

Hijacking Federalism: Evaluating the Conflict Between the Federal Controlled Substances Act and Hawaii's Medical Marijuana Law

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I. INTRODUCTION

Marijuana, often referred to as *Pakololo* in Hawai'i,¹ is commonly denounced as a detrimental drug, and its use, possession, and distribution is prohibited by Hawai'i state law.² Aside from the occasional cry of "legalize it,"³ by local reggae music artists or special interest groups, the prohibition of marijuana has met with little organized resistance. Recently, however, proponents of the legalization of marijuana found a new avenue into the legislature – an avenue that is more appealing to a mainstream audience.

In 2000, the Hawai'i State Legislature recognized scientific research indicating that patients with debilitating illnesses may respond favorably to controlled doses of marijuana.⁴ The Hawai'i State Legislature subsequently passed Act 228, permitting the medical use of marijuana.⁵ Hawai'i thus became one of ten states that have passed medical marijuana laws since 1996.⁶ According to the *Honolulu Advertiser*, "[t]he number of people in Hawaii who have registered to use marijuana for medical purposes continues to grow, reaching almost 2,000 since the state Legislature created the program[.]"⁷ Despite the apparent success of

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¹ See MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 304 (University of Hawaii Press 1986).

² HAW. REV. STAT. §§ 712-1247 to §712-1249 (2005).

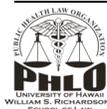
³ International reggae star, Pato Banton, sings a popular song entitled, "Legalize It." PATO BANTON, *Legalize It!*, on LIFE IS A MIRACLE (Surfdog Records 2000).

⁴ 2000 Haw. Sess. Laws S.B. No. 862.

⁵ *Id.*; Act of June 14, 2000, ch. 329, 2000 Haw. Sess. Laws 595-600.

⁶ Robbie Dingeman, *Doctors Wary of Sanctioning Marijuana Use*, THE HONOLULU ADVERTISER, Dec. 20, 2004, at A1.

⁷ *Id.*



and need for the program, both patients and doctors worry that they may be prosecuted under federal law which prohibits the importation, manufacturing, distribution, and possession of marijuana.⁸

This Comment will argue that the federal prosecution of persons using intrastate marijuana for medicinal purposes, pursuant to state law, is within the scope of Congress' power under the Commerce Clause. Furthermore, this Comment will argue that Hawaii's state law permitting the medical use of marijuana is preempted by federal law. Section II will set forth the federal laws prohibiting the use of marijuana. Section III will set forth Hawaii's medical marijuana law and its relevant background. Section IV will analyze the extent of Congress' power under the Commerce Clause. Section V will analyze whether federal law preempts Hawaii's medical marijuana law. Section VI will propose that lobbying the Federal Drug Administration to recognize the medical benefits of marijuana is a more appropriate alternative to Hawaii's medical marijuana law.

II. FEDERAL CONTROLLED SUBSTANCES ACT

The Controlled Substances Act (hereinafter "CSA") was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁹ The CSA categorizes certain drugs within one of five schedules, designating those drugs as "controlled substances."¹⁰ According to the CSA, marijuana is classified as a schedule I controlled substance.¹¹ This means that the federal government determined that marijuana "has a high potential for abuse, . . . has no currently accepted medical use in treatment in the United States, . . . and that there is a lack of accepted safety for use of the drug or other substance under medical supervision."¹²

Among other things, the CSA makes it unlawful for "any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled

⁸ 21 U.S.C.A. §§ 812(c)(10), 841, 844 (WEST 2005); *see also* Dingeman, *supra* note 6.

⁹ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513 (1970).

¹⁰ 21 U.S.C.A. §§ 802(6), 812(a).

¹¹ 21 U.S.C.A. § 812(c).

¹² *Raich v. Ashcroft*, ("Raich I"), 352 F.3d 1222, 1224 (9th Cir. 2003), *vacated sub nom.* *Gonzalez v. Raich*, 125 S. Ct. 2195 (2005) (citing 21 U.S.C. § 812(b)(1) (1970)) (internal quotations omitted).

substance.”¹³ Subject to a limited exception, the CSA also makes it unlawful for “any person knowingly or intentionally to possess a controlled substance.”¹⁴ Consequently, according to the CSA, it is unlawful for any person to knowingly or intentionally manufacture, distribute, dispense, or possess marijuana.¹⁵

