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**International Effect: The Ongoing Tension with Medical Marijuana Legalization**

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**Abstract**

**Purpose:** In the landscape of the United States, an escalating number of states are ushering in a new era by enacting legislation that affords individuals the right to employ cannabis for medical purposes. However, this commendable stride toward medical autonomy is accompanied by an escalating tension, a discordant symphony of conflict between state and federal jurisdictions. This study embarks on a journey through the labyrinth of legislative intricacies, seeking to unravel the roots of this tension and proffering insights into potential resolutions. At the heart of the matter lies the dichotomy between state and federal legislation. While states pave the way for medical cannabis use, the federal stance casts a looming shadow of ambiguity and discord. The conflict, multifaceted and dynamic, beckons for a nuanced exploration.

**Methodology:** The study adopted desktop literature research design.

**Findings:** By delving into the intricacies of the legislative measures themselves, this research identifies mitigating factors that can potentially alleviate the tension between conflicting jurisdictions. Mitigation, however, requires more than a superficial understanding of legislative nuances. It demands a comprehensive acknowledgment of the extensive legal and medical data interwoven with the fabric of cannabis use for medical purposes.

**Unique Contribution to Theory, Practice and Policy:** The study advocates for a holistic approach, urging policymakers to draw upon a repository of knowledge that transcends mere legal frameworks. In doing so, it seeks to bridge the gap between state and federal perspectives, fostering a more informed and cooperative discourse. Navigating the path toward resolution involves a delicate balance. The sculpting of legislative measures should be informed by a deep appreciation of the medical intricacies associated with cannabis use. The study underscores the significance of considering medical data as an essential compass in the journey toward harmonizing state and federal regulations. By acknowledging the complex interplay between legality and medical efficacy, this research contributes to the ongoing dialogue surrounding cannabis legislation. In conclusion, this study illuminates the intricate dance between state and federal jurisdictions in the realm of medical cannabis use. Through a meticulous examination of legislative intricacies and a robust consideration of legal and medical data, it endeavors to pave the way for a more harmonious coexistence between state and federal perspectives.

**Keywords:** *International Law, Legal Conflicts, Marijuana*

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## INTRODUCTION

In the ongoing litigation around medical marijuana, the primary issues that tend to arise revolve around the inconsistency of laws. Such inconsistencies are seen from a State and Federal level, and even more so when looking to international regions and analyzing the present application of marijuana laws. Currently, in the United States of America, 29 States have laws legalizing the medical application of marijuana.<sup>1</sup> Of the 29 States that have recognized the medicinal application of marijuana, 12 States reside along the Canadian border. Among those States is Washington, Montana, North Dakota, Minnesota, Michigan, Ohio, Pennsylvania, New York, Vermont, New Hampshire, Vermont and Maine.<sup>2</sup> Traditionally, an act of Congress would govern and supersede any applicable State interest in the event that a conflict may arise. The power stems from the Supremacy Clause of the United States Constitution, and has steered many States away from legalization, up until President Obama's tenure. The Obama Administration however, took a States rights approach allowing for States to determine the applicability of the appropriate laws on the matter.<sup>3</sup> With the Federal government granting States the authority to act in their own best interest, medical marijuana legislation became enacted among an increasing majority of the States.

Washington State applies legislation allowing for the medical use of marijuana by providing patients with the affirmative defense acknowledged in common law as "medical necessity".<sup>4</sup> The statute applied within Washington State demonstrates the appropriate beneficial effects of medical marijuana when applied to curing and/or treating the following diseases: Nausea, vomiting, and cachexia associated with cancer, HIV-positive status, AIDS, hepatitis C, anorexia, and their treatments; Severe muscle spasms associated with multiple sclerosis, epilepsy, and other seizure and spasticity disorders; Acute or chronic glaucoma; Crohn's disease; and Some forms of intractable pain.<sup>5</sup> The appropriate application and medical use of marijuana does vary substantially among each State, however, the medical necessity defense is a common component in any legislation that allows for the use of marijuana in a medicinal setting.

Canada bears multiple similarities with active legislation among medicinal states, as the initial passage of medical marijuana laws was seen in 1996.<sup>6</sup> The primary

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<sup>1</sup> Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits, ProCon.org, <https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated June 26th, 2017).

<sup>2</sup> *Id.* See also National Comity of State Legislatures: Medical Marijuana Laws. <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last updated September 14th, 2017)

<sup>3</sup> Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1428 (2009)

<sup>4</sup> Wash. Rev. Code Ann. § 69.51A.040 Compliance with Chapter

<sup>5</sup> Wash. Rev. Code Ann. § 69.51A.005 Purpose and Intent

<sup>6</sup> Controlled Drugs and Substances Act (S.C. 1996, c. 19)

differentiating factor between Canada and the United States would be the Federal recognition and enactment of legislation allowing for individuals to use marijuana for medical purposes. The Canadian government allows for individuals to possess marijuana given the appropriate prescription from a caregiver, hospital, or primary physician.<sup>7</sup> Although Canada does allow for patients within their jurisdiction to medicate using marijuana, individuals crossing the borders from States where medical marijuana is legal into Canada are still subject to scrutiny. Commonly, this is seen by confiscation of the patient's medical marijuana, and at times the patient will be denied entry to Canada.<sup>8</sup> The authority behind patients having their medicine seized at the border of Canada is the United States Federal law. More specifically, the United States Federal government controls all land, air, and sea borders within its jurisdiction. In turn, the Border Patrol agents act in accordance with United States Federal laws, rather than applying the laws of the State or Canada.

