

California Supreme Court Historical Society
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Third Place Entry

“Federal Government Exceeds its Power to Regulate California’s State-
Authorized Medical Marijuana under the Guise of the Commerce Clause”

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**FEDERAL GOVERNMENT EXCEEDS ITS POWER TO REGULATE
CALIFORNIA’S STATE-AUTHORIZED MEDICAL MARIJUANA UNDER THE
GUISE OF THE COMMERCE CLAUSE**

TABLE OF CONTENTS

I. INTRODUCTION6

II. HOW FAR IS THE REACH OF THE COMMERCE CLAUSE?7

 a. Under *Wickard v. Filburn* 9

 b. Under *Lopez and Morrison* 10

 c. *Gonzales v. Raich*..... 12

III. CONTROLLED SUBSTANCE ACT18

 a. History 18

 b. Criticism..... 19

 c. Reclassification..... 20

IV. CALIFORNIA'S COMPASSIONATE USE ACT21

 a. The Who, What and Why of the CUA..... 21

 b. Regulations and Loopholes of the CUA 22

V. A SUBSTANTIAL ECONOMIC IMPACT24

 a. A Benefit to the Market 24

 1. The Potential for “*Growth*” 24

 2. A Relaxed Federal Regulation..... 25

VI. CONCLUSION26

Table of Authorities

CASES

Gibbons v. Ogden, 22 U.S. 190-191 Wheat. 1 (1824)-----9

Gonzales v. Raich, 545 U.S. 1 (2005) ----- 9, 11, 17, 20

Maryland v. Wirtz, 392 U.S. 196 (1968)..... 20

People v. Urziceanu, 132 Cal.App.4th 874 (2005) ----- 26

United States v. Lopez, 514 U.S. 549 (1995)-----13, 14

United States v. Morrison, 529 U.S. 598 (2000) -----10, 14

Wickard v. Filburn, 317 U.S. 111 (1942) -----11, 12, 13, 17

STATUTES

18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V) 12

21 U.S.C. §812(b)(1) (1970)..... 16

Cal. Health & Safety Code § 11362.5 (West, WESTLAW 2011)..... 8

Cal. Health & Safety Code Ann. §11362.5 (West Supp. 2005)..... 25

Cal. Health & Safety Code §11362.5(b)(1)(A) (West Supp. 2005)..... 25

Cal. Health & Safety Code §11362.77..... 26

18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V) 12

21 U.S.C. § 801 et seq..... 8

OTHER AUTHORITIES

Alex Johnson, *DEA to Halt Medical Marijuana Raids*, MSNBC.com (Feb. 27, 2009)

http://www.msnbc.msn.com/id/29433708/ns/health-health_care/ 27

Christopher P. Edelson, <i>Toward Rational Regulation of Marijuana in the United States: FDA's Role in Consumer Choice and Safety</i> , LEDA at Harvard Law School, http://leda.law.harvard.edu/leda/data/86/cedelson.html	19
Claire Suddath, <i>A Brief History of the War on Drugs</i> , TIME.com (March 25, 2009), http://www.time.com/time/world/article/0,8599,1887488,00.html	21
Commerce Clause, LII Legal Information Institute at Cornell Law School N.p., n.d. Web. 22 Feb. 2011. http://topics.law.cornell.edu/wex/Commerce_Clause	9
David Coleman, Ken Hughes, and Erin Mahan, <i>Nixon Transcript</i> , Presidential Recordings Project at the Miller Center for Public Affairs, University of Virginia. www.whitehousetapes.org	23
Devlin Barrett, <i>New Medical Marijuana Policy: Obama Administration Will Not Seek Arrests For People Following State Laws</i> , Huffington Post (Oct. 18, 2009), http://www.huffingtonpost.com/2009/10/19/new-medical-marijuana-pol_n_325426.html	30
Drug Scheduling, United States Drug Enforcement Administration http://www.justice.gov/dea/pubs/scheduling.html	24
Eric Bailey, <i>Doctors Urge Easing of Marijuana Ban</i> , LA Times (Feb. 15, 2008) http://articles.latimes.com/2008/feb/15/local/me-medpot15	24
Larry Sloman, <i>Reefer Madness: A History of Marijuana</i> , 359 (St. Martins Press) (1979)	23
Lonnette Harrell, <i>The Abuse of Medical Marijuana in California</i> , Associated Content from Yahoo (Jan. 28, 2008) http://www.associatedcontent.com/article/556293/the_abuse_of_medical_marijuana_in_california.html?cat=17	27

National Organization for the Reform of Marijuana Laws. *NORML Report on Sixty Years of Marijuana Prohibition in the U.S.*, 12 July 2003. norml.org. 4 February 2011
 <http://norml.org/pdf_files/NORML_Report_Sixty_Years_US_Prohibition.pdf>. 30

Stephen Dinan and Ben Conery, *DEA PotRaids Go On; Obama Opposes*, The Washington Time (Feb. 5, 2009)
<http://www.washingtontimes.com/news/2009/feb/05/dea-led-by-bush-continues-pot-raids/> 30

Susan Vaughn, *Viagra: A Guide to the Phenomenal Potency Promoting Drug*, 3 (Pocket Books) (1998) 28