III. HAWAII’S MEDICAL MARIJUANA LAW

Despite the federal prohibition on the importation, manufacturing, distribution, and possession of marijuana,¹⁶ the Hawai’i State Legislature (“the Legislature”) created a mechanism that permits qualified patients to use marijuana for medical purposes.¹⁷ The Legislature stated that “modern medical research has discovered a beneficial use for marijuana in treating or alleviating the pain or other symptoms associated with certain debilitating illnesses.”¹⁸ The Legislature further noted that “[t]here is sufficient medical and anecdotal evidence to support the proposition that these diseases and conditions may respond favorably to a medically controlled use of marijuana.”¹⁹ However, the Legislature also recognized the problems associated with permitting the medical use of marijuana, including the “legal problems associated with the legal acquisition of marijuana for medical use,”²⁰ and the fact that “federal law expressly prohibits the use of marijuana.”²¹ These potential limitations notwithstanding, the Legislature passed Act 228 “for the health and welfare of its citizens.”²² Thus, Hawaii’s medical marijuana law states in relevant part:

Notwithstanding any law to the contrary, the medical use of marijuana by a qualifying patient shall be permitted only if:

¹³ 21 U.S.C.A. § 841(a)(1).

¹⁴ 21 U.S.C.A. § 844.

¹⁵ 21 U.S.C.A. §§ 841, 844.

¹⁶ *Id.*

¹⁷ *See* Act of June 14, 2000, ch. 329, 2000 Haw. Sess. Laws 595-600.

¹⁸ 2000 Haw. Sess. Laws S.B. No. 862.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

(1) the qualifying patient has been diagnosed by a physician as having a debilitating medical condition; (2) the qualifying patient's physician has certified in writing that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for the particular qualifying patient; and (3) the amount of marijuana does not exceed an adequate supply.²³

As a practical matter, the medical marijuana certification process is quite simple. According to Keith Kamita, administrator with the state Narcotics Enforcement Division, a patient must first visit a physician who indicates that the person has a debilitating medical condition.²⁴ The patient must then fill out an application which is reviewed by Kamita's agency.²⁵ Subsequently, upon approval, Kamita's agency will issue a medical marijuana certificate.²⁶ The patient or a caregiver may grow up to three mature or flowering plants and four immature plants weighing up to one ounce per plant.²⁷ However, the simplicity of the certification process is misleading. The true difficulty, and perhaps one of the fundamental flaws, of the program lies in how one obtains the marijuana for medical use. The statute defines the term "medical use" as:

the *acquisition*, possession, cultivation, use, distribution, or transportation of marijuana or paraphernalia relating to the administration of marijuana to alleviate the symptoms of effects of a qualifying patient's debilitating medical condition. For the purposes of "medical use", the term distribution is limited to the transfer of marijuana and paraphernalia from the primary caregiver to the qualifying patient.²⁸

²³ HAW. REV. STAT. § 329-122(a) (2004).

²⁴ See Dingeman, *supra* note 6; see also Haw. Admin. Rules § 23-202-3 (2000).

²⁵ See Dingeman, *supra* note 6; see also Haw. Admin. Rules § 23-202-4(b) (2000); Dingeman, *supra* note 6.

²⁶ *Id.*

²⁷ See Haw. Admin. Rules § 23-202-2 (2000) (defining "adequate supply").

²⁸ Haw. Rev. Stat. § 329-121 (emphasis added).

However, the statute fails to identify how one initially acquires marijuana for medical use. The statute does not identify a legitimate source. This lack of clarity not only results in practical difficulties in the execution of the program,²⁹ but also results in strengthening the federal government's argument that the medical use of marijuana substantially affects interstate commerce.

IV. CONGRESS' CONSTITUTIONAL AUTHORITY UNDER THE COMMERCE CLAUSE

The Commerce Clause of the United States Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."³⁰ Congress' scope of authority under the Commerce Clause is, and has traditionally been, unquestionably broad.³¹ However, even early interpretations of the Commerce Clause recognized certain limitations.³² In past decisions the United States Supreme Court held that certain zones of activity "such as 'production,' 'manufacturing,' and 'mining' were within the province of state governments, and thus were beyond the power of Congress under the

²⁹ According to the *Honolulu Advertiser*, marijuana for medical use is available at the retail level in California. However, access to medical marijuana in Hawai'i is more difficult. See Dingeman, *supra* note 6.

³⁰ U.S. CONST. art. I, §8, cl. 3.