The current Federal laws applied to marijuana recognize that there is no medical application for marijuana. Rather, the laws demonstrate that marijuana is categorized as a Schedule I illicit substance.<sup>9</sup> Schedule I substances are determined to contain three requisites, and those are as follows: "the drug or other substance has a high potential for abuse; the drug or other substance has no currently accepted medical use in treatment in the United States; there is a lack of accepted safety for use of the drug or other substance under medical supervision."<sup>10</sup> The adequate authority in determining the appropriate class of a drug rests with the incumbent Attorney General of the United States. The Attorney General has guidelines that are statutorily granted when determining what class a drug should fall within; however, the guidelines may be utilized at the Attorney General's own discretion.<sup>11</sup>

The intermittent legal issue that arises is demonstrated when turning to patents obtained by the Federal government for the medical application of marijuana. Notably, in 2003 the United States government obtained a patent for Cannabinoids found within marijuana, to which an excess of 150 medical doctrines were cited at the behest of the government the medical benefits rendered with the substance.<sup>12</sup> This patent falls subject to numerous others obtained on behalf of the United States government, especially between the early 1990's to present day. With ongoing research, and acceptance of the medicinal application of the substance, discoveries of new benefits are unveiled at a faster pace than noted historically. Patent 6630507 is a patent obtained by the acting assignee, The United States of America as, represented by the Department of Health, and Human Services, Washington, DC. The Patent acts as the overarching

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<sup>7</sup> *Id. see also* Access to Cannabis for Medical Purposes Regulations. P.C. 2016-743.

<sup>8</sup> *Travel Advisory for Medical Marijuana Prescription Holders*, U.S. Customs & Border Protection.  
<https://www.cbp.gov/newsroom/local-media-release/travel-advisory-medical-marijuana-prescription-holders> (last updated January 24th, 2017).

<sup>9</sup> 21 U.S.C.A. § 812 Schedules of Controlled Substances (West).

<sup>10</sup> *Id.*

<sup>11</sup> 21 U.S.C.A. § 811 Authority and criteria for classification of substances (West).

<sup>12</sup> *Cannabinoids as Antioxidants & Neuroprotectants*, US PAT 6630507

authority in depicting the inconsistencies with the Federal classification of marijuana, as it was obtained for the medical application of the drug. The patent provides for numerous cross-references among other active patents and medical doctrines, proving the application of marijuana's medical incentives.<sup>13</sup>

Part II discussed the current medical marijuana laws as seen within the State of Washington. By exploring these laws, the consistencies will be made readily apparent, demonstrating the underlying foundation seen among all of the similar statutes. Part III will analyze the current laws present in the United States, The Supremacy Clause and the States right to protect the health and welfare of its citizens. Part IV assessed the current United State Federal policy that impacts the ongoing developments within the medical marijuana field. Further, this section will discuss the patent rights reserved by the United States Federal Government in relation to medical marijuana. Part V addressed the conflict of laws between United States and Canada, along with the governing laws when United States Citizens enter Canada. Lastly, Part VI provides for an overview on the primary conflicts demonstrated and potential outcomes as time passes.

#### **A. Thesis**

While an increasing majority of states within the United States pass legislation that grants an individual's ability to utilize cannabis for medical purposes, the tension between State and Federal legislation grows as numerous conflicts arise. Such conflicts can be overcome when looking to mitigating factors involved with the sculpting of the legislative measures and acknowledging the extensive legal and medical data affiliated with the matter.

## **II. Medical Marijuana States**

As of September 15<sup>th</sup>, 2017, 29 of the 50 States within the United States of America recognize the medicinal application of marijuana.<sup>14</sup> Of the 29 States that recognize the medicinal application of marijuana, 12 reside along the United States border with Canada. In turn leaving only one State on the border that does not recognize medical marijuana. The foregoing section will look to the legislative intent with the passage of medical marijuana laws, the means in which the laws were implemented, and the medical applications of marijuana recognized within one of these 12 bordering States. The State specifically that will be assessed is Washington, as their statute maintains numerous commonalities to other medical marijuana states.

#### **A. Washington State**

In 1998 Washington State was among the first states to allow for the medical application of marijuana. The ballot measure that passed is initiative 692, which passed

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<sup>13</sup> *Id.*

<sup>14</sup> *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, ProCon.org, <https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated September 15<sup>th</sup>, 2017).

with a 58.97% vote in favor of the measure.<sup>15</sup> Initially, the ballot measure allowed for patients who face certain terminal medical conditions and debilitating measures to gain access to the substance, pending medical approval and prescription. The scope of the law has since been revised several times to include for an array of medical purposes as research on the medical effects was furthered. The current legislative purpose and intent furthered the reach of marijuana's medical application in the State of Washington by providing the following.