TELL YOUR CHILDREN (G&H Productions, 1936). 7

The Random House Dictionary of the English Language 411 (2d ed. 1987)..... 8

U.S. Const. art. I, § 8, cl. 3., Cornell Legal Info. Inst., *available at* http://topics.law.cornell.edu/wex/Commerce_Clause (as of Feb. 22, 2011). 9

REGULATIONS

H.R. CONF. REP. NO. 103-711, at 385 (1994)..... 14

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3..... 8

LAW REVIEW

Alistair E. Newbern, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 Cal. L. Rev. 1585 (2000)

Allison M. Busby, *Seeking a Second Opinion: How to Cure Maryland’s Medical Marijuana Law*, 40 U. Balt. L. Rev. 139 (2010). 7

Andrew J. LeVay, <i>Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense</i> , 41 B.C.L. Rev. 703 (2000), http://lawdigitalcommons.bc.edu/bclr/vol41/iss3/6	21
Dennis S. Newitt, <i>The Medical Use of Marijuana: State Legislation, Judicial Interpretation and Federal Drug Laws</i> , Journal of Legal Advocacy and Practice (2002).....	21
Gregory W. Watts, <i>Gonzales v. Raich: How to Fix a Mess of “Economic” Proportions</i> , 40 Akron L. Rev. 545 (April, 2007) -----	11, 12
Hastings Women's Law Journal Speeches, <i>The Criminalization of Medicinal Marijuana</i> , 11 Hastings Women's L.J. 75 (2000) -----	22
Ilya Somin, <i>A False Dawn for Federalism: Clear Statement Rule after Gonzales v. Raich</i> , Cato Supreme Court Review 2005-2006	17
Jesse J. Ransom, “Anslingerian” Politics: <i>The History of Anti-Marijuana Sentiment in Federal Law and How Harry Anslinger’s Anti-Marijuana Politics Continue to Prevent the FDA and Other Medical Experts from Studying Marijuana’s Medical Utility</i> , LEDA at Harvard Law School (1999) http://leda.law.harvard.edu/leda/data/352/Ransom.pdf	19
Robert J. Pushaw, <i>The Medical Marijuana Case: A Commerce Clause Counter-Revolution</i> , Lewis & Clark L.Rev. 879 (2005).....	29, 30

I. INTRODUCTION

Throughout generations Marijuana has been stigmatized as taboo. The 1936 American exploitation film, “Reefer Madness” demonized marijuana use to be the cause of the following: a hit and run accident, manslaughter, suicide, attempted rape, and descent into madness.¹ As America has evolved its rigid thinking since the Great Depression, the judicial system and federal government remain hard-nosed when it comes to the potential use and benefits of marijuana.

Today, marijuana remains illegal as a controlled substance under federal law.² However, sixteen states, including California, allow for marijuana to be used for medicinal purposes.³ In 1996 California voters supported Proposition 215, also called the Compassionate Use Act, which allows patients with a valid doctor's recommendation, and the patient's designated Primary Caregivers, to possess and cultivate marijuana for personal medical use.⁴

This article will discuss the clash between federal law and California’s state law over the regulation of medical marijuana through a deceptively, judicially engineered interpretation of commerce as applied by the Commerce Clause. Supreme Court Justice Sandra Day O’Connor stated it best in her dissenting opinion in Gonzales v. Raich when

¹ *TELL YOUR CHILDREN* (G&H Productions, 1936).

² *The Controlled Substances Act*, 21 U.S.C. § 801 (1970).

³ Allison M. Busby, *Seeking a Second Opinion: How to Cure Maryland’s Medical Marijuana Law*, 40 U. Balt. L. Rev. 139 (2010).

⁴ *Cal. Health & Safety Code* § 11362.5 (West, WESTLAW 2011).

*she accused the majority of making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use.*⁵

II. HOW FAR IS THE REACH OF THE COMMERCE CLAUSE?

Article I, section 8, clause 3 of the United States Constitution states that the United States Congress shall have the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁶ Commerce includes the buying and selling of goods, especially on a large scale, between cities or nations.⁷ Justice Marshall described commerce as traffic and something more: it is intercourse – it describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.⁸ Congress has often used the Commerce Clause to justify exercising legislative power over the activities of states and their citizens, leading to significant and ongoing controversy regarding the balance of power between the federal government and the states.⁹ The basic component of understanding the extent of the commerce clause’s reach is to evaluate whether the activity in question has an economic or commercial effect on a larger regulatory scheme. If so, then congress is justified in regulating the activity.

Congress has divided its power to regulate certain activities under the commerce clause into three distinct categories:

⁵ *Gonzales v. Raich*, 545 U.S. 57 (2005).

⁶ U.S. Const. art. I, § 8, cl. 3.

⁷ The Random House Dictionary of the English Language 411 (2d ed. 1987).

⁸ *Gibbons v. Ogden*, 22 U.S. 190-191 Wheat. 1 (1824).

⁹ U.S. Const. art. I, § 8, cl. 3., Cornell Legal Info. Inst., *available at* http://topics.law.cornell.edu/wex/Commerce_Clause (as of Feb. 22, 2011).

