

7-1-2015

## Brandeisian Experiment Meets Federal Preemption: Is Cooperative Federalism a Panacea for Marijuana Regulation?

Saby Ghoshray

Follow this and additional works at: <https://huskiecommons.lib.niu.edu/niulr>



Part of the [Law Commons](#)

---

### Suggested Citation

Saby Ghoshray, Brandeisian Experiment Meets Federal Preemption: Is Cooperative Federalism a Panacea for Marijuana Regulation?, 35 N. Ill. U. L. Rev. 511 (2015).

This Article is brought to you for free and open access by the College of Law at Huskie Commons. It has been accepted for inclusion in Northern Illinois University Law Review by an authorized editor of Huskie Commons. For more information, please contact [jschumacher@niu.edu](mailto:jschumacher@niu.edu).

# Brandeisian Experiment Meets Federal Preemption: Is Cooperative Federalism a Panacea for Marijuana Regulation?

DR. SABY GHOSHRAY\*

*This Article traces marijuana regulation's federal-state dichotomy through a multi-dimensional prism to evaluate states' rights with a Brandeisian experiment under the Constitution's Tenth Amendment. The genesis of this federalism conflict is evaluated through the ambiguity of the applicable federal law, while the federal preemption is examined through the dual lens of the Supremacy Clause and the Anti-commandeering doctrine. By evaluating the relevance of cooperative federalism through its constitutional inheritance, this Article proposes a roadmap for implementing cooperative federalism for marijuana regulation. In taking note of the deficiency in contemporary discourse in adequately contextualizing the intersecting rights framework for marijuana regulation, it is further observed that the pertinent inquiry must be indexed not at how much to regulate, but how to regulate by evaluating the collateral risks arising out of the nationwide paradigm shift toward marijuana. Finally, this Article presents the importance of viewing the evolving paradigm through a multi-dimensional prism consisting of safeguards surrounding cross-border contagion, cultural shift, injury to human health and long-term impacts from marijuana's cumulative effects—issues that may not have been encapsulated within the panoply of current state laws.*

---

\* Dr. Saby Ghoshray's scholarship focuses on subsets of International Law, Constitutional Law, First Amendment Jurisprudence, and Cyberspace Law, among others. His work has appeared in a number of publications including, *Albany Law Review*, *ILSA Journal of International and Comparative Law*, *European Law Journal ERA-Forum*, *Toledo Law Review*, *Georgetown International Environmental Law Review*, *Temple Political & Civil Rights Law Review*, *Fordham International Law Journal*, *Santa Clara Law Review*, *Michigan State International Law Journal*, *Loyola Law Journal*, and *New England Law Review*, among others. The author would like to thank Jennifer Schulke for her assistance in legal research and typing of the manuscript, and his beautiful children, Shreyoshi and Sayantan, for their patience and understanding. Dr. Ghoshray can be reached at [sabyghoshray@sbcglobal.net](mailto:sabyghoshray@sbcglobal.net).

I.	INTRODUCTION.....	512
II.	CONSTITUTIONAL ISSUES—FEDERAL PREEMPTION, SUPREMACY CLAUSE, AND THE TENTH AMENDMENT.....	518
A.	GENESIS OF THE CONFLICT – AMBIGUITY IN THE CSA .....	518
B.	INTERPLAY BETWEEN PREEMPTION AND ANTI-COMMANDEERING .....	521
C.	IS A STATE’S RIGHT TO EXPERIMENT ENOUGH FOR A NEW MARIJUANA PARADIGM? .....	522
III.	INTRODUCING COOPERATIVE FEDERALISM.....	524
A.	SEEKING CONSTITUTIONAL INHERITANCE OF COOPERATIVE FEDERALISM.....	525
B.	FINDING POPULAR SUPPORT IN OTHER AREAS .....	526
IV.	COOPERATIVE FEDERALISM IN MARIJUANA REGULATION.....	530
A.	LINKING COOPERATIVE FEDERALISM WITH MARIJUANA REGULATION .....	530
B.	RESPONSE TO STATEWIDE MARIJUANA – WILL COOPERATIVE FEDERALISM PAVE THE WAY? .....	533
V.	CONCLUSION .....	535

