Maine Law Review

Volume 56 | Number 2 Article 9

June 2004

Conant v. Walters: A Misapplication of Free Speech Rights in the Doctor-Patient Relationship

Katharine M. McCarthy
University of Maine School of Law

Follow this and additional works at: https://digitalcommons.mainelaw.maine.edu/mlr

Part of the Constitutional Law Commons, First Amendment Commons, and the Medical Jurisprudence Commons

Recommended Citation
Katharine M. McCarthy, *Conant v. Walters: A Misapplication of Free Speech Rights in the Doctor-Patient Relationship*, 56 Me. L. Rev. 447 (2004).
Available at: https://digitalcommons.mainelaw.maine.edu/mlr/vol56/iss2/9

This Case Note is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

CONANT V. WALTERS: A MISAPPLICATION OF FREE SPEECH RIGHTS IN THE DOCTOR-PATIENT RELATIONSHIP

I. INTRODUCTION
II. POLICIES ON MARIJUANA USE, DISTRIBUTION, AND MEDICAL RECOMMENDATIONS
   A. Federal Policies
   B. California Policies
   C. The Federal Government Responds to California's Policy
III. THE *CONANT* DECISION
IV. RECOMMENDATIONS
V. CONCLUSION

CONANT V. WALTERS: A MISAPPLICATION OF FREE SPEECH RIGHTS IN THE DOCTOR-PATIENT RELATIONSHIP

I. INTRODUCTION

In *Conant v. Walters*,[1] the United States Court of Appeals for the Ninth Circuit addressed the application of the First Amendment's right of free speech[2] to a federal policy that prohibited the recommendation of medical marijuana by physicians.[3] This class action suit, brought by physicians and severely ill patients,[4] successfully enjoined the federal government from enforcing its policy revoking the federal prescriptive licenses of physicians who recommend or approve of marijuana use by patients suffering from certain severe illnesses.[5] The federal government's policy, issued in 1996 through a statement of Barry McCaffrey, director of the Office of National Drug Control Policy (ONDCP),[6] responded directly to recent legislation in California decriminalizing the use of marijuana under certain medically-approved circumstances.[7] The California legislation also protected physicians from prosecution under state law for recommending marijuana use.[8] Entering an injunction against the federal policy, the United States District Court held that, although the federal government had the right to regulate the distribution and use of marijuana, it could not interfere with First Amendment interests by precluding doctors and patients from discussing marijuana as a treatment for medical conditions.[9] On appeal, the majority affirmed on the basis of the First Amendment implications of the government policy.[10] The concurring opinion, however, expressed another reason for enjoining the government from enforcing its policy, specifically the Commandeering Doctrine, which prohibits the federal government from requiring that states address a particular problem or enforce a federal regulatory program.[11] The Supreme Court denied certiorari on October 14, 2003.[12]

---

1. 309 F.3d 629 (9th Cir. 2002).
2. "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I.
3. 309 F.3d 629 (9th Cir. 2002).
4. The plaintiffs in this case included patients with serious illnesses, their treating physicians (all licensed in the State of California), a patient's organization (Being Alive: People with HIV/AIDS Action Coalition, Inc.), and a physician's organization (Bay Area Physicians for Human Rights). *Id.* at 633.
5. *Id.* at 632.
6. The policy, entitled "Administration Response to Arizona Proposition 200 and California Proposition 215," was a product of the Office of National Drug Control Policy, and was published as a notice in the Federal Register on February 11, 1997. Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997).
7. Conant v. Walters, 309 F.3d at 632. *See* The Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2004).
8. Conant v. Walters, 309 F.3d at 632.
9. *Id.* at 633-34.
10. *Id.* at 639.
11. *Id.* at 645.
12. Conant v. Walters, 309 F.3d 629 (9th Cir. 2002), *cert. denied*, 124 S.Ct. 387 (2003).

Although the Ninth Circuit appropriately recognized that the First Amendment extends to the doctor-patient relationship, the majority failed to articulate the full nature of the speech rights implicated by the policy and the basis of the federal policy enacted to regulate physician recommendations of marijuana use. The majority's use of free speech rights in this case is simply disguised policy-making, evidenced by an insufficient analysis of First Amendment rights as they pertain to physician recommended-use of substances illegal under federal law. The Ninth Circuit, viewing the medical use of marijuana as appropriate in some circumstances, made a policy choice to allow physicians to make medical recommendations on the matter, or at least to prohibit the government from stopping them. This policy choice is made even more evident in view of the fact that the Supreme Court recently reversed a Ninth Circuit decision concerning the exemption of federal drug laws in circumstances where marijuana is dispensed for medical purposes.[13] Having failed to exempt federal drug laws in cases of medical necessity, the Court of Appeals, in *Conant v. Walters*, used the First Amendment to further its agenda of keeping the federal government out of the realm of medical marijuana.

Although the concurring opinion recognized the tensions between state and federal policies regarding physician recommendations of marijuana, the concurrence also failed to provide a full analysis of the issues presented in the case. Based on the Commandeering Doctrine, the concurring opinion argued that because federal drug laws rely heavily on local law enforcement, particularly in circumstances involving possession of small amounts, as is generally the case for patients using marijuana for medical purposes, the policy against doctor recommendations represented a federal effort to force the State of California to change its law on the medical use of marijuana. The concurring opinion, however, failed to fully explain how the federal government would rely on the State to enforce its policy,[14] and ultimately fell short of a complete legal analysis of the issue. The Ninth Circuit's poorly drafted response to the federal government's puzzling policy resulted in increased ambiguity regarding the scope of the First Amendment in physician-patient relationships and the authority of the federal government to regulate professional conduct.

This Note explores federal laws that pertain to marijuana use, as well as California's policies on medical marijuana and physician recommendations, considering the implications of both the First Amendment and the Commerce Clause in the resolution of this case. This Note concludes that the Ninth Circuit complicated the issue by failing to address the legal effect of the statement issued by the ONDCP. This Note ultimately concludes that the Ninth Circuit erred by finding a federal policy it considered "bad policy" to be unconstitutional on free speech grounds, and further explores the possible invalidation of the policy for exceeding congressional authority under the Commerce Clause.

---

13. *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001), *rev'g* United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109 (9th Cir. 1999).

14. After all, the policy itself calls for action by the Department of Health and Human Services and the Department of Justice, both agencies of the federal government. Conant v. Walters, 309 F.3d at 633.

