wheat prices. [FN149] As a result, a penalty was imposed on the defendant by the federal regulation because his wheat crop exceeded the quota provided. [FN150] He argued the statute was unconstitutional because it only dealt with production, something Congress could not regulate. [FN151] The Supreme Court upheld the statute, claiming defendant's harvest competed with the national wheat market. [FN152] The Court found that under the aggregation doctrine, though one crop alone is trivial, taken as a whole with other actors engaged in the same activity it impacts interstate commerce. [FN153]

***388** Unlike wheat, marijuana for medicinal purposes has no market to compete with, as its cultivation is illegal in the United States. There are no marijuana farmers across the nation that will be affected, except those who illegally produce the crop. Even if it is argued that the illegal market for marijuana needs to be regulated, allowing citizens of the state who suffer from certain illnesses to cultivate the plant and personally use it need not conflict with the criminal prosecution of those who persist in the illegal use of the plant. Furthermore, the federal government has not established a quota for the cultivation and use of medical marijuana; rather they want to prohibit all of its production and use, even when it can significantly assist in the health of seriously ill patients. Unlike *Wickard*, Congress through the Controlled Substances Act is not making an effort to control the price of drugs; [FN154] it is merely passing a criminal law, and crime control has been traditionally left in the hands of States. Furthermore, in *Wickard*, the wheat farmer was not only using it for his own personal use, but also producing wheat to feed his chicken and livestock, which he then sold on the market. [FN155] Marijuana, however, is only being legalized for medical patients, which in no way affects interstate commerce, just as legalizing morphine for medical patients does not affect interstate commerce. States can regulate how much is produced and, if it crosses state lines, the federal government can have jurisdiction over the issue. The commerce power is not to extend,

to those [activities] which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself. [FN156] Marijuana for medicinal use will be cultivated within the State and used within the State and therefore does not interfere with interstate commerce.

The Gun Free School Zones Act in *Lopez* could not be sustained under the Commerce Clause because it inappropriately superseded legitimate state laws with a new and unnecessary federal law. [FN157] In the case of marijuana, the federal law (The Controlled Substances Act) overrides a legitimate state law that does not criminalize marijuana use by the medically ill. The states can legitimately prosecute individuals who possess and distribute marijuana, and, accordingly, the Controlled Substances Act is an unnecessary federal law as to the prosecution of those individuals

In addition, the Court in *Lopez* held the Gun-Free School Zones Act contained no jurisdictional element providing that firearm possession near a school affected interstate commerce; nor did it provide any legislative findings***389** regarding the effect of firearm possession on interstate commerce. [FN158] The Court said although such legislative findings were not required, such findings would permit them to evaluate Congress' judg-

ment that the activity substantially affected interstate commerce. [FN159] After *Lopez* was decided, the constitutionality of the Controlled Substances Act was challenged in subsequent cases, but the Circuit Courts held that Congress, in enacting the Act, made specific legislative findings that local narcotics substantially affected interstate commerce. [FN160] Regardless, the Supreme Court decision in *United States v. Morrison*, establishes that these legislative findings are not sufficient to establish Congress' authority under the Commerce Clause.

In *Morrison* the Court upheld the principles decided in *Lopez*, affirming that the powers of Congress under the Commerce Clause are not unlimited. [FN161] *390 The Court also held that legislative findings of the effects on interstate commerce are not sufficient to give Congress authority to regulate non-economic activities by its Commerce Clause power. [FN162] In *Morrison*, a woman, after being repeatedly raped and assaulted, filed suit under a federal statute, the Violence Against Women Act of 1994, [FN163] which provided a civil remedy for victims of gender-motivated crimes. [FN164] The Act provided “all persons within the United States shall have the right to be free from crimes of violence motivated by gender.” [FN165] To enforce the right,

[a] person who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate. [FN166]

The defendant moved to dismiss, on the grounds the statute was unconstitutional, because Congress did not have authority to enact it under the Commerce Clause. [FN167] The United States intervened to defend the constitutionality of the statute, on the grounds that the statute was a regulation of an activity (gender motivated crimes) substantially affecting interstate commerce. [FN168] Unlike the *Gun-Free School Zones Act* invalidated in *Lopez*, Congress supported the constitutionality of the Violence Against Women Act with numerous legislative findings concerning the serious impact gender motivated crimes had on interstate commerce. [FN169] The legislative findings held *391 gender-motivated violence affects interstate commerce, “by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . .by diminishing national productivity, increasing *392 medical and other costs, and decreasing the supply of and the demand for interstate products.” [FN170] Nonetheless, the Supreme Court held the existence of these findings was not sufficient to maintain the Violence Against Women Act constitutional under the Commerce Clause. [FN171] “[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” [FN172] The Court held the legislative findings of the affect of gender motivated crimes on interstate commerce were weak because Congress relied on a “but-for” argument, one that is “unworkable if we are to maintain the Constitution's enumeration of powers.” [FN173] The Court rejected the “but-for” argument linking the initial violent crime to the effect on interstate commerce, because they felt it would allow Congress to regulate any crime, which would give Congress infinite power. [FN174] Findings have to be related to a legitimate regulation, and regulation of a non-commercial activity is not legitimate under the Commerce Clause. As the United States is a system of dual-sovereignty, there must be powers that are to be solely left in the hands of states. Chief Justice Rehnquist in his majority opinion states:

The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central government, than the suppression of violent crime and vindication of its victims. Congress therefore may not regulate non-economic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce. [FN175]

Here, the Supreme Court throws out the aggregate principle established in *Wickard* [FN176] for non-

economic violent criminal conduct. The same holds true with the case of medical marijuana. It is a non-economic activity being regulated based on its aggregate effect on interstate commerce. Ultimately, the Court held gender-motivated crimes of violence are not economic activities and thus do not fall under Congress' commerce power to regulate, as it only has the power to regulate economic activities with a substantial effect on interstate commerce, even if Congress provides a vast amount of legislative findings that the activity has a substantial effect on interstate commerce. [FN177] Similarly, although the Controlled Substances Act provides legislative*393 findings on the affect of controlled substances on interstate commerce, the reasoning employed is merely a “but-for” argument alleging the initial activity within the confines of a state will in turn have an effect on interstate commerce, an argument the Supreme Court rejects.

Comparable to the case of Morrison, where the federal government can become involved if a woman is transported across state lines and abused, [FN178] the federal government can get involved if the marijuana crosses state lines. However, violence occurring within the confines of a sovereign state is strictly a matter of state jurisdiction. Therefore, medical marijuana cultivated and used within the confines of a sovereign state should be left up to the state to decide what actions--if any--should be taken against it. If such a fundamental power is taken away from the states, there is no need to have a distinction between the state and federal government. [FN179]

VIII. Conclusion

Congress' authority under the Commerce Clause to pass private regulations is limited, as the recent Supreme Court decisions of Lopez and Morrison illustrate. Congress cannot regulate non-commercial activities, even when mass amounts of legislative findings demonstrate how the activity does affect interstate commerce. Instead, Congress should only become involved in intrastate activities through its commerce power when necessary to regulate the use of the channels for interstate commerce, to protect the instrumentalities of interstate commerce, and to regulate commercial activities that substantially affect interstate commerce. [FN180]

States ought to decide whether or not marijuana should be decriminalized for medicinal purposes for numerous reasons. States are more than capable of regulating marijuana in their states, as they have demonstrated by decriminalizing marijuana for medicinal purposes, and continuing to prosecute recreational marijuana users. Moreover, the federal system, which is already overwhelmed with its current caseload, is being burdened further, and the federal prosecution of persons whom the state is fully able to prosecute is unnecessary. Furthermore, states can act as “laboratories for experimentation.” [FN181] There is no way of knowing if allowing marijuana to be used legally for medical purposes will work unless we allow for experimentation.*394 [FN182] State legislatures are closer to the people and therefore are in a better position to legislate for their health, welfare, and safety. [FN183] Allowing California residents to decriminalize marijuana for medicinal purposes enables the nation to see whether a policy legalizing marijuana for medicinal purposes accomplishes something beneficial or whether it does lead to more marijuana being on the streets. Without attempting to implement a program, the federal government cannot know if its marijuana policy is the best one possible for the nation as a whole. Moreover, by not experimenting, people who are in need of the marijuana for their ailments are never able to gain access to the beneficial medication.

A federal statute criminalizing marijuana for medicinal purposes is unnecessary, since a state can control and regulate activities occurring in their state when the activities are completely internal and do not affect other states. Chief Justice Marshall said, “Congress may control the State laws, so far as it may be necessary to control

them, for the regulation of commerce.” [FN184] Here, we are dealing with medically ill patients who will be cultivating marijuana in their own backyards and using it as a necessary treatment for their illness. A state law, which decriminalizes marijuana for medicinal purposes, needs no “control,” as Justice Marshall stated so long ago, because the cultivation and use of marijuana for terminally ill patients in a state does not affect interstate commerce. Thus, the federal government can prohibit marijuana from traveling to other states, but cannot restrict it from being cultivated and used within a state, because that must be left for the states to control as part of their police powers. Congress is attempting to use the Commerce Clause to bring the issue into federal jurisdiction, when it has no place there and when the Commerce Clause never intended such.