One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. . . . Yet, whenever . . . the action of one state reaches . . . into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and [the Supreme Court] is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

- *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907)

## I. INTRODUCTION

Torn between state law’s sanctification and federal law’s prohibition, the position of marijuana in the United States (U.S.) is in an evolutionary flux. Diverging state regulations have made the federal-state dichotomy even more cumbersome and constitutionally complex. Despite being listed

as a Schedule I narcotic under the Controlled Substance Act (CSA),<sup>1</sup> many states have broken the legal prohibition for the distribution, manufacture, and consumption of marijuana.<sup>2</sup> With more states following the path of marijuana legalization, CSA's regulatory force is in a collision course with state laws. Under the CSA, the manufacturing and sale of marijuana is subject to a felony punishment for up to life in prison.<sup>3</sup> Yet, several states have either legalized marijuana for medical purposes or removed criminal penalties for limited quantities of recreational marijuana use.<sup>4</sup> The genesis of this paradigm shift can be traced to the states' right to a Brandeisian experiment under the Constitution's Tenth Amendment.<sup>5</sup> By going against the spirit of almost a half-century-old federal law, these states are embarking on a unique federalism crisis that tests the limits of the federal preemption doctrine. As the states are essentially legalizing what the federal government has prohibited, participants of this Brandeisian experiment, some willing and some not so willing, have been thrown into a vortex of uncertainty as they do not have a roadmap to deal with this unique constitutional jeopardy.

The Tenth Amendment allows states to develop their own playbook for marijuana regulation within their own borders. A state may remove pro-

---

1. The CSA was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. 21 U.S.C. §§ 801-812 (1970). For more information on the CSA, see BRIAN T. YEH, CONG. RESEARCH SERV., RL34635, *THE CONTROLLED SUBSTANCES ACT: REGULATORY REQUIREMENTS* (2012); see also BRIAN T. YEH, CONG. RESEARCH SERV., RL30722, *DRUG OFFENSES: MAXIMUM FINES AND TERMS OF IMPRISONMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND RELATED LAWS* (2015). CSA regulates the manufacture, possession, use, importation, and distribution of certain drugs, substances, and precursor chemicals. Under the CSA, an individual caught manufacturing or selling marijuana is subject to a felony punishment for up to life in prison. There are five schedules under which substances may be classified, Schedule I being the most restrictive. Substances placed onto one of the five schedules are evaluated on a set of categories that include: actual or relative potential for abuse; known scientific evidence of pharmacological effects; current scientific knowledge of the substance; history and current pattern of abuse; scope, duration, and significance of abuse; risk to public health; psychic or physiological dependence liability; and whether the substance is an immediate precursor of an already-scheduled substance. See 21 U.S.C. § 811(a) (2014).

2. See *infra* note 4.

3. See *supra* note 1.

4. By the end of December 2014, more than half of all states and the District of Columbia allowed for the medical use of marijuana in some capacity. In the November 2012 elections, voters in Washington State and Colorado voted to legalize, regulate, and tax small amounts of marijuana for recreational use. In the November 2014 elections, voters in the District of Columbia, Oregon, and Alaska also passed recreational legalization initiatives. See NAT'L CONFERENCE OF STATE LEGISLATURES, *State Medical Marijuana Laws* (Nov. 2014), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>. See also MARIJUANA POLICY PROJECT, *State-By-State Medical Marijuana Laws: How to Remove the Threat of Arrest* 1, 2 (2013), available at <http://www.mpp.org/assets/pdfs/library/State-by-State-Laws-Report-2013.pdf> [hereinafter *How to Remove the Threat of Arrest*].

