

## California's Pot Shot: Legalizing Marijuana for Fun and Profit

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### Abstract

The citizens of California are considering an initiative, Proposition 19, that would legalize the recreational and commercial use of marijuana. California and thirteen other states plus the District of Columbia have legalized the medical use of marijuana. In *Gonzales v. Raich*, while the Supreme Court held that blanket federal prohibitions against marijuana use of any kind are constitutional, respected judges, policymakers, and scholars have opined that state medical marijuana laws are not preempted by federal law: state laws lifting criminal sanctions against medical marijuana, to the point, authorize no behavior that federal law could preempt.

California's current marijuana debate, however, raises an entirely new legal question. While proponents argue that legalizing the commercial use of marijuana would effectively address the Golden State's precipitous and punishing revenues declines, would state law that authorizes then taxes cannabusinesses of any sort be preempted by federal law? Should Californians adopt Proposition 19, this article argues, the doctrine of federal preemption would void the legalization of commercial, but not recreational, use of marijuana, leaving California, and any other state that promises to follow its lead, with an exacerbated drug-abuse problem coupled with no new revenues to address related social costs—not to mention “jobs, health care, schools and libraries, roads and more” that proponents of marijuana's commercial legalization promise.

### Introduction

On November 2, 2010, voters in the state of California will pass judgment on Proposition 19,<sup>1</sup> which, if approved, would mark two firsts for the Golden State famous for many: one, California would become the first state in the Union to exempt both the recreational and commercial uses of marijuana from its criminal code; and second, California would become the first to impose a tax on a Schedule I drug, proscribed for nearly any reason by Congress' historic Controlled Substances Act (CSA) of 1970.<sup>2</sup> Unlike California's unsuccessful attempt at marijuana legalization in 1972—also known as Proposition 19, ironically, debate over California's 2010 version of this proposal occurs at a time when the state's financial condition is on life support, the White House is occupied by a President that admits to inhaling marijuana—“I thought that was the point,” quipped Obama,<sup>3</sup> and opinion polls suggest that legalization is ripe for voter acceptance.<sup>4</sup> California, moreover, is not alone: in addition to a number of state legislatures,

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<sup>1</sup> Initiative Measure 09-0024: “Regulate, Control, Tax Cannabis,” available at [http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i182\\_initiative\\_09-0024\\_amdt\\_1-5.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i182_initiative_09-0024_amdt_1-5.pdf) (last visited Aug. 31, 2010).

<sup>2</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

<sup>3</sup> Roger Parloff, *How Marijuana Became Legal*, CNNMoney.com, Sept. 18, 2009, <http://cnnmoney.printthis.clickability.com/pt/cpt?action=cpt&title=How+marijuana+beca> (last visited Jan. 26, 2010).

<sup>4</sup> *Id.*

similar initiatives in similar circumstances may be acted upon by voters in Nevada and Washington in the near future. Thus, if not California now, perhaps another state soon.<sup>5</sup>

This paper examines a legal issue central to state efforts to legalize marijuana, California's in particular. While the arguments for and against Proposition 19 will be briefed, a question of seemingly fundamental and vital significance will be asked: Should voters in California approve marijuana's exemption from its criminal code "for fun and profit"—or the voters in any other state, should Californians fail, would federal law constitutionally preempt state law? Put differently, should the popular forces in a sovereign state legalize marijuana, would judicial forces in federal courts void that choice?

With that question in mind, Part I of this paper provides an overview of California's trend-setting 1996 initiative crafted to limit criminal liability for the medical use of marijuana.<sup>6</sup> Popular, even scholarly impressions notwithstanding, California's Compassionate Use Act (CUA) did survive in tact a landmark 2005 decision of the United States Supreme Court, *Gonzales v. Raich*.<sup>7</sup> The *Raich* holding, together with an empowering constitutional teaching that guides, for better or worse, Proposition 19 proponents and key state and federal officials, will be explained. In Part II, the provisions of Proposition 19 are outlined, as well as the arguments against and for its passage; that the measure is brought before a state starved for new revenue streams, promising, says its chief sponsor, to be "the answer for all the things on the news,"<sup>8</sup> will be stressed.

