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COMMENTS

TAking the Narrow Path to the Waterfall: Defending the Use of Medical Cannabis After United States V. Oakland Cannabis Buyers' Cooperative

Bart Volkmer*

I. INTRODUCTION

Terminally and chronically ill people in the United States continue to use medical cannabis despite unprecedented numbers of arrests for marijuana possession and distribution. In the form of voter propositions and legislative bills, states are now beginning to approve the use of cannabis for medical purposes.²

The Federal Government, however, has not followed suit. In California, the Federal Government's response to statesponsored sanctioning of medical cannabis use has taken three forms: (1) criminally prosecuting users and distributors;³ (2) seeking civil injunctions against clubs that distribute

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1. See Jefferson M. Fish, Conference: Is Our Drug Policy Effective? Are There Alternatives?, 28 FORDHAM URB. L.J. 3, 117 (2000) (noting that although the number of arrests on marijuana charges has been increasing, patients are continuing to use marijuana for medicinal purposes).


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cannabis to the terminally ill; and (3) threatening sanctions against doctors who recommend the medical use of cannabis. Clearly, the will of the states is clashing with the will of the federal government in this area. Some commentators have suggested that those who defend the use of medical cannabis should raise constitutionally-based challenges, such as claims based on the Commerce or the Tenth Amendment.

As background for examining the viability of the Commerce Clause challenge, Part II of this comment discusses the current medical marijuana jurisprudence, including the recent decision United States v. Oakland Cannabis Buyers' Cooperative, the Controlled Substances Act, the Commerce Clause, the equity power of district courts and the Tenth Amendment. Part III identifies the medical marijuana issues left unanswered by Oakland Cannabis. The pitfalls of using a traditional Commerce Clause analysis to challenge drug laws and the most promising Commerce Clause arguments are highlighted in Part IV. Part IV also applies the principles of the Supreme Court's Commerce Clause rulings to the medical cannabis debate and analyzes the equity powers of district courts after Oakland Cannabis. This comment shows that when the government seeks injunctive relief to close medical cannabis clubs, an opportunity arises for arguments in favor of continued medical cannabis use. Part V proposes that those faced with injunctions for dispensing medical cannabis should take advantage of the equitable powers of the court by arguing that injunctive relief is not the proper method for enforcement of the Controlled Substances

4. See United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711, 1722 (2001) (holding that the Ninth Circuit Court of Appeals erred when remanding an injunction request to the District Court with instructions to allow a medical necessity exemption to the Controlled Substances Act).


8. See infra Part II.

9. See infra Part III.

10. See infra Part IV.
Act ("CSA") in the medical cannabis context. Last, this comment argues that the Tenth Amendment acts as a limit to Congress's commerce power when it seeks to criminalize noneconomic behavior expressly permitted by the states.

II. BACKGROUND

A. The United States v. Oakland Cannabis Buyers' Cooperative Case

Oakland Cannabis is the only Supreme Court decision that has addressed the issue of medical marijuana. Accordingly, future medical marijuana litigation will proceed against its backdrop.

1. The Facts of Oakland Cannabis

The Oakland Cannabis Buyers' Cooperative ("OCBC") is a nonprofit organization that distributed marijuana to its patients. In order to become a member of the OCBC, patients had to submit a written statement from a doctor approving the patient's use of marijuana for medical purposes. The OCBC also required potential patients to sit for a screening interview. Once a member of the organization, patients were given identification cards entitling them to receive marijuana from the OCBC. The cooperative operated pursuant to the authority of California's Proposition 215, which creates an exception to state laws prohibiting marijuana cultivation and possession when the marijuana is being used for medical purposes at the recommendation of a doctor.

2. Procedural History

In January 1998, the United States sued the OCBC in federal district court seeking to enjoin the cooperative from distributing and manufacturing marijuana. Even though

11. See infra Part V.
12. See infra Part V.A-B.
14. See id.
15. See id.
16. See id.
18. See Oakland Cannabis, 121 S. Ct. at 1715-16.
the activities of the OCBC did not necessarily violate California law, the United States maintained that distribution of marijuana for medical purposes nonetheless violated the federal CSA. The district court agreed with the government and granted a preliminary injunction. The OCBC petitioned the district court to modify the injunction to allow for the distribution of marijuana to a limited number of patients whose marijuana use was medically necessary for relief from pain and suffering. The district court denied this petition.

On appeal, the Ninth Circuit Court of Appeals reversed the district court's denial of the modification petition. The court of appeals ruled that the defense of medical necessity was "legally cognizable" and would likely apply under the circumstances of the case. The Ninth Circuit remanded the case instructing the district court to consider the medical necessity defense when modifying the injunction.

3. Holding

The Supreme Court held that medical necessity is not a defense to manufacturing and distributing marijuana. Accordingly, the Court held that the Ninth Circuit erred when instructing the district court to modify its injunction to include a medical necessity defense. After Oakland Cannabis, defenders of medical marijuana are thereby prevented from using the common law defense of necessity.

19. See id. at 1716.
20. See id.
21. See id.
22. See id.
23. See id.
24. See id.
25. See id. The Ninth Circuit specifically instructed the district court to reconsider the appellants' request for a modification that would exempt from the injunction distribution to seriously ill individuals who need cannabis for medical purposes. In particular, the district court is instructed to consider ... criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order.
26. See Oakland Cannabis, 121 S. Ct. at 1719.
27. Id. at 1722.
28. As Justice Stevens points out in the concurrence, the holding of Oakland Cannabis is technically limited to the necessity defense as applied to the distribution and manufacture of marijuana. See id. at 1722 (Stevens, J., concurring). The five members of the Court in the majority, however, indicate in dicta that
4. Reasoning

Although the CSA does not explicitly abrogate a necessity defense, the Court reasoned that the necessity defense is not available when the legislature has already made a determination of the values regarding the behavior that is claimed to be necessary. With regard to a medical necessity defense to the CSA, the Court determined that Congress had already made a determination that marijuana has "no currently accepted medical use," and therefore a medical necessity defense was unavailable. The Court reasoned that the structure of the Act supports this reading because marijuana is placed in the most restrictive category of controlled substances.

In Oakland Cannabis, defendants urged the Supreme Court to affirm the Ninth Circuit based on the equity powers of the district courts. The OCBC argued that courts sitting in equity have broad powers to fashion equitable relief based on the public interest, irrespective of the legal defenses available. The Court initially noted that district courts, when sitting in equity, have discretion to refuse to issue an injunction absent a clear command in the statute to the contrary. The Court stated that this is also true with regard to the Controlled Substances Act, noting that "Congress' resolution of the policy issues can be (and usually is) upheld without an injunction."

The Court found, however, that the district courts should not consider all factors relating to public interest. The Court determined that the choice of a district court "is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not

the necessity defense would also not be available to a defendant charged with possession of a controlled substance. See id. at 1719 n.7 ("Lest there be any confusion, we clarify that nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act.").

29. See id. at 1718.
30. See id.
31. See id.
32. See id. at 1720.
33. See id.
34. See id. at 1720-21.
35. See id. at 1721.
36. See id. at 1721.
whether enforcement is preferable to no enforcement at all. Consequent
ly, when a court of equity exercises its discretion, "it may not con-
sider the advantages and disadvantages of nonenforcement of the statute, but only the advantages and disad-
vantages of 'employing the extraordinary remedy of in-
junction,' over the other available methods of enforcement."

Although the Court held that the Ninth Circuit erred in in-
structing the district court to modify its injunction to in-
clude a necessity exemption, Justice Thomas' majority opin-
ion recognized the flexible equitable powers of district
courts. In this ruling, the Court did not reach constitutional
issues because the lower courts did not address them.

