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# United States v. Oakland Cannabis Buyers' Cooperative: Whatever Happened to Federalism

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# *UNITED STATES v. OAKLAND CANNABIS BUYERS' COOPERATIVE*: WHATEVER HAPPENED TO FEDERALISM?

United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001).

## I. INTRODUCTION

In *United States v. Oakland Cannabis Buyers' Cooperative*[1] the Supreme Court held that there is no medical exception to the Controlled Substances Act's ("CSA")[2] prohibitions on manufacturing and distributing marijuana. Justice Thomas reasoned that because Congress unambiguously designated marijuana as a Schedule I substance within the CSA, it had determined that there was no current "accepted medical use" or medical benefit of marijuana to warrant an exception granted to other drugs under the Act.[3] Thus, due to what Thomas deemed to be "apparently absolute language" of the CSA, the Court summarily rejected the assertion of the Oakland Cannabis Buyers' Cooperative (the "Cooperative") that because a medical necessity defense exists under the common law, a medical necessity exception should be read into the CSA.[4] Lastly, the Court held that although lower federal courts do enjoy "sound discretion," this discretion does not allow federal courts to ignore Congress's judgment expressed within legislation.[5]

This Note argues that the Supreme Court's decision in *Oakland* is inadequate because it fails to examine an issue necessary to resolve this case: does Congress's attempt to regulate the wholly intrastate activity of distribution of marijuana for medical purposes under the CSA exceed Congress's enumerated commerce power? First, the principles of federalism on which our government is based, in con-

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[1] 532 U.S. 483, 494–95 (2001) [hereinafter *Oakland*].
[2] 21 U.S.C. §§ 801-971 (1994 & Supp. V. 1998).
[3] *Id.* at 491–92.
[4] *Id.* at 490–91.
[5] *Id.* at 496–98.

junction with the facts of *Oakland*, require this inquiry. Federalism plays a crucial role in the strained relationship between California's Proposition 215,[6] under which the defendant cannabis cooperatives formed, and the CSA. Furthermore, both *Oakland* and the broader medical marijuana issue involve a situation in which California has chosen to serve as a social and economic laboratory.[7] As Justice Stevens pointed out in his concurrence, when such situations arise, it is the duty of the Supreme Court, and all federal courts, to step in and, whenever possible, resolve any conflicts between state and federal law.[8]

Second, by failing to address federalism principles and the constitutionality of the CSA, the Court's decision in *Oakland* is inconsistent with the Rehnquist Court's recent reinvigoration of federalism and its efforts to apply "judicially enforceable outer limits" on Congress's commerce power.[9] This Note argues that when one examines the CSA under the heightened standards the Court set forth in *Lopez* and *Morrison*, it becomes clear that the Act, as applied to the wholly intrastate cultivation, possession, and use of medical marijuana is highly constitutionally suspect, if not wholly unconstitutional.

## II. BACKGROUND

### A. PROPOSITION 215

In November 1996, Proposition 215, the "Medical Use of Marijuana" initiative, was passed in California by fifty–six percent of citizens participating in a statewide election,[10] and was codified into law as the "Compassionate Use Act."[11] The Proposition was enacted "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes."[12] Its broad language legalizes marijuana possession and cultivation by seriously ill patients and their caregivers for use by the patient if the patient's physician rec-

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[6] CAL. HEALTH & SAFETY CODE § 11362 (West 2002).

[7] *Oakland*, 532 U.S. at 502.

[8] *Id.*

[9] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566 (1995) (federal criminal penalty for possession of a firearm in a school zone); United States v. Morrison, 529 U.S. 598 (2000) (federal civil remedy for gender–violence).

[10] United States v. Cannabis Cultivators Club, 5 F. Supp. 2d. 1086, 1091 (N.D. Cal. 1998) [hereinafter *Cannabis*].

[11] CAL. HEALTH & SAFETY CODE § 11362.

[12] *See id.* § 11362.5(b)(1)(A).

ommends such treatment.[13] Such patients and their primary caregivers are exempt under Proposition 215 from prosecution for possession of marijuana under California's Health and Safety Code section 11357 and for cultivation of marijuana under section 11358.[14]

Eight other states have followed California's lead in passing medical marijuana initiatives declaring that persons with a medical need to smoke marijuana will not be prosecuted for possessing or manufacturing the substance.[15] On June 14, 2000, Hawaii's Governor Ben Cayetano (D) signed into law a bill that protects seriously ill patients who use marijuana medically from local and state prosecution.[16] However, such sentiment and action certainly has not yet transferred to the federal level. The Clinton Administration immediately responded to the California and Arizona initiatives with an unequivocal official announcement that federal drug statutes were the controlling legal authority in the United States.[17] Several federal law enforcement agencies also made public statements warning California citizens that possession and cultivation of marijuana was a federal crime, regardless if those actions were now legal under California law.[18] As recently as September 1998, the House of Representatives declared its opposition to the legalization of marijuana for medical use in a "sense of Congress" resolution entitled "Not Legalizing Marijuana for Medical Use" by a 310–93 margin.[19]

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[13] *See id.* §§ 11362.5(c)–(d). For a discussion about the broad language used by Proposition 215's drafters and 215's drafting flaws, see Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707 (1998).

[14] CAL. HEALTH & SAFETY CODE §§ 11357, 11358; *Cannabis*, 5 F. Supp. 2d at 1091.

[15] Arizona voters also approved medical marijuana laws in 1996. *See* ARIZ. REV. STAT. ANN. § 13–3412.01 (2001). Voters in Alaska, Oregon and Washington approved similar laws in 1998, followed by voters in Maine in 1999, and Hawaii, Colorado and Nevada in 2000. While voters in the District of Columbia passed an initiative with sixty-nine percent in 1998, Congress overrode the law. *See* Nat'l Org. to Reform Marijuana Laws, *Medical Frequently Asked Questions*, *at* http://www.norml.org/index.cfm?Group_ID=3387 (last modified Mar. 28, 2002).

[16] National Organization to Reform Marijuana Laws, *Medical Frequently Asked Questions*, *at* http://www.norml.org/index.cfm?Group_ID=4533&wtm_view=medical (last accessed Sept. 16, 2002).

[17] *See* Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997).

[18] *See* William Claiborne, *Federal Warning on Medical Marijuana Leaves Physicians Feeling Intimidated*, WASH. POST, Jan. 1, 1997, at A6; *see also infra* Part II(B)(2) discussion of Conant v. McCaffrey, 172 F.R.D. 681 (N.D. Cal. 1997) [hereinafter *Conant I*].

[19] In this piece of legislation, Congress declared that it "continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to

B. CONTROLLED SUBSTANCES ACT

The controlling federal drug statute in the United States is the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("CSA"), which prohibits the manufacture and distribution of various drugs.[20] The Act specifically provides that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, a controlled substance."[21] The CSA assigns controlled substances to one of five "Schedules" depending on the substance's potential for abuse, the extent to which use may lead to psychological or physical dependence, and whether a substance has a currently accepted medical use in the United States.[22] Substances which have a "high potential for abuse," "no currently accepted medical use in treatment," and "a lack of accepted safety for use of the drug . . . under medical supervision" are designated "Schedule I."[23] Schedule I substances are strictly regulated, and the Act provides only one explicit exception in which use of Schedule I substances is permitted: government–approved research projects.[24] Physicians, therefore, cannot legally dispense Schedule I substances to any patient; however, physicians may lawfully distribute substances designated in Schedules II through V.[25]

Congress placed marijuana, along with LSD and heroine, in Schedule I upon passage of the Act and it has remained in Schedule I to the present day.[26] 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 Schedule I to Schedule II for many years.[27] However,

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circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration." H.R.J. Res. 117, 105th Cong., 144 CONG. REC. H7719 (1998). Record of votes on the resolution appear at 144 CONG. REC. H7783 (1998). *See also* Judy Holland, *House Votes to Oppose Medical Marijuana Use*, S.F. EXAMINER, Sept. 16, 1998, at A10.

[20] 21 U.S.C. §§ 801–971 (1994 & Supp. V 1998).

[21] *Id.* § 841(a)(1); § 844(a) makes possession unlawful.

[22] 21 U.S.C. § 812(b).

[23] *Id.* § 812(b)(1).

[24] *Id.* § 823(f).

[25] *See* 21 U.S.C. § 823(f). Note an exception: doctors may dispense Schedule I substances to any patient within a strictly controlled research project that has been registered by the DEA and approved by the FDA.

[26] 21 U.S.C § 812(c) (listed under Schedule I(c)(10)).