Finally, in Part III, the likely outcomes of a constitutional challenge to Proposition 19, should it be enacted, will be presented. Disappointing these results would be for those supporting Proposition 19 and its promise of tapping deeply into a huge reservoir of new revenue, since what would remain of Proposition 19 after preemption analysis would amount to nothing but increased demands on social services coupled with no newer resources at play to address them—unintended by initiative authors, perhaps, but in the world of California politics, a classic "bait and switch." Against sponsors' claim that "money does grow on trees," the practical consequences of a federal preemption challenge for California, particularly in trying times, would morph, and in this order, from bad, to worse, to preempted worst.

## **I. CSA, CUA, and the *Raich* Teaching**

In 1913, California became the first state to criminalize marijuana, a choice eventually mirrored by every other state in the Union.<sup>9</sup> Congress effectively nationalized its prohibition against the

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<sup>5</sup> John Hoeffel, *California May Vote on Legalizing Pot*, L.A. TIMES, March 23, 2010, <http://www.latimes.com/news/local/la-me-marijuana-initiative24-201024.0.20272285.print.story> (last visited Mar. 24, 2010).

<sup>6</sup> Compassionate Use Act, CAL. HEALTH & SAFETY CODE § 11362.5 (2009).

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

<sup>8</sup> Stu Woo, *Legal-Pot Backers Split on Timing*, WSJ.com, Oct. 3, 2009, <http://online.wsj.com/article/SB125452817069360889.html> (last visited Aug. 31, 2010).

<sup>9</sup> Dale H. Gieringer, *The Origins of California's 1913 Cannabis Law*, June, 2006, <http://canormal.org/background/ca1913.html> (last visited Sept. 2, 2010).

drug in 1937;<sup>10</sup> then, following President Nixon’s 1969 “war-on-drugs” declaration, Congress passed the Controlled Substances Act of 1970, a far more sweeping and forceful package of drug regulations.

The CSA aimed at consolidating federal drug statutes for the purpose of providing a comprehensive regulatory approach to the “illegal importation, manufacture, distribution and possession and improper use of controlled substances [that] have a substantial and detrimental effect on the health and general welfare of the American people.”<sup>11</sup> Congress adopted the Act based on its explicit constitutional power to regulate “Commerce ...among the several States.”<sup>12</sup> That said, the Act’s reach embraced the intrastate manufacture, distribution, and possession of controlled substances, and for a number of critically important reasons: first, “[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances”;<sup>13</sup> second, “it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate”;<sup>14</sup> and third, “[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.”<sup>15</sup>

The CSA organizes all controlled substances into one of five schedules: schedule I drugs (1) have a “high potential for abuse,” (2) have no accepted medical application, and (3) can only be used for tightly-supervised, federally-approved research purposes; schedules II through V include drugs with established medical benefits, arranged in descending order based upon an assessment of the substance’s relative degree of risk to “the health and general welfare of the American people.” The CSA classifies “marihuana” as a Schedule I drug. The Act makes it “unlawful for any person knowingly or intentionally ...to manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute, or dispense, a controlled substance,”<sup>16</sup> and unlawful for “any individual [to] knowingly possess[ ] a controlled substance unless otherwise authorized to do so elsewhere in the Act.”<sup>17</sup>

Not to be outdone by its “first-to-criminalize” approach to marijuana, California also became the first to decriminalize the drug, doing so with the passage of Proposition 215 in 1996, California’s Compassionate Use Act.<sup>18</sup> State criminal sanctions otherwise prohibitive of both marijuana possession and cultivation were eliminated for a narrowly circumscribed lot: “seriously ill Californians,” “their primary caregivers,” and a participating “physician.” The two-fold goals of the CUA were briefly and, in places, ambiguously noted: first, “[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where

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<sup>10</sup> Marihuana Tax Act, Pub. 238, 75<sup>th</sup> Congress, 50 Stat. 551 (Aug. 2, 1937).

<sup>11</sup> Controlled Substances Act, 21 U.S.C. § 801.

<sup>12</sup> U.S. Const. art. 1, 8, cl. 3.

<sup>13</sup> Controlled Substances Act, 21 U.S.C. § 801(4).

<sup>14</sup> *Id.* at § 801(5).

<sup>15</sup> *Id.* at § 801(6).

<sup>16</sup> *Id.* at § 841.

<sup>17</sup> *Id.* at § 884.

<sup>18</sup> Compassionate Use Act, CAL. HEALTH & SAFETY CODE § 11362.5 (2009).

that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief”;<sup>19</sup> and second, “[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendations of a physician are not subject to criminal prosecution or sanction”<sup>20</sup>—an immunity also applicable to physicians “for having recommended [but not prescribed] marijuana to a patient for medical purposes.”

