THE FEDERAL CONTROLLED SUBSTANCES ACT DOES NOT PREEMPT THE MICHIGAN MEDICAL MARIHUANA ACT

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I. INTRODUCTION

Michigan voters approved by initiative the Michigan Medical Marihuana Act (MMMA) of 2008.[1] The election approving the law took place on November 4, 2008.[2] Michigan voters approved the MMMA by a margin of 3,006,820 to 1,790,889 (62.67% in favor and approved by a majority of voters in each of Michigan's eighty-three counties). The MMMA became effective December 4, 2008.[3] Section 8 of the MMMA

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1. MICH. COMP. LAWS ANN. §§ 333.26421-333.26430 (West 2010). Although the typical spelling of the word is "Marijuana," the statutory language typically used across the nation is "Marihuana." Some court decisions interpreting these statutes use the more common spelling. Unless we directly quote from one of these decisions, we will use the "statutory" spelling ("Marihuana") in this article.

2. MICH. DEP'T OF STATE, *State Proposal -08-1: Legislative Initiative to Allow under St. Law the Medical Use of Marijuana* (2008), *available at* http://miboecfr.nictusa.com/election/results/08GEN/90000001.html.

3. Michigan Medical Marihuana Act, MICH. COMP. LAWS ANN. §§ 333.26421-333.26430 *available at*

permits appropriate medical marihuana patients to interpose an affirmative defense to any offense involving marihuana.[4]

The consolidated trial court decision rendered in the Circuit Court for Midland County Michigan on June 8, 2011, *People v. Van Wert* and *People v. Finney*, as well as the decision in *Dearborn v. Brandon*, have introduced a new analytical wrinkle into the discussion of the MMMA.[5] These cases stated that the United States Controlled Substances Act (CSA)[6] renders the MMMA unconstitutional under the doctrine of preemption.[7]

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http://www.legislature.mi.gov/(S(cjcyqn45jnm3ws550przzw55))/mileg.aspx?page=getObject&objectName=mcl-Initiated-Law-1-of-2008.

4. MICH. COMP. LAWS ANN. § 333.26428. Section 8 states that:

(a) Except as provided in Section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:

> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
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> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
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> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.
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> (b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).

5. People v. Finney, No. 09-4081-FH-L (Midland Cir. Ct. June 8, 2011) (consolidated opinion and order regarding medical marijuana), *available at* http://www.scribd.com/doc/58468204/Midland-County-Medical-Marijuana-opinion; City of Dearborn v. Brandon, No. 10C0214 (D. Ct. 19th Jud. D. Ct. Mar. 7, 2011), *available at* http://www.duimaze.com/files/MMMA_Dearborn_v_Brandon.pdf. The Michigan statute is similar to all other MMAs in structure and content. The authors have not found any other criminal case, whether in federal or state court, that reached a similar conclusion regarding preemption—hence, "a new wrinkle."

6. The Controlled Substances Act, 21 U.S.C.A. §§ 801-03, 811-14, 821-32, 8 40-65, 871-90, 901-04 (West 2010).

7. *Finney*, No. 09-4081-FH-L, at 20; *Brandon*, No. 10C0214 at 5.

In the Midland Circuit Court cases (*Van Wert* and *Finney*), the court held that because each defendant was on or would be placed on probation, the standard statutory "probation" language requiring that defendant violate no state or federal law meant that neither the affirmative defense,[8] nor the more general protection of the MMMA[9] were available to the defendants.[10] So, without reaching the preemption question, the court had already determined the issue against the defendants.[11] Consequently, the language in the court's opinion as to preemption was dicta.

In *Brandon*, the district judge found that defendant did not demonstrate a bona fide patient-physician relationship with the doctor who signed the certificate required under the MMMA, and that the doctor did not issue the certificate until two months after defendant Brandon first came to court.[12] Nevertheless, the *Brandon* court's opinion attempted to cast its conclusion that the MMMA is preempted by the CSA as a holding, rather than as dicta.[13] County prosecutors and local municipal attorneys, sometimes with the direct intervention of the Michigan Attorney General in support,[14] have advanced arguments similar to the preemption reasoning in *Van Wert/Finney* and *Brandon* in other cases in Michigan.[15]

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8. MICH. COMP. LAWS ANN. § 333.26428, which in pertinent part provides: "Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows . . . [setting forth the specific requirements]."

9. MICH. COMP. LAWS ANN. § 26424 ("[a] qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner . . . .").

10. *Finney*, No. 09-4081-FH-L, at 6-7.

11. *Id.*

12. *Brandon*, No. 10C0214 at 2 n.3, 1 n.1.

13. *Id.* at 5.

14. Lott v. Livonia, No. 10-013917-C (Wayne Cir. Ct. July 22, 2011).

15. *See, e.g.*, 2011 MICH. ATT'Y GEN. OP. NO. 7262, at *1 (Nov. 10, 2011) (providing the state of Michigan Attorney General's opinion that the portions of the MMMA that conflict with federal law are preempted by federal law). The Michigan Attorney General's specific finding of conflict preemption was quite limited, and stated:

> Section 4(h) of the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26424(h), which prohibits the forfeiture of marihuana possessed for medical use, directly conflicts with and is thus preempted by, the federal Controlled Substances Act, 21 USC 801 *et seq.*, to the extent section 4(h) requires a law enforcement officer to return marihuana to a registered patient or primary caregiver upon release from custody.

Id. See also Lott, No. 10-013917-C.

The Arizona Attorney General issued an opinion consistent with the Michigan Attorney General's Opinion on August 6, 2012. The Arizona Attorney General's

This Article investigates whether the preemption analysis in the *Van Wert/Finney* and *Brandon* decisions is correct, when viewed as either "holding" or as dicta. The *ratio decidendi* in both decisions rested exclusively on "preemption" analysis.[16] The court decisions made no mention of the fundamental question of "federalism," and in particular, neither decision discussed the doctrine of dual sovereignty.[17] In fact, neither the word "federalism," nor the term "dual sovereignty" appears in either opinion.[18]

The history of the U.S. Constitution, its original terms and subsequent Amendments, as well as an unbroken string of decisions dating back to the early days of the United States Supreme Court, all demonstrate that "federalism" was and remains an essential part of the constitutional fabric of the United States.[19] Fundamental to the concept of federalism is the idea of "dual sovereignty."[20] In a series of cases dating back to the early nineteenth century, the Supreme Court noted, and then ultimately held, that dual sovereignty allowed successive prosecutions for essentially the same offense committed against different sovereigns.[21] However, the federalism aspects of dual sovereignty are limited neither to criminal cases in particular, nor to double jeopardy issues in particular.[22] Rather, dual sovereignty is a fundamental part of our constitutional fabric.[23]

Eighteen United States jurisdictions, ranging in population from small (Vermont and the District of Columbia) to very large (California), have enacted statutes that are popularly described as Medical Marihuana

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Opinion explicitly cites to and relies upon the Michigan Attorney General's Opinion. 2012 ARIZ. ATT'Y GEN. OP. NO. I112-001 at P.5. The Arizona Attorney General's opinion does not refer to the published decision of the Michigan Court of Appeals in *Ter Beek v. City of Wyoming*, No. 306240 (Mich. Ct. App. July 31, 2012). *See generally infra* notes 26 and 297. *See also* John Ingold, *Colorado Court Ruling Says Medical Marijuana Trumped by Federal Law*, DENVER POST, Aug. 18, 2012, *available at http://www.denverpost.com/news/marijuana/ci_21340833/colorado-court-ruling-says-medical-marijuana-trumped-by?refresh=no* (explaining how a Colorado District Court found a contract between a marijuana grower and dispensary void as an illegal contract due to federal law).

16. *Finney*, No. 09-4081-FH-L, at 20; *Brandon*, No. 10C0214, at 5.

17. *Finney*, No. 09-4081-FH-L; *Brandon*, No. 10C0214.

18. *Finney*, No. 09-4081-FH-L; *Brandon*, No. 10C0214.

19. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 2 (1895).

20. Heath v. Alabama, 474 U.S. 82, 92 (1985).

21. *See* United States v. Lanza, 260 U.S. 377, 382 (1922).

22. Daniel R. Dinger, *Successive Interviews and Successful Prosecutions: The Interplay of the Sixth Amendment Right to Counsel and the Dual Sovereignty Doctrine in A Post-*Cobb *World*, 40 TEX. TECH L. REV. 917, 971 (2008).

23. *Id.* (stating "[t]he dual sovereignty doctrine is a natural result of our federal-state system").

Acts (MMA or MMAs).[24] The basic components of these laws include a state registration program for qualifying medical marihuana patients, protection for registered patients from arrest on marihuana possession charges, and establishment of an affirmative defense for such patients in the event prosecutors file a criminal case against a qualifying patient.[25]

The MMAs enacted across the United States have resulted in numerous appellate decisions, mainly, but not exclusively, concerned with direct appeals pertaining to criminal charges.[26] The appellate judges

24. The jurisdictions and the years of enactment are: California-1996, Alaska-1998, Oregon-1998, Washington-1998, Maine-1999, Colorado-2000, Hawaii-2000, Nevada-2000, Delaware-2011, New Jersey-2010, Vermont-2004, Rhode Island-2006, New Mexico-2007, Montana-2004, Michigan-2008, Washington D.C.-2010, Arizona-2010, and Connecticut - 2012. *16 Legal Medical Marijuana States and D.C.*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (Last visited Sept. 15, 2012). Additionally, Maryland has enacted two laws, which taken together can be seen as comprising a partial Medical Marihuana law. MD. H.B. NO. 702, 2003 MD. LAWS 442; MD. S.B. NO. 308, 2011 MD. LAWS 215 (codified at MD. CODE ANN. CRIM. LAW § 5-601 (West 2010 & Supp. 2011)). The first Maryland law allows a defendant to interpose a medical necessity defense as a mitigating sentencing factor, requires the court to consider the defense when offered, and removes incarceration as a penalty when the medical necessity defense is successful. MD. H.B. NO. 702, 2003 MD. LAWS 442. The second Maryland law allows an affirmative defense, not limited to the question of sentencing. MD. S.B. NO. 308, 2011 MD. LAWS 215.

25. The specifics of the various MMAs vary slightly from jurisdiction to jurisdiction, and are beyond the scope of this article. For further information see the excellent summary at PROCON.ORG, *supra* note 24.

26. This article will focus principally on criminal and constitutional law questions. Cases related to MMAs have also involved questions of employment, gun possession and registration, and bankruptcy. *See, e.g.*, Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indust., 230 P.3d 518 (Or. 2010); Willis v. Winters, 253 P.3d 1058 (Or. 2011), *cert. denied*, 132 S.Ct. 999 (2012); *In re* McGinnis, 453 B.R. 770 (Bankr. D. Or. 2011); *Lott*, No. 10-013917-C (Wayne Cir. Ct. July 22, 2011). *Lott* was a Wayne County, Michigan Circuit Court case concerned zoning issues. The Attorney General of Michigan intervened in the case. *Id.* The "preemption" reasoning in the decision parallels that of the cases discussed in this article. *Id.* While the present article was in process of publication, the authors became aware of *People of the City of Livonia v. Novicoff*, No. 12L00313-OM, in the District Court for the 16th Judicial District (Livonia) and *Ter Beek v. City of Wyoming*, No. 306240, 2012 WL 3101758 (Mich. Ct. App. July 31, 2012). In *Novicoff* the defendant attempted to interpose the affirmative defense permitted by Section 8 of MMMA. *Novicoff*, No. 12L00313-OM. The trial judge ruled, in a pre-trial hearing, that the circuit court's ruling in *Lott v. Livonia* was a controlling decision by a higher court, and prevented defendant asserting the defense. *Id.* As this article is being written, the case pends resolution in the district court. In *Ter Beek* at the trial court level, a Kent County Circuit Judge held that the City of Wyoming was within its authority to enact a Zoning Ordinance banning growth of medical marihuana. *Ter Beek*, 2012 WL 3101758, at *1. The court held that the CSA preempted the MMMA, and therefore the City of Wyoming was authorized to enact the restrictive zoning law. *Id.* The Kent County Circuit Court's reasoning paralleled the reasoning in Lott. *Id.* As this Article was in final production edits, the Michigan Court of Appeals reversed the Kent County Court decision. *Id.*

rendering the various state appellate court decisions have had no difficulty understanding the meaning of the statutory language.[27] Their decisions have sustained the legality of the various MMAs, and have given practical guidance to police, the bar, and the public as to the meaning and impact of the MMAs in the various jurisdictions.[28]

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27. *See, e.g.*, Niehaus v. State, No. A-8385, 2003 WL 22938506, at *1-2 (Alaska Ct. App. Dec. 10, 2003).

28. *See, e.g., id.* (holding that a criminal defendant was not entitled to assert the affirmative defense under Alaska's MMA for several reasons, including that he lacked a registration card and did not meet the statutory requirements to allow him to be a primary caregiver for more than one person.); Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 480-82 (Cal. Ct. App. 2008) (deciding a case in which various California counties asserted that the California MMA was invalid, though not unconstitutional, on federal preemption grounds). The California courts disagreed, and ordered the counties to implement the registration card schema set forth in the California MMA. Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 973 (2011) (holding that an unemployment claimant's medical marihuana card was not the same as a medical prescription, so claimant was not entitled to benefits); State v. Nelson, 195 P.3d 826, 830-31 (Mont. 2008) (holding that Montana's MMA, and the principal of dual sovereignty, required trial court probation order to allow criminal defendant to use medical marihuana while on probation); State v. Thayer, 14 A.3d 231, 232, 234 (Vt. 2010) (holding that, despite the criminal defendant's tragic circumstances, her failure to comply with the registration requirements of Vermont's MMA, coupled with an overall failure to demonstrate she had no reasonable alternative to violate Vermont's cultivation law, required that she was not entitled to a jury instruction of medical necessity. The dissent stated that the facts of the case established that the defendant was entitled to assert the defense of medical necessity); State v. Adams, 198 P.3d 1057, 1061 (Wash. 2009) (holding that the criminal defendant was entitled to the "primary caregiver" defense under Washington's MMA); State v. Fry, 228 P.3d 1, 13 (Wash. 2010) (holding that the criminal defendant was not a qualifying patient under Washington's MMA, and therefore, she could not assert the compassionate use affirmative defense at trial). Additionally, in the case *Willis v. Winters*, the Oregon State Sheriff declined the applicants' requests to obtain or renew concealed weapons permits, on grounds that each applicant was a medical marihuana user, and therefore a violator of the Federal CSA. *Willis v. Winters*, 253 P.3d 1058, 1062-63, 1066 (Or. 2011). The Supreme Court of Oregon, in *Willis v. Winters*, affirmed the trial court and intermediate appellate court decisions stating: "Oregon's concealed handgun licensing statute is not preempted by federal law, because it does not affirmatively authorize what the federal statute prohibits—i.e., possession of firearms by unlawful drug users—but, instead, merely exempts licensees from state criminal liability for the possession of a concealed handgun." *Id.* at 1062-63. Willis relied heavily on *Printz v. United States* and *New York v. United States*, and noted that the anti-commandeering doctrine means:

> Although the United States Constitution establishes the supremacy of the federal government in most respects, it reserves to the states certain powers that are at the core of state sovereignty. One expression of that reservation of powers is the notion that Congress lacks authority 'to require the states to govern according to Congress's instructions.'

Id. (citing Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992)).

II. ANALYSIS OF *VAN WERT/FINNEY* AND *BRANDON*

A. Van Wert *and* Finney

People v. Van Wert and *People v. Finney* (the Midland County Circuit Court cases) both involved probation revocation proceedings that the Michigan Department of Corrections (MDOC) initiated.[29] Mr. Finney had been convicted of the crimes of "felon in possession of a firearm" and "delivery or manufacture of marijuana."[30] As a result of his conviction, Mr. Finney was sentenced to probation for five years.[31] The court set forth the relevant terms of the sentencing order in its opinion, stating: "1. [You must n]ot violate any criminal law of any unit of government. [and] 8. 02.4 You must not use any controlled substance or drug paraphernalia with the exception that you may possess marijuana when you are providing bona fide care giving services to Mr. George Gant."[32]

In a footnote, the court noted that "Mr. George Gant suffers from multiple sclerosis, and Mr. Finney is employed as one of his caregivers. Mr. Gant is the holder of medical identification card issued pursuant to the MMA."[33] Shortly after the start of Mr. Finney's probation, the MDOC subjected him to routine drug testing.[34] He tested positive for using marijuana.[35] The MDOC initiated probation revocation proceedings in Midland County Circuit Court, where Mr. Finney had been convicted and sentenced.[36] Mr. Finney interposed the assertion that he had an MMMA registration card, issued before the date of his conviction.[37] He asserted that Condition 8 of the Sentencing Order should be modified, to allow him to use Medical Marihuana under the MMMA.[38]

Mr. Van Wert originally "was charged . . . with the offenses of possession with intent to deliver marijuana and maintaining a drug house."[39] He ultimately pleaded guilty to possession with intent to

29. People v. Finney, No. 09-4081-FH-L, at *1 (Midland Cir. Ct. June 8, 2011).

30. *Id.*, at 2; *see also* MICH. COMP. LAWS ANN. § 750.224(f) (West 2010); MICH. COMP. LAWS ANN. 333.740(2)(d) (West 2010).