[FN1]. The following is based on a hypothetical.

[FN2]. Chemotherapy is administered intravenously every few weeks and is considered to be the most important treatment for cancer; however, the agents used in the treatment are “among the most powerful and toxic chemicals used in medicine.” Lester Grinspoon & James B. Bakalar., *Marijuana the Forbidden Medicine* 23 (1997).

[FN3]. Other, more severe, side effects include deafness, life-threatening kidney failure, bleeding, bruising, suppressing the immune system, destroying the heart muscle, eating away of skin or tissue, hair loss, and a second type of cancer. See *id.* at 23-24.

[FN4]. See *id.* at 24-25.

[FN5]. See National Organization for the Reform of Marijuana Laws [[hereinafter NORML], *Medical Marijuana: Frequently Asked Questions*, at <http://www.norml.org/medical/faq.shtml> (last visited Nov. 4, 2000).

[FN6]. See *Cal. Health & Safety Code § 11362.5* (West 2000).

[FN7]. See Grinspoon & Bakalar, *supra* note 2, at 25.

[FN8]. A federal law prohibiting cultivation and possession of marijuana for any purpose. *21 U.S.C. § 812* (West 2000).

[FN9]. *21 U.S.C. § 812(b) (2000)*. Drugs classified in Schedule I are considered to have a high potential for abuse, have no currently accepted medical use in treatment in the United States, and there is a lack of accepted safety for their use under medical supervision. Physicians are prohibited from prescribing Schedule I drugs. Physicians are permitted to prescribe drugs from Schedules II through V. Drugs classified in Schedule II are considered to also have a high potential for abuse, but they are considered to have a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions, and abuse of the drug or other substances may lead to severe psychological or physical dependence. Drugs classified in Schedule III are considered to have a potential for abuse less than the drugs or other substances in schedules I and II, they have a currently accepted medical use in treatment in the United States, and abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence. Drugs classified in Schedule IV are considered to have a low potential for abuse relative to the drugs or other substances in schedule III, they have a currently accepted medical use in treatment in the United States, and abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III. Finally, drugs classified in schedule V are considered to have a low potential for abuse relative to the drugs or other substances in schedule IV, they have a currently accepted med-

ical use in treatment in the United States, and abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV. See generally *id.*

[FN10]. American Cancer Society: Statistics, at [http:// www.cancer.org/cancerinfo/sitecenter](http://www.cancer.org/cancerinfo/sitecenter) (last visited Nov. 18, 2000).

[FN11]. See Grinspoon & Bakalar, *supra* note 2, at 24.

[FN12]. Center for Disease Control, Divisions Of HIV/AIDS Prevention, at <http://www.cdc.gov/hiv/stats/cumulati.htm> (last visited Nov. 18, 2000).

[FN13]. *Id.*

[FN14]. This syndrome is defined as a ten percent loss of body weight or more for unknown reasons. Grinspoon & Bakalar, *supra* note 2, at 102.

[FN15]. See *id.* at 103.

[FN16]. See *id.* There are only two drugs permitted by the Federal Drug Administration to treat the AIDS wasting syndrome, but most victims of this syndrome prefer to smoke marijuana, as the side effects for the two permitted drugs are unpleasant. See *id.* at 102-03. A patient living with AIDS said smoking marijuana makes her feel “as if I am living with AIDS rather than just existing. My appetite returns, and once I have eaten, I don't feel sick anymore.” *Id.* at 104. Another physician patient said, “I felt better than at any time since I had been diagnosed...I felt truly alive once again.” *Id.* at 106-07.

[FN17]. See generally Grinspoon & Bakalar, *supra* note 2.

[FN18]. See 21 U.S.C. § 812 (West 2000).

[FN19]. Grinspoon & Bakalar, *supra* note 2, at 24-25.

[FN20]. Physicians Desk Reference 594, 607-608 (2000).

[FN21]. See generally *Nat'l Org. for the Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974); *Nat'l Org. for the Reform of Marijuana Laws v. Drug Enforcement Agency*, 559 F.2d 735 (D.C. Cir. 1977); *Nat'l Org. for the Reform of Marijuana Laws v. Drug Enforcement Agency & Dep't of Health Educ. & Welfare*, 930 F.2d 936 (D.C. Cir. 1991); *Alliance for Cannabis Therapeutics v. Drug Enforcement Agency*, 15 F.3d 1131 (D.C. Cir. 1994).