[27] *See, e.g.*, Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131 (D.C. Cir. 1994);

their efforts have repeatedly failed at both the legislative and administrative levels.[28] Supporters of rescheduling argue that failure to reschedule marijuana is absurd when substances such as morphine and cocaine are classified as Schedule II substances, given the medical knowledge of greater risks associated with the latter substances.[29]

The federal government has unanimously and adamantly opposed rescheduling, arguing that marijuana has no proven medical value,[30] or, alternatively, that the harms outweigh any potential benefit that may result from rescheduling.[31] Congress has consistently rejected legislation to remove marijuana from Schedule I to Schedule II.[32] The Drug Enforcement Administration ("DEA") also has the authority from the Attorney General to reschedule marijuana,[33] but it too has refused to do so. In 1986, the DEA agreed to conduct public hearings on the possible rescheduling of marijuana.[34] After two years of hearings, an administrative law judge recommended the removal of marijuana from Schedule I to Schedule II due to its "currently accepted medical use."[35] However, the Administrator of the DEA refused to apply the recommendation, and instead applied an eight–

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Alliance for Cannabis Therapeutics v. DEA, 930 F.2d 936 (D.C. Cir. 1991); Nat'l Org. for the Reform of Marijuana Laws v. DEA, 559 F.2d 735 (D.C. Cir. 1977); Nat'l Org. for the Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974).

[28] *See generally* Gregg A. Bilz, *The Medical Use of Marijuana: The Politics of Medicine*, 13 HAMLINE J. PUB. L. & POL'Y 117, 124–30 (1992) (describing the several failed legal attempts to reschedule marijuana in the 1980s).

[29] *See, e.g.*, Jerome P. Kassirer, M.D., Editorial, *Federal Foolishness and Marijuana*, 336 NEW ENG. J. MED. 366, 366 (1997) (concluding "[a] federal policy that prohibits physicians from alleviating the suffering by prescribing marijuana is seriously misguided, heavy–handed, and inhumane").

[30] *See, e.g.*, Drug Enforcement Admin., U.S. Dep't of Justice, *Say It Straight: The Medical Myths of Marijuana*, *at* http://www.usdoj.gov/dea/pubs/sayit/myths.htm (last visited Sept. 13, 2002).

[31] *See Medical Marijuana Referenda Movement in America: Hearing Before the House Comm. on the Judiciary, Subcomm. on Crime*, 105th Cong. (1997) (statement of Gen. Barry R. McCaffrey, Director, Office of National Drug Control Policy, submitted for the Record), *available at* 1997 WL 14151535.

[32] *See, e.g.*, H.R. 912, 106th Cong. (1999) and H.R. 1782, 105th Cong. (1997) (both bills proposed by Barney Frank, D–MA, entitled "The Medical Use of Marijuana Act"); *see also* Holland, *supra* note 19.

[33] *See* http://www.usdoj.gov/dea/agency/csa.htm (last visited on Nov. 3, 2001).

[34] *See* LESTER GRINSPOON, M.D. & JAMES B. BAKALAR, MARIJUANA: THE FORBIDDEN MEDICINE 14–15 (1993).

[35] Alliance for Cannabis Therapeutics v. DEA, 930 F.2d 936, 938 (D.C. Cir. 1991).

factor test to reschedule marijuana.[36]

In the mid–1970s, the Food and Drug Administration ("FDA") did establish an Individual Use Investigational New Drug ("IND") program, which gave a small number of patients access to marijuana on a limited and experimental basis.[37] However, in 1989, due to the drastic rise in AIDS, the FDA was bombarded with applications for the IND program.[38] This led to the suspension and discontinuation of the program in 1991 and 1992, respectively, because, as the chief of the Public Health Service explained, the program undercut the federal government's opposition to the use of illegal drugs.[39] Only eight patients from the program continue to receive marijuana presently.[40]

*1. California Courts and Proposition 215*

The California Court of Appeals for the First District has addressed Proposition 215 in two separate, disagreeing opinions.[41] First, in *People v. Trippet*[42] the Court held that Proposition 215 does not exempt a seriously ill patient and his primary caregiver from California's Health and Safety Code section 11360, which prohibits the transportation of marijuana.[43] However, the court held that Proposition 215 might provide a defense for a defendant charged with illegally transporting marijuana so long as "the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs."[44]

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[36] *Id.* (the factors were (1) scientific knowledge of the drug's chemistry, (2) its toxicology in animals, (3) established effectiveness treating humans in clinical trials, (4) availability of the substance and the facts about its effects, (5) documentation of uses in generally accepted medical reference materials, (6) specific indications for use, (7) acceptance by the community of medical professionals, and (8) acceptance and use by a substantial body of U.S. medical practitioners).

[37] *See generally* GRINSPOON & BAKALAR, *supra* note 34, at 17–18. *See also* Lauryn P. Gouldin, *Controlled Substances Law: Cannabis, Compassionate Use and the Commerce Clause: Why Developments in California May Limit the Constitutional Reach of the Federal Drug Laws*, 1999 ANN. SURV. AM. L. 471, 479 (1999).

[38] GRINSPOON & BAKALAR, *supra* note 34, at 17–18; *see also* Gouldin, *supra* note 37, at 479.

[39] GRINSPOON & BAKALAR, *supra* note 34, at 21–22; *see also* Gouldin, *supra* note 37, at 479.

[40] *See* Sheryl Gay Stolberg, *For a Very Few Patients, U.S. Provides Free Marijuana*, N.Y. TIMES, Mar. 19, 1999, at A10.

[41] *Cannabis*, 5 F. Supp. 2d. 1086, 1091 (N.D. Cal. 1998).

[42] 56 Cal. App. 4th 1532 (1st Dist. 1997).

[43] *Id.*

[44] *Id.* at 1550–51.

Three months later, a different division of this court handed down another decision addressing Proposition 215 in *People ex rel. Lungren v. Peron.*[45] In *Peron*, the court held that the defendants, Dennis Peron and the San Francisco Cannabis Cultivators Club, were not primary caregivers within the meaning of Proposition 215.[46] The court further held that Proposition 215 does exempt seriously ill patients and their caregivers from California Health and Safety Code sections 11357 and 11358, which prohibit possession and cultivation of marijuana.[47] However, the court disagreed with *Trippet* in further holding that Proposition 215 does not, under any circumstances, exempt such patients from sections 11359 and 11360, which prohibit the sale or giving away of marijuana. The Supreme Court of California denied review of the *Peron* decision on February 25, 1998.[48]

*2. Federal Case Law and Proposition 215*

The federal government's opposition to Proposition 215 was first directed towards physicians in California who recommended medicinal use of marijuana pursuant to state law.[49] Specifically, the Department of Justice, the Department of Health and Human Services, the Drug Enforcement Agency, and General Barry McCaffrey, the Director of the National Drug Control Policy, threatened physicians with criminal prosecution, disqualification from Medicare and Medicaid programs, and revocation of DEA registration to prescribe controlled substances.[50] A group of California physicians and their patients responded to the government with a class action lawsuit that directly challenged the constitutionality of the Clinton Administration's threat to prosecute California physicians who recommended the medical use of marijuana for their seriously ill patients.[51] Specifically, they asserted that the threat of prosecution violated their First

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[45] 59 Cal. App. 4th 1383 (1st Dist. 1997).

[46] *Id.* at 1392–93. Note that Mr. Peron and the San Francisco Club appeared as defendants in *Oakland*.

[47] *Peron*, 59 Cal. App. 4th. at 1392.

[48] *Id.* at 1402.

[49] *See Conant I*, 172 F.R.D. 681, 686–87 (N.D. Cal. 1997). *See also* Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997) (notice signed by Barry McCaffrey, Director of National Drug Control Policy).

[50] *See* Administration Response, *supra* note 49.

[51] *Conant I*, 172 F.R.D. at 686. For a thorough discussion of *Conant I*, see J. Wells Dixon, Note, *Conant v. McCaffrey: Physicians, Marijuana, and the First Amendment*, 70 U. COLO. L. REV. 975 (1999).

Amendment free speech rights to discuss marijuana.[52] The federal district court granted a preliminary injunction on the ground that the federal government threats may infringe upon the physicians' First Amendment rights.[53]

However, the Court greatly limited its opinion by also holding that conversations between the physicians and patients were protected only to the extent that the physician did not aid and abet or conspire to violate the federal prohibition against marijuana.[54] On September 7, 2000, however, the district court permanently enjoined the federal government from threatening to revoke DEA prescription licenses from physicians who recommend marijuana to patients, holding that in light of the First Amendment the DEA had exceeded its authority.[55] The court held that while the federal government had a legitimate concern in enforcing marijuana prohibition, this concern "pale[d] in comparison to free speech concerns."[56]

## III. FACTUAL AND PROCEDURAL HISTORY:

### A. STATEMENT OF FACTS

Since the passage of Proposition 215, several individuals have created non–profit "medical cannabis dispensaries" or "cooperatives" to provide marijuana for seriously ill patients upon a physician's recommendation.[57] To date, approximately twenty–five cannabis cooperatives have been established in California.[58] The organizers claim that prior to the creation of these dispensaries, qualified patients were forced to purchase marijuana, if they could at all, on the black market, paying excessive prices for questionable quality marijuana.[59]

In these cooperatives, a physician serves as medical director, and registered nurses staff the organization during business hours.[60] To

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[52] *Conant I*, 172 F.R.D. at 686.