31. *Finney*, No. 09-4081-FH-L, at 2.

32. *Id.* (alterations in original).

33. *Id.* at 2 n.6.

34. *Id.* at 3.

35. *Id.*

36. *Id.* at 2-3.

37. *Finney*, No. 09-4081-FH-1, at 3.

38. *Id.* at 3.

39. *Id.* at 4; MICH. COMP. LAWS ANN. §§ 333.7405(1)(d), (2), .7406 (West 2010 & Supp. 2011).

deliver,[40] and received a plea bargain, including an agreement to delay sentencing for a year, as allowed by Michigan law.[41] The plea agreement provided that if Mr. Van Wert successfully complied with specified conditions for one year, then his conviction would be modified to a misdemeanor.[42] At the initial sentencing hearing (at the start of the year delay), Mr. Van Wert's counsel asked the court not to adopt one of the proposed conditions.[43]

In particular, Mr. Van Wert's counsel requested that the court allow Mr. Van Wert to use medical marihuana during the period of his probation.[44] Mr. Van Wert had been issued a medical marihuana registry card under Section 3 of the MMMA.[45] The court deferred ruling on this request, effectively consolidated the *Van Wert* and *Finney* cases for purposes of ruling on the law, and shortly thereafter issued the written opinion here under discussion.[46]

The bulk of the court's opinion discussed matters such as probation in Michigan,[47] bona fide patient-physician relationships under the MMMA,[48] and whether either Mr. Van Wert or Mr. Finney was sufficiently ill or disabled so as to qualify for a registration card.[49] These aspects of the decision will not be discussed in this Article. The remaining pages (20-27) of the opinion in *Van Wert* and *Finney* considered the preemption issue.[50]

The court undertook a review of some federal cases, and a few state cases.[51] However, the court failed to note that all the cases that actually considered the preemption question were civil cases.[52] These cases included: *CSX Transportation. Inc. v. Easterwood*,[53] *Maryland v.*

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40. *Finney*, No. 09-4081-FH-1, at 4; MICH. COMP. LAWS ANN. § 333.7405(1)(b).

41. *Finney*, No. 09-4081-FH-1, at 4-5; MICH. COMP. LAWS. ANN § 771.2 (West 2010).

42. *Finney*, No. 09-4081-FH-1, at 5.

43. *Id.*

44. *Id.* (citing MICH. COMP. LAWS ANN. § 771.2).

45. *Id.* (citing MICH. COMP. LAWS ANN. § 333.26423).

46. *Id.* at 5.

47. *Id.* at 5 (citing MICH. COMP. LAWS ANN. § 771.3(1)(a) (West 2010)).

48. *Finney*, No. 09-4081-FH-1, at 7-14 (citing MICH. COMP. LAWS ANN. § 333.26428(a)(1) (West 2010 & Supp. 2011)).

49. *Id.* at 14-16 (citing MICH. COMP. LAWS ANN. § 333.26427(b)(5) (West 2010 & Supp. 2011)).

50. *Id.* at 20-27.

51. *Id.*

52. *See id.*

53. CSX Transp. Inc. v. Easterwood, 507 U.S. 658, 659-70 (1993). *CSX* was a wrongful death diversity case arising from a railroad accident. *Id.* While finding that limited preemption existed, the Court noted: "In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find

Louisiana,[54] *English v. General Electric*,[55] *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*,[56] *Gonzales v. Oregon*,[57] *United States v. Oakland Cannabis Buyers' Cooperative*,[58] *Wyeth v Levine*,[59]

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pre-emption. Thus, pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.'" *Id.* (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

54. Maryland v. Louisiana, 451 U.S. 725, 751 (1981). *Maryland v. Louisiana* turned on interpretation of the constitutional grant of original jurisdiction in the Supreme Court in disputes between various states. *Id.* It provides no illumination to whether the MMMA is preempted by the CSA. *See generally id.*

55. English v. Gen. Elec., 496 U.S. 72, 75 (1990). *English v. General Electric* was a tort action. *Id.* Vera English was a technician at a GE nuclear plant in Georgia. *Id.* She asserted GE had repeatedly violated safety regulations, including failure to clean up spills of nuclear material. *Id.* She asserted intentional infliction of emotional distress. *Id.* The Supreme Court held that this state based claim was not preempted. *Id.* at 89. This case does not support the conclusion that the MMMA is preempted by federal law.

56. Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 519-36 (Or. 2010).

57. Gonzales v. Oregon, 546 U.S. 243 (2000). *Gonzales v. Oregon* involved the issue of death with dignity and physician assisted suicide. *Id.* at 248-49. A civil case, it arose from Oregon's challenge to an Interpretive Rule (IR) issued by the Attorney General of the United States. *Id.* at 249. The IR found that the Oregon Death with Dignity Act was preempted by the federal CSA. *Id.* at 249 (referring to The Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800-127.897 (West 2010)). The United States Supreme Court disagreed:

> The Government, in the end, maintains that the prescription requirement delegates to a single executive officer the power to affect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.

Gonzales, 546 U.S. at 275. The decision in *Gonzales v. Oregon* does not support the conclusion that the CSA preempts the MMMA.

58. United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001). *Oakland Cannabis* arose from an injunction. *Id.* at 486. Justice Thomas wrote the opinion of the Court. *Id.* at 486. The decision summarized the basic facts:

> In January 1998, the United States sued the Cooperative and its executive director, respondent Jeffrey Jones (together, the Cooperative), in the United States District Court for the Northern District of California. Seeking to enjoin the Cooperative from distributing and manufacturing marijuana, *the United States argued that, whether or not the Cooperative's activities are legal under California law, they violate federal law.* Specifically, the Government argued that the Cooperative violated the Controlled Substances Act's prohibitions on distributing, manufacturing, and possessing with the intent to distribute or manufacture a controlled substance. 21 U.S.C. 841(a). Concluding that the Government had established a probability of success on the merits, the District Court granted a preliminary injunction.

Id. at 486-87. (emphasis added) (internal citation omitted).

The *Oakland Cannabis* Court stated that "[t]he Controlled Substances Act [] prohibits the manufacture and distribution of various drugs, including marijuana. In this case, we must decide whether there is a medical necessity exception to these prohibitions. We hold that

Michigan Canners v. Agricultural Marketing and Bargaining Board,[60] and the intermediate Michigan appellate cases *Burns v. Olde Discount*,[61] and *Kauffman v. Chicago Corp.*[62]

In general, the *Van Wert/Finney* opinion cited to the above cases to set out the standards applying to preemption.[63] The opinion did not analyze the particular facts and holdings of the cases.[64] As noted in the footnotes in the foregoing paragraph, these cases not only fail to support the *Van Wert/Finney* court's conclusion that the CSA preempts the MMMA,[65] they actually support the contrary conclusion: the MMMA is not preempted by the CSA. The three cases discussed in the *Van*

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there is not." *Id.* at 486. The Court's summary of the case recognized that a question of dual sovereignty existed. *Id.* at 486-87. The limited nature of the Court's holding, restricted to rejecting the medical necessity defense in federal court, does not in any way support the conclusion that the CSA preempts a state MMA. *See id.* at 486. Indeed, the highlighted text of the opinion supports a contrary conclusion.

59. Wyeth v. Levine, 555 U.S. 555 (2009). *Wyeth v. Levine* upheld a wrongful death verdict in a Vermont court against Wyeth, a pharmaceutical company. Wyeth was later purchased by Pfizer for $68 billion, according to Bloomberg News. Shannon Pettypiece, Tom Randall & Zachary Mider, *Pfizer's $68 Billion Wyeth Deal Eases Lipitor Loss (Update 3)*, BLOOMBERG (Jan. 26, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aBKORs4C1t4g&refer=home. Wyeth had asserted that its purported compliance with FDA labeling requirements shielded it from liability, on the theory of preemption. *Wyeth*, 555 U.S. at 558-59. The Supreme Court's finding that the action was not preempted does not support the conclusion that the CSA preempts the MMMA. *See* MICH. COMP. LAWS ANN. § 333.26421. Indeed, a contrary conclusion is more reasonable.

60. Mich. Canners v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461 (1984). *Michigan Canners* concerned the rules governing the economic representation of asparagus growers. *Id.* at 466. The decision contains not one word about criminal liability, or the circumstances under which a state criminal statute can be preempted by a federal criminal statute. *Id.* at 461-78. The case is completely about the definition of preemption as it applies in a civil case. *Id.* It sheds no light on whether the CSA preempts the MMMA.

61. Burns v. Olde Discount, 538 N.W.2d 686 (Mich. Ct. App. 1995). *Burns* concerned the arbitration clause in a stockbroker's employment contract. *Id.* at 687. The plaintiff asserted claims "sounding in tort and contract." *Id.* No mention was made of preemption in the court's decision. *Id.* at 686-90. It cites to *Kaufmann v. The Chicago Corp.* regarding the obligation of state courts to implement the Federal Arbitration Act. *Id.* at 688 (citing Kauffman v. Chicago Corp., 466 N.W.2d 726 (Mich. Ct. App. 1991)).

62. *Kauffmann*, 466 N.W.2d at 726. *Kauffman* also concerned an arbitration clause in an employment contract. *Id.* at 728. Again, no mention was made of preemption in the decision. *Id.* at 726-31. The opinion's passing reference to the obligation of a state court to enforce a federal law does not illuminate the issue of preemption, and the opinion did not even include the word "preemption." *Id.* at 726-31 (stating that "State Courts are bound under the Supremacy Clause, U.S. Const. art VI, cl. 2, to enforce the substantive provisions of the federal [arbitration] act.").

63. *Finney*, No. 09-4081-FH-L, at 20-26 nn.66-104.

64. *Id.*

65. *See generally* MICH. COMP. LAWS ANN. § 331.26421.

Wert/Finney opinion,[66] but not discussed in the foregoing footnotes, will be more fully analyzed in the following paragraphs.

In *Emerald Steel*, the Oregon Supreme Court's majority opinion summarized the employer's argument, pertaining to narrow employment law issues, as follows: "[the employer contends] . . . that, because marijuana possession is unlawful under federal law, even when used for medical purposes, state law does not require an employer to accommodate an employee's use of marijuana to treat a disabling medical condition."[67] The *Emerald Steel* majority, in a very narrowly focused opinion, accepted this argument on the basis of preemption.[68] The *Van Wert/Finney* decision cites *Emerald Steel* twice, in footnotes 76 and 77.[69] The *Emerald Steel* opinion states that if a substance is placed in Schedule 1 in the CSA,[70] then physicians are not allowed to prescribe it.[71] This observation does not illuminate whether *Emerald Steel* supports the conclusion that the CSA preempts the provisions of the MMMA that exempt possession of medical marihuana from criminal liability in Michigan.[72]

In fact, the *Emerald Steel* court reached exactly the opposite conclusion regarding preemption.[73] In the penultimate paragraph of its decision, the Oregon Supreme Court stated: "we do not hold that the Controlled Substances Act preempts provisions of the Oregon Medical Marijuana Act that exempt the possession, manufacture or distribution of medical marijuana from state criminal liability."[74] The Oregon Supreme Court held that the Oregon MMA is preempted only in the limited employer-employee context.[75] The Oregon MMA's provisions that shield

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66. *Finney*, No. 09-4081-FH-L.

67. *Emerald Steel Fabricators*, 230 P.3d at 520.

68. *Id.* The basic logic ran as follows: Oregon's relevant employment law allows an employer to discipline an employee who uses drugs made illegal under state or federal law. OR. REV. STAT. ANN. § 659A.127 (West 2010). Use of marihuana is illegal under federal law. 21 U.S.C.A. §§ 801-03, 811-14, 821-32, 840-65, 871-90, 901-04 (West 2010). To the extent that Oregon's MMA allows the use of medical marihuana, federal law preempts it in the limited employer-employee circumstances presented in the case. OR. REV. STAT. ANN. § 475.306(1) (West 2010); *Emerald Steel Fabricators*, 230 P.3d at 529. Thus, the employer was permitted to terminate the employee for using marihuana. *Emerald Steel Fabricators*, 230 P.3d at 529.

69. *Finney*, No. 09-4081-FH-L, at 22 nn.76-77 (citing *Emerald Steel Fabricators*, 230 P.3d at 519).

70. 21 U.S.C.A. §§ 801-03, 811-14, 821-32, 840-65, 871-90, 901-04.

71. *Emerald Steel Fabricators*, 230 P.3d at 529.

72. *See* MICH. COMP. LAWS ANN. § 333.26428.

73. *Emerald Steel Fabricators*, 230 P.3d at 535-36.

74. *Id.* at 536.

75. *Id.* at 529-30 (citing OR. REV. STAT. ANN. § 475.306(1)).

medical marihuana users from criminal sanctions remain effective.[76] The citation in *Van Wert/Finney* in support of the opposite conclusion is a significantly incorrect statement of the holding in *Emerald Steel.*[77]

The *Van Wert/Finney* decision also cited the *United States v. Moore*[78] and *Gonzales v. Raich*[79] opinions. Neither case supports the conclusion that the MMMA is preempted by the CSA.[80]

Moore was a criminal prosecution against a doctor who prescribed massive doses of methadone, contrary to 21 U.S.C. §841(a)(1), a federal statute that makes it unlawful to distribute or dispense knowingly or intentionally a controlled substance, except as authorized by the CSA.[81] The gravamen of the *Moore* decision, as suggested by footnote 76 in the *Van Wert/Finney* opinion, is that physicians dispensing a controlled substance must do so in a way that meets professional standards and complies with law.[82] The Supreme Court noted that "[t]he Government's position is that the evidence established that Dr. Moore's conduct was inconsistent with all accepted methods of treating addicts, that in fact he operated as a 'pusher.'"[83] Indeed, the facts were astonishing. Over approximately twenty-three weeks between September 1971 and mid-February 1972, "three District of Columbia pharmacies filled 11,169 prescriptions written by Dr. Moore," which "covered 800,000 methadone tablets."[84] On fifty-four days during the twenty-three weeks described, Dr. Moore wrote more than one hundred prescriptions for methadone.[85]

The Supreme Court in *Moore* focused exclusively on which section of the CSA applied to Dr. Moore.[86] The reason for this was the nature of the defense Dr. Moore interposed; if one section applied, he would face more serious sentence consequences than if a different section applied.[87] The court of appeals below determined that the applicable section was

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76. *Id.* at 535-36 (citing OR. REV. STAT. ANN. § 475.306(1)).

77. *See Finney*, No. 09-4081-FH-L, at *22 nn.76-77 (citing *Emerald Steel Fabricators*, 230 P.3d at 535-36).

78. 423 U.S. 122 (1975).

79. 545 U.S. 1 (2005).

80. *See generally* 21 U.S.C.A. §§ 801-03, 811-14, 821-32, 840-65, 871-90, 901-04; MICH. COMP. LAWS ANN. § 333.26423.

81. *Moore*, 423 U.S. at 124 (citing 21 U.S.C.A. § 841(a)(1) (West 2010)).

82. *Id.* (cited by *Finney*, No. 09-4081-FH-L, at 22 n.76).

83. *Id.* at 126.

84. *Id.* Note that the factual findings set out by the Supreme Court do not discuss whether other pharmacies in the District or in neighboring Virginia or Maryland also filled prescriptions for methadone written by Dr. Moore. *Id.* The numbers described, staggering as they already are, may only be part of the truth.

85. *Id.*

86. *Id.* at 124.

