

# Cooperative Federalism and Marijuana Regulation

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## ABSTRACT

The struggle over marijuana regulation is one of the most important federalism conflicts in a generation. The ongoing clash of federal and state marijuana laws forces us to consider the preemptive power of federal drug laws and the appropriate roles for state and federal governments in setting drug policy. This conflict also creates debilitating instability and uncertainty on the ground in those states moving from prohibition to regulation of marijuana.

While the courts have yet to establish the precise contours of federal preemption doctrine in this context, we argue that the preemptive reach of the federal Controlled Substances Act (CSA) is relatively modest. Recognition of this legal reality likely played a significant role in the recent Department of Justice (DOJ) decision not to challenge the Colorado and Washington State ballot initiatives legalizing and regulating marijuana for adult use. Yet even if the federal government honors its commitment to not enforce federal drug laws against those complying with robust state regulatory regimes, the ancillary consequences flowing from the continuing federal prohibition remain profound. Banks, attorneys, insurance companies, potential investors, and others—justifiably concerned about violating federal law—are reluctant to provide investment capital, legal advice, or other basic professional services necessary for marijuana businesses to function. Those using marijuana in compliance with state law still risk losing their jobs, parental rights, and many government benefits if their marijuana use is discovered.

We suggest an incremental and effective solution that would allow willing states to experiment with novel regulatory approaches while leaving the federal prohibition intact for the remaining states: The federal government should adopt a cooperative federalism approach that allows states meeting specified federal criteria—criteria along lines that the DOJ has already set forth—to opt out of the CSA provisions relating to marijuana. State law satisfying these federal guidelines would exclusively govern marijuana activities within those states opting out of the CSA but nothing would change in those states content with the CSA's terms. This proposed solution embodies the best of federalism by empowering state experimentation with marijuana regulation while maintaining a significant federal role in minimizing the impact of those experiments on states wishing to proceed under the federal marijuana prohibition.

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## INTRODUCTION

The struggle over marijuana regulation is one of the most important federalism conflicts in a generation. Unprecedented public support for legalizing marijuana has emboldened Brandeisian experimentation<sup>1</sup> across the country. Since 1996 twenty-three states have legalized marijuana for medical purposes<sup>2</sup> and in November 2013 Colorado and Washington State went even further, legalizing marijuana for adult recreational use.<sup>3</sup> And while the Obama administration has thus far utilized its enforcement discretion to allow those state policy experiments to play out, marijuana remains a prohibited substance under federal law.<sup>4</sup> The ongoing clash over marijuana laws raises questions of tension and cooperation between state and federal governments and forces policymakers and courts to address the preemptive power of federal drug laws. Divergent federal and state laws also create debilitating instability and uncertainty on the ground in those states that are pioneering new approaches to marijuana control.

In the fall of 2013, Deputy Attorney James M. Cole issued a memorandum (Cole Memorandum II) on behalf of the federal Department of Justice (DOJ) that announced the DOJ will not prioritize the enforcement of federal marijuana laws in states with their own robust marijuana regulations and specified eight federal enforcement priorities to help guide state lawmaking.<sup>5</sup> This announcement has been widely interpreted to signal

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1. Brandeisian experimentation refers to the idea that states may experiment with new practices before they are adopted by the rest of the country. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). Justice Brandeis was the first to describe this notion of states being laboratories of democracy. *Id.*
  2. See *infra* note 139.
  3. WASH. REV. CODE ANN. §§ 46.04.586, 46.04.5055, 46.20.308, 46.61.502–506 (West 2012); WASH. REV. CODE ANN. §§ 69.50.101–609 (West 2014); WASH. ADMIN. CODE 314-55-005–540 (West 2014); COLO. CONST. art. XVIII, § 16 (2013) Colo. Const. art. XVIII, § 16; COLO. REV. STAT. §§ 12-43.4-101–1101 (West 2014); COLO. REV. STAT. §§ 18-3-106, 18-3-205 (West 2014); COLO. REV. STAT. § 42-4-1301 (West 2014); 1 COLO. ADMIN. CODE 212-2.102–1401 (West 2014).
  4. See 21 U.S.C. § 801 (2012).
  5. The eight federal enforcement priorities listed in Deputy Attorney James M. Cole’s memorandum (Cole Memorandum II) are: (1) preventing the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana;

that the federal government will not enforce its stricter marijuana laws against those complying with the new Washington and Colorado laws so long as the new state regulatory regimes effectively prevent the harms the DOJ has identified as federal priorities.<sup>6</sup> Yet even if the federal government voluntarily refrains from enforcing its drug laws against those complying with robust state regulatory regimes, the ancillary consequences flowing from the continuing federal prohibition remain profound.

We suggest an incremental and effective solution that would allow willing states to experiment with novel regulatory approaches while leaving the federal prohibition intact for the remaining states. The federal government should adopt a cooperative federalism approach that allows states meeting criteria specified by Congress or the DOJ to opt out of the federal Controlled Substances Act (CSA) provisions relating to marijuana.<sup>7</sup> State law satisfying these federal guidelines would exclusively govern marijuana activities within

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(6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) preventing marijuana possession or use on federal property. See U.S. DEPT OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT 1–2 (2013) [hereinafter Cole Memo II], available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

6. See, e.g., Brady Dennis, *Obama Administration Will Not Block State Marijuana Laws if Distribution is Regulated*, WASH. POST (Aug. 29, 2013), [http://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws—for-now/2013/08/29/b725bf8-10bd-11e3-8cdd-bcdc09410972\\_story.html](http://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws—for-now/2013/08/29/b725bf8-10bd-11e3-8cdd-bcdc09410972_story.html); Ashley Southall & Jack Healy, *U.S. Won't Sue to Reverse States' Legalization of Marijuana*, N.Y. TIMES, Aug. 29, 2013, at A11, available at <http://www.nytimes.com/2013/08/30/us/politics/us-says-it-wont-sue-to-undo-state-marijuana-laws.html>; John Ingold, *Federal Government Won't Block Colorado Marijuana Legalization*, DENVER POST (Aug. 29, 2013, 11:32 AM), [http://www.denverpost.com/breakingnews/ci\\_23973568/federal-government-wont-block-colorado-marijuana-legalization](http://www.denverpost.com/breakingnews/ci_23973568/federal-government-wont-block-colorado-marijuana-legalization); Steven Nelson, *DQJ: Marijuana Stores Can Open in Colorado and Washington*, U.S. NEWS (Aug. 29, 2013, 9:08 AM), <http://www.usnews.com/news/newsgram/articles/2013/08/29/doj-marijuana-stores-can-open-in-colorado-and-washington>. At the same time the Department of Justice (DOJ) has made clear that if states legalize marijuana under state law without also implementing a strict regulatory framework, the federal government will continue to enforce the CSA's marijuana provisions in those states. See Timothy Phelps, *California Needs Stronger Marijuana Regulation, Federal Official Says*, LA TIMES, Oct. 26, 2014, at A1, available at <http://www.latimes.com/la-me-attorney-general-marijuana-20141017-story.html> (quoting Deputy Attorney James M. Cole as warning, "If you don't want us prosecuting [marijuana users] in your state, then get your regulatory act together[.]"). The article also noted that, "Unlike most other states that have legalized marijuana in some form, California has no statewide regulatory regimen, leaving counties and cities to create a hodgepodge of rules and protections." *Id.*
7. Our proposed amendments to 21 U.S.C. § 903, set out in Part IV.B.2.c, *infra*, incorporate the guidelines from the Cole Memorandum II as the criteria states would need to meet in order to opt out. See Cole Memo II, *supra* note 5. Of course, Congress could use those guidelines or could create new or additional criteria in consultation with the DOJ.

those states opting out of the CSA. But nothing would change in those states content with the CSA's terms.

Our Article proceeds as follows. We begin in Part I with a brief overview of the history of marijuana regulation from the 1930s to the present, explaining how the current tension over the appropriate roles of the state and federal government arose. We then catalog in Part II many of the problems flowing from the clash between federal and state laws and demonstrate that, despite the DOJ's announced enforcement leniency, the continuing federal prohibition significantly hampers the new state laws. Banks, attorneys, insurance companies, potential investors, and others—justifiably concerned about breaking federal law—are reluctant to navigate complex state and local regulations and provide investment capital, legal advice, and other basic professional services necessary for businesses to function. Federal tax rules treat these marijuana business activities like any other federal drug crime, which enormously increases tax liability by disallowing deductions for common business expenses. And those engaging in marijuana activity entirely legal under state law—whether recreational or medical—still risk losing their jobs, parental rights, and many government benefits. Although President Obama has said that state policy experiments in Washington and Colorado are “important” and should go forward,<sup>8</sup> the continuing federal prohibition of marijuana substantially undermines these new state laws.

In Part III we turn to a discussion of federal preemption law as it applies to the CSA. This Part explains why the DOJ, even if it wished to do so, could not simply shut down all state marijuana legalization efforts using the federal government’s preemption power under the Supremacy Clause. While the courts have yet to establish the precise contours of federal preemption doctrine in this context, the preemptive reach of the CSA is relatively modest. Recognition of this legal reality likely played a significant role in the recent DOJ decision not to bring preemption challenges against the Colorado and Washington State ballot initiatives.<sup>9</sup>

Finally, in Part IV we turn to legislative solutions to the current, unstable status quo. Legislators, policy experts, and commentators have proposed possible solutions to this quandary. Some have suggested amending

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8. See David Remnick, *Annals of the Presidency: Going the Distance, On and Off the Road With Barack Obama*, NEW YORKER (Jan. 27, 2014), available at [http://www.newyorker.com/reporting/2014/01/27/140127fa\\_fact\\_remnick?currentPage=all](http://www.newyorker.com/reporting/2014/01/27/140127fa_fact_remnick?currentPage=all) (noting that “[President Obama] said of the legalization of marijuana in Colorado and Washington that ‘it’s important for it to go forward because it’s important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished.’”).

9. See Cole Memo II, *supra* note 5; see also Southall & Healy, *supra* note 6.

federal law to reschedule marijuana, while others have proposed less sweeping but still significant changes to the CSA to ease the federal prohibition.<sup>10</sup> We discuss the various pieces of legislation that have been introduced in Congress but have not gained significant traction thus far. We then suggest a more incremental solution that would allow willing states to experiment with novel regulatory approaches while leaving the federal marijuana prohibition unchanged for the remaining states. We refer to this approach as cooperative federalism. Under our cooperative federalism approach the Attorney General would be required to create a certification process allowing states to opt out of the CSA's marijuana provisions if state laws and regulatory frameworks satisfy enforcement criteria that the DOJ has already announced.<sup>11</sup> In opt-out states certified by the Attorney General, only state law would govern marijuana-related activities and the CSA marijuana provisions would cease to apply. Federal agencies could continue to cooperate with opt-out states and their local governments to jointly enforce marijuana laws, but state law rather than the CSA would control within those states' borders. Equally important, nothing would change in those states content with the status quo under the CSA. This proposed approach embodies the best of cooperative federalism;

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10. See, e.g., Respect States' and Citizens' Rights Act of 2013, H.R. 964, 113th Cong., (2013) (amending the Controlled Substances Act (CSA) to provide that no provision of the Act shall be construed as indicating congressional intent to occupy the field or preempt state law); MARK EDDY, CONG. RESEARCH SERV., RL 33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 45 (2010), available at <http://fas.org/sgp/crs/misc/RL33211.pdf> (noting that beginning in 1972 the National Organization for the Reform of Marijuana Laws has petitioned the Drug Enforcement Administration to reschedule marijuana); Mark A.R. Kleiman, *Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization*, 6 DRUG POL'Y ANALYSIS 1, 6 (2013) (proposing a system of legislatively-authorized policy waivers or cooperative agreements authorized by the executive branch that would allow states to explore new policies within their own borders); Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OREGON L. REV. 1029, 1031 (2013) (suggesting a model based on Netherlands' marijuana policy, which would require a Congressional amendment to the CSA that would allow retail marijuana sales but continue to ban all commercial manufacturing and wholesale distribution); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446 (2009) (noting that states possess legal authority to enact permissive laws despite contrary federal policy); Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 23 (2013) (proposing that courts and lawmakers employ a narrow direct conflict preemption rule that only permits state law to be preempted when state law requires a violation of the CSA); STUART TAYLOR, JR., MARIJUANA POLICY AND PRESIDENTIAL LEADERSHIP: HOW TO AVOID A FEDERAL-STATE TRAIN WRECK, GOVERNANCE STUDIES AT BROOKINGS (2013) (proposing that the president create clear contractual cooperative agreements permitting state-regulated marijuana businesses to operate legally while protecting federal interests).

11. See Cole Memo II, *supra* note 5.

those states that prefer the status quo may keep it while those states that embrace marijuana law reform will be allowed to experiment with alternative models of marijuana regulation. As the nation moves ever closer to a repeal of the federal marijuana prohibition, our proposed solution would allow the states to operate as laboratories of ideas, generating regulatory models that could serve as templates for federal policy.

## I. THE HISTORY OF MARIJUANA REGULATION FROM THE 1930S TO THE PRESENT

For most of American history, marijuana was legal to grow and consume.<sup>12</sup> Beginning in the 1910s, however, a number of states moved to criminalize the drug for the first time.<sup>13</sup> It has been well documented that the move to regulate marijuana was motivated in large part by racism and xenophobia.<sup>14</sup> During the 1920s and 1930s, marijuana came to be associated in the public imagination with both crime and black and Latino migrant workers.<sup>15</sup>

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12. EDDY, *supra* note 10, at 1 (“For most of American history, growing and using marijuana was legal under both federal law and the laws of the individual states.”).
  13. See, e.g., RICHARD J. BONNIE & CHARLES H. WHITEBREAD, THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES 51–53 (1974) (charting the path of marijuana prohibition in the states); Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J. L. REFORM 707, 749–51 (1998) (“In 1937, Harry J. Anslinger was serving as the United States Commissioner of Narcotics. He had served in the Treasury Department where he aggressively enforced the Harrison Act and headed the Federal Bureau of Narcotics in the Treasury Department. Anslinger’s appeal to racism and hysteria was unabashed. He and other proponents of the Marijuana Tax Act argued that marijuana caused criminal and violent behavior. During the brief hearings on the Act, Anslinger stated that, “[m]arijuana [was] an addictive drug which produce[d] in its users insanity, criminality, and death.””).
  14. See, e.g., Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 325 (2011) (“U.S. marijuana prohibition has long been motivated largely by racism”); Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1011 (1970) (“From a survey of contemporary newspaper and periodical commentary we have concluded that there were three major influences [on states’ decisions to criminalize marijuana]. The most prominent was racial prejudice.”).
  15. See, e.g., THE NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 16 (1972), available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015015647558;view=1up;seq=5> (“As the Mexicans spread throughout the West and immigrated to the major cities, some of them carried the marihuana habit with them. The practice also became common among the same urban populations with whom opiate use was identified.”); *id.* at 7 (“For decades its use was mainly confined to the underprivileged socioeconomic groups in our cities and to certain insulated social groups, such as jazz musicians and artists.”).