The much anticipated conflict between the goals of Congress’ CSA and California’s CUA dramatically erupted on August 15, 2002. In a DEA raid in Butte County, California, marijuana plants were seized under the authority of the CSA, which Angel McClary Raich had cultivated and consumed in accordance with the state’s CUA. Her medical misfortunes were staggering: Raich had “been diagnosed with more than ten serious medical conditions, including an inoperable brain tumor, life-threatening weight loss, a seizure disorder, nausea, and several chronic pain disorders.”<sup>21</sup> Consistent with CUA language, Raich consumed marijuana for palliative purposes because none of the thirty-five medications that had been prescribed by her physician were effective or tolerable. Pronounced her doctor, depressingly, “foregoing marijuana treatment may be fatal.”<sup>22</sup> Deprived of her necessary medical treatment by the DEA, Raich sued the Attorney General claiming that the CSA as applied to California’s CUA was unconstitutional.

Three years later, in *Gonzales v. Raich*,<sup>23</sup> the Supreme Court posed the following question: “whether the power vested in Congress ... ‘to regulate commerce ... among the several states’ includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.”<sup>24</sup> By a 6-3 vote, the Court concluded that Congress had not exceeded its Commerce Clause power that in this case had been applied to the prosecution of intrastate, noncommercial medical marijuana users. In his opinion for the Court, Justice Stevens held that Congress could reasonably believe that intrastate, noncommercial medical marijuana (a “fungible commodity,”<sup>25</sup> no one denied) would significantly affect marijuana’s \$10.5 billion illegal interstate market.<sup>26</sup> As Stevens opined, the “notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.”<sup>27</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Raich v. Ashcroft*, 352 F. 3d 1222, 1226 (9<sup>th</sup> Cir. 2003).

<sup>22</sup> *Id.*

<sup>23</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>24</sup> *Id.* at 6.

<sup>25</sup> *Id.* at 18.

<sup>26</sup> *Id.* at 21.

<sup>27</sup> *Id.* at 27.

In his concurring opinion, Justice Scalia observed that marijuana “was never more than an instant from the interstate market.”<sup>28</sup>

In dissent, Justice O’Connor lamented that the Court had extinguished California’s experiment with medical marijuana and had done so “without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation.”<sup>29</sup> Justice Thomas, also dissenting, wryly noted that if “the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States.”<sup>30</sup>

“Quilting bees, clothes drives, and potluck suppers” aside, while the scope of Congress’ Commerce Clause power seems breathtakingly expansive, California’s CUA was not preempted, voided, or extinguished by the *Raich* holding. Invalid is the CUA in federal courts against federal drug charges to be sure. But California’s medical-marijuana immunity from that state’s criminal code was not upended or disturbed as an affirmative defense in California courts. While some scholars would suggest otherwise,<sup>31</sup> California courts, along with state and national attorneys general, advance the theory that *Raich* actually represents an enormous victory for state power and the constitutional language on which that theory rests, the Tenth Amendment.<sup>32</sup> Among those historic judicial victories boldly advancing the principle of “states’ rights,” *Raich* is surely a neglected one; as Professor Mikos skillfully observes, *Raich* symbolizes “the states’ underappreciated power to legalize activity that Congress bans.”<sup>33</sup>

The Tenth Amendment theory propelled by *Raich* is stunningly powerful. Accordingly, California’s CUA is not an act that authorizes medical marijuana; rather, it is an act that merely returns California to a point in time before the manufacture, possession, and distribution of marijuana was made a crime, at least for qualified medical marijuana patients, caregivers, and physicians; for these principals, the CUA simply removes criminal penalties, thus restoring the status quo ante. In this way, then, one could argue that situated at the very heart of the Tenth Amendment’s “reserved” power, is the sovereign state prerogative not to act, to choose not to choose, inaction, in a word, that Congress is incapable of preempting. What law, after all, could be voided if no law either bans or authorizes a particular behavior? Thus, the Constitution’s preemption doctrine presupposes a conflict between state law and federal law “so that the two cannot consistently stand together.”<sup>34</sup> Under these circumstances, because “compliance with both federal and state regulations is a physical impossibility,”<sup>35</sup> the Constitution’s Supremacy

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<sup>28</sup> *Id.* at 40.

<sup>29</sup> *Id.* at 43.

<sup>30</sup> *Id.* at 69.