³¹ The United States Supreme Court established that Congress' power under the Commerce Clause is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power . . . may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824).

³² The *Gibbons* Court stated that:

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one.

Id. at 194.

Commerce Clause.”³³ Consequently, while Congress’ scope of authority under the Commerce Clause is extensive, the Court limited that authority with respect to certain predominantly local issues.

When analyzing the boundaries of Congress’ authority under the Commerce Clause, courts apply a three-pronged analysis. First, “Congress may regulate the use of the channels of interstate commerce.”³⁴ Second, Congress may “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.”³⁵ Finally, Congress may “regulate . . . those activities that substantially affect interstate commerce.”³⁶

In the present case, the specific issue is whether the federal government may interpret the CSA to prohibit the intrastate cultivation, use,

³³ U.S. v. Lopez, 514 U.S. 549, 554 (1995) (citing Wickard v. Filburn, 317 U.S. 111, 121 (1942)).

³⁴ *Id.* at 558; *see also* U.S. v. Darby, 312 U.S. 100, 114 (1941) (“Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.”) (citations omitted); Heart of Atlanta Motel v. U.S., 379 U.S. 241, 256 (1964) (“The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.”) (citations omitted).

³⁵ *Lopez*, 514 U.S. at 558; *see also* Houston, E. & W. Tex. Ry. Co. v. U.S., 234 U.S. 342, 351 (1914) (“The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care.”); Southern Ry. Co. v. U.S., 222 U.S. 20, 27 (1911) (“[I]t is no objection to such an exertion of this power that the danger intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.”); *Perez v. U.S.*, 402 U.S. 146, 150 (1971) (“Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft . . ., or persons or things in commerce, as, for example, thefts from interstate shipments[.]”) (citing 18 U.S.C. §§ 32, 659).

³⁶ *Lopez*, 514 U.S. at 558-59.

and possession of marijuana for medical purposes, pursuant to state law. The United States Ninth Circuit Court of Appeals considered this issue in *Raich v. Ashcroft*.³⁷

A. *RAICH V. ASHCROFT*

On October 9, 2002, Angel McClary Raich and Diane Monson sued United States Attorney General John Ashcroft and Drug Enforcement Administration Administrator Asa Hutchinson for injunctive and declaratory relief claiming that the CSA was unconstitutional as applied to them.³⁸ Raich had been diagnosed with more than ten serious medical conditions, “including an inoperable brain tumor, life-threatening weight loss, a seizure disorder, nausea, and several chronic pain disorders.”³⁹ Monson suffered from a spinal degenerative disease which resulted in “severe chronic back pain and constant, painful muscle spasms.”⁴⁰ The doctors for both women stated that conventional medication was either “ineffective or produce[d] intolerable side effects.”⁴¹ As a result, both women use marijuana for medicinal purposes pursuant to California’s Compassionate Use Act.⁴² In order to protect their supplies of marijuana, plaintiffs Raich and Monson specifically sought a declaration that the CSA is unconstitutional to the extent it purports to prevent them from obtaining, possessing, or manufacturing marijuana for medical use.⁴³ The United States District Court for the Northern District of California conceded that “[t]raditional medicine [had] utterly failed these women,”⁴⁴ but nonetheless denied the motion for injunction holding that the plaintiffs had not

³⁷ 352 F.3d 1222 (9th Cir. 2003).

³⁸ *Raich v. Ashcroft* (“*Raich I*”), 248 F. Supp. 2d 918, 921-22 (N.D. 2003), *rev’d*, 352 F.3d 1222 (9th Cir. 2003), *vacated sub nom.* *Gonzales v. RAich*, 125 S. Ct. 2195 (2005).

³⁹ *Raich v. Ashcroft* (“*Raich II*”), 352 F.3d 1222, 1225, *vacated sub nom.* *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Raich v. Ashcroft* (“*Raich I*”), 248 F. Supp. 2d 918, 921 (N.D. 2003), *rev’d*, 352 F.3d 1222 (9th Cir. 2003), *vacated sub nom.* *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

established a sufficient “likelihood of success on the merits.”⁴⁵ However, on December 16, 2003 the United States Ninth Circuit Court of Appeals reversed the district court’s ruling.⁴⁶