B. The Controlled Substances Act

A growing number of states have passed voter proposi-
tions that allow the medical use of cannabis. Title II of the
Comprehensive Drug Abuse Prevention and Control Act of
1970, commonly known as the Controlled Substances Act,
("CSA"), stands at odds with these propositions. The CSA
uses five schedules to classify controlled substances. Con-
gress placed marijuana on Schedule I, which is reserved for
drugs with a high potential for abuse, no currently accepted
medical use in the United States, and a lacking acceptable

37. Id. at 1721.
38. Id. at 1722 (citation omitted).
39. "Although district courts whose equity powers have been properly in-
voked indeed have discretion in fashioning injunctive relief (in the absence of a
statutory restriction), the Court of Appeals erred concerning the factors that the
district courts may consider in exercising such discretion." Id. at 1720. In Oak-
land Cannabis, the district court, in exercising its equitable discretion, had
originally granted the government's § 882 injunction request. See id. at 1716.
On appeal to the Ninth Circuit, the court ruled that the district court abused its
discretion in not contemplating the public interest and granting defendants' pe-
tition to modify the injunction to include a medical necessity defense. See id.
Accordingly, the Supreme Court was only ruling on whether or not the Appeals
Court properly determined that the District Court abused its discretion. Id.
40. See Oakland Cannabis, 121 S. Ct. at 1719 ("Nor do we consider the un-
derlying constitutional issues today. Because the Court of Appeals did not ad-
dress these claims, we decline to do so in the first instance.").
41. See supra note 2.
42. See Pub. L. No. 91-513, tit. II, 84 Stat. 1242 (codified as amended at 21
43. The CSA does not provide an exemption for medical marijuana use.
However, an exemption does exist for government-supervised research. See 21
44. See id. § 812(a).
levels of safety when used under medical supervision. When state voters determine the legality of medical cannabis under state law, the declaration traditionally does not affect the enforceability of federal statutes because of the broad interpretation of the Supremacy Clause of the Constitution.

The statute contains a civil remedy provision that allows the Federal Government to petition district courts to enjoin violations of the CSA. The Federal Government has only invoked § 882 in three reported decisions, including Oakland Cannabis. In United States v. Williams, the defendant pharmacist failed to maintain distribution records for prescription drugs and filled incomplete, photocopied, and forged prescriptions for his own profit. The court ordered the defendant to maintain accurate records and inventories and to cease and desist from filling illegal prescriptions. The district court also assessed civil penalties.

United States v. 121 Nostrand Avenue is another case where the Government invoked § 882. In that case, the Government seized property connected to drug dealing. The court only briefly discussed § 882 in the opinion:

The Government requests an injunction prohibiting the claimants or other occupants from using the apartment to commit or facilitate narcotics offenses. Such an injunction

45. Id. § 812(b). The definition of a Schedule I drug lies at the heart of the medical marijuana debate since proponents steadfastly claim that marijuana indeed has medicinal qualities. The definition states that a drug must have no currently accepted medical use in the United States. See id. This definition seems to leave open the possibility that these substances could, at a later date, be found to indeed have a legitimate medical use. However, once placed on Schedule I, doctors are not allowed to prescribe the substance to patients, thus the label "no currently accepted medical use in the United States" remains permanent. Id. § 828. The definition of a Schedule I drug at first blush appears dynamic, but is in reality static.

46. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 4 (1997) ("Practically, the effect of the Supremacy Clause is that the state and local laws are deemed preempted if they conflict with federal law.").

47. 21 U.S.C. § 882(a).


49. See Williams, 416 F. Supp. at 612-14.

50. See id. at 614.

51. See id.

52. See 121 Nostrand Ave., 760 F. Supp. (enjoining future distribution of illicit drugs at a public housing unit).

53. See id.
is authorized by [§ 882]. How such an injunction can be enforced apart from state and federal criminal statutes is not clear. The statute arguably provides for an injunction. The Government has established the prerequisites for obtaining an injunction. The injunction is granted.  

121 Nostrand Avenue dealt with the sale of crack cocaine at a public housing unit. The defendants did not submit any evidence encouraging the court to refrain from issuing the injunction.

C. The Commerce Clause

The Commerce Clause is relevant to the current medical marijuana debate because the Court in Oakland Cannabis did not address the issue of whether Congress exceeded its Commerce power when enacting the CSA. In 1937, Congress' power to enact laws pursuant to the Commerce Clause was effectively turned on its head. In NLRB v. Jones & Laughlin Steel Corp., the Supreme Court upheld a federal labor law, which appeared to affect purely local activities. On its face, this decision appeared unremarkable; Jones & Laughlin Steel was a huge steel corporation engaged in interstate commerce. The aftermath of the Jones & Laughlin decision, however, is remarkable: For fifty-eight years, not a single law was declared unconstitutional as exceeding the scope of Congress's commerce power. In essence, the courts gave Congress carte blanche when claiming the Commerce Clause as a source of power behind a law.

The Supreme Court case of Wickard v. Filburn further expanded Congress's power under the Commerce Clause.

54. Id. at 1035 (citation omitted).
55. See id. at 1024.
56. See id. at 1033.
57. See supra note 40.
58. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that the National Labor Relations Act of 1935 was a constitutionally permissive expression of Congress' commerce power because the intrastate activity in question had a substantial effect on interstate commerce).
59. See id. at 49.
60. See id. at 20.
62. See Wickard v. Filburn, 317 U.S. 111 (1942) (holding that the Agricultural Adjustment Act of 1938 was constitutional even as applied to purely intrastate sustenance wheat production).
Wickard, a wheat farmer sued the government to enjoin a quota system that penalized him for growing wheat in excess of the quota.\textsuperscript{63} Even though his wheat crop was grown solely for personal consumption on his Ohio farm, the Court still held that Congress had the power to regulate this activity.\textsuperscript{64} The court noted: "Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."\textsuperscript{65} Although the wheat in question was not a thing in interstate commerce, the "aggregate effects" of the home consumption of the wheat did have an effect on the over-all market for wheat nationwide and was thus a proper subject of Congressional regulation.\textsuperscript{66}

In 1995, Commerce Clause jurisprudence again underwent a major revision. In United States v. Lopez, the Supreme Court declared the Gun Free School Zones Act of 1990 ("GFSZA") unconstitutional.\textsuperscript{67} Chief Justice Rehnquist's majority opinion recognized that Congress may enact legislation under the Commerce Clause if the law: (1) regulates the channels of interstate commerce; (2) regulates the instrumentalities of interstate commerce (i.e., the regulation of persons and things in interstate commerce); or (3) deals sufficiently with commerce in a way that substantially affects interstate commerce.\textsuperscript{68}

With respect to the third category, the court further refined the analysis by first examining whether the regulated activity was economic and substantially affecting interstate commerce.\textsuperscript{69} If so, the law would be sustained.\textsuperscript{70} Second, the court examined the law for the presence of an express jurisdictional element, limiting the subject matter of the law to things actually in interstate commerce.\textsuperscript{71} Third, the Court analyzed whether Congress had made express findings showing that the activity in question did in fact substantially af-

\textsuperscript{63} See id. at 113.
\textsuperscript{64} See id. at 128-29.
\textsuperscript{65} Id. at 128.
\textsuperscript{66} See id.
\textsuperscript{68} See id. at 558-59.
\textsuperscript{69} See id. at 559-60.
\textsuperscript{70} See id. at 560.
\textsuperscript{71} See id. at 561-62.
ffect interstate commerce. The Court analyzed whether the link between the regulated activity and interstate commerce was not attenuated. The Lopez Court found that the GFSZA possessed none of these elements.

The law in question federally criminalized possession of a gun in a school zone. The Court noted that the GFSZA was a criminal law, not an economic law, and that the law was not limited to guns that were actually in interstate commerce, as defined by a jurisdictional element. Therefore, the law could not be said to affect interstate commerce in a way that would save its constitutionality. The Court's ruling notes that laws dealing with economic regulation would still be accorded deference, while laws proscribing activities relating to violent behavior would receive closer scrutiny.