87. *Moore*, 423 U.S. at 131 (citing 21 U.S.C.A. § 801).

the one that exposed Dr. Moore to lesser penalties.[88] The Supreme Court reversed, and determined that the applicable section was the one that exposed Dr. Moore to more severe penalties.[89] The Supreme Court decision in *Moore* did not discuss preemption.[90] In fact, the word "preemption" does not appear in the decision.[91] *Moore* was the only criminal case mentioned in the *Van Wert/Finney* decision.[92] It sheds absolutely no light on what standards should be applied in order to determine whether a federal criminal statute preempts a state criminal statute.[93]

The last case cited in the *Van Wert/Finney* opinion was *Gonzales v. Raich*.[94] At the time of the DEA raid that gave rise to the federal civil suit seeking an injunction that eventually made its way to the United States Supreme Court, Angel Raich was a profoundly ill woman, suffering from multiple painful and dangerous conditions, which the Supreme Court set forth in its opinion.[95]

The *Van Wert/Finney* opinion cites to *Raich* several times.[96] These citations are as important for what they do not mean as for what they do mean. *Raich* is cited in footnotes 70 and 71 as describing the objective of the CSA to be the "conquer[ing] drug abuse and [] control[ing] the legitimate and illegitimate traffic in controlled substances."[97] The *Van Wert/Finney* opinion cited *Raich* in footnotes 79 and 80 generally to support how marihuana came to be placed in Schedule I of the CSA.[98] The citation to *Raich* in footnote 85 of the *Van Wert/Finney* opinion supports the opinion's explanation of the criminal sanctions imposed under the CSA as a result of marihuana's placement in Schedule 1.[99]

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88. United States v. Moore, 505 F.2d 426, 428 (D.C. Cir. 1974), *rev'd*, 423 U.S. at 146 (citing 21 U.S.C. § 829 (West 2010)).

89. *Moore*, 423 U.S. at 124 (citing 21 U.S.C.A. § 841(a)(1)).

90. *Id.* at 122-46.

91. *Id.*

92. *See Finney*, No. 09-4081-FH-L.

93. *See Moore*, 423 U.S. at 122-46.

94. *Raich*, 545 U.S. at 12-14; 21 U.S.C.A. §§ 801-03, 811-14, 821-32, 840-65, 871-90, 901-04; CAL. HEALTH & SAFETY CODE § 113.625 (West 2010).

95. *Raich*, 545 U.S. at 6-7. Ms. Raich remains gravely ill, most likely near death at the time this Article was submitted to the Law Review for publication. *See* Angel Raich, ANGELJUSTICE, http://angeljustice.org/angel/Angel_Raichs_Website.html, (last visited Sept. 15, 2012).

96. *Finney*, No. 09-4081-FH-L, at 21-23 nn.70-73, 78-80, 85-87 (citing *Raich*, 545 U.S. at 12-13).

97. *Id.* at 21 nn.70-73 (citing *Raich*, 545 U.S. at 12-13).

98. *Id.* at 22 nn.79-80 (citing *Raich*, 545 U.S. at 14; 21 U.S.C.A. § 801).

99. *Id.* at 23 n.85 (citing *Raich*, 545 U.S. at 14; 21 U.S.C.A. § 812(c)).

None of these citations to *Raich* asserted that *Raich* held that the California MMA was preempted by the CSA.[100]

This is not surprising, because *Raich* did not hold that the California MMA was preempted by the CSA.[101] In fact, *Raich* was not a preemption case.[102] Rather, *Raich* was a "battle royale" that evidenced the continuing and well-established jurisprudential battle among the Supreme Court justices on the meaning and scope of the Commerce Clause.[103] Relying on two recent Supreme Court cases, *United States v. Lopez*[104] and *United States v. Morrison*,[105] both which had applied the Tenth Amendment[106] so as to sharply limit the capacity of Congress to legislate as to intrastate commerce, *Raich* and her fellow respondents relied on the Supreme Court's then recent Tenth Amendment jurisprudence, and argued in the Supreme Court that Congress was forbidden to regulate homegrown marihuana that was exclusively cultivated in California and would be used exclusively by California medical marihuana patients.[107] Justice O'Connor's dissent, joined by Chief Justice Rehnquist and Justice Thomas, accepted this position, which was buttressed by a separate dissent by Justice Thomas.[108] Justice Stevens' majority opinion for five justices held that even assuming the marihuana would be locally cultivated and consumed, a "rational basis" existed for concluding that the secondary market effects of such cultivation and use could "substantially affect interstate commerce."[109] Justice Scalia's concurring opinion reiterated his previously expressed views about the "necessary and proper" clause.[110]

A review of the oral arguments in *Raich* vividly demonstrates that the Justices were concerned about whether the Commerce Clause allowed Congress to enact laws regarding locally cultivated, locally used

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100. *Id.* at 21-23 nn.70-73, 78-80, 85-87 (citing *Raich*, 545 U.S. at 12-14; 21 U.S.C.A. § 801; CAL. HEALTH & SAFETY CODE § 113.625).

101. *Raich*, 545 U.S. at 12-14.

102. *See id.* at 5.

103. *See id* (considering U.S. CONST. art. I, § 8, cl. 3).

104. 514 U.S. 549 (1995).

105. 529 U.S. 598 (2000).

106. U.S. CONST. amend. X.

107. *See Raich*, 545 U.S. at 9.

108. *Id.* at 42 (O'Connor, J., dissenting).

109. *Id.* at 2-3. "In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so holding." *Id.* at 22.

110. *Id.* at 33-34 (Scalia, J., concurring). *See also generally* U.S. CONST. art 1, § 8, cl. 18.

"California" medical marihuana.[111] The well respected "Oyez Project" at the Chicago-Kent College of Law noted that the question before the Court was: "Does the Controlled Substances Act (21 U.S.C. § 801) exceed Congress' power under the commerce clause as applied to the intrastate cultivation and possession of marijuana for medical use?"[112] Links within the Oyez Project webpage devoted to *Raich* allow viewing of the transcript of oral argument.[113] The overall focus of the discussion at oral argument, indeed virtually its entirety, related to whether Congress was barred from regulating the locally grown and consumed medical marihuana by virtue of the Tenth Amendment as interpreted by *Lopez* and *Morrison*.[114] This is well demonstrated by United States Solicitor General's first comment when he began his rebuttal argument before the Supreme Court:

> As I understand Respondents' position, it's effectively that their clients, and clients like them, in their use of medical marijuana, is somehow so hermetically sealed from the rest of the market on marijuana that it has no effect on that market on marijuana and no effect on the government's overall regulatory regime.[115]

Consequently, none of the case law cited in the *Van Wert/Finney* opinion explores the specific question of what standards to apply when determining whether a federal criminal statute preempts a state criminal statute.[116] In particular, none of the cases cited compel the conclusion that the CSA preempts the MMMA, indeed, several of the cited cases actually support the conclusion that the CSA does not preempt the MMMA.[117]

The implications of the failure of the *Van Wert/Finney* decision to discuss the issue of dual sovereignty will be discussed, *infra*.[118]

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111. *See Gonzalez v. Raich*, OYEZ http://www.oyez.org/cases/2000-2009/2004/2004_03_1454 (last visited Sept. 15, 2012). See *also Raich*, 545 U.S. at 1.

112. *See* OYEZ, *supra* note 111.

113. *Id.*

114. *Id. Raich*, 545 U.S. at 9; *Lopez*, 514 U.S. at 551; *Morrison*, 529 U.S. at 617; U.S. CONST. amend. X.

115. OYEZ, *supra* note 111.

116. *See Finney*, No. 09-4081-FH-L, at 20-27.

117. *See id. See generally* 21 U.S.C.A. §§ 801-03, 811-14, 821-32, 840-65, 871-90, 901-04; MICH. COMP. LAWS ANN. § 333.26423.

118. *See infra* Part III.

B. Brandon

A review of the *Brandon* opinion discloses that the bulk of the court's discourse is in the form of declaratory statements, with little analysis.[119] The opinion's failure to acknowledge the existence of the statutory language that explicates Congress's intent not to occupy the field—in other words, the non-preemption language—is troubling.[120] This is particularly true because Congress's statement that it did not intend to occupy the field to the exclusion of traditional state authority specified the intent not to intrude on states' traditional authority to set penalties for criminal law violations.[121]

To the extent that *Brandon* goes beyond simple declarative statements and attempts to be analytical, the critical statements appear after the seventh enumerated paragraph, where the court quotes extensively from *Jones v. Rath Packing Co.* as follows:

> Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, . . . *we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . This assumption provides assurance that "the federal-state balance, . .* . will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has unmistakably . . . ordained, . . . *that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of*

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119. City of Dearborn v. Brandon, No. 10C0214, at 1-8 (19th Jud. D. Ct. Mar. 7, 2011).

120. *See id.* The language appears in § 903 of the CSA states:

> *No provision of this subchapter 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.

21 U.S.C.A. § 903 (West 2010) (emphasis added). It is similar to language used in many federal laws. *See, e.g.*, 18 U.S.C.A. § 927 (West 2010) (federal statute regulating firearms). Whatever other weaknesses exist in the *Van Wert/Finney* opinion, at least the judge in that case acknowledged the existence of the § 903 language. *Finney*, No. 09-4081-FH-L, at 23 n.88. Indeed, the bulk of the *Finney* opinion's pertinent analysis was an effort to show that the MMMA created a "positive conflict" with the CSA sufficient to overcome the non-preemptive text in the statute. *Id.*; 21 U.S.C.A. §§ 801-03, 811-14, 821-32, 840-65, 871-90, 901-04; MICH. COMP. LAWS ANN. § 33.26423.

121. *See* 21 U.S.C.A. § 903.

> *commerce must fall.* This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.[122]

Nowhere in either the *Brandon* nor the *Van Wert/Finney* decision did the trial court judges recognize the well-settled doctrine repeatedly confirmed (as demonstrated in the above quotation from *Rath Packing Co.* by the United States Supreme Court) that a fundamental aspect of dual sovereignty is that states retain traditional police powers, and this applies in particular to criminal cases.[123] One practical meaning of this doctrine, alluded to above and more fully discussed below, is that the federal courts have been extremely reluctant to find federal preemption of a state's capacity to enforce its criminal laws.[124]

The failure of the *Van Wert/Finney* and *Brandon* decisions to discuss or even acknowledge the fundamental constitutional principle of dual sovereignty does not inspire confidence in the correctness of these decisions.[125]

III. BASIC PRINCIPLES

In *United States v. Hudson & Goodwin*, the Supreme Court considered a case that arose from an indictment for libel against defendant newspaper editors.[126] The newspaper published an article that asserted the President and Congress voted a $2 million gift to Bonaparte.[127] The indictment was at common law, not based on any federal statute.[128] The Supreme Court held that federal courts lacked common law criminal jurisdiction.[129] The Court's *ratio decidendi* was straightforward: "The powers of the general Government are made up of concessions from the several states – whatever is not expressly given to the former, the latter expressly reserve."[130]

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122. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (emphasis added) (internal citations and quotation marks omitted).

123. *See Finney*, No. 09-4081-FH-L; *Brandon*, No. 10C0214.

124. *See infra* Part III.

125. *See Finney*, No. 09-4081-FH-L; *Brandon*, No. 10C0214.

126. United States v. Hudson & Goodwin, 11 U.S. 32, 32 (1812).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 33. Because the Constitution did not grant federal courts the ability to proceed in "common law" criminal prosecutions, from the date *Hudson & Goodwin* was decided, federal prosecutions would be allowed only if the complaint asserted a statutory violation. *Id.*

More recently, the Supreme Court noted in a religious liberty case involving a Texas inmate that dual sovereignty is fundamental to our Constitution's content.[131] In *Sossamon*, the Court noted: "'Dual sovereignty is a defining feature of our Nation's constitutional blueprint.' Upon ratification of the Constitution, the States entered the Union 'with their sovereignty intact.'"[132]

An explicit feature of dual sovereignty is that:

> Congress cannot compel the States to enact or enforce a federal regulatory program . . . . The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[133]

When interpreting laws enacted by Congress in areas traditionally occupied by the States, the Supreme Court has explained: ". . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[134]

Article VI of the United States Constitution states that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

131. Sossamon v. Texas, 131 S. Ct. 1651, 1656 (2011).

132. *Id.* at 1657 (quoting Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743, 751 (2002)).

133. Montana v. Nelson, 195 P.3d 826, 833-34 (Mont. 2005) (quoting Printz v. United States, 521 U.S. 898, 935 (1997)). *Nelson* was a 6-1 decision of the Montana Supreme Court. *See id.* at 827, 834. It struck down the provision of a lower court's sentence that restricted defendant from using medical marijuana as a condition of probation. *Id.* at 834. The court held that "[w]hile *Nelson* may be generally required to obey federal law, an exception must be made for his lawful use of medical marijuana in accordance with the MMA." *Id.* The *ratio decidendi* was dual sovereignty. *Id.*

134. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

> be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[135]

The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[136]

The potential for interpretational conflict or tension between the constitutionally based doctrines of "supremacy" and "dual sovereignty" is apparent. Over the years, the Supreme Court has addressed this by creating a structure within which such matters are addressed, reconciled and resolved. Basically, the analytical framework is as follows: when a state statute is to be evaluated to determine if it is preempted by a federal statute, first (although most cases do not address this because it is obvious), the statute is checked to see if it conflicts with a constitutional power reserved exclusively to the United States.[137] Assuming that this does not obtain, the next step is to determine if the state statute involves a "police power" normally reserved to the states.[138] If this is the case, further analysis is necessary.[139] If the "police power" involved is civil—that is, does not involve the state's criminal code—then preemption will not be found, unless it was "the clear and manifest purpose of Congress" to do so.[140] If the "police power" involves the state's criminal code, then the Supreme Court erects an even higher barrier to a finding of preemption.[141]

Because the enactment and enforcement of a criminal code is the "foremost" expression of sovereignty, and the principal "locus" for the enactment and enforcement of criminal statutes historically resides with the states, not the federal government, the Supreme Court has rarely found a federal statute to preempt a state criminal statute.[142] In practical terms, the Supreme Court evaluates such cases with close attention to the scope and purpose of the federal statute, the interest(s) being protected by the statute, the importance of the federal interest, and, particularly, the "facts on the ground" which tend to show (or not show) that the asserted

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135. U.S. CONST. art. VI, § 2.
136. U.S. CONST. amend. X.
137. *Rice*, 331 U.S. at 230-31 (1947).
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. Heath v. Alabama, 474 U.S. 82, 88-89 (1985); Abbate v. United States, 359 U.S. 187, 195 (1959) ("for the States under our federal system have the principal responsibility for defining and prosecuting crimes . . . .").

federal preemption is demonstrated by sufficient federal enforcement activity (investigation and prosecution at a minimum) so as to justify the exceptional step of finding that a federal statute preempts a state criminal statute.[143]

Most typically, the Supreme Court has analyzed state statutes involving civil law. If the threshold suggested in the foregoing summary has been met, then the Court teaches that even further inquiry and analysis is required before a finding of preemption is justified.[144] Although detailed review of the many decisions and extensive learned academic writings concerning these "downstream" requirements needed to justify a finding of federal preemption is beyond the scope of this Article the existence of these further requirements amply demonstrates that the barriers erected by the Supreme Court cases to a finding of preemption are genuine.[145]

The analytical framework created by the Supreme Court provides practical protection to the sovereignty of the individual states, while allowing the federal government to assert and implement supremacy where appropriate—presuming that the federal government meets the stringent requirements needed to invoke supremacy.[146]

In 2008, the Supreme Court decided *Altria Group v. Good.*[147] Plaintiff Good had sued Altria, claiming Altria's advertising about their "light" cigarettes violated Maine's statute proscribing unfair trade practices.[148] Altria defended on the grounds that the Federal Cigarette Labeling and Advertising Act preempted the plaintiffs' claim.[149] The trial court granted summary judgment for defendants.[150] The court of appeals reversed, and the Supreme Court affirmed the circuit court in a 5-4 decision.[151] The doctrinal issues that caused the sharp division of the Supreme Court are beyond the scope of this article. In spite of the sharp division of the court, the dissenters did not disagree with, or even comment on, the concise summary in Justice Stevens' opinion of the Court as to the fundamental characteristics of the doctrine of preemption.[152] Writing for the Court, Justice Stevens noted:

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143. Pennsylvania v. Nelson, 350 U.S. 497, 506-08 (1956).

144. *See, e.g.,* Robert S. Peck, *A Separation-of-Powers Defense of the "Presumption Against Preemption,"* 84 TUL. L. REV. 1185, 1185-94 (2010).

145. *Id.*

146. *Id.*; Caleb Nelson, *Preemption,* 86 VA. L. REV. 225 (2000).

147. 555 U.S. 70 (2008).

148. *Id.* at 72.

149. *Id.* at 73.

150. *Id.*

151. *Id.*

152. *Id.* at 91 (Thomas, J., dissenting).