As these workers moved throughout the country, marijuana prohibition soon followed from the American West to the Northeast.<sup>16</sup>

In 1937 the federal government set out to regulate the drug for the first time.<sup>17</sup> That year, Congress passed the Marijuana Tax Act,<sup>18</sup> which led to dropping marijuana from the Federal Pharmacopoeia,<sup>19</sup> the list of permissible medicines approved by the federal government. Although the American Medical Association (AMA) opposed the reclassification of marijuana,<sup>20</sup> those trumpeting its association with crime and disfavored minority groups ultimately prevailed.

Marijuana's verboten status was solidified with the passage of the CSA in 1970.<sup>21</sup> Marijuana, along with LSD, heroin, and other serious narcotics, was classified as a Schedule I drug, defined as a drug with a high likelihood of addiction and no safe dose.<sup>22</sup> Under the CSA, the manufacture, distribution,

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16. See BONNIE & WHITEBREAD, *supra* note 13, at 51–53 (mapping the progress of marijuana prohibition from the West, through the Midwest, and to the Northeast). Interestingly, the current policy trend toward decriminalization is following a similar geographical pattern by also starting in the West. See *Marijuana Law Reform Timeline*, NORML, <http://norml.org/about/item/marijuana-law-reform-timeline> (last visited Sept. 14, 2014).
  17. See LISA N. SACCO & KRISTIN FINKLEA, CONG. RESEARCH SERV., R43164, STATE MARIJUANA LEGALIZATION INITIATIVES: IMPLICATIONS FOR FEDERAL LAW ENFORCEMENT 3 (2013), available at <https://www.fas.org/sgp/crs/misc/R43164.pdf> (“Until 1937, the growth and use of marijuana was legal under federal law. The federal government unofficially banned marijuana under the Marihuana Tax Act of 1937....”).
  18. Pub. L. No. 75–238, 50 Stat. 551 (enacted Aug. 2, 1937) (repealed Aug. 10, 1956).
  19. EDDY, *supra* note 10, at 2–3.
  20. BONNIE & WHITEBREAD, *supra* note 13, at 164 (“Dr. William C. Woodward . . . appeared on behalf of the AMA to oppose the [Marijuana Tax Act]. Dr. Woodward methodically challenged the validity of each of the assumptions upon which the legislation was based.”). For a thorough discussion of the long history of marijuana’s medicinal use, see LESTER GRINSPOON & JAMES B. BAKALAR, MARIJUANA: THE FORBIDDEN MEDICINE (1997).
  21. Controlled Substances Act of 1970, Pub. L. No. 91–513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 812 (2012)).
  22. 21 U.S.C. §§ 812(b)(1), 812(c)(c)(10) (2012); see also Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1133 (D.C. Cir. 1994) (“A drug is placed in Schedule I if (1) it ‘has a high potential for abuse,’ (2) it has ‘no currently accepted medical use in treatment in the United States,’ and (3) ‘there is a lack of accepted safety for use of the drug . . . under medical supervision.’”) (quoting 21 U.S.C. § 812(b)(1) (1988)). It is debatable whether marijuana actually meets these criteria; in fact, Congress itself “debated whether marijuana should even be included in Schedule I. The legislative history for the [CSA] notes that marijuana is not a narcotic, not addictive, and does not cause violence or crime. Marijuana was retained in Schedule I only because the U.S. Assistant Secretary of Health and Scientific Affairs recommended this classification ‘at least until the completion of certain studies now underway.’” K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 279 (2005). The “studies now underway” referred to studies by the Shafer Commission, established by Pub. Law No. 91–513, § 601(e) (1970). See U.S. v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1105 (N.D. Cal. 1998). The Shafer Commission recommended decriminalizing

and possession of Schedule I narcotics is prohibited and punishments can extend to life in prison for large volume manufacturers and dealers.<sup>23</sup> The Supreme Court has upheld the power of the federal government to regulate marijuana, including marijuana grown and consumed within a single state,<sup>24</sup> and the U.S. Court of Appeals for the District of Columbia Circuit recently declined to characterize as arbitrary and capricious the Drug Enforcement Administration (DEA)'s refusal to reschedule marijuana.<sup>25</sup>

Moreover, because Schedule I narcotics are not approved for any medical use, doctors cannot prescribe them lest they risk losing their DEA license. The very classification of marijuana as a Schedule I narcotic hampers an accurate determination of its dangerous or addictive properties. In a classic Catch-22, Schedule I classification makes double-blind testing<sup>26</sup> normally conducted on medical products next to impossible. For this reason the AMA has recommended that marijuana's classification be reviewed with an eye to making clinical trials of the drug more feasible.<sup>27</sup>

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possession and distribution of small amounts of marijuana. *Id.* (citing FIRST REPORT OF NAT'L COMM'N ON MARIJUANA AND DRUG ABUSE, MARIJUANA: A SIGNAL OF MISUNDERSTANDING 152 (1972)). Other commentators have noted that Congress's decision to place marijuana in Schedule 1 when enacting the Controlled Substances Act was not supported by the scientific and medical evidence available at the time. See, e.g., Matthew A. Christiansen, *A Great Schism: Social Norms and Marijuana Prohibition*, 4 HARV. L. & POL'Y REV. 229, 235 (2010) ("[An] historical examination of marijuana prohibition shows the initial prohibition was largely a byproduct of social forces present in the 1930s and was not based on scientific research."); *id.* (quoting Raymond P. Shafer, *Foreword* to RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES, at xi (2d ed., The Lindesmith Center 1999) (1974)) ("[S]ocial scientific evidence was not used or was ignored as 'the federal narcotics bureaucracy made no serious effort before the decision to seek federal legislation to find out what the drug's effects really were.' In addition, the chief architect of the 1937 marijuana bill 'ignored the contrary findings of every scientific inquiry which had been conducted.' As a result, this bill 'was tied neither to scientific study nor to enforcement need.'"). Nonetheless, the federal courts have upheld numerous refusals by the Drug Enforcement Administration (DEA) to remove marijuana from Schedule I, most recently in *Americans for Safe Access v. Drug Enforcement Admin.*, 706 F.3d 438 (D.C. Cir. 2013).

23. 21 U.S.C. § 841(b) (2012).
24. Gonzales v. Raich, 545 U.S. 1, 22 (2005).
25. Americans for Safe Access v. Drug Enforcement Admin., 706 F.3d 438, 440–41 (2013); see also *supra* note 22 (providing a more detailed history of federal courts' upholding the DEA's classification of marijuana as a Schedule I drug).
26. The term double-blind is "used to describe an experiment that is done so that neither the people who are doing the experiment nor the people who are the subjects of the experiments know which of the groups being studied is the control group and which is the test group." *Double-blind Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/double-blind> (last visited Nov. 11, 2014).
27. See AM. MEDICAL ASS'N, REPORT 3 OF THE COUNCIL ON SCIENCE AND PUBLIC HEALTH (I-09): USE OF CANNABIS FOR MEDICINAL PURPOSES 2 (2009), available at <http://www.ama-assn.org>

After the CSA's passage, marijuana was prohibited in all fifty states.<sup>28</sup> In fact, state marijuana laws provide the basis for nearly every marijuana arrest in the country. Since the CSA's implementation more than forty years ago, nearly all marijuana enforcement in the United States has taken place at the state level. For example, of the nearly 900,000 marijuana arrests in 2012, arrests made at the state and local level dwarfed those made by federal officials by a ratio of 109 to 1.<sup>29</sup>

Beginning in 1996, however, marijuana policy slowly began to change at the state level. For a variety of reasons—the apparent futility of prohibiting a substance that remained universally available, the racially disparate impact of marijuana laws,<sup>30</sup> or the enormous number of resources that the enforcement of marijuana laws consumed<sup>31</sup>—states started to rethink their marijuana

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assn.org/resources/doc/csaph/csaph-report3-i09.pdf (“Our AMA urges that marijuana’s status as a federal Schedule I controlled substance be reviewed with the goal of facilitating the conduct of clinical research and development of cannabinoid-based medicines, and alternate delivery methods.”). Clinical research necessary to move marijuana through the Food and Drug Administration (FDA) approval process, which is required to make it available as a prescription medicine, is further stymied by limited access to marijuana. Unlike any other Schedule I drug, the only legal source of marijuana for researchers in the United States is the National Institute on Drug Abuse (NIDA), which has broad discretion to refuse to sell its marijuana to researchers. See Lindsay Stafford Mader, *The State of Clinical Cannabis Research in the United States*, 85 HERBALGRAM J. AM. BOTANICAL COUNCIL 64, 64–67 (2010), available at <https://www.maps.org/media/herbalgrammidamonopolyfeb2010.pdf> (describing the DEA and NIDA’s obstruction of medical marijuana research and a proposed alternate marijuana production facility at the University of Massachusetts, Amherst); see also *id.* at 67 (“While more people are able to obtain marijuana for treatment under some states’ laws, little research is being done to document the efficacy and safety of cannabis as a medicine.”).

28. See, e.g., David Lamb, *Other Emotional Issues on Ballots Nationwide: Five States Are Apparently Ready to Adopt Lotteries*, L.A. TIMES (Nov. 5, 1986), [http://articles.latimes.com/1986-11-05/news/mn-15354\\_1\\_lottery-initiative](http://articles.latimes.com/1986-11-05/news/mn-15354_1_lottery-initiative) (reporting that Oregon was the first state “to decriminalize possession of small quantities of marijuana”).
29. In 2010 there were 889,133 marijuana arrests at the local level. See AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 8 (2013), available at <https://www.aclu.org/criminal-law-reform/war-marijuana-black-and-white-report> (citing FBI/UNIFORM CRIME REPORTING PROGRAM DATA: COUNTY-LEVEL DETAILED ARREST AND OFFENSE DATA, 1995–2010, NAT’L ARCHIVE OF CRIM. JUSTICE DATA). In comparison, there were only 8,117 marijuana arrests at the federal level in 2010. See MARK MOTIVANS, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2010, at 8 (2013), available at <http://www.bjs.gov/content/pub/pdf/fjs10.pdf>.
30. See AM. CIVIL LIBERTIES UNION, *supra* note 29, at 4 (“The report also finds that, on average, a Black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though Blacks and whites use marijuana at similar rates. Such racial disparities in marijuana possession arrests exist in all regions of the country . . . ”).
31. See, e.g., RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990S, at 9–10 (2005), available at [http://www.sentencingproject.org/doc/publications/dp\\_waronmarijuana.pdf](http://www.sentencingproject.org/doc/publications/dp_waronmarijuana.pdf) (“[W]e

prohibitions. This shift was initially driven by increasing popular and political support for the use of medical marijuana by seriously ill patients.<sup>32</sup> In 1996 California became the first state to permit the use of marijuana for medical purposes, with voters passing Proposition 215 by a margin of 55.6 percent to 44.4 percent.<sup>33</sup> Becoming the model for other states that soon followed suit, Proposition 215 permitted marijuana use by those who had received an oral or written recommendation from a doctor.<sup>34</sup> The recommendation language was carefully chosen; Supreme Court precedent in the abortion context had established the proposition that doctors could not be banned from discussing or recommending particular health care options.<sup>35</sup> Thus, a doctor who might lose her DEA license for prescribing the drug could “recommend” it with impunity.<sup>36</sup>

Alaska, Oregon, and Washington State legalized medical marijuana two years later, with Hawaii, Colorado, and Nevada following in 2000.<sup>37</sup> By the time Barack Obama was sworn into office as the forty-fourth president of the United States in January 2009, thirteen states had enacted medical marijuana

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estimate that \$2.1 billion, or 2.9% of the entire law enforcement budget nationally, is spent on marijuana arrests. Of this, approximately \$430 million is spent on marijuana trafficking and \$1.7 billion on marijuana possession arrests.”).

32. See, e.g., PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, AMERICA'S NEW DRUG POLICY LANDSCAPE 3 (2014), available at <http://www.peoplepress.org/2014/04/02/americas-new-drug-policy-landscape> (“Majorities across nearly all demographic and partisan groups say the use of marijuana should be legal, at least for medicinal use.”); ART SWIFT, GALLUP POLITICS, FOR THE FIRST TIME, AMERICANS FAVOR LEGALIZING MARIJUANA 2 (2013), available at <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx> (“The increasing prevalence of medical marijuana as a socially acceptable way to alleviate symptoms of diseases such as arthritis, and as a way to mitigate side effects of chemotherapy, may have also contributed to Americans’ growing support.”).
33. See *Votes For and Against November 5, 1996, Statewide Ballot Measures and Constitutional Amendments*, CAL. SECY OF STATE (1996), available at <http://www.sos.ca.gov/elections/sov/1996-general/votes-for-against.pdf>; *Proposition 215: Text of Proposed Law*, CAL. SECY OF STATE (1996) [hereinafter Prop. 215], available at <http://vote96.sos.ca.gov/Vote96/html/BP/215text.htm> (codified as The Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (2013)).
34. See Prop. 215, *supra* note 33; CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (2013).
35. See Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 884 (1992) (plurality opinion) (recognizing a physician’s First Amendment right not to speak); Rust v. Sullivan, 500 U.S. 173, 200 (1991) (noting that regulations on physician speech may “impinge upon the doctor-patient relationship”).
36. The DOJ, under then President Bill Clinton, threatened to take disciplinary action against doctors who recommended marijuana to patients under Proposition 215. But a federal court enjoined the DOJ from doing so, clearing the path for the medical marijuana law to survive and flourish. See *Conant v. Walters*, 309 F.3d 629, 632, 638–39 (9th Cir. 2003).
37. ALASKA STAT. §§ 17.37.010–080 (2013); OR. REV. STAT. § 475.300 (2007); WASH. REV. CODE § 69.51A (2007); HAW. REV. STAT. §§ 329–121–128 (2013); COLO. CONST. art. XVIII, §16 (2013); NEV. REV. STAT. §§ 453A.010–240 (2013).

provisions.<sup>38</sup> President Obama's election would prove a turning point in the movement for marijuana law reform. During the campaign he hinted that he might relax the nation's marijuana laws if elected<sup>39</sup> and, once President Obama took office, his Attorney General, Eric Holder, stated that his boss's views would now be federal policy.<sup>40</sup> A more detailed statement of federal policy came that fall in the now infamous Ogden memorandum. In that memorandum, Deputy Attorney General David Ogden wrote to U.S. Attorneys around the country, providing them with enforcement priority guidance in light of changing law in the states: "As a general matter, pursuit of [federal] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."<sup>41</sup>

Although the Ogden memorandum was loaded with cautionary language,<sup>42</sup> many took it, perhaps too optimistically, as the announcement of