The Court rejected the Government's argument that possession of a gun in a school zone substantially affects interstate commerce because the costs of violent crime are spread through the nation by increased insurance costs, and because violent crime discourages interstate travel. The Court found that these arguments were overbroad, and if followed would give the Federal Government a national police power over all violent crime. Such a broad interpretation would overstep the Article I powers of Congress. On a practical level, it is important to note that the GFSZA was passed in 1990 and overturned only five years later; the executive branch had not installed an agency to enforce this law. With

72. See id. at 562.
73. See id. at 563-64.
74. The court ruled that the GFZSA did not contain a jurisdictional element, that it was not supported by Congressional findings on how the regulated activity affects interstate commerce, and that it was not regulating an activity that had a substantial effect on interstate commerce. See id. at 562.
75. See id. at 551.
76. See id. at 561.
77. See id.
78. See id. at 567.
79. "Even Wickard, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." Id. at 560.
80. See id. at 561.
81. See id. at 563-64.
82. See id. at 564.
83. See id.
84. It is always important to recognize political realities. When the judiciary acquiesces to a law and the executive has been vigorously enforcing it, the
the GFSZA, Congress boldly attempted to pass a federal criminal statute with only a tenuous a link to commerce. The practical realities of the GFSZA made it a clear target for a federalism-centered court to reign in the power of Congress. Some commentators feel this decision provides precedent to challenge federal enforcement of the CSA against medical cannabis providers.

The second salvo in the Supreme Court's attempt to send a message to Congress that it was willing to carefully scrutinize Commerce Clause legislation came in United States v. Morrison. In Morrison, the Court examined the constitutionality of a provision in the Violence Against Women Act of 1994 ("VAWA"), which gave plaintiffs a civil remedy of damages for gender-motivated crimes. The statute provided: "A person . . . who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from crimes of violence] . . . shall be liable to the party injured . . . ." The Court ruled that the civil penalty provisions of VAVA were unconstitutional because the activity the Act addressed did not substantially affect interstate commerce. The Court recognized that the judiciary traditionally gives Congress deference when analyzing the constitutionality of laws passed pursuant to its Commerce Clause power. Despite this acknowledgment, the Court proceeded to hold that the civil remedy provisions of VAVA exceeded the scope of

law becomes more difficult to invalidate from a practical standpoint.

85. See id. at 561.
86. "Plaintiffs seeking the ability to use medical marijuana without the threat of federal prosecution must embrace [the] prospect that Lopez and its progeny have given them and argue that Congress's regulatory power no longer reaches state-legalized medical marijuana use." Newbern, supra note 6, at 1633.
89. See 42 U.S.C. § 13981 (2000); Morrison, 529 U.S. at 668. It should be noted that the GFSZA, struck down in Lopez, was a criminal statute, not a civil one. The VAWA, however, did share a common element with the GFSZA: Both statutes attempted to regulate violent activity. See id. at 675.
91. See Morrison, 529 U.S. at 676.
92. See id. at 669. The court speaks of a "presumption of constitutionality" and notes that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." Id.
Congress's authority and therefore the Court declared it unconstitutional.93

The Morrison Court began its analysis by making explicit what was implicit in the Lopez decision: If the activity being regulated involves economic activity, the old rules of deference still apply. The court noted that "Lopez's review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."94

Using Lopez as a guide, the Court determined that the VAWA provision did not in any way involve an economic activity, and therefore an analysis of the aggregate effects of the regulated activity on interstate commerce was inappropriate.95 Further, the VAWA provision contained no jurisdictional element.96 The provision was so far reaching that a gender-motivated, violent crime between two life-long residents of a state would still have been covered by the Act. Crimes covered under the Act might bear no relation to economic activity. In this case, although Congress did provide numerous findings supporting the proposition that gender motivated crime had a substantial effect on interstate commerce,97 the Court still rejected the argument that Congress had the authority to regulate noneconomic, violent criminal conduct based only on the aggregate effect of that conduct on interstate commerce.98 The Court was concerned that the statutes in question in both Lopez and Morrison dealt with

93. See id. at 676.
94. See Morrison, 529 U.S. at 672. It can be tempting to over-generalize the holdings in Lopez and Morrison. A more reasonable interpretation of the two cases is that the holdings reach only non-economic activity. The Morrison court noted: "a fair reading of Lopez shows that the non-economic, criminal nature of the conduct at issue was central to our decision in that case." Id.
95. See Morrison, 529 U.S. at 672. But note that the Court did not set forth a "categorical rule against aggregating the effects of any non-economic activity." Id at 673. Presumably the prohibition against aggregating in Morrison was limited to its particular facts: a federal statute attempting to regulate a traditional matter of local police power.
96. See id. at 672. Congress could have added a jurisdictional element by requiring the plaintiff to prove that the defendant crossed state lines to commit the violent action.
97. See id. at 674-75.
98. Id. at 676.
the suppression of violent crime and the vindication of its victims, deeming such regulation the clearest example of a power vested in the states.  

The civil remedy provision of VAWA did not require a federal executive bureaucracy to enforce violations of the Act because Congress extended the VAWA remedy to private litigants, not the Government. As in Lopez, this statute was struck down soon after its enactment. Like the GFZSA, this provision, from a practical standpoint, was ripe for the plucking.

In the case of United States v. Cannabis Cultivators Club, a Commerce Clause challenge was raised as a defense to the CSA. Defendants, owners of cannabis clubs, argued that since all of their activity was purely intrastate and since they were not in the business of for-profit drug trafficking, the CSA should not apply to them. The district court rejected these arguments, noting that the Ninth Circuit Court of Appeals had held in previous cases that the CSA is a valid expression of Congress’s commerce power. The court also found unavailing defendants’ argument that those cases were inapposite because they were distributing cannabis for medical purposes and not for profit. The court noted that even this type of distribution would have an effect on interstate commerce.

D. The Equity Power of District Courts

When a federal provision explicitly authorizes injunctions to enforce a statute, a question arises as to whether a district court sitting in equity must issue an injunction when the

99. See id.
100. 42 U.S.C. § 13981(c) (2000). As in Lopez, this gave the Court a practical reason to strike down the provision.
101. The VAWA was enacted in 1994. The Morrison case was decided in 2000. See Morrison, 529 U.S. at 598.
103. See id.
104. See id. (citing United States v. Bramble, 103 F.3d 1475, 1479-80 (9th Cir. 1996); United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996), cert. denied, 519 U.S. 1140 (1997); United States v. Kim, 94 F.3d 1247, 1249-50 (9th Cir. 1996); and United States v. Staples, 85 F.3d 461, 463 (9th Cir.), cert. denied, 519 U.S. 938 (1996)).
105. See id.
106. See id.
statute is violated. The first Supreme Court case to deal with this issue was *Hecht Co. v. Bowles.*

In *Hecht*, plaintiff, a price administrator, brought an action to secure an injunction against a department store pursuant to the Price Control Act of 1942. The defendant had charged prices in violation of the Price Control Act and failed to keep records pursuant to the Act. The district court refused to grant an injunction, noting that the violations were not made in bad faith, the problems were corrected, and the Hecht Company had cooperated with the government during the process. The Court of Appeals for the District of Columbia reversed, holding that the injunction was mandatory once a violation was found. The Supreme Court later ruled that an injunction was not mandatory in all circumstances and reversed the Court of Appeals.

The *Hecht* Court was dealing with a provision of the Emergency Price Control Act of 1942 that provided: "upon a showing . . . that a person has engaged or is about to engage in any such [violations of the price control statutes] . . . a permanent or temporary injunction shall be granted without a bond." The language of the statute made an injunction mandatory, not permissive, yet the Supreme Court held that the district court still retained the power to decide whether or not to issue the injunction because Congress had not shown an intent to alter the equity powers of the court. The Court noted that "[T]he standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief."