> Article VI, cl. 2, of the Constitution provides 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. Consistent with that command, we have long recognized that state laws that conflict with federal law are without effect.
>
> Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case. Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose. If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains. Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law.
>
> When addressing questions of express or implied pre-emption, we begin our analysis with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States. Because federal law is said to bar state action in a field of traditional state regulation, namely, advertising, we work on the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress'. Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.[153]

The *Altria* case in particular, and the cases cited in Justice Stevens' introductory summary of the law in general, were all civil cases.[154] The Supreme Court has explained that the precept against intruding upon "the historic police powers of the States" is particularly powerful when the

153. *Altria Grp.*, 555 U.S. at 76-77. (internal citations and quotations omitted).
154. *Id.*

"intrusion" involves an assertion that a federal law preempts a state criminal statute.[155]

Commonwealth of Pennsylvania v. Nelson is the lead case in which the Supreme Court found that a federal statute preempted a state criminal statute.[156] Pennsylvania prosecuted and convicted Nelson for violating the State Sedition Act, which was substantively the same as the Federal Smith Act.[157] After carefully delineating many examples in which state prosecutions would not be preempted by parallel federal law, the United States Supreme Court held that the narrow and specific circumstances present in *Nelson* required a finding that Congress had occupied the field, and therefore Pennsylvania was barred—preempted—from pursuing its prosecution.[158] The Court noted that the evidence of "occupying the field," including the comprehensive communist control investigations and prosecutions being actively pursued by the federal government, the comprehensive nature of the federal statute, the dominance of the federal interest, and the fact that the "sedition" asserted in the Pennsylvania prosecution was against the United States, taken together mandated the conclusion that Congress had occupied the field.[159]

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155. *Id.*

156. *Nelson*, 350 U.S. 497 (1956).

157. *Id.* at 498.

158. *Id.* at 509-10.

159. *Id.* at 502-10. The doctrine announced in Nelson has been widely followed in the state courts. The Colorado Supreme Court decided a preemption issue in *Exotic Coins v. Beacom*, 699 P.2d 930 (1985). The Colorado statute in question imposed felony sanctions for violations of the record-keeping requirements imposed upon dealers in valuable coins and bullion. *Id.* at 933. The dealers contended that the explicit U.S. constitutional provision pertaining to the exclusive capacity of the U.S. Government to mint coinage, coupled with the extensive congressional legislation amounting to "occupying the field" meant that Congress had preempted Colorado from enacting and enforcing the Colorado statute. *Id.* at 934. The Court cited *Nelson*, and noted the extensive legislation by Congress pertaining to coinage and related matters. *Id.* at 935. The court said: "the narrow scope of regulation effected by the Act does not infringe on national or international monetary policy. We perceive no continuing intention of Congress to preclude state regulation such as the Act, particularly where, as here, strong local interests underlie that regulation." *Id.* at 937 (internal citation omitted). The Court held: "We conclude that the Act is not preempted by federal law." *Id.* at 938. In *State v. Bruckner*, prosecutors convicted defendant of possession of child pornography. State v. Bruckner, 447 N.W.2d 376 (1989). Defendant appealed to the Wisconsin Court of Appeals, asserting, in part, that relevant federal law pertaining to child pornography comprehensively occupied the field, and preempted Wisconsin from prosecuting him. *Id.* at 379. Defendant explicitly relied upon *Nelson* to buttress his argument. *Id.* at 386. The court addressed this argument, and noting the limited reach of *Nelson*, rejected it:

> Bruckner's preemption argument leans heavily on *Pennsylvania v. Nelson*, which struck down a Pennsylvania law insofar as it outlawed sedition against the United States. The Supreme Court's decision in *Nelson*, however, was

> based on the substantial showing that the Pennsylvania law would significantly hamper enforcement of a nearly identical federal statute. Sedition against the United States "is not a local offense" but "is a crime against the Nation." Child pornography, however, is a crime against us all—state and nation. Accordingly, as in the enforcement of our drug laws, where the "interlocking trellis of Federal and State law . . . enable[s] government at all levels to control more effectively the drug abuse problem," federal and state regulation of child pornography results in a partnership that enhances rather than retards the underlying goal of protecting children from sexual exploitation. Indeed, as we have already mentioned, Congress specifically anticipated this partnership with approval.

Id.

The Appellate Court of Connecticut considered a *Nelson*-based preemption issue in *State v. Radzvilowicz*, 703 A.2d 767 (1997). The defendant had been convicted under Connecticut law of forgery related to documents required by the Federal Internal Revenue Service. *Id.* at 770. The court noted: "Arguing that the federal government has the exclusive interest in the regulation of federal income taxation, the defendant claims that the Internal Revenue Code is so pervasive as 'to indicate its exclusive intent to regulate matters pertaining to federal income taxation.'" *Id.* at 784. Directly responding to the defendant's claim that Nelson required a finding of preemption, the Connecticut court noted Nelson's restrictive language, and rejected the preemption argument:

> There can be little, if any, question that the Internal Revenue Code is a most comprehensive regulatory code, both in its statutory and regulatory aspects. As is almost any complex federal statute, it is national in its application and impact. Despite the complex statutory and regulatory scheme of the code, the subjects of certain regulation "often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." Moreover, Connecticut has a legitimate interest in enforcing its criminal statutes. In this case, the state, in our view, is not transgressing any specific statutory provision of the code nor any regulation under it. We do not infer any Congressional intent to make 'the scheme of federal regulation . . . so pervasive as to make reasonable [any] inference that Congress left no room for the States to supplement it.'

Id. at 787. (internal citations omitted).

Michigan Supreme Court Justice Boyle, a former Federal District Court Judge, wrote the Opinion in *People v. Hegedus*, 443 N.W.2d 127 (Mich. 1989). The state charged Mr. Hegedus with manslaughter for a death resulting from violation of health and safety standards set forth in the Occupational Health and Safety Act (OSHA). *Id.* at 128. The trial court quashed the information against Defendant and dismissed the case, on the grounds that the criminal sanctions within OSHA preempted the state prosecution. *Id.* at 128-29. The prosecutor appealed to the court of appeals, which affirmed the trial court's dismissal. *Id.* at 129. The prosecutor's appeal to the supreme court resulted in a unanimous reversal. *Id.* at 139. After a comprehensive review of all possible theories of preemption, the court held:

> The defendant in this case is charged with manslaughter, not simply with a "willful" violation of an OSHA standard. While his conduct, if proved, might also satisfy the elements of that "crime," the state has chosen, *in a valid exercise of its police powers*, to pursue this matter under its own criminal laws.

Id. (emphasis added).

The continued vitality of *Nelson*, and its importance to the subject matter of "field preemption," was confirmed by the Supreme Court in *Arizona v. United States*.[160]

Having described the fundamental principles that might be at issue in determining whether a state criminal statute can be, and in fact is, preempted by a federal statute, and the standards the Supreme Court has established to guide inquiry into such a matter, we now turn to considering whether the MMMA is preempted by the CSA.[161]

IV. THE MICHIGAN MMA IS A VALID EXPRESSION OF STATE SOVEREIGNTY

Perhaps the most famous "pre-ratification" explanation of the relationship between the powers of the state and federal government was set forth by Publius in Federalist Number 39.[162] Publius explained that the central government under the proposed Constitution was neither fully national, nor fully a confederacy united for a common purpose.[163] In so doing, Publius[164] set forth the basis for what became the doctrine of dual sovereignty:

> But if the government be national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in

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160. 132 S.Ct. 2492 (2012).

161. *See generally* 21 U.S.C.A. §§ 801-03, 811-14, 821-32, 840-65, 871-90, 901-04; MICH. COMP. LAWS ANN. § 333.26423.

162. THE FEDERALIST NO. 39 (James Madison), *available at* http://teachingamericanhistory.org/library/index.asp?document=818.

163. *Id.* Madison explained that the form of government proposed under the Constitution was not centralized without substantial local authority, but was also not like the government that existed under the Articles of Confederation.

164. Professor Jenna Bednar has comprehensively reviewed and analyzed federations across the world. JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN (2009). From the beginning of the book she acknowledges her debt to Madison:

> Throughout this book, I build on the thinking of James Madison because Madison approached the design of federations as a problem of incentives: how to structure institutions to induce desirable political behavior. Madison may have invented modern federalism, but in a very real sense he had no alternative: a unitary government was out of the question, and the looser confederation had proven unsuccessful. His goal was to devise a system of government that would make the union thrive. . . . Just as Madison had no real alternative but to recognize state sovereignty, this book begins with the premise that federalism has been selected as the governmental form and thinks about the principles for constructing a federal constitution.

Id. at 5 n.3. Professor Bednar is a political scientist, not a lawyer, but surely she hit a fundamental legal principle squarely on the head—the Constitution's recognition of state sovereignty is fundamental to understanding the fabric of the Constitution.

> relation to the *extent* of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controuled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.[165]

And thus Madison explained that our federal system was a "dual sovereignty" system to be achieved under the Constitution.[166]

The most commonly cited cases relating to the dual sovereignty doctrine are the double jeopardy cases. Basically, the double jeopardy and dual sovereignty cases hold that when a person commits an act that violates the law of two sovereigns,[167] his right to be free from twice being placed in jeopardy for the same offense does not prohibit the two sovereigns from prosecuting him.[168] In other words, an individual can suffer two convictions in two different jurisdictions for the same offense.[169] The reason for this is that each sovereign has the capacity to enact its own criminal laws, and to exact punishment for actions that violate them.[170]

A substantial body of Supreme Court dicta elucidated this principle in the 19th century,[171] but it was not until the Prohibition-era case of

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165. THE FEDERALIST NO. 39, *supra* note 162.

166. *Id.*

167. Because the cases giving rise to this article arose in Michigan, imagine the two sovereigns to be Michigan and the United States.

168. *See, e.g.*, United States v. Lanza, 260 U.S. 377, 381-82 (1922).

169. *Id.*

170. *Id.*

171. *See id.* at 382-84 (discussing a long line of Supreme Court cases that stood for the proposition that an individual being subject to separate criminal trials in both state and

United States v. Lanza that the Supreme Court issued an opinion where the principle was stated as the case's holding.[172]

Lanza reviewed the prior decisions illuminating dual sovereignty, and, in upholding both the state and federal convictions, the Court stated:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.[173]

This is not to say that the application of the dual sovereignty doctrine to cases involving potential double jeopardy issues lacked critics.[174] The principal concern expressed by critics was that no matter how the various doctrines are described, the Double Jeopardy Clause of the Fifth Amendment[175] simply prohibited multiple sovereigns from obtaining convictions for the same action.[176] As a result of the controversy, cases exploring the interplay between the Double Jeopardy Clause and the dual sovereignty doctrine continued to be considered by the Supreme Court after *Lanza*.[177]

Perhaps the most important were the *Bartkus* and *Abbate* cases, decided on the same day in 1959.[178] Part of the significance of the cases arose from the particular procedural facts presented. In *Bartkus*, the first

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federal jurisdictions under principles of dual sovereignty did not violate double jeopardy principles).

172. *Id.* at 381-82.

173. *Id.* at 382. The Court then collected other Supreme Court cases, where the dual sovereignty doctrine had been described, most typically in dicta. These cases included: Fox v. Ohio, 46 U.S. 410 (1847); United States v. Marigold, 50 U.S. 560 (1850); Moore v. Illinois, 55 U.S. 13 (1852); United States v. Cruikshank, 92 U.S. 542 (1875); *Ex parte* Siebold, 100 U.S. 371 (1879); Cross v. North Carolina, 132 U.S. 131 (1889); Pettibone v. United States, 148 U.S. 197 (1893); Crossley v. California, 168 U.S. 640 (1898); S. Ry. Co. v. R.R. Comm'n of Ind., 236 U.S. 439 (1915); Gilbert v. Minnesota, 254 U.S. 325 (1920); and, McKelvey v. United States, 260 U.S. 353 (1922).

174. *See* Bartkus v. Illionis, 359 U.S. 121, 150 (1959) (Black, J., dissenting).

175. The Fifth Amendment's Double Jeopardy Clause states: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

176. *See Bartkus*, 359 U.S. at 150-164.

177. *See, e.g., Bartkus*, 359 U.S. at 121; Abbate v. United States, 359 U.S. 187 (1959).

178. *Bartkus*, 359 U.S. at 121; *Abbate*, 359 U.S. at 187.

prosecution was in federal court, and the second in Illinois state court.[179] In *Abbate*, the first prosecution was in Illinois state court, the second in Mississippi federal court.[180] In *Bartkus*, the state trial resulted in an acquittal, whereas the federal trial resulted in a conviction.[181] In *Abbate*, both the state and federal trials resulted in convictions.[182] Deciding the two cases on the same day gave the Supreme Court the opportunity to resolve essentially all possible questions left open by the *Lanza* decision.

Justice Frankfurter wrote the opinion of the Supreme Court in *Bartkus v. United States*.[183] Bartkus was first tried and acquitted in federal court for bank robbery.[184] A month after the federal trial, he was tried in an Illinois state court under an indictment charging facts "substantially identical to those contained in the prior federal indictment."[185] The Illinois case facts and circumstances disclosed considerable cooperation between state and federal officials.[186] The existence of this cooperation was an issue in the case.[187] Bartkus essentially contended that the Illinois authorities acted as agents of the federal government.[188] Whether this contention was true, and what impact it had on the legality of his conviction in the Illinois court, was a matter discussed in the decision.[189]

Justice Frankfurter's majority opinion is lengthy, detailed, and unabashedly scholarly, reflecting his tenure as a professor of law prior to becoming a Supreme Court Justice.[190]

Pertinent to whether the cooperation between federal and state officials mattered, Justice Frankfurter noted that "[t]he record establishe[d] . . . that federal officials acted in cooperation with state authorities, as is the conventional practice between the two sets of prosecutors throughout the country."[191] The "Footnote 1" text is significant, because it acknowledges the Defendant's position as to the

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179. *Bartkus*, 359 U.S. at 121-22.
180. *Abbate*, 359 U.S. at 187-89.
181. *Bartkus*, 359 U.S. at 122.
182. *Abbate*, 359 U.S. at 188-89.
183. *Bartkus*, 359 U.S. at 121.
184. *Id.* at 121-22.
185. *Id.* at 122.
186. *Id.* at 122-23, 123 n.1.
187. *Id.* at 122-23.
188. *Id.* at 122.
189. *Bartkus*, 359 U.S. at 121-39.
190. *See id.* Much of Justice Frankfurter's opinion comprehensively reviews state and federal decisions that were related to the issue before the Court. Even fifty-two years after the decision, the opinion remains relevant.
191. *Bartkus*, 359 U.S. at 123.

level of cooperation between state and federal law enforcement pertaining to the Defendant's dual trials for the same offense:

> We have had a number of cases where the state's attorney's office have been cooperating very well with the federal authorities, particularly in the narcotics cases, because in that connection the federal government should have the first authority in handling them because narcotics is a nation-wide criminal organization, and so when I see people going through this town and criticizing the County of Cook and the City of Chicago, because of the police, the state's attorney and the judges cooperating with the federal authorities, and giving that as proof of the fact that since we don't take the lead we must be negligent in our duties, I am particularly glad to see a case where the federal authorities came to the state's attorney.
>
> We are cooperating with the federal authorities and they are cooperating with us, and these statements in this city to the effect that the fact that the federal authorities are in the county is a sign of breakdown in law enforcement in Cook County is utter nonsense.
>
> The federal authorities have duties and we have duties. We are doing our duty and this is an illustration of it, and we are glad to continue to cooperate with the federal authorities. Give them the first play where it is their duty, as in narcotics, and we take over where our duty calls for us to carry the burden. . . .[192]

Having set out the facts of the case, Justice Frankfurter undertook a lengthy analysis of both federal and state cases interpreting the constitutional principle of dual sovereignty as it relates to the Double Jeopardy Clause. He demonstrated that this long line of cases firmly established that dual sovereignty means that a state and the federal government can compel a defendant to undergo two criminal trials for the same act, where the indictments charge essentially the same crime, and he considered the broader question whether such successive indictments violated due process.[193] He wrote:

> With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even

192. *Id.* at 123 n.1.
193. *Id.* at 136.

> though there had been a prior trial by another government for a similar offense, it would be disregard of a long, unbroken, unquestioned course of impressive adjudication for the Court now to rule that due process compels such a bar.[194]

Justice Frankfurter's opinion in *Bartkus* considered the impact of undermining dual sovereignty in regard to constitutional principles, particularly with regard to the states' authority and capacity to create and enforce their own criminal laws.[195] Justice Frankfurter strongly supported the notion that dual sovereignty requires recognition of a state's capacity to create and enforce its own criminal laws, whether or not such state criminal laws were consistent with similar federal laws.[196] Justice Frankfurter wrote:

> In *Screws v. United States*, defendants were tried and convicted in a federal court under federal statutes with maximum sentences of a year and two years respectively. But the state crime there involved was a capital offense. Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, the result would be a shocking and untoward deprivation of the *historic right and obligation of the States to maintain peace and order within their confines.* It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States.
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> . . . .
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> [It has] been shown that the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power. Mr. Justice Brandeis has written that separation of powers was adopted in the Constitution 'not to promote efficiency but to preclude the exercise of arbitrary power.' Time has not lessened the concern of the Founders in

194. *Id.*
195. *Id.*
196. *Id.* at 137.