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38. See *Marijuana Law Reform Timeline*, *supra* note 16 (showing that the following states passed medical marijuana laws: California (1996), Alaska (1998), Oregon (1998), Washington (1998), Maine (1999), Nevada (2000), Colorado (2000), Hawaii (2000), Montana (2004), Vermont (2004), Rhode Island (2006), New Mexico (2007), and Michigan (2008)).
  39. See, e.g., Bob Egelko, *Next President Might Be Gentler on Pot Clubs*, SFGATE.COM (May 12, 2008, 4:00 AM), <http://www.sfgate.com/health/article/Next-president-might-be-gentler-on-pot-clubs-3284500.php>; John Tierney, *Obama to Stop Raids on Marijuana Clinics*, N.Y. TIMES (May 14, 2008, 12:14 PM), <http://tierneylab.blogs.nytimes.com/2008/05/14/obama-to-stop-raids-on-marijuana-clinics>.
  40. See, e.g., David Johnston & Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensers*, N.Y. TIMES, Mar. 18, 2009, at A20, available at <http://www.nytimes.com/2009/03/19/us/19holder.html> ("Attorney General Eric H. Holder Jr. on Wednesday outlined a shift in the enforcement of federal drug laws, saying the administration would effectively end the Bush administration's frequent raids on distributors of medical marijuana."); see also Stu Woo & Justin Scheck, *California Marijuana Dispensaries Cheer U.S. Shift on Raids*, WALL ST. J., Mar. 9, 2009, at A6, available at <http://online.wsj.com/news/articles/SB123656023550966719> ("The attorney general signaled recently that states will be able to set their own medical-marijuana laws, which President Barack Obama said during his campaign that he supported. What Mr. Obama said then 'is now American policy,' Mr. Holder said.").
  41. U.S. DEPT OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS: INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA 1-2 (2009) [hereinafter Ogden Memo].
  42. *Id.* at 2 ("Of course, no State can authorize violations of federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous

a hands-off policy to enforcing federal marijuana laws in those states authorizing the drug under state law. The reaction on the ground to these statements was swift. In Colorado, for example, the number of marijuana dispensaries, which were not specifically authorized by state law, increased from a handful to as many as a thousand in the 2009 calendar year.<sup>43</sup> In California, a largely unregulated medical marijuana industry expanded just as quickly, with giant dispensaries emerging to serve thousands of marijuana patients.<sup>44</sup>

Yet it quickly became apparent that the federal government was not comfortable with the rapid expansion of marijuana entrepreneurship in the states. In 2010, Attorney General Holder weighed in as California considered becoming the first state in the nation to legalize marijuana not just for patients, but for any adult user.<sup>45</sup> With the legalization initiative, Proposition 19, leading in the polls, Holder warned Californians in highly publicized statements that while the federal government had tolerated their experiment with medical marijuana, a move to fully legalize the drug would not be met with such leniency.<sup>46</sup> After Holder's threats, public support for Proposition 19 dropped and it ultimately failed by a vote of 53.5 percent to 46.5 percent.<sup>47</sup>

In 2011 the DOJ released a new memorandum to U.S. Attorneys around the country, making clear that those who had read the Ogden memorandum as a green light to the states to permit marijuana use had misread it:

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compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.”).

43. See, e.g., Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, 89 DENV. U. L. REV. 977, 981 (“While there were press reports that famously blared that there were more dispensaries than Starbucks in Denver and that there were more than 1,000 stores open state-wide, the truth is that no one knew for sure.” (citation omitted)).
44. See, e.g., John Hoeffel, *Cities, Counties No Longer Mellow About Pot Dispensaries*, L.A. TIMES (Nov. 10, 2009), <http://articles.latimes.com/2009/nov/10/local/me-pot-bans10> (“[H]undreds of medical marijuana dispensaries have opened this year in a startling rollout across California . . .”); Karl Vick, *In California, Medical Marijuana Laws Are Moving Pot Into the Mainstream*, WASH. POST POLITICS (Apr. 12, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/11/AR2009041100767.html>. (“Los Angeles officials say applications for retail outlets surged after Feb. 26, when U.S. Attorney General Eric H. Holder Jr. announced that the Drug Enforcement Administration will no longer raid such stores.”).
45. See *Feds Warn, Indict California Medical Marijuana Dispensary Operators*, KABC-TV (Oct. 7, 2011), <http://abclocal.go.com/kabc/story?section=news/state&id=8383655> [hereinafter *Feds Warn*] (describing recent federal law enforcement actions against California marijuana dispensaries).
46. See John Hoeffel, *Holder Vows Fight Over Prop 19*, L.A. TIMES, Oct. 16, 2010, at A4, available at <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016>.
47. See *Votes For and Against November 2, 2010, Statewide Ballot Measures*, CAL. SECY OF STATE (2010), available at <http://www.sos.ca.gov/elections/sov/2010-general/07-for-against.pdf>.

The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with the resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil enforcement of federal law with respect to such conduct, including enforcement of the CSA.<sup>48</sup>

Enforcement actions in the fall of 2011 made clear that the administration meant what it said. The four U.S. Attorneys in California combined forces in a concerted action against California's medical marijuana industry;<sup>49</sup> Montana's industry was essentially shut down by law enforcement actions;<sup>50</sup> and Colorado dispensaries within a thousand feet of a school were told they must either relocate or close their doors.<sup>51</sup>

By the end of 2011, the federal government stood in a very antagonistic position vis-à-vis those states authorizing marijuana for medical purposes. But then events on the ground seemed to outstrip those in the nation's capital. In November 2012, three states considered adult use initiatives<sup>52</sup> and two of them—Colorado and Washington State—passed them, becoming the first American jurisdictions to replace their marijuana prohibitions with a system to tax and regulate marijuana.<sup>53</sup> The two initiatives were similar; they immediately

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48. U.S. DEPT OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING THE OGDEN MEMO IN JURISDICTIONS SEEKING TO AUTHORIZE MARIJUANA FOR MEDICAL USE 2 (2011) [hereinafter Cole Memo], available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>.
  49. See *Feds Warn*, *supra* note 45 (describing recent federal law enforcement actions against California marijuana dispensaries).
  50. See Jamie Kelly, *Former Grizzly Pleads Not Guilty to Federal Drug Charges*, MISSOULIAN (Jan. 19, 2012, 8:00 PM), [http://missoulian.com/news/state-and-regional/former-grizzly-pleads-not-guilty-to-federal-drug-charges/article\\_5166136a-4304-11e1-a886-0019bb2963f4.html#ixzz1k1FXdfT4](http://missoulian.com/news/state-and-regional/former-grizzly-pleads-not-guilty-to-federal-drug-charges/article_5166136a-4304-11e1-a886-0019bb2963f4.html#ixzz1k1FXdfT4).
  51. See *Medical Marijuana: Federal Crackdown, Similar to That in California, Begins in Colorado*, HUFFPOST DENVER (Jan. 12, 2012, 4:28 PM), [http://www.huffingtonpost.com/2012/01/12/medical-marijuana-federal\\_n\\_1202725.html](http://www.huffingtonpost.com/2012/01/12/medical-marijuana-federal_n_1202725.html).
  52. The three states were: Colorado (Amendment 64 (2012)); Oregon (Measure 80 (2012)); and Washington (Initiative 502 (2012)).
  53. See, e.g., Keith Coffman & Nicole Neroulias, *Colorado, Washington First States to Legalize Recreational Pot*, REUTERS, Nov. 7, 2012, <http://www.reuters.com/article/2012/11/07/us-usa-marijuana-legalization-idUSBRE8A602D20121107>; see also *Amendments and Propositions*, COLO. SEC'Y OF STATE, <http://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/amendProp.html> (last visited Nov. 11, 2014); NOVEMBER 6, 2012, GENERAL ELECTION ABSTRACT OF VOTES,

repealed criminal penalties for possession of small amounts of marijuana and instructed their legislatures to implement a regulatory scheme for the taxation and regulation of recreational marijuana production and sale.<sup>54</sup>

All eyes turned immediately to the DOJ to see what the federal response would be. After months of agonizing silence, the federal government surprised many by announcing that it would forgo, for the time being, legal challenges to the new laws and allow Colorado and Washington to

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OR. SEC'Y OF STATE (2012), *available at* [http://www.oregonvotes.gov/doc/history/nov62012/G12\\_Abstract.pdf](http://www.oregonvotes.gov/doc/history/nov62012/G12_Abstract.pdf), November 06, 2012 General Election Results, Initiative Measure No. 502 Concerns Marijuana, WASH. SEC'Y OF STATE <http://vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana.html> (last visited Nov. 11, 2014). In contrast to 2010, the Department of Justice made no effort to prevent the passage of the legalization initiatives considered by the states in 2012.

54. Colorado's Amendment 64 amends the state constitution to allow adults older than twenty-one years of age to possess, use, display, purchase, and transport up to one ounce of marijuana; however, the use of marijuana in public remains prohibited. The measure allows adults to grow their own marijuana, to share marijuana with other adults over twenty-one years old, and to purchase marijuana from a licensed retail marijuana store. It permits adults twenty-one years of age and older to grow up to six marijuana plants, of which three or fewer are mature, flowering plants, and to harvest the marijuana from the plants, provided they adhere to strict home cultivation requirements. *See* 2012 STATE BALLOT INFORMATION BOOKLET, LEGIS. COUNCIL COLO. GEN. ASSEMBLY 727-397-14, at 30-31 (2012), *available at* <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822971738&ssbinary=true>. Amendment 64 also requires the Colorado Department of Revenue (DOR) to adopt regulations concerning licensing and security requirements for marijuana establishments, the prevention of marijuana sales to underage persons, labeling requirements for marijuana products, health and safety standards for marijuana manufacturing, advertising restrictions, and civil penalties for violations. The DOR is required to issue licenses and renewals for marijuana cultivation, product manufacturing, testing facilities, and retail stores. *Id.* at 9-10. In addition, this measure requires an excise tax on marijuana, which will generally be collected at the wholesale level and passed on to consumers in the retail price. Marijuana cultivation facilities will pay the excise tax when selling marijuana to either marijuana product manufacturing facilities or to retail marijuana stores. *Id.* at 7. Similarly, Washington's I-502 removed state civil and criminal prohibitions against persons over twenty-one years of age who grow, manufacture, and distribute marijuana in a manner consistent with the state marijuana licensing and regulatory system. It legalizes, under state law, the purchase and possession of limited amounts of marijuana by persons over twenty-one years old. However, it remains illegal for persons under twenty-one years old to grow, sell, or possess marijuana, and for anyone to sell products containing marijuana to a person under twenty-one years old. Proper licenses are necessary in order to legally grow and distribute marijuana under state law. Separate licenses are available for production/cultivation, wholesale distribution, and retail sales. I-502 also places limits on marijuana advertising and mandates regular quality testing of marijuana products. An excise tax is placed on all sales of marijuana in the amount of 25 percent of the selling price, which is collected at each level of production and distribution. In addition, the measure specifies how the state may spend these tax revenues. Finally, the measure amends the law to prohibit driving under the influence of marijuana. *See* COMPLETE TEXT: INITIATIVE MEASURE 502, WASH. SEC'Y OF STATE (2012), *available at* [https://wei.sos.wa.gov/agency/osos/en/press\\_and\\_research/PreviousElections/2012/General-Election/Documents/I-502\\_complete\\_text.pdf](https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2012/General-Election/Documents/I-502_complete_text.pdf).

implement their regulatory regimes unimpeded.<sup>55</sup> This new memorandum emphasized eight priorities that drive federal marijuana enforcement policy and then noted that states that could demonstrate compliance with these priorities would largely be left to their own devices.<sup>56</sup>

While this policy guidance constitutes a welcome step back from the federal government's previous brinksmanship, it hardly solves the federalism problems caused by marijuana's dual legal status. As Part II demonstrates, marijuana's continued status as a prohibited substance under federal law significantly hampers the states' capacity to effectively implement new state taxation and regulatory policies.

## II. PROBLEMS POSED BY CONTINUING FEDERAL PROHIBITION

Part I made clear that the threat of criminal prosecution against those operating marijuana businesses under the aegis of state law is more remote now than it has been in recent years. The federal government has announced a wait-and-see approach to state-level regulation,<sup>57</sup> creating metrics for measuring whether states are up to the task of taxing-and-regulating rather than prohibiting marijuana outright.<sup>58</sup> But the threat of federal enforcement is only one of the potential problems stemming from the continuing federal prohibition of marijuana.<sup>59</sup>

In this Part, we point out the often dire consequences that continue to flow from marijuana's categorization as a Schedule I narcotic. Even if the promise of federal nonenforcement were made permanent—which cannot be done by executive action alone because enforcement decisions made by one presidential administration could easily be overturned by the next—federal

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55. See Cole Memo II, *supra* note 5, at 2–3; see also Southall & Healy, *supra* note 6.

56. Cole Memo II, *supra* note 5, at 1–3.

57. Southall & Healy, *supra* note 6.

58. See Cole Memo II, *supra* note 5, at 1 (“The Department is . . . committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of [these] objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government . . .”).

59. As Robert Mikos has noted, the continuing federal prohibition of marijuana also makes the regulatory task more difficult in those states discarding their own prohibitions. See Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 222, 258 (2012) (arguing that the continuing federal ban will frustrate state “monitoring of marijuana distribution by preventing consolidation of the marijuana market”); *id.* at 260 (“[P]rohibition gives drug distributors ample incentive to hide from law enforcement authorities—this hinders monitoring that is necessary for effective collection of civil taxes.”).

prohibition operates to present substantial obstacles to businesses and adults seeking to implement and avail themselves of new state laws authorizing marijuana distribution and use.