In coming to its ultimate conclusion the court first emphasized the class of activity involved. Generally, where a “class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.”⁴⁷ In other words, where Congress regulates a certain class of activities, courts may not make exceptions for “individual instances” even where the specific activity’s contact with commerce is *de minimis*.⁴⁸ However, the *Raich* court, noting that previous cases upholding the CSA involved drug trafficking, distinguished those cases by classifying the medical use of marijuana as a “*separate and distinct class of activities*.”⁴⁹ The court determined that the plaintiffs’ actions are fairly classified as the “intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient’s physician pursuant to valid California state law.”⁵⁰ In addition, the court stated that the specific activity at issue is “distinct from the broader illicit drug market – as well as any broader commercial market for medicinal marijuana.”⁵¹

Having identified the specific class of activity involved, the court subsequently analyzed whether the class “has an effect on interstate commerce sufficient to make it subject to federal regulation under the Commerce Clause.”⁵² The court initially determined that the medical use of marijuana did not involve the channels of interstate commerce, or the instrumentalities of interstate commerce, or persons or things in interstate commerce. Consequently, if Congress has authority to regulate under the Commerce Clause, that authority must originate from the third prong of the standard set forth in *Lopez*: whether the specific class of activity “sub-

⁴⁵ *Id.* at 931.

⁴⁶ *Raich v. Ashcroft* (“*Raich II*”), 352 F.3d 1222, 1235, *vacated sub nom.* *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

⁴⁷ *Id.* at 1228 (internal citations omitted).

⁴⁸ *Id.* at 1227-28 (internal citations omitted).

⁴⁹ *Id.* at 1228.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1229.

stantially affect[s] interstate commerce.”⁵³ In order to determine whether the “intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician”⁵⁴ substantially affects interstate commerce, the court applied a four-factor analysis first iterated in *United States v. Morrison*.⁵⁵

The first factor is “whether the statute regulates commerce or any sort of economic enterprise.”⁵⁶ The *Raich* Court noted that Black’s Law Dictionary defines the term “commerce” as “the exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations.”⁵⁷ The medical use of marijuana, however, “lack[s] sale, exchange, or distribution,”⁵⁸ and therefore “does not possess the essential elements of commerce.”⁵⁹ The government subsequently argued that the cumulative effect of the medical use of marijuana has a commercial impact.⁶⁰ The court disagreed, however, pointing out that previous court rulings required that the activity have an “apparent commercial character” before its aggregate effect could be deemed to have a commercial impact.⁶¹ Accordingly, the Ninth Circuit concluded that the “cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity.”⁶² Thus the first *Morrison* factor favored the conclusion that Congress exceeded its authority under the Commerce Clause.⁶³

The second *Morrison* factor is “whether the statute contains any ‘express jurisdictional element.’”⁶⁴ The court found that no such “juris-

⁵³ *U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995).

⁵⁴ *Raich v. Ashcroft* (“*Raich II*”), 352 F.3d 1222, 1228, *vacated sub nom.* *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

⁵⁵ 529 U.S. 598 (2000).

⁵⁶ *Raich II*, 352 F.3d at 1229 (citing *Morrison*, 529 U.S. at 610-12).

⁵⁷ *Id.* at 1230 (citing BLACK’S LAW DICTIONARY (7th ed. 1999)).

⁵⁸ *Id.* at 1229.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1230.

⁶¹ *Id.* (citing *U.S. v. McCoy*, 323 F.3d 1114, 1120 (9th Cir. 2003)).

⁶² *Id.* at 1229.

⁶³ *Id.* at 1231.

⁶⁴ *Id.* at 1229 (citing *U.S. v. Morrison*, 529 U.S. 598, 610-12 (2000)).

dictional hook” limited the scope of the CSA to a “discrete set of cases that substantially affected interstate commerce.”⁶⁵ Hence, the court concluded that the second *Morrison* factor also supported the conclusion that Congress exceeded its Commerce Clause authority.⁶⁶

The third factor in *Morrison* was “whether the statute or its legislative history contains ‘express congressional findings’ regarding the effects of the regulated activity upon interstate commerce.”⁶⁷ The Ninth Circuit recognized that the CSA contains clear congressional findings in support of the national regulation of controlled substances, which state in relevant part:

(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.⁶⁸

The court stated that although the foregoing congressional findings are primarily concerned with drug trafficking, they nevertheless provide “some evidence that intrastate possession of controlled substances may impact interstate commerce.”⁶⁹ Consequently, the court concluded that the third factor supports a finding that the CSA is constitutional as applied.⁷⁰ However, the court also noted that there is no evidence that Congress contemplated the medical use of marijuana when it made its findings and “[c]ommon sense indicates that the findings related to this

⁶⁵ *Id.* at 1231.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1229 (citing *Morrison*, 529 U.S. at 610-12).