5. See *infra* note 44.

hibition on marijuana cultivation and distribution and create a regulatory regime to promote marijuana sales within its border. Yet, passing state law and not running afoul of federal law are not mutually exclusive, as states cannot immunize their citizens and officials from the adverse consequences of federal law enforcement. However, the scope and intensity of federal enforcement may differ between recreational and medical use of marijuana.<sup>6</sup> Within the context of federal preemption, when the operating paradigm shifts from medicinal marijuana use to recreational use, state law comes in even more intense conflict with federal law. Conflict with federal law also presents a host of legal constraints for state participants in areas ranging from employment law to tax to contract law and banking.<sup>7</sup>

Growing divergence among state marijuana laws poses significant constitutional questions. Federal law literally puts a blanket prohibition on virtually all marijuana related activities.<sup>8</sup> As per the CSA, marijuana is considered a “drug” under the most restrictive Schedule 1 reserved for drugs with a “lack of accepted safety,” “no currently accepted medical use” and a “high potential for abuse.”<sup>9</sup> Such expansive generalization has allowed for a sweeping federal enforcement power to impose criminal sanctions to most

---

6. Significant functional and legal distinction exists between marijuana decriminalization and its legalization. Decriminalization occurs when the state removes accompanying criminal penalties from the conduct in question. However, civil penalties might remain attached to such conduct in question. For example, a state decriminalizes the possession of marijuana in small amounts, typically less than an ounce. Possession of marijuana still violates state law. However, possession of such small amount of marijuana within the specified small amount is considered a civil offense and subject to a civil penalty, not criminal prosecution. By decriminalizing possession of marijuana in small amounts, states are not legalizing its possession. Looking at the details of the CSA, it appears at first glance that state decriminalization initiatives may not run afoul of the federal law, as both laws converge in maintaining that possessing marijuana is in violation of the law. If we take individual state examples, looking at the scenario in Massachusetts—a state that has decriminalized possession in small amounts—individuals could be in violation of both the CSA and Massachusetts state law. The state and federal law differs in the associated penalties for these federal and state violations. Under the CSA, a person convicted of simple possession of marijuana may be punished with up to one year imprisonment and/or fined not less than one thousand dollars. *See* 21 U.S.C. § 844 (2014). On the contrary, under Massachusetts state law, a person in possession of an ounce or less of marijuana is subject to a civil penalty of one hundred dollars. *See* MASS. GEN. LAWS ANN. ch. 94C, § 32L (West 2008); MASS. GEN. LAWS ANN. ch. 40, § 21D (West 2008).

7. *See generally* Serge F. Kovalecki, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, Jan. 11, 2014; John Ingold, *Last Bank Shuts Doors on Colorado Pot Dispensaries*, DENV. POST, Oct. 1, 2011; Jonathan Martin, *Medical-marijuana dispensaries run into trouble at the bank*, SEATTLE TIMES, Apr. 29, 2012.

8. 21 U.S.C.A. §§ 801-971 (West 2010). The CSA was enacted into law via the Comprehensive Drug Abuse Prevention and Control Act of 1970.

9. 21 U.S.C.A. §§ 811-812 (West 2014).

medicinal marijuana usage that has now been legalized by the states.<sup>10</sup> Marijuana's federalism crisis, therefore, stems from many developments—from wide dispersion of state laws to definitional inconsistencies and structural ambiguities within the controlling federal marijuana law of the land. The source of this federal-state conflict can be identified in three main threads.