[53] *Id.* at 701.

[54] *Id.*

[55] *See* Conant v. McCaffrey, No. C 97–00139 WHA, 2000 WL 1281174 (N.D. Cal. Sept. 7, 2000).

[56] *Id.* at 15.

[57] United States v. Cannabis Cultivators Club, 5 F. Supp. 2d. 1086, 1092 (N.D. Cal. 1998).

[58] Jean Merl, *Marijuana Distribution Ban Alarms Patients*, L.A. TIMES, Aug. 31, 2000, at C1.

[59] *Cannabis*, 5 F. Supp. 2d at 1091.

[60] United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 494–95

become a member of a Cooperative, patients are required to provide a written statement from a treating physician agreeing to marijuana therapy, and the patient then must go through a screening interview.[61] If a patient is accepted, he receives an identification card that allows him to procure marijuana from the Cooperative.[62]

In January of 1998, more than a year after California voters passed Proposition 215, the United States filed six separate lawsuits against six independent cannabis dispensaries and individuals involved with the dispensaries.[63] Pursuant to Local Rule 3–12, all six cases were reassigned to the United States District Court for the Northern District of California as related cases.[64]

The United States alleged that the defendants violated federal law under the CSA whether or not the defendants' activities were legal under California law. Specifically, the federal government alleged that the defendants' manufacture and distribution of marijuana violated 21 U.S.C. section 841(a)(1); their use of facilities (the actual locations) for the purpose of manufacture and distribution violated 21 U.S.C. section 856(a)(1); and the individual defendants' conspiracy to violate the CSA violated 21 U.S.C. section 846.[65] Thus, the United States sought to preliminarily and permanently enjoin the Cooperative from distributing and manufacturing marijuana under 21 U.S.C. section 882(a), which provides federal district courts with jurisdiction to enjoin violations of the Act.[66]

The Cooperative argued that the court should dismiss the federal government's claims because 21 U.S.C. section 841(a) exceeded Congress's authority under the Commerce Clause.[67] The defendants further argued that just as Congress did not have the authority to regulate possession of a firearm in a school zone, as the Supreme

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(2001).

[61] *Id.*

[62] *Id.*

[63] The defendants in the related actions were: Cannabis Cultivators Club and Dennis Peron; Marin Alliance for Medical Marijuana and Lynette Shaw; Ukiah Cannabis Buyers' Club, Cherrie Lovett, Marvin Leherman and Mildred Leherman; Oakland Cannabis Buyers' Cooperative and Jeffrey Jones; Flower Therapy Medical Marijuana Club, John Hudson, Mary Palmer and Barbara Sweeney; and Santa Cruz Cannabis Buyers Club. *Cannabis*, 5 F. Supp. 2d at 1092 n.1.

[64] *Id.* at 1093.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 1094.

Court held in *Lopez*,[68] Congress also did not have the authority to regulate their purely intrastate conduct because the marijuana was both manufactured and distributed solely within California.[69] The court placed the defendants' arguments into three categories: (1) defendants have not violated federal law; (2) defendants have valid defenses to their violation of the law; and (3) equitable principles preclude injunctive relief.[70]

B. PROCEDURAL HISTORY

*1. United States v. Cannabis Cultivators Club (1998)("Cannabis")*

In *Cannabis*, the district court held that the Government established a probability that it would likely succeed on the merits of its claim that the defendants are in violation of federal law.[71] Thus, it granted a preliminary injunction prohibiting the defendants from manufacturing or distributing marijuana, or from possessing marijuana with the intent to manufacture and distribute it.[72]

First, the court held that it has jurisdiction to hear the case because the CSA does not exceed Congress's power under the Commerce Clause.[73] The court asserted that when Congress declares that an entire class of activities affects commerce, courts have no power to "'excise, as trivial individual instances'" of the class.[74] The court pointed to Congress's detailed findings that intrastate cultivation, distribution and possession of controlled substances have "a substantial and direct effect upon interstate commerce."[75] The court also stressed that since *Lopez* was decided, the Ninth Circuit has held that Congress's enactment of the CSA is permissible under the Commerce Clause.[76] The court rejected the defendants' argument that distribution of marijuana to seriously ill patients is not within the class of activities that Congress sought to regulate with the CSA, arguing that even if such activity falls into a different class, that class also sub-

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[68] 514 U.S. 549 (1995).

[69] United States v. Cannabis Cultivators Club, 5 F. Supp. 2d. 1086, 1094 (N.D. Cal. 1998).

[70] *Id.*

[71] *Id.* at 1103.

[72] *Id.* at 1106.

[73] *Id.* at 1098.

[74] *Id.* at 1097 (citing Perez v. United States, 402 U.S. 146 (1971)).

[75] *Id.* (citing 21 U.S.C. §§ 801(3)–(6)).

[76] *Id.* at 1097.

stantially affects interstate commerce.[77] The court decided that there is nothing about the nature of medical marijuana that limits it to intrastate cultivation or distribution.[78] The court concluded that distribution, even "if done for the humanitarian purpose of service the legitimate health care needs of seriously ill patients," can affect interstate commerce.[79]

Moving on to the merits of the case, the court then held that the Government established it would likely succeed in proving that the defendants' conduct violated federal law. First, the court asserted that it is immaterial whether the defendants' conduct falls within Proposition 215.[80] It concluded that a state law which purports to legalize the distribution of marijuana for any purpose, "even a laudable one," nonetheless directly conflicts with federal law, specifically 21 U.S.C. section 841(a), which does not exempt the distribution of marijuana to seriously ill persons for their personal medical use.[81]

Lastly, the court held that the joint users defense, the ultimate user defense, and, most importantly, the medical necessity defense would not preclude the granting of injunctive relief sought here.[82] The court explained that for the medical necessity defense to succeed, the defendants would have the difficult task of proving that each and every patient it provides marijuana to is in danger of imminent harm, the marijuana will alleviate that harm, and that each patient had no other alternatives.[83]

The district court concluded by asserting that it was not declaring Proposition 215 to be unconstitutional, and it was not enjoining possession of marijuana by seriously ill patients for medical use upon a physician's recommendation.[84] The court also made clear that it was not foreclosing the possibility of a medical necessity *or* constitutionality defense in any proceeding in which it is alleged that a defendant has violated the injunction the court issued in its opinion.[85]

The Cooperative did not appeal the injunction, but violated it by

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[77] *Id.* at 1098.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 1100.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 1102.
[84] *Id.* at 1105.
[85] *Id.*

continuing to distribute marijuana to several persons.[86] The Government initiated contempt proceedings, in which the Cooperative defended that any distributions were medically necessary.[87] The district court rejected this defense, found the Cooperative in contempt, and, at the Government's request, modified the injunction to empower a United States Marshall to seize the Cooperative's premises.[88] A few days later, the district court summarily rejected a motion made by the Cooperative to modify the injunction to permit medically necessary distributions.[89]

### *2. United States v. Oakland Cannabis Buyers' Cooperative (1999)("OCBC")*

In response to the district court's decision, the Cooperative and its executive, Jeffrey Jones, (collectively, "the Cooperative") sought an interlocutory appeal with the Court of Appeals for the Ninth Circuit.[90] The appellants did not appeal the district court's order enjoining the distribution of marijuana, but sought to appeal three subsequent district court orders: (1) the order denying the Cooperative's motion to dismiss, (2) the order subsequently purged and vacated that found the Cooperative in contempt of the injunction, and (3) the order denying the Cooperative's motion to modify the injunction to permit cannabis distribution to persons who have a doctor's certificate that marijuana is a medical necessity.[91]

Because the Ninth Circuit held that it lacked jurisdiction over the first two district court orders, it only ruled on the third, the district court's refusal to modify the injunction to include a medical necessity exception.[92] The court reversed the district court's denial of the motion to modify the injunction, and remanded for the district court to include in the injunction the criteria for the medical necessity exemp-

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[86] *Oakland*, 532 U.S. 483, 494–95 (2001).

[87] *Id.*

[88] *Id.*

[89] *Id.* at 488.

[90] United States v. Oakland Cannabis Buyers' Cooperative, 190 F.3d 1109, 1111 (9th Cir. 1999) [hereinafter *OCBC*].