“There is medical evidence that some patients with terminal or debilitating medical conditions may, under their health care professional's care, benefit from the medical use of marijuana. Some of the conditions for which marijuana appears to be beneficial include, but are not limited to:

- (i) Nausea, vomiting, and cachexia associated with cancer, HIV-positive status, AIDS, hepatitis C, anorexia, and their treatments;
- (ii) Severe muscle spasms associated with multiple sclerosis, epilepsy, and other seizure and spasticity disorders;
- (iii) Acute or chronic glaucoma;
- (iv) Crohn's disease; and
- (v) Some forms of intractable pain.”<sup>16</sup>

The passage of this legislative measure was enacted in July 24<sup>th</sup>, 2015, and encompassed a far larger spread of diseases in which patients may turn to cannabis for medical benefits. The extensive list of applicable medical uses changed due to the overwhelming amount of research on the effects of marijuana that had occurred between the early 2000's to present. The laws in Washington allow for a common law approach by the implementation of a medical necessity defense, to all individuals who are qualifying patients. Medical necessity grants an affirmative defense to a defendant in the event that they are charged under older marijuana laws.

Individuals who fall within the confines of the current medical marijuana laws, and are eligible patients may use the defense of medical necessity.<sup>17</sup> Medical necessity is defined within Washington as a requested certified inpatient service that is reasonably calculated to “(a) Diagnose, arrest, or alleviate a chemical dependency; or (b) prevent the progression of substance use disorders that endanger life or cause suffering and pain, or result in illness or infirmity or threaten to cause or aggravate a handicap, or cause physical deformity or malfunction, and there is no adequate less restrictive alternative available.”<sup>18</sup> The affirmative defense is not designed to counteract the federal classifications of substances under Federal laws, as implemented by the Food and Drug Administration. Rather, the passage of the medical marijuana laws remained

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<sup>15</sup> *Washington Medical Marijuana, Initiative 692 (1998)*,  
[https://ballotpedia.org/Washington\\_Medical\\_Marijuana,\\_Initiative\\_692\\_\(1998\)](https://ballotpedia.org/Washington_Medical_Marijuana,_Initiative_692_(1998)). (Last updated September 3<sup>rd</sup>, 2013)

<sup>16</sup> Wash. Rev. Code Ann. § 69.51A.005 (West)

<sup>17</sup> 50 A.L.R.6th 353 (Originally published in 2009)

<sup>18</sup> Wash. Rev. Code Ann. § 70.96A.020 (West)

silent on the Federal classification of marijuana while providing for an affirmative defense that may be implemented within State courts.<sup>19</sup>

### **B. Common Law Affirmative Defense of Medical Necessity**

The defense of medical necessity derives from Common Law, and has varied based on each jurisdiction's adoption of it, however the primary principles remain the same. Among the States that have adopted the necessity defense, a defendant must show: (1) that he committed the charged offense to prevent a significant evil; (2) that there was no adequate, reasonably available alternative to committing the offense; and (3) that the harm caused by the charged offense was not disproportionate to the harm the defendant avoided by breaking the law.<sup>2021</sup>

Although there is no comprehensive definition of medical necessity, the overall definition may be extracted from multiple cases in which it has been applied, alongside some statutory guidance.<sup>22</sup> Through multiple jurisdictions, to raise a sufficient necessity defense, an individual must demonstrate that there was an undeniable infliction of harm, certain to occur, and that no alternative was readily available to avoid such harm.<sup>23</sup> The underlying principle behind necessity being that at times, deviating from the law to avoid a greater evil provides for a better overall result in society. Necessity offers much of the same legal safeguards as medical necessity, with the key differentiating factor being that the greater evil is that of a debilitating medical condition. Accordingly, the States that have adopted medical marijuana laws have applied this defense as a means of excusing the usage of marijuana in the event that an individual maintained the appropriate prerequisites.

Out of the 29 States that currently have medical marijuana laws, all of them apply the affirmative defense of medical necessity to provide their citizens with the ability to use the drug, without legal ramifications. The offense generally is dictated by the absence of an alternative means of achieving a similar outcome, when looking to the affirmative defense of necessity. The foregoing issue litigated frequently with its application to the medical marijuana industry is in the fact that for many of these ailments, alternative medications do in fact exist.<sup>24</sup> The reoccurring theme in the litigation tends to err on the side of effectiveness of the medication when turning to the states that have recognized this defense. As such, the medication yields more results when looking at those suffering from severe ailments or diseases, providing for no alternative that has shown to be nearly as effective.<sup>25</sup>

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<sup>19</sup> Wash. Rev. Code Ann. § 69.51A.005 (West)

<sup>20</sup> Alaska Stat. Ann. § 11.81.320 (West)

<sup>21</sup> Lacey v. State (2002) Alaska App., 54 P.3d 304.

<sup>22</sup> See GEORGE E. DIX & MICHAEL SHARLOT, CRIMINAL LAW 718-32 (3d ed. 1987) (discussing necessity, duress, and justification defenses).

<sup>23</sup> WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 441 (2d ed. 1986).

<sup>24</sup> Andrew J. LeVay, Note, Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense, 41 B.C. L. REV. 699, 716 n.114 (2000) (citing United States v. Randall, 104 Daily Wash. L. Rep. 2249, 2251 (D.C. Super. Ct. 1976)).