> devising a federal system which would likewise be a safeguard against arbitrary government.[197]

Justice Black, joined by Chief Justice Warren and Justice Douglas, dissented in both *Bartkus* and *Abbate*.[198] The basis for their dissents was the Fifth Amendment bar against double jeopardy.[199] In effect, they argued the ban against double jeopardy trumped whatever significance might be attached to the dual sovereignty doctrine.[200] The dissenters clearly stated that *Lanza* should be viewed carefully and not followed blindly.[201] In this regard, the dissenting Justices' opinion mirrored the criticism of the dual sovereignty doctrine, as applied to successive prosecutions, which had been presented in the various nineteenth century cases arising from similar facts.[202]

Justice Brennan wrote the majority opinion in *Abbate v. United States*.[203] Justice Brennan's *Abbate* opinion is less a scholarly discourse on the relationship between. state and federal opinions as to dual sovereignty as written by Justice Frankfurter in *Bartkus*, and more an explicit delineation of federal case law and constitutional doctrine.[204]

The *Abbate* opinion first briefly set out the pertinent case facts:

> During a strike against the Southern Bell Telephone and Telegraph Company, the petitioners and one McLeod were solicited in Chicago . . . to dynamite facilities of the telephone company located in the States of Mississippi, Tennessee, and Louisiana. . . . McLeod . . . obtained dynamite and went to Mississippi to destroy telephone company facilities located there. The petitioners thereupon disclosed the plot to the telephone company and the Chicago police.[205]

After defendants were convicted, the Supreme Court "granted certiorari limited to consideration of the claim that the federal

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197. *Bartkus*, 359 U.S. at 137 (emphasis added) (internal citations omitted).

198. *Id.* at 150; *Abbate*, 359 U.S. at 202.

199. *Bartkus*, 359 U.S. at 150; *Abbate*, 359 U.S. at 202-03.

200. *Abbate*, 359 U.S. at 202-03.

201. *Id.* at 202.

202. *See generally Bartkus*, 359 U.S. at 150-64; *Abbate*, 359 U.S. at 201-03.

203. *Abbate*, 359 U.S. at 187. Justice Brennan dissented in *Bartkus*. He felt that the extent of federal involvement in the state prosecution in *Bartkus* meant that it amounted to a second federal prosecution. On this limited basis, he felt the second *Bartkus* prosecution violated the ban against double jeopardy.

204. *See id.* at 187-201.

205. *Id.* at 187-88.

prosecutions, based on the same acts as were the prior state convictions, placed petitioners twice in jeopardy contrary to the Fifth Amendment..."[206]

Justice Brennan explicitly noted: "We do not write on a clean slate in deciding this question. As early as 1820 in *Houston v. Moore* [], it was recognized that this issue would arise from the concurrent application of state and federal laws."[207]

After thorough review of the Supreme Court cases that developed deeper discussion of dual sovereignty after *Houston v. Moore*, Justice Brennan turned his attention to *Lanza*:

> Culminating this development was *United States v. Lanza* [], where the issue was directly presented to this Court. Lanza was convicted by the State of Washington for 'manufacturing, transporting, and having in possession' a quantity of liquor in violation of a state statute. He was subsequently convicted in a Federal District Court of violating the Volstead Act [], for performing the same acts with regard to the same liquor. The Court held that the prior state conviction did not bar the federal prosecution. It pointed out that the State could constitutionally make Lanza's acts criminal under its original powers reserved by the Tenth Amendment, and the Federal Government could constitutionally prohibit the acts under the Eighteenth Amendment. Thus . . . two sovereigns had, within their constitutional authority, prohibited the same acts, and each was punishing a breach of its prohibition.[208]

Justice Brennan reiterated the holding of the *Lanza* Court:

> A unanimous Court, in an opinion by Chief Justice Taft, held: 'We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory . *** Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.[209]

Having set forth both the facts of the case and the relevant existing Supreme Court decisions, Justice Brennan then turned to the essence of

206. *Id.* at 189.
207. *Id.* at 190 (citing Houston v. Moore, 18 U.S. 1 (1820) (internal citations omitted)).
208. *Id.* at 190-93 (internal citations omitted).
209. *Abbate*, 359 U.S. at 194.

the *Abbate* case.[210] Declining the petitioners' request that *Lanza* be overruled, Justice Brennan went beyond *stare decisis* to address the fundamental question of dual sovereignty.[211] In particular, he noted that the states have principal responsibility in our federal system for defining and enforcing crimes:

> Petitioner asks us to overrule Lanza. We decline to do so. No consideration or persuasive reason not presented to the Court in the prior cases is advanced why we should depart from its firmly established principle. On the contrary, undesirable consequences would follow if Lanza were overruled. The basic dilemma was recognized over a century ago in Fox v. State of Ohio. As was there pointed out, if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered. For example, the petitioners in this case insist that their Illinois convictions resulting in three months' prison sentences should bar this federal prosecution which could result in a sentence of up to five years. Such a disparity will very often arise when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest. But no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law. This would bring about a marked change in the distribution of powers to administer criminal justice, *for the States under our federal system have the principal responsibility for defining and prosecuting crimes.*[212]

Lanza, *Bartkus*, and *Abbate*, taken together, conclusively demonstrate that the Supreme Court holds that dual sovereignty is fundamental to the constitutional fabric, and that different sovereigns, such as the states and federal governments, have the authority to enact and prosecute crimes, even consecutively against the same defendant for the same act.[213]

Conversely, the doctrine of preemption divests states of authority to enact or enforce laws pertaining to subject matter that has been

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210. *Id.* at 194-95.
211. *Id.*
212. *Id.* at 195 (emphasis added).
213. *See generally id.* at 195-96; *Bartkus*, 359 U.S. at 137; *Lanza*, 260 U.S. at 381-84.

preempted by federal law.[214] As might be expected in view of the Supreme Court's explication of the impact of dual sovereignty upon criminal cases and the principal of double jeopardy, extreme care is appropriate before determining that a federal statute has preempted a state criminal statute.[215]

Jones v. Rath Packing Co. teaches that "[w]here, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[216] This is a general explication of the rule, applicable to "historic police powers" wielded by the states, whether implemented through civil or criminal statutes.[217]

Moreover, the Supreme Court has made it clear that additional concerns arise when the issue is whether a federal criminal statute preempts a state criminal statute.[218] In *Heath v. Alabama*, the Court noted:

> It is axiomatic that [i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other . . . The Constitution leaves in the possession of each State certain exclusive and very important portions of sovereign power. *Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code.*[219]

The holdings in *Heath* and *Rath* are consistent with the Supreme Court's decision in *Nelson*, which recognized the general rule against intruding into traditional state police powers described in *Rath*, and limited its finding of preemption to a very narrow circumstance. The state cases, cited above,[220] amplify and support the conclusion that the

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214. Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

215. *See Bartkus*, 359 U.S. at 131; *Abbate*, 359 U.S. at 193.

216. *Rath Packing Co.*, 430 U.S. at 525 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (internal citations and quotations omitted).

217. *Id.*

218. *See, e.g.*, Heath v. Alabama, 474 U.S. 82 (1985).

219. *Id.* at 92-93 (emphasis added) (internal citations omitted) (internal quotation marks omitted).

220. *See* sources cited *supra* note 159 and accompanying text.

range of circumstances in which *Nelson* will support a finding of congressional preemption of a state criminal statute is quite narrow.

In regard to the CSA, the intent of Congress not to occupy the field, that is to say, not to preempt, is explicitly stated in Section 903 of the CSA.[221] Any possible lingering question about the meaning of this "non-preemption" language is answered by several reports, issued over a series of years, by the Congressional Research Service (CRS) regarding medical marijuana.[222] The most recent report by Specialist in Social Policy, Mark Eddy, was issued on April 2, 2010.[223] As might be expected from Congress's historic non-partisan research resource,[224] which describes its mission as "providing comprehensive and reliable legislative research and analysis that are timely, objective, authoritative, and confidential, thereby contributing to an informed national legislature,"[225] the report is detailed, exhaustive, excruciatingly complete and even-handed.[226]

The Report explicitly addresses the issue of preemption by stating:

> The CSA is not preempted by state medical marijuana laws, under the federal system of government, *nor are state medical laws preempted by the CSA. States can statutorily create a medical use exception for botanical cannabis and its derivatives under their own, state-level controlled substance laws.* At the same time, federal agents can investigate, arrest and prosecute medical marijuana patients, caregivers, and providers in accordance with the Controlled Substances Act, even in those states where medical marijuana programs operate in accordance with state law.[227]

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221. 21 U.S.C.A. § 903 (West 2010). Section 903 states:

> No 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 . . . .

Id.

222. *See*, MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES (2010).

223. *Id.*

224. CONG. RESEARCH SERV. CAREERS, LIBRARY OF CONG. (Jan. 4, 2012), http://www.loc.gov/crsinfo/about/history.html.

225. *Id.*

226. *See* EDDY, *supra* note 222.

227. *Id.* at 3-4 (emphasis added). Similar language appeared in earlier CRS reports to Congress on Medical Marihuana. *See, e.g.*, MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE

Besides stating quite clearly that the CSA does not preempt state "medical use exception" medical marihuana laws, the quotation describes the existing situation quite well.[228]

Of course, the CRS Reports are not by themselves dispositive of the question. However, the CRS is uniquely situated to understand what information Congress was seeking from its research service, and similarly well-situated to understand what Congress's legislative intent was in the statute being "researched" as to possible future action. This is particularly true when the statement, as here, is repeated in multiple reports.[229] The CRS statement that the CSA does not preempt state medical marihuana laws is both illuminating of congressional intent, probative, and highly persuasive.[230]

POLICIES (2008), *available at* http://medpot.co.nz/download/RL33211.pdf; MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES (2007), *available at* http://www.scribd.com/doc/54414373/CRS-Medical-Marijuana-Report-2007.

228. *See generally* EDDY, *supra* note 222, at 3-4.

229. *See id.*; EDDY (2008), *supra* note 227; EDDY (2007), *supra* note 227.

230. *See* EDDY (2010), *supra* note 222; EDDY (2008), *supra* note 227; EDDY (2007), *supra* note 227. *See also* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY AND ISSUES (1992), *available at* http://www.library.unt.edu/gpo/acir/Reports/policy/a-121.pdf. The Advisory Commission on Intergovernmental Relations (ACIR) was a congressionally-created commission that included members of the Senate, House, Governors, and other elected officials. Its report comprehensively reviewed the hundreds of federal statutes with preemptive effect, noted whether that effect was partial or total, and set out its findings in the form of a comprehensive inventory. *Id.* at 14-17. If a law was generally preemptive, the report simply listed it as a preemptive statute. *Id.* at 14. If a statute was preemptive only as to particular portions of the law, then those particular portions were specified. *Id.* The ACIR report noted that the CSA's *forfeiture* provisions were preemptive. *Id.* at 47. In other words, the ACIR found the rest of the CSA not to be a preemptive statute. *Id.* Reviewing the text of the CSA forfeiture provisions, the language essentially invokes the language of continuing criminal enterprise found the Racketeering and Corrupt Organizations (RICO) Act. The CSA at Section 848 notes:

> Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

21 U.S.C.A. § 848 (West 2010). Section 853 of the CSA sets out the forfeiture that may arise under the CSA:

> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

The anti-commandeering rule buttresses the support that the dual sovereignty and double jeopardy cases render the conclusion that the CSA does not preempt state medical marihuana statutes.[231]

Printz v. United States considered whether the Brady Handgun Violence Prevention Act,[232] which commanded certain conduct by state and local law enforcement personnel, violated the Constitution.[233] Writing for the Court, Justice Scalia noted: "We have held, however, that state legislatures are *not* subject to federal direction."[234] The holdings in *New York v. United States* and *Printz* are commonly known as the anti-commandeering rule. *Printz* generally considered whether individual state officers were subject to "command" by the federal government.[235] *New York* focused on whether state legislatures were subject to such "command."[236] Taken together, the two cases mean that the anti-commandeering rule applies comprehensively to individual state officers, and to state governing bodies.[237]

Significantly, the source for the anti-commandeering rule is dual sovereignty. In *Printz* Justice Scalia confirmed that the anti-commandeering rule arises from dual sovereignty:

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(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

21 U.S.C.A. § 853 (West 2010).

It is easy to understand why the forfeiture provisions of the CSA are preemptive. The pre-condition for pursuing forfeiture is a conviction under the CSA carrying at least a year imprisonment, and the forfeiture is to be made to the United States Government. The parties to such a case will necessarily be the convicted Defendant (or his property), the United States, and the law to be interpreted will be federal law.

231. *See* Printz v. United States, 521 U.S. 898 (1997).

232. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

233. *Printz*, 521 U.S. at 902.

234. *Id.* at 912 (citing New York v. United States, 505 U.S. 144 (1992) (emphasis in original)).

235. *Id.* at 909.

236. *New York*, 505 U.S. at 162.

237. *See generally id.*; *Printz*, 521 U.S. at 909.

> We turn next to consideration of the structure of the Constitution, to see if we can discern among its "essential postulate[s]," a principle that controls the present cases. . . . It is incontestible that the Constitution established a system of "*dual sovereignty.*" Although the States surrendered many of their powers to the new Federal Government, they retained "*a residuary and inviolable sovereignty*," . . . The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict . . . the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people . . . .[238]

Having set forth the fundamental constitutional principle, Justice Scalia then entered into a long conversation with the dissenters. Ultimately reaching the point where the conversation had to end and a case decision had to be rendered, the Court held:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; *such commands are fundamentally incompatible with our constitutional system of dual sovereignty.* Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.[239]

In 2009, the Vanderbilt Law Review published an article by Professor Robert Mikos on the subjects of medical marihuana, and federal supremacy.[240] Responding directly to the Supreme Court decision

238. *Printz*, 521 U.S. at 918-20 (emphasis added) (internal citations omitted).

239. *Id.* at 935 (emphasis added).

240. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009), *available*

in *Raich*, Professor Mikos carefully analyzed the interplay between the Supremacy Clause, the anti-commandeering rule, and preemption.[241] He focused on the developing trend, which continued after the *Raich* decision, of states enacting medical marihuana laws.[242] The conclusion to his article is quite relevant: "Medical marijuana is but one example of a much broader phenomenon: situations in which states legalize private activity that Congress proscribes."[243] Mikos added:

> Though Congress has banned marijuana outright, through legislation that has survived constitutional scrutiny, state laws legalizing medical use of marijuana not only remain in effect, they now constitute the de facto governing law in thirteen states.[244] These state laws and most related regulations have not been—and more interestingly, *cannot* be—preempted by Congress, given constraints imposed on Congress's preemption power by the anti-commandeering rule, properly understood. Just as importantly, these state laws *matter*; state legalization of medical marijuana has not only eliminated the most relevant legal barrier to using the drug, it has arguably fostered more tolerant personal and social attitudes toward the drug. In sum, medical marijuana use has survived and indeed thrived in the shadow of the federal ban. The war over medical marijuana may be largely over, though skirmishes will undoubtedly continue, but contrary to conventional wisdom, it is the states, and not the federal government, that have emerged the victors in this struggle. Supremacy, in short, has its limits.[245]

The clear message of both the Supreme Court cases, and Professor Mikos's article, is that the anti-commandeering rule applies as to the interplay between the various state medical marihuana acts, and the Federal Controlled Substances Act.[246] In fact, it seems quite clear that the

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at http://www.vanderbiltlawreview.org/articles/2009/10/Mikos-On-the-Limits-of-Supremacy-62-Vand.-L.-Rev.-1421-2009.pdf.

241. *Id.* at 1445-52.

242. *Id.*

243. *Id.* at 1479.

244. Of course, the number of states with medical marihuana acts has grown since Professor Mikos's article was published.

245. Mikos, *supra* note 240, at 1481-82. Professor Mikos reached his conclusions without citing to Eddy's CRS Report, which powerfully supports his analysis and conclusion, particularly where the CRS report specifically states the CSA does not preempt state drug laws.