109. See *Hecht*, 321 U.S. at 324.
110. See id. at 325.
111. See id.
112. See id. at 330-31.
113. See id. at 321.
114. The Court stated that

A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

115. Id. at 329.
116. Id. at 331.
In only one instance has the Supreme Court held that a district court did not have the equitable discretion to refrain from issuing an injunction. In *Tennessee Valley Authority v. Hill*116 ("TVA"), the Court ruled that an injunction must be issued enjoining the building of a dam that would have admittedly violated the Endangered Species Act.117 Justice Rehnquist stated in his dissent:

Only by sharply retreating from the statutory principle of construction announced in *Hecht Co.* could I agree with the Court of Appeals' holding in this case that the judicial enforcement provisions . . . require automatic issuance of an injunction once a violation is found. I choose to adhere to *Hecht Co.*'s teaching . . . . Since the District Court possessed discretion to refuse injunctive relief even though it had found a violation of the Act, the only remaining question is whether discretion was abused in denying respondents' prayer for an injunction.118

In *TVA*, suspending the building of the dam was the only available remedy to ensure compliance with the Endangered Species Act.119 In short, the court was faced with two options: either allow the building of the dam by issuing the injunction and sacrifice an endangered species, or prevent the completion of the dam and save the species.

E. The Tenth Amendment

The Tenth Amendment to the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."120 Although some cases in the 1980s ruled that this amendment does not act as a substantive limit on Congress's power,121 recent Supreme Court decisions demonstrate respect for state sovereignty as expressed in the amendment.

In *New York v. United States*, the Supreme Court analyzed the constitutionality of the Low-Level Radioactive

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117. See id. at 171-74.
118. Id. at 212-13 (Rehnquist, J., dissenting).
119. See id. at 172.
120. U.S. CONST. amend. X.
121. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (holding that a municipality was not immune from federal minimum wage provisions).
Waste Policy Amendments Act of 1985. The Act provided that if states did not wish to regulate low level waste in accordance with federal regulations, they must take title to the waste and become liable for all damages suffered as a result of failing to regulate. The court held that this provision was unconstitutional because states were given a choice between two options, either of which standing alone would be unconstitutional. The court noted that "whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution."

In Printz v. United States the Court examined interim provisions of the Brady Act. The provisions of the Act required local law enforcement officials to participate in the administration of the Act. When examining the constitutionality of the provisions, the Court turned to historical understanding and practice, the structure of the Constitution, and the jurisprudence of the Court. The Court recognized the dual sovereignty of states and the Federal Government under the Constitution. The Court ruled that federal laws that violate principles of state sovereignty are not "proper" for the purposes of the Supremacy Clause. Accordingly, the Court held that the Brady Act provisions were unconstitutional.

III. IDENTIFICATION OF THE LEGAL PROBLEM

After Oakland Cannabis, supporters of medical marijuana cannot use the defense of medical necessity. The Supreme Court, however, has not addressed constitutional chal-
Perhaps one of the most compelling questions left unanswered by *Oakland Cannabis* is whether Congress has the power to regulate intrastate medical marijuana use under the Commerce Clause. If Congress does not have the power to regulate intrastate drug use, then the decision in *Oakland Cannabis* becomes irrelevant. If courts reject Commerce Clause challenges to the CSA, then a question remains as to whether other constitutional defenses, like a Tenth Amendment challenge, may prove successful. *Oakland Cannabis* also addressed the equity powers of district courts. The Court indicated that under certain circumstances, a district court need not issue an injunction when violations of the CSA are found. An analysis of when such discretion should be employed may help medical marijuana providers who face injunctions in the future.

IV. ANALYZING THE CONSTITUTIONALITY OF THE CSA UNDER THE COMMERCE CLAUSE AND THE EQUITY POWER OF DISTRICT COURTS

A. *Is the CSA a Valid Expression of Congress’s Commerce Power?*

Current Commerce Clause analysis begins with an inquiry into whether the regulated activity deals with economic activity or violent intrastate crime. If the CSA is merely a regulation covering intrastate violent crime, *Lopez* and its progeny dictate its demise. Obvious connections exist between violent crime and drugs, and the prohibition against using illicit drugs stems largely from the belief that use of drugs leads to violent behavior. The CSA also recognizes that the transfer of drugs, both illicit and legally controlled, is at least indirectly a commercial endeavor. The scheduling

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133. *See supra* note 40.
135. *See supra* note 38 and accompanying text.
136. *See supra* note 68-70 and accompanying text.
system of the CSA provides support for this proposition. When a drug is placed on Schedules II through V, doctors are able to prescribe these drugs to qualifying patients. Due to the economic nature of these transactions, the provisions of the CSA that regulate a doctor's ability to prescribe drugs are unaffected by the *Lopez* and *Morrison* decisions since they fall within *Lopez's* second category of "things" in interstate commerce.

Schedule I drugs cannot be prescribed by a doctor and have been determined by Congress to have no currently accepted medical use. Individuals may possess or ingest these drugs only in strictly controlled environments approved by the federal government. The government's prohibition against the use and distribution of Schedule I drugs is actually more appealing to the litigant seeking to challenge Congress's authority to enact the CSA under the Commerce Clause. By classifying drugs in Schedule I, the government takes those drugs out of legitimate interstate commerce and ironically makes the classification of those drugs more vulnerable to a Commerce Clause challenge because the regulation becomes a purely criminal affair as opposed to a garden-variety regulation of a thing in interstate commerce. It is important to note that the Attorney General can both move a drug from one schedule to another, and remove a drug from any schedule entirely. This means that overnight the Attorney General can transform an illicit drug from something arguably not involved in interstate commerce into a thing unquestionably in interstate commerce simply by placing it on a

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138. The scheduling scheme of the CSA deals largely with drugs sold at the corner pharmacy in every city in America. See 21 U.S.C. § 812 (2000). When it comes to illicit drugs, the forfeiture statutes show that one of the concerns of the government is that drug dealers are financially profiting from their crimes. See id. § 881.

139. See id. § 812.

140. The Food and Drug Administration ("FDA") regulates over-the-counter and prescription drugs as well as food, medical devices, biologics, animal feed, cosmetics and radiation emitting devices. For more information on the FDA generally, see the FDA Web site address http://www.fda.gov. Because these examples are all directly related to economic activity, the federal government has authority to regulate in these areas.

141. See 21 U.S.C § 812(b)(1).

142. See id. § 823(f). For a fascinating story of a man, Robert Randall, whom the federal government allows to use cannabis to medicate his glaucoma, see ROBERT C. RANDALL, MARIJUANA RX (1998).

less restrictive schedule. Those wishing to attack the constitutionality of the CSA would have to argue that the Schedule I provisions are severable from the CSA and are unconstitutional, while the remainder of the regulatory scheme should remain intact. If such a challenge were successful, Congress could then decide to regulate the prohibited drugs by moving them to a less restrictive schedule, or it could choose not to schedule at all and decisions regarding prohibition and enforcement would be left to the states. Although this idea would be more attractive to a court than a request to declare the whole act unconstitutional, it is still an uphill battle. The remaining analysis of the constitutionality of the CSA and the Commerce Clause in this comment is limited to Schedule I drugs.

Before a court could determine that the CSA was not directly related to commercial activity and did not regulate the instrumentalities of interstate commerce, the court would first look for the presence of a jurisdictional element. The court would not find one. Under the CSA, controlled substances that are grown and ingested in one’s home and that never enter the stream of commerce or cross state or even county lines, let alone county lines, still fall within the scope of the Act. This fact lends credence to the argument that Congress has exceeded its authority when enacting the CSA.