#### A. Banking

Perhaps the most profound and well-documented consequence of marijuana's prohibited status at the federal level is the unavailability of even the most rudimentary banking services for those engaged in marijuana commerce.<sup>60</sup> The threat of money laundering prosecutions—often made explicit—has made banks unwilling to engage in any transactions with marijuana businesses.<sup>61</sup> As a result, marijuana businesses complying with state laws are forced to operate solely in cash.<sup>62</sup> The lack of commercial banking is more than a dignitary harm for those operating in the marijuana industry; for many it is a sincere safety concern. Marijuana businesses present an easy target for thieves who are aware that these businesses often have no choice but to keep large quantities of cash on hand.<sup>63</sup>

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60. See, e.g., Sam Kamin & Joel Warner, *Your Money Stinks: Why Banks Won't Do Business With the Marijuana Industry (And Why It's a Huge Problem)*, SLATE (Jan. 24, 2014, 12:04 PM), [http://www.slate.com/articles/news\\_and\\_politics/alterred\\_state/2014/01/colorado\\_marijuana\\_businesses\\_have\\_a\\_big\\_problem\\_banks\\_won\\_t\\_take\\_their.html](http://www.slate.com/articles/news_and_politics/alterred_state/2014/01/colorado_marijuana_businesses_have_a_big_problem_banks_won_t_take_their.html); Jack Healy & Matt Apuzzo, *Legal Marijuana Businesses Should Have Access to Banks, Holder Says*, N.Y. TIMES, Jan. 23, 2014, at A20, available at <http://www.nytimes.com/2014/01/24/us/legal-marijuana-businesses-should-have-access-to-banks-holder-says.html> (Attorney General Holder, at the Miller Center at the University of Virginia, stated, "There's a public safety component to this. Huge amounts of cash, substantial amounts of cash just kind of lying around with no place for it to be appropriately deposited [due to banks refusing to grant checking accounts], is something that would worry me, just from a law enforcement perspective.").
  61. See, e.g., Cole Memo, *supra* note 48, at 2; U.S. DEP'T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA RELATED FINANCIAL CRIMES 3 (2014), [hereinafter DOJ Banking Memo], available at <http://www.justice.gov/usa/o/cfo/news/2014/feb/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%202014%2014.pdf> ("Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA, the money laundering and unlicensed money transmitter statutes, or the BSA, including the obligation of financial institutions to conduct customer due diligence.") Thus, financial institutions that engage in transactions involving the proceeds of marijuana activity may also be in violation of federal money laundering statutes and other federal financial laws. *Id.*
  62. See, e.g., David Migoya, *Pot Businesses in Colorado Cannot Bank and No Solution Is Ahead*, DENVER POST (March 10, 2013, 12:01 AM), [http://www.denverpost.com/business/ci\\_22751888/colorado-pot-businesses-cannot-bank-and-nosolution-is](http://www.denverpost.com/business/ci_22751888/colorado-pot-businesses-cannot-bank-and-nosolution-is) ("[T]here is little that those businesses can legally do with their cash other than put it in a safe or bury it. No bank, credit union or financial services company can knowingly accept business accounts with any trace of a marijuana connection. If they do, it's a federal crime.").
  63. See, e.g., Jacob Sullum, *Eric Holder Promises to Reassure Banks About Taking Marijuana Money Very*

Regulators in Colorado and Washington State grasped early on that resolution of this problem would be one of the key concerns of the administrative process<sup>64</sup>—marijuana businesses are much more difficult to regulate and tax if they are operating on a cash basis. But lawmakers in both states also realized fairly quickly that given the predominantly federal nature of banking regulation, there was little that could be done at the state level alone. Although the Obama administration announced in early 2014 that marijuana businesses should have access to banking services<sup>65</sup> and promulgated a pair of memorandums purporting to loosen banking restrictions on the marijuana industry,<sup>66</sup> there is

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Soon,’ FORBES (Jan. 24, 2014, 1:02 PM), <http://www.forbes.com/sites/jacobsullum/2014/01/24/eric-holder-promises-to-reassure-banks-about-taking-marijuana-money-very-soon> (quoting Attorney General Eric Holder as stating, “There’s a public safety component to this. Huge amounts of cash, substantial amounts of cash just kind of lying around with no place for it to be appropriately deposited, is something that would worry me, just from a law enforcement perspective”). Moreover, armored car services report that they have been pressured to drop their marijuana clients. *See, e.g.*, Steven Nelson, *Pot Clinics: DEA Threatening Armored Car Firms out of Providing Security*, US NEWS (Aug. 26, 2013, 12:26 PM), [http://www.denverpost.com/ci\\_24713153/denver-cops-barred-from-working-off-duty-security](http://www.usnews.com/news/blogs/washington-whispers/2013/08/26/marijuana-dispensaries-fear-theyve-become-robbery-target-after-alleged-dea-action-to-scare-off-security; see also</a> Sadie Gurman, <i>Denver Cops Barred From Working Off-Duty Security Jobs at Pot Shops</i>, DENVER POST (Dec. 12, 2013, 8:22 AM), <a href=).

64. *See, e.g.*, Govs. Hickenlooper, Inslee Call for Flexibility in Federal Banking Regulations for Marijuana Businesses, COLORADO: THE OFFICIAL STATE WEB PORTAL (Oct. 2, 2013), <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=GovHickenlooper%2FCBONLayout&ccid=1251646488031&pgname=CBONWrapper> (“Access to the banking system by these state-licensed businesses is a necessary component in ensuring a highly regulated marijuana system that will accurately track funds, prevent criminal involvement, and promote public safety.”); *see also* Letter from John W. Hickenlooper, Governor, State of Colo. and Jay Inslee, Governor of Wash., to Jacob J. Lew, Secretary, Sec’y of the Treasury, Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve, Martin J. Gruenberg, Chairman, Fed. Deposit Ins. Corp., Thomas J. Curry, Comptroller of the Currency, Richard Cordray, Dir., Consumer Fin. Prot. Bureau, and Debbie Matz, Chairman, Nat’l Credit Union Admin. (Oct. 2, 2013), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Govs.+Hickenlooper%2C+Inslee+call+for+flexibility+in+federal+banking+regulations+for+marijuana+businesses.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251893131086&ssbinary=true>; Matt Ferner, *Marijuana Businesses Need More Flexibility in Federal Banking Regulations: Govs. Hickenlooper, Inslee*, HUFFINGTON POST (Oct. 3, 2013, 4:58 PM), [http://www.huffingtonpost.com/2013/10/03/marijuana-banking\\_n\\_4038955.html](http://www.huffingtonpost.com/2013/10/03/marijuana-banking_n_4038955.html).
65. *See, e.g.*, Healy & Apuzzo, *supra* note 60.
66. *See* DEPT OF THE TREASURY, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES, GUIDANCE: FINANCIAL CRIMES ENFORCEMENT NETWORK (2014), available at [http://extras.mnginteractive.com/live/media/site36/2014/0214/20140214\\_113553\\_Guidance-Marijuana-Related-Businesses.pdf](http://extras.mnginteractive.com/live/media/site36/2014/0214/20140214_113553_Guidance-Marijuana-Related-Businesses.pdf); DOJ Banking Memo, *supra* note 61.

little that the executive branch can do unitarily; the core of the banking problem is the continuing illegality of marijuana at the federal level.<sup>67</sup>

For example, even if the federal government were to promise never to pursue money laundering charges against those banks doing business with the marijuana industry, it is not at all clear that banks would actually begin to treat marijuana businesses the way they treat other businesses. Because the CSA and its forfeiture provisions remain good law, the assets of a marijuana business remain subject to forfeiture<sup>68</sup> even in the face of a federal promise not to pursue such actions, and it is difficult to see how those assets could be seen by a bank as sufficiently secure against government seizure to be worth the risk.<sup>69</sup> It was for this reason that the reaction of the marijuana industry to the new banking guidelines was decidedly tepid.<sup>70</sup>

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67. See, e.g., Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, Jan. 11, 2014, at A1, available at <http://www.nytimes.com/2014/01/12/us/banks-say-no-to-marijuana-money-legal-or-not.html>.
  68. Any DOJ suggestion that it will voluntarily elect not to enforce a valid federal law would not be binding in court and would not constitute an absolute defense to a forfeiture action. While a bank could raise some defenses based on good faith or collateral estoppel arguments, the federal government could still pursue forfeiture and the bank's funds would be at risk. A change to federal law could, however, protect banks working with legitimate marijuana businesses. An initial step toward such reform took place on July 16, 2014, when the Republican-led House of Representatives passed a bipartisan amendment preventing the Treasury Department from spending money to penalize banks and other financial institutions for providing services to marijuana businesses that are legal under state law. *Financial Services and General Government Appropriations Act of 2015*, H.R. 5016, 113th Cong. § 916 (2014) (passing out of the House of Representatives by a vote of 231 to 192).
  69. See, e.g., Washington Bankers Association, *Banking and the Marijuana Industry*, [http://www.aba.com/Groups/Documents/MarijuanaBankingWBABankingandtheMarijuanaIndustry\(1\).pdf](http://www.aba.com/Groups/Documents/MarijuanaBankingWBABankingandtheMarijuanaIndustry(1).pdf) (last visited Aug. 12, 2014) ("All financial institutions are currently prohibited from lending to the marijuana industry. Financial institutions cannot lend against inventory or receivables because the collateral is illegal at a federal level.").
  70. See, e.g., Evan Perez, *Banks Cleared to Accept Marijuana Business*, CNN (Feb. 17, 2014, 8:39 AM), <http://www.cnn.com/2014/02/14/politics/u-s-marijuana-banks> ("Michael Elliott—executive director of the Marijuana Industry Group, the largest marijuana business association in Colorado—said . . . 'While we believe today's guidance should provide banks some of the assurances they need to begin doing business with the marijuana industry, it doesn't solve all the problems . . .' Elliott's group wants Congress to approve pending legislation that would 'provide certainty for banks and allow our industry to operate just like any other business. . . .'); Clayton Sandell, *Legal Cash-Only Pot Sellers Supermarkets for Crooks*, ABC NEWS (Feb. 18, 2014, 7:26 PM), <http://abcnews.go.com/blogs/headlines/2014/02/legal-cash-only-pot-sellers-supermarkets-for-crooks> ("The marijuana industry said that real safety would only come when Congress changed banking laws.").

## B. Tax Law

A little-known provision of federal tax law makes the operation of a successful marijuana business—even one operating in clear compliance with state law—an incredibly difficult proposition. Federal Tax Rule 280E<sup>71</sup> requires any trade or business operating in violation of federal drug laws—and only federal drug laws<sup>72</sup>—to pay federal income tax and to do so on disadvantageous terms. Under 280E a marijuana retailer cannot deduct her expenses before calculating her taxable income; other than the cost of obtaining the goods for sale, a marijuana business is required to pay taxes on its gross receipts.<sup>73</sup> All other usual business expenses—retail rent, employee payroll, lights, and heating and cooling—cannot be deducted as they can in any other business, either legitimate or illegal.

Even if the federal government does not seek to prosecute marijuana businesses for violating federal law, and even if it does not seek to forfeit the assets of businesses in violation of that federal law, it is already applying rule 280E against those businesses in ways that may prove nearly as crippling to the industry. For example, in 2011 the Internal Revenue Service ruled that Harborside Health Center, California’s largest medical marijuana dispensary, owed millions in taxes under the application of 280E.<sup>74</sup> Steve DeAngelo, Harborside’s owner, stated that a literal interpretation of 280E would ruin not just his business but also the entire industry: “No business, including Harborside, could survive if it’s taxed on its gross revenue. All we want is to be treated like every other business in America.”<sup>75</sup>

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71. I.R.C. § 280E (2006).

72. See, e.g., Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 533 (2014) (“To be clear, this over-taxation of a marijuana seller’s income is not simply the result of her engaging in an illegal business activity. If she were engaged in murder for hire, she would owe federal income tax on the profits she made from such activity, but would be allowed to deduct as ordinary and necessary business expenses the cost of her gun and bullets, the cost of overnight travel to and from the crime scene, any amounts she paid to employees or contractors who helped her carry out her crime, and other expenses associated with her criminal activity.”).

73. See *id.* at 532 (“The situation is not quite as dire as it initially may seem. A marijuana seller is not required to actually calculate her income tax strictly as a percentage of her gross income. The Tax Court has explained that “[cost of goods sold] is not a deduction within the meaning of [the tax code] but is subtracted from gross receipts in determining a taxpayer’s gross income.” (quoting *Olive v. Comm’r*, 139 T.C. 19, 20 n.2 (2012))).

74. See Lisa Leff, *Harborside Health Center, Oakland Pot Shop, Hit with \$2.4 Million Tax Bill*, HUFFINGTON POST (Dec. 4, 2011, 5:12 AM), [http://www.huffingtonpost.com/2011/10/04/harborside-health-center-tax-bill\\_n\\_995139.html](http://www.huffingtonpost.com/2011/10/04/harborside-health-center-tax-bill_n_995139.html).

75. See *id.*

### C. Access to Law and Lawyers

So long as marijuana remains illegal at the federal level, marijuana businesses will have difficulty operating as full legal citizens. One of the biggest obstacles facing marijuana businesses is finding attorneys who are willing to provide them with legal services. The Model Rules of Professional Responsibility and the ethics rules of nearly every state prohibit an attorney from knowingly facilitating a client's criminal conduct.<sup>76</sup> Because nearly all the actions of a marijuana business remain violations of federal law, any assistance that a lawyer gives to a business that she knows to be in violation of federal law could be construed as an ethical violation. This is true not only when the lawyer helps a marijuana retailer purchase product from a marijuana grow facility—in other words, when she assists in the actual violations of federal law—but also when the lawyer incorporates the marijuana business, helps draft a lease, lobbies local government officials for a zoning exemption, or negotiates an employment agreement. Because all these tasks help a marijuana business to break federal law, there is a plausible argument that the lawyer subjects herself to discipline for knowingly doing so.

State bar committees considering the ethics of representing the marijuana industry have largely split on the issue. Most recently, the Ethics Committee of the Colorado Bar Association concluded that, as the Colorado Rules of Professional Conduct are currently drafted, lawyers put themselves at risk when they perform many legal tasks for marijuana clients:

A lawyer cannot comply with Colo.RPC 1.2(d) and, for example, draft or negotiate (1) contracts to facilitate the purchase and sale of marijuana or (2) leases for properties or facilities, or contracts for resources or supplies, that clients intend to use to cultivate, manufacture, distribute, or sell marijuana, even though such transactions comply with Colorado law, and even though the law or the transaction may be so complex that a lawyer's assistance would be useful, because the lawyer would be assisting the client in conduct that the lawyer knows is criminal under federal law.<sup>77</sup>

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76. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1983) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").
  77. Colo. Bar Ass'n Ethics Comm., Formal Opinion 125—The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities, 42 COLO. LAW. No. 12, 19 (2013).

The State of Arizona came to exactly the opposite conclusion, reasoning that the assistance of lawyers was necessary to help the state achieve its goals of maintaining a regulated medical marijuana regime:

[W]e decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its rights to advocate for the interests of clients, is a bulwark of our system of government. . . . A state law now expressly permits certain conduct. Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law.<sup>78</sup>

Even if a state were to explicitly empower lawyers to assist marijuana clients, those lawyers would have to tell those clients that they are in a state of profound legal uncertainty. Take, for example, the little known case of *Hammer v. Today's Health Care II*.<sup>79</sup> In *Hammer*, a pair of Arizona citizens sued a Colorado medical marijuana dispensary in Arizona state court to recover a \$500,000 loan on which the dispensary had stopped making payments.<sup>80</sup> The court sided with the defendant, holding that neither legal nor equitable relief was available to the plaintiffs who had knowingly lent money to defendant for criminal purposes.<sup>81</sup> The court recognized the absurdity of this result—excusing the defendants from repaying the loan because they were, in the eyes of the law, drug dealers—but was unwilling to give the plaintiffs the benefit of their bargain when the conduct envisioned by

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78. State Bar of Ariz. Ethics Op. 11-01 (2011) (Scope of Representation); *see also*, Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 906 (2013) ("Without the guidance of lawyers, lay clients would often be unable to ascertain the meaning and application of the law and would therefore be denied the ability to decide how to conduct themselves under the law in an informed manner. If lawyers were to face disciplinary charges for 'assisting' clients whenever they merely know of the clients' criminal conduct, lawyers would be inhibited from representing clients, and the ability of those clients to meaningfully direct their own conduct would necessarily be compromised.").
  79. Judgment of Dismissal, *Hammer v. Today's Health Care II*, CV2011-051310 (Ariz. Super. Ct. April 17, 2012).
  80. *Id.*
  81. *Id.* at 4 ("The explicitly stated purpose of these loan agreements was to finance the sale and distribution of marijuana. This was in clear violation of the laws of the United States. As such, this contract is void and unenforceable").

the agreement remained illegal under federal law.<sup>82</sup> An insurance case from Hawai'i produced an equally disquieting result. A homeowner whose twelve marijuana plants had been stolen from her home sued her insurance company for failing to pay out on a policy insuring, among other things, "loss to trees, shrubs, and other plants."<sup>83</sup> The court rejected the claim on the basis that state law did not purport to and could not authorize marijuana cultivation under federal law and that enforcement of the insurance contract would thus be contrary to both federal law and policy.<sup>84</sup>

These cases, along with the restrictions on lawyer availability, demonstrate the unsettling expectations for those in the marijuana industry. They cannot rely on the contracts they sign or the insurance they pay for. They may or may not be able to secure legal representation to help them through the legal minefield created by complex state regulatory apparatuses. Although they are required to pay their taxes, they cannot deduct their expenses the way other businesses can. The reason in each case is the same: In the eyes of the law, they are engaging in criminal conduct.