<sup>31</sup> Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VANDERBILT L. REV. 1419, 1439 (2009).

<sup>32</sup> CALIFORNIA DEPARTMENT OF JUSTICE, GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE 3 (Aug. 2008).

<sup>33</sup> Mikos, *supra* note 31, at 1422.

<sup>34</sup> Controlled Substances Act, 21 U.S.C. § 903.

<sup>35</sup> Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

Clause would command the Supreme Court to preempt and void the conflicting state law.<sup>36</sup> A state that authorized conduct banned by federal law, or, alternatively, a state law that banned conduct authorized by federal law, would properly raise Supremacy Clause issues; but state “inaction,” and for whatever reason, would not. Again, in the thoughtful and persuasive hands of Professor Mikos, if government action distinguishes the state of nature from civil society, then “Congress may drive states into—or prevent states from departing from—this state of nature (preemption), but Congress may not drive them out of—or prevent them from returning to—the state of nature (commandeering).”<sup>37</sup> Put differently, Mikos explains, “[c]ommandeering compels state *action*, whereas preemption, by contrast, compels *inaction*”;<sup>38</sup> the former is unconstitutional per se, and the latter, constitutional in light of the principle of “impossibility preemption.”

No small wonder, then, that despite contrary federal law, the criminal codes in fourteen states plus the District of Columbia no longer criminalize medical marijuana, valid, too, because, properly understood, state legislative vacuums cannot be federally preempted or commandeered.

California attorneys general past and present concur. Echoing themes from his predecessor Bill Lockyer, Attorney General Edmund Brown writes that the “incongruity between federal and state law has given rise to understandable confusion, but no legal conflict exists merely because state law and federal law treat marijuana differently.”<sup>39</sup> As Brown understands the lack of incongruity, the state’s CUA does not “conflict with the CSA because, in adopting [it] California did not ‘legalize’ medical marijuana, but instead exercised the state’s reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition.”<sup>40</sup> His recommendation to state law enforcement officers? A shock to no student of the Tenth Amendment: “this Office recommends that state and local law enforcement officers not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California’s medical marijuana laws.”<sup>41</sup>

Not unexpectedly, President Bush’s “zero tolerance” standard for marijuana offenses shifted to the left when Barack Obama was inaugurated. President Obama’s Attorney General, Eric Holder, confirmed that change in a memo issued on October 19, 2009, one actually written by Deputy Attorney General David W. Ogden.<sup>42</sup> In it, Holder’s “guidance to federal prosecutors” advanced no preemption claims whatsoever. Quite the contrary: to advance the “efficient and rational use of its limited investigative and prosecutorial resources,” Justice Department “priorities should not focus federal resources ... on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of

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<sup>36</sup> U.S. Const. art. VI.

<sup>37</sup> Mikos, *supra* note 31, at 1448.

<sup>38</sup> *Id.* at 1446.

<sup>39</sup> CALIFORNIA DEPARTMENT OF JUSTICE, *supra* note 32.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 4.

<sup>42</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF DEPUTY ATTORNEY GENERAL, MEMORANDUM, INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA (Oct. 19, 2009).

marijuana.”<sup>43</sup> Never mind that the language of the CUA itself is not clear and unambiguous on key issues—e.g., the amounts of marijuana a patient may possess, conceptual disputes over dispensaries versus collectives and sales versus contributions, drug transportation, and illnesses that legitimately trigger a physician’s medical-marijuana recommendation; never mind, too, that not clear and ambiguous language also infects Holder’s message itself—e.g., “nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law.”<sup>44</sup> From all that is unclear and ambiguous, however, the underlying intent of the Holder memo seems incontrovertible: the Obama Administration has neither the will nor the resources to prosecute medical marijuana users in states that do not prosecute medical marijuana users. In one sense, Obama’s “do not prosecute” policy allows for state preemption of federal law—an absurd claim in law but sound, nevertheless, in fact.

Next, the provisions of Proposition 19.

## II. Proposition 19—For a Better California?

California’s voter-inspired initiative to legalize marijuana is modeled after tax and regulate laws that govern alcohol and tobacco. That said, Proposition 19 at its core would amend California’s law in two momentous ways.