[91] *Id.*

[92] The Court held that it lacked jurisdiction over the denial of the motion to dismiss because denial of the motion to dismiss is not one of the interlocutory orders that can be appealed under 28 U.S.C. § 1292, and it is not a final judgment under § 1291. It further held that it lacked jurisdiction over the contempt order appeal because the order was purged, rendering the issue moot. *OCBC*, 190 F.3d at 1111–12.

tion[93] established in the Ninth Circuit's decision in *United States v. Aguilar*.[94]

First, the Ninth Circuit held that the district court had the discretion to modify the injunction.[95] The court asserted that the district court was mistaken in its belief that it did not have the power to issue an injunction more limited in scope than the CSA.[96] The court held that district courts have broad equitable discretion in deciding injunctions against violations of federal statutes unless Congress has balanced the equities and has explicitly mandated an injunction within the statute.[97] The court concluded that nothing in the CSA mandates a limitation on district courts' equitable discretion.[98] Thus, the court asserted that the district court was not being asked to ignore federal law as it claimed it was, but was instead being asked to simply take into account the "legally cognizable defense" of medical necessity that most likely would pertain to this particular case.[99] The court reasoned that had the federal government chosen to enforce the CSA not through an injunction but in the usual way, by arresting and prosecuting the defendants, the defendants would have been able to raise the medical necessity defense in the course of litigation.[100]

Second, the court held that the district court abused its discretion in deciding this issue without considering the public interest on the record.[101] The court stated that the materials the Cooperative submitted in support of its motion to modify the injunction clearly showed a strong public interest in the availability of cannabis to treat debilitating and life threatening conditions suffered by a large population of California's citizens.[102] Through this evidence, the court held that the Cooperative showed that there is a class of people who could fulfill the requirements of the medical necessity exception.[103] By contrast,

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[93] *Id.* at 1115.

[94] 883 F.2d 662, 692 (9th Cir. 1989).

[95] *OCBC*, 190 F.3d at 1115.

[96] *Id.*

[97] *Id.* at 1114 (citing Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1156 (9th Cir. 1988)).

[98] *OCBC*, 190 F.3d at 1114.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] The Court referred specifically to the fact that the City of Oakland had declared a public health emergency in response to the district court's refusal to grant the modification before this court on appeal. *Id.* at 1114–15.

[103] *Id.*

the court asserted that the Government did not identify any interest it may have in blocking the distribution of marijuana to those with medical needs, relying instead only on its general interest in the enforcement of federal statutes.

The Government appealed the district court's order amending the preliminary injunction. The U.S. Supreme Court granted the Government's request to stay the order pending appeal,[104] and granted certiorari to review the decision of the Ninth Circuit that medical necessity is a legally cognizable defense to violations of the CSA.[105]

## IV. SUMMARY OF THE OPINIONS

### A. THE MAJORITY OPINION

The majority opinion stated that the Court granted certiorari because the Ninth Circuit's decision "raise[d] significant questions as to the ability of the United States to enforce the Nation's drug laws."[106] The Supreme Court held that there is no medical necessity exception to the CSA's prohibitions on manufacturing and distributing marijuana.[107] Justice Thomas reasoned that even assuming the necessity was a recognized defense to a criminal violation, a medical necessity exception for marijuana was at odds with the unambiguous terms of the CSA.[108]

Justice Thomas began his inquiry by looking to the actual language of the CSA. He pointed out first that the Act clearly designated marijuana as a Schedule I substance, which provided for only one express exception to the prohibitions on manufacturing and distributing of marijuana: government–approved research projects.[109] Thomas continued that under any conception of legal necessity, the defense cannot succeed when the legislature has made a "determination of values."[110] In this case, he stated that the CSA's structure and its placement of marijuana in Schedule I reflected Congress's unequivocal determination that marijuana has "no currently accepted medical use" and that marijuana has no medical benefits worthy of an

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[104] United States v. Oakland Cannabis Buyers' Cooperative, 530 U.S. 1298 (2000).

[105] United States v. Oakland Cannabis Buyers' Cooperative, 531 U.S. 1010 (2000).

[106] *Oakland*, 532 U.S. 483, 489 (2001) (Thomas, J., joined by Rehnquist, C.J., and O'Connor, Scalia and Kennedy, J.J.).

[107] *Id.* at 493–95.

[108] *Id.* at 490–94.

[109] *Id.* at 490 (citing 21 U.S.C. § 823(f)).

[110] *Id.* at 491.

exception granted to other drugs under the Act.[111]

Due to what Thomas deemed "apparently absolute language" of the CSA, he summarily rejected the Cooperative's contention that because there is a necessity defense at common law, a medical necessity exception can and should be read into the CSA.[112] Justice Thomas continued by calling the general defense of necessity into question, stating that it is controversial, especially because under our constitutional system, federal crimes are defined by statute and not the common law.[113] However, he held that further inquiry into the necessity defense was not necessary in the instant case because the language of the CSA leaves "no doubt" that the medical necessity defense is unavailable.[114]

The second half of the decision is devoted to the Supreme Court's rejection of the Cooperative's argument that federal courts acting as courts of equity have discretion to modify an injunction based upon a weighing of public interest factors.[115] Thomas held that this argument is not a basis for affirming the Ninth Circuit, even though the district court in this case did have discretion. He argued that, while district courts do enjoy "sound discretion,"[116] the mere fact that a court has discretion does not mean that it can ignore Congress's judgment expressed within the legislation.[117] Thomas asserted, however, that district courts have the discretion to choose between an injunction and other enforcement mechanisms, not whether enforcement is preferable to no enforcement.[118]

Lastly, Justice Thomas held that the Ninth Circuit erred by considering the following evidence as relevant to its determination: that some people have "serious medical conditions for whom the use of cannabis is necessary in order to treat or alleviate those conditions," that these patients "will suffer serious harm if they are denied cannabis," and that there is "no legal alternative to cannabis for the effective treatment of their medical conditions."[119] Thomas asserted that

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[111] *Id.* at 491–92.

[112] *Id.* at 490–91.

[113] *Id.* at 490.

[114] *Id.* at 491.

[115] *Id.* at 495.

[116] *Id.* (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944)).

[117] *Id.* at 496–97 (citing Virginian Ry. Co. v. Sys. Fed'n No. 40, Ry. Employees Dep't, 300 U.S. 515, 551 (1937)).

[118] *Id.*

[119] *Id.* at 498 (quoting *OCBC*, 190 F.3d at 1115).

because the CSA covers those people who have what could be termed a medical necessity for marijuana, the Act precluded consideration of this evidence.[120]

B. JUSTICE STEVENS' CONCURRENCE[121]

Justice Stevens agreed with the majority's reversal of the Ninth Circuit's determination that the Cooperative had a "legally cognizable" medical necessity defense.[122] However, his main concern with Justice Thomas's majority opinion was the broad dicta, and the "unwarranted and unfortunate excursions" that Thomas made in his opinion, which prevented Stevens from joining the majority.[123]

Justice Stevens first clarified the majority's "narrow" and "limited" holding: "We hold that medical necessity is not a defense to *manufacturing* and *distributing* marijuana."[124] He argued that the majority's opinion reached far beyond the facts of this case by suggesting that the medical necessity defense is unavailable for anyone under the CSA.[125] The only issue presented in this case, Stevens asserted, is whether the medical necessity defense is available to distributors of marijuana.[126] Stevens argued that the majority "gratuitously casts doubt" on whether necessity could ever be a defense to any federal statute that does not explicitly provide for it.[127] Stevens criticized the majority's assertion that this is an "open question," and argued that Supreme Court precedent has undoubtedly established that necessity is a viable common law defense, even in cases involving federal criminal statutes that do not provide for it.[128]

Justice Stevens stressed the "importance of showing respect for the sovereign States" and discussed the implications of the majority's overly broad language for federalism.[129] He argued that this is a case

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[120] *Id.*

[121] Justice Ginsburg joined in Justice Stevens' concurrence. Justice Breyer took no part in the consideration or the decision of this case.

[122] *Id.* at 500 (Stevens, J., concurring) (quoting *OCBC*, 190 F.3d 1109, 1114 (9th Cir. 1999)).

[123] *Id.* at 499–500 (Stevens, J., concurring).

[124] *Id.* at 499–500 (Stevens, J., concurring).

[125] *Id.* at 500–501 (Stevens, J., concurring).

[126] *Id.* (Stevens, J., concurring).

[127] *Id.* (Stevens, J., concurring).

[128] *Id.* (Stevens, J., concurring) (citing United States v. Bailey, 444 U.S. 394, 415 (1980)).