246. *Id. Printz*, 521 U.S. at 909; *New York*, 505 U.S. at 162.

anti-commandeering rule would apply even in the absence of the statutory language in CSA Section 903 evidencing intent not to occupy the field, or the explicit statements by the CRS that the CSA does not preempt state medical marihuana acts.[247]

Furthermore, as noted above, Section 903 of the CSA declares Congress's intent not to occupy the field, and specifically preserves the traditional authority of states to specify penalties for violations of state criminal laws pertaining to controlled substance related criminal acts.[248] The extraordinary variety of sentencing schema for convictions arising from such convictions[249] provides substantial support for the conclusion that the "not occupying the field" language in Section 903 means precisely that—Congress has not occupied the field, and the CSA does not preempt the various state MMAs.[250]

More broadly, several states have substantially decriminalized marihuana possession. In 1975, Alaska's Supreme Court held that personal possession of non-commercial amounts of marihuana in a person's home was protected from prosecution under constitutional privacy rights.[251] Ohio has substantially decriminalized possession of small amounts of marihuana, and this protection extends to the "gifting" (*i.e.* a non-commercial transfer) of small amounts of marijuana from person to person.[252] In other words, the Ohio statute decriminalizes both possession and delivery of small amounts of marihuana.[253] Similarly, New York treats first and second-time possession of small amounts of marihuana as civil infractions.[254] The NORML webpage listing states that have decriminalized marihuana possession includes fourteen states,

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247. *See* EDDY (2010), *supra* note 222.

248. 21 U.S.C.A. § 903.

249. Although a substantial review of potential sentences that may be imposed for violating marihuana laws in states across the United States is beyond the scope of this article, no state has a sentencing scheme which precisely follows the provisions that the CSA sets forth for various violations related to marihuana. Some states' statutes allow sentencing more leniently "across the board" for various marihuana violations than would arise from convictions arising under the CSA. *See Penalties*, NORML (2011) http://norml.org/laws/penalties (last visited Sept. 15, 2012). Other states, at least in part, allow more severe sentencing than would arise under the CSA, and still more states allow both more severe and more lenient sentencing, depending on the particular offense. *Id.*

250. *See id.*; 21 U.S.C. § 903.

251. Ravin v. Alaska, 537 P.2d 494, 511 (Alaska 1975).

252. OHIO REV. CODE ANN. §§ 3719.01, 2925.01 (West 2010); *Ohio Penalties*, NORML (2011), http://norml.org/laws/item/ohio-penalties-2?category_id=879.

253. *See* OHIO REV. CODE ANN. §§ 3719.01, 2925.01.

254. N.Y. PENAL LAW § 220 (McKinney 2011); N.Y. PUBLIC HEALTH LAW §§ 3306-07 (McKinney 2011); *see also New York Penalties*, NORML (2011), http://norml.org/laws/item/new-york-penalties-2?category_id=876.

the majority of which do not have medical marihuana statutes.[255] In addition to New York and Ohio, the states that have decriminalized marihuana possession, but lack medical marihuana laws include Nebraska, Mississippi, North Carolina, Minnesota and Massachusetts.[256]

A state statute that generally decriminalizes possession of user amounts of marihuana as to any person in the state is *a fortiori* inconsistent with the CSA statutory scheme than a statute that restricts its "lenient relative to the CSA" treatment of marihuana possession to those who demonstrate actual medical need to use marihuana. No case has been found that overturns any of the decriminalizing statutes.

Approximately 50% of the people in the United States reside in states or the District of Columbia that have either decriminalized possession of small amounts of marihuana or enacted medical marihuana statutes.[257] The twenty-five states, and the District of Columbia that have enacted these "lenient as compared to the CSA" marihuana possession statutes are not engaged in defiance of a congressional mandate expressed in a "preempting" statute.[258] Nor, for that matter, have the legislatures in all fifty states so engaged when they enacted controlled substance statutes that in one way or another defined a drug crime differently than the CSA does, or allowed different, sometimes considerably more "pro-defendant," defenses, or imposed a different sentence, whether more or less lenient than specified in the CSA, for crimes that parallel those proscribed in the CSA.[259]

Rather, the state legislatures, and the various state electorates acting by way of voter initiative, have been doing precisely what the United States Constitution allows, protects, promotes, and guarantees. They have been exercising the "foremost . . . prerogative" manifesting

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255. *See States That Have Decriminalized*, NORML (2011), http://norml.org/marijuana/personal/item/states-that-have-decriminalized.

256. *Id.*

257. *Personal Use—Introduction*, NORML (2011), http://norml.org/marijuana/personal/item/introduction-4?category_id=729. According to the Census Bureau, as of April 1, 2010, the eighteen states, plus the District of Columbia that had enacted Medical Marihuana Acts had a total population of approximately 99.93 million. The seven additional states that had decriminalized the possession of small amounts of marihuana had a total population of approximately 57.2 million. *See* U.S. CENSUS BUREAU, *2010 Census Data*, http://2010.census.gov/news/xls/apport2010_table1.xls (last visited July 21, 2012). The Census Bureau reported the total U.S. population as being 308,745,538. *Id.* Thus, as of the 2010 Census, 50.8% of the United States population lived in states—or the District of Columbia—that had enacted MMAs, or lived in states that had decriminalized possession of small amounts of marihuana.

258. Mikos, *supra* note 240, at 1453.

259. *Id.*

sovereignty in our federal, dual sovereignty system.[260] They have been implementing, state-by-state, each state's criminal code.

Michigan's Medical Marihuana Act is an example of a state enacting its own criminal code; the MMMA is well within the constitutional authority guaranteed the states under the Constitution, particularly, but not exclusively, the Tenth Amendment.

V. ADDITIONAL DISCUSSION IN THE NATURE OF *REDUCTIO AD ABSURDUM*

The argument that Congress has occupied the field as to the portions of the CSA regarding marihuana enforcement, so as to exclude conflicting state law by virtue of preemption, is simply not supported by how criminal prosecutions actually play out in real life.

For instance, if Congress actually intended to "occupy the field," one would expect that the bulk of criminal prosecutions, as well as the bulk of policing personnel, would be "federal."[261] Yet, the overwhelming majority of all drug prosecutions, particularly marihuana prosecutions, are state, not federal.[262] The crimes as defined, (i.e. the elements of the offenses), the sentencing schema, and the defenses,[263] as well as many

260. *Heath*, 474 U.S. at 93.

261. *Cf.* 21 U.S.C.A. § 903.

262. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Correctional Population in the United States*, NCJ 236319, at Appendix Table 2 (Dec. 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf. *See also* Jon B. Gettman, *Crimes of Indiscretion, Marihuana Arrests in the United States*, NORML, at 48-104 (2005), *available at* http://norml.org/pdf_files/NORML_Crimes_of_Indiscretion.pdf. The "Ogden Memorandum" and the recent memorandum from the four California United States Attorneys amply demonstrate why the overwhelming majority of marihuana prosecutions are for violation of state statutes. MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS FROM DAVID W. OGDEN (Oct. 19, 2009), *available at* http://blogs.justice.gov/main/archives/192 [hereinafter "OGDEN MEMO"]; Press Release, Benjamin B. Wagner, United States Attorney, U.S. Dep't of Justice, Eastern District of California, *California's Top Federal Law Enforcement Officials Announce Enforcement Actions Against State's Widespread and Illegal Marijuana Industry*, (Oct. 7, 2011), *available at* http://www.justice.gov/usao/cae/news/docs/2011/10-07-11CalifMarijuanaEnforcement.html. The threshold for federal prosecution set by the two memoranda require the involvement of huge amounts of marihuana, so the portion of marihuana cases that could result in federal prosecutions is quite small. *See* OGDEN MEMO.

263. Much could be written about the implications of the variety of "state case" defenses available to drug charge defendants compared with those available in federal cases. This Article has already cited to the federal case law explicating that the "medical necessity defense" is either not available in federal cases, or, if it is possible to assert in such cases, only to a very limited extent. *See* United States v. Oakland Cannabis Buyers'

procedural aspects that can affect case outcomes, are profoundly different from state to state, and as to virtually every state as compared to the federal government. Moreover, the typical arrangement described by Justice Frankfurter in the *Bartkus* decision, that dual sovereignty is often demonstrated and reflected in cooperation between state and federal prosecuting authorities, is strongly in place as to drug law enforcement.[264] State and federal police agencies actively cooperate, both informally and in designated, formally functioning joint task forces across the nation. Congress appropriates funds for such cooperative enforcement, and often provides funding for state drug law enforcement efforts.[265] These are all indications that Congress is aware of, and

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Cooperative, 532 U.S. 483 (2001). This contrasts with the wide availability of the defense in various states. *See, e.g.*, State v. Thayer, 14 A.3d 231, 233-36 (Vt. 2010) (both the majority and dissenting opinions acknowledging the existence of a medical necessity defense in Vermont). The issue dividing the court was whether Thayer was entitled to assert the defense. *See id.* Of course, post-*Hinckley* the federal insanity defense is more restrictive than the insanity defense available in many states. *See* United States v. Hinckley, 672 F.2d 115, 132-34 (D.C. Cir. 1982), *overruled in part on other grounds*, Hudson v. Palmer, 468 U.S. 517 (1984). While the insanity defense is not often relevant in drug cases, the entrapment defense is often relevant in such cases. The federal entrapment standard regarding entrapment is more restrictive than the standard used in many states. *Compare* Sherman v. United States, 356 U.S. 369, 372-878 (1958), *with* People v. D'Angelo, 257 N.W.2d 655, 658-63 (Mich. 1977). In Michigan, the difference has been noted in the Michigan Judicial Institute's "Controlled Substances Benchbook." MICH. JUDICIAL INST., CONTROLLED SUBSTANCES BENCHBOOK (2012) [hereinafter "BENCHBOOK"]. The Benchbook makes it clear that the Michigan Supreme Court recognizes the difference between the federal and Michigan entrapment standards, and expects Michigan judges to apply the Michigan standard. *See id.* at § 10.5, pp. 10.12-10.14. These differences in "elements" of defenses can result in state cases resulting in acquittals, where similar federal prosecutions would result in convictions. This is completely acceptable within the doctrine of dual sovereignty. *Bartkus*, 359 U.S. at 130-33, 138-39 (1959).

264. *Cf. Bartkus*, 359 U.S. at 130-33, 138-39.

265. For instance, several pages on Michigan's official state website proudly proclaim such cooperative efforts. One recurring page is the "Commander's Column, which includes a report from a Michigan State Police Command Officer. *See, e.g.*, D/Lt. Jeffery Racine, Upper Penninsula Substance Enforcement Team, *Commander's Column* (Mar. 10, 2012), *available at* https://www.michigan.gov/documents/drugteam-UPSET-10MAR_129656_7.pdf. The second page of this report includes a "funding source" note: This project was supported by Byrne Grant #2003-DB-BX-0049, awarded by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice (DOJ), and administered by the Michigan Office of Drug Control Policy. Points of view or opinions contained within this document do not necessarily represent the official position or policies of the DOJ.

Id. The page where the funding source note appears includes the following substantive text:

> By combining local resources with the resources of the Michigan State Police, Criminal Investigation Division, along with state police and federal drug

actively supports, the multiplicity of efforts, including the differing statutory schema, pertaining to drug law enforcement.[266]

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information identification and tracking systems, Michigan took a major step in bringing the fight against drug dealers and drug related crimes to the local level. And, it has worked!

Id. In one neat package, we see: 1) local and federal law enforcement cooperation, reflective of dual sovereignty as described by Justice Frankfurter; *see Bartkus*, 359 U.S. at 130-33, 138-39, and 2) federal funding of cooperative law enforcement programs, rather than "commandeered" activities; thereby complying with the rules of *Printz* and *New York*. *See Printz*, 521 U.S. at 909; *New York*, 505 U.S. at 162. Of course, because the described police work and arrests were by local officers, prosecutions under Michigan law resulted. *See also* MICHIGAN STATE POLICE, *Multijurisdictional Task Forces*, MICHIGAN.GOV (2012), http://michigan.gov/msp/0,1607,7-123-1593_41992_42001---,00.html, which is a Michigan State Police web page describing "Multijurisdictional Task Forces." Fifteen task forces are listed. *Id.* One of them, the Upper Peninsula Substance Enforcement Team (UPSET), is the task force described in the "Commander's Column" described earlier in this note. *Id*; Racine, *supra*. Following the UPSET link takes one to the website http://michigan.gov/msp/0,1607,7-123-1593_41992-21688--,00.html. MICHIGAN STATE POLICE, *UPSET – Upper Peninsula Substance Enforcement Team*, MICHIGAN.GOV (2012), http://michigan.gov/msp/0,1607,7-123-1593_41992-21688--,00.html (last visited Apr. 16, 2012). The principal text on that page describes UPSET:

> UPSET is a multijurisdictional street narcotics team that covers the following counties: Alger, Baraga, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Marquette, Menominee, Ontonagon, and Schoolcraft. Participating agencies include Delta County Sheriff's Department, Escanaba Public Safety Department, Marquette City Police Department, Marquette County Sheriff's Department, Alcohol, Tobacco and Firearms, and Michigan State Police.

Id. From this page, we learn that not only has UPSET benefitted from federal law enforcement technology, but also that Alcohol, Tobacco and Firearms (ATF) officers cooperate with the UPSET team. *Id.* This further demonstrates the cooperation Justice Frankfurter described as a typical expression of Dual Sovereignty. *See Bartkus*, 359 U.S. at 130-33, 138-39. Also, the State of Michigan Licensing and Regulatory Affairs (LARA) website contains considerable information about the MMMA, and its implementation in Michigan. LARA, *Michigan Medical Marijuana Program*, MICHIGAN.GOV (2012), http://www.michigan.gov/lara/0,1607,7-154-27417_51869---,00.html. Further, The State of Michigan LARA website implicitly recognizes the application of the "dual sovereignty" doctrine, noting on the "General Information" page: "The Act neither protects marihuana plants from seizure nor individuals from prosecution if the federal government chooses to take action against patients or caregivers under the federal Controlled Substances Act." *See* LARA, *General Information About the Program*, MICHIGAN.GOV (2012), http://www.michigan.gov/lara/0,4601,7-154-27417_51869_52137---,00.html.

266. In a sense, Congress has legislatively acquiesced to the more liberal marihuana laws, whether limited to "medical marihuana," or involving frank decriminalization of small amount that exist in many states. *Cf.* 21 U.S.C.A. § 903. While "legislative acquiescence" is not a primary principle of current Supreme Court jurisprudence, it continues to be recognized as a legitimate, auxiliary tool of statutory construction. *See* Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 345 n.3 (1988) (Blackmun, J., concurring). *See also* Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988).

Consider the following questions: What situation would obtain in states across the country if the CSA were a preemptive statute? Would the overwhelming majority of prosecutions be initiated by state prosecutors, or by federal prosecutors? To the extent that state prosecutions were allowed under such a regime, would defendants be allowed to interpose defenses unavailable in similar federal cases (i.e., medical necessity, or guilty but mentally ill)?[267] Similarly, in cases when affirmative defenses allowed both by state and federal law, (for instance entrapment or insanity) might be asserted, would the purportedly preemptive effect of the CSA require that the federal definition of such a defense be applied, even though the case involved an allegation of violation of a state statute, and was being tried in state court? Would the conclusion that the CSA preempts and therefore prohibits the ability of Michigan to define defenses[268] that might be more favorable to "Michigan" defendants than the defenses available in cases involving violations of parallel charges in federal court also mean that neither Michigan, nor any other state, would have the authority to enact and implement a sentencing regime that was different from—particularly more lenient than—the parallel federal sentencing scheme?

Although it is possible to construct, at least in some instances, answers to the foregoing questions that do not immediately descend into the realm of the logically absurd, the overall problem is that the contemporaneous public discourse about what form of government the Constitution would establish dating from Federalist 39, the explicit text of the Constitution, including the Tenth Amendment, and an unbroken line of Supreme Court opinions all clearly establish that the Constitution establishes a federal system of dual sovereignty. Because the foremost prerogative of sovereignty is the ability to create and enforce a criminal code,[269] the only sensible way to view the "facts on the ground" described herein is to conclude that the facts on the ground demonstrate in real life that the CSA was never intended to preempt state drug laws.[270] The contrary conclusion clearly would lead to absurd results, not the least of which would be undermining the fundamental fabric of the Constitution reflected in, and required by, dual sovereignty.

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267. *Cf.* MICH. COMP. LAWS ANN. § 333.26428 (West 2010).

268. Section 8 of the MMMA, which was the principal text that the Dearborn Judge found was preempted by the CSA in *People of the City of Dearborn v. Brandon*, does nothing more than establish an affirmative defense to a Michigan criminal charge. *Cf.* City of Dearborn v. Brandon, No. 10C0214 (D. Ct. 19th Jud. D. Ct. Mar. 7, 2011) (citing MICH. COMP. LAWS ANN. § 333.26428).