[FN22]. The DEA has the authority from the Attorney General to reschedule marijuana. See Drug Enforcement Agency, Controlled Substances Act, at <http://www.usdoj.gov/dea/agency/csa.htm> (last visited Nov. 18, 2000).

[FN23]. Cannabis in Medical Practice: A Legal, Historical and Pharmacological Overview of the Therapeutic Use of Marijuana 51-52 (1997).

[FN24]. See *id.* at 52.

[FN25]. See *id.*

[FN26]. Arizona and California voters approved medical marijuana laws in 1996. See NORML, Medical Marijuana: Frequently Asked Questions, at <http://www.norml.org/medical/faq.shtml> (last visited Nov. 4, 2000). Voters in Alaska, Oregon and Washington approved similar laws in 1998. See *id.* Although the District of Columbia voters approved an initiative in 1998 with 69 percent of the vote, Congress overrode the law. See *id.* Voters in Maine approved their own medical marijuana law in 1999, and the Hawaii State Senate approved a bill that protects seriously ill patients who use marijuana medically from local and state criminal prosecution., which, on June 14, 2000, was signed into law by Hawaii's Governor Ben Cayetano. See *id.* On November 7, 2000, Nevada and Colorado citizens also passed similar marijuana initiatives. See NORML, Medical Marijuana Initiatives Pass In Colorado and Nevada; Californians Pass Initiative To Keep Non-Violent Drug Offenders Out Of Jail, at <http://www.norml.org/news/archives/00-11-09.shtml> (last visited Nov. 29, 2000).

[FN27]. See 21 U.S.C. § 801(3) (2000).

[FN28]. See generally *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

[FN29]. See *id.*

[FN30]. Federalism is defined as the division of power between the federal government and state governments. Raoul Berger, *Federalism: The Founder's Design* 3 (1987).

[FN31]. 514 U.S. 549 (1995).

[FN32]. 529 U.S. 598 (2000).

[FN33]. See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 *Hastings L.J.* 979, 979 (1995)

[FN34]. James Madison in *Federalist No. 45* wrote,

The powers delegated in the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects as war, peace, negotiations and foreign commerce....The powers reserved to the States will extend to all objects which, in the course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State.

Berger, *supra* note 30, at 71-72.

[FN35]. See James A. Strazzella, *Task Force on Federalization of Criminal Law*, 1998 *A.B.A. Sec. Crim. Just. Rep.* 7.

[FN36]. See 1999 *Admin. Off. of the U.S. Cts. Ann. Rep.* 15.

[FN37]. *Id.*

[FN38]. See Strazzella, *supra* note 35, at 14-15.

[FN39]. See *id.* at 17.

[FN40]. Strazzella, *supra* note 35, at 50; Beale, *supra* note 33, at 985-88.

[FN41]. See Strazzella, *supra* note 35, at 50.

[FN42]. See 18 U.S.C. § 3161 (West 1985) (stating that if a trial does not occur within seventy days, the charge will be dismissed).

[FN43]. See Beale, *supra* note 33, at 985-88.

[FN44]. *Id.* at 997.

[FN45]. *Id.*

[FN46]. See 21 U.S.C. § 841 (West 2000).

[FN47]. 21 U.S.C. § 812(b)(1) (West 2000).

[FN48]. See 21 U.S.C. § 823(f) (West 2000).

[FN49]. *Id.*

[FN50]. The Attorney General may by rule:

(1) add to such a schedule or transfer between such schedules any drug or other substance if he--(A) finds that such drug or other substance has a potential for abuse, and (B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or (2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule. Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party. The Attorney General shall, before initiating proceedings request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the following factors (1) Its actual or relative potential for abuse; (2) Scientific evidence of its pharmacological effect, if known; (3) The state of current scientific knowledge regarding the drug or other substance; (4) Its history and current pattern of abuse; (5) The scope, duration, and significance of abuse; (6) What, if any, risk there is to the public health; (7) Its psychic or physiological dependence liability; and (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance.

21 U.S.C. § 811 (West 2000).

[FN51]. See generally cases cited *supra* note 21.

[FN52]. See generally Strazzella, *supra* note 35.

[FN53]. Grinspoon & Bakalar, *supra* note 2, at 3.

[FN54]. Id.

[FN55]. Id. at 4.

[FN56]. Id.

[FN57]. Id.

[FN58]. Id. at 7-8.

[FN59]. Id.

[FN60]. Id. at 8.

[FN61]. For example, research on the medicinal effects of marijuana became nearly impossible. See Matthew Segal, [Overdue Process: Why Denial of Physician-Prescribed Marijuana to Terminally Ill Patients Violates the United States Constitution](#), 22 *Seattle U.L. Rev.* 235, 240 (1998). By 1941 marijuana was removed from the United States Pharmacopoeia and National Formulary. Grinspoon & Bakalar, *supra* note 2, at 8.