[129] *Id.* at 501–502 (Stevens, J., concurring).

in which the citizens of a State had chosen to serve as a laboratory for the law, and that in such situations federal courts have a duty to respect and, whenever possible, to avoid conflicts between state and federal law.[130] Stevens asserted that *Oakland* is such a case because the voters of California had decided that seriously ill patients and their primary caregivers should be exempt from prosecution under state law.[131] Thus, Stevens argued, the Court should not use this decision to deprive *all* such patients of the benefit of a necessity defense to federal prosecution.[132]

## V. LEGAL ANALYSIS

The Supreme Court's decision in *Oakland* is incomplete in that it ignores the critical underlying issue that is necessary to resolve this case: whether the CSA's regulation of wholly intrastate cultivation, possession, and use of medical marijuana, sanctioned by California law, exceeds Congress's enumerated power under the Commerce Clause. The "first principles" of federalism command the Court to intervene in cases such as *Oakland* in which tension exists between state and federal law and in which Congress seeks to regulate wholly intrastate activities under its Commerce Clause power. [133] Furthermore, because the Court in *Oakland* failed to address this crucial issue, the decision is inconsistent with the Rehnquist Court's reinvigorated loyalty to federalism and to reining in Congress's commerce power. Lastly, had the Court examined the CSA under the heightened scrutiny of *Lopez* and *Morrison*, its decision should have been radically different because a heightened review of the CSA under *Lopez* and *Morrison* reveals that the Act's regulation of wholly intrastate cultivation, possession and use of state sanctioned medical marijuana exceeds Congress's commerce power.

### A. THE *OAKLAND* DECISION IS INCOMPLETE IN ITS FAILURE TO ADDRESS THE CONSTITUTIONALITY OF THE CONTROLLED SUBSTANCES ACT

Justice Thomas's opinion in *Oakland* ignores a crucial issue that is necessary to resolve this case: does Congress's attempt to regulate

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[130] *Id.*

[131] *Id.* at 502 (Stevens, J., concurring).

[132] *Id.*

[133] *See Lopez*, 514 U.S. 549, 552 (1995) (characterizing federalism ideals as "first principles").

the wholly intrastate activity of distribution of marijuana for medical purposes under the CSA exceed the power afforded to Congress by the Commerce Clause? In *Oakland*, the Court held that the language and the structure of the CSA abrogate the discretion of federal courts to balance potential harms in issuing injunctions and eliminate the medical necessity defense.[134] The next logical and necessary question the Court should have addressed is whether such a broad statute, which, according to the majority, lies beyond the reach of both the federal courts and the states, exceeds Congress's enumerated commerce power. Had the Court addressed this issue, it should have found that the CSA, as it is applied to conduct related to the medical use of marijuana, is, at the very least, highly constitutionally suspect.

### *1. Federalism Principles Require an Inquiry into the Constitutionality of the CSA*

In order to avoid an all–powerful central government and to ensure state sovereignty, the Constitution declares the federal government to be one of enumerated powers.[135] Furthermore, the Tenth Amendment proclaims that "[t]he 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."[136] One of the enumerated powers granted to Congress by the Constitution is the power to "regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes,"[137] known generally as the commerce power. Police powers, including the protection of public health,[138] safety, and morals of citizens, are left to the states, however.[139] Nevertheless, despite its lack of a "police power," Congress

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[134] *Oakland*, 532 U.S. at 493–98.

[135] U.S. CONST. art. I, § 8. *See also* New York v. United States, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals"); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front"); Marbury v. Madison, 5 U.S. 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written").

[136] U.S. CONST. amend. X. *See* United States v. Printz, 521 U.S. 898, 919 (1997).

[137] U.S. CONST. art. I, § 8, cl. 3.

[138] *See* Fernando R. Laguarda, Note, *Federalism Myth: States as Laboratories of Health Care Reform*, 82 GEO. L.J. 159, 160 (1993) (asserting that states are "major regulators, payers, and providers of health care"). *See also* General Motors Corp. v. Tracy, 519 U.S. 278, 306 (1997) (reaffirming the principal interest of the states in regulating health matters).

[139] *See* RAOUL BERGER, FEDERALISM: THE FOUNDER'S DESIGN 140 (1987). *See also Lopez*, 514 U.S. at 566; Berman v. Parker, 348 U.S. 26, 32 (1954).

has passed federal criminal laws, relying on its power under the Commerce Clause to do so,[140] including the CSA.

Justice Thomas skirts the federalism issue in the *Oakland* decision by merely stating that the Court is not deciding any constitutional issues in this opinion.[141] However, as pointed out by Justice Stevens in his concurrence, federalism clearly plays a crucial role in the strained relationship between California's Proposition 215 (and similar laws in eight other states) and the CSA.[142] First, medical marijuana falls into two categories traditionally left to the state: health care and criminal law enforcement.[143] In enacting the CSA, Congress claimed that it intended to allow the states to freely exercise their independent authority over public health.[144] Second, the medical marijuana issue in this case involves a situation in which a state has chosen to "serve as a laboratory" in the trial of a "novel social and economic experiment."[145] Thus, because of these two considerations, the paramount principles of federalism impose a duty on the federal courts, including the Supreme Court, to settle and minimize the conflict between federal and state law at issue in *Oakland*.[146]

### *2. The* Oakland *Decision Is Inconsistent With The Rehnquist Court's Recent Reinvigoration of Federalism*

The Rehnquist Court has established a newfound willingness to

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[140] *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1142–45 (1995).

[141] Justice Thomas's sole explicit reference to federalism concerns is buried in a footnote, in which he asserts that, while the majority shares Justice Stevens' concern for the sovereignty of the states, the Court is not at liberty to rewrite the federal criminal code, and is also not passing on any constitutional question. *See Oakland*, 532 U.S. at 495 n.7.

[142] *See id.* at 502 (Stevens, J., concurring).

[143] *See* Laguarda, *supra* note 138, at 160 (health care primarily left to states); Brickey, *supra* note 140, at 1138 (criminal law traditionally left to states).

[144] *See* 21 U.S.C. § 903 ("No provision of this subchapter shall be construed as indicating an intention on the part of Congress to occupy the field . . . unless there is a positive conflict between that provision of this subchapter and that state law so that the two cannot consistently stand together.").

[145] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments . . . ."), *quoted in Oakland*, 532 U.S. at 502 (Stevens, J., concurring).

[146] *See* United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the federal judiciary] to admit inability to intervene when one or the other level of Government has tipped the scales too far."). *See also Oakland*, 532 U.S. at 502 (Stevens, J., concurring).

reinvigorate federalism, and, significantly, to use federalism to limit Congress's authority.[147] In the seminal *Lopez* decision, the Supreme Court invalidated a federal criminal statute for the first time in nearly sixty years for exceeding Congress's authority under the Commerce Clause.[148] The Court also indicated that it would continue to subject regulations passed by Congress's authority under the Commerce Clause to a heightened, independent review.[149] *Morrison*, involved a more recent Commerce Clause challenge in which the Court struck down another federal statute as unconstitutional, signaling that *Lopez* was not an anomaly, but is the standard by which the Rehnquist Court will evaluate Congress's Commerce Clause authority in the future.[150] Thus, based on the Court's Commerce Clause jurisprudence since 1995, *Oakland* cannot be properly settled unless the constitutionality of the CSA is analyzed thoroughly.

(1) *United States v. Lopez*: Supreme Court Creates the Standards By Which Congressional Acts under the Commerce Clause, Including the CSA, Are To Be Evaluated

The Supreme Court's decision in *Lopez* was a revolutionary shift from the New Deal Court's interpretation of Congress's power under the Commerce Clause.[151] In *Lopez*, a twelfth grader was indicted by a federal grand jury under the Gun–Free School Zones Act of 1990 ("GFSZA") for bringing a concealed .38 caliber handgun and bullets into his San Antonio high school.[152] The GFSZA, passed to deter gun–related violence in schools, made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual

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[147] *See generally* United States v. Morrison, 529 U.S. 598 (2000); *Lopez*, 514 U.S. at 549. This willingness has also manifested itself in Tenth and Eleventh Amendment Supreme Court decisions. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996).

[148] 514 U.S. at 568. For a general discussion of the merits of federalism after the *Lopez* decision, see Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995).

[149] *See id.* at 562 (describing the Court's "independent evaluation of constitutionality under the Commerce Clause").

[150] *See* Alistair E. Newbern, *Good Cop, Bad Cop: Federal Prosecution of State–Legalized Medical Marijuana Use After* United States v. Lopez, 88 CALIF. L. REV. 1575, 1608–12 (2000) (characterizing *Morrison* as showing that *Lopez* is not merely a "hiccup" in American constitutional law).

[151] *See* Calabresi, *supra* note 148, at 752 (characterizing decision as "revolutionary").