<sup>25</sup> Agurell et al., "Pharmacokinetics and Metabolism of Delta Tetrahydrocannabinol and Other Cannabinoids with Emphasis on Man" Pharmacological Reviews, 38 (1986).

In *State v. Diana*, the defendant faced charges for possession and consumption of marijuana under Washington law in 1979. Prior to the legislative recognition, the defendant raised the defense of medical necessity, citing to medical doctrines, which had demonstrated that the use of marijuana was in fact effective in treating multiple sclerosis.<sup>26</sup> The defendant had demonstrated that other alternative had incredibly detrimental side effects, which were not present with the use of marijuana. The Washington Court of Appeals held that the defendant's use of marijuana was justified as she had definitively and sufficiently established all the elements of the defense of medical necessity. The ruling was unprecedented for its time, as no legislative measures in the nation had yet passed demonstrating the medical application of marijuana. As such, the defense of medical necessity was proven effective under certain circumstances when applied to medical marijuana.

Similarly, in *Jenks v. State* two defendants were tried and found guilty of possession of marijuana. On appeal, the defendants raised the contention that marijuana was being utilized to mitigate the effects of AIDS, endured by both defendants. The defendants demonstrated that they were avoiding a greater evil than that of marijuana, by means of self-medicating, utilizing the medical components of marijuana.<sup>27</sup> The Florida Court of Appeals found that the defendants effectively and sufficiently proved the three elements necessary to provide for the defense of medical necessity. This was seen as the defendants did not intentionally inflict themselves with AIDS, physicians supported the notion that no alternative was as effective and that failure to mitigate such effects would lead to a substantially more significant harm as the defendant's lives would be placed in jeopardy.<sup>28</sup>

Accordingly, the two commonalities demonstrated within the above referenced cases is readily apparent when looking to the timeline of the cases. Both cases occurred during a time when medical marijuana laws were not yet implemented, yet on appeal, both cases demonstrated the applicability of the medical necessity defense. The elements of medical necessity are demonstrated therein and can be narrowly observed to mean that 1) the harm seen with marijuana become superseded by the evils of preventing an appropriate patient to receive the drug as treatment 2) and that there is no other appropriate alternative that may be deemed as effective. As such, with the increased implementation of medical marijuana laws among the states, the legislation allows for medical marijuana to the extent of which the affirmative defense of medical necessity may be applied.

### **I. Conflict of Laws within the United States Federal Laws and State Legislative Measures**

Congress first enacted the Controlled Substances Act (CSA) in 1970 as a means of attacking the drug epidemic in the United States.<sup>29</sup> During its enactment Congress determined that although the majority of the drugs classified by the CSA serve

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<sup>26</sup> *State v. Diana* 604 P.2d 1312 (Wash. Ct. App. 1979)

<sup>27</sup> *Jenks v. State* 582 So. 2d 676 (Fla. Dist. Ct. App. 1991).

<sup>28</sup> *Id.*

<sup>29</sup> Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at titles 18, 21 26, 31, 40, 42, 46, 48, and 49 U.S.C. (2012)).



legitimate and beneficial medical purposes, the regulations listed by the CSA provide for restrictions that are necessary to “protect and maintain the health and general welfare of the American people.”<sup>30</sup> In furtherance of this notion, the CSA adopted a classification system ranging between 5 “schedules” for each drug. Of the Schedules provided, drugs that fall subject to the classification of a Schedule V are the least restricted, while Schedule I drugs are the most restricted.<sup>31</sup> Schedule I drugs are considered to have no legitimate medical purpose and a high potential for abuse by the general public.<sup>32</sup> For purposes provided, this paper will focus on Schedule I restraints, as marijuana was then and still is classified by the CSA as a Schedule I narcotic.

When looking to the classification process, it is the task of the acting Attorney General of the United States to apply the provisions of the CSA to the controlled substances list. Further, the Attorney General reserves the ability to alter or refrain from altering the drugs listed on the scheduled lists.<sup>33</sup> From the enactment of the CSA and the initial classification of marijuana, no measures have been successful however, in the rescheduling of marijuana. The current standard applied continues to suggest that there is no legitimate medicinal value and that there is a high potential for abuse.

The overarching authority utilized by the Federal government when applying these restrictions rests within the commerce clause. In *Gonzales v. Raich* the case elaborated on the powers vested within Congress under the commerce clause. In 1996 California became the first state in the nation to pass a legislative measure allowing for the medical use of marijuana; The Compassionate Use Act.<sup>34</sup> In 2002 Federal agents raided the home of an ill women, who was acting under the direction of her authorized physician when cultivating marijuana plants.<sup>35</sup> Although her actions were deemed compliant with the local laws of California, Gonzales was charged under the jurisdiction of the Federal government, under the violation of Federal regulations.