1. Congress's authority to keep the channels of interstate commerce free from immoral and injurious uses;
2. Congress's power to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;
3. Congress's commerce authority to regulate activities having a substantial relation to interstate commerce, and activities that *substantially* affect interstate commerce (emphasis added).¹⁰

Therefore, under the Commerce Power, Congress lacks the ability to regulate activities that don't fall within the scope of the term "commerce."¹¹

Therefore, there is no justification in regulating intrastate (local in nature), noncommercial cultivation, possession, and use of marijuana for personal, medical purposes on the advice of a physician in accordance with state law.¹² The following cases will discuss and analyze the federal government's regulation of commerce through the commerce clause in areas where the regulation of activities can be clearly traced to an economic effect and in areas where activities do not meet this standard, and fall outside of Congress's realm of control.

¹⁰ *United States v. Morrison*, 529 U.S. 598 (2000).

¹¹ Gregory W. Watts, *Gonzales v. Raich: How to Fix a Mess of "Economic" Proportions*, 40 Akron L. Rev. 545 (April, 2007).

¹² *Gonzales v. Raich*, 545 U.S. 3 (2005).

a. Under *Wickard v. Filburn*¹³

Roscoe Filburn was a wheat farmer who owned and operated a small farm in Montgomery County, Ohio.¹⁴ Pursuant to the Agricultural Adjustment Act of 1938, Filburn was required to grow wheat not in excess of a fixed quota. He violated this rule, which constituted farm-marketing excess when he grew additional wheat for his personal consumption.¹⁵ The purpose behind the Agricultural Adjustment Act of 1938 was to control the volume of agriculture moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high prices and its obstruction to commerce.¹⁶

Filburn argued that his surplus wheat should not have been regulated by the commerce clause because his intent for the extra wheat was for his own personal consumption and he had no intentions of selling the wheat on the market. Ultimately, the Court reasoned that production of wheat for personal consumption on the farm may be trivial in this particular case but it is not enough to remove the grower from the scope of federal regulation where his contribution, taken with that of many others similarly situated, is far from trivial.¹⁷ From an economic standpoint, Filburn's excess wheat production had far-reaching effects on the national market because, taken in the aggregate, it could swing the supply and demand pendulum too far in one direction. The power to regulate interstate

¹³ *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁴ *Id.* at 114.

¹⁵ *Id.* at 115.

¹⁶ *Id.* at 115.

¹⁷ *Wickard*, 317 U.S. at 127-128.

commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices.¹⁸

In this case, Congress's regulation of wheat production was indeed justified under the Commerce Clause because the Court was able to show an actual effect on interstate commerce.¹⁹ The Court proved this by showing that on-site consumption of locally grown wheat could have the effect of varying the amount of wheat sent to the market by as much as twenty percent.²⁰ Thus, it was within Congress's purview to regulate Filburn's wheat production.

b. Under *Lopez* and *Morrison*

Alfonso Lopez was a senior in high school when he was arrested for carrying a concealed weapon to school and charged with violating the Gun Free School Zone Act of 1990.²¹ Under this act, Congress made it a federal offense “for any individual to knowingly possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”²²

The rationale behind this act was that carrying a gun inside a school, which operates much like a business because it draws people to its city, would affect the functionality of the national economy.²³ The government argued that the aftermath of violent crimes is expensive and the costs associated with remedying the crime would be spread throughout

¹⁸ *Wickard*, 317 U.S. at 128.

¹⁹ *Id.* at 127.

²⁰ *Wickard*, 317 U.S. at 127-128.

²¹ *United States v. Lopez*, 514 U.S. 549 (1995).

²² Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V).

²³ *Lopez*, 514 U.S. at 560 (1995).

the community.²⁴ They further argued that this type of activity should be regulated under the Commerce Clause because violent crimes hinder the number of travelers and tourists into the state, which in turn has an effect on the state's overall revenue.²⁵

However, the Court concluded that the Gun Free School Zone Act neither regulates a commercial activity nor contains a requirement that the possession of a gun be connected in any way to interstate commerce.²⁶ Here, Congress attempted to rationalize federal regulation but only stretched the meaning of commerce so far and to such an nth degree that it encapsulated everything under the sun. The idea that bringing a gun to school can have a direct and substantial effect on the national economy is not only far-fetched but ignores the fact that local and state laws are already enforced to protect and deter this type of violence.

Congress made similar arguments in *Morrison*. This case involved the constitutionality of the Violence Against Women Act of 1994, which states that “all persons within the United States shall have the right to be free from crimes of violence motivated by gender.”²⁷ The female victim in this case was raped by petitioner and brought suit against him under this act.

Again, the Court struck down the government's attempt to stretch the meaning of the Commerce Clause to include the regulation of gender-motivated violence. The government argued that that this type of violence affects interstate commerce “by deterring potential victims from traveling interstate, from engaging in employment in

²⁴ *Lopez*, 514 U.S. at 560 (1995).

²⁵ *Lopez*, 514 U.S. at 560.

²⁶ *Id.* at 561-562.