[152] *Lopez*, 514 U.S. at 551.

knows, or has reasonable cause to believe, is a school zone."[153]

Lopez challenged his indictment by arguing that Congress lacked the power under the Commerce Clause to enact the statute under which he was charged, the GFSZA.[154] The United States Supreme Court, by a narrow five–to–four decision, affirmed the Fifth Circuit's holding that the GFSZA was unconstitutional because Congress exceeded its commerce authority by enacting it.[155] The Court laid out three categories of activity that Congress can regulate under its commerce power: (1) the channels of interstate commerce, (2) the instrumentalities of commerce, or persons or things in interstate commerce, and (3) those activities that substantially affect interstate commerce.[156]

Because the GSFZA, like the CSA, did not seek to regulate a channel or instrumentality of interstate commerce, and because it sought to regulate wholly intrastate gun possession, it might only have fallen into the third category of activities.[157] The Court held that the proper test to determine whether Congress can regulate wholly intrastate activities is whether such activities have a "substantial effect" on interstate commerce.[158] The GFSZA, according to Chief Justice Rehnquist, did not have a substantial effect on interstate commerce because the Act "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."[159]

The majority distinguished this case from precedent by stating that unlike prior acts before the Court, the GFSZA "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[160] The Court also distinguished the activity at issue in *Lopez*, gun possession, from the activity at issue in *Wickard v. Filburn*,[161] wheat production for personal use, by asserting that the latter involved a commercial activity whose intrastate effects could be aggre-

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[153] 18 U.S.C. § 992(q)(2)(A) (1994).
[154] *Lopez*, 514 U.S. at 551.
[155] *Id.* at 568.
[156] *Id.* at 558–59.
[157] *Id.* at 559.
[158] *Id.*
[159] *Id.* at 551.
[160] *Id.* at 561.
[161] 317 U.S. 111 (1942).

gated.[162] The Court asserted that if it aggregated the non–economic activity of gun possession, as the Government urged it to do, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate."[163]

Federalism is a persistent theme throughout the majority opinion of *Lopez*.[164] Chief Justice Rehnquist began his Commerce Clause analysis by describing the way in which the Constitution divides the framework of the United States' government between the national government and the states, describing this framework as the "first principles."[165] In his concurring opinion, Justice Kennedy asserted that it is the judiciary's role to maintain the balance between federal and state power,[166] and he argued that the GFSZA upsets the balance of power to such a degree that the judiciary must step in to render it unconstitutional.[167] Moreover, the Chief Justice argued that to sustain the GFSZA would be to undermine any "distinction between what is truly national and what is truly local."[168]

(2) *United States v. Morrison*: Confirms that *Lopez* is the Standard for Commerce Clause Inquiries

The most recent Supreme Court decision on the constitutionality of a federal statute under *Lopez* is the highly anticipated *Morrison* decision, in which the Court again found that Congress had exceeded its constitutional authority under the Commerce Clause.[169] The Court struck down section 13981 of the Violence Against Women Act of 1994 ("VAWA"), which provided a federal civil remedy for victims of gender–motivated violent crimes,[170] as an unconstitutional exercise of Congress's commerce power.[171] The opinion in *Morrison*, again written by Chief Justice Rehnquist, staunchly reaffirmed the test handed down in *Lopez*, establishing that *Lopez* was not an aberration, but is the standard by which the Court will view acts of Congress en-

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[162] *Lopez*, 514 U.S. at 560–61.

[163] *Id.* at 564.

[164] *See infra* notes 164–67 and accompanying text.

[165] *Lopez*, 514 U.S. at 552.

[166] *Id.* at 575–76 (Kennedy, J., concurring).

[167] *Id.* at 580 (Kennedy, J., concurring).

[168] *Id.* at 567–68.

[169] United States v. Morrison, 529 U.S. 598, 602 (2000).

[170] 42 U.S.C. § 13981(c) (1994).

[171] *Morrison*, 529 U.S. at 627.

acted under the Commerce Clause.[172]

VAWA ensured the right of all persons in the United States to "be free from crimes of violence motivated by gender."[173] The constitutionality of VAWA's civil remedy provision was called into question when a female Virginia Tech student brought a federal civil suit under section 13981, alleging that two Virginia Tech football players raped her.[174] The two defendants filed a successful motion to dismiss, in which they argued that Congress lacked the constitutional authority to pass section 13981 under the Commerce Clause and the Fourteenth Amendment.[175] The United States then intervened on behalf of the plaintiff and appealed to the Fourth Circuit, arguing that Congress was justified in passing section 13981 under its commerce power because gender–motivated violence substantially affected the national economy.[176] Relying entirely on the principles in *Lopez*, the Fourth Circuit held that *Lopez* dictated that it strike down section 13981 of VAWA as an unconstitutional exercise of Congress's commerce power.[177]

The Supreme Court affirmed the Fourth Circuit's decision, quoting extensively from and delineating the principles set forth in *Lopez*.[178] The Court evaluated VAWA by applying the factors it had laid out in evaluating the GFSZA in *Lopez*.[179] First, the Court began its Commerce Clause analysis by addressing the dispositive issue as to whether the activity VAWA sought to regulate was economic in nature.[180] Just as in *Lopez*, the Court concluded that "[g]ender–motivated crimes of violence are not, in any sense of the phrase, economic activity."[181] Second, the Court held that an aggregation test could not be applied to prove substantial effect on interstate commerce because, according to *Lopez*, aggregation analysis is only appropriate when the activity in question is economic *per se*.[182]

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[172] *See* Newbern, *supra* note 150, at 1608–12 (2000).

[173] 42 U.S.C. § 13981(b).

[174] Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 827 (4th Cir. 1999).

[175] *Id.* at 828.

[176] *Id.*

[177] *Id.* at 826, 830.

[178] United States v. Morrison, 529 U.S. 598, 607–12 (2000).

[179] *Id.* at 602, 607–10 (stating that *Lopez* controlled the Court's decision in this case, and repeatedly quoting and referring to *Lopez*).

[180] *Id.* at 609–10.

[181] *Id.* at 613.

[182] *Id.*

The Court also held that the legislative findings used in drafting VAWA were insufficient to demonstrate a sufficient link between gender-motivated violence and interstate commerce.[183] Notably, unlike the GFSZA at issue in *Lopez*, the VAWA was passed with an extensive congressional record that detailed the vast effects violence against women had on various aspects of American society.[184] Furthermore, VAWA was passed with the overwhelming support from the vast majority of states.[185] The Court dismissed these congressional findings, however, holding that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause regulation."[186]

### *3. Justice Thomas's View of Federalism as Expressed in* Lopez *and* Morrison *Further Warrants Inquiry as to Why Analysis of the Constitutionality of the CSA is Absent in Oakland*

Justice Thomas's views on federalism, as expressed in his concurring opinions in both *Lopez* and *Morrison*, beg the question as to why he entirely ignored federalism, the Commerce Clause, and the constitutionality of the CSA in his decision in *Oakland*. In *Lopez*, Justice Thomas called for an even more narrow interpretation of the Commerce Clause than Rehnquist's interpretation in the *Lopez* decision.[187] He unequivocally asserted that the "Federal Government has nothing approaching a police power."[188] Thus, Thomas vigorously expressed his disapproval of what he characterized as the broad and unjustified expansion of commerce power.[189] Thomas criticized the majority's substantial effects test and *Wickard*'s aggregation test as being inconsistent with the framer's narrower understanding of what constituted commerce.[190] Thomas repeated this criticism in his concurrence in *Morrison*, asserting that until the Supreme Court narrowed its standard of what constitutes commerce under the Com-

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[183] *Id.* at 615.

[184] *See id.* at 630–34 (Souter, J., dissenting). Justice Souter recounts facts from the congressional record.

[185] *See* Linda Greenhouse, *Battle on Federalism*, N.Y. TIMES, May 17, 2000, at A18. When *Morrison* reached the Supreme Court for review, 36 states had joined in amicus briefs in support of sustaining VAWA. Only one state, Alabama, filed an amicus brief suggesting that VAWA be struck down.

[186] *Morrison*, 529 U.S. at 614.

[187] *See* United States v. Lopez, 514 U.S. 549, 584–86 (1995) (Thomas, J., concurring).

[188] *Id.* at 584–85 (Thomas, J., concurring).

[189] *Id.* at 599–600 (Thomas, J., concurring).