The respondents in the case alleged that Congress had exceeded their authority when seizing the medicine of the terminally ill women, Raich. The respondents further alleged that the seizure of marijuana and prosecution of Raich provided for an infringement on the state sovereignty of California. The Supreme Court held that Congress had the appropriate authority to conduct the seizure and to prosecute the Defendant. Consequently, the Court established that there was a rational basis in believing that the manufacturing and cultivation of marijuana would have a substantial effect on interstate commerce as the legislation passed in California would provide for an effect on the prices seen within the black market nationwide.<sup>36</sup> Since the CSA was enacted under the authority of the commerce clause, the primary question posed to the Court was whether the application of the CSA was rationally related to the cause it wished to eliminate. In a 6-3 decision with Scalia concurring the Supreme Court

<sup>30</sup> 21 U.S.C. §§ 801(1)–(2)

<sup>31</sup> 21 U.S.C. § 812(c)(10)

<sup>32</sup> *Id.*; see also 21 U.S.C. § 812(c)(12)

<sup>33</sup> Todd Garvey & Brian T. Yeh, Cong. Research Serv., R43034, State Legalization of Recreational Marijuana: Selected Legal Issues 7 (2014) (citing 21 U.S.C. § 811(a))

<sup>34</sup> Cal. Health & Safety Code § 11362.5 (West)

<sup>35</sup> *Gonzales v. Raich*, 545 U.S. 1, 6–7 (2005)

<sup>36</sup> *Id.* at 7 – 8, 15.

established that there was in fact a substantial effect on interstate commerce, and that the regulations provided within the CSA were rationally related to addressing the effect therein.<sup>37</sup> Accordingly, the Federal laws continue to enforce the regulations provided for within the CSA, denying any medical application of marijuana.

## **II. Conflict of Laws within the United States Federal System**

### **A. The Felonious Implications of Marijuana**

In accordance with the regulations established by both the CSA and the Attorney General of the United States, Federal statutes provide that “it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”<sup>38</sup> A violation of such a decree amounts to a felony with a presumptive prison sentence of 5 years, and a maximum sentence of 20 years.<sup>39</sup> It should be noted that the felonious implications of marijuana are restricted to cultivation, manufacturing, distributing and subsequent possession offenses.

A recently established ruling focuses on the Federal implications vested within the statutes dictating marijuana offenses. In *United States v. Oakland Cannabis Buyer Cooperative*, the defendants were residents of California, a State where medical marijuana is recognized.<sup>40</sup> Oakland Cannabis Buyer Cooperatives were, while in compliance with local and State laws, attempting to cultivate and distribute marijuana to qualifying patients.<sup>41</sup> The defendants, although compliant with State laws and regulation, faced charges in Federal Court, under the jurisdiction of the Federal government. The government filed a motion in limine to suppress any defense of medicinal necessity, as the law presently being applied was that of Federal, not the State of California. The motion in limine was granted, resulting in the appeal of the Defendants. The reasoning for granting the motion in limine was the fact that the Supremacy Clause of the Constitution provides that when a conflict arises between State and Federal law, Federal laws will be supreme.<sup>42</sup> Here, since the case was in a Federal Court, applying Federal laws, the Court granted the motion in limine. In turn the defendant was unable to raise the affirmative defense of medical necessity.

The Supreme Court held that no medical necessity defense exists for the illegal distribution of marijuana because the Controlled Substances Act “reflects a determination that marijuana has no medical benefits worthy of an exception.” Equally evident, despite extensive litigation over many years in numerous cases nationwide, no final court ruling has ever held that marijuana should be removed from Schedule I or that federal law outlawing marijuana even for alleged medical purposes could not be enforced.”<sup>43</sup> Justice Thomas delivered the majority opinion when stating that “the

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<sup>37</sup> *Id.* at 27 - 42.

<sup>38</sup> 21 U.S.C.A. § 841 (West)

<sup>39</sup> *Id.*

<sup>40</sup> *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001)

<sup>41</sup> *Id.* at 483

<sup>42</sup> *Id.*; see also U.S. Const. art. I, §8, cl. 5. and art. I, §10, cl. 1

<sup>43</sup> *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001).

Controlled Substances Act <sup>44</sup> 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 there is not.” This rendering provided for a view in contrast to that applied by 29 states within the United States, as it determined that the defense of medical necessity can only be applied under circumstances in which the CSA determines that the medicine can appropriately aid the patients. In light of this ruling, the Supreme Court once more concluded in accordance with the Federal government and the acting Attorney General in establishing that there is no medical application to marijuana.

### **B. United States Patents Pertaining to Medicinal Applications of Marijuana**

The view of the United States Federal government in relation to marijuana is increasingly apparent when turning to the previously discussed implications under Federal law. The implications conclusively imply that there are zero medical applications to the substance, and that marijuana has a high tendency for abuse. When faced with applications of marijuana that are deemed fit by 29 states and the nation of Canada, the United States dismisses these mitigating circumstances with haste, as seen with the prior cases reviewed. In 1999 however, the Federal government filed for a patent to be reserved on behalf of the United States government, in which another conflict arises. Patent 6630507 is one of multiple patents reserved currently by the Federal government, in which the primary focus is to reserve medical applications of Cannabinoids, otherwise known as marijuana.<sup>45</sup>

When arguing to obtain patent 6630507, the Federal Government went before a United States District Court stating explicitly that cannabinoids serve multiple beneficial tendencies. Some of the instances referenced by the Federal Government include aiding nausea, pain relief, sleep deprivation, appetite, while also posing several benefits to cancer patients.<sup>46</sup> The patent further proclaims that “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 neuro protectants, for example in limiting neurological damage following ischemic insults, such as stroke and trauma, or in the treatment of neurodegenerative diseases, such as Alzheimer's disease, Parkinson's disease and HIV dementia. Nonpsychoactive cannabinoids, such as cannabidoil, are particularly advantageous to use because they avoid toxicity that is encountered with psychoactive cannabinoids at high doses useful in the method of the present invention.”<sup>47</sup> The language provided stated a consensus gathered by a means of over 150 different medical doctrines, in which the overwhelming consensus revealed benefits to cannabis that proved to be correlated to those applied by both state laws and laws in Canada.