²⁷ *United States v. Morrison*, 529 U.S. 598 (2000).

interstate business, and from transacting with business, and in places involved in interstate commerce.”²⁸ Like *Lopez*, here the argument for regulation goes beyond the scope of what the Commerce Clause was intended to protect – activities that have a substantial affect on interstate commerce. Generally, violent related acts are criminal in nature and are regulated by the criminal justice system through the state’s police power. Predators, like the one in this case, will likely be punished by serving time in jail for committing a crime. Since there is an existing and functioning deterrent and punishment in place for people who commit gender-motivated crimes, the Court concludes that such crimes bear no logical relation or impact on the interstate market, commerce clause regulation is improper.

It is important to note that the Court in *Lopez* and *Morrison* made a clear distinction between activities that can be governed by Congress through the Commerce Clause and activities that ought to be governed by the respective states’ police power. “The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”²⁹ However, fast forward ten years and this statement is contradicted when the court decides in *Gonzales v. Raich* that the commerce clause regulation is proper in regulating state activities like medical marijuana.

c. *Gonzales v. Raich*

Pursuant to California’s Compassionate Use Act, Respondents Angel Raich and Diane Monson were actively growing and using medical marijuana for the clear purpose of

²⁸ *H.R. CONF. REP. NO. 103-711*, at 385 (1994).

²⁹ *Morrison*, 529 U.S. 618 (2000).

alleviating their ongoing battle with their serious medical conditions.³⁰ They brought suit in 2005 and at their trial, their expert witness testified that respondents' health condition was so severe and marijuana was the only drug available and proven to treat their illness.³¹

Although Raich and Monson's activity of growing and using medical marijuana was completely legal and in compliance with California law,³² the federal Drug Enforcement Administration (DEA) agents seized and destroyed their marijuana plants pursuant to the Controlled Substance Act (CSA).³³ The CSA regulates the manufacture, importation, possession, use and distribution of certain substances.³⁴ Since marijuana is a Schedule I drug, it is at the top of the list of drugs that are heavily regulated and are believed to have no proven medical use or benefit.³⁵

The argument for regulation of medical marijuana under the CSA follows the same flawed logic as the arguments in *Lopez* and *Morrison*. Just as dangerous weapons in *Lopez* and gender-related crimes in *Morrison* were incorrectly characterized as activities having a substantial impact on the interstate market, the argument here is that local cultivation and use of marijuana will substantially affect the supply and demand of marijuana in the illegal drug markets.³⁶

³⁰ *Gonzales v. Raich*, 545 U.S. 6,7 (2005).

³¹ *Id.* at 7.

³² *Id.* at 1.

³³ *Gonzales v. Raich*, 545 U.S. 7 (2005).

³⁴ *Id.* at 12, 13.

³⁵ 21 U. S. C. §812(b)(1) (1970).

³⁶ *Gonzales v. Raich*, 545 U.S. 19 (2005).

Justice Stevens compares this case to *Wickard v. Filburn* discussed above. In *Wickard*, the farmer was in the business of growing wheat for profit.³⁷ Here, this case involves two chronically ill women who grow and consume marijuana to help endure the excruciating pain they suffer. Justice Stevens claims that marijuana grown solely for home consumption is likely to be in high demand in the interstate market and will draw such marijuana into that market.³⁸ The difference between this case and *Filburn* is that respondent is a terminally ill patient and is not in the business of selling marijuana for profit. One would imagine that making money by illegal means is not on the list of to-dos for someone who struggles to cope with severe pain. Stevens sarcastically states that you don't need an economics degree to understand why a nationwide exemption for the vast quantity of marijuana locally cultivated for personal use may have a substantial impact on the interstate market for such a popular drug.³⁹ Stevens goes so far as to assume that medical marijuana patients will inevitably share their marijuana with friends and family.⁴⁰ What Justice Stevens and the federal government are doing is criminalizing innocent patients by branding them as potential drug dealers in the illicit market. This kind of labeling is unfair and demoralizing.

Stevens expands on this analogy even further by stating that the homegrown wheat in *Wickard* tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, while the homegrown marijuana in *Gonzales* tends to frustrate the federal interest in eliminating commercial

37 *Wickard v. Filburn*, 317 U.S. 115 (1942).

38 *Gonzales v. Raich*, 545 U.S. 19 (2005).

39 *Id.* at 28.

40 *Id.*

transactions in the interstate market in its entirety.⁴¹ Although Stevens raises a legitimate concern, he fails to back his theory with any supporting evidence.

The majority in *Gonzales v. Raich* fails to explain or expand on how marijuana locally grown and consumed for medicinal purpose has a substantial affect on interstate commerce; the court only assumes that it's obvious to the naked eye.⁴² In her dissenting opinion, Justice O'Connor criticizes the majority's definition of economic activity as being too broad, and for sweeping all human activity into federal regulatory reach.⁴³ Justice O'Connor states that it is not enough that the ends be legitimate but also that the means to that end chosen by Congress must not contravene the spirit of the Constitution.⁴⁴ Almost any human activity involves the distribution or consumption of a commodity, like having dinner at home, which involves the consumption of food or giving a birthday present to a friend, which entails commodity distribution.⁴⁵

In contrast, in *Wickard*, the Court was able to show the actual effects of growing excess wheat upon interstate commerce by analyzing the economics of the wheat industry.⁴⁶ The government met its burden when it provided the Court with actual numbers and was able to prove that consumption of homegrown wheat was the most variable factor in the size of the national wheat crop.⁴⁷ Congress has failed to show a direct impact on the interstate market and has failed to justify their excursion into a state's domain.