[190] *Id.* at 585 (Thomas, J., concurring).

merce Clause, "we will continue to see Congress appropriating state police powers under the guise of regulating commerce."[191]

### B. AN APPLICATION OF *LOPEZ* AND *MORRISON* TO THE CSA WOULD HAVE CHANGED THE OUTCOME OF *OAKLAND*

The Court established in *Lopez* that the Supreme Court would evaluate Congressional acts enacted under the Commerce Clause with an independent, heightened scrutiny in the name of the "first principles" of federalism.[192] Had the Supreme Court applied the principles it so vigorously asserted in *Lopez* and *Morrison* to *Oakland*, especially Justice Thomas's version of these issues, the Court would have found, at the very least, that the CSA is extremely constitutionally suspect as it is applied to marijuana grown and distributed wholly within one state, under that state's laws, for medical purposes.

#### *1. Post–*Lopez *Decisions of Lower Federal Courts Regarding the Constitutionality of the CSA Are Inconsistent with* Lopez *and* Morrison

The *Lopez* decision prompted several challenges to the constitutionality of the CSA from defendants convicted of various drug offenses.[193] Notwithstanding *Lopez*, lower federal courts have uniformly upheld the federal drug laws in the face of challenges to other federal statutes.[194] The federal courts of appeals also have not interpreted *Lopez* as permitting an overhaul of federal drug laws.[195] Such

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[191] *Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

[192] *See Lopez*, 514 U.S. at 552, 562–63.

[193] *See* Erik R. Neusch, Comment, *Medical Marijuana's Fate in the Aftermath of the Supreme Court's New Commerce Clause Jurisprudence*, 72 U. COLO. L. REV. 201, 236–44 (2001).

[194] *See, e.g.*, United States v. Gonzalez, 893 F. Supp. 935, 937 (S.D. Cal. 1995); United States v. Bramble, 894 F. Supp. 1384, 1394–96 (D. Haw. 1995), *aff'd*, 103 F.3d 1475 (9th Cir. 1996). However, district courts have been more active in upholding *Lopez* with regard to other statutes, particularly with newer statutes. *See, e.g.*, Hoffman v. Hunt, 923 F. Supp. 791, 819 (W.D.N.C. 1996) (striking down the Freedom of Access to Clinic Entrances Act), *rev'd*, 126 F.3d 575 (4th Cir. 1997); United States v. Parker, 911 F. Supp. 830, 835 (E.D. Pa. 1995) (holding that the federal Child Support Recovery Act was unconstitutional), *rev'd*, 108 F.3d 28 (3d Cir. 1997).

[195] *See, e.g.*, United States v. Westbrook, 125 F.3d 996, 1009 (7th Cir. 1997) ("We join the other circuits that uniformly have held, after *Lopez*, that it was within the authority of the Congress under the Commerce Clause to create drug laws criminalizing narcotics transactions such as those found under 21 U.S.C. §§ 846 and 841."). *See also* Gilbert v. United States, 165 F.3d 470, 474 (6th Cir. 1999); United States v. Walker, 142 F.3d 103, 111 (2d Cir. 1998), *cert. denied*, 525 U.S. 896 (1998); Tisor v. United States, 96 F.3d 370, 375 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140 (1997); Proyect v. United States, 101 F.3d 11, 14 (2d

an interpretation seems to be at odds with the Rehnquist Court's reinvigorated federalism ideals. *Oakland*, one of the only cases involving the CSA to reach the Supreme Court, served as an opportunity to apply *Lopez* to the CSA, to reassert the federalism concerns it stressed in *Lopez*, and to decide its constitutionality one way or the other.

The lower federal courts have upheld the CSA by distinguishing it from the GFSZA on three general grounds.[196] First, lower courts have argued that unlike the GFSZA, the CSA contains specific and extensive findings as to the substantial effect single state drug activities have on interstate commerce.[197] Second, federal courts, including the district court in *United States v. Cannabis Cultivators Club*, have concluded that in contrast to gun possession, intrastate drug possession is inherently commercial.[198] Third, courts have held that under the *Wickard* doctrine, Congress may regulate trivial instances of drug activity, such as possession or cultivation, because they fall within a broader "class of activities" that Congress believed to affect interstate commerce.[199]

Taken one by one, an analysis of each of the arguments set forth by lower federal courts to uphold the CSA reveals that the Act may very well exceed Congress's enumerated powers under the Commerce Clause.

### 2. *The* Lopez *and* Morrison *Decisions Established that Legislative Findings Do Not Necessarily Prove A Substantial Effect on Interstate Commerce*

Congress claims that it can regulate the intrastate cultivation and possession of marijuana for medical purposes because they fall into

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Cir. 1996), United States v. Kim, 94 F.3d 1247, 1249–50 (9th Cir. 1996), United States v. Bramble, 103 F.3d 1475, 1479 (9th Cir. 1996), United States v. Leshuk, 65 F.3d 1105, 1112 (4th Cir. 1995).

[196] *See infra* text accompanying notes 197–199.

[197] *See, e.g.*, United States v. McKinney, 98 F.3d 974, 979 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1119 (1997); United States v. Genao, 79 F.3d 1333, 1337 (2d Cir. 1996); *Proyect*, 101 F.3d at 12; *Leshuk*, 65 F.3d at 1112.

[198] *See, e.g.*, United States v. Cannabis Cultivators' Club, 5 F.Supp. 2d 1086, 1098 (N.D. Cal. 1998); *Proyect*, 101 F.3d at 13 ("The Controlled Substances Act concerns an obviously economic activity.") (quoting *Genao*, 79 F.3d at 1337).

[199] *See, e.g.*, *Tisor*, 96 F.3d at 375 ("The challenged laws are part of a wider regulatory scheme criminalizing interstate and intrastate commerce in drugs."); *Leshuk*, 65 F.3d at 1112 ("In passing the Drug Act, Congress made detailed findings that intrastate manufacture, distribution and possession of controlled substances, as a class of activities, 'have a substantial and direct effect' upon interstate drug trafficking . . . .") (quoting 21 U.S.C. § 801).

the third category of activities defined by *Lopez*, regulation of "those activities having a substantial relation to interstate commerce."[200] Thus, a significant portion of the Congressional findings that preface the CSA are a justification of the Act's regulation of wholly intrastate activity.[201] These findings stress (1) that such intrastate activity has a substantial effect on interstate activity and (2) the practical difficulty in distinguishing between controlled substances based on the place they were manufactured and the scope of their distribution.[202] Congress also stresses that federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidences of such traffic.[203]

However, the Court made clear in *Lopez*, and then reaffirmed in *Morrison*, that legislative findings that a wholly intrastate conduct substantially affects interstate commerce do not end the Court's inquiry.[204] Furthermore, the Supreme Court has clearly established that whether particular activities substantially affect interstate commerce is "ultimately a judicial rather than a legislative question" to be "settled finally only by [the Supreme] Court."[205] Thus, simply because Congress asserts in its legislative findings of the CSA that wholly intrastate drug activities affect interstate commerce no longer means that the Court will accept that assertion. The Court in *Lopez* asserted that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."[206] *Morrison* not only affirms *Lopez* in this regard, but also heightens the bar for Congress. The *Morrison* Court admits that, unlike the law at issue in *Lopez*, VAWA was supported by countless

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[200] *Lopez*, 514 U.S. 549, 558–59 (1995).

[201] 21 U.S.C. § 801 (1994).

[202] 21 U.S.C. § 801 ("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 . . . .").

[203] 21 U.S.C § 801 ("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.").

[204] *See infra* text acompanying notes 209–16.

[205] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (Black, J., concurring). Both *Lopez* and *Morrison* quote this passage. *See* United States v. Morrison, 529 U.S. 598, 614 (2000); *Lopez*, 514 U.S. at 557 n.2. *See also Lopez*, 514 U.S. at 562–63 (discussing the Court's "independent evaluation" of Congress's legislative findings, intended to "evaluate the legislative judgment that the activity in question substantially affected interstate commerce.").

[206] 514 U.S. at 557 n.2 (quoting Hodel v. Va. Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 311 (1981)).

findings regarding the serious impact that gender–motivated violence has on victims and their families.[207] However, the Court stated, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."[208]

### *3. A Heightened Scrutiny of the CSA's Legislative Findings Reveals Medical Marijuana Conduct Does Not Have a Substantial Effect on Interstate Commerce*

The Supreme Court has made it clear in both *Lopez* and *Morrison* that it will subject Congress's findings in support of legislation passed under the Commerce Clause to a strict, independent review. Strict scrutiny of the legislative findings of the CSA reveals several problems with the justifications Congress presented in support of its enactment of the CSA.