The court would also review the findings of Congress in order to determine whether there was sufficient evidence to show that the regulated activity had a substantial effect on interstate commerce. In 1970, when Congress passed the CSA, it included findings and declarations that linked the CSA to interstate commerce:

144. See 21 U.S.C. § 901 ("If a provision of this Act is held invalid, all valid provisions that are severable shall remain in effect.").

145. In theory, if Schedule I provisions were deemed unconstitutional, the government could reschedule all Schedule I drugs to Schedule II and still impose onerous conditions on distribution.

146. Many federal statutes impose a requirement that the regulated activity have a sufficient nexus with interstate commerce as an element of the offense. See, e.g., 18 U.S.C. § 875 (prohibiting interstate extortion and threats); 18 U.S.C. § 922 (prohibiting unlicensed interstate firearms transfer); 18 U.S.C. § 1201 (making kidnapping a federal offense by crossing state lines).

147. Congress has declared that this category of drugs would be a distinct minority. See 21 U.S.C. § 801(3) (noting that a major portion of the traffic in illicit drugs flows through interstate and foreign commerce).

148. See supra note 72 and accompanying text.
(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

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

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.149

In passing the CSA, Congress determined that since there is no way to distinguish between drugs which are purely intrastate in nature and those that are interstate, it should be given the authority to regulate all drugs.150 This dispenses with the need for a jurisdictional element. Such an argument would probably be suitable to withstand a Commerce Clause challenge. In the Lopez decision, the Court noted that the GFSZA “is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”151 Chief Justice Rehnquist may have had the CSA in mind when making this distinction.152 When dealing with large-scale economic regulation, Congress has the power to regulate purely intrastate economic activity if such regulation is essential to larger regulatory needs.153

In addition, if the drug business can be construed as commercial in nature, a litigant can use the aggregate effects test announced in Wickard154 to determine that prohibitions on intrastate drug possession and distribution are a valid ex-

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149. 21 U.S.C. § 801.
150. Indeed, with economic regulations in particular, the Supreme Court has never held that a regulated activity must relate to interstate commerce in all conceivable situations.
152. See United State v. Morrison, 529 U.S. 598, 700 (Breyer, J., dissenting) (noting that the CSA provides an example of this type of Congressional regulation).
153. Id.
154. See supra note 66 and accompanying text.
pression of Congress's commerce power. Since traditional rules of supply and demand apply even to illicit industries, purely intrastate drug use affects drug markets nationwide. If a particular state is over-represented with intrastate drug consumption, then drug suppliers need to look to other states to peddle their wares. When a customer base cannot fulfill its demand via local markets, then drug dealers from other states will fill the demand gap.

Although supporters of medical cannabis would correctly point out that they are not selling drugs, but rather dispensing needed medicine to sick and dying patients, the same result would be reached regardless of the fact that a buyer-seller relationship does not exist. By going to a cannabis club to receive marijuana, patients are not buying cannabis on the interstate black market. This inaction affects the nationwide market for drugs. Although Morrison and Lopez seem to indicate an increased hostility to the commerce power of Congress, these cases address only non-economic, violent crime. When dealing with drugs, the issues presented are at least partially economic and many of the pre-Lopez rules still apply. A finding that the CSA exceeds Congress's Commerce Power would require a significant expansion of the Commerce Clause precedent.

Apart from the legal arguments that the government would employ to defend the CSA from a Commerce Clause attack, the disruption alone that would result if the Supreme Court found the CSA unconstitutional would probably be enough to prevent the Supreme Court from doing so. Unlike the provisions in Morrison and Lopez, the CSA has been on the books for over thirty years. In fact, the Federal Government has controlled the flow of marijuana for nearly sev-

155. The vast regulatory scheme of the CSA regulates not only illicit drugs, but varying levels of controlled drugs. See 21 U.S.C. § 812. The argument that the federal government has the ability to regulate prescription drugs, but not the power to proscribe drugs, seems a difficult hurdle to cross.

156. The argument here is that the use of purely local drugs creates a local market, which then in turn affects the larger market. See 21 U.S.C. § 801(4) (determining that local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances).

157. In fact, a compelling reason to allow medical cannabis clubs is that sick and dying people should not have to turn to the black market to obtain medicine.

158. See supra note 50 and accompanying text.

enty years. In addition to the sheer length of time that the CSA has been on the books, an entire executive regulatory industry has been set up to enforce it. There are currently 9,209 Drug Enforcement Administration ("DEA") employees and in fiscal year 2000, the DEA had a budget of 1.55 billion dollars. The DEA is so entrenched in government bureaucracy and the commitment to the war on drugs is so complete (the total federal drug budget in 2000 was 17.8 billion) that common sense alone dictates that a court would not likely find any portion of the CSA unconstitutional.

One commentator noted that "the absence of a jurisdictional hook does make it necessary to demonstrate explicitly the connection between an individual defendant’s marijuana use and interstate commerce. If a defendant can demonstrate that the drug in question was obtained locally and not through interstate commerce, the Government’s ability to prosecute is weakened." The lack of a jurisdictional element, however, does not mean that a jurisdictional element is infused into all federal statutes passed pursuant to the Commerce Clause; rather any attack on such a federal statute becomes a facial challenge to the law. When it comes to drug prosecutions, it is unlikely that a court will accept the defense that possession of drugs is a purely local affair outside the scope of Congress’ commerce power. As the Court in Can-

160. See Levay, supra note 3, at 701-05 (noting that the prohibitions on marijuana date back to 1934).
161. The Drug Enforcement Administration, which falls under the Department of Justice, enforces the CSA. See DRUG ENFORCEMENT ADMIN., U.S. DEPT OF JUSTICE, DEA GENEALOGY, at http://www.usdoj.gov/dea/agency/genealogy.htm (last visited Jan. 8, 2001).
163. See id.
164. Newbern, supra note 6, at 1622.
165. The lack of a jurisdictional element in a federal criminal statute does not create a burden on the prosecutor to show that the activity substantially affects interstate commerce. Rather, courts have treated the lack of a jurisdictional element as a facial attack on the law. See United States v. Haney, 264 F.3d 1161, 1166 (10th Cir. 2001) (noting that a Commerce Clause challenge to a statute without a jurisdictional element is by its very nature facial); United States v. Riddle, 2001 FED App. 0146P (6th Cir.), 249 F.3d 529, 539 ("Any as-applied challenge is irrelevant since [the federal gambling statute] does not contain a jurisdictional element and the prosecution need not put on evidence of a particular connection with interstate commerce.").
166. This is particularly true in light of the growing popularity of metham-
nabis Cultivators Club recognized:

To hold that the Controlled Substances Act is unconstitutional as applied here would mean that in every action in which a plaintiff seeks to prove a defendant violated a federal law, an element of every case-in-chief would be that the defendant’s specific conduct at issue . . . substantially affected interstate commerce.167

Placing this standard on all plaintiffs and prosecutors who seek to enforce a federal statute would prove too burdensome. If a facial challenge to the CSA were successful, any person would be free to cultivate or produce Schedule I drugs at his home and consume them with immunity from federal prosecution. Political realities dictate that this will not happen.

For this reason, when arguing that the Commerce Clause limits the power of Congress to regulate medical marijuana, supporters must differentiate between intrastate medical cannabis consumption approved by a state and mere intrastate recreational use. When a state like California passes a law that decriminalizes the use and distribution of medical marijuana for medical purposes, the intrastate nature of the sanctioned use can be implied by examining the text of the statute. In Proposition 215, California voters approved the Compassionate Use Act of 1996, which exempts medical marijuana users and their primary caregivers from state criminal prosecution.168 One of the purposes of Proposition 215 is to “ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes.”169 The Compassionate Use Act of 1996 is limited to matters of local concern (the health and safety of California citizens) and applies to only a limited subset of the population who can show that they are seriously ill and have the recommendation of a phy-

169. See id. § 11362.5(b)(1)(A).
sician to use marijuana for medical purposes.\textsuperscript{170} Although this argument provides a means to differentiate medical marijuana use from recreational use, this difference is probably not significant enough to make a difference in the overall Commerce Clause analysis because these factors do not directly create a limitation of Congress's power.