II. POLICIES ON MARIJUANA USE, DISTRIBUTION, AND MEDICAL RECOMMENDATIONS

A. Federal Policies

Marijuana has been used for medicinal purposes in the United States since the early 1800s.[15] In fact, marijuana use was unregulated by the United States government until 1937, when the Congress first imposed the Marihuana Tax Act to curb increasing recreational use of the drug.[16] The Marihuana Tax Act required recreational users of marijuana to pay a fee of $100 an ounce, while medical users were required to pay only one dollar per ounce.[17] The Marihuana Tax Act remained the country's sole regulation on marijuana use and distribution until 1970, when Congress enacted the Controlled Substances Act, which classified all illegal drugs, placing marijuana under Schedule 1, the most restrictive category.[18] Under the Controlled Substances Act, physicians are not allowed to prescribe Schedule 1 drugs, including marijuana. In pertinent part, the Controlled Substances Act provides that marijuana is illegal to "manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense."[19] The Drug Enforcement Administration (DEA), the federal agency primarily responsible for the enforcement of drug laws, has advocated in favor of the Controlled Substances Act's policies against marijuana use, maintaining that it is not an appropriate drug for medical use.[20]

The Controlled Substances Act has been the subject of litigation by physicians and patients who have challenged the federal government's authority to enact prohibitions on marijuana use, particularly in medical circumstances.[21] In *Kuromiya v. United States*, patients unsuccessfully challenged the constitutionality of the Controlled Substances Act's prohibition on marijuana use for medical purposes.[22] The United States District Court held that the interstate nature of drug trade gives

---

15. Catheryn L. Blaine, Note, *Supreme Court "Just Says No" to Medical Marijuana: A Look at* United States v. Oakland Cannabis Buyers' Cooperative, 39 HOUS. L. REV. 1195, 1196 (2002).

16. *Id.* The Marihuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (1937), was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970. Alex Kreit, *The Future of Medical Marijuana: Should the States Grow their Own?*, 151 U. PA. L. REV. 1787, 1793 n.40 (2003).

17. Kreit, *supra* note 16, at 1793. While the Marihuana Tax Act effectively eliminated recreational use of marijuana by charging a fine in excess of the cost of the drug itself, it did not strictly prohibit its use. *Id.* Although the fine imposed for medical use of marijuana was substantially lower, the paperwork required of doctors who wanted to use medical marijuana in their practice, decreased its use in the medical profession substantially. *Id.* (citing LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA, THE FORBIDDEN MEDICINE (rev. & expanded ed., 1997)).

18. Blaine, *supra* note 15, at 1196-97. *See* 21 U.S.C. §§ 801-971 (2000).

19. 21 U.S.C. § 841(a)(1) (2000).

20. Blaine, *supra* note 15, at 1209 (citing United States Drug Enforcement Administration, *Exposing the Myth of Medical Marijuana*, http://www.usdoj.gov/dea/ongoing/marijuana.html (last visited Dec. 4, 2003)).

21. *See, e.g.*, Kuromiya v. United States, 37 F. Supp. 2d 717 (E.D. Pa. 1999); People v. Moore, 637 N.Y.S.2d 652 (N.Y. Crim. Ct. 1996).

22. 37 F. Supp. 2d 717, 730 (E.D. Pa. 1999).

Congress the authority to regulate drugs under the Commerce Clause, and on that basis, the Controlled Substances Act withstood constitutional challenge.[23]

Enforcement of federal drug policy falls overwhelmingly to state and local law enforcement agencies. In 1999, the Bureau of Justice's *Statistics Law Enforcement Management and Administrative Statistics* indicated that 76 percent of state law enforcement agencies had primary responsibility for enforcing drug laws in their jurisdictions.[24] Furthermore, "90% of county police departments, 99% of municipal police departments, and 95% of sheriffs' departments had primary responsibility for drug law enforcement."[25] Also, the arrest and seizure rates for marijuana are staggering. In 2001, the federal government's total drug seizure for the year amounted to 2,913,724 pounds, 2,673,535 pounds of which were attributable to marijuana seizure.[26] The next most-seized drug was cocaine, which amounted to only 235,377 pounds.[27]

B. California Policies

Despite the federal government's policies against the use and distribution of marijuana, some states have enacted legislation that decriminalizes the use of marijuana in certain medical instances.[28] Proponents of these laws urge that marijuana can be used to alleviate symptoms that stem from a host of diseases, including

23. *Id.* The court also found that even in a case where a person who used medical marijuana could prove that his marijuana had never crossed state lines, the court would not second-guess the judgment of the legislature. *Id.* at 724. In enacting the Controlled Substances Act, Congress made the following findings in asserting its authority to regulate drugs under the Commerce Clause:

> (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—(A) after manufacture, many controlled substances are transported in interstate commerce, (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
>
> (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
>
> (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate.

21 U.S.C.A. § 801 (1999). Similar to the above congressional findings, courts have likewise recognized the authority of the federal government to regulate drugs under the Commerce Clause, due to the interstate nature of the illegal drug market. *See, e.g.*, United States v. Orozco, 98 F.3d 105, 106-07 (3rd Cir. 1996).

24. Executive Office of the President, Office of National Drug Control Policy: *Drug Data Summary* (March 2003), *available at* http://www.whitehousedrugpolicy.gov/pdf/drug_datasum.pdf (last visited Dec. 1, 2003).

25. *Id.* at 2-3.

26. *Id.* at 3.

27. *Id.*

28. Nine states currently maintain laws that legalize marijuana for people with physician recommendations or prescriptions. Associated Press, *Supreme Court Clears Way for Medical Marijuana*, USA TODAY, October 14, 2003, *available at* http://www.usatoday.com/news/washington/2003-10-14-mar-medical_x.htm (last visited Dec. 2, 2003). These states include Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington. *Id.*

"AIDS, cancer, glaucoma, multiple sclerosis, paraplegia, epilepsy, and quadriplegia."[29] In fact, ten states currently allow marijuana use in severely ill patients with physician approval, though none of these states have extended this right for recreational use.[30]

In California, the Compassionate Use Act of 1996[31] became the first voter-approved initiative, granting patients that suffer from certain illnesses the right to obtain marijuana for medical use upon the recommendation of a physician.[32] The Compassionate Use Act provides, in pertinent part:

> To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where 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... patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.[33]

The California initiative was enacted as a protective measure, ensuring that seriously ill patients and their treating physicians would not be subject to state criminal prosecution.[34] In practice, the Act does not create a "complete" immunity from arrest or prosecution, but rather, creates a statutory defense, both at trial and in a motion, to set aside an indictment.[35] Although the California law has powerful application for proponents of marijuana use for medical purposes in the context of state action, the Act does not purport to make prohibited conduct under federal law subject to a medical-use defense.[36]