269. Heath v. Alabama, 474 U.S. 82, 93 (1985).

270. *See id.*

As to the medical and scientific questions involved in the classification of marihuana, we recognize that Congress has made a finding that marihuana has no useful medical properties, which is part of what "qualifies" marihuana under Schedule 1 of the CSA.[271] The extent that this finding has been called into question is reflected by the majority opinion in *Raich*, which acknowledged the substantial controversy within the science community as to the accuracy of this finding.[272] The continuing question about the accuracy of Congress's finding is part of the "landscape" that has engendered so much political activity around the question of removing marihuana from Schedule 1. In this context, a brief review is pertinent.

Marihuana was listed as a "medicinal" in the United States Pharmacopeia (USP) for many years, through the 1930s.[273] Recent cases in numerous jurisdictions have remarked about the mounting scientific evidence that marihuana and its constituent chemicals have many useful medical properties.[274] At least one court has gone so far as to require the United States to provide marihuana as medicine to a class of patients.[275] The order in the *Kuromiya* case is still in effect, and the United States continues to provide marihuana to these patients.[276]

When Washington D.C. enacted medical marihuana via a 1998 initiative, funding was required to implement aspects of the medical marihuana program.[277] For the first time since the initiative passed, Congress recently passed an appropriation for Washington D.C. that provided funding.[278]

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271. 21 U.S.C.A. § 812 (West 2010).

272. Gonzales v. Raich, 545 U.S. 1, 27 n.37 (2005).

273. *See Historical Timeline: History of Marijuana as Medicine*, PROCON.ORG (2012), http://medicalmarijuana.procon.org/view.resource.php?resourceID=000143.

274. *See, e.g.*, Kuromiya v. United States 78 F. Supp. 2d 367, 370-74 (E.D. Pa. 1999). *See also* In The Matter of Marijuana Rescheduling Petition, No. 86-22, (Sept. 6, 1988), *available at* http://medicalmarijuana.procon.org/sourcefiles/Young1988.pdf. The 1988 opinion, written by the DEA Chief Administrative Law Judge Francis Young, considered a request that marihuana be rescheduled and placed into Schedule II. Judge Young considered testimony from numerous patients, as well as medical and other scientific experts. The Opinion found marihuana to be medically beneficial and safe for use in treatment of such problems as glaucoma, control of vomiting secondary to chemotherapy, and restoration of appetite in cancer patients whose appetite had been depressed due to the effects of chemotherapy.

275. *Kuromiya*, 78 F. Supp. 2d at 368.

276. *See id.* (referencing the "Randall" case—the unreported settlement of which gave rise to the order in question).

277. D.C. Act 13-138, Initiative 59, Legalization of Marijuana for Medical Treatment Act (1998); EDDY (2010), *supra* note 222, at 8.

278. Consolidated Appropriations Act, Pub. L. No. 111-117, 123 Stat. 3034 (2010).

In particular, on April 10, 2010 the CRS[279] provided a report to Congress about medical marihuana, which observes, in the Summary that begins the long, comprehensive, authoritative study:

> For the first time since District of Columbia residents approved a medical marijuana ballot initiative in 1998, a rider blocking implementation of the initiative was not attached to the D.C. appropriations act for FY2010 (P.L. 111-117), clearing the way for the creation of a medical marijuana program for seriously ill patients in the nation's capital.[280]

The tension between the finding in the CSA that marihuana has no medical utility and the recent law funding the District's medical marihuana program is significant.[281] Besides the federal courts' acknowledgement of mounting evidence of marihuana's medical utility (in one case requiring provision of medical marihuana) and Congress's recent funding of the District's medical marihuana program, one particularly dramatic action by the executive branch of government merits remark. In 1998, researchers from the National Institutes of Health (NIH) ". . . discovered that cannabidiol, a non-psychoactive, naturally-occurring substance in the marijuana plant, is a potent anti-oxidant which can prevent brain cell death in an experimental stroke model . . . ."[282] In

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279. Located in the Library of Congress, the Congressional Research Service is described as follows:

> The Congressional Research Service (CRS) works exclusively for the United States Congress, providing policy and legal analysis to committees and Members of both the House and Senate, regardless of party affiliation. As a legislative branch agency within the Library of Congress, CRS has been a valued and respected resource on Capitol Hill for nearly a century. CRS is well-known for analysis that is authoritative, confidential, objective and nonpartisan. Its highest priority is to ensure that Congress has 24/7 access to the nation's best thinking. This website provides information about our organization, career opportunities and our services to Congress.

CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS (2012), http://www.loc.gov/crsinfo/.

280. EDDY (2010), *supra* note 222, at i; Eddy's report has also been published by the government and is available at http://www.amazon.com/Medical-Marijuana-Analysis-Federal-Policies/dp/1116258706#reader_111625870.

281. *Compare* 21 U.S.C.A. §§ 812(b)(1)(B), 812—Schedule I(c)(10) *with* Consolidated Appropriations Act, Pub. L. No. 111-117, 123 Stat. 3034 (2010).

282. NAT'L INST. OF HEALTH, CANNABOID ANTIOXIDANT PROTECTS BRAIN CELLS – WITHOUT THE HIGH (1998), http://www.hempworld.com/hemp-cyberfarm_com/htms/articles/medicalm05.html. National Institute of Mental Health (NIMH) researchers Aidan Hampson, Ph.D, Julius Axelrod, Ph.D., and other NIH colleagues authored the report. *Id.*

the NIH press release announcing the discovery, we learn that the principal researchers "report on their findings in the July 7 *Proceedings of the National Academy of Sciences*."[283] From the abstract of that article, we learn "[t]his study reports that cannabidiol and other cannabinoids such as THC are potent antioxidants that protect neurons from glutamate-induced death without cannabinoid receptor activation."[284]

Ultimately, this discovery led to the issuance of a United States Patent, No. 6,630,507, on October 3, 2003.[285] The inventors of this patent are listed as Aidan Hampson, Julius Axelrod, and Maurizio Grimaldi.[286] A measure of the level of scientific accomplishments and credibility of the authors is suggested by Hampson's brief vita,[287] Grimaldi's biography and vita,[288] and the official biography of Dr. Axelrod on the Nobel Prize site.[289]

To return to the Patent, the Assignee of the Patent is "The United States of America as represented by the Department of Health and Human Service."[290] The Abstract of the Patent states in part:

> Cannabinoids have been found to have antioxidant properties, unrelated to NMDA receptor antagonism. This new found property makes cannabinoids useful in the treatment and prophylaxis of wide variety of oxidation associated diseases, such as ischemic, age-related, inflammatory and autoimmune diseases. The cannabinoids are found to have particular application as neuroprotectants, for example in limiting

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283. *Id.*

284. A.J. Hampson et al., *Cannabidiol and (−)Δ^9-tetrahydrocannabinol are Neuroprotective Antioxidants*, 95 PROC. NAT'L ACAD. SCI. 8268, 8268 (1998), *available at* http://www.pnas.org/content/95/14/8268.full.pdf.

285. U.S. PATENT NO. 6,630,507 (filed Oct. 7, 2003).

286. *Id.*

287. AIDAN HAMPSON'S BRIEF VITA, LINKEDIN, http://www.linkedin.com/in/aidanhampsonphd (last visited Apr. 7, 2012).

288. BIOGRAPHY OF MAURIZIO GRIMALDI, M.D., PH.D., SOUTHERN RESEARCH, http://www.southernresearch.org/life-sciences/biochemistry-molecular-biology/senior-staff/maurizio-grimaldi-md-phd (last visited Sept. 15, 2012).

289. BIOGRAPHY OF JULIUS AXELROD, NOBEL PRIZE, http://www.nobelprize.org/nobel_prizes/medicine/laureates/1970/axelrod-bio.html (last visited Apr. 7, 2012). Dr. Axelrod was a biochemist. *Id.* His wide-ranging and ground-breaking research focused on synaptic neuro-transmission, both generally in the nervous system and particularly within the brain. *See id.* The work he did at the NIMH, which led to the granting of the described patent, is within the mainstream of his lifelong work in the area. *See* Press Release, KAROLINSKA INSTITUTET (Oct. 1970), *available at* http://www.nobelprize.org/nobel_prizes/medicine/laureates/1970/press.html (last visited Sept. 15, 2012) (describing Dr. Axelrod's work on neurotransmitters).

290. U.S. PATENT NO. 6,630,507.

> neurological damage following ischemic insults, such as stroke and trauma, or in treatment of neurodegenerative diseases, such as Alzheimer's disease, Parkinson's disease and HIV dementia.[291]

In spite of Congress's finding that marihuana has no medical utility, an enormous body of research evidence, anecdotal evidence, case law (mostly commentary or analysis, but at least one court has found medical utility and required provision of marihuana as medicine), and executive activity stands in opposition to the "finding" in the CSA.[292] So too, at least implicitly, does the recent funding by Congress of the District of Columbia's medical marihuana program.[293]

The CRS Report reflects Congress's continued awareness of both the scientific controversy regarding the medical utility of marihuana, as well as the broad extent to which various states have enacted marihuana laws that are considerably more liberal than the CSA.[294] Congress is certainly aware that the overwhelming majority of marihuana prosecutions are conducted by the states, and that these prosecutions result in a similarly large majority of incarcerations for marihuana violations.[295] Congress's ongoing active financial support of joint state and local drug task forces frequently result in arrests and prosecutions in states where the applicable marihuana laws are considerably more lenient than the federal law. This is explicitly true, for instance in Michigan, where Congress continued to provide funding for such joint task forces after enactment of the MMMA. Congress's original enactment of the CSA includes express language specifying that Congress did not intend to occupy the field.[296] The CRS has repeatedly stated that the CSA does not preempt state MMMAs. In such circumstances, the argument that the CSA preempts the MMMA and renders it unconstitutional is, literally, reduced to the absurd.

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291. *Id.* at "Abstract".

292. EDDY (2010), *supra* note 222, at 25-46.

293. D.C. Act 13-138, Initiative 59, Legalization of Marijuana for Medical Treatment Act; Consolidated Appropriations Act, Pub. L. No. 111-117, 123 Stat. 3034.

294. EDDY (2010), *supra* note 222, at 25-46. We have more than the mere CRS report to rely on. Congress has several times actively considered re-scheduling marihuana, as reflected in the CRS report. *Id.* Indeed, it is precisely this congressional activity that motivated the multiple issuances of the various versions of the report. *See id.* If Congress felt that the state statutory scheme regarding marijuana had intruded upon Congress's (alleged) original intent to "occupy the field," then Congress certainly could have amended the statutory language. However, Congress has not done this. *See generally* 21 U.S.C.A. §§ 801-03, 811-14, 821-32, 840-65, 871-90, 901-04 (West 2010).

295. EDDY (2010), *supra* note 222, at 41.

296. *Id.* at "Summary."

VI. SUMMARY AND CONCLUSION

Decisions rendered by a District Court Judge in Dearborn and a Circuit Court Judge in Midland asserted, whether as holding or dicta, that Michigan's Medical Marihuana Act is unconstitutional under the Supremacy Clause, and preempted by the Federal Controlled Substances Act.[297] Neither decision considered whether the constitutional doctrine of dual sovereignty had any bearing on the question before the courts.[298] Neither decision recognized or applied the analytical framework established by the Supreme Court to assure that the potentially conflicting doctrines of supremacy and dual sovereignty were acknowledged, respected, and reconciled.[299] When the judges in *Van Wert/Finney* and *Brandon* did not recognize or apply this Supreme Court mandated approach, their decisions were doomed to jurisprudential failure.[300]

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297. People v. Finney, No. 09-4081-FH-L (Midland Cir. Ct. June 8, 2011) (consolidated opinion and order regarding medical marijuana); City of Dearborn v. Brandon, No. 10C0214 (D. Ct. 19th Jud. D. Ct. Mar. 7, 2011).

298. *See Finney*, No. 09-4081-FH-L, at *5; *Brandon*, No. 10C0214, at 6.

299. *See* Rice v. Santa Fe Elevator Corp., 331 U. S. 218 (1947); Pennsylvania v. Nelson, 350 U.S. 497 (1956). As this Article was in final production edits, we became aware of an article which the CRS issued to Congress on March 6, 2012 (after this article was first submitted to the Law Review). TODD GARVEY, CONG. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS (2012). In spite of the article's title, the article nowhere mentions *Lanza*, *Abbate*, *Nelson*, *Bartkus* or *Heath*. The term "dual sovereignty" does not appear in the article. In general, the article's analysis is limited to civil cases. Nevertheless, the article does note in its conclusion: "Although state laws that merely exempt qualified users of medical marijuana from state prosecution have consistently survived preemption challenges . . . ."

300. This conclusion is powerfully supported by *Ter Beek v. City of Wyoming*, decided by the Michigan Court of Appeals in a published decision on July 31, 2012, while this article was in the process of final production edits. *Ter Beek v. City of Wyoming*, No. 306240 (Mich. Ct. App. July 31, 2012). Writing for a unanimous 3 judge panel, Judge Hoekstra noted that Mr. Ter Beek is a qualified medical marijuana (the court's spelling of the word) patient, who grows his own marijuana, and who has not been charged with a criminal offense related thereto. *Ter Beek*, at 1-2. In 2010, the City of Wyoming amended its Zoning Ordinance to prohibit growing of medical marihuana. *Id.* Mr. Ter Beek filed a declaratory action in Kent County Circuit Court, which was denied late in 2011. *Id.* The court of appeals reversed. *Ter Beek*, at 1. It made two essential findings. First, under the Michigan state doctrine of pre-emption—not discussed in this article—the MMMA preempts the City of Wyoming Ordinance, because it is inconsistent with the state law. *Ter Beek*, at 2-5. Second, the court found that: a) applicable federal jurisprudence recognizes that a state's historic police powers are presumed not to be preempted by federal law; and b) the federal government may not command enforcement by the states of the CSA. *Ter* Beek, at 5-8. As this article "goes to press," it seems reasonable to

This Article conclusively demonstrates that dual sovereignty is the correct analytical framework to consider whether Michigan's electorate had the constitutional capacity to enact the MMMA via initiative. Patently, Michigan has the authority to enact the MMMA, and enforce it within Michigan's state courts.

Whether *Van Wert/Finney* or *Brandon* is appealed or reconsidered at the trial court level, any Michigan case decided on a similar basis at the trial court level should not withstand appellate scrutiny, and should be reversed.

APPENDICES

These Appendices consists of relevant portions of the Finney *and* Van Wert *opinion. People v. Finney, No. 09-4081-FH-L (Midland Cir. Ct. June 8, 2011) (Consolidated opinion and order regarding medical marihuana).*

Note: These appendices are left in the original format.

I. RELEVANT PORTION OF THE *FINNEY* OPINION

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States...shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any states to the Contrary notwithstanding."[65] Consistent with that command, where a state law conflicts with or frustrates a federal law, the former must yield.[66] The United States Supreme Court has explained that state law is preempted under the Supremacy Clause in three circumstances:[67]

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one. Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively...Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found

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conclude that the City of Wyoming will seek leave to appeal in the Michigan Supreme Court.

65. U.S. Const., Article VI, cl. 2.

66. *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 663 (1993); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

67. *English v. General Elec. Co.*, 496 U.S. 72, 78 (1990).

> pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[68]

The CSA contains no preemptive language, nor does it reflect a congressional intent to occupy the entire field of controlled substances. Rather, it is the last basis for preemption that applies in this case. For the reasons articulated below, this Court concludes that the MMA conflicts with the CSA, thereby rendering it "without effect."[69]

Enacted in 1970, the CSA repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in controlled substances.[70] The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.[71] To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance classified in any of the Act's five schedules.[72] Each schedule is associated with a distinct set of controls regarding the manufacture, distribution and use of the substances listed therein.[73] Schedule I contains the most severe restrictions on access and use, and Schedule V the least.[74]

> Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. [21 U.S.C.] § 812(b)(1). These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also a have high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. [21 U.S.C.] § 812(b).[75]

Consistent with Congress' determination that the controlled substances listed in Schedule II through V have currently accepted medical uses, the CSA authorizes physicians to prescribe those substances for medical use, provided that they do so within the bounds of

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68. *Id.* (Internal citations omitted).

69. *Maryland*, 451 U.S. at 746.

70. *Gonzales v Raich*, 545 U.S. at 12-13 (2005).

71. *Id.*

72. *Id* at 13; 21 U.S.C. §§ 841(a)(1), 844(a). *See also Gonzales v. Oregon*, 546 U.S. 243, 250 (2006).

73. *Id.* at 13-14.

74. *Gonzales v. Oregon*, 546 U.S. 243, 250 (2006).