There exists, theoretically, a strong argument to support the proposition that the CSA's Schedule I provisions are unconstitutional: The CSA does not contain a jurisdictional element; Congress did not make "findings" but rather made bald proclamations regarding the relationship between drug prohibition and interstate commerce; and the activity being regulated is not purely economic, but rather criminal and therefore a matter of state concern.\textsuperscript{171} In reality, however, post-

\textit{Morrison} appeals courts have been hostile, without exception, towards Commerce Clause challenges to federal criminal statutes.\textsuperscript{172}

When a court is asked to declare the CSA unconstitutional under the Commerce Clause, many of these legal issues evaporate in the face of the realistic consequences of complying with such a request. In light of legal and political realities, lawyers should concede the validity of the CSA under traditional Commerce Clause jurisprudence and move on to other arguments in order to help those who need cannabis for medical purposes.\textsuperscript{173}

\begin{footnotes}
\item[170] See id.
\item[171] See \textit{supra} notes 137-49 and accompanying text.
\item[172] See United States v. Faasse, 2001 FED App. 03240P (6th Cir.), 265 F.3d 475, 479 (recognizing that all eleven circuits have ruled that the Child Support Recovery Act is a valid expression of Congress' power under the Commerce Clause); United States v. Spinello, 265 F.3d 150, 157-58 (3d Cir. 2001) (rejecting a Commerce Clause challenge to federal bank robbery statutes and noting that other courts that addressed the issue have given it short shrift); United States v. Haney, 264 F.3d 1161 (10th Cir. 2001) (holding that a federal ban on machineguns is constitutional and noting that all of the Courts of Appeals to address the issue have found likewise); United States v. Gregg, 226 F.3d 253 (3d Cir. 2000) (upholding the Freedom of Access to Clinics Act); United States v. Taylor, 226 F.3d 593, 598-600 (7th Cir. 2000) (holding that the federal carjacking statute was constitutional under \textit{Lopez-Morrison} and noting that nine other circuits have agreed).
\item[173] Indeed all courts that have addressed the issue have determined that \textit{Lopez} and its progeny do not affect the continuing constitutionality of the CSA. \textit{See}, e.g., United States v. Medina, 901 F. Supp. 59, 60 (D.P.R. 1995) ("[T]here is no serious debate that Congress has authority to regulate drugs and narcotics under the Commerce Clause"); Proyect v. United States, 101 F.3d 11, 14 (2d Cir. 1996) ("[W]e therefore join the Fourth Circuit and the District of Maine in re-
B. Equitable Powers of District Courts

Section 882 of the CSA gives the federal government jurisdiction to seek civil injunctions for violations of the CSA. Because medical cannabis users in California are seriously ill and therefore do not make good criminal defendants, the government is instead starting to seek injunctive relief pursuant to § 882 of the CSA against those who run cannabis clubs.

Although § 882 of the CSA has been operative for more than 30 years, its invocation is rare at best. To a certain degree, § 882 is surplusage with regard to Schedule I violators because the government has the option of criminally prosecuting those who violate the CSA. Common sense dictates that the Government would only invoke the injunctive powers of the court when violations do not warrant criminal prosecution. For instance, the Government might seek an injunction when a pharmacy fails to comply with the terms of the CSA in its distribution of drugs placed on Schedules II and II.

jecting the claim that... criminalizing the act of growing marijuana solely for personal consumption, is unconstitutional"); United States v. Tisor, 96 F.3d 370, 375 (9th Cir. 1996) ("[O]ther courts reviewing the question of the continued viability of the Controlled Substances Act after Lopez have uniformly found the statute to be constitutional").


175. Juries are more likely to engage in jury nullification when they are sympathetic to the defendant. See generally Aaron T. Oliver, Note, Jury Nullification: Should the Type of Case Matter?, 6 KAN. J.L. & PUB. POLY 49 (1997).


177. Prior to the recent actions of the federal government seeking to shut down the cannabis clubs in Oakland Cannabis, the statute was only mentioned in five reported cases. See United States v. Williams, 416 F. Supp. 611 (D.D.C. 1976); United States v. 121 Nostrand Ave., 760 F. Supp. 1015 (E.D.N.Y. 1991); Kieffer v. United States, 550 F. Supp. 101 (E.D. Mich. 1982); Crocker v. United States, 37 Fed. Cl. 191 (1997); Burley v. United States Drug Enforcement Admin., 443 F. Supp. 619 (M.D. Tenn. 1977). Of these five, the government was the plaintiff invoking § 882 in only the Williams and 121 Nostrand Ave. cases.


179. When the government wants to prosecute someone for possessing or distributing illicit drugs, prosecutors almost always seek an indictment and then try the defendant before a jury in a criminal case or reach a plea bargain. See supra note 177 and accompanying text. Subsequent violations are not civilly enjoined, but rather a defendant faces a harsher sentence in the criminal justice system. The civil remedies of the CSA are not designed to be punitive. They are concerned with the prevention of illegal profits from drug dealing. See, e.g., 21 U.S.C. § 881 (providing for forfeiture of property used in connection with drug selling).
The Government almost exclusively files criminal charges when dealing with Schedule I violations. However, the Government has recently begun using § 882 to shut down medical cannabis distribution clubs. At the center of the Government’s effective use of § 882 is the argument that since Congress has already balanced the equities regarding any use of cannabis, an injunction is mandatory once a CSA violation is found. In other words, Congress has divested the district courts of equitable discretion. But the Supreme Court ruling in Oakland Cannabis and other cases upon which the Court relied dispel this notion.

In Williams, the Government obtained an injunction against a pharmacist who failed to comply with provisions of the CSA. In that case, the court noted that the practical purpose of § 882 was to prevent businesses that engage in unlawful practices from illegally profiting from lax distribution procedures. Since the CSA governs a wide range of drugs, Congress wisely provided an enforcement mechanism to enjoin unfair business practices that did not warrant criminal prosecution.

The 121 Nostrand Avenue opinion demonstrates that § 822 is unnecessary when dealing with Schedule I violations. The lack of discussion regarding the injunction and the fact that it was issued so abruptly in that case lend credence to


181. See supra note 4 and accompanying text.

182. "[W]hen Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes . . . ." Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975). "A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711, 1721 (2001).

183. See Oakland Cannabis, 121 S. Ct. at 1720 ("[W]hen district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise.").

184. See Williams, 416 F. Supp. at 614.

185. See id.

186. In Williams, such a mechanism worked perfectly. The defendant did engage in some violations of the CSA, but he did not possess the moral culpability of the average drug dealer. Instead of criminal prosecution, he was fined and an injunction was put in place to prevent further unlawful activities. See id.

187. See text accompanying notes 52-56.
the argument that § 882 is indeed surplusage when dealing with the vending of street drugs. The CSA is effective as a means to enforce the laws regarding controlled substances placed on Schedules II through V. The district court judge in 121 Nostrand Avenue probably did not expect to see the United States back in his court seeking compliance if the defendant violated the injunction. Although the court noted that "the statute arguably provides for an injunction," it still issued the injunction. The court did not meaningfully consider its decision to issue the injunction, if § 882 was only "arguably" applicable. The court's discussion illustrates the tension inherent in issuing prospective injunctive relief when criminal penalties are available.