⁶⁸ *Id.* at 1232 (citing 21 U.S.C. § 801 (1970)).

⁶⁹ *Id.* at 1232.

⁷⁰ *Id.*

specific class of activities would be significantly different from the findings relating to the effect of drug trafficking, generally, on interstate commerce.”⁷¹ Furthermore, in *Morrison*, the United States Supreme Court warned subsequent courts to “take congressional findings with a grain of salt.”⁷²

The fourth factor is “whether the link between the regulated activity and a substantial effect on interstate commerce is ‘attenuated.’”⁷³ The court admitted that the intrastate possession, cultivation and distribution of marijuana for medical use could potentially have a marginal effect on interstate commerce.⁷⁴ However, the court questioned whether such an effect would be “substantial,” citing other court opinions that found the connection attenuated.⁷⁵ Consequently, the court determined that the fourth factor supports a finding that the CSA cannot constitutionally be applied to the intrastate cultivation, possession, and use of marijuana.⁷⁶

⁷¹ *Id.*

⁷² *Id.* The United States Supreme Court in *Morrison* stated that:

the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, [s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Rather, [w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.

U.S. v. Morrison, 529 U.S. 598, 614 (2000) (internal citations omitted).

⁷³ *Raich v. Ashcroft* (“*Raich I*”), 352 F.3d 1222, 1229, *vacated sub nom.* *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (citing *Morrison*, 529 U.S. at 610-12).

⁷⁴ *Id.* at 1233.

⁷⁵ *Id.* In *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), Judge Kozinski wrote in a concurring opinion that “[m]edical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce. Federal efforts to regulate it considerably blur the distinction between what is national and what is local.” *Conant*, 309 F.3d at 647 (Kozinski, J., concurring). The District Court for the Northern District of California has also seriously questioned the substantiality of the connection between such activities and interstate commerce. See *County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1209 (N.D. Cal. 2003).

⁷⁶ *Raich II*, 352 F.3d at 1233.

Having analyzed the issue pursuant to the *Morrison* factors, the Ninth Circuit concluded that the CSA, as applied to the plaintiffs, was unconstitutional.⁷⁷ Thus, the court granted the requested injunction, concluding that the plaintiffs met their burden of showing “the likelihood of success on the merits.”⁷⁸ Although the holding in *Raich* pertained to the grant of a preliminary injunction, the logical conclusion was that Congress was without authority to regulate the intrastate cultivation, possession, and use of marijuana for medical reasons.

B. *GONZALES V. RAICH*

The Ninth Circuit’s decision, however, has been overruled by the United States Supreme Court’s recent decision in *Gonzales v. Raich*.⁷⁹ Justice Stevens wrote for a majority of the Court,⁸⁰ ultimately concluding that the provisions of the CSA may, via the Commerce Clause, be enforced against intrastate users and growers of marijuana for medical purposes.⁸¹

The majority first relied on its previous decision in *Wickard v. Filburn*.⁸² In *Wickard*, the Court “upheld the application of the Agricultural Adjustment Act to the planting and consumption of homegrown wheat. The effect on interstate commerce in [*Wickard*] followed from the possibility that wheat grown at home for personal consumption could be drawn into the market by rising prices[.]”⁸³ The Court, in the present case, found the factual similarities to be persuasive, stating that “[l]ike the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.”⁸⁴ The Court then distinguished *Lopez* and *Morrison*, cases which

⁷⁷ *Id.* at 1234.

⁷⁸ *Id.*

⁷⁹ (“*Raich III*”), 125 S.Ct. 2195 (2005).

⁸⁰ Justice Stevens was joined by Justices Souter, Ginsberg, Breyer, and Kennedy. *Id.* at 2198. Interestingly, Justice Kennedy joined both of the majority opinions in both *Lopez* and *Morrison*. See *U.S. v. Lopez*, 514 U.S. 549, 550 (1995); *U.S. v. Morrison*, 529 U.S. 598, 600 (2000).

⁸¹ *Raich III*, 125 S. Ct. at 2215.