In fact, upon passage of the California initiative, several groups organized to distribute and manufacture marijuana for qualified patients, and were enjoined from these activities under federal law.[37] In *United States v. Oakland Cannabis Buyers' Cooperative*,[38] the United States Supreme Court held that whether or not legal under California state law, the manufacture and distribution of marijuana remained illegal under federal law.[39] On that basis, the Supreme Court reversed

---

29. Blaine, *supra* note 15, at 1212. *See also* The National Organization for the Reform of Marijuana Laws, *Medical Use, at* http://norml.org/index.cfm?Group_ID=3376 (last visited Jan. 30, 2004); Jerome P. Kassirer, *Federal Foolishness and Marijuana*, 336 NEW ENG. J. MED. 366, 366 (1997). For an in-depth report on medical research supporting the use of marijuana for the reduction of cancerous tumors, see Manuel Guzman, *Cannabinoids: Potential Anticancer Agents*, 3 NATURE REVIEW 745, 745-55 (2003).

30. The National Organization for the Reform of Marijuana Laws, *Summary of Active State Programs*, *available at* http://norml.org/index.cfm?Group_ID=3376 (last visited Feb. 3, 2004).

31. CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

32. Blaine, *supra* note 15, at 1215.

33. CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

34. People v. Bianco, 113 Cal. Rptr. 2d 392, 395 (Cal. Ct. App. 2002).

35. People v. Mower, 49 P.3d 1067, 1070 (Cal. 2002).

36. United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1101-02, 1105 (N.D. Cal. 1998).

37. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 486-87 (2001). *See also* United States v. Cannabis Cultivators Club, 5 F. Supp. 2d at 1092.

38. 532 U.S. 483 (2001).

39. *Id.* at 489. The Court recognized that the Controlled Substances Act itself specifically provides that "marijuana has 'no currently accepted medical use' at all." *Id.* at 491 (quoting 21 U.S.C. § 812(b) (2000)).

the opinion of the Ninth Circuit Court of Appeals, which had recognized a medical necessity defense to the federal Controlled Substances Act.[40] Instead, the Court found that the language of the Controlled Substances Act was clear in placing marijuana on Schedule 1, a category that contains only those drugs that have "'high potential for abuse,'" and "'lack of accepted safety for use . . . under medical supervision.'"[41] On that basis, the Supreme Court refused to apply the medical necessity defense advocated by the California initiative to actions arising under the federal law.[42]

C. *The Federal Government Responds to California's Policy*

On December 30, 1996, Barry McCaffrey, Director of the Office of National Drug Control Policy, released a statement entitled "The Administration's Response to the Passage of California Proposition 215 and Arizona Proposition 200," in which he declared the recommendation or prescription of marijuana by physicians was inconsistent with "public interest" as used in the Controlled Substances Act, and therefore, was grounds for revocation of a physician's federal license to prescribe controlled substances.[43] This policy, recorded as a Notice in the Federal Register, provided that a letter would be sent by the Departments of Justice and Health and Human Services to practitioner associations and licensing boards, warning doctors that physicians who "intentionally provide their patients with oral or written statements in order to enable them to obtain controlled substances in violation of federal law . . . risk revocation of their DEA prescription authority."[44]

The policy itself, promulgated by a federal agency through the statement of its director, seeks to stop physician recommendations of a controlled substance deemed illegal by the federal government.[45] The policy set forth enforcement mechanisms by federal agencies and ultimately ordered the revocation of federal prescription licenses.[46] Although the government's clear legislative intent was to nullify the state initiatives in California and Arizona, this federal policy failed to otherwise implicate state law.

In *Pearson v. McCaffrey*,[47] a group of physicians sued the Office of National Drug Control Policy, the Department of Health and Human Services, the Department of Justice, and the Drug Enforcement Agency in federal district court, alleging that the federal policy prohibiting the recommendation of marijuana use in medical circumstances was unconstitutional.[48] The plaintiff physicians sought to enjoin the federal government from initiating civil, criminal, or administrative pro-

---

40. *Id.* at 488. Although the majority broadly construed its holding, negating the possibility of a medical necessity defense to any regulation under the Controlled Substances Act, Justice Stevens, in his concurrence, argued that this ruling should be limited to the distribution and manufacture of marijuana, and that the medical necessity defense should be reviewed separately in the case of a patient's prosecution for use of marijuana. *Id.* at 503 (Stevens, J., concurring).

41. *Id.* at 492 (quoting 21 U.S.C. § 812(b)(1)(A)-(C)).

42. *Id.* at 494.

43. Administrative Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6164 (Feb. 11, 1997).

44. *Id.*

45. *Id.*

46. *Id.*

47. 139 F. Supp. 2d 113 (D.D.C. 2001).

48. *Id.*

ceedings against physicians who recommend and prescribe marijuana to their terminally ill patients, or against patients who seek to obtain marijuana for medical purposes, or scientists who seek to consult with patients and physicians through research on medical marijuana.[49] The plaintiff physicians alleged that the federal policy violated the First, Ninth and Tenth Amendments, as well as the Commerce Clause and the Administrative Procedures Act, and that the policy exceeded the statutory authority of the Office of National Drug Control Policy.[50] The plaintiff physicians failed on all counts to convince the district court that the federal policy should be invalidated.[51] Instead, the district court provided a full analysis of the statement released by McCaffrey finding it to be, "in essence, a public affirmation of the federal government's intent to enforce the CSA," rather than a new drug policy.[52]

Addressing the First Amendment rights of physicians as they relate to the recommendation of marijuana in certain medical circumstances, the court in *Pearson* rejected all three of the plaintiffs' arguments that the federal policy amounted to a prior restraint, that the policy was impermissibly content-based, and that the policy was overbroad.[53] The court addressed the character of the "recommendations" and "prescriptions" implicated by the policy and found that they did not amount to protected speech.[54] In making this determination, the court noted that:

> [I]n . . . California, the term 'recommend' has a special significance under the law because patients are able to take a recommendation for medicinal marijuana to a buyers' club to receive the drug. In these situations, a recommendation is analogous to a prescription, therefore the federal government will treat it as such. . . . It is clear that, short of a prescription or recommendation for marijuana, the federal government will not get involved in communication between doctors, patients, and researchers regarding the potential medical benefits of marijuana use.[55]

Because the federal policy did not restrict physicians from all communications with patients regarding the "benefits and risks of the use of marijuana," the court found that the policy did not implicate First Amendment rights.[56]