First, statewide inconsistencies have been the result of states' layered regulatory approaches. In this multi-layered compliance framework there are some state laws that allow medicinal use of marijuana with strict medical supervision under the compassionate use doctrine. Despite blanket federal prohibition, this class of usage may see less federal enforcement than a more expansive medical regime. When state laws exhibit a further paradigm shift into the recreational arena, such laws invite an even more stringent federal enforcement. Yet, sixteen states and the District of Columbia have already legalized medicinal usage of marijuana.<sup>11</sup> Along the way, these states have developed regulatory frameworks for the entire value chain of marijuana—from cultivation to manufacturing to dispensing and distribution.<sup>12</sup> Such a flux in statewide marijuana laws poses not only an overall federal enforcement difficulty, but also signals a general ambience of uncertainty for the participants. For example, the state-sanctioned dispensaries within private premises in California were the subjects of repeated federal raids. It was well documented that marijuana dispensaries and manufacturing facilities were systematically destroyed by federal agents.<sup>13</sup> Despite state legislative imprimatur on marijuana cultivation, such federal raids continued in states like Montana, Connecticut, and Michigan.<sup>14</sup> With this, a federalism crisis has begun to take shape.

Second, lack of clarity on potential federal responses to state laws have further enhanced the federal and state dichotomy on marijuana regula-

---

10. See *How to Remove the Threat of Arrest*, *supra* note 4, at B-2; see also 21 U.S.C.A. § 841 (West 2010).

11. Michael Vitiello, *Why the Initiative Process Is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215*, 43 MCGEORGE L. REV. 63, 76 (2012).

12. In 1996, the California voters passed the Compassionate Use Act, also known as Proposition 215. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2012).

13. *How to Remove the Threat of Arrest*, *supra* note 4, at O-11; see also Press Release, Drug Enforcement Administration, Local, State, and Federal Agents Shut Down Two Commercial Marijuana Grow Operations (June 30, 2011), <http://www.dea.gov/divisions/sf/2011/sf063011.shtml>.

14. See Adam Cohen, *Legal Recreational Marijuana: Not So Far Out*, TIME (Feb. 6, 2012), available at <http://ideas.time.com/2012/02/06/legal-recreational-marijuana-not-so-far-out/?xid%3Dgonewsedit>.

tion.<sup>15</sup> Buoyed by overwhelming local support via ballot initiatives, states began codifying local aspirations into laws. This forced the federal administration to announce an informal policy of relaxing federal enforcement on medical usage through a memorandum by the Deputy Attorney General David Ogden in 2009 (Ogden Memo).<sup>16</sup> Instead of providing a cogent guideline to the states, this Ogden Memo provided an ambiguous roadmap towards federal enforcement of medical marijuana.<sup>17</sup> The Ogden Memo certainly delineated scenarios of significant trafficking from instances of medical usage. Yet, the Ogden Memo's emphasis on continued federal interest in the prosecution of the CSA's violation caused confusion amongst both the state participants and the federal enforcement agents.<sup>18</sup> With more states blazing the decriminalization path, state laws' tension with the CSA became further pronounced. This prompted the new Deputy Attorney General James Cole to release a follow-up memorandum in 2011 (Cole Memo).<sup>19</sup> The Cole Memo was designed to alleviate confusion by delineating scenarios between patients requiring the drug for medicinal purposes and entrepreneurs engaging in for-profit ventures.<sup>20</sup> In reality, the Cole Memo's ambiguous language became the source of continued confusion. In dealing with conflict situations, where state laws allow for the growth of

---

15. For more detail regarding both Washington Initiative 502 and Colorado Amendment 64, see TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES (2014).

16. Memorandum from Deputy Attorney General David W. Ogden to Selected United States Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), *available at* <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [hereinafter Ogden Memo].

17. The Deputy Attorney General stated:

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the [Justice] Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these 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.

*Id.*

18. *Id.*

19. Memorandum from Deputy Attorney General James M. Cole to United States Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), *available at* <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [hereinafter Cole Memo].

20. *Id.*

manufacturing facilities and federal law mandates prosecution of such commercial dispensers, the memos call for applying exemptions on a case-by-case basis.<sup>21</sup> Further enhancing the state-federal tension is the individual nuances presented by state laws. Although medical marijuana has to be recommended by a physician, states vary regarding the scope and context of a physical condition under which a patient can obtain marijuana.<sup>22</sup> Despite the registration requirement of the users, both the regulatory objectives and the scope of database maintenance by the states vary.<sup>23</sup> Furthermore, restrictions on both the quantity and manner of procurement vary from state to state.<sup>24</sup> Such diverging state practices make the development of a uniform federal guideline rather problematic.