⁸² *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁸³ *Id.*

⁸⁴ *Raich III*, 125 S.Ct. at 2206.

were foundational to the Ninth Circuit's analysis, on the grounds that those cases involved attempts by Congress to regulate non-economic activity.⁸⁵ The Court noted that "[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic."⁸⁶

The majority continued by emphasizing that, for purposes of analyzing Congress' scope of authority under the Commerce Clause, it is not necessary to determine whether the activity sought to be regulated substantially affects interstate commerce *in fact*, but rather, a reviewing court's task is only to assess whether a *rational basis* existed for so concluding.⁸⁷ The Court subsequently identified a rational basis as follows:

Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. . . . That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.⁸⁸

The Court noted that a fundamental flaw in the Ninth Circuit's analysis was its isolation of the intrastate cultivation, use, and possession of marijuana for medical purposes as a separate and distinct class of activities,⁸⁹ stating that "the subdivided class of activities . . . was an essential part of the larger regulatory scheme."⁹⁰

Pursuant to the foregoing, the Court vacated the judgment of the Ninth Circuit and remanded the case for further proceedings.⁹¹ Ac-

⁸⁵ *Id.* at 2209-10.

⁸⁶ *Id.* at 2211.

⁸⁷ *Id.* at 2208.

⁸⁸ *Id.* at 2209 (footnote omitted).

⁸⁹ *Id.* at 2211.

⁹⁰ *Id.*

⁹¹ *Id.* at 2215.

cordingly, the application of the provisions of the CSA, criminalizing the manufacture, distribution, and possession of marijuana, to intrastate growers and users of marijuana for medicinal purposes does not violate the Commerce Clause.

However, Hawaii's medical marijuana law may nonetheless be valid if it is not preempted by the CSA. The following section will address the preemption issue.

V. PREEMPTION

The Supremacy Clause⁹² of the United States Constitution (hereinafter “the Supremacy Clause”) is the basis for the doctrine of preemption. The Supremacy Clause states, in relevant part, that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁹³ At its most basic level, the Supremacy Clause gives Congress the power to enact federal statutes that override state law in certain situations.⁹⁴

When evaluating whether a federal statute or regulation preempts state action, courts traditionally distinguish between “express” and “implied” preemption.⁹⁵ With regard to express preemption, state action may be superseded by express language in a congressional enactment.⁹⁶ State action may also be foreclosed by implication from the depth and breadth of a congressional scheme that occupies the legislative field,⁹⁷ or by implication because of a conflict with a congressional enactment.⁹⁸ The CSA contains no express statement by Congress intending to preempt state ac-

⁹² U.S. CONST. art. VI, cl. 2.

⁹³ *Id.*

⁹⁴ DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 1045 (2003).

⁹⁵ *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000).

⁹⁶ *Lorrillard Tobacco Co. v. Reilly*, 533 U.S. 525, 545 (2001); *see also* *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

⁹⁷ *Lorrillard*, 533 U.S. at 545; *see also* *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

⁹⁸ *Lorrillard*, 533 U.S. at 545; *see also* *Geier*, 529 U.S. at 869-74.

tion such as Hawaii's medical marijuana law.⁹⁹ Rather, the CSA specifically states that:

[n]o provision . . . shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.¹⁰⁰

Thus Congress specifically indicated an intent not to occupy the field. Accordingly, the question whether Hawaii's medical marijuana law is preempted by the CSA depends on whether there is an implied preemption by direct conflict.

When there is no “clear evidence” of a direct conflict, courts presume that the federal law does not pre-empt a state statute.¹⁰¹ Here, there is “clear evidence” of a direct conflict between the CSA and Hawaii's medical marijuana law. The United States Supreme Court has held that a direct conflict exists either where compliance with both federal and state laws is a physical impossibility,¹⁰² or where state action “stand[s] as an obstacle to the accomplishment and execution” of the objectives of Congress.¹⁰³ An analysis of the foregoing standard reveals that the CSA preempts Hawaii's medical marijuana law.

First, it is physically impossible to comply with both the CSA and Hawaii's medical marijuana law. The CSA flatly prohibits the knowing or intentional manufacturing, distribution, or dispensing of a controlled sub-

⁹⁹ See 21 U.S.C.A. §§ 801-829 (WEST 2005).

¹⁰⁰ 21 U.S.C.A. § 903.

¹⁰¹ See *Geier v. American Honda Motor Co.*, 529 U.S. 861, 885 (2000) (“[A] court should not find preemption too readily in the absence of clear evidence of a conflict.”).