III. THE *CONANT* DECISION

In *Conant v. Walters*, patients and physicians brought a class action suit to enjoin the federal government from enforcing its policy against the recommendation of marijuana use to treat patients with severe medical conditions.[57] The United States District Court entered a preliminary injunction against the government, providing that "the government 'may not take administrative action against physicians for recommending marijuana unless the government in good faith believes that it has substantial evidence' that the physician aided and abetted" marijuana

49. *Id.* at 115.
50. *Id.* at 117.
51. *Id. at* 125.
52. *Id.*
53. *Id.* at 119-20.
54. *Id.* at 120-21.
55. *Id.*
56. *Id.*
57. Conant v. Walters, 309 F.3d 629, 633 (9th Cir. 2002).

purchase, cultivation or possession.[58] The government did not appeal the preliminary injunction, which remained in force for more than two years pending litigation.[59] In 1999, the district court entered a permanent injunction, enjoining the federal government from enforcing its policy against physician recommendations of medical marijuana.[60] The district court recognized the possibility of many legitimate responses to a recommendation by a physician for the use of marijuana.[61] For example, the court concluded that patients could seek placement in a federally approved, experimental marijuana-therapy program or could seek to repeal the federal law against the use of marijuana in medical circumstances.[62] Finding that the government's policy would unduly restrict discourse regarding public policy, and that it would "disable patients from understanding their own situations well enough to participate in the debate," the district court invalidated the federal policy on First Amendment grounds.[63]

On appeal, the court found that the fundamental issue in this case was the extent to which the federal government may regulate communications in the doctor-patient relationship without violating First Amendment rights.[64] The Ninth Circuit recognized that the Supreme Court had reversed its recent decision in *United States v. Oakland Cannabis Buyers' Cooperative*[65] concerning the exemption of federal drug laws from dispensing marijuana in cases of medical necessity.[66] The court insisted that the present case involved issues independent from the application of federal drug laws in the context of medical use; according to the court, the issues presented by this case involved speech rights present in physician-patient communications.[67]

Although the government argued that the "recommendation" given by a physician is analogous to a prescription for marijuana because patients in California may use a recommendation to obtain marijuana, albeit illegally under federal law, the court refused to characterize "recommendation" in such a way.[68] Instead, the court stated that recommendations used by patients to illegally obtain marijuana would subject physicians to charges of aiding and abetting the violation of federal law.[69] The Ninth Circuit, however, recognized that a recommendation by a doctor for a patient to use medical marijuana constituted protected speech, unless the doctor's intent is to actively help the patient obtain marijuana.[70]

According to the Ninth Circuit, the injunction issued in this case restricts the federal government from initiating an investigation of a physician solely on the

---

58. *Id.* at 633 (quoting Conant v. McCaffrey, 172 F.R.D. 681, 701 (N.D. Cal. 1997)).

59. Conant v. Walters, 309 F.3d at 633.

60. *Id.*

61. *Id.* at 634.

62. *Id.*

63. *Id.* at 634-35 (quoting the district court's decision in Conant v. McCaffrey, No. 6 97-00139 WHA, 2000 WL 1281174, at *14 (N.D. Cal. Sept. 7, 2000)).

64. *Id.* at 634.

65. 532 U.S. 483 (2001).

66. Conant v. Walters, 309 F.3d at 634 (citing United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001), *rev'g* United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109 (9th Cir. 1999)).

67. *Id.*

68. *Id.* at 635.

69. *Id.*

70. *Id.* at 636.

basis of a recommendation of marijuana; in other words, unless the government has a good faith belief that it has substantial evidence of criminal conduct, it may not investigate a physician simply for recommending marijuana use.[71] The Ninth Circuit was not clear, however, in defining the criminal conduct that the federal government may rely upon, leaving a legitimate question as to whether the government may use criminal conduct on the part of the patient as a substantial basis for initiating investigations with respect to a treating physician.[72]

Applying principles set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[73] and *Rust v. Sullivan*,[74] the Ninth Circuit recognized that First Amendment protection exists in the physician-patient relationship.[75] In fact, the court noted that the Supreme Court has recognized that "professional speech may be entitled to 'the strongest protection our Constitution has to offer.'"[76] In this case, the court held that the protections provided to physicians in the doctor-patient relationship were compromised by the government's effort to "'prevent the physician from exercising his or her medical judgment.'"[77] This purpose, according to the court, resulted in an impermissible restriction on doctor-patient communication.[78]

The Ninth Circuit also noted the effect of the government policy on physician-patient relationships in California.[79] Although the government contended that the federal policy was enacted to prohibit physician recommendations and prescriptions that would result in illegal conduct by the patient, the court recognized that the policy itself had "chilled" virtually all physician communication regarding marijuana as a potential treatment for certain illnesses.[80] In fact, the court recognized that the government had "even stipulated in the district court that a 'reasonable physician would have a genuine fear of losing his or her DEA registration to dispense controlled substances if that physician were to recommend marijuana to his or her patients.'"[81] Finding that the government's policy had become, in practice, a broad threat to virtually all speech regarding the medical use of marijuana, the Ninth Circuit found the policy unconstitutional under the First Amendment, and on that basis, upheld the permanent injunction issued by the district court.[82]

The concurring opinion argued that, although the majority correctly enjoined the federal government from carrying out its policy on First Amendment grounds, the federal policy also ran afoul of the Commandeering Doctrine set forth by *New York v. United States*[83] and *Printz v. United States*.[84] Based on the Commandeering Doctrine, the concurring opinion argued that because federal drug laws rely

71. *Id.*
72. *Id.*
73. 505 U.S. 833 (1992).
74. 500 U.S. 173 (1991).
75. Conant v. Walters, 309 F.3d at 636.
76. *Id.* at 637 (quoting Florida Bar v. Went For It, Inc., 515 U.S. 618, 634 (1995)).
77. *Id.* at 638 (quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. at 883-84).
78. *Id.*
79. *Id.*
80. *Id.* at 638-639.
81. *Id.* at 639.
82. *Id.*
83. 505 U.S. 144 (1992).
84. 521 U.S. 898 (1997); Conant v. Walters, 309 F.3d at 645 (Kozinski, J., concurring).