[FN62]. Grinspoon & Bakalar, *supra* note 2, at 13.

[FN63]. See 21 U.S.C. § 812.

[FN64]. See *id.*

[FN65]. Grinspoon & Bakalar, *supra* note 2, at 14.

[FN66]. See generally cases cited *supra* note 21.

[FN67]. Grinspoon & Bakalar, *supra* note 2, at 13.

[FN68]. Id. at 14.

[FN69]. Morphine and cocaine are a few such examples.

[FN70]. See Introduction, and accompanying text.

[FN71]. Those who have a medical need will be permitted to use the substance with a prescription; those who do not have such a need will be prosecuted for possession of a controlled substance.

[FN72]. See Laura M. Rojas, [California's Compassionate Use Act and the Federal Government's Medical Marijuana Policy: Can California Physicians Recommend Marijuana to Their Patients Without Subjecting Themselves to Sanctions?](#) 30 *McGeorge L. Rev.* 1373, 1390 (1999).

[FN73]. The Compassionate Use Act in California provides that nothing in the section “shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.” *Cal. Health & Safety Code* § 11362.5(b)(2) (West 2000).

[FN74]. See Rojas, *supra* note 72, at 1390.

[FN75]. See Andrew J. LeVay, [Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense](#), 41 B.C. L. Rev. 699, 711 (2000).

[FN76]. California State Proposition 215.

[FN77]. [Cal. Health & Safety Code § 11362.5](#) (West 2000).

[FN78]. Cannabis is part of the scientific name for the marijuana plant, and often used to refer to marijuana.

[FN79]. [United States v. Cannabis Cultivators Club](#), 5 F. Supp. 2d 1086, 1091-92 (N.D. Cal. 1998).

[FN80]. See [21 U.S.C. § 841](#) (West 2000).

[FN81]. See [Conant v. McCaffrey](#), 2000 WL 1281174, 1 (N.D. Cal. 2000) (holding the Controlled Substances Act does not permit the government to revoke a physician's license to dispense controlled substances merely because the physician "recommends" marijuana to a patient).

[FN82]. See [Cannabis Cultivators Club](#), 5 F. Supp. at 1088.

[FN83]. *Id.*

[FN84]. [United States v. Cannabis Cultivators Club](#), 1999 WL 111893.

[FN85]. *Id.*

[FN86]. [United States v. Oakland Cannabis Buyers' Coop.](#), 190 F.3d 1109 (9th Cir. 1999).

[FN87]. *Id.* at 1115.

[FN88]. [United States v. Oakland Cannabis Buyers' Coop., et al.](#), 2000 WL 1517166 (2000).

[FN89]. [United States v. Oakland Cannabis Buyers' Coop.](#), 121 S. Ct. 21 (2000). Justice Stevens dissented stating:

Because the applicant in this case has failed to demonstrate that the denial of necessary medicine to seriously ill and dying patients will advance the public interest or that the failure to enjoin the distribution of such medicine will impair the orderly enforcement of federal criminal statutes, whereas respondents have demonstrated that the entry of a stay will cause them irreparable harm, I am persuaded that a fair assessment of that balance favors a denial of the extraordinary relief that the government seeks.

Id. (Stevens, J., dissenting).

[FN90]. NORML, at <http://www.norml.org./news/archives/00-11-28.shtml> (last visited Nov. 29, 2000). Oral arguments on this case were heard by the Supreme Court on March 28, 2001. See [United States v. Oakland Cannabis Buyers' Cooperative](#), 2001 WL 300618. On May 14, 2001, the Supreme Court reversed the Ninth Circuit's ruling and held there is no medical necessity defense available to the Buyers' Cooperative to the Controlled Substances Act; however, the Court declined to address any Constitutional issues, finding that that they were not presented at the Court of Appeals. See [United States v. Oakland Cannabis Buyers' Cooperative](#), 2001 WL 501567.

[FN91]. [New York v. United States](#), 505 U.S. 144, 181 (1992).

[FN92]. U.S. Const. art. I, § 8.

[FN93]. “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.” [U.S. Const. amend. X](#).

[FN94]. U.S. Const. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... under the Authority of the United States, shall be the supreme Law of the Land.”).

[FN95]. See *id.* (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.”).

[FN96]. See [NORML](#), *supra* note 26, and accompanying text.

[FN97]. See [United States v. Lopez](#), 514 U.S. 549, 558-59 (1995).