First, in both *Lopez* and *Morrison*, the Court relied on what has been termed as the "non–infinity principle" to emphasize the narrow range of what Congress may regulate under the Commerce Clause.[209] The "non–infinity principle" dictates that "for a Commerce Clause rationale to be acceptable under *Lopez*, it must not be a rationale that would allow Congress to legislate on everything."[210] In rejecting the GFSZA, the Court expressed its fears that Congress's "costs of crime" and "national productivity" justifications for the GSFZA would allow Congress to regulate virtually any activity under the Commerce Clause.[211] The Court stated that under these theories presented by the Government in support of the GFSZA, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where states have historically been sovereign."[212]

The Court again relied on the "non–infinity principle" in *Morrison* to reject Congress's justifications in support for VAWA. The Court essentially implied that Congress's findings were less persuasive because they, in effect, proved too much.[213] The Court explained

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[207] *Morrison*, 529 U.S. at 614.

[208] *Id.*

[209] *See* David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial–Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 69 (1997). This article first coined the phrase "non–infinity principle."

[210] *Id.* at 69.

[211] *Lopez*, 514 U.S. at 564.

[212] *Id.*

[213] United States v. Morrison, 529 U.S. 598, 615 (2000).

that under the method of reasoning used by Congress to support VAWA, Congress could regulate "murder or any other type of violence since gender–motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part."[214] The Court concluded that to allow Congress to regulate such a broad category of crimes would be an intolerable invasion upon the traditional domain of state criminal law enforcement.[215]

Thus, the Court has established that that it will not accept justifications for Congressional authority under the Commerce Clause that are so broad that they essentially allow Congress to regulate any activity imaginable, so long as it somehow touches upon interstate commerce.[216] Implicit in this *Lopez* finding is the fact that Congress must indicate through its legislative findings that an Act passed under the Commerce Clause does not reach *every* single activity within a class of activities.[217] Thus, the non–infinity principle of *Lopez* and *Morrison* dictates that Congress cannot regulate every conceivable aspect of controlled substances use as federal crimes.[218] One aspect that should be out of Congress's control under the CSA is the wholly intrastate conduct of local possession and cultivation of marijuana, which is legal under a state's own laws pursuant to its own citizens' actions.[219]

This assertion is supported and bolstered by many facts. First, Congress's findings in support of the CSA are devoted to a congressional concern with the interstate market in illicit drugs.[220] However, medical marijuana does not necessarily implicate an interstate market, as it can be cultivated, distributed, and consumed locally without ever crossing a state line.[221] State–governed and regulated cooperatives can ensure that such conduct remains intrastate, helping to lower abuse of the medical marijuana law by confining distribution

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[214] *Id.*

[215] *Id.* at 618.

[216] *Id.* at 615; *see also Lopez*, 514 U.S. at 564.

[217] Newbern, *supra* note 150, at 1624.

[218] *Id.* at 1624–25.

[219] *Id.* at 1625.

[220] 21 U.S.C. § 801 ("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 . . . ").

[221] Neusch, *supra* note 199, at 248.

locally to qualified patients.[222] Furthermore, Proposition 215, as well as every other recently passed state medical marijuana initiative, explicitly limits the amount of marijuana qualified patients can procure or possess for their treatment, which lessens the probability of interstate contact.[223] Lastly, in *Conant*, the most significant case involving Proposition 215 prior to *Oakland*, Judge Smith stated that the number of medical marijuana users who obtain the drug through conduct protected by Proposition 215 is too small to have a significant impact upon the national drug trade.[224]

Second, the CSA, like the GSFZA, does not have a jurisdictional element to ensure through a case–by–case inquiry that conduct related to controlled substances had any tie to interstate commerce.[225] Thus, in order to successfully prosecute under the CSA, the government must show an additional, requisite nexus between an individual defendant's marijuana use (or activities related to that use) and interstate commerce.[226] Because the marijuana at issue in *Oakland* was cultivated and used locally, to show a nexus to interstate commerce would require the Government to "pile inference upon inference," which the *Lopez* decision expressly and unequivocally rejected.[227]

4. Wickard *Aggregation Principle Is Not Applicable to Medical Marijuana Conduct Because Medical Marijuana is Not Inherently Commercial*

In *Wickard v. Filburn*, the Supreme Court held that Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce.[228] The *Wickard* Court upheld the application of the Agricultural Adjustment Act of 1938 to the production of homegrown wheat on the basis that, when aggregated, such conduct has an effect on the supply and demand of inter-

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[222] *Id.*

[223] *See, e.g.*, COLO. CONST. art. 18, § 14; ALASKA STAT. § 17.37.040 (2000); OR. REV. STAT. § 37.475.306 (2001); WASH. REV. CODE § 69.69.51A.040 (2002).

[224] *Conant I*, 172 F.R.D. 681, 694 n.5 (N.D. Cal. 1997).

[225] *See* United States v. Lopez, 514 U.S. 549, 561–62 (1995). *See also* United States v. Bass, 404 U.S. 336, 349 (1971). In *Bass*, the Court held that 18 U.S.C.§1201(a), which made it a federal crime for a convicted felon to possess a firearm, required additional proof on the part of the government of a connection to interstate commerce due to the ambiguous nature of the statute. The Court set aside the conviction because, although the government had demonstrated that the defendant possessed a firearm, it failed to show the "requisite nexus with interstate commerce."

[226] 514 U.S. at 561–62 (discussing *Bass*).

[227] *Id.* at 567.

[228] *Wickard v. Filburn*, 317 U.S. 111, 124–29 (1942).

state commerce.[229]

However, in both *Lopez* and *Morrison*, the Court established that the *Wickard* aggregation principle will not be applied to intrastate activities that are not economic, even if they may be closely linked to economic activities.[230] Thus, in order to determine whether the *Wickard* aggregation principle applies to conduct related to medical use of marijuana, one must first determine whether such conduct is an economic or commercial activity.[231] While the sale of marijuana constitutes commercial conduct, supplying marijuana without charge to another for medical purposes is much more questionable. Cultivation and possession of marijuana for personal medical use is even more questionable. However, the CSA regulates all of the above.[232]

Furthermore, the facts of *Wickard* and *Oakland* can be distinguished convincingly. In *Wickard*, the homegrown wheat consumption at issue detracted from a national market that the government was trying to maintain and bolster as part of the New Deal legislation.[233] The *Wickard* Court feared that production and consumption of homegrown wheat would either create a surplus in the interstate market or reduce demand if many farmers partook in the activity.[234] By contrast, the effect of regulated, local cultivation and consumption of medical marijuana would, if anything, have the opposite effect because it would reduce the demand for commercially available marijuana in the illegal drug market.[235] Thus, it is possible that the effect would be to diminish the very market the federal government is trying to eliminate with the CSA.[236] Therefore, it would be inappropriate for Congress to aggregate the effects of conduct relating to medical marijuana to prove a substantial effect on interstate commerce because 1) it is questionable as to whether such conduct is economic in nature, and 2) such conduct can easily be distinguished from the

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[229] *Id.* at 127–29.

[230] *See Lopez*, 514 U.S. at 559–60 (noting that, in every case in which the Court has sustained a federal regulation under *Wickard*'s aggregation principle, the regulated activity was economic in nature); United States v. Morrison, 529 U.S. 598, 611(2000).

[231] *Lopez*, 514 U.S. at 559–560.

[232] 21 U.S.C. § 841(a)(1), § 844(a).

[233] *Wickard*, 317 U.S. at 115–16 (discussing the Agricultural Adjustment Act of 1938 and its purposes and effects).

[234] *Id.* at 127.

[235] *See* Neusch, *supra* note 193, at 251.

[236] *See* 21 U.S.C. § 801 (1994 & Supp. V. 1998). *See also* United States v. Greenberg, 334 F.Supp 364, 366 (W.D. Pa. 1971) (stating that the purpose of 21 U.S.C. § 801 is to provide a system for control of drug traffic and to prevent abuse of drugs).

conduct at issue in *Wickard*.[237]

## VI. CONCLUSION:

An examination of the constitutionality of the CSA as applied to medical marijuana was necessary to adequately decide *Oakland*. Not only do the fundamental principles of federalism require such an inquiry, but a constitutional inquiry was necessary to remain consistent with the Rehnquist Court's recent efforts to reestablish federalism and to rein in Congress's abuse of its commerce power. Had the Court engaged in a constitutional examination, it would have found that, according to *Lopez* and *Morrison*, the CSA's regulation of medical marijuana arguably lies beyond Congress's commerce power. The cultivation, possession, and use of marijuana for medical purposes wholly within the borders of California or any other state have a negligible effect on interstate commerce. A determination that the federal government cannot regulate such intrastate activity related to medical use of marijuana, when California's state laws sanction and regulate it, would not compromise existing federal drug laws, but would merely require that Congress act within its constitutional authority. To sustain Congress's power over such activity, in light of *Morrison* and *Lopez*, would be to apply a selective Commerce Clause and states' rights jurisprudence.

Caroline Herman

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[237] 21 U.S.C. § 801.