⁴¹ *Gonzales v. Raich*, 545 U.S. 19 (2005).

⁴² *Id.* at 28, 29.

⁴³ *Id.* at 49.

⁴⁴ *Id.* at 52.

⁴⁵ Ilya Somin, *A False Dawn for Federalism: Clear Statement Rule after Gonzales v. Raich*, *Cato Supreme Court Review* 2005-2006 at 118.

⁴⁶ *Wickard v. Filburn*, 317 U.S. 125 (1942).

⁴⁷ *Id.* at 128.

Even if the government could prove that locally grown and consumed medical marijuana has a substantial effect on interstate commerce, it would be speculative at best. In order to prove a substantial effect, the government would first need to know how much marijuana was locally grown vis-à-vis the Compassionate Use Act and how much was grown illegally. It is easier to determine the amount of marijuana grown for medicinal purposes than it would be for illegal purposes because the state regulates the number and size of plants an individual or caregiver can grow. On the other hand, it is difficult to estimate how much marijuana is grown and sold in the illicit market because of its underground and discreet nature.⁴⁸ However, experts state that the range of marijuana sold in the illicit market is anywhere from \$10 billion to over \$120 billion a year.⁴⁹

Assuming arguendo that the government could meet its burden and supply solid evidence of the impact of locally-grown medical marijuana on the interstate market, that number would not be a sizeable enough class to impact the national drug market.⁵⁰ Many medical marijuana patients suffer from terminal illnesses and have short life expectancies. The potential impact on the market would have to take into consideration variable factors such as the death toll for medical marijuana patients. Congress cannot justify regulating medical marijuana, based on a relatively insignificant impact on commerce, as an excuse for broad regulation of state and private activities.⁵¹

⁴⁸ Christopher P. Edelson, *Toward Rational Regulation of Marijuana in the United States: FDA's Role in Consumer Choice and Safety*, Legal Electronic Document Archive (LEDA) at Harvard Law School, <http://leda.law.harvard.edu/leda/data/86/cedelson.html>.

⁴⁹ Ariel Nelson, *How Big Is The Marijuana Market*, CNBC Marijuana & Money, http://www.cnbc.com/id/36179677/How_Big_Is_The_Marijuana_Market (April 20, 2010).

⁵⁰ *Gonzales v. Raich*, 545 U.S. 53 (2005).

⁵¹ *Maryland v. Wirtz*, 392 U.S. 196 (1968).

In comparing *Lopez* and *Morrison* to *Raich* it is clear that they all involve activities in which the state already has some type of regulation in place. In *Lopez* and *Morrison* the state enforces criminal charges for violations. Likewise, California regulates the consumption and cultivation of medical marijuana through the Compassionate Use Act and Senate Bill 420, as well as criminal charges for illegal use and possession. The difference between the aforementioned cases and *Raich* is that *Raich* involves an illicit drug that is known to be addictive and serves no acceptable medical purpose.

Historically, the American legislative and judicial branches tend to be politically conservative and have enacted laws against marijuana for decades.⁵² Marijuana has been prohibited and unrecognized as having any medical benefits since the 1930s.⁵³ It seems that the legislative and judicial branches of government are unwilling to accept the view that marijuana could have any potential medical benefits because doing so would go against decades of harsh criticism and opposition to the drug. “After *Raich*, virtually any activity is considered ‘economic,’ virtually any noneconomic activity can still be regulated as part of a broader regulatory scheme, and any stray activity that does not fall within the first two categories can be swept up under the rational basis test.”⁵⁴

⁵² *Gonzales v. Raich*, 545 U.S. 11 (2005).

⁵³ Jesse J. Ransom, “*Anslingerian*” *Politics: The History of Anti-Marijuana Sentiment in Federal Law and How Harry Anslinger’s Anti-Marijuana Politics Continue to Prevent the FDA and Other Medical Experts from Studying Marijuana’s Medical Utility*, LEDA at Harvard Law School (1999) <http://leda.law.harvard.edu/leda/data/352/Ransom.pdf>.

⁵⁴ Somin, Ilya, *A False Dawn for Federalism: Clear Statement Rule after Gonzales v. Raich*, *Cato Supreme Court Review* 2005-2006 at 120.