The CSA is a statutory scheme that allows for both criminal prosecution and equitable remedies. A line of Supreme Court cases support the proposition that the court need not mechanically issue coextensive injunctive relief whenever a statutory violation is found. In fact, the equitable discretion of the court to refrain from issuing an injunction remains unchanged.

In Hecht, the Supreme Court was presented with a statute that on its face took away the district court's ability to refuse to issue an injunction in certain circumstances. The Supreme Court, however, ruled that the language in that statute—that an injunction "shall be granted"—could not be read to alter the discretion of the district court because the relief sought was equitable and an intent to abrogate the equitable powers of the court was not demonstrated. The CSA, unlike the statute involved in Hecht, does not contain mandatory or permissive language, but merely confers jurisdiction for equitable relief.

192. Id. at 328-29.
193. See 21 U.S.C. § 882(a) ("The district courts of the United States and all courts exercising general jurisdiction in the territories and possessions of the United States shall have jurisdiction in proceedings in accordance with the Federal Rules of Civil Procedure to enjoin violations of this title.").
One could argue that in *Hecht* the court did not issue an injunction only because the violations were technical and issuing the injunction would not further the policies behind the statute since the violations had ceased. To a certain extent such an argument conflates the actual balancing of the equities by the court and the power of the court to exercise its discretion to balance in the first place. The *Hecht* court determined that the district court had the power to balance the equities, even in spite of the statute, and the results of the balancing yielded a decision to refrain from issuing an injunction. The actual balancing will differ from case to case, but the principle to be taken from *Hecht* is clear. Even when faced with a statute that requires an injunction, an injunction is never mandatory absent a clear command from Congress to limit the equity powers of the Court.

The reasoning of *Hecht* bolsters the argument that the CSA does not divest the district court’s authority to use its equity powers to either refrain entirely from issuing an injunction or to issue an injunction with exemptions. The Supreme Court stated that “[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.” Since the CSA may be enforced through other remedies, such as criminal prosecution, the CSA cannot be construed as including a “necessary and inescapable reference” that the court’s equity authority is

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194. See *Hecht*, 321 U.S. at 325.
195. See id. at 330.
196. The particular facts of *Hecht* are exceedingly unique, as the title of the statute in question, Emergency Price Control Act of 1942, might suggest. But the broad pronouncement of *Hecht* regarding the equity powers of the court when faced with a statutory injunction remains vital to this day. See supra note 114 and accompanying text. Perhaps the *Hecht* decision is even more relevant today, since there are so many more federal laws on the books than there were in 1944.
198. See United States v. Oakland Cannabis Buyers’ Coop., 121 S. Ct. 1711, 1720 (2001) (“[W]hen district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise.”).
somehow restricted.

Under the CSA, the government is not faced with the *TVA v. Hill* dilemma.\textsuperscript{200} In *TVA*, the only way for the district court to ensure compliance with the federal statute was to issue an injunction.\textsuperscript{201} In the context of the CSA, if an injunction is not granted at all, or is not granted as broadly as the Government would like, the Government can simply prosecute the violators in a criminal court.\textsuperscript{202} *TVA* provides a perfect example of when an injunction should be mandatory: when such relief is the only way to remedy the statutory violation. The CSA does not fit that mold.

The *Oakland Cannabis* Court recognized that the equitable powers of district courts are not divested by the CSA.\textsuperscript{203} Writing for the majority, Justice Thomas chose to engage in a pronouncement of how equitable discretion operates in the context of § 882 injunction requests:

\begin{quote}
[T]he mere fact that the District Court had discretion does not suggest that the District Court, when evaluating the motion to modify the injunction, could consider any and all factors that might relate to the public interest or the conveniences of the parties, including the medical needs of the Cooperative's patients. . . . [W]hen a court of equity exercises its discretion, it may not consider the advantages and disadvantages of non-enforcement of the statute, but only the advantages and disadvantages of 'employing the extraordinary remedy of injunction,' over the other available methods of enforcement.\textsuperscript{204}
\end{quote}

Although the Court in *Hecht* eloquently summarized the power of the equity court in a much broader fashion,\textsuperscript{205} Justice Thomas' opinion in *Oakland Cannabis* still leaves open an

\begin{footnotesize}
\begin{enumerate}
\item[201.] The court speaks of an "irreconcilable conflict" between building the dam and enforcing the Endangered Species Act. *Id.* at 193.
\item[202.] *See supra* note 189 and accompanying text.
\item[203.] *See supra* note 39 and accompanying text.
\item[204.] United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711, 1721-22 (2001) (citation omitted).
\item[205.] The Court noted:
\begin{quote}
The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied.
\end{quote}
\end{enumerate}
\end{footnotesize}
argument that injunctions against medical marijuana providers are a less favorable method of enforcement than criminal prosecution.

When a criminal defendant is charged with a federal crime, he is guaranteed the right to a twelve-person jury, and unanimity among the jurors is required for a conviction. This right to a jury trial in a criminal case is obviously not subject to summary judgment proceedings. Under § 882, however, a person facing a contempt charge for violating an injunction faces the possibility of summary judgment and a six-person jury. Obviously, when a court grants summary judgment, any hope for jury nullification is lost. When the Government brings a § 882 action, prosecutors make a tactical decision not to criminally prosecute the offender. This decision can lead to a diminished role for the jury. This is particularly troubling in California where the people have expressed an interest in permitting medical marijuana use.

206. See United States v. Smedes, 760 F.2d 109, 113 (6th Cir. 1985) (noting that a federal criminal defendant cannot waive the right to unanimity); FED. R. CRIM. P. 23(b) (preserving the right to a twelve-person jury).


209. Although it is difficult to speculate about the Government's motives when bringing a § 882 injunction instead of a criminal prosecution, civil courts clearly provide procedural advantages to the government. One possible advantage is not having to contend with jury nullification. See supra note 175. When the government prosecutes people suffering from AIDS and cancer, such an advantage cannot be understated.

210. See United States v. Oakland Cannabis Buyers' Coop, 190 F.3d 1109,1114 (9th Cir. 1999) ("The government did not need to get an injunction to enforce the federal marijuana laws. If it wanted to, it could have proceeded in the usual way, by arresting and prosecuting those it believed had committed a crime.").

211. CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2002).
V. PROPOSAL, INVOKING THE COURTS OF EQUITY & REVIVING THE TENTH AMENDMENT

As discussed above, the Federal Government's response to increased state sanctioning of medical cannabis has taken three forms: (1) criminally prosecuting medical cannabis users and their providers; (2) seeking civil injunctions to prevent clubs from distributing cannabis; and (3) threatening sanctions against doctors who recommend cannabis to their patients.\(^{212}\) The Federal Government’s attempts to threaten doctors have been largely unsuccessful.\(^{213}\) For that reason, this proposal focuses on criminal prosecutions and civil injunctions. The first part of this proposal advocates invoking equitable principles to protect medical marijuana users and caregivers when the government seeks civil injunctions to shut down cannabis clubs.\(^{214}\) The second part of this proposal contends that in certain circumstances defendants should use the Tenth amendment to protect themselves when faced with federal criminal prosecution for using and distributing medical marijuana.\(^{215}\)

A. Civil Injunctions Against Medical Marijuana Distribution

After *Oakland Cannabis,* when the government seeks to enjoin distribution of medical cannabis, defendants can still argue the deficiencies of a civil injunction as compared with the remedy of criminal prosecution, including the deprivation of the Sixth Amendment right to a jury trial, the possibility of summary adjudication, the denial of a privilege against self-incrimination and the denial of a presumption of innocence.\(^{216}\) A defendant can argue that a jury of one’s peers is the best method to resolve an evolving issue of law with unique states’ rights implications.