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<sup>44</sup> Controlled Substances Act, 84 Stat. 1242, 21 U.S.C. § 801 *et seq.*

<sup>45</sup> *Cannabinoids As Antioxidants & Neuroprotectants*, US PAT 6630507

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 4-6.

The patent filed provides for a protection reserved to the Federal Government of the properties that exist in marijuana as a means of treatment for the specified diseases.<sup>48</sup> In turn, such a reservation creates a barrier for pharmaceutical companies who so choose to make strides toward implementing the active drugs found to benefit the applicable patients. The barrier is commonly overcome with a price however, as patents generally restrict the ability of others to use the reserved discovery to the degree of which royalties on the discoveries application are granted. Accordingly, the United States government reserves such a patent for purposes of monetary gain within the pharmaceutical industry.

The World Intellectual Property Organization is one of the 17 agencies of the United Nations. The organization was created in 1967 for purposes of encouraging creativity and promoting the protection of intellectual property globally.<sup>49</sup> The International Bureau is the World Intellectual Property Organization located at Geneva, Switzerland.<sup>50</sup> It is the international intergovernmental organization, which acts as the coordinating body under the Treaty and the Regulations.<sup>51</sup> When turning to the patents international categorization, 6630507 is found under the World Intellectual Property Organization as a reserved patent under the “Human Necessities” category, section A.<sup>52</sup> The category provides for the patent as one attained for purposes of sustaining the innovation within the medical sector.<sup>53</sup> In turn, the Federal Government was found to meet the appropriate burden of discovery to maintain a patent on marijuana.

In accordance with the patent laws posed by the United States, patent 6630507 maintains an international influence in restricting the commercial generation, application, and sale of marijuana when cannabinoids are extracted for the purposes provided for previously. Organizations such as the World Intellectual Property Organization maintain responsibility for filing, publishing, maintaining and policing infringement on patent rights. Currently however, the enforcement of this patent has remained dormant, as the Federal Government yet has to bring to light any measures enforcing the intellectual property to which they maintain rights.

### **III. Conflict of Laws for International Travel of Patients Traveling From Medical Marijuana States**

Unlike other medications, when a patient that utilizes medical marijuana for their ailment attempts to cross the United States border into Canada, their medication is seized and often times they are denied entry. This is most frequently an issue that arises when individuals attempt to cross over from states that recognize the medical application of marijuana, and are in full compliance with the applicable state laws. The driving law behind such seizures rests with the United States Federal laws in regards to

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<sup>48</sup> 37 C.F.R. § 1.151; *see also* 37 C.F.R. § 301.1

<sup>49</sup> Designating the World Intellectual Prop. Org., 1975-2 C.B. 542 (Pres. Exec. Order 1975)

<sup>50</sup> 37 C.F.R. § 1.415

<sup>51</sup> *Id.*

<sup>52</sup> *World Intellectual Property Organization*, <http://www.wipo.int/classifications/ipc/ipcpub> (Last Updated 2017)

<sup>53</sup> *Id.*

marijuana.<sup>54</sup> This can be seen when addressing the laws in Canada in regards to medical marijuana, where it is considered a fundamental right. Then by analyzing the similarities with the applicable laws within the states that recognize medical marijuana. And lastly, by looking to the Federal classification of marijuana, which involves the laws that border patrol agents most commonly enforce. This section will first look to the history and present laws in regards to marijuana within Canada and how they have evolved over time. Then this section will look to analyze the legal principles applied when medical marijuana is seized at the border.

### **A. Canadian Law as a fundamental Right to Use Marijuana for Medical Purposes**

Laws in Canada regarding medical marijuana have been subject to frequent change over the last two decades. As of 1999 Canada has allowed for the medical application under section 56 exceptions of the Controlled Drugs and Substances Act (CDSA).<sup>55</sup> The CDSA allowed for qualifying patients to access dried marijuana for the approved medical purposes as demonstrated by the Food and Drug Administration of Canada. The decision was furthered in 2000 when the decision of *R. v. Parker* when before the Supreme Court. The Defendant, Parker, was in need of a means to control his epileptic seizures. In turn, Parker chose to grow marijuana in his backyard to self-medicate as he found this method to be effective. Parker was subsequently arrested.<sup>56</sup>

The issue before the Court in *R. v. Parker* was whether Section 7 of the Charter of Guarantees was violated when Parker was arrested for growing marijuana. Section 7 provides that “*Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*”<sup>57</sup> The Supreme Court turned to the CDSA list of exemptions, specifically under section 56, when determining that growing marijuana and ingesting it as a means of self-medication is a fundamental liberty reserved under Section 7 of the Charter of Guarantees. Accordingly, the Court set a precedent with the landmark decision that judicially recognized the medicinal application of marijuana. Further, the Court had established that the process of self-medication when looking to marijuana, and the cultivation, as a means of doing so is a fundamental right granted to each citizen that falls within the confines of a medically appropriate class of diseases or ailments.<sup>58</sup>