III. CONTROLLED SUBSTANCE ACT

a. History

The War on Drugs began shortly after President Nixon took office in 1969 when he declared drugs to be “public enemy number one in the United States.”⁵⁵ This campaign continued on and picked up speed through Ronald Reagan’s presidency with the help of his wife, Nancy Reagan, and her campaign to “Just Say No” to drugs.⁵⁶ During this time drug use became synonymous with protest and social rebellion in the era's atmosphere of political unrest.⁵⁷

The Controlled Substance Act was created as a part of the Comprehensive Drug Abuse Prevention and Control Act of 1970⁵⁸ in response to a wave of abuse of illegal drugs and to prevent abuse of prescription medications.⁵⁹ According to the Act, using, possessing, manufacturing, or distributing psychotropic drugs is a criminal offense.⁶⁰ The Act categorizes drugs into five schedules depending on the nature and control imposed on the drugs.⁶¹ Schedule I drugs are highly regulated and it is undisputed that such drugs have no currently accepted medical use in treatment in the United States and a lack of accepted

⁵⁵ *Gonzales v. Raich*, 545 U.S. 1, 10 (2005) (citing Pamela Korsmeyer & David F. Musto, *The Quest for Drug Control*, 60 (2002)).

⁵⁶ Claire Suddath, *A Brief History of the War on Drugs*, TIME.com (March 25, 2009), <http://www.time.com/time/world/article/0,8599,1887488,00.html>.

⁵⁷ Paul M. Kohn and G.W. Mercer, *Drug Use, Drug-Use Attitudes, and the Authoritarianism-Rebellion Dimension*, *Journal of Health and Social Behavior*, Vol. 12, No. 2 (June 1971).

⁵⁸ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (Oct. 27, 1970).

⁵⁹ 21 U.S.C. § 801 (1970).

⁶⁰ *Id.*

⁶¹ 21 U.S.C. § 801 (1970).

safety for use under medical supervision.⁶² It is further undisputed that a drug in this category has at least some potential for abuse sufficient to warrant control under the CSA.⁶³

b. Criticism

Since its inception, efforts were underway to reclassify marijuana to the less-rigorous Schedule II.⁶⁴ Marijuana was originally classified as a Schedule I drug, temporarily, when the CSA was first created until the Commissioner completed his report on the drug.⁶⁵ In March 1972, while President Nixon was in office, Commissioner Raymond P. Shafer presented his report to Congress wherein he suggested ending prohibition of marijuana and adopting other methods to discourage its use.⁶⁶ To the contrary, the Nixon Administration did not implement the study's recommendation.⁶⁷ Nixon attempted to influence the result by telling Shafer, "You're enough of a pro to know that for you to come out with something that would run counter to what the Congress feels and what the country feels, and what we're planning to do, would make your commission just look bad as hell."⁶⁸ It was clear that marijuana was to remain a Schedule I drug indefinitely.

⁶² *Id.*

⁶³ 21 U.S.C. § 801 (1970).

⁶⁴ Dennis S. Newitt, *The Medical Use of Marijuana: State Legislation, Judicial Interpretation and Federal Drug Laws*, *Journal of Legal Advocacy and Practice* (2002).

⁶⁵ Andrew J. LeVay, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 *B.C.L. Rev.* 703 (2000), <http://lawdigitalcommons.bc.edu/bclr/vol41/iss3/6>

⁶⁶ Larry Sloman, *Reefer Madness: A History of Marijuana*, 359 (St. Martins Press) (1979).

⁶⁷ Hastings Women's Law Journal Speeches, *The Criminalization of Medicinal Marijuana*, 11 *Hastings Women's L.J.* 75 (2000).

⁶⁸ David Coleman, Ken Hughes, and Erin Mahan, *Nixon Transcript*, Presidential Recordings Project at the Miller Center for Public Affairs, University of Virginia. www.whitehousetapes.org.

Nixon's comment reflects the overtones of the judicial and legislative branches' disapproval of marijuana. Even though there was a valid report that stated there were potential medical benefits associated with marijuana, Nixon and his administration refused to reclassify marijuana and left it a Schedule I drug, thereby preventing it from being utilized to medically treat people.

c. Reclassification

Many attempts have been made to reclassify marijuana as a Schedule II or Schedule III drug but to no avail.⁶⁹ Marijuana currently remains a Schedule I drug along with heroin, ecstasy and LSD.⁷⁰ Its status as a Schedule I drug makes it very difficult for researchers to conduct proper medical testing of marijuana in the United States. Such testing can only be done with a permit from the federal government, which is difficult to obtain.⁷¹ The structure of the current federal drug laws has proved to be a significant impediment to reclassification efforts.⁷² If marijuana were recognized as having any medical benefit, then the federal government could not legitimately criminalize medical marijuana under the CSA.

In 2009, the American Medical Association "voted to adopt a resolution urging that marijuana's status as a federal Schedule I controlled substance be reviewed with the goal

⁶⁹ Alistair E. Newbern, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 Cal. L. Rev. 1585 (2000).

⁷⁰ Drug Scheduling, United States Drug Enforcement Administration <http://www.justice.gov/dea/pubs/scheduling.html>.

⁷¹ Eric Bailey, *Doctors Urge Easing of Marijuana Ban*, LA Times (Feb. 15, 2008) <http://articles.latimes.com/2008/feb/15/local/me-medpot15>.

⁷² Alistair E. Newbern, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 Cal. L. Rev. 1585 (2000).

of conducting more clinical research and developing cannabinoid-based medications.”⁷³

If the medical society were to validate marijuana’s medical benefit then Californians with medical marijuana ID cards would feel legitimized in using medical marijuana and would not fear federal prosecution for possession or use of marijuana.