First, it “shall not be a public offense under California law for any person 21 years or older” to cultivate, possess, and consume “not more than one ounce of cannabis.”<sup>45</sup> Qualified Californians would be permitted to cultivate marijuana in a space “not more than twenty-five square feet per private residence.”<sup>46</sup> Some significant criminal sanctions attached to personal consumption would remain in force: marijuana cultivated for recreational reasons (1) may not be sold, or (2) consumed in public, (3) consumed in a fashion that impairs vehicle operations, or (4) consumed “while minors are present.”<sup>47</sup>

Second, local governing units in California—counties and cities—would be empowered, should they choose to do so, to “adopt ordinances, regulations or other acts having the force of law to control, license, regulate, permit or otherwise authorize...the cultivation, processing, distribution ...and transportation” of marijuana for purposes wholly commercial.<sup>48</sup> Retail sales would be limited to (1) purchases not exceeding one ounce, (2) and only “in licensed premises,” and only (3) to “persons 21 years or older.” A broad array of issues impacting the buying and selling of marijuana, such as zoning, location, size, hours of operation, occupancy, and advertising would be subject entirely to local regulation and control.

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Initiative Measure 09-0024: “Regulate, Control, Tax Cannabis,” available at [http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i182\\_initiative\\_09-0024\\_amdt\\_1-5.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i182_initiative_09-0024_amdt_1-5.pdf) (last visited Aug. 31, 2010).

<sup>46</sup> *Id.* § 11300.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* § 11301.

Intimately linked to the local regulation and control of the business of marijuana, but of course, is the power to tax. “No legalization without taxation”<sup>49</sup> is the battle cry, and in this regard perhaps the most attractive of Proposition 19 provisions for a cash-starved California is its invitation to impose “appropriate ...taxes ...or fees” on any commercial activity authorized by county or city governments related to the buying and selling of marijuana. By no means immaterial, too, marijuana for commercial purposes would also be subject to existing federal and state income and business taxes, among others.

Of seismic moment, as I shall argue, is the initiative’s concluding provision, which holds that should any portion of the law be invalidated, “that invalidity shall not affect other provisions ...that can be given effect.”

Opponents of the measure, organized and well-funded, will argue familiar, mostly decades-old themes against drug use. Legalizing marijuana, even glamorizing it, (1) will attract crime,<sup>50</sup> and (2) increase rates of teenage drug dependency already horrifyingly high<sup>51</sup>—especially true, critics emphasize, since the THC content of 21<sup>st</sup> Century cannabis, its primary psychoactive ingredient, has quadrupled since the late 70s.<sup>52</sup> Together with (3) a long list of unhealthy effects associated with smoking—head, neck, and lung cancer, Proposition 19 opponents argue that (4) any new revenues generated by taxes on commercial marijuana would, in fact, be negated by mounting and expensive demands on government to address the consequences increased addiction.<sup>53</sup> The math paints a bleak future, explains one authority, since for every dollar raised from alcohol and tobacco taxes, nearly \$9 is spent to help to repair the carnage of abuse;<sup>54</sup> adding yet another intoxicating drug to this wound could only work to compound already staggering social and financial costs.

Those who support legalizing marijuana “for fun and profit” spin the arguments in entirely different directions. Recreational use of marijuana, they point out, (1) is a fact of American life with or without Proposition 19.<sup>55</sup> According to initiative findings, “roughly 100 million Americans (around 1/3 of the country’s population) acknowledge that they have used cannabis, 15 million ...in the last month.”<sup>56</sup> The drug’s popularity is linked, in part, to the belief that (2) “cannabis has fewer harmful effects than either alcohol or cigarettes, which are both legal for adult consumption.”<sup>57</sup> Towering above all other reasons to “just say yes” to drugs are

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<sup>49</sup> Peter Hecht, *The Conversation: As Medical Marijuana Dispensaries Proliferate, Some Argue that the State Should Get a Cut of the Action*, SACRAMENTO BEE, Jan. 10, 2010, <http://www.sacbee.com/opinion/story/2449110.html> (last visited Sept. 5, 2010).

<sup>50</sup> Hoeffel, *supra* note 5.

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

<sup>52</sup> Skip Miller, *Don’t Legalize Marijuana*, L.A. TIMES, Jan. 28, 2010, <http://www.latimes.com/news/opinion/commentary/la-oe-miller28-2010jan28,0,7619571.story> (last visited Jan. 28, 2010).