heavily on local law enforcement, particularly in circumstances involving possession of small amounts, as is generally the case for patients using marijuana for medical purposes, the policy against doctor recommendations was largely a federal effort to force the State of California to change its law on the medical use of marijuana.[85] Recognizing that the federal government retained the ability to keep medical marijuana illegal, the concurring opinion argued that the federal government could not force the State of California to do the same.[86] While the federal government did not specifically order that California keep medical marijuana illegal, the concurring opinion argued that, in effect, the federal government's policy forces the State of California to do just that: "the state is being forced to regulate conduct that it prefers to leave unregulated."[87] Recognizing that the doctor-patient relationship is regulated according to the states' traditional police powers, the concurring opinion argued that the federal government had no authority to force the states to regulate the doctor-patient relationship in the interest of a federal policy.[88]

IV. RECOMMENDATIONS

The Ninth Circuit appropriately recognized that the Office of National Drug Control Policy had publicly responded to the California initiative through a statement by its director warning that physicians engaged in the recommendation or prescription of marijuana would be subject to investigation, and ultimately, revocation of their federally-issued licenses to prescribe controlled substances.[89] The Ninth Circuit, however, failed to address the legal effect of the statement, including its publication as a Notice, and ultimately complicated the issue presented by the case. The statement itself, according to the government in *Pearson v. McCaffrey*, was meant to iterate how the ONDCP, along with Health and Human Services and the Drug Enforcement Agency, interpreted physician conduct in the context of the Controlled Substances Act.[90] According to the District of Columbia Court of Appeals in *Pearson v. McCaffrey*, the statement issued in response to the California initiative did not rise to the level of a new policy, but rather constituted an affirmation of the government's intent to enforce the Controlled Substances Act.[91]

In *Conant*, rather than addressing the role of McCaffrey's statement as a Notice under federal law, the Ninth Circuit referred to the statement as a new and distinct policy, enacted in direct response to state initiatives surrounding medical marijuana, placing new restrictions on the medical profession. The court failed to provide a detailed analysis of this conclusion. Although lacking in a full analysis, the Ninth Circuit may have been correct to view McCaffrey's statement as a new federal policy for two reasons: first, rather than restating the current law under the Controlled Substances Act, McCaffrey's statement set clear regulations on physi-

85. Conant v. Walters, 309 F.3d at 644-46 & n.10 (Kozinski, J., concurring).
86. *Id.* at 645-46.
87. *Id.*
88. *Id.* at 647.
89. *Id.* at 632 & n.1.
90. 139 F. Supp. 2d 113, 125 (D.D.C. 2001). *See also supra* notes 45-54 and accompanying test.
91. *Id.*

cians by prohibiting them from recommending marijuana. Second, rather than reaffirming the legal consequences of failing to comply with the Controlled Substances Act, McCaffrey's statement outlined new enforcement mechanisms and threatened specific punishment through the revocation of physicians' federal prescriptive licenses. For these reasons, the Ninth Circuit, had it analyzed the actual notice more fully, might have explicitly disagreed with the court in *Pearson v. McCaffrey*, determining that the policy was enacted as a new regulation on marijuana use and its relation to the medical profession.

Further proof that this policy has added a new dimension to the federal government's drug regulation is evidenced by the fact that the policy itself has "chilled speech" regarding marijuana use in doctor-patient relationships.[92] In addition, although the federal policy has been enjoined since 1997, nine doctors currently face revocation of their state medical licenses by the Medical Board of California upon complaints by law enforcement agencies.[93] These physicians, including a Berkeley-based psychiatrist, Dr. Tod Mikuriya, have been accused of "extreme departure from the standard of care" through their written recommendations, granting patients medical approval for the use of marijuana, legal under California law.[94] The threatened revocation of state medical licenses confirms that the policy itself has implications on the state level and is not a simple matter of federal regulation.

On the other hand, because McCaffrey's statement purported to explain the role of physician recommendations in the determination of "public interest" under the Controlled Substances Act, a valid argument can be made that the statement simply addressed the ways in which the government intended to enforce the Controlled Substances Act itself. Further support for this conclusion exists in the fact that McCaffrey's statement never underwent any federal legislative process to become law, but was issued only as a Notice, with no indication it would ever be formally codified. The Ninth Circuit in *Conant* never addressed these arguments, but rather assumed that the policy was a distinct, new regulation on physician speech.

Regardless of this distinction, the Ninth Circuit erred by failing to analyze the context of the statement issued by the ONDCP. The federal government ought to be able to threaten that which it may lawfully carry out. In other words, if the ONDCP can revoke a physician's federal prescriptive license, or can declare the basis upon which a federal prescriptive license may be revoked, it may lawfully threaten to do so. In this case, the Ninth Circuit never addressed when or why a federal prescriptive license may lawfully be revoked. For this reason, the Ninth Circuit complicated the issue and arguably stretched the First Amendment beyond its scope.

Although the majority recognized the government's argument that doctor "recommendations" under the federal policy were analogous to "prescriptions," the court rejected this contention without analyzing the context within which the argument was made.[95] In California, as recognized in *Pearson v. McCaffrey*, the "rec-

---

92. Conant v. Walters, 309 F.3d at 638.

93. Ann Harrison, *Prosecuting the Pot Doc*, THE SAN FRANCISCO BAY GUARDIAN, Oct. 8, 2003, *available at* http.www.sfbg-com/38/02/news_mikuriya.html.

94. *Id.*

95. Conant v. Walters, 309 F.3d at 635.

ommendation" of marijuana as a medical treatment by a medical professional generally consists of a piece of writing by the doctor, which historically acted as a prescription, and currently acts as a permit of sorts to possess marijuana under state law.[96] Based on the fact that the federal policy grouped "recommendations" and "prescriptions" together for the purpose of regulation, but never purported to restrict physicians from "communicating" or "informing" their patients about the use of marijuana to treat certain illnesses, the government makes a compelling argument that the federal policy does not implicate speech at all.[97] Rather, the federal policy regulates conduct; specifically, the prescription for or "recommendation" (as used in the limited sense of this context) of marijuana in severely ill patients.

Failing to recognize the complexities of the federal policy, the Ninth Circuit analyzed the First Amendment rights implicated by substantially restricting physician approval of marijuana use in certain medical circumstances. The court analyzed whether a physician's recommendation of medical marijuana constituted protected speech if the doctor's intent was not to help the patient obtain marijuana for that purpose.[98] Although the record of medical marijuana policy in California clearly establishes that medical recommendations are made specifically for that purpose,[99] even in the absence of such a finding, physician recommendations of medical marijuana do not fall within a category of protected speech recognized by the Supreme Court. Rather, such speech has been explicitly recognized as subject to the regulatory powers of the state.[100]

Recognizing that speech and conduct are often invariably intertwined, the Supreme Court has stated that when "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[101] Adopting a test for government regulations on conduct that create certain incidental restrictions on First Amendment freedoms, the Supreme Court stated:

96. Pearson v. McCaffrey, 139 F. Supp. 2d 113 (D.D.C. 2001). *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001) (providing evidence that physician "recommendations" were used, prior to the decision of the Supreme Court, as a means of obtaining marijuana from providers set up for medical purposes). *See also* Harrison, *supra* note 93 (referring to the investigation of physicians who had "written more than half the estimated 50,000 medical marijuana recommendations in California").