IV. CALIFORNIA’S COMPASSIONATE USE ACT

a. *The Who, What and Why of the CUA*

Proposition 215 was passed in 1996 after fifty-six percent of Californians voted to remove state-level criminal penalties on the use, possession and cultivation of marijuana by patients who possess a written or oral recommendation from their physician that he or she would benefit from medical marijuana.⁷⁴ This law allows for patients, who are seriously ill, to have the option to use or possess marijuana especially when no other alternative drug has helped alleviate their suffering.⁷⁵ California has set up a registry to allow patients to obtain cards allowing them to possess, grow, transport and use marijuana.⁷⁶ Conditions typically covered by the law include but are not limited to: arthritis; cachexia; cancer; chronic pain; HIV or AIDS; epilepsy; migraine; and multiple sclerosis.⁷⁷

⁷³ Thadeus Greenon, *AMA Urges Feds to Reclassify Marijuana*, The Times-Standard, (Nov. 15, 2009) http://www.times-standard.com/localnews/ci_13794282.

⁷⁴ Cal. Health & Safety Code Ann. §11362.5 (West Supp. 2005). The California Legislature recently enacted additional legislation supplementing the Compassionate Use Act. §§11362.7—11362.9 (West Supp. 2005).

⁷⁵ California Health & Safety Code §11362.5(b)(1) (West Supp. 2005).

⁷⁶ *Id.*

⁷⁷ California Health & Safety Code §11362.5(b)(1)(A) (West Supp. 2005).

Although the Compassionate Use Act (CUA) provides Californians with immunity from state prosecution for possession of marijuana, the Act does not trump the federal law that deems marijuana use and possession a federal crime.⁷⁸ Instead, the California statute “affords a limited defense to the patient and the primary caregiver to grow and distribute marijuana under certain specified conditions.”⁷⁹ Thus, there is always a latent fear that Californians with medical marijuana ID cards can be federally prosecuted under the CSA for using or possessing marijuana that is legal in their home state but illegal by federal standards.

b. Regulations and Loopholes of the CUA

California has imposed regulations on medical marijuana to prevent its abuse. Even with a physician's recommendation or approval, a patient may not possess an unlimited quantity of marijuana.⁸⁰ The California legislature adopted Senate Bill 420 to supplement the CUA by imposing statewide guidelines outlining how much medicinal marijuana patients may grow and possess.⁸¹ Under this amendment, qualified patients and/or their primary caregivers can possess up to eight ounces of dried marijuana and/or six mature (or twelve immature) marijuana plants.⁸² By imposing guidelines for medical marijuana, California is taking the initiative in preventing a full-blown exploitation of a drug it has deemed to have some medical benefit.

This is not to say that the regulations imposed by the state are ironclad in preventing abuse. Because of the wording of the statute, there are no clear restrictions on the type of

⁷⁸ *People v. Urziceanu*, 132 Cal.App.4th 873 (2005).

⁷⁹ *Id.* at 874.

⁸⁰ California Health & Safety Code §11362.5(d) (West Supp. 2005).

⁸¹ California Health & Safety Code §11362.77.

⁸² California Health & Safety Code Ann. §11362.77(a) (West Supp. 2005).

pain that marijuana could be prescribed for.⁸³ In addition to AIDS and cancer, medical marijuana would be legal for “any other illness for which marijuana provides relief.”⁸⁴ A loose interpretation of the law could result in a flood of possible ailments that might qualify for a prescription. Additionally, marijuana dispensaries, often regarded as the patient’s caregivers,⁸⁵ have been accused of abusing the system, and the DEA now views them as criminals.⁸⁶ Many dispensaries are forced to shut down their operations by the DEA because of the backlash from some dispensaries that are illegally run. This leaves many patients, who truly need the drug, without a “reputable” source.⁸⁷

The CUA is a breakthrough in medicine for those who truly need it. California does a fair job in implementing regulations for the drug but the federal government is not satisfied with the results. What California needs are more rigid rules on who can possess and use medical marijuana, what types of ailments specifically qualify for prescriptions, and what role a caregiver plays in supplying patients with marijuana. If California can fine-tune its law to assuage the federal government’s concern over misuse and abuse, then federal intervention in the state’s law will be unnecessary and a waste of federal funding.

⁸³ Lonnette Harrell, *The Abuse of Medical Marijuana in California*, Associated Content from Yahoo (Jan. 28, 2008) http://www.associatedcontent.com/article/556293/the_abuse_of_medical_marijuana_in_california.html?cat=17.

⁸⁴ *Id.*

⁸⁵ *Gonzales v. Raich*, 545 U.S. 6 (2005).

⁸⁶ News Release, Local Marijuana Dispensary Operators Indicted on Drug Trafficking Charges, U.S. Drug Enforcement Administration (July 17, 2007).

⁸⁷ Alex Johnson, *DEA to Halt Medical Marijuana Raids*, MSNBC.com (Feb. 27, 2009) http://www.msnbc.msn.com/id/29433708/ns/health-health_care/.