#### D. Risks to Patients and Consumers

If the previous concerns have largely been localized to those trying to make a living in the industry, other burdens fall on those who are simply seeking to use marijuana—either recreationally or medically—with those states purporting to authorize marijuana for some purposes. In this Subpart we nonexhaustively categorize some of the potential consequences for those taking advantage of their states' weakening of their marijuana prohibitions.

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82. *Id.* ("The rule is that a contract whose formation or performance is illegal is, subject to several exceptions, void and unenforceable. But this is not all, for one who enters into such a contract is not only denied enforcement of his bargain, he is also denied restitution for any benefits he has conferred under the contract."); *see also* Order, *Haeberle v. Blue Sky Care Connection, LLC.*, No.11CV709 (D. Colo. Aug. 8, 2012), at 8 ("[C]ontracts for the sale of marijuana are void as they are against public policy. Accordingly, the contract here is void and unenforceable").
  83. *Tracy v. USAA Casualty Ins., Co.*, No. 11-00487, 2012 WL 928186, at \*1 (D. Haw. March 16, 2012).
  84. *Id.* at \*13 ("[T]his Court cannot enforce the provision because Plaintiff's possession and cultivation of marijuana, even for State-authorized medical use, clearly violates federal law. To require Defendant to pay insurance proceeds for the replacement of medical marijuana plants would be contrary to federal law and public policy, as reflected in the CSA, *Gonzalez [v. Raich]*, and its progeny.").

## 1. Employment

Loss of employment is perhaps the biggest concern for marijuana users if their use is discovered. In January 2014 the Colorado Supreme Court granted certiorari in the case of *Coats v. Dish Network LLC*.<sup>85</sup> Brandon Coats, a quadriplegic medical marijuana patient, was fired by his employer when his off-duty marijuana use was discovered by means of a drug test.<sup>86</sup> Coats alleged that his dismissal violated Colorado's "lawful activities" statute,<sup>87</sup> which created an exception to Colorado's at-will employment rules forbidding the firing of an employee for engaging in lawful conduct while off duty. A divided Court of Appeals panel held that the firing did not violate the statute because Coats's marijuana use was not legal: It remained prohibited by federal law. The court explained, "[F]or an activity to be 'lawful' in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law but complies with state law cannot be 'lawful' under the ordinary meaning of that term."<sup>88</sup> Thus, federal prohibition can justify the firing of employees who use medical marijuana even in states where such use is permitted.

## 2. Probation and Parole

It is a condition of nearly every sentence to probation or parole that the defendant agrees to obey all laws while serving his noncustodial sentence.<sup>89</sup>

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- 85. No. 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014).
  - 86. *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 149 (Colo. App. 2013), *cert. granted*, No. 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014).
  - 87. COLO. REV. STAT. § 24–34–402.5 (2013).
  - 88. *Coats*, 303 P.3d at 150–51. Similar results were reached by the Sixth Circuit and the state supreme courts in California and Oregon. *See Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 435–37 (6th Cir. 2012) (holding that the Michigan Medical Marijuana Act protects registered adults against criminal liability and other adverse action by the state, but private employers are not required to accommodate the use of medical marijuana); *Ross v. RagingWire Telecomm. Inc.*, 174 P.3d 200, 204–07 (Cal. 2008) (holding that California's medical marijuana law provides immunity from criminal liability but does not require employers to accommodate employee use of marijuana because, in part, it remains illegal under federal law); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529–33 (Or. 2010) (holding that the CSA preempts the provisions of the Oregon Medical Marijuana Act, which affirmatively authorizes the use of medical marijuana, but does not preempt other provisions that exempt marijuana-related activities from criminal liability).
  - 89. *See, e.g., COLO. REV. STAT. § 18–1.3–204(1)* (2013) ("[T]he court shall provide as [an] explicit condition[] of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation."). CAL. PENAL CODE § 1203.2 (2013) (permitting rearrest of a probationer or parolee if she "has

Like the debate over what constitutes lawful off-duty conduct in the employment context, there is a lingering question of whether marijuana use—if permitted by state law but still forbidden by federal law—constitutes the commission of a new offense sufficient to warrant the revocation of a probationer or parolee's release. Colorado courts have held that a medical marijuana patient is not entitled to use the drug while on probation or parole, yet courts in Montana and California have come to different conclusions citing the state policy interest in making marijuana available as a medicine for those it might benefit.<sup>90</sup> Although the issue, like the question of off-duty conduct, could be resolved by state statute, at the moment courts continue to grapple with whether it is permissible for marijuana patients to use the drug while on probation or parole. The rights of these patients remain unsettled.

### 3. Family Law

While there is little case law on point, it is becoming increasingly clear that marijuana use will likely play a role in family law proceedings, particularly in child custody disputes. Some courts have held that a parent's medical marijuana use alone cannot form the basis of diminishing her parenting rights.<sup>91</sup> But there is no guarantee that marijuana use—even use sanctioned by state law—will not provide a basis for diminishing a parent's rights. Since

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subsequently committed other *offenses*, regardless whether he or she has been prosecuted for such *offenses*.” (emphasis added)).

90. Compare *People v. Watkins*, 282 P.3d 500, 506 (Colo. App. 2012) (concluding that the requirement that probationers commit no new offenses includes federal offenses like marijuana possession and that the passage of medical marijuana provisions did nothing to change that requirement), with *People v. Tilehkooh*, 113 Cal. App. 4th 1433, 1437 (2003) (finding that “the defendant was entitled to assert California's medical marijuana use statute as a defense against the revocation of his probation”), and *State v. Nelson*, 195 P.3d 826, 834 (Mont. 2008) (holding that the trial court exceeded its authority in imposing a probation condition that required the defendant to comply with federal drug laws that conflict with the state's medical marijuana statute).
91. See, e.g., *In re Alexis E.*, 90 Cal. Rptr. 3d 44, 56 (2009) (finding that while the “use of medical marijuana, *without more*, cannot . . . bring[] the minors within the jurisdiction of the dependency court,” further facts about the parent's marijuana use justified restrictions on his parental rights); *In re Marriage of Parr*, 240 P.3d 509, 512 (Colo. App. 2010) (“In the absence of an evidentiary hearing, which the district court could have held . . . , the record does not show that father's use of medical marijuana represented a threat to the physical and emotional health and safety of the child, or otherwise suggested any risk of harm. Thus, father's use of medical marijuana cannot support the trial court's restriction on his parenting time.”); see also David Malleis, *The High Price of Parenting High: Medical Marijuana and Its Effects on Child Custody Matters*, 33 U. LAVERNE L. REV. 357, 357 (2012) (collecting cases in which courts “have used legal parental marijuana use, in and of itself, as probative negative evidence when deciding child custody matters”).

the purchase, cultivation, and possession of marijuana are still violations of federal law, a court could quite easily conclude that allowing such a parent extensive supervision of a minor child is not in the child's best interest.<sup>92</sup>

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This cursory survey of the issues shows that states seeking to legalize and regulate marijuana face substantial impediments due to marijuana's continuing illegality under federal law. Before turning to a discussion of potential ways to resolve this tension, we first examine an important preliminary issue: Why did the federal government decide not to enjoin the new state marijuana laws as preempted by federal law under the Supremacy Clause of the U.S. Constitution? Part III reveals that even when states legalize marijuana activity prohibited by federal law, the CSA does not preempt these state laws. The Tenth Amendment and the CSA itself significantly limit the federal government's ability to simply shut down the state marijuana policy experiments using its Supremacy Clause powers.

### III. THE CSA AND FEDERAL PREEMPTION OF STATE MARIJUANA LAWS

As Californians were preparing to go to the polls in 2010 to vote on Proposition 19, which would legalize, tax, and regulate marijuana for adult recreational use, a group of former heads of the DEA sent a highly publicized letter expressing their "grave concern."<sup>93</sup> They urged Attorney General Holder to publicly oppose the initiative and, if voters approved it, to file a lawsuit to "uphold the Supremacy Clause of the U.S. Constitution and the preemption provision of the CSA to prevent Proposition 19 from becoming law."<sup>94</sup> This group sent a similar letter to the Attorney General in the fall of

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92. See Malleis, *supra* note 91, at 377 ("Medical marijuana patients who are also full or part time custodial parents of minor children have reason to fear that their marijuana use may cause them to lose custody of their children."). This fear is likely grounded in the fact that marijuana use, even in states legalizing the drug for some purposes, still carries a significant stigma due to its illegality under federal law.

93. Letter from the Former Adm'rs of the Drug Enforcement Admin., 1973–2007, to Eric Holder, U.S. At'ty Gen. (Aug. 24, 2010), available at <http://www.mainjustice.com/files/2010/09/Letter-from-Former-DEA-Administrators-to-AG-Holder.pdf>.

94. *Id.* The letter had its desired effect. Attorney General Holder subsequently made several highly publicized statements opposing Proposition 19 just weeks before the election. See John Hoeffel, *Holder Vows Fight Over Prop. 19*, L.A. TIMES, Oct. 16, 2010, at A4, available at <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016> (reporting that Holder stated the DOJ's "strongly opposes" Proposition 19; that he "promised to 'vigorously enforce' federal drug laws against Californians who grow or sell marijuana for recreational use even if voters pass the legalization measure;" and that in a letter responding to the one he received from the

2012 decrying the Washington and Colorado legalization ballot initiatives.<sup>95</sup> They referenced their 2010 letter and asserted that “the CSA clearly states that federal law trumps state laws when there is a conflict. Since these initiatives would ‘tax and regulate’ marijuana, there is a clear and direct conflict with federal law.”<sup>96</sup>

No federal court opinion has yet addressed this broad federal preemption argument. Yet several state courts have ruled against local government officials advancing similar arguments seeking to invalidate state medical marijuana laws as preempted by federal law, and the U.S Supreme Court denied certiorari when it was sought in these cases.<sup>97</sup> Moreover, when

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former DEA administrators, he warned “that a period of turmoil, pitting the federal government against pot legalization backers, will ensue if voters approve Proposition 19”.

95. Letter from the Former Adm’rs of the Drug Enforcement Admin., 1973–2007, to Eric Holder, U.S. Att’y Gen. (Sept. 7, 2012), *available at* <http://www.saveoursociety.org/sites/saveoursociety.org/files/Ltr%20202%20to%20AG%20Holder%202012.pdf>.
96. *Id.* Among other things, the letter called on Holder to publicly oppose the state initiatives because they violated the CSA. *Id.*; *see also* Alex Dobuzinskis, *Ex-DEA Heads Urge Holder Oppose Marijuana Ballots*, REUTERS (Sept. 7, 2012, 9:03 PM), <http://www.reuters.com/article/2012/09/08/us-usa-marijuana-holder-idUSBRE8861CI20120908> (reporting in September 2012 that nine former heads of the DEA sent a letter to Attorney General Holder urging him to oppose the Washington and Colorado legalization ballot initiatives, citing the primacy of federal law). In a subsequent letter a year later, the same group urged Holder to file a lawsuit to have the state laws declared preempted by the CSA. Letter from the Former Adm’rs of the Drug Enforcement Admin., 1973–2007, to Eric Holder, U.S. Att’y Gen. (Sept. 9, 2013), *available at* [http://www.saveoursociety.org/sites/saveoursociety.org/files/Holder\\_ltr\\_090613.pdf](http://www.saveoursociety.org/sites/saveoursociety.org/files/Holder_ltr_090613.pdf) (the letter stated that the Colorado and Washington state marijuana laws are in “direct conflict with federal law” and called for Holder to live up to his oath of office and reconsider his decision not to challenge the state laws). The Huffington Post later reported on a follow-up conference call with reporters in which former directors of the DEA and the federal Office of National Drug Control Policy (ONDCP) explained their view that, “Federal law, the U.S. Constitution and Supreme Court decisions say that this cannot be done because federal law preempts state law.” Matt Ferner, *States Legalizing Marijuana Will Violate Federal Law, Trigger Constitutional Showdown: DEA, Drug Czars*, HUFFPOST DENVER (Oct. 15, 2012, 10:04 PM), [http://www.huffingtonpost.com/2012/10/15/dea-drug-czars-states-leg\\_n\\_1967363.html](http://www.huffingtonpost.com/2012/10/15/dea-drug-czars-states-leg_n_1967363.html).
97. *See* Town of Wakefield v. Coakley, No. CV2013-01684 (Mass. Super. Ct. May 7, 2013) (rejecting both conflict and obstacle preemption arguments brought against state medical marijuana provisions); Ter Beek v. City of Wyoming, 846 N.W.2d 531, 544 (Mich. 2014) (holding unanimously that the CSA does not preempt the Michigan Medical Marihuana Act); People v. Crouse, No. 12CA2298, 2013 WL 6673708, at \*7–9 (Colo. App. Dec. 19, 2013) (holding that returning improperly seized marijuana to its owner would not violate the CSA and that the CSA does not preempt state marijuana provisions); Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 461, 481–83 (Cal. Ct. App. 2008), *cert. denied*, 129 S.Ct. 2380 (2009) (holding that the CSA does not preempt provisions allowing patients to obtain medical marijuana identification cards because they do not positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible; and, the identification card provisions do not pose significant impediment to federal objectives embodied in the CSA); City of Garden Grove v. Superior Court, 157 Cal. App. 4th 355 (2007), *cert. denied*, 129 S.Ct. 623 (2008) (holding that a medical marijuana patient was qualified to invoke the protections of California’s medical marijuana law, was entitled under state law to the return

announcing the most recent iteration of federal marijuana enforcement policy in the wake of the Colorado and Washington ballot initiatives, the DOJ explicitly reserved its prerogative to ask federal courts to enjoin state marijuana laws in the future.<sup>98</sup> A careful analysis of federal preemption doctrine in the context of state marijuana laws and the CSA is thus warranted here.

#### A. The Preemption Doctrine, the Supremacy Clause, and the Anticommandeering Counterweight

The preemption doctrine is based on the Constitution's Supremacy Clause, which makes federal law "the supreme law of the land" trumping conflicting state laws.<sup>99</sup> The constitutional question that will determine the outcome of any preemption lawsuit seeking to invalidate state marijuana laws is whether state laws allowing the sale, cultivation, and use of limited amounts of marijuana create an impermissible "conflict"—as that term has been defined by the Supreme Court—with the CSA provisions prohibiting marijuana altogether.