Third, a rush to cash in on marijuana's promise of a new economy without investing in an adequate infrastructure for the cultivation, distribution, and sale of marijuana has left significant regulatory gaps. Many questions continue to remain unanswered. Should such products be eventually codified under the definition of commodity? Must they be regulated within a taxation framework? Will such commodity be regulated via an agency such as the Commodity Futures Trading Corporation (CFTC)? These regulatory inquiries lead us to more questions to identify the constitutional source of the issue. Is it within Congress's power to eliminate marijuana from Schedule 1 of the CSA? What prevents the federal government from bringing uniformity in state laws? To what extent can the federal government enforce uniform federal preemption across states?

To evaluate these important issues, this Article proceeds as follows: Part II provides the background of the federalism crisis in multiple threads by evaluating the interplay amongst the relevant constitutional components, while identifying the ambiguous trajectory of the federal law. This leads to exploring the relevance of cooperative federalism for marijuana regulation in Part III by tracing the constitutional inheritance of cooperative federalism in similar scenarios. This discussion then sets the stage for proposing a roadmap for implementing cooperative federalism in nationwide marijuana regulation in the U.S.

---

21. *Id.*

22. See Edward G. Brown, Jr., *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*, ATTORNEY GEN. DEP'T OF JUSTICE, STATE OF CAL. (Aug. 2008), *available at* [http://medicalmarijuana.procon.org/sourcefiles/Brown\\_Guidelines\\_Aug08.pdf](http://medicalmarijuana.procon.org/sourcefiles/Brown_Guidelines_Aug08.pdf).

23. *Id.*

24. *Id.*



## II. CONSTITUTIONAL ISSUES—FEDERAL PREEMPTION, SUPREMACY CLAUSE, AND THE TENTH AMENDMENT

The entire spectrum of activities surrounding marijuana usage—manufacturing, cultivation, and distribution—are all conducts subject to regulation by a sovereign authority, either the state or the federal government. Several constitutional guideposts shed light on which law is controlling. First, the interplay between two clauses of the U.S. Constitution, the Commerce Clause<sup>25</sup> and the Supremacy Clause,<sup>26</sup> supervises the regulatory scope of such conduct from the context of intrastate commercial activities. The conflict in the scope of these Clauses is one of the drivers of constitutional tension in marijuana regulation.

Under the Commerce Clause, Congress regulates interstate commerce through legislation.<sup>27</sup> Since 2005, *Gonzales v. Raich*<sup>28</sup> has been the settled constitutional guide in the arena that recognizes the federal government's prohibitory power over intrastate cultivation and possession of marijuana.<sup>29</sup> However, *Raich* also opens up to a federal dichotomy while addressing federal law's interference with state law within a state's own jurisdiction.<sup>30</sup> *Raich* falls short of giving blanket constitutional approval on state sanctioned cultivations and distributions as it leaves open the question of whether individual states can carve out exceptions that might survive federal preemptory power. Although the right to such exceptions must be drawn from the interplay between the Supremacy Clause and the Tenth Amendment, such right to conduct experimentation must recognize the limits of state law.<sup>31</sup> The states attempting to usher in their own marijuana regime must therefore recognize the limits on state experimentation under the Supremacy Clause of the U.S. Constitution.<sup>32</sup> To adequately identify the limits of state laws in a scenario of conflict with federal law, we must evaluate the implications of the controlling federal law in this context—the CSA.