An equity court need not allow injustice simply because the letter of the law fails to address the particular needs of certain situations. By forcing the Government to bring criminal actions against very sick people and their caregivers, a le-

\(^{212}\) See *supra* notes 3-5 and accompanying text.
\(^{214}\) See *infra* Part V.
\(^{215}\) See *supra* Part V.B.
\(^{216}\) See *supra* notes 207-11 and accompanying text.
gitimate hope exists that prosecutorial discretion and compassion will enter the equation. If the Government chooses to criminally prosecute these people, at least the possibility of jury nullification remains.217

The CSA is not flexible enough to consider the hardship imposed upon the many people deprived of cannabis as a medicine. It does not factor in their suffering, nor does it contemplate that dying people may have to resort to a dangerous black market to obtain this medicine. In short, a federal criminal statute that prohibits distribution of cannabis under all circumstances is unduly harsh. A court sitting in equity can refrain from issuing an incompassionate and rigid remedy. If a court finds that an injunction is not in fact the preferable enforcement mechanism, the door remains open for continued distribution of medical marijuana.

B. Reviving the Tenth Amendment

Under current Commerce Clause jurisprudence, it is highly unlikely that any court will rule that Congress has exceeded its authority to enact the CSA.218 But allowing the Federal Government to invade the democratically expressed will of the states regarding health and safety issues appears overbearing, especially since purely intrastate criminal law has traditionally been left to the determination of the states.219 The underlying principles of the recent Commerce Clause cases and those cases that have been respectful to state sovereignty can provide the support needed to fashion a new argument allowing for continued state-sponsored medical marijuana distribution.

When California voters passed Proposition 215, they expressed their shared values regarding medical marijuana.220 Deborah Jones Merrit stated the benefits of respecting such an expression of these values:

[A] major advantage of federalism lies in the ability of state and local governments to draw citizens into the po-

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217. See supra note 175.
218. See supra Part IV.
219. See United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812) ("Certain implied powers must necessarily result to [federal] Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers.").
The greater accessibility and smaller scale of local government allows individuals to participate actively in governmental decision-making. This participation, in turn, provides myriad benefits: it trains citizens in the techniques of democracy, fosters accountability among elected representatives, and enhances voter confidence in the democratic process. For these reasons, the opportunity to participate personally in governmental decision-making is an important part of the democratic process.\(^{221}\)

The participation of California voters in the democratic process should not be taken lightly. But finding constitutional protection for this participation in the medical marijuana debate may be difficult in light of the Supremacy Clause\(^{222}\) and decisions characterizing the Tenth Amendment as a nullity or a mere truism.\(^{223}\)

In *New York v. United States*, however, the Supreme Court held that a federal provision violated the Tenth Amendment because it forced the state of New York to choose between either taking title to nuclear waste or regulating the waste in accordance with federal law.\(^{224}\) The Federal Government lacked the power to impose either of these conditions independently, and therefore the Government lacked the authority to impose the choice.\(^{225}\) *New York v. United States* stands for the proposition that the Federal Government cannot force state legislatures to act in a specified manner. Similarly, in *Printz v. United States*, the Supreme Court declared unconstitutional a federal law that required state law enforcement officers to participate in regulating gun transfers.\(^{226}\) The *Printz* ruling ensures that the Federal Government cannot make an end-run around *New York v. United States* by commandeering state executive officials to enforce federal law.

After *New York v. United States* and *Printz*, the Federal Government is prohibited from forcing states to enforce fed-


\(^{222}\) U.S. CONST. art. VI, cl. 2.

\(^{223}\) See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (rejecting a Tenth Amendment challenge to a law, noting that states are protected by the federal structure which gives each state representation in Congress).


\(^{225}\) See *id*.

eral laws. With these principles in mind, this comment proposes the following hypothesis: Congress exceeds its Commerce power when it invades the traditional province of the States to regulate health and safety by criminalizing behavior which a state explicitly permits and participates in.\textsuperscript{227} This hypothesis is effective only when the following four conditions are present.

\textsuperscript{227} Terrence Messonnier explains that:

To the extent the acts passed in the thirty years following the framing and ratification of the Constitution can be used to interpret the meaning of the Constitution, or the Framers' understanding of the meaning of the Constitution, these acts indicate that the constitution was meant to confer only an extremely limited power over criminal law. The remaining power over criminal law belonged to the states.

1. The Federal Law Must Lack an Express Jurisdictional Element

Since Congress has the power to regulate things in interstate commerce, the presence of a jurisdictional element increases the likelihood of facial constitutional compliance. The CSA contains no jurisdictional element.

2. The Conduct at Issue Must Not Directly Relate to Commercial Activity or Involve the Channels or Instrumentalities of Interstate Commerce

The power of the federal government to regulate commercial activity in a highly inter-connected Union remains untouched by a stricter view of the Commerce Clause. Accordingly, if the regulated activity is directly related to commercial enterprise, or in any manner regulates the channels or instrumentalities of interstate commerce, a contrary state law would not affect the validity of the federal statute. The CSA, is not directly economic in nature since it prohibits mere possession and transfer of drugs without the exchange of money.

3. The State Statute Must Expressly Permit the Activity Forbidden by the Federal Criminal Statute

The manifest expression of a state regarding issues traditionally left to the states, like criminal statutes, would trigger Tenth Amendment review. The CSA conflicts with Proposition 215 because the affirmative permission granted by the California statute to use marijuana for medical purposes is directly at odds with the CSA’s all-encompassing prohibitions on possession and distribution of marijuana.

4. The State Must Actively Participate in the Activity Forbidden by the Federal Statute
Although no state currently distributes medical marijuana, such a plan remains a possibility.\textsuperscript{228} If a state were to distribute medical marijuana, unique states-rights issues would be present if the Federal Government attempted to enjoin such distribution. If the State of California decided to actively distribute marijuana pursuant to Proposition 215, the concerns of \textit{New York v. United States} and \textit{Printz} would come to the forefront. Rather than hoping for voluntary participation by the state or local government, future proposition drafters should require state participation.

If the four conditions were met, the federal statute would not be operative as applied to the activity permitted by the particular state law in question. Under this analysis, the federal statute would be deemed unconstitutional only as applied to the state-sanctioned activity. As to states that have not passed legislation expressly permitting the federally prohibited behavior or have not actively participated in the behavior, the federal law would remain operative.

Under this proposal, Congress is still given wide latitude to pass laws pursuant to the Commerce Clause, however this latitude is checked by the will of the States. The federal law remains the supreme law of the land to the extent it does not usurp the Tenth Amendment rights of the States to pass laws regarding public health and safety and participate in their administration. More importantly, the political realities of this analysis would be more palatable to courts since it does not seek to declare all prohibitions on personal intrastate drug use unconstitutional. Rather, it provides a narrow sphere that is protected from government interference. If a court presented with a federal medical marijuana prosecution recognized this proposal, the CSA could not be used to prosecute those acting in compliance with state laws permitting the use of medical marijuana.

VI. CONCLUSION

A traditional challenge to the Commerce Clause power of

\textsuperscript{228} See United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1105-06 (N.D. Cal. 1998) ("[T]he San Francisco District Attorney has raised the issue of possible local governmental distribution of medical marijuana. . . . The Court recognizes that local governmental distribution of medical marijuana to seriously ill patients raises political issues which may not require judicial intervention.").
Congress when enacting the CSA would likely be unsuccessful because of legal precedent and political realities.\footnote{229} When the Government employs § 882 in an effort to enjoin individuals from distributing medical cannabis, the equity power of the court is not divested. District courts need not issue an injunction against medical cannabis distribution if they determine that injunctive relief is not a preferable method of enforcement. When faced with criminal prosecutions under the CSA, in certain circumstances courts should recognize the Tenth Amendment as a limit to Congress' Commerce Clause power. When a state expressly permits behavior prohibited by a federal criminal statute unrelated to purely economic concerns, and actively participates in that behavior, the state statute should remain operative.