But there is a significant constitutional counterweight to the Supremacy Clause: the Tenth Amendment's anticommandeering doctrine.<sup>100</sup> The federal government may not commandeer states by forcing them to enact laws or by requiring state officers to assist the federal government in enforcing its own laws within the state.<sup>101</sup> Under this doctrine, the federal government cannot

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of his seized marijuana, and that the return of the marijuana was not precluded by federal preemption). Although private employers in some medical marijuana states have successfully argued the supremacy of federal law to defend disciplinary actions against employees based on drug tests indicating marijuana use, courts in these cases have limited their holdings to the drug testing issue and left most of the state medical marijuana law provisions in place. *See Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 435–37 (6th Cir. 2012); *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200, 204–07 (Cal. 2008); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529–33 (Or. 2010).

98. *See Southall & Healy, supra* note 6 ("If federal prosecutors believe that a state's controls are inadequate, 'the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions,' Mr. Cole wrote.").

99. U.S. CONST., art. VI, cl. 2.

100. *See Robert A. Mikos, On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446 (2009) ("Though expansive, Congress's preemption power is not, in fact, coextensive with its substantive powers, such as its authority to regulate interstate commerce. The preemption power is constrained by the Supreme Court's anti-commandeering rule.").

101. *See Printz v. United States*, 521 U.S. 898, 912 (1997) (noting that Congress is also prohibited from commandeering the states to enforce federal law); *New York v. United States*, 505 U.S. 144, 162 (1992) (observing that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions").

require states to enact or maintain on the books any laws prohibiting marijuana.

Taken together, the commandeering prohibition and the Supremacy Clause help define the contours of our federalist system of coexisting state and federal governments. A state can constitutionally decide not to criminalize conduct under state law even if such conduct offends federal law. While states cannot stop the federal government from enforcing federal law within their territory, the federal government cannot command the state to create a law criminalizing the conduct.<sup>102</sup> “No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.”<sup>103</sup>

The U.S. Supreme Court has upheld the federal government’s ability to enforce the CSA even against those complying with more lenient state marijuana laws.<sup>104</sup> Because Congress has the authority under the Commerce Clause to prohibit even the intrastate cultivation and possession of marijuana, no state can erect a legal shield protecting its citizens from the reach of the CSA. But at the same time, states’ decisions to eliminate state marijuana prohibitions are simply beyond the power of the federal government. The federal government cannot command any state government to criminalize marijuana conduct under state law.<sup>105</sup> From that incontrovertible premise flows the conclusion that if states wish to repeal existing marijuana laws or partially repeal those laws, they may do so without running afoul of federal preemption.

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102. See *Printz*, 521 U.S. at 912; *New York*, 505 U.S. at 162.

103. *New York*, 505 U.S. at 178.

104. See *United States v. Oakland Cannabis Buyers’ Co-op*, 532 U.S. 483, 486 (2001) (holding that there is no medical necessity exception to the CSA’s marijuana prohibitions); see also *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (The Court held that the CSA can still be applied to intrastate manufacturing and possession of medical marijuana in compliance with state law. Such local activities are part of an economic “class of activities,” which have a substantial effect on interstate commerce. CSA regulation of these activities is necessary because of enforcement difficulties in distinguishing between marijuana grown locally and marijuana grown elsewhere, as well as concerns about the marijuana’s diversion into illicit channels).

105. As the U.S. Supreme Court put it, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” *New York*, 505 U.S. at 162.

### B. Congress Intended That the CSA Preempt Only State Laws That Positively Conflict With Federal Law

Although Congress had the authority to occupy the field of controlled substances regulation when it enacted the CSA, it explicitly chose not to do so. Section 903 of the CSA includes an antipreemption provision expressly disclaiming preemptive intent in all but a narrow set of circumstances:

No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.<sup>106</sup>

As previously noted, the preemption doctrine is rooted in the Supremacy Clause<sup>107</sup> and the “fundamental principle of the Constitution that Congress has the power to preempt state law.”<sup>108</sup> But the doctrine is not without limits: Every preemption case starts “with a presumption that the state statute is valid” and asks whether the party arguing for preemption “has shouldered the burden of overcoming that presumption.”<sup>109</sup> Two basic principles guide all preemption analyses. First, the purpose of the legislation must be analyzed to determine whether it was the intent of Congress to preempt state law.<sup>110</sup> Second, “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ [courts] ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”<sup>111</sup>

Courts have “identified four ways in which Congress may preempt state [or local] law:” express, field, conflict, and obstacle preemption.<sup>112</sup> Whether federal law preempts state or local law is “fundamentally a question of

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106. 21 U.S.C. § 903 (1988) (emphasis added).

107. U.S. CONST., art. VI, cl. 2.

108. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

109. *Pharm. Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661–62 (2003).

110. See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (“[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.”) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); see also *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 162 P.3d 569, 574 (Cal. 2007).

111. *Medtronic, Inc.*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

112. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 862 (Cal. 2010) (quoting *In re Jose C.*, 198 P.3d 1087, 1098 (Cal. 2009)); see, e.g., *Crosby*, 530 U.S. at 372.

congressional intent.”<sup>113</sup> When Congress includes an explicit preemption clause within a statute, courts may rely on the plain text of the clause to identify congressional intent to preempt state and local laws.<sup>114</sup> When no express preemptive intent is provided, state laws must yield to a congressional act when “Congress intends federal law to ‘occupy the field.’”<sup>115</sup> But courts have long presumed that state law is valid when Congress legislates in a field traditionally occupied by the states.<sup>116</sup> Even in the realm of traditional state power, however, state law may be preempted to the extent it conflicts with a valid federal law.<sup>117</sup> In such instances, courts will find a state law to be preempted when simultaneous compliance with both federal and state law is a “physical impossibility”<sup>118</sup> or when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of” a federal statute.<sup>119</sup>

The phrase “positive conflict . . . so that the two cannot consistently stand together” in section 903 has been interpreted as narrowly restricting the preemptive reach of the CSA to “cases of an actual conflict with federal law such that ‘compliance with both federal and state regulations is a physical

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113. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990) (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988)); *see, e.g., Medtronic, Inc.*, 518 U.S. at 485 (“[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.”).

114. *See, e.g., Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (“When a federal law contains an express preemption clause, we ‘focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.’”) (citing *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (“When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision *explicitly addressing* that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.” (emphasis added) (internal quotation marks omitted) (citing *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978))); Cal. Fed. Savings & Loan Ass’n v. Guerra, 479 U.S. 272, 282 (1987); *English*, 496 U.S. at 79 (“[W]hen Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.”); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–32 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941).

115. *Crosby*, 530 U.S. at 372 (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989)); *Rice*, 331 U.S. at 230.

116. *See, e.g., CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188–89; *Medtronic, Inc.*, 518 U.S. at 485; *Rice*, 331 U.S. at 230.

117. *See, e.g., Rice*, 331 U.S. at 230.

118. *See, e.g., Crosby*, 530 U.S. at 372 (2000) (“We will find preemption where it is impossible for a private party to comply with both state and federal law . . . .”); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (“A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility . . . .”).

119. *Hines*, 312 U.S. at 67.

impossibility.”<sup>120</sup> Justice Scalia has written that the plain language of section 903 states a congressional intent that the CSA preempt only state laws that require someone to engage in an action specifically forbidden by the CSA.<sup>121</sup> As a California appellate court succinctly put it, “mere speculation about a hypothetical conflict is not the stuff of which preemption is made.”<sup>122</sup>

It is not physically impossible to comply with both the CSA and state marijuana laws; nothing in the more liberal state laws requires anyone to act contrary to the CSA. Only if a state law required a citizen to possess, manufacture, or distribute marijuana in violation of federal law would it be impossible for a citizen to comply with both state and federal law. Similarly, if a state were to make state officers the manufacturers or distributors of marijuana, it might well be impossible for those officials to comply with both state and federal law. No state marijuana law, however, has attempted to require state or local officials to violate the CSA in this manner.

There is a reasonable argument that this straightforward analysis should entirely settle the preemption question in the context of all state marijuana laws that are more permissive than the CSA but do not require anyone to violate the CSA. The express language of section 903 establishes Congress’s intent that preemption claims under the CSA be analyzed under a conflict preemption rubric and, as conflict preemption is applied by the U.S. Supreme Court, there simply is no conflict between permissive state marijuana laws and the CSA. But the Court has suggested in some of its preemption decisions that even when there is an express statutory preemption provision under which a reviewing court finds no federal preemption, courts should in some circumstances still undertake an “implied preemption” analysis.<sup>123</sup>

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120. See *S. Blasting Servs., Inc. v. Wilkes Cnty*, 288 F.3d 584, 591 (4th Cir. 2002). In rejecting a federal preemption claim concerning county and federal regulations governing explosive materials, the court in *Southern Blasting Services* analyzed the express preemption provision contained in 18 U.S.C. § 848, which uses language that is materially identical to that in 21 U.S.C. § 903. Section 848 provides:

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

*S. Blasting Servs.*, 288 F.3d at 590.

121. *Gonzales v. Oregon*, 546 U.S. 243, 290 (2006) (Scalia, J., dissenting) (noting that the CSA “does not purport to pre-empt state law [regarding assisted suicide] in any way . . . unless . . . some States require assisted suicide”).

122. *Solorzano v. Superior Court*, 13 Cal. Rptr. 2d 161, 169–70 (Cal. Ct. App. 1992).

123. See Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POLY 5, 23 (2013) (advocating that the Supreme Court adopt a direct conflict approach

Under this analysis federal law will preempt if the state law or action at issue creates an “obstacle to the purposes and objectives” of the federal law.<sup>124</sup>

We therefore turn to consider whether state laws legalizing marijuana for medical or recreational use are preempted under the Court’s implied obstacle preemption test. The next Subpart demonstrates that even under this broad implied obstacle preemption analysis,<sup>125</sup> the CSA does not preempt more lenient state marijuana laws because such state laws are consistent with the CSA’s purposes and objectives.<sup>126</sup>

### **1. Implied Preemption and the Strong Presumption Against Preemption**

The implied obstacle preemption analysis begins with a strong presumption against the preemption of state statutes, particularly when, as here, such statutes operate in a field within which states have traditionally

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which “would help courts to avoid the mistakes [of overly broad obstacle preemption tests], without necessarily running the risk of permitting too many conflicts to go unresolved”).

124. *Id.*

125. Although the CSA explicitly dictates a conflict preemption analysis, some lower courts have analyzed claims that the CSA preempts state marijuana laws under an implied obstacle preemption analysis. *See, e.g., Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 480–83 (Cal. Ct. App. 2008), *cert. denied*, 129 S.Ct. 2380 (2009) (“Because Congress provided that the CSA preempted only laws positively conflicting with the CSA so that the two sets of laws could not consistently stand together, and omitted any reference to an intent to preempt laws posing an obstacle to the CSA, we interpret title 21 United States Code section 903 as preempting only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible. . . . Although we conclude title 21 United States Code section 903 signifies Congress’s intent to maintain the power of states to elect to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country all state laws that do not positively conflict with the CSA, we also conclude the identification laws are not preempted even if Congress had intended to preempt laws posing an obstacle to the CSA.” (internal quotation marks and citations omitted)).

126. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867–86 (2000) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Wyeth v. Levine*, 555 U.S. 555, 572–81 (2009) (analyzing a federal preemption claim under the implied obstacle preemption test after finding no preemption under an express statutory preemption provision); *id.* at 593–604 (Thomas, J., concurring) (denouncing the Court’s purposes and objectives preemption jurisprudence because it “facilitates freewheeling, extratextual, and broad evaluations of the ‘purposes and objectives’ embodied within federal law . . . giving improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress pursuant to the Constitution . . . lead[ing] to the illegitimate—and thus, unconstitutional—invalidation of state laws.”).

regulated.<sup>127</sup> Congress specifically left a significant role for the states in regulating controlled substances like marijuana, thus triggering this presumption.<sup>128</sup> The CSA itself addresses areas traditionally regulated by the states and their subdivisions: public health and medical care,<sup>129</sup> land use,<sup>130</sup> and state and local government's power to criminalize conduct.<sup>131</sup> Since our nation's founding, it has been chiefly state and local governments, not the federal government, that have taken responsibility for crafting and enforcing laws designed to promote health and protect safety. In the field of drug control, specifically, states have long experimented with laws and policies aimed at reducing the harms caused by the misuse of controlled substances while maximizing their social and medicinal benefits.

The U.S. Supreme Court recently reiterated that its "precedents 'establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.'"<sup>132</sup> "Implied preemption analysis," the Supreme Court cautioned, "does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal

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127. See Cole Memo II, *supra* note 5, at 2 ("Outside of [the eight federal marijuana enforcement priorities], the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.").

128. See 21 U.S.C. § 903 (1988).

129. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 269–70 (2006) (holding that regulation of the public health falls within the States' police powers) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)); see also *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) (noting that health care has historically been a matter of local, not federal, concern); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern." (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))); *Olszewski v. Scripps Health*, 69 P.3d 927, 939 (Cal. 2003).

130. See, e.g., *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (citing *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)) ("[R]egulation of land use [is] a function traditionally performed by local governments."); see also *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979).

131. See, e.g., *Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("[F]oremost among the prerogatives of sovereignty is the power to create and enforce a criminal code."); *Alfred L. Snapp & Son v. P.R., ex rel., Barez*, 458 U.S. 592, 601 (1982) (identifying States' "sovereign power over individuals and entities," including "the power to create and enforce a [criminal] legal code"); *McCulloch v. State*, 17 U.S. 316, 418 (1819) ("The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers."); see also *In re Jose C.*, 198 P.3d 1094, 1097 (Cal. 2009); *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 478–79 (Cal. Ct. App. 2008).

132. See *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (Roberts, J., plurality opinion) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992)) (Kennedy, J., concurring).

objectives.”<sup>133</sup> Indeed, the requisite congressional intent to impliedly preempt state law may be inferred only “to the extent [the state law] actually conflicts with federal law.”<sup>134</sup> Moreover, “[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.”<sup>135</sup>

When it enacted the CSA, Congress was well aware that there were many existing state laws concerning marijuana cultivation, sale, and use and that not all these laws punished this conduct as harshly as the new federal drug laws; Congress nonetheless “decided to stand by both concepts and to tolerate whatever tension there [is] between them.”<sup>136</sup> The CSA punishes possession for personal use as a misdemeanor subject to up to one year in federal prison. Long before the 2012 Washington and Colorado ballot initiatives, numerous other states already had laws punishing marijuana offenses much more leniently than the CSA.<sup>137</sup> Several had laws making possession of up to an ounce of marijuana an infraction punishable only by a fine.<sup>138</sup>

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133. *Id.* (quoting *Gade*, 505 U.S. at 111) (Kennedy, J., concurring).

134. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 281 (1987).