[FN98]. See Centers for Disease Control and Prevention, National Center for HIV, STD, and TB Prevention, Division of HIV/AIDS Prevention, 1998 special data run.

[FN99]. See *id.*

[FN100]. [Berger](#), *supra* note 30, at 131.

[FN101]. The Supreme Court has recognized a de facto police power to prohibit the interstate shipment of things. See [Champion v. Ames](#), 188 U.S. 321 (1903) (holding Congress could prohibit the shipment of lottery tickets from state to state under its Commerce Clause power); [Hoke v. U.S.](#), 227 U.S. 308, 323 (1913) (holding Congress could prohibit the transportation of women for immoral purposes). See also [Brooks v. U.S.](#), 267 U.S. 432 (1925) (holding Congress could ban the interstate transportation of stolen autos).

[FN102]. The powers that the states were to retain encompassed the protection of health, safety, and morals of its citizens. See [Berger](#), *supra* note 30, at 140.

[FN103]. See *id.* at 140; Kathleen F. Brickey, [Criminal Mischief: The Federalization of American Criminal Law](#), 46 *Hastings L.J.* 1135, 1138 (1995).

[FN104]. See Anna Johnson Cramer, [The Right Results for All the Wrong Reasons: A Historical and Functional Analysis of the Commerce Clause](#), 53 *Vand. L. Rev.* 271, 272 (2000); Brickey, *supra* note 103, at 1142.

[FN105]. See [21 U.S.C. § 801\(3\)](#) (West 2000).

[FN106]. See Cramer, *supra* note 104, at 292.

[FN107]. See Brickey, *supra* note 103, at 1159.

[FN108]. *Id.*

[FN109]. “The federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us [the judiciary] to admit inability to intervene when one or the other level of Government has tipped the scales too far.” [United States v. Lopez](#), 514 U.S. 549, 578 (Kennedy, J., concurring in the judg-

ment).

[FN110]. See generally [United States v. Lopez](#), 514 U.S. 549 (1995); [United States v. Morrison](#), 529 U.S. 598 (2000).

[FN111]. See Berger, *supra* note 30, at 140.

[FN112]. [Lopez](#), 514 U.S. at 561 n.3.

[FN113]. See [Cal. Health & Safety Code § 11357](#) (West 2000):

Except as authorized by law, every person who possesses any concentrated cannabis shall be punished by imprisonment in the county jail for a period of not more than one year or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment, or shall be punished by imprisonment in the state prison.

See also [Cal. Health & Safety Code § 11358](#) (West 2000) (“Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment in the state prison.”).

[FN114]. [U.S. Const. art. I, § 8, cl. 3](#).

[FN115]. 1 Laurence H. Tribe, [American Constitutional Law § 5-4](#), 807-08 (3d ed. 2000).

[FN116]. [Gibbons v. Ogden](#), 22 U.S. (9 Wheat.) 1 (1824).

[FN117]. *Id.* at 196.

[FN118]. *Id.* at 195.

[FN119]. *Id.*

[FN120]. See Tribe, *supra* note 115, at 808.

[FN121]. *Id.* at 810.

[FN122]. 301 U.S. 1 (1937).

[FN123]. See *id.* at 41.

[FN124]. *Id.* at 37.

[FN125]. The courts did invalidate regulations of state activities, however, as going beyond the scope of the Commerce Clause. See generally [Nat'l League of Cities v. Usery](#), 426 U.S. 833 (1976) (invalidating the 1974 amendments to the Fair Labor Standards Act because Congress did not have the authority under the Commerce Clause to coerce states to structure traditional state operations); [New York v. U.S.](#), 505 U.S. 144 (1992) (invalidating the “take-title” provision of the Low-Level Waste Policy Act compelling states to enact a federal regulatory program because it was beyond the power granted to Congress under the Commerce Clause).

[FN126]. Both the Lopez and Morrison decisions were five to four. See [United States v. Lopez](#), 514 U.S. 549 (1995); [United States v. Morrison](#), 529 U.S. 598 (2000).

[FN127]. *Lopez*, 514 U.S. at 551 (citing 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)).

[FN128]. *Id.* at 552.

[FN129]. *Id.*

[FN130]. *Id.* at 564.

[FN131]. *Id.*

[FN132]. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

[FN133]. *Id.* at 549.

[FN134]. *Id.*

[FN135]. *Id.* at 567.

[FN136]. *Id.* at 567-68

[FN137]. 21 U.S.C. § 801(3) (West 2000).

[FN138]. See Steven A. Kohnke, *Can Congress Do That? An Analysis of the Federal Prohibition on Marijuana Possession*, 19 *Miss. C. L. Rev.* 381, 384 (1999).