97. *See* Administrative Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997).

98. Conant v. Walters, 309 F.3d at 636.

99. *See* Pearson v. McCaffrey, 139 F. Supp. 2d 113 (D.D.C. 2001); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001).

100. Linder v. United States, 268 U.S. 5, 18 (1925) (recognizing that the regulation of physician conduct is the prerogative of the states and outside the reach of the federal government). *See also* Whalen v. Roe, 429 U.S. 589, 591 (1977); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 881 (1992); Thompson v. W. States Med. Ctr., 535 U.S. 357, 376-77 (2002).

101. United States v. O'Brien, 391 U.S. 367, 376 (1968). In *United States v. O'Brien*, the Supreme Court upheld a government restriction on the burning of Selective Service registration certificates, despite First Amendment protection of expressive conduct, on the basis that the government had an important interest in regulating the destruction of the certificates. *Id.* at 367.

102. *Id.* at 377.

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[102]

In order to determine the communicative nature of particular conduct warranting First Amendment protection, the United States Supreme Court has asked whether "[a]n intent to convey a particularized message was present, and in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it."[103]

Although government- and state-imposed restrictions on speech carry a heavy presumption against their validity, the Supreme Court has recognized that the First Amendment does not protect all actions in all places.[104] In fact, limitations on the manner, time and place of expression are generally upheld if the restrictions serve a significant government interest[105] and if the restrictions themselves do not alter the message, ideas, or content of expression.[106] Recognizing that the basic guarantee provided by the First Amendment is the guarantee that all ideas may be advocated without government intrusion, the Supreme Court has strictly ruled against content-based restrictions on speech.[107] When the government does create a speech restriction, the Supreme Court has held that it may not regulate "based on hostility—or favoritism—towards the underlying message expressed."[108]

While content-based restrictions on speech are presumptively invalid, there do remain some areas of expression that the government may regulate.[109] In addition to obscene and libelous speech, the Supreme Court has historically left speech

---

103. Spence v. Washington, 418 U.S. 405, 410-11 (1974).

104. United States v. Grace, 461 U.S. 171, 177 (1983) (stating that the government is entitled to enforce reasonable regulations on the time, place and manner of expression, as long as such restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication"). *Id.* (citation omitted). *See* Grayned v. City of Rockford, 408 U.S. 104, 119-20 (1972) (finding restrictions as to the time and place of demonstrations on school property a reasonable limitation on First Amendment protections); Adderley v. Florida, 385 U.S. 39, 46-48 (1966) (affirming trespass convictions of protestors on jailhouse grounds, viewing jailhouse property as an unreasonable place for such protests).

105. United States v. Grace, 461 U.S. at 177.

106. Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95 (1972) (citing Cohen v. California, 403 U.S. 15, 24 (1971); Street v. New York, 394 U.S. 576 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); NAACP v. Button, 371 U.S. 415, 445 (1963); Wood v. Georgia, 370 U.S. 375, 388-89 (1962); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937)). In *Police Dep't of Chicago v. Mosely*, the Court found that government-imposed restrictions on the subject-matter of political expression were impermissible under the First Amendment to the Constitution.

107. *See, e.g.*, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-90 (1959) (holding that a state may not deny a license to a film based on the message portrayed in the film); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (finding a city ordinance unconstitutional because it prohibited racially offensive speech, solely based on the offensive content of the speech).

108. R.A.V. v. City of St. Paul, 505 U.S. at 386.

109. *See, e.g.*, Miller v. California 413 U.S. 15 (1973) (holding that obscene material is unprotected by the First Amendment).

unprotected that incites illegal action.[110] In *Brandenburg v. Ohio*,[111] the Supreme Court set forth the modern test for incitement speech left unprotected by the First Amendment. In that case, the Court recognized that the government did not enjoy the right to regulate speech that merely advocates lawlessness.[112] According to the Court, the government may, however, proscribe speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[113] This two-part test has typically become the measure for government action taken against protesters, and has been applied narrowly, allowing government to regulate speech only in instances where lawless action or violence is imminent.[114]

The Court has been careful to note that participation in critical political discourse, even by advocating violent or lawless means, is protected by the First Amendment and does not fall within incitement language, as defined by *Brandenburg v. Ohio*.[115] Although the test identified in *Brandenburg* is for speech that urges or incites immediate lawless action, the scope of the incitement cases may well be more limited. The historical recognition of incitement language began with sedition and early cases involving conspiracies to obstruct the United States during wartime.[116] In the early incitement cases, the Court required the expression to "create a clear and present danger that . . . will bring about the substantive evils that Congress has a right to prevent" in order to qualify as incitement unprotected by the First Amendment.[117] Even in modern incitement cases, the Court has required much more than mere advocacy of an illegal purpose.[118] Instead, the incitement doctrine has been narrowly applied to circumstances that urge immediate, violent, lawless actions.[119] In the context of medical marijuana, it is doubtful that physician recommendations, though they arguably incite lawless action, would be reached by the scope of the incitement cases.

The First Amendment to the Constitution applies not only to personal communications, but is also recognized in the realms of commercial and professional speech, though on a more limited basis.[120] The Supreme Court has recognized

110. *See* Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919); Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917); Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927); Dennis v. United States, 341 U.S. 494 (1951).

111. 395 U.S. 444 (1969).

112. *Id.* at 447.

113. *Id.*

114. *See, e.g.*, Hess v. Indiana, 414 U.S. 105, 108 (1973) (holding that language that advocates lawless action at some "indefinite future time" is not considered incitement language, and is protected by the First Amendment).

115. Brandenburg v. Ohio, 395 U.S. at 447.

116. *See* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919).

117. Schenck v. United States, 249 U.S. at 52.

118. Yates v. United States, 354 U.S. 298 (1957). "The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something." *Id.* at 324-25.

119. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969). *See generally* Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645.

120. Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770-73 (1976).

that government may regulate commercial speech that concerns unlawful activity or that is misleading.[121]

The Supreme Court recently addressed a Ninth Circuit decision which held that specific provisions of the Food and Drug Administration's Modernization Act amounted to impermissible restrictions on commercial speech.[122] In *Thompson v. Western States Medical Center*, the Court addressed a provision of the Modernization Act that prohibited the solicitation or advertisement of particular compounded drugs by pharmaceutical providers.[123] The Court analyzed the commercial speech according to a two-part test, articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[124] According to this test, the Court first asked "a threshold matter of whether the commercial speech concerns unlawful activity or is misleading."[125] If unlawful or misleading, the Court determined that the First Amendment does not protect the commercial speech.[126] If the speech at issue does not concern unlawful activity or misleading information, the Court then addresses the substantial nature of the government's interest in regulating the speech.[127] Applying this test, the Court held that the government regulation regarding the advertisement and solicitation of compounded drugs was an unconstitutional restriction on commercial speech because the government had failed to show how the restrictions would advance its interests or that less restrictive alternatives were unavailable.[128]

Although commercial speech such as advertising may be afforded constitutional protection according to the tests set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*[129] and *Thompson v. Western States Medical Center*,[130] the speech interests of medical professionals in the treatment of patients has been analyzed by courts in a different way.[131] In *Rust v. Sullivan*,[132] the Supreme Court addressed a First Amendment challenge to regulations promulgated by the Department of Health and Human Services that limited

---

121. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980). The Court has further recognized the application of the test set forth in *Central Hudson* in the areas of particular professions, including law (see Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995), and the medical profession (see Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002)).

122. Thompson v. United States, 535 U.S. at 360.

123. *Id.* Drug compounding is the process by which a medical professional (pharmacist or doctor, generally) mixes, combines or alters the ingredients in a medication in order to tailor it to a specific patient's needs. *Id.* at 360-61. Although these individually compounded drugs are not submitted for approval by the FDA, their regulation has historically been left to the states. *Id.* at 362. For more information on drug compounding and modern issues in pharmaceutical regulation, see J. THOMPSON, A PRACTICAL GUIDE TO CONTEMPORARY PHARMACY PRACTICE, 11.3 (1998).

124. Thompson v. W. States Med. Ctr., 535 U.S. at 367 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)).

125. *Id.* at 367.

126. *Id.*

127. *Id.*

128. *See id.* at 376.

129. 447 U.S. 557 (1980).

130. 535 U.S. 357 (2002).

131. *See generally* Rust v. Sullivan, 500 U.S. 173 (1991); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992); Nat'l Ass'n for the Advancement of Psychoanalysts v. Cal. Bd. of Psychology, 228 F.3d 1043 (9th Cir. 2000).

132. 500 U.S. 173 (1991).

the ability of Title X[133] fund recipients to use federal funding for abortion-related activities.[134] The Act at issue in *Rust v. Sullivan* provided that "[n]one of the funds appropriated . . . shall be used in programs where abortion is a method of family planning."[135] The Supreme Court held that the regulations, on their face, would not be deemed unconstitutional if a conceivable constitutional construction was possible for the Act.[136] On that basis, the Court ruled that the Act was constitutional.[137] With respect to the First Amendment challenge, the Court refused to recognize an infringement on speech where funding was provided to certain organizations that further "certain permissible goals" (childbirth) while discouraging "alternative goals" (abortion).[138] Because physicians in this case were not singled out based on the content of their speech, but rather, were denied funding for activities, including speech, reaching beyond the goals of a funded project, the Court held that speech rights were not implicated.[139] Although the Court recognized the First Amendment rights present in the doctor-patient relationship, it refused to analyze the full scope of doctor-patient rights because nothing in the Act at issue "requires a doctor to represent as his own any opinion that he does not in fact hold."[140]

In 2000, the Ninth Circuit examined the nature of First Amendment rights of psychoanalysts, who argued that their free speech rights had been abridged by the State of California's licensing requirements.[141] According to the Ninth Circuit, "'the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. . . . That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection.'"[142] The court further noted that "[t]he communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation."[143] The court found that the state's interest in its requirements, enacted for the purpose of regulating the quality of mental health services in the state, was compelling, and that the regulations themselves did not suppress speech based on its message.[144] On that basis, the court held that psychoanalysts' First Amendment rights were not impermissibly restricted by the California licensing requirements.[145]

---

133. The Public Health Service Act, 42 U.S.C. §§ 300 - 300a-6 (2000), provides federal funding to public and nonprofit private entities that provide voluntary family planning projects and services.

134. Rust v. Sullivan, 500 U.S. at 177-78.

135. 42 U.S.C. § 300a-6.

136. Rust v. Sullivan, 500 U.S. at 183, 190. The Court relied upon Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.").

137. Rust v. Sullivan, 500 U.S. at 178.

138. *Id.* at 194.

139. *Id.* at 194-95.

140. *Id.* at 200.

141. Nat'l Ass'n for the Advancement of Psychoanalysts v. Cal. Bd. of Psychology, 228 F.3d 1043, 1053 (9th Cir. 2000).

142. *Id.* at 1054.

143. *Id.* (citing IDK, Inc. v. Clark County, 836 F.2d 1185, 1191 (9th Cir. 1988).

144. *Id.* at 1054-55.

145. *Id.* at 1056.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[146] the Supreme Court specifically addressed the speech rights of physicians in the context of regulations placed on physicians by a state statute, requiring doctors to provide specific information to patients considering an abortion.[147] The information, published by the State, included, among other things, information about "medical assistance for childbirth . . . child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion."[148] The Court rejected petitioners' argument that a physician's First Amendment right not to speak[149] necessitated the state regulation's invalidation on constitutional grounds.[150] Instead, the Court stated, "the physician's First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here."[151] Because the state-required information was justified by an interest in ensuring that "a woman be apprised of the health risks of abortion and childbirth," the Court ruled that the information was within the realm of medical information that the state police power has the power to regulate.[152] The Court, recognizing the speech interests of physicians, refused to allow those interests to override state-based regulation of professional conduct.[153]

In *Casey*, the Supreme Court recognized that the First Amendment applies in limited circumstances within the doctor-patient relationship, but that the state's interests in regulating physician conduct may substantially outweigh these individual speech interests.[154] The authority to regulate professional conduct, particularly that of medical professionals, is derived from the state's general police powers and not from any federal authority.[155] For example, in *Linder v. United States*,[156] the Supreme Court held that a physician, who, in good faith, dispensed small amounts of narcotics to a drug addict, did not violate federal narcotics laws.[157] Although *Linder* has not been reversed, it predates the Controlled Substances Act, and therefore, does not address detoxification of drug addicts according to modern drug laws. The case does, however, provide the general principle that "direct control of medical practice in the States is beyond the power of the Federal Government."[158]

In *Whalen v. Roe*,[159] physicians and patients challenged the constitutionality of a New York statute requiring the registration of names and addresses of all

146. 505 U.S. 833 (1992).