¹⁰² *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

¹⁰³ *Geier*, 529 U.S. at 883; see also *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating that the “primary function is to determine whether, under the circumstances of this particular case, [state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

stance.¹⁰⁴ The CSA also prohibits the possession of a controlled substance.¹⁰⁵ Marijuana is listed as a schedule I controlled substance,¹⁰⁶ and therefore the CSA clearly prohibits the manufacturing, distribution, dispensing, and possession of marijuana. Despite the clear prohibition in the CSA, Hawaii's medical marijuana law specifically permits a qualified patient to cultivate, use, and possess marijuana for medical purposes pursuant to a physician's recommendation.¹⁰⁷ Essentially, Hawai'i law purports to permit that which federal law prohibits, and thus there appears to be clear evidence of a direct conflict.

It is possible, however, to argue that the CSA does not preempt Hawaii's medical marijuana law because Congress did not specifically deliberate on whether there should be an exception for the medical use of marijuana. According to the U.S. Supreme Court, "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States."¹⁰⁸ When enacting the CSA, Congress clearly intended to regulate drug trafficking, but there is no evidence to suggest that Congress even considered an exception for the medical use of marijuana. Rather, the CSA is a broadly-worded regulatory statute that prohibits "controlled substances" generally.

In *Parker v. Brown*,¹⁰⁹ the U.S. Supreme Court held that the Sherman Act,¹¹⁰ which governs "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States,"¹¹¹ should not preempt the specific state action in question, because "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action."¹¹² The Court further acknowledged that the legislative history also did not suggest "a purpose to restrain state action."¹¹³ The CSA is analogous: Congress enacted a broad crimi-

¹⁰⁴ 21 U.S.C.A. § 841.

¹⁰⁵ 21 U.S.C.A. § 844.

¹⁰⁶ 21 U.S.C.A. § 812(c).

¹⁰⁷ HAW. REV. STAT. § 329-122(a) (2004).

¹⁰⁸ *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

¹⁰⁹ 317 U.S. 341 (1943).

¹¹⁰ 15 U.S.C.A. § 1.

¹¹¹ *Id.*

¹¹² *Parker*, 317 U.S. at 351.

¹¹³ *Id.*

nal statute with no indication in the text or legislative history that it intended to prohibit state action. It is possible to argue that, similarly, the CSA should not be interpreted to preempt Hawaii's medical marijuana law. But despite the apparent logic and coherence of the foregoing argument, some evidence suggests that Congress did consider the possibility of creating an exception to the wholesale prohibition of marijuana. Congress explicitly acknowledged that “[t]he extent to which marihuana should be controlled is a subject upon which opinions diverge widely.”¹¹⁴ Nonetheless, Congress enacted the law “as recommended by the administration and as reported by the committee, [and therefore] marihuana is listed under schedule I, as subject to the most stringent controls.”¹¹⁵ Congress did not include marijuana as one of those controlled substances that may be used for medical purposes. It logically follows that Congress did not perceive any medical benefit from the use of marijuana. An exception to Congress’ flat prohibition based on the medical use of marijuana thus seems to directly contradict congressional intent.

Second, authorizing the use of marijuana for medical purposes “stand[s] as an obstacle to the objectives” of the CSA.¹¹⁶ The objective of the CSA is to regulate drug trafficking,¹¹⁷ and permitting the medical use of marijuana would seriously interfere with that federal purpose. Marijuana is fungible and as such there is no way to determine whether it was cultivated intrastate or purchased in an interstate transaction. The inability to distinguish between interstate and intrastate marijuana could substantially interfere with federal enforcement of the CSA. For example, the mere fact that certain people are legally permitted to use marijuana for medical purposes creates a potential market for marijuana. Practically speaking, not every qualified patient is going to grow their own marijuana. As previously mentioned, there is at least some danger that qualified patients are going to purchase the marijuana used. One cannot turn a blind eye to the practical reality – that these purchases will most likely take place on the black market. This encourages drug trafficking and undermines federal regulation.

The foregoing analysis thus demonstrates that Hawaii's medical marijuana law conflicts with the CSA first by permitting the possession

¹¹⁴ H.R. Rep. No. 99-1444, pt. 1, at 12 (1970).

¹¹⁵ *Id.*

¹¹⁶ *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000).

¹¹⁷ *Raich v. Ashcroft*, (“*Raich II*”), 352 F.3d 1222, 1228, *vacated sub nom.* *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

and use of marijuana where the CSA prohibits it, and second by standing as an obstacle to the CSA's objective of regulating drug trafficking. Consequently, the CSA preempts Hawaii's medical marijuana law.