[FN139]. See *Cal. Health & Safety Code* § 11362.5(d) (West 2000) (“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.”).

[FN140]. See *Cal. Health Safety Code* § 11357, *supra* note 113, and accompanying text.

[FN141]. See Kohnke, *supra* note 138, at 385.

[FN142]. See 21 U.S.C. § 801(3) (West 2000).

[FN143]. See Kohnke, *supra* note 138, at 387.

[FN144]. See generally *Hoke v. U.S.*, 227 U.S. 308 (1913) (holding Congress could prohibit the transportation of women for immoral purposes); *Brooks v. U.S.*, 267 U.S. 432 (1925) (holding Congress could ban the interstate transportation of stolen automobiles).

[FN145]. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

[FN146]. 317 U.S. 111 (1942).

[FN147]. *Id.* at 114.

[FN148]. *Id.* at 114-15.

[FN149]. *Id.* at 115.

[FN150]. *Id.* at 113.

[FN151]. *Id.* at 113-14.

[FN152]. *Id.* at 128.

[FN153]. *Id.* at 127-28.

[FN154]. See Marcia Tiersky, *Medical Marijuana: Putting the Power Where It Belongs*, 93 *Nw. U.L. Rev.* 547, 593 (1999).

[FN155]. *Wickard v. Filburn*, 317 U.S. 111, 114 (1942).

[FN156]. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 195 (1824).

[FN157]. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995).

[FN158]. *Id.* at 562.

[FN159]. *Id.* at 563.

[FN160]. See *Proyect v. United States*, 101 F.3d 11, 12 (2d Cir. 1996) (holding Congress made explicit findings about the effect of drugs on interstate commerce); *United States v. Puckett, et al*, 147 F.3d 765, 769 n.4 (8th Cir. 1998) (holding that the statute at issue was unlike the statute in *Lopez* because there were findings made about the effects on interstate commerce); *United States v. Walker*, 142 F.3d 103, 111 (2d Cir. 1998) (holding Congress made specific findings and declarations that local narcotics activity substantially affects interstate commerce).

The Congressional findings for the Controlled Substances Act are as follows:

The Congress makes the following findings and declarations: (1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people. (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people. (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, (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession. (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 (West 2000).

[FN161]. *United States v. Morrison*, 529 U.S. 598, 607 (2000).

[FN162]. *Id.* at 598.

[FN163]. 42 U.S.C. § 13981 (West 1994).

[FN164]. *Morrison*, 529 U.S. at 598.

[FN165]. *Id.* at 605. See also 42 U.S.C. § 13981(b) (West 1994).

[FN166]. 42 U.S.C. § 13981(c) (West 1994).

[FN167]. *Morrison*, 529 U.S. at 598.

[FN168]. *Id.* at 603, 609.

[FN169]. *Id.* at 614. With respect to domestic violence, Congress received evidence for the following findings:

‘Three out of four American women will be victims of violent crimes sometime during their life.’ *H.R. Rep. No. 103-395 p. 25 (1993)* (citing U.S. Dept. of Justice, Report to the Nation on Crime and Justice 29 (2d ed. 1988)). ‘Violence is the leading cause of injuries to women ages 15 to 44....’ *S. Rep. No. 103-138, p. 38 (1993)* (citing Surgeon General Antonia Novello, From the Surgeon General, U.S. Public Health Services, 267 *JAMA* 3132 (1992)). ‘[A]s many as 50 percent of homeless women and children are fleeing domestic violence.’ *S. Rep. No. 101-545, p. 37 (1990)* (citing E. Schneider, Legal Reform Efforts for Battered Women: Past, Present, and Future (July 1990)). ‘Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others.’ *S. Rep. No. 101-545*, at 30 (citing Bureau of Justice Statistics, Criminal Victimization in the United States (1974) (Table 5)). ‘[B]attering ‘is the single largest cause of injury to women in the United States.’ *S. Rep. No. 101-545*, at 37 (quoting Van Hightower & McManus, Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies, 49 *Pub. Admin. Rev.* 269 (May/June 1989)). ‘An estimated 4 million American women are battered each year by their husbands or partners.’ *H.R. Rep. No. 103-395*, at 26 (citing Council on Scientific Affairs, American Medical Assn., Violence Against Women: Relevance for Medical Practitioners, 267 *JAMA* 3184, 3185 (1992)). ‘Over 1 million women in the United States seek medical assistance each year for injuries sustained [from] their husbands or other partners.’ *S. Rep. No. 101-545*, at 37 (citing Stark & Flitcraft, Medical Therapy as Repression: The Case of the Battered Woman, *Health & Medicine* (Summer/Fall 1982)). ‘Between 2,000 and 4,000 women die every year from [domestic] abuse.’ *S. Rep. No. 101-545*, at 36 (citing Schneider, *supra*). ‘[A]rrest rates may be as low as 1 for every 100 domestic assaults.’ *S. Rep. No. 101-545*, at 38 (citing Dutton, Profiling of Wife Assaulters: Preliminary Evidence for Trimodal Analysis, 3 *Violence and Victims* 5-30 (1988)). ‘Partial estimates show that violent crime against women costs this country at least 3 billion--not million, but billion-- dollars a year.’ *S. Rep. No. 101-545*, at 33 (citing Schneider, *supra*, at 4). ‘[E]stimates suggest that we spend \$5 to \$10 billion a year on health care, criminal justice, and other social costs of domestic violence.’ *S. Rep. No. 103-138*, at 41 (citing Biden, Domestic Violence: A Crime, Not a Quarrel, *Trial* 56 (June 1993)).