135. *Wyeth v. Levine*, 555 U.S. 555, 575 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989)). In this sense, the CSA preemption language is clearly distinguishable from that contained in the Professional and Amateur Sports Protection Act (PASPA). 28 U.S.C. § 3701 *et seq.* In July 2014, the Third Circuit held that PASPA preempted New Jersey’s attempt to regulate sports gambling within the state. *NCAA v. Christie*, 730 F.3d 208 (3d. Cir. 2014). The court held that the purpose of PASPA was to preempt attempts by the states to authorize sports gambling. *Id.* at 216. Clearly, no such intent is present in the CSA. Furthermore, although the Third Circuit’s reading of PASPA would invalidate state attempts to tax and regulate sports gambling, the anti-commandeering doctrine nonetheless prohibits Congress from requiring the states to keep their existing sports-gambling bans on the books.

136. See *id.* (quoting *Bonito Boats, Inc.*, 489 U.S. at 166–67; 21 U.S.C. § 903 (2012)).

137. Possession of limited amounts of marijuana intended for personal use is classified as a submisdemeanor offense subject to no jail time in the District of Columbia and the following states: California, Maine, Massachusetts, Mississippi (first offense only), Nebraska (first offense only), New York (first and second offenses only), Ohio, Rhode Island, and Vermont. In addition, the following states do not require jail time for possession of marijuana for personal use, despite continuing to classify the offense as a misdemeanor: Minnesota, Nevada (first and second offenses only), North Carolina, and Oregon. See *State Info*, NORML, <http://www.norml.org/states> (last visited June 23, 2014); *State Policy*, MPP, <http://www.mpp.org/states> (last visited June 23, 2014); Marijuana Possession Decriminalization Amendment Act of 2014, B20-409, Council Period 20 (D.C. 2014).

138. See *supra* note 137; Washington, D.C., Simple Possession of Small Quantities of Marijuana Decriminalization Amendment Act of 2013, B20-409 (Mar. 31, 2014).

Similarly, twenty-three states<sup>139</sup> and Washington, D.C.<sup>140</sup> have enacted laws over the past eighteen years that allow limited use of marijuana for medical purposes while federal marijuana law has no exception for medical use.<sup>141</sup>

Of course, the federal government can and does enforce the stricter CSA provisions even in states that have decriminalized possession or where patients, other users, and suppliers are in compliance with state medical and recreational marijuana laws. No one contests the power of the federal government to do so. The federal government has never argued, however—nor has any court ever held—that the CSA completely preempts state marijuana laws that are more permissive than federal law.

## 2. More Permissive State Marijuana Laws Are Consistent With the Purposes and Objectives of the CSA

The argument that state laws legalizing marijuana activity prohibited by the CSA pose an obstacle to the purposes and objectives of federal law has an

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- 139. The twenty-three states that have passed medical marijuana laws are: Alaska (Ballot Measure 8 (1998)), Arizona (Proposition 203 (2010)), California (Proposition 215 (1996)), Colorado (Ballot Amendment 20 (2000)), Connecticut (House Bill 5389 (2012)), Delaware (Senate Bill 17 (2011)), Hawaii (Senate Bill 862 (2000)), Illinois (House Bill 1 (2013)), Maine (Ballot Question 2 (1999)), Maryland (H. Bill 1101 (2013); H. Bill 180 (2013)), Massachusetts (Ballot Question 3 (2012)), Michigan (Proposal 1 (2008)), Minnesota (S.F. 2470 (2014)), Montana (Initiative 148 (2004)), Nevada (Ballot Question 9 (2000)), New Hampshire (House Bill 573 (2013)), New Jersey (Senate Bill 119 (2010)), New Mexico (Senate Bill 523 (2007)), New York (A. 6357/S. 7923 (2014)), Oregon (Ballot Measure 67 (1998)), Rhode Island (Senate Bill 0710 (2006)), Vermont (Senate Bill 76 (2003)), and Washington (Initiative 692 (1998)).
  - 140. Washington, D.C. legalized medical marijuana with the Legalization of Marijuana for Medical Treatment Amendment Act of 2010, B18-622 (May 4, 2010).
  - 141. Very limited allowances exist under federal law for FDA approved research projects and the FDA's Compassionate Investigational New Drug program, under which four people continue to receive marijuana from the federal government for their medical treatment. In 1976 Robert Randall, a glaucoma patient who had lost a significant portion of his vision, successfully established a defense of medical necessity in his marijuana possession case. *U.S. v. Randall*, 103 Daily Wash. L. Rptr. 2249, 2252–54 (D.C. Super. Ct. Nov. 24, 1976). After his court victory, Mr. Randall sued the federal government, resulting in a 1978 settlement that established a federal medical marijuana program that served twenty patients suffering from debilitating diseases. See Mohamed Ben Amar, *Cannabinoids in Medicine: A Review of Their Therapeutic Potential*, 105 J. ETHNO-PHARMACOLOGY 1, 2 (2006) (“In 1978, in response to the success of a lawsuit filed by a glaucoma patient (Robert Randall) . . . the U.S. Government created a compassionate program for medical marijuana . . . . This program was closed to new candidates in 1991 by President Bush . . . .”). Under the program, patients legally receive Food and Drug Administration approved marijuana cigarettes from the National Institute on Drug Abuse. *Id.* Only four patients remain in the program. See, e.g., *U.S. Government Provides Marijuana to Four Americans, Including 72-Year-Old Eugene Woman*, ASSOCIATED PRESS (Sept. 28, 2011, 9:56 AM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/09/us\\_government\\_provides\\_marijua.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/09/us_government_provides_marijua.html).

intuitive appeal. After all, these states have removed criminal sanctions for, and thus allow citizens to engage in, conduct that federal law prohibits. How could that not pose an obstacle to the CSA's objectives of "combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances"?<sup>142</sup> The problem with this argument is that it confuses the common definition of "obstacle" with the distinct legal concept developed in the Supremacy Clause jurisprudence governing federal preemption of state law.

The proper obstacle preemption analysis can be discerned through the use of a simple thought experiment. Recall the Tenth Amendment's anticommandeering proscription discussed above: A state clearly can decide not to criminalize conduct under state law even if such conduct is prohibited by federal law. Just as the federal government cannot command the state to create a law criminalizing conduct,<sup>143</sup> neither can it command the state to leave current state laws on the books.<sup>144</sup> Imagine, then, that tomorrow a state chooses to repeal all its state laws concerning marijuana. The CSA would still be in effect and the federal government could continue to enforce its prohibition of marijuana within that state, but that conduct would not be illegal under state law.

Under those circumstances, the federal government could not require the state either to reenact its repealed marijuana laws or to assist the federal government in enforcing the CSA. That would violate the anticommandeering principle the Court has said is inherent in the Tenth Amendment. Would such a repeal of state laws, in effect legalizing any and all marijuana use under state law, pose an obstacle to the CSA's objectives? It is true that removal of state sanctions and assistance would make the federal enforcement of its own laws more difficult in that the federal government would lose an enforcement partner.<sup>145</sup> But that loss of state assistance cannot constitute an obstacle for

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

143. *See New York v. United States*, 505 U.S. 144, 162 (1992) (observing that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"); *Printz v. United States*, 521 U.S. 898, 912 (1997) (noting that Congress is also prohibited from commandeering the states to enforce federal law).

144. *See Mikos, supra* note 123, at 28 ("The CSA does not, and, as discussed above, cannot, oblige state officials to punish people for possessing, cultivating, or distributing marijuana.").

145. In fact, the United States would lose quite a formidable partner when one considers that state and local law enforcement, rather than federal agencies such as the Drug Enforcement Agency (DEA), make more than 99 percent of all marijuana arrests in the country annually. *Compare AM. CIVIL LIBERTIES UNION, supra* note 29, at 8 (showing that state and local law enforcement made 889,133 marijuana arrests in 2010), *with MOTIVANS, supra* note 29, at 9 (indicating that there were only 8,117 marijuana arrests by the DEA in 2010).

purposes of the federal preemption analysis.<sup>146</sup> As Judge Kozinski noted in his concurring opinion in a 2002 Ninth Circuit decision analyzing California's medical marijuana laws, “[t]hat patients may be more likely to violate federal law if the additional deterrent of state liability is removed may worry the federal government, but the proper response—according to *New York* and *Printz*—is to ratchet up the federal regulatory regime, not to commandeer that of the state.”<sup>147</sup>

Now carry the thought experiment one step further: Imagine that the day after repealing all its marijuana laws, the same state enacted a new regulatory scheme under which only adults twenty-one and over would be allowed to possess marijuana and only up to one ounce. Assume further that this new state regulatory scheme empowered local jurisdictions to license commercial cultivation and the sale of marijuana to adults; production and sales conforming to these regulations—but only such sales—would now be permitted. Under these new state regulations, possession of more than one ounce, unlicensed cultivation or sale, and distribution of marijuana to a minor would all become new criminal offenses. Enacting these new state laws, creating a tightly regulated marijuana market, and adding new criminal penalties, could not be deemed an obstacle to the CSA's objectives of “combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances.”<sup>148</sup> The state's new laws are a greater support to the federal goals on day two than they were on day one. On day one the state permitted all marijuana activity; on day two it prohibited most marijuana activity, permitting only regulated sales and possession of small amounts. If the state can remove all its marijuana prohibitions on day one despite the CSA's prohibition and despite the Supremacy Clause—and it clearly can—the state can certainly add some prohibitions back on day two without running afoul of the CSA.

Doctrinally, the outcome of the federal preemption analysis in this context cannot turn upon whether a state first repeals all its marijuana laws and then subsequently enacts a regulatory scheme or jumps straight from

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146. A construction of the CSA that deemed state regulatory systems obstacles for preemption purposes would raise serious constitutional questions under the Tenth Amendment that should be avoided when another reasonable construction is available. *See Fed. Comm'nns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (“The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.”); *see also* *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).
147. *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) (referring to *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997)).
148. *Gonzales v. Oregon*, 546 U.S. 243, 250 (2006).

prohibition to regulation. For the same reasons that states may repeal any and all state marijuana laws, they may remove some or even all criminal penalties and impose a state system to regulate marijuana activity instead.

Given the significant limitations on the federal government's ability to nullify state laws legalizing marijuana, and the increasing public support for liberalizing marijuana laws, the number of states doing away with their marijuana prohibitions is likely to only grow in the years to come. In the next Part we examine some possible solutions to the tensions between state and federal regulation of marijuana.

#### **IV. CHANGING FEDERAL LAW TO ACCOMMODATE STATE MARIJUANA LAWS**

In Part III, we demonstrated that even if no criminal marijuana prosecutions are brought under the CSA, the tension between federal law and state laws with regard to marijuana enforcement generates an untenable status quo. Expectations are unsettled and state policy goals are frustrated by the legal-but-not-entirely-legal status of marijuana in twenty-three states. In this Part, we discuss a number of possible changes to federal law that could resolve this clash of federal and state authority.

##### **A. Proposed Federal Marijuana Bills**

Several federal marijuana-related bills have been introduced in Congress in recent years, but none have gained much traction. Separately, these bills proposed to: (1) remove marijuana from the CSA schedule of drugs and the enforcement and punishment provisions of the federal code;<sup>149</sup> (2) reschedule marijuana to allow marijuana for medical use in the states where medical marijuana has been legalized and to ensure "an adequate supply of marijuana is available for therapeutic and medicinal research;"<sup>150</sup> (3) provide an affirmative defense for medical marijuana-related activities conducted in compliance with state law and mandate the return of property seized by the federal government in connection to marijuana prosecutions;<sup>151</sup> (4) amend the asset forfeiture provisions of the CSA to prohibit the seizure of real property used in activities performed in

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<sup>149</sup>. Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. § 101 (2013). Federal law would continue to prohibit trafficking and the unlicensed cultivation, production, manufacturing, and sale of marijuana.

<sup>150</sup>. States' Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. § 4 (2013).

<sup>151</sup>. Truth in Trials Act, H.R. 710, 113th Cong. § 2(a) (2013).

compliance with state marijuana laws;<sup>152</sup> (5) amend the CSA preemption provision (21 U.S.C. § 903) to specify that the CSA shall not be construed to indicate that Congress intended to occupy the field of marijuana enforcement or preempt state marijuana laws;<sup>153</sup> (6) prohibit the DEA and the DOJ from spending taxpayer money to raid, arrest, or prosecute medical marijuana patients and providers in states where medical marijuana is legal;<sup>154</sup> (7) prohibit any provision of the CSA from being applied to any person acting in compliance with state marijuana laws;<sup>155</sup> and (8) provide legal immunity from criminal prosecution to banks and credit unions providing financial services to marijuana-related businesses acting in compliance with state law.<sup>156</sup>

Some of these solutions—such as removing marijuana from the CSA entirely or completely disclaiming any congressional intent to preempt any state marijuana law—would largely eliminate the collateral consequences identified in Part II. Since Congress does not yet appear inclined to completely end or even to significantly curtail the federal prohibition of marijuana, we describe more incremental permissive and cooperative federalism approaches that could allow states meeting specified federal criteria to opt out of the CSA provisions relating to marijuana while leaving federal law unchanged in those states content with the status quo.

## B. State and Federal Joint Enforcement of Marijuana: Permissive or Cooperative Federalism

Under either a permissive or cooperative federalism approach, the federal government could allow states to govern marijuana laws and regulations within their borders so long as the state regulatory schemes comply with specified federal requirements such as those set out in the Cole Memorandum II.

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152. States' Medical Marijuana Property Rights Protection Act, H.R. 784, 113th Cong. § 3 (2013).

153. Respect States' and Citizens' Rights Act of 2013, H.R. 964, 113th Cong. § 2 (2013).

154. H. Amdt. 748, 113th Cong. (2013–14) (amending Commerce, Justice, Science, and Related Agencies Appropriations Act, H.R. 4660, 113th Cong. (2013–14)). Substantially similar versions of this amendment had been introduced in at least six other legislative sessions. The amendment finally passed in the House on May 5, 2014.

155. Respect State Marijuana Laws Act of 2013, H.R. 1523, 113th Cong. § 2 (2013).

156. Marijuana Business Access to Banking Act of 2013, H.R. 2652, 113th Cong. § 3 (2013).

### 1. Permissive Federalism

Under a permissive federalism approach, Congress could allow an administrative agency to grant state-level temporary, revocable waivers of the CSA marijuana provisions based on specified criteria. During the period of the waiver, participating states could experiment with their own laws and regulations while the federal government agrees not to enforce federal law.

For example, several federal welfare statutes allow the federal and state governments to share authority over welfare policy provided that state policies meet federal guidelines.<sup>157</sup> The federal government is authorized to use revocable waivers to grant states temporary oversight over a set of policies for specified periods of time.