### A. GENESIS OF THE CONFLICT – AMBIGUITY IN THE CSA

Marijuana regulation certainly involves ambiguous contours of state and federal laws, where the coterminous points are unmarked and the preemptory trajectories indeterminate. The federal-state conflict in marijuana-

---

25. U.S. CONST. art. I, § 8, cl. 3.

26. U.S. CONST. art. VI, § 2.

27. U.S. CONST. art. I, § 8, cl. 3.

28. *Gonzales v. Raich*, 545 U.S. 1 (2005).

29. *Id.* at 17-21.

30. *Id.* at 22.

31. *See infra* note 44.

32. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 108 (2008).

na regulation hinges in part on the complex question surrounding preemptory authority, for which, the jurisprudential legacy of preemption is worth revisiting. Case laws like *Gonzales v. Oregon*<sup>33</sup> have outlined categories of conflicts where preemption can occur.<sup>34</sup> Preemption results from scenarios that call for simultaneous compliance. Preemption could be triggered via two pathways. When Congressional purpose of the federal law is explicitly identified, it is much easier for federal preemption to get triggered. However, in the event congressional intent of preemption has to be inferred indirectly through attendant issues surrounding the laws in question, expressed federal preemption can still be triggered.<sup>35</sup> In general, congressional intent is the key determinant in identifying whether the case for federal preemption exists. The most potent scenario for preemption, thus, comes from instances where such intent is explicitly mandated within the relevant federal law. In the absence of such explicit mandate, intent has to be uncovered via implicit means—either by exploring the legislative history, or by tracing the historical context of the relevant federal law.<sup>36</sup>

Constitutional jurisprudence suggests states can pass their own marijuana laws as long as the presumption that Congress does not intend to displace state laws is valid.<sup>37</sup> While such presumption may be directly gleaned from the statute itself, the text may become susceptible to an alternative reading. In such a scenario, preemption may be disfavored by the courts,<sup>38</sup> as can be indirectly interpreted from the Department of Justice (DOJ) Ogden and Cole memos. However, despite the linguistic conundrum of the CSA and a conflation of purposes within the DOJ memos, the congressional purpose remains the deciding cornerstone in dealing with the federalism conflict surrounding marijuana regulation—an area that may have been overlooked by states' urgency in engaging in their own Brandeisian experiments.

---

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

34. *Id.* at 265-67.

35. *Id.*

36. Congressional intent of preemption can be difficult to ascertain. Implied intent of preemption is to be uncovered through identifying characteristics of conflict, conflict that exists between federal law and state law. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (citations omitted). In this context, preemption possibilities arise as a result of scenarios that require simultaneous compliance, and where a state's legislative enactment creates an obstacle for implementation of federal law. *Id.* However, when there is no conflict, the determination of preemption requires an evaluation of field preemption. Field preemption is a situation in which "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it[.]" *Id.* (internal quotation and citations omitted).

37. *Altria Grp.*, 555 U.S. at 77 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

38. *Altria Grp.*, 555 U.S. at 77 (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

A state within the federal union draws constitutional strength to conduct its own Brandeisian experiment from the Tenth Amendment, which empowers states to conduct individual experiments by allowing exceptions to be carved out of the federal intent.<sup>39</sup> The Tenth Amendment guarantees states certain rights that have not been expressly delegated to the federal government,<sup>40</sup> a constitutional imprimatur that may be the single most defining element in shaping the evolution of medical marijuana laws. Yet, the federalism debate does not end here. It must be evaluated within the coterminous trajectories of the three interacting constitutional components: the Commerce Clause,<sup>41</sup> the Supremacy Clause,<sup>42</sup> and the Tenth Amendment.<sup>43</sup>