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

<sup>54</sup> *Id.*

<sup>55</sup> Initiative Measure 09-0024: “Regulate, Control, Tax Cannabis,” *available at* [http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i182\\_initiative\\_09-0024\\_amdt\\_1-5.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i182_initiative_09-0024_amdt_1-5.pdf) (last visited Aug. 31, 2010).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



the estimates of proponents that since “\$15 billion in illegal cannabis transactions” occur annually in California alone, (3) taxing the sale of marijuana would net “billions of dollars in annual revenues for California to fund what matters most: jobs, health care, schools and libraries, roads, and more.”<sup>58</sup> New revenues, and revenues saved, too, since a part of legalization’s appeal is (4) the assertion that the state would save huge sums of money that are otherwise focused on the arrest, prosecution, and incarceration of “non-violent cannabis consumers.”<sup>59</sup>

The revenue allure of the cannabusiness market arrives at particularly grim economic times—the worst since the Great Depression—for California state and local officials alike. Struggling to compensate for double-digit declines in sales and income taxes, California has cut \$32 billion in spending, imposed modest tax increases, paroled hundreds of “low risk inmates,” issued billions of IOUs, furloughed state workers, closed state offices, and increased tuition rates at public universities by 32%; and as of July, 2010, officials trying to close a \$19 billion deficit are threatening to reduce the wages of 240,000 state employees to the minimum set by the federal government, \$7.25 per hour!<sup>60</sup>

In this context, California’s State Board of Equalization has estimated that tax receipts from cannabusinesses, should they be “regulated and controlled,” would yield \$1.4 billion worth of new state revenues<sup>61</sup>—enough to pay the salaries of 23,000 teachers, or the tuition fees of 73,000 university students.<sup>62</sup> Furthermore, while county and city revenues would depend upon the rates imposed by each of the 475+ governing units, the city of Oakland—the first in the country to do so—has already imposed a tax on the four authorized medical marijuana dispensaries/collectives operating within its jurisdiction, netting in excess of \$1 million based on a rate of \$18 per \$1000 of gross sales.<sup>63</sup> And should “cannabis tourism” even begin to rival California’s wine industry, an estimated 50,000 new jobs could be created.<sup>64</sup>

In sum, according to a report issued by the state’s Legislative Analysts Office,<sup>65</sup> if Proposition 19 is adopted, “significant savings” will be realized due to a rearrangement of enforcement priorities, and “potentially major” new revenues will be collected from the production and sale of marijuana products. No wonder that early 2010 public opinion polls indicate approval ratings of 56%. According to Willie Brown, one very seasoned veteran of

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Julianne Pepitone, *California to Workers: It’s Minimum Wage For You*, CNNMoney, July 8, 2010, [http://money.cnn.com/2010/07/08/news/economy/california\\_pay\\_cuts/index.html](http://money.cnn.com/2010/07/08/news/economy/california_pay_cuts/index.html) (last visited Sept. 6, 2010).

<sup>61</sup> Beau Kilmer et al., *Altered State? Assessing How Marijuana Legalization in California Could Influence Marijuana Consumption and Public Budgets*, RAND CORPORATION, DRUG POLICY AND RESEARCH CENTER 1 (2010).

<sup>62</sup> Jon Walker, *With 1.4 Billion in Cannabis Tax Revenue, California Could Help Millions*, <http://fdlaction.firedoglake.com/2010/06/06/with-1-4-billion-in-cannabis-tax-revenue-california-could-help-millions/> (last visited June 21, 2010).

<sup>63</sup> Jesse McKinley, *Marijuana Supporters Welcome a Tax Increase*, N.Y. TIMES, July 23, 2009.

<sup>64</sup> Mary Rice, *The California Regulate, Control and Tax Cannabis Act: Part I*, <http://personalmoneystore.com/moneyblog/2010/03/25/california-regulate-control-tax-cannabis-act-part-1/> (last visited June 21, 2010).

<sup>65</sup> Mac Taylor and Michael C. Genest, *Report on A.G. File No. 09-0024*, LEGISLATIVE ANALYST’S OFFICE, Sept. 9, 2009.

California politics, “truth be told, there is just too much money to be made by both the people who grow marijuana and the cities and counties that would be able to tax it.”<sup>66</sup>

Should Proposition 19 become the law of the land—California’s that is, what would remain of it should a challenge to its constitutionality be mounted?

### **III. Proposition 19: From Bad, to Worse, to Preempted Worst**

Assume Proposition 19 is approved by California voters on November 2, 2010. With a few exceptions, the state criminal code would no longer criminalize the cultivation, possession, and consumption of marijuana for recreational purposes. Additionally, local governments could authorize and tax, under conditions of their own making, the cultivation, processing, distribution, and sale of marijuana for commercial purposes.