75. *Id.* at 14.

professional practice.[76, 77] By contrast, because Schedule I controlled substances lack any accepted medical use, federal law prohibits *all* use of those drugs with one express exception, and it is available only for Government approved research projects.[78]

In enacting the CSA, Congress classified marijuana as a Schedule I drug.[79] This classification reflects a determination that marijuana has a high potential for abuse and lacks any accepted medical benefits worthy of an exception.[80] As noted above, while some other controlled substances can be dispensed and prescribed for medical use, the same is not true for marijuana.[81] In *U.S. v Oakland Cannabis Buyers' Co-op, supra,* a group of patients seeking access to marijuana for medicinal purposes argued that because necessity was a defense at common law, medical necessity should be read into the CSA, notwithstanding the absolute language of Section 841(a).[82] The Supreme Court disagreed, holding that "[i]t is clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception."[83] A medical necessity exception would, therefore, be at odds with the terms of the CSA.[84] By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense.[85] And despite "considerable efforts" to reclassify marijuana, it remains a Schedule I drug.[86] Marijuana has a "high potential for abuse, lack[s] any accepted medical use, and [there is an] absence of any accepted safety for use in medically supervised treatment."[87]

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76. *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or. 159, 173 (2010); *United States v. Moore*, 423 U.S. 122, 142-143 (1975).

77. As the Oregon Supreme Court articulated in *Emerald*:

> Two subsections of the [CSA] accomplish that result. Section 823(f) directs the Attorney General to register physicians and other practitioners to dispense controlled substances listed in Schedule II through V, 21 U.S.C. § 823(f). Section 822(b) authorizes persons registered with the Attorney General to dispense controlled substances "to the extent authorized by their registration and in conformity with the other provisions of this subchapter." 21 U.S.C. § 822(b).

78. *Raich*, 545 U.S. at 14; *see* 21 U.S.C. § 823(f) (recognizing exception).

79. *Id;* 21 U.S.C. § 812(c).

80. *Raich*, 545 U.S. at 14.

81. *Oakland Cannabis Buyers' Co-op*, 532 U.S. at 491 (2001).

82. *Id.* at 490.

83. *Id.*

84. *Id.* at 491.

85. *Raich*, 545 U.S. at 14.

86. *Id.* at 15 and n. 23 (summarizing considerable, and ultimately unsuccessful, efforts to reschedule marijuana).

87. *Id.* at 14.

With these congressional objectives and prior decisions in mind, this Court turns to Section 903 of the CSA, which addresses the relationship between the Act and state law. That Section provides:

> No provision of this subchapter 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.[88]

Michigan is therefore free to pass laws "on the same subject matter" as the CSA provided there is no "positive conflict" between state and federal law "so that the two cannot consistently stand together." The question becomes, then, what constitutes a "positive conflict."

When faced with a comparable preemption provision, the United States Supreme Court in *Wyeth v Levine*,[89] engaged in an implied preemption analysis to determine whether a federal statute preempted state law. In *Wyeth*, the provision at issue provided that the federal statute did not preempt state law unless there was a "direct and positive" conflict between state and federal law. Guided by *Wyeth*, this Court will follow a similar course and use an implied preemption analysis. Under this analysis, state law is preempted when "it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[90]

Regarding the first prong of the analysis, Mr. Finney and Mr. Van Wert are correct in stating that it is not physically impossible to comply with both the MMA and the federal CSA. Although the two laws are logically inconsistent – state law authorizes what federal law prohibits – an individual can comply with both laws by refraining from any use of marijuana. These probationers, however, altogether ignore the second prong of the analysis, that is, whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[91] In examining the second prong of the analysis, this Court finds guidance in *Michigan Canners & Freezers Association v.*

88. 21 U.S.C. § 903.
89. 555 U.S. 555, 564-568 (2009).
90. *English*, 496 U.S. at 79. (internal citations omitted).
91. *Id.*

Agricultural Marketing and Bargaining Board,[92] in which the United States Supreme Court was called upon to determine whether certain provisions of the Michigan Agricultural Market and Bargaining Act (MAMBA) were in conflict with, and thus preempted by, the federal Agricultural Fair Practices Act (AFPA).

The AFPA was enacted to protect the rights of farmers and other producers of agricultural commodities to join cooperative associations in order to protect their marketing and bargaining position as against large agricultural producers.[93] The Act, however, also protected producers from coercion by associations of producers. The AFPA thus made it unlawful for either a processor or a producers' association to engage in practices that interfered with a producer's freedom to choose whether to bring his products to market himself or to sell them through a producers' cooperative association.[94] Like the AFPA, the MAMBA was designed to encourage collective action among producers; however, it also created a state-administered system by which producers' associations could be certified as exclusive bargaining agents for all producers of a particular commodity.[95] Under this system, once an association of producers had received accreditation from the state board, all producers of the commodity, regardless of whether they were members of the association or not, had to pay a service fee to the association and had to adhere to the terms of the contracts that the association negotiated with processors.[96]

Plaintiff, an independent Michigan asparagus producer, sued the accredited asparagus association claiming that the service-fee and mandatory-representation provisions of the MAMBA frustrated the purpose and objective of the AFPA by imposing on unwilling producers an exclusive bargaining arrangement with associations.[97] In its view, although Congress' chief interest in enacting the AFPA was to facilitate the growth of agricultural cooperative associations, an equally important congressional objective was to preserve the free choice of producers to join associations or to remain independent.[98]

The United States Supreme Court agreed. It first reasoned that because the Michigan act is cast in permissive rather than mandatory terms – an association may, but need not, act as exclusive bargaining representative – this is not a case in which it is impossible for an

92. 467 U.S. 461 (1984).
93. *Id.* at 461.
94. *Id.* at 464.
95. *Id.* at 466.
96. *Id.* at 468-468.
97. *Id.* at 470.
98. *Id.*

individual to comply with both state and federal law.[99] The Supreme Court went on to conclude, however, that "because the Michigan Act authorizes producers' associations to engage in conduct that the federal Act forbids, it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[100]

Although factually different, this Court finds the Supreme Court's opinion in *Michigan Canners* to be instructive in the instant case as the preemption issue is the same: state law authorizes what federal law prohibits. In the case of the CSA, the statute reflects a determination that marijuana has a high potential for abuse and lacks any accepted medical benefits worthy of an exception. It is for this reason that Congress categorized marijuana as a Schedule I drug, and the Supreme Court has refused to recognize a "medical necessity" exception that permits the manufacture, distribution or possession of marijuana for medical treatment.[101] In fact, beyond simply not conferring a right to cultivation of medical marijuana, the CSA criminalizes its possession and cultivation under essentially all circumstances. The MMA, on the other hand, permits the use of medical marijuana by registered patients with debilitating medical conditions. Whether this is good or bad public policy for Michigan is not for this Court to decide. This Court, however, like every state court throughout the United States, is bound by the Supremacy Clause to be guided by the paramount Constitution and laws of the United States.[102] Thus, even assuming that Mr. Van Wert and Mr. Finney had proven that they are seriously ill individuals using marijuana for its palliative effects, this Court would nonetheless conclude that the MMA "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and therefore must be declared to be "without effect."[103] [104]

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For the foregoing reasons, Mr. Finney and Mr. Van Wert's motions to modify the conditions of their probation are denied. Further, Mr. Finney is found to be in violation of the terms of his probation. Mr. Finney's case will therefore be referred to the MDOC for the purpose of

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99. *Id.* at 478, n. 21.

100. *Id.* at 478, citing *Hines*, 312 U.S. at 67.

101. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. at 494.

102. *Id*; *Burns v. Olde Discount Corp.*, 212 Mich. App. 576 (1995); *Kauffman v. The Chicago Corp.*, 187 Mich. App. 284 (1991).

103. *English*, 496 U.S. at 79. (internal citations omitted).

104. *Maryland*, 451 U.S. at 746.

preparing an updated presentence investigation report. Mr. Finney shall further appear before this Court to be resentenced on July 28, 2011.

IT IS SO ORDERED.

Date: June 8, 2011
/s/
Jonathan E. Lauderbach
Circuit Judge

II. RELEVANT PORTION OF THE *BRANDON* OPINION

By way of further pre-trial motion Brandon seeks dismissal of all charges pursuant to the Michigan Medical Marihuana Act ["the MMMA"] being MCL §333.26421 *et seq.* Specifically, defendant asserts the affirmative defense provided under Sec. §8 of the MMMA arguing that on May 28, 2010, he was seen by a physician and received a certification entitling him to registration as a patient under the MMMA.

* * *

In response to the defendant's motion the City of Dearborn ["the City"] opines that the affirmative defense under Sec. §8 of the MMMA is only available to a person who is a registered qualified patient at the time of their arrest, that Brandon does not in any event otherwise meet the requirements of the affirmative defense, that he was committing an offense for which the affirmative defense does not apply [operating a motor vehicle while under the influence of marijuana], and that the entire MMMA is preempted by Federal Law and is, consequently, null and void.

Respecting the latter argument, the court observes as a preliminary matter that state political subdivisions do have standing to invoke the Supremacy Clause when challenging state regulations that conflict with federal law. As a result, this court is compelled to then acknowledge and adopt the following findings of fact and conclusions of law as dispositive of all issues presented:

(1) *First*, the MMMA creates a statutory scheme for the regulation of marihuana as medicine under state law by: (1) providing therein that "the medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act"; (2) creating therein statutory rules for qualification and registration of persons with the Department of Health [the "Department"] as patients and caregivers and the issuance of identification cards to those persons by the Department; (3) establishing the quantity of marihuana that a patient or caregiver may possess under the Act; (4) requiring the promulgation and

administration of rules and imposition of fees by the Department of Health; (5) establishing procedural and substantive protections under both civil and criminal law for the medical use of marijuana that extend to patients, caregivers and physicians; and (6) providing for confidentiality of registration records and criminal penalties for divulging any such confidential information.

(2) *Second*, the Constitution of the United States "and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Constitution, Art. VI, Sec. 2 [the "Supremacy Clause"]

(3) *Third*, the Commerce Clause of the United States Constitution empowers Congress to, *inter alia*, regulate commerce among the states and to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Constitution, Art. I, Sec.8.

(4) *Forth*, the Controlled Substances Act ("the CSA") was duly enacted by and pursuant to the lawful authority granted to Congress under the Commerce Clause of the Constitution and extends to regulation of the *intra*state manufacture, distribution and possession of marijuana. *Raich v. Gonzalez*, 545 U.S. 1, 22, (2005).

(5) *Fifth*, the CSA establishes a comprehensive regulatory scheme pursuant to which drugs listed under Schedule I are deemed by Congress to have a high potential for abuse, a lack of any accepted medical used, and an absence of any accepted safety standards for use in medically supervised treatment. *Id.* at p.14. All drugs listed in Schedule I are, therefore contraband *per se*. [see: *Id.* at 2621; USC §844]

(6) *Sixth*, upon enactment of the CSA in 1970 Congress itself listed marijuana on Schedule I and "[b]y classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study." [*Id.* at p.14].

(7) *Seventh*, while Congress has provided for the periodic updating of the controlled substance schedules under the terms of the CSA, no such action has occurred with respect to the classification of marijuana. Federal trial and appellate courts have uniformly upheld the right of Congress to regulate narcotics and they have universally and unwaveringly rejected attempts to challenge the classification of marijuana, on Schedule I.

This court finds that in consequence of the lawful designation of marijuana as a Schedule I narcotic under the Controlled Substances Act the MMMA is rendered unconstitutional and void in its entirety by operation of the Supremacy Clause of the United States Constitution. Whereas this finding is dispositive, the court declines to rule on the remaining issues presented by the parties.

Federal pre-emption occurs in either of two ways – by the expressly stated intention of Congress to preempt state action by exclusively occupying an entire field of regulation, or where State action constitutes an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Jones v. Rath Packing Co.*, 430 U..S. 519; 97 S. Ct. 1305; 51 L.Ed. 2d 604; (1977):

> "The first inquiry is whether Congress, pursuant to its power to regulate commerce, U. S. Const., Art 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, see, *e.g.*, U.S. Const. Art I § 10; *Patapsco Guano Co. v. North Carolina,* 171 U.S. 345, 358 (1898), "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This assumption provides assurance that "the federal-state balance," *United States v. Bass*, 404 U.S. 336, 346 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has "unmistakably... ordained," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp., supra*, at 230.
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> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the

> accomplishment and execution of the full purposes and objectives of Congress." *Hines v Davidowitz*, 312 U.S. 52, 67 (1941). Accord, *de Canas v. Bica*, 424 U.S. 351, 363 (1976); *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Florida Lima & Avocado Growers, Inc. v. Paul, supra*, at 141; *id.*, at 165 (WHITE, J., dissenting). This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. See *De Canas v. Bica, supra*, at 363-365; *Swift & Co. v. Wickham*, 230 F. Supp. 398, 408 (SDNY 1964), appeal dismissed, 382 U.S. 111 (1965), aff'd on further consideration, 364 F. 2d 241 (CA2 1966), cert. denied, 385 U.S. 1036 (1967)."

In this court's view, the MMMA cannot withstand the City's constitutional challenge under either test. In the first instance, by the express declaration of its intent in banning the manufacture, distribution and possession of all Schedule I narcotics Congress has declared them to be contraband *per se* and has left no room for States to regulate those substances – period.

Secondly, by taking *affirmative legislative action* to implement regulations that "allow" and protect the manufacture, distribution and use of medical marijuana "in accordance with" state law it is simply beyond credulity to believe the MMMA has any practical effect other than to officially sanction, encourage and facilitate the manufacture, distribution and possession of a Schedule I narcotic in direct violation of federal law. In so doing, it is in direct conflict with and acts as an obstacle to Congressional efforts to ban those substances from interstate commerce. As noted above, the Supreme Court's decision in *Raich, supra*, settles the *inter-* vs- *intra* state issue in favor of federal regulation and, by application, federal pre-emption regarding all Schedule I drugs – including marijuana. Particularly noteworthy in this "obstacle" analysis is the Supreme Court's observation regarding the effect of an increasing number of state medical marijuana laws: "Congress could have rationally concluded that the aggregate impact on the national market of all transactions exempted from supervision is unquestionably substantial" *Raich, supra* at p.32. In a similar vein, a further specific example of the effect of state medical marijuana laws running contrary to Congressional purpose is the MMMA's own provision granting protections to "visiting qualifying patient[s]" holding a "registry identification card, or its equivalent, that is issued under the laws of another state, district, territory, commonwealth, or insular possession of the United State." As the MMMA makes no provision for supplying a "visiting qualifying patient" with marijuana manufactured in Michigan, the Act has the unmistakable practical effect of inviting such visitors to transport their

own supply of the drug across state lines and through interstate commerce.

It is true that "states are not required to enforce federal law or to prosecute people for engaging in activities prohibited by federal law." Moreover, the State of Michigan and its political subdivisions could simply decide not to proscribe, or not to prosecute anyone for the manufacture, distribution or possession of any federally controlled substance under state or local law – whether for medical, or even, for that matter, purely "recreational" use. From the forgoing constitutional authority, however, it is equally evident that the state and its political subdivisions cannot constitutionally attempt to create a government-approved regulatory scheme that "allows" the manufacture, distribution and possession of controlled substances which Congress has lawfully declared to be contraband *per se* under Schedule I of the CSA. Any such effort can only be viewed as an affirmative act that is irreconcilable with and creates obstacles to the accomplishment and execution of the full purposes and objectives of Congress. Alternatively stated, where compliance with both the Federal regulation prohibiting the manufacture, distribution and possession of Schedule I drugs and the MMMA is an impossibility, the state's regulation must fail:

> "Of course, a state statute is void to the extent that it actually conflicts with a valid federal statute; and
>
> "[a] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility...,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v Davidowitz*, 312 U.S. 52, 67 (1941); *Jones v. Rath Packing Co.* [430 U.S. 519], 526, 540-541 [(1977)]. Accord, *De Canas v. Bica*, 424 U.S. 351, 363 (1976)." *Ray v. Atlantic Richfield Co.* 435 U.S. 151, 158 (1978)". *Edgar v. Mie Corp.*, 457 U.S. 624,631 (1982).

The MMMA's findings and declarations that "Modern medical research, including as found by the National Academy of Sciences Institute of Medicine in a March 1999 report, has discovered beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions" may very well be true, but they must yield to the lawful exercise of pre-emptive Congressional authority.

This court concludes with the observation made by the majority in *Raich*:

> "We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even 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 29

NOW, THEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that the MMMA is void and that Defendant's motion to dismiss brought pursuant to §8 thereof be, and the same is hereby DENIED.

/s/
Hon. Mark W. Somers