The decision in *R. v. Parker* led to the implementation of the Marijuana Medical Access Regulations (MMAR). MMAR was implemented in 2001 and enabled medical patients to access dried marijuana in the event that they had the appropriate medical prescription, authorized by a primary care physician. Medical patients had accordingly reserved the right to grow and cultivate their own medicine as long as they maintained

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<sup>54</sup> 50 A.L.R.6th 353 (Originally published in 2009)

<sup>55</sup> Controlled Substances Act. [https://www.fda.gov/ohrms/dockets/ac/03/briefing/3978B1\\_07\\_A-FDA-Tab%206.pdf](https://www.fda.gov/ohrms/dockets/ac/03/briefing/3978B1_07_A-FDA-Tab%206.pdf). (Last Updated August 2003)

<sup>56</sup> *R. v. Parker*, 49 O.R. 3d. 481 (2000).

<sup>57</sup> The Constitution Act. Schedule B to the Canada Act, 1982 (West).

<sup>58</sup> *R. v. Parker*, 49 O.R. 3d. 481 (2000).

the requisite prescription.<sup>59</sup> Under the currently recognized medical marijuana laws in Canada, the following conditions provide for the proper prescription of the substance: ADD/ADHD; Alzheimer's Disease; Anxiety; Arthritis; Auto Accident(s); Back & Neck Problems; Brain Injury; Cancer; Chronic Nausea; Chronic Pain; Colitis; Crohn's Disease; Depression; Eating Disorders; Epilepsy; Fibromyalgia; Gastrointestinal Disorders; Hepatitis C; HIV/AIDS; Irritable Bowel Syndrome; Kidney Failure/Dialysis; Migraines; Multiple Sclerosis; Muscle Spasms; Muscular Dystrophy; Parkinson's Disease; Post Traumatic Stress Disorder; Severe Arthritis; Sexual Dysfunction; Sleep Disorders; Spinal Cord Injury/Disease.<sup>60</sup> Accordingly, patients that suffer from any of the previously noted debilitating conditions are capable of receiving treatment by means of marijuana.

### **B. International Implications of Banning U.S. Citizens from entering Canada based on violations of U.S. federal Law**

The United States maintains complete control of all land, air and sea borders. Such a degree of control allows for border patrol agents to both deny entry and seize any marijuana found at a border crossing. The authority for such control stems from multiple legal principles. The first of which this analysis will turn to is that of the active personality principle. Active personality looks to the notion that an individual carries the laws of their nation of origin on their back when entering other sovereignties.<sup>61</sup> The basis of this stems from Roman law, in which Romans were traditionally granted jurisdiction over their citizens, regardless of where they were located. The rationale is that the "national sovereign pride and honor are tainted when a national commits a crime or is the victim of a crime [abroad]".<sup>62</sup> This principle is one that has been adopted by the United States Federal government, especially when looking to the enforcement of federal law. Such can be seen when looking to *United States v. Clark*.

In *United States v. Clark*, the defendant was a United States national who decided to travel abroad. Clark travelled to Cambodia in 2003 where Cambodian officials arrested the defendant for paying to have sexual intercourse with two boys that were 13 years of age.<sup>63</sup> After being arrested in Cambodia, Clark became the first person to be charged under 18 U.S.C. § 2423(c), a provision of the PROTECT Act.<sup>64</sup><sup>65</sup> Clark, then a seventy-

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<sup>59</sup> Understanding the New Access to Cannabis for Medical Purposes Regulations.  
<https://www.canada.ca/en/health-canada/services/publications/drugs-health-products/understanding-new-access-to-cannabis-for-medical-purposes-regulations.html>. (Last updated on September 2016)

<sup>60</sup> Mary E. Lynch MD, *Journal of Pain and Symptom Management*, 497-501 (FRCPC, 5<sup>th</sup> ed. 2006)

<sup>61</sup> Merry Ellen O'Connell, *The International Legal System*, 341 (Robert C. Clark, 6<sup>th</sup> ed. 2010)

<sup>62</sup> *Id.* at 341

<sup>63</sup> *United States v. Clark*, 435 F.3d 1100, 1119 (9<sup>th</sup> Cir. 2006)

<sup>64</sup> Ninth Circuit Holds That Congress Can Regulate Sex Crimes Committed by U.S. Citizens Abroad. - *United States v. Clark*, 435 F.3d 1100, 1103 (9<sup>th</sup> Cir. 2006), 119 Harv. L. Rev. 2612 (2006).