For instance, section 1115 of the Social Security Act (SSA) authorizes the Secretary of the Department of Health and Human Services (HSS) to waive specified statutory requirements of the Temporary Assistance for Needy Families (TANF) program, thereby allowing states to experiment with novel welfare strategies.<sup>158</sup> The Secretary may issue these waivers to the extent, and for the period of time, necessary to enable states to carry out pilot programs that promote the objectives of the TANF program.<sup>159</sup> The waivers last only for the duration of the demonstration projects, which are typically granted for less than five years.<sup>160</sup> Thus, the SSA permits a state to establish an experimental welfare project if it furthers the federal objectives of the TANF program and the Director of HSS grants the state a time-limited waiver of its federally statutory obligations.<sup>161</sup>

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157. See Shelly Arsneault, *Welfare Policy Innovation and Diffusion: Section 1115 Waivers and the Federal System*, 32 ST. & LOC. GOV'T REV. 49, 49–50 (2000).
158. See 42 U.S.C. 1315 (2013); Arsneault, *supra* note 157, at 151, 158–59; see also OFFICE OF FAMILY ASSISTANCE, TANF-ACF-IM2012-03 (GUIDANCE CONCERNING WAIVER AND EXPENDITURE AUTHORITY UNDER SECTION 1115) (2012), available at <http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203>; DEP'T OF HEALTH AND HUMAN SERVS., STATE WELFARE WAIVERS: AN OVERVIEW (2001), available at <http://aspe.hhs.gov/hsp/isp/waiver2/waivers.htm>. Similar waivers were allowed under the Aid to Families with Dependent Children program before the Temporary Assistance for Needy Families (TANF) replaced it. See *id.*; Arsneault, *supra* note 157, at 151.
159. 42 U.S.C. 615 (2012). Under TANF, states may be granted welfare waivers to pursue pilot projects in any of the following categories: work and training requirements, time limits, family cap provisions, income disregards, resource limits transitional assistance, eligibility for two-parent families, and child support enforcement. See DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 158.
160. See DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 158.
161. See, e.g., Michael Wiseman, *State Strategies for Welfare Reform: The Wisconsin Story*, 15 J. POL'Y ANALYSIS & MGMT. 515 (1996); Arsneault, *supra* note 157, at 57–58.

Revocable waivers could be a good first step toward permitting states to experiment with novel approaches to legalizing and regulating marijuana. Marijuana policy expert Mark Kleiman has proposed a revocable waiver approach under which an administrative agency could grant state-level waivers of the CSA marijuana provisions based on specified criteria.<sup>162</sup> In effect, the revocable waiver would provide a more reliable nonenforcement of federal law guarantee that the Cole Memorandum II implies. But as long as the federal government merely agrees not to enforce federal law in opt-out states, and thus conduct is illegal but not prosecuted, most, if not all, the ancillary problems flowing from the continued illegality under federal law are likely to remain.

## 2. Cooperative Federalism

In light of this concern with a permissive revocable waiver, we suggest that a cooperative federalism approach is a better solution. Congress could amend the CSA to allow states to opt out of most<sup>163</sup> of the CSA's marijuana provisions within its borders, thereby making conduct allowed by state law actually legal under federal law within that state.

Cooperative federalism has been described as "a partnership between the States and the Federal Government, animated by a shared objective."<sup>164</sup> Put differently, cooperative federalism allows federal and state laws to solve problems jointly rather than conflict with each other. In the interest of cooperation, certain federal statutes permit cooperative agreements between the federal government and the states to solve issues of mutual concern. In the context of marijuana policy, such agreements would provide that only state law governs marijuana enforcement within opt-out states so long as the states comply with federal guidelines. In all other states, the CSA would continue to control.

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162. Mark A.R. Kleiman, *Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization*, 6 J. DRUG POL'Y ANALYSIS 1, 6 (2013).

163. Because a cooperative federalism framework would only allow state marijuana laws to govern activities taking place within opt-out states, the CSA would continue to govern all interstate and international marijuana trafficking. Obviously, no state would be able to regulate or punish marijuana trafficking that affected states or territories outside of its control.

164. See *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

### a. Existing Examples of Cooperative Federalism

Examples of cooperative frameworks can be found in several federal statutes, including the Clean Water Act (CWA) and the Clean Air Act (CAA), and the Patient Protection and Affordable Care Act of 2010 (ACA).

#### i. The Clean Air and Clean Water Acts

The plain language of the CAA<sup>165</sup> and CWA<sup>166</sup> states a congressional intent that the federal government and the states work together to prevent pollution. Under the CAA, each state has primary responsibility for the air quality within its geographic area.<sup>167</sup> States may promulgate their own air pollution prevention plans, but if those plans do not meet the requirements of the CAA then a federal plan will be promulgated instead.<sup>168</sup>

Along the same lines, the CWA grants states primary responsibility for water quality standards, but the federal government may take a more active role if a state fails to comply with the Environmental Protection Agency (EPA)'s mandates.<sup>169</sup> The CWA requires states to periodically review and

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- 165. 42 U.S.C. § 7401(c) (2006) (stating that the goal of the CAA “is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention”); *see* 42 U.S.C. § 7402(a) (2006) (“The Administrator shall encourage cooperative activities by the States and local governments for the prevention and control of air pollution . . . .”); 42 U.S.C. § 7402(b) (2006) (“The Administrator shall cooperate with and encourage cooperative activities by all Federal departments and agencies . . . so as to assure the utilization . . . of all appropriate and available facilities and resources within the Federal Government.”).
  - 166. 33 U.S.C. § 1251(b) (2012) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.”).
  - 167. *See* 42 U.S.C. § 7407(a) (2012); *see also* 42 U.S.C. § 7410(a)(2) (2006) (outlining the requirements for what shall be included in the plans and revisions, including requirements for data collection and analysis that must be provided to the Administrator upon request). States are required to submit implementation plans and may submit revisions specifying “the manner in which . . . air quality standards will be achieved and maintained within each air quality control region in such State,” including the establishment of procedures for monitoring air quality and collecting and analyzing data. *See* 42 U.S.C. § 7407(a) (2006).
  - 168. *See* 42 U.S.C. § 7410(c)(1) (2012).
  - 169. The CWA mandates two sets of water quality measures: “effluent limitations,” which are promulgated by the federal Environmental Protection Agency (EPA), and “water quality

update these standards, subject to EPA approval.<sup>170</sup> If a state fails to comply, the EPA is authorized to directly promulgate water quality standards on behalf of the state.<sup>171</sup>

It is easy to see how these statutes avoid running afoul of the anticommandeering doctrine. States are not obligated to do a thing. They may legislate if they wish—subject to federal guidelines—or they may do nothing and be subject to federal regulation instead.

## ii. The Establishment and Operation of Health Care Exchanges Under the Affordable Care Act

Similar to the CWA and CAA, section 1321 of the ACA establishes a cooperative federalism model for implementing and running healthcare exchanges in each state.<sup>172</sup> The ACA authorizes states to establish their own health care exchanges, subject to the standards established by the Secretary of Health and Human Services pursuant to section 18041(a) of the ACA.<sup>173</sup> The Secretary is mandated to establish and operate an exchange within states electing not to run their own healthcare exchanges or failing to make their exchanges operational.<sup>174</sup> Thus, states can elect to have as much or as little federal involvement in their healthcare exchanges as they choose as long as they comply with federal regulations.

## b. Applying the Cooperative Federalism Approach to Marijuana Laws

We propose below an amendment to the CSA that would allow states and the federal government to cooperatively enforce and regulate marijuana.

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standards,” which are generally promulgated by the States. *Arkansas*, 503 U.S. at 101; 33 U.S.C. §§ 1311, 1313–14 (2012). The two water quality measures are meant to supplement each other in order “to prevent water quality from falling below acceptable levels.” See *Arkansas*, 503 U.S. at 101 (citing *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12 (1976); 40 CFR § 131 (1991)).

170. See *Arkansas*, 503 U.S. at 101 (“[T]he Act requires . . . that state authorities periodically review water quality standards and secure the EPA’s approval of any revisions in the standards.”).

171. See *id.* (referencing 33 U.S.C. § 1313(c)).

172. In the statute, Congress expressly granted states “flexibility” related to the establishment and operation of healthcare exchanges. Pub. L. No. 111-148, 124 Stat. 186 (2010) Part III of the ACA, “State Flexibility Relating to Exchanges” is codified under 42 U.S.C. §§ 18041–18042 (2012).

173. *Id.*

174. *Id.* Since the implementation of the ACA, seventeen states have chosen to run their own healthcare exchanges, twenty-seven have federally-run exchanges, and six have a hybrid model. See, e.g., Christina Scotti, *Why State-Run Health Exchanges Are Faring Better*, FOX BUS. (Oct. 16, 2013), <http://www.foxbusiness.com/personal-finance/2013/10/16/why-state-run-health-exchanges-are-faring-better>.

As with the CAA, CWA, and ACA, state law would govern in states that have legalized recreational or medical marijuana. Federal law would supplement state law only when states defer to federal law or fail to satisfy federal requirements.<sup>175</sup> Just as the EPA works with states to enforce air and water pollution laws, federal agencies could continue to cooperate with opt-out states and local governments to enforce marijuana laws. But state laws and regulations would control within those states' borders rather than the CSA.

Amending the CSA to include a cooperative federalism framework for marijuana laws would give the federal government influence over the enforcement and regulatory priorities of those states that choose to ease prohibitions on marijuana. By requiring opt-out states to comply with specific federal marijuana enforcement and regulatory priorities, such an approach would incentivize states—which have much greater drug enforcement resources than the federal government<sup>176</sup>—to use local law enforcement resources to help achieve federal priorities. Simply stated, the federal government can incentivize state marijuana enforcement and regulatory priorities by requiring opt-out states to comply with enumerated guidelines in order to avoid CSA oversight within their borders.

Importantly, modifying the CSA to allow cooperative agreements between the states and the federal government would allow the federal government to guide state policy without commandeering the state legislatures while giving states the freedom to develop the best approach for regulating marijuana. Furthermore, variations among the state laws and regulations would allow for experimentation just short of full legalization. While some states would maintain their current marijuana prohibitions, others would likely test out different regulatory schemes permitting more or less marijuana activity. The relative successes and failures of the various marijuana legalization models would help inform other states—and possibly the federal government—about the best practices for legalizing marijuana for adults while maintaining public safety. Moreover, this model mitigates the impact of marijuana legalization on states choosing to maintain the status quo.

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175. These federal requirements could incorporate the eight marijuana enforcement priorities listed in the August 29, 2013, memorandum issued by Deputy Attorney General Cole. *See Cole Memo II, supra* note 5, at 1–2.

176. *See supra* note 29 and accompanying text.

### c. Amending Section 903 of the CSA to Allow Cooperative Federalism

As noted in Part IV, Congress included an explicit antipreemption provision in section 903 of the CSA. Section 903 sets out the limited circumstances under which the CSA will preempt state laws. We propose adding a new section 903A to effect the cooperative federalism approach discussed above. This new section reads as follows:

#### **Section 903. Application of State Law**

No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

#### **Section 903A. CSA Marijuana Control Law Opt-Out Procedure for States**

- (1) Notwithstanding any other provision of law:
  - (a) No provision of this subchapter or any other federal statute concerning marijuana, including but not limited to criminal and civil penalties, shall apply to any acts which take place within the jurisdiction of any State during any time period in which such State is certified as a CSA Marijuana Control Opt-Out State by the Attorney General under the procedure established in subdivision (2), except to the extent the certified State's laws expressly provide otherwise.
  - (b) In any State certified under subdivision (2) during any period of time the State is so certified:
    - i. The certified State's laws concerning marijuana shall supersede and have full effect and control to the exclusion of this subchapter's provisions concerning marijuana.
    - ii. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any certified State for the purpose of regulating marijuana.
- (2) The Attorney General shall, as soon as practicable after the enactment of this Section, issue regulations establishing a

procedure by which States may request certification as a CSA Marijuana Control Opt-Out State. The regulations shall require the Attorney General to certify any requesting State within a reasonable time period unless the Attorney General determines that State's marijuana control laws do not create strong and effective regulatory and enforcement systems reasonably able to prevent the following:

- (a) the distribution of marijuana to minors;
  - (b) revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
  - (c) the diversion of marijuana from states where it is legal under state law in some form to other states;
  - (d) state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
  - (e) violence and the use of firearms in the cultivation and distribution of marijuana;
  - (f) drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
  - (g) growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands;
  - (h) preventing marijuana possession or use on federal property.
- (3) The certification granted under subdivision (2) shall be for a period of two years. Before the expiration of this two-year certification period the Attorney General shall reassess the State's marijuana control laws unless the State notifies the Attorney General it is not seeking recertification. The State shall be recertified every two years unless the Attorney General determines that the State's marijuana control laws no longer meet the standards set out in subdivision (2).
- (4) Any determination that a State seeking certification under subdivision (2) does not satisfy the certification standards set out in that subdivision shall be conveyed in writing and shall specify all the criteria provided in subdivisions (a) through (h) of subdivision (2) that the State's marijuana control laws fail to satisfy. Any such written determination shall also include specific changes to the State's marijuana control laws that would bring the State into compliance with the specified criteria and allow certification.
- (5) The regulations issued under subdivision (2) shall include:

- (a) Emergency procedures by which the Attorney General may seek to revoke a certification granted under subdivision (2) before the expiration of the two-year certification period if a certified State's marijuana control laws no longer meet the standards set out in subdivision (2) and there is an imminent threat of significant harm to a person or persons unless federal law is reinstated; and
- (b) Procedures by which a State may seek administrative review of any decision to deny certification under subdivision (2) or revoke a certification previously granted.

## CONCLUSION

With growing majorities of Americans in favor of legalizing marijuana,<sup>177</sup> the tension between state and federal law will not resolve itself. Short of a decision by Congress to drop marijuana from the CSA entirely—an unlikely political outcome even given the majority of Americans who might favor it—a more modest federal legislative solution is needed. The cooperative federalism solution that we suggest is both feasible and effective—it will allow state experimentation to proceed while giving the federal government the ability to influence the direction of that legal change.

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177. See e.g., Majority Now Supports Legalizing Marijuana, PEW RESEARCH CTR. FOR PEOPLE & THE PRESS (Apr. 4, 2013), <http://www.peoplepress.org/2013/04/04/majority-now-supports-legalizing-marijuana/>; Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP POLITICS (Oct. 22, 2013), <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>; CNN/ORC Poll Regarding Marijuana Legalization, CNN & ORC INT'L (Jan. 6, 2014), at p. 2, <http://i2.cdn.turner.com/cnn/2014/images/01/06/cnn.orc.poll.marijuana.pdf> (showing that 54 percent of Americans polled believe that Marijuana should be made legal). The New York Times further evidenced this growing trend by becoming the first major national newspaper to officially endorse marijuana legalization. See The Editorial Board, *Repeal Prohibition, Again*, N.Y. TIMES, Jul. 7, 2014, [http://www.nytimes.com/interactive/2014/07/27/opinion/sunday/high-time-marijuana-legalization.html?\\_r=0](http://www.nytimes.com/interactive/2014/07/27/opinion/sunday/high-time-marijuana-legalization.html?_r=0). In addition, the New York Times went as far as endorsing three state marijuana legalization initiatives on the November 2014 ballot. The Editorial Board, *Yes to Marijuana Ballot Measures*, N.Y. TIMES, Oct. 5, 2014, [http://www.nytimes.com/2014/10/06/opinion/alaska-oregon-and-the-district-of-columbia-should-legalize-pot.html?\\_r=1](http://www.nytimes.com/2014/10/06/opinion/alaska-oregon-and-the-district-of-columbia-should-legalize-pot.html?_r=1).