Morrison, 529 U.S. at 631-34.

The evidence as to rape was similarly extensive, supporting these conclusions:

[The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years.’ *S. Rep. No. 101-545*, at 30 (citing Federal Bureau of Investigation Uniform Crime Reports (1988)). ‘According to

one study, close to half a million girls now in high school will be raped before they graduate.’ [S. Rep. No. 101-545](#), at 31 (citing R. Warshaw, *I Never Called it Rape* 117 (1988)). ‘[One hundred twenty--five thousand] college women can expect to be raped during this--or any--year.’ [S. Rep. No. 101-545](#), at 43 (citing testimony of Dr. Mary Koss before the Senate Judiciary Committee, Aug. 29, 1990). ‘[T]hree-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason.’ [S. Rep. No. 102-97](#), p. 38 (1991) (citing M. Gordon & S. Riger, *The Female Fear* 15 (1989)). ‘[Forty-one] percent of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims.’ [S. Rep. No. 102-197](#), at 47 (citing Colorado Supreme Court Task Force on Gender Bias in the Courts, *Gender Justice in the Colorado Courts* 91 (1990)). ‘Less than 1 percent of all [rape] victims have collected damages.’ [S. Rep. No. 102-197](#), at 44 (citing report by Jury Verdict Research, Inc.). ‘[A]n individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.’ [S. Rep. No. 101-545](#), at 33 n.30 (quoting H. Field & L. Bienen, *Jurors and Rape: A Study in Psychology and Law* 95 (1980)). ‘Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months.’ [S. Rep. No. 103-138](#), at 38 (citing Majority Staff Report of Senate Committee on the Judiciary, *The Response to Rape: Detours on the Road to Equal Justice*, 103d Cong., 1st Sess., 2 (Comm. Print 1993)). ‘[A]lmost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity.’ [S. Rep. No. 102-197](#), at 53 (citing Ellis, Atkeson, & Calhoun, *An Assessment of Long-Term Reaction to Rape*, 90 *J. Abnormal Psych.* 3, 264 (1981)).

Id. at 633-34.

[FN170]. Id. at 634.

[FN171]. Id. at 614.

[FN172]. [United States v. Lopez](#), 514 U.S. 549, 557(1995) (quoting [Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.](#), 452 U.S. 264, 311 (1981)) (Rehnquist, C. J., concurring in judgment).

[FN173]. [United States v. Morrison](#), 529 U.S. 598, 614 (2000).

[FN174]. Id. at 599.

[FN175]. Id.

[FN176]. [Wickard v. Filburn](#), 317 U.S. 111, 127-28 (1942) (stating that it was not the one person that affected interstate commerce, but the collective actions that did).

[FN177]. [Morrison](#), 529 U.S. at 598.

[FN178]. Id. at 613 n.5.

[FN179]. “Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.” [United States v. Lopez](#), 514 U.S. 549, 577 (1995) (Kennedy, J., concurring in the judgment).

[FN180]. Id. at 558-59.

[FN181]. Tiersky, *supra* note 154, at 586 (citing [United States v. Lopez](#), 514 U.S. 549, 581 (1995)) (Thomas, J., concurring).

[FN182]. [Lopez](#), 514 U.S. at 581 (Kennedy, J., concurring in the judgment).

[FN183]. See Tiersky, *supra* note 154, at 586.

[FN184]. [Gibbons v. Ogden](#), 22 U.S. (9 Wheat) 1, at 206 (1824).

[FN185]. J.D. candidate, April, 2002. Many thanks to Professors Laurence Benner, Michael Belknap, and Matthew Ritter for all of their comments and suggestions.

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