V. A SUBSTANTIAL ECONOMIC IMPACT

a. *A Benefit to the Market*

One thing that the majority opinion got right in *Gonzales v. Raich* is that medical marijuana does in fact have a substantial impact on interstate commerce and the economy. However, this impact is not harmful but actually profitable for our economy. A recent report by See Change Strategy, an independent financial analysis firm, states that medical marijuana is a \$1.7 billion dollar market.⁸⁸ This number seems astounding especially when compared to Viagra, which rakes in \$1.9 billion nationally⁸⁹ and has been around for over ten years.⁹⁰ The projected sales for medical marijuana are expected to double in the next five years as interest from entrepreneurs and venture capitalists continues to peak.⁹¹ The beneficial impact medical marijuana sales have on our economy depends on two things: (1) medical marijuana's business development potential and (2) the federal government loosening its chokehold regulations.

1. The Potential for “Growth”

Currently, there is an estimated \$1 billion worth of opportunity in medical marijuana for ancillary businesses serving retailers, which includes businesses like testing labs, insurance companies and software developers.⁹² What this means for the economy is more job opportunities in fields directly and indirectly linked to medical marijuana.

⁸⁸ Al Olson, *Medical Pot Ranks as Blockbuster Drug*, MSNBC.com (March 24, 2011) http://www.msnbc.msn.com/id/42237531/ns/business-small_business/.

⁸⁹ *Id.*

⁹⁰ Susan Vaughn, *Viagra: A Guide to the Phenomenal Potency Promoting Drug*, 3 (Pocket Books) (1998).

⁹¹ Al Olson, *Medical Pot Ranks as Blockbuster Drug*, MSNBC.com (March 24, 2011). http://www.msnbc.msn.com/id/42237531/ns/business-small_business/

⁹² *Id.*

Instead of focusing on how locally-grown medical marijuana impacts interstate commerce by penetrating the illicit market's supply and demand, the federal government should shift its focus to the potential impact medical marijuana has on our economy in providing jobs and enhancing financial growth.

2. A Relaxed Federal Regulation

The federal government's regulation of medical marijuana serves as a deterrent for investors and businesses from joining a potentially lucrative business for fear of the risks involved by countering the federal government.⁹³ The high costs associated with prohibition of medical marijuana are not only a waste of federal funding but a waste of the government resources that are better used for more pressing concerns.⁹⁴ President Obama believes that federal resources should not be used to circumvent state laws.⁹⁵ In fact, the current administration will not seek to arrest medical marijuana users and suppliers as long as they conform to state laws, under new policy guidelines.⁹⁶ What this new policy means for medical marijuana patients is that they can medicate themselves without fear of a DEA drug raid as long as they are abiding by California's state law. The federal government's focus is shifting toward targeting illegal drug trafficking and

⁹³ Al Olson, *Medical Pot Ranks as Blockbuster Drug*, MSNBC.com (March 24, 2011). http://www.msnbc.msn.com/id/42237531/ns/business-small_business/

⁹⁴ National Organization for the Reform of Marijuana Laws. *NORML Report on Sixty Years of Marijuana Prohibition in the U.S.*, 12 July 2003. norml.org. 4 February 2011 <http://norml.org/pdf_files/NORML_Report_Sixty_Years_US_Prohibition.pdf>.

⁹⁵ Stephen Dinan and Ben Conery, *DEA PotRaids Go On; Obama Opposes*, The Washington Time (Feb. 5, 2009) <http://www.washingtontimes.com/news/2009/feb/05/dea-led-by-bush-continues-pot-raids/>.

⁹⁶ Devlin Barrett, *New Medical Marijuana Policy: Obama Administration Will Not Seek Arrests For People Following State Laws*, Huffington Post (Oct. 18, 2009), http://www.huffingtonpost.com/2009/10/19/new-medical-marijuana-pol_n_325426.html.

steering away from innocent patients. With more relaxed federal regulations, the potential economic benefit medical marijuana has on the interstate market has yet to reach fruition.

VI. CONCLUSION

The decision in *Gonzales v. Raich* conferred more power on Congress to regulate whatever it deemed to fit nicely into their broad definition of commerce. Professor Pushaw contends, “[T]his provision has become an empty vessel into which any meaning can be poured to decide any given case.”⁹⁷ By extending the meaning of commerce beyond what the Constitution permits, Congress is creating a wholly different standard by which to evaluate future cases. The foundation for this standard is not only based on conservative ideologies that have not yet evolved along with medicine and technology, but also lacks any evidence that in-state cultivation and possession of marijuana for personal medical use is “commerce” in any meaningful sense of the word.⁹⁸

The so-called economic impact that Congress warns will ultimately occur if medical marijuana is not federally regulated is puffery and stifles the potential economic boom that experts profess is an untapped source of wealth. State regulated medical marijuana does not affect commerce in any other state, and so is beyond the purview of federal regulation.⁹⁹

⁹⁷ Robert J. Pushaw, *The Medical Marijuana Case: A Commerce Clause Counter-Revolution*, Lewis & Clark L.Rev. 879 (2005).

⁹⁸ Robert J. Pushaw, *The Medical Marijuana Case: A Commerce Clause Counter-Revolution*, Lewis & Clark L.Rev. 879 (2005) at 913-914.

⁹⁹ *Id.* at 914.