<sup>65</sup> 18 U.S.C.A. § 2423 (West)

one year old, was tried and convicted when he returned to the United States. On appeal, the Ninth Circuit Court heard Clark's reservations on this conviction.<sup>66</sup> Clark challenged the Act on statutory, jurisdictional and constitutional grounds. The Court rejected these claims for multiple reasons, among the most relevant being that Clark should have expected to be haled to an American court when committing a criminal offense abroad.<sup>67</sup> The Ninth Circuit affirmed the lower Courts ruling on the basis that the United States maintains jurisdiction over their own nationals. Further, the Ninth Circuit found that the PROTECT Act was within Congress's authority to regulate foreign commerce, under the foreign commerce clause. Congress's channels of commerce authority extends to regulating crimes committed abroad that are "necessarily tied to travel in foreign commerce".<sup>68</sup> Accordingly, the Ninth Circuit found that the United States did maintain the appropriate jurisdiction over the defendant when looking to the international law principle of active personality.

When applying the rationale from *United States v. Clark* to marijuana being seized at the borders of Canada, the legal principles and authority become increasingly apparent. When an individual leaves their country, the laws of their national origin follow with them where they go; this being seen when turning to the United States borders and the basis for which individuals are denied their medicine. As a Schedule I narcotic, the border patrol agents look to Federal legislation to enforce the laws of the United States. Due to the Federal classification of marijuana, border patrol agents continue to seize and penalize patients attempting to cross the border, regardless of state licenses, or the legalities as seen within Canada.<sup>69</sup>

In addition to the legal doctrine of active personality, another mitigating factor providing border patrol with the appropriate authority to seize medical marijuana is that of Federal preemption. Preemption occurs when a state law stands as an obstacle for a Congressional measure. When such a conflict arises, the measures and objectives of the congressional provision will preempt the state law.<sup>70</sup> The doctrine of Federal preemption derives from the Supremacy Clause of the United States Constitution. The Constitution, being the supreme law of the land within the United States, provides that where a conflict exists between State and Federal laws, the Federal laws will reign supreme. Further, the preemption clause provides that any congressional measures will preempt State measures that are in conflict with them.<sup>71</sup> Thus, the Supremacy Clause grants Congress the ability to preempt State legislation that is in conflict with Federal provisions.<sup>72</sup> In turn, the consequential effect seen among the borders of the United

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<sup>66</sup> Ninth Circuit Holds That Congress Can Regulate Sex Crimes Committed by U.S. Citizens Abroad. - *United States v. Clark*, 435 F.3d 1100, 1103 (9th Cir. 2006)., 119 Harv. L. Rev. 2612 (2006).

<sup>67</sup> *Id.*

<sup>68</sup> *United States v. Clark*, 435 F.3d 1100, 1119 (9th Cir. 2006)

<sup>69</sup> *Travel Advisory for Medical Marijuana Prescription Holders*, U.S. Customs & Border Protection. <https://www.cbp.gov/newsroom/local-media-release/travel-advisory-medical-marijuana-prescription-holders> (last updated January 24th, 2017).

<sup>70</sup> *City of Detroit v. Ambassador Bridge Co.*, 481 Mich. 748 N.W.2d 221, 223 (2008)

<sup>71</sup> U.S. Const. art. I, §8, cl. 5. and art. I, §10, cl. 1

<sup>72</sup> Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 260 (2000)

States are the Federal laws preempting medical marijuana state provisions. Regardless of the applicable state laws, the Federal regulations on the drug, being a Schedule I narcotic, grants border patrol agents the authority to seize the medication at the border.

#### **IV. Conclusion**

As further conflicts arise in relation to medical marijuana, it becomes increasingly apparent that the laws regarding the substance are inevitably subject to change. When looking to the patent maintained by the Federal government for the medical use of marijuana, the benefits posed to individuals faced with a wide array of ailments and diseases are rather indisputable. With furthered research on the substance and the effects it carries, the primary legal restraint rests with its Federal classification as a Schedule I substance. Due to such a classification, researching marijuana's effects is severely hindered, however with ongoing passage of legislation in favor of medical marijuana, the Federal classification of marijuana may be prone to change. With 29 states currently providing for medical marijuana, a new era of marijuana regulation is shaping. To what degree change will be seen is speculative by nature; however it is probable and likely that with ongoing tensions in the field, the Federal government may revisit the current classification in order to adequately utilize their patent pertaining to it, and to remedy to ongoing conflicts.

In light of the evident benefits associated with the medical use of marijuana as underscored by the Federal government's own patent, it is recommended that policymakers consider a comprehensive review and potential revision of the current Federal classification of marijuana as a Schedule I substance. The evolving landscape of state legislation, with 29 states currently allowing for medical marijuana, signals a paradigm shift in marijuana regulation. To facilitate further research on the medicinal properties of marijuana and address the conflicts arising from its current classification, the Federal government should explore avenues for reevaluating its stance on marijuana. A reconsideration of the Schedule I classification would not only align with the growing body of state-level support but also unlock opportunities for scientific exploration and advancement in understanding marijuana's therapeutic potential. Moreover, by aligning the Federal classification with the changing attitudes and legislation at the state level, the government can proactively harness the benefits outlined in its own medical marijuana patent. This shift would not only reflect the evolving societal perspectives on medical marijuana but also contribute to the resolution of conflicts surrounding its use.

In summary, this policy recommendation advocates for a dynamic and responsive approach to marijuana regulation, urging policymakers to revisit the Federal classification in light of emerging state-level support for medical marijuana. Such a step would not only harmonize federal and state perspectives but also pave the way for enhanced research opportunities and the realization of the medicinal benefits associated with marijuana use.