Recall in *Raich*, the Court sustained an application of Congress’ Commerce Clause power to criminalize the intrastate, noncommercial use of marijuana for medical purposes, marking for some the outermost reaches of national regulatory power in our federal system of government. But positioned far closer to the center of Congress’ regulatory reach, should both the recreational and commercial uses of marijuana be legalized, no one could seriously doubt that such behavior would offend the CSA, and, further, that an application of federal law to this behavior would not be unconstitutional. But would state law that legalizes such behavior be preempted and voided by the CSA?

Recreational marijuana first. In the CUA, California lifted its criminal ban on the cultivation and possession of marijuana for medical purposes; in this way, California’s decision not to act to authorize medical marijuana could not conflict with federal law. Applying precisely the same legal logic to recreational marijuana produces precisely the same result, with one titanic exception: while California’s return to inaction regarding recreational marijuana cannot be preempted, the “targets” under DEA helicopters would increase dramatically—by “leaf and bud,” making every third California citizen a felon. Advantage Proposition 19: if the Justice Department admits that its investigative and prosecutorial resources are overmatched by violations of federal law created by compliance with the CUA, surely those very same resources would be hopelessly ineffective to capture violations of federal law in California’s permissive, “hands off” approach to marijuana.

But would the legal logic that preserves recreational marijuana also apply to the legalization of commercial marijuana in California—together with its promise of state and local wealth? First, preemption notwithstanding, one wonders why Californians would be expected to buy a drug that can be grown so effortlessly in twenty-five square feet of one’s backyard? Furthermore, if taxes drive up the price of commercial marijuana, one could also wonder whether black market prices for the drug would be driven down to maintain a competitive edge? Second, preemption notwithstanding, all agree that the revenues from commercial marijuana would be determined by rates established by each of the state’s 475+ local governments. True, while no

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<sup>66</sup> Jessica Bennett, *Taking the High Road*, NEWSWEEK, Mar. 26, 2010, <http://www.newsweek.com/2010/03/25/taking-the-high-road.html> (last visited June 21, 2010).

government could authorize a ban on recreational consumption—an action preempted by state law, “dry counties and cities” that choose not to authorize commercial marijuana would dot California’s political landscape. But for those local entities that did seek wealth from weed, a government ordinance that acts to authorize commercial marijuana is a prerequisite. Competition, again, would be intense, this time between and among local governments to attract cannabusiness enterprises, effectively reducing tax rates, hence income, even further.

Thus, a local government that authorizes commercial marijuana and imposes a tax would risk driving potential buyers to either their backyard plots or to cheaper marijuana on the black market—a bad impact on revenue. Also, a local government seeking to attract cannabusinesses would need to lower its tax rates ever further to remain competitive with other governments, making revenue expectations even worse.

But from bad to worse to worst in light of the principle of federal preemption. The legal theory that lifting marijuana sanctions creates legal vacuums that cannot be federally preempted or commandeered applies exclusively, in this instance at least, to recreational drug use. A local government that authorizes commercial marijuana, however, would require behavior that is entirely at odds with federal law. Simultaneous compliance with conflicting federal and state law raises the specter of “impossibility preemption,” and would compel the Supreme Court to void state law. How is it possible, to take but one seemingly obvious example, to pay a tax to satisfy local law enforcement, when paying that tax is evidence of felonious federal behavior? Paying the state tax violates federal law, and not paying the state tax violates state law. Thus, in light of preemption principles generally, and the language of the CSA more specifically, since “a positive conflict” would arise between federal and state law “so that the two cannot consistently stand together,”<sup>67</sup> the commercial side of California’s Proposition 19 would be voided, the worst scenario possible for those who supported the initiative given its promise of revenue.

In sum, then, from bad, to worse, to preempted worst—in California, or in any other state that follows its lead. If Proposition 19 is approved, on *de jure* grounds recreational marijuana cannot be prosecuted by state law enforcement officials, and on *de facto* grounds recreational marijuana will not be prosecuted by federal law enforcement officials. In the inevitable challenge in federal courts, moreover, Proposition 19 provisions for commercial marijuana would be voided, leaving public schools—to cite but one particularly noteworthy example—in an even more desperate scramble for funds to maintain their school year, or some meaningful portion of it.

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