147. *Id.* at 881.

148. *Id.*

149. *See generally* Wooley v. Maynard, 430 U.S. 705 (1977) (upholding an individual's right not to convey a State message).

150. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. at 884.

151. *Id.* (citation omitted).

152. *Id.* at 884-85.

153. *Id.*

154. *Id.*

155. *See* Whalen v. Roe, 429 U.S. 589, 601-03 (1977). *See also* Linder v. United States, 268 U.S. 5, 18 (1925).

156. 268 U.S. 5 (1925).

157. *Id.* at 22-23.

158. *Id.* at 18.

159. 429 U.S. 589 (1977).

patients who had obtained, by physician prescription, drugs identified by the New York Controlled Substances Act as having both permissible medical and illegal recreational uses.[160] Although the plaintiffs argued that the physician-patient relationship involved a "zone of privacy" protected by the due process clause,[161] the Court held that "the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control."[162] For this purpose, the Court determined that states' broad police powers could be used to regulate the professional conduct of physicians.[163]

In a detailed analysis of free speech rights and the regulation of the medical profession, it seems that the State of California could have properly enacted regulations limiting the ability of physicians to speak to their patients about medical treatment with marijuana, particularly if California had deemed the regulation necessary for the safety of patients. In this context, the physician's First Amendment rights might be implicated, "but only as part of the practice of medicine, subject to reasonable licensing and regulation of the State."[164] As in *Casey*, no constitutional infirmity would exist in requiring that physicians provide (or not provide) information mandated by state professional conduct policies, as long as the policies reflect a substantial government interest.[165]

Similar to the situation in *National Ass'n for the Advancement of Psychoanalysis v. California Board of Psychology*, physicians may use speech to treat their clients, or to communicate the treatment that they recommend; however, "[t]he communication that occurs during [this treatment, although] entitled to constitutional protection, . . . is not immune from regulation."[166] Rather, states retain the prerogative to control professional conduct in the realm of the medical profession.[167]

While the states retain the power to regulate the professional conduct of physicians, even when speech may be used to carry the conduct out, "direct control of medical practice in the States is beyond the power of the federal government."[168] Although never addressed by the majority, the ultimate reason the federal government might have been enjoined from its stated policy lies in the inability of the federal government to enact regulations regarding the professional conduct of physicians. The concurring opinion appropriately recognized this failure.

According to the concurring opinion in *Conant*, however, the federal government enacted its policy in an attempt to force the State of California to regulate what it had chosen not to regulate.[169] According to the concurrence, because the federal policy in effect rendered California's initiative invalid, and because the federal government relies heavily on local law enforcement in drug arrests and

160. *Id.* at 591.

161. *Id.* at 598.

162. *Id.*

163. *Id.* at 600-03. *See also* Linder v. United States, 268 U.S. 5, 18 (1925) (recognizing that the regulation of physician conduct is the prerogative of the states and outside the reach of the federal government).

164. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 884 (1992).

165. *Id.*

166. 228 F.3d 1043, 1054 (9th Cir. 2000).

167. Linder v. United States, 268 U.S. at 18.

168. *Id.*

169. Conant v. Walters, 309 F.3d 629, 645 (9th Cir. 2002) (Kozinski, J., concurring).

prosecutions, the federal government has impermissibly commandeered the State of California. In the present case, state law enforcement agencies have not been called upon to enforce the federal policy; the policy itself calls for action by the Department of Health and Human Services and the Department of Justice, both agencies of the federal government.[170] The concurring opinion fails to recognize that federal preemption is not commandeering. In fact, courts have generally and consistently upheld the federal government's authorization, under the Commerce Clause, to regulate drug use, even in medical circumstances. If the federal government had chosen to invalidate California's initiative, the Controlled Substances Act, which recognizes no acceptable medical use for marijuana, preempts state law to the contrary.

One remaining avenue that the Ninth Circuit could have addressed is the question of how far congressional authority extends in the realm of medical marijuana. While courts have generally upheld congressional prohibitions on medical marijuana, case law also generally denies the federal government the authority to regulate physician conduct. The court might have addressed the congressional findings in 21 U.S.C.A. § 801 that authorized the regulation of controlled substances under the Commerce Clause, but, in this new analysis weighed the weaker link to interstate drug traffic in medical cases against the dangers of extending the Commerce Clause to the realm of physician conduct. Allowing the federal government to strictly regulate the medical profession effectively blurs the line between national and local matters, relegating a long list of traditional police powers into the federal realm.

Nevertheless, because the federal government retains the general authority to grant and revoke the prescriptive licenses of physicians, the federal government should be allowed to issue statements warning how these actions will be carried out. Unless the federal policy at issue in this case overreaches the federal government's role by regulating physician conduct in a way unheard of with respect to the government's licensing authority, the Ninth Circuit should not have affirmed the decision to enjoin the policy. At the very least, the Ninth Circuit should have focused part of its analysis on these issues. Although the court appropriately recognized the chilling effect the federal policy had at the state level, these effects should not have been the crux of the court's decision. Instead, if the Ninth Circuit determined that the federal government's policy unduly restricted doctor-patient communications and legitimate, lawful responses to such communications, they should have affirmed the district court's injunction insofar as the policy was overbroad, but reversed the part of the injunction that removed federal authority to threaten lawful federal action.

V. CONCLUSION

This case is the logical end to vague and conflicting policies regarding the medical use of marijuana. If federal law may regulate all marijuana use, state laws contrary to federal law are preempted. To this end, the government could have enacted a law that precluded states from legalizing marijuana use under any circumstances or providing protection to people who violate federal law. Instead, the

170. *Id.* at 632-33.

government enacted a policy that limited physicians in their ability to make recommendations to patients, a decision that placed federal marijuana policy on shaky ground and arguably extended the regulatory power of the federal government too far. The Ninth Circuit, however, places itself on even shakier ground by attacking the regulation of doctors on the basis of free speech, rather than going for the heart of the issue, which is the ability of the federal government to regulate physician conduct. For these reasons, the Ninth Circuit misapplied the First Amendment to its legal determination of the issues presented in *Conant v. Walters*.

Katharine McCarthy