VI. THE FEDERAL DRUG ADMINISTRATION AS A VIABLE ALTERNATIVE

The validity of any law permitting the medical use of marijuana is currently suspect because Congress has the authority to regulate medical marijuana under the CSA and the CSA will probably preempt any law purporting to permit what it prohibits. Despite the legal infirmities, however, ten states have enacted medical marijuana laws.¹¹⁸ Hawai'i, in particular, did so for the purpose of protecting the welfare of its people.¹¹⁹ However, it is questionable whether permitting patients to grow their own prescription drugs, without further regulation, is in the best interest of Hawaii's citizens. In order to truly benefit the citizenry, Hawaii's Legislature should also have taken appropriate precautionary measures, such as ensuring that the medical marijuana supply is steady, safe, and reliable. The fact that Hawaii's Legislature did not enact such precautionary measures raises the concern that Hawaii's medical marijuana law is either a legislative half-measure, or a good intention without proper planning.

As opposed to enacting a law with debatable constitutional merit, Hawaii's Legislature should instead take advantage of existing alternatives such as lobbying the federal Food and Drug Administration ("FDA") to approve the medical use of marijuana.¹²⁰ If the FDA conducts research and concludes that marijuana has medical benefits, the Drug Enforcement Agency would have the authority to place marijuana into a less restrictive

¹¹⁸ See *Gonzales v. Raich* ("*Raich III*"), 125 S. Ct. 2195, 2199 n.1 (2005).

¹¹⁹ See *supra* note 4.

¹²⁰ Indeed, the United States Supreme Court in *Gonzales* acknowledged that "evidence proffered by respondents . . . regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I." *Raich III*, 125 S.Ct. at 2212 n.37. The Court also stated that "the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress." *Id.* at 2215.

schedule under the CSA.¹²¹ If marijuana is reclassified from schedule I to any of schedules II through V, the CSA permits possession of marijuana obtained under a valid prescription order.¹²² In addition, the marijuana obtained would be subject to, among other things, stringent production, order-form, prescription, record-keeping, labeling, packaging, and diversion controls that the CSA places on controlled substances with an accepted medical use.¹²³ These comprehensive regulations would grant access to marijuana for medical purposes while simultaneously satisfying minimal health and safety standards.

The Legislature's attempt to circumvent established procedures appears to have backfired inasmuch as the United States Supreme Court has overruled *Raich*. Essentially, Hawaii's medical marijuana law still provides qualified patients with a defense to state prosecution, but does not protect the same patients from federal prosecution. Accordingly, patients who take advantage of Hawaii's medical marijuana law are presently forced to gamble that federal agents will not attempt to enforce the CSA. Surely this is not the desired result and Hawaii's Legislature should ultimately repeal its medical marijuana law.

VII. CONCLUSION

In a federalist system, political power is allocated between central and subordinate sovereign entities with distinct areas of authority.¹²⁴ Some scholars advocate a view of federalism that favors greater autonomy on the part of the states and a limitation on the authority of the federal government.¹²⁵ The U.S. Supreme Court, in *Lopez* and *Morrison*, iterated a similar view of federalism, limiting the authority of Congress under the Commerce Clause. Recently, under the guise of federalism, proponents of medical marijuana won a foothold in the United States Ninth Circuit of Appeals in *Raich*. In *Raich*, the Ninth Circuit held that Congress was without authority to prohibit the intrastate cultivation, possession, and use

¹²¹ Peter G. Pan, *In Search of a Viable Distribution System for Hawai'i's Medical Marijuana Program*, H. Rep. 22-4, 2nd Sess., at 16 (2004).

¹²² 21 U.S.C.A. § 829 (WEST 2005).

¹²³ 21 U.S.C. §§ 821-829.

¹²⁴ STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 610 (Daniel A. Mandelker et al. eds., 5th Ed., 2004).

¹²⁵ *Id.*

of marijuana for medical purposes. However, the United States Supreme Court rejected the Ninth Circuit's attempt to use its carefully constructed approach to federalism to support the medical use of marijuana. Furthermore, an analysis of the Supremacy Clause indicates that the CSA preempts Hawaii's medical marijuana law by prohibiting the manufacturing, distribution, dispensing, and possession of marijuana. As such, the Court's decision in *Gonzales* may well have rung the death knell of Hawaii's medical marijuana law.