Interplay of these constitutional components raises fundamental questions on marijuana regulation: can the federal government apply the Supremacy Clause of the U.S. Constitution to preempt various state marijuana laws? If what states legalize is prohibited by federal law, can the federal preemptory power foreclose the states' Brandeisian experimentation on marijuana? Can the Tenth Amendment significantly limit the federal government's ability under the CSA?<sup>44</sup> Superimposing the Supremacy Clause within the CSA's preemptory provision may make it likely that states attempting to regulate recreational marijuana use via taxation may be preempted by the federal law. In a conflict over supremacy, federal law clearly trumps state laws. Thus, state initiatives calling for regulating marijuana via taxation certainly invite federal preemption authority.<sup>45</sup> In the context of the judiciary's intervention, federal courts have yet to either rule against federal preemption of state marijuana law or rule in favor of changing the status of marijuana as a Schedule 1 substance under the CSA.<sup>46</sup> State courts, on the contrary, have ruled against local government officials

---

39. See *infra* note 44.

40. *Id.*

41. U.S. CONST. art. I, § 8, cl. 3.

42. U.S. CONST. art. VI, § 2.

43. U.S. CONST. amend. X.

44. The Tenth Amendment states that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* As the Tenth Amendment relegates a slew of responsibilities to the lower level of state and local governments, it allows the state level experimentation to take shape, thus forming the basis for the laboratories of experimentation concept. The long-standing tradition of states' rights for individual experimentation and their judicial recognition causes us to ponder and take note of the sudden trajectory the Court undertook in *Raich*.

45. See TODD GARVEY, CONG. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS (2012), available at <http://fas.org/sgp/crs/misc/R42398.pdf>.

46. See Paul Armentano, *Federal Judge Upholds Schedule 1 Classification of Cannabis*, <http://blog.norml.org/2015/04/15/federal-judge-upholds-schedule-i-classification-of-cannabis/> (last visited Apr. 18, 2015).

attempting to invalidate state laws under the federal preemption doctrine.<sup>47</sup> Sitting on the fence, the U.S. Supreme Court has thus far refused to enter the fray, while repeatedly denying certiorari. On the other hand, Congress has shown signs of retraining the DOJ from its federal law enforcement prerogative against the violation of applicable federal law for marijuana.<sup>48</sup> This perpetuation of inertia has manifested itself in a continued federalism crisis and as such, we must now look at the interplay between preemption and state rights.

## B. INTERPLAY BETWEEN PREEMPTION AND ANTI-COMMANDEERING

Marijuana's regulatory inertia is borne out of a unique constitutional impasse that is indexed at the interplay between the preemption doctrine and the anti-commandeering provision of the Constitution. While the Supremacy Clause emboldens the federal preemption doctrine,<sup>49</sup> its force is significantly buttressed by the Tenth Amendment's anti-commandeering doctrine.<sup>50</sup> Thus, where state law supervises sale, cultivation, and use,

---

47. See, e.g., The Court of Appeal in the State of California, Fourth Appellate District in *City of Temecula v. Cooperative Patients Services*, noted the following:

This court rarely finds implied preemption: "We are reluctant to invoke the doctrine of implied preemption. 'Since preemption depends upon *legislative intent*, such a situation necessarily begs the question of why, if preemption was legislatively *intended*, the Legislature did not simply say so, as the Legislature has done many times in many circumstances.' [Nurdyke v. King, 229 F.3d 1266 (9th Cir. 2000)] "'In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the legislative scheme.'" [Water Quality Assn. v. Cty. of Santa Barbara, 52 Cal. Rptr. 2d 184, 189-91 (Cal. Ct. App. 1996)]. Indeed, preemption will not be implied where local legislation serves local purposes, and the general state law appears to be in conflict but actually serves different, statewide purposes. There is a presumption against preemption . . . ." *Garcia v. Four Points Sheraton LAX*, 188 Cal.App.4th 364, 374.)

*City of Temecula v. Coop. Patients Servs.*, 2012 WL 4788107, at \*7 (Cal. Ct. App. Oct. 9, 2012).

48. See Eric Eckholm, *Legal Conflicts in Medical Marijuana Ensnare Hundreds as Courts Debate a New Provision*, N.Y. TIMES, Apr. 8, 2015, available at [http://www.nytimes.com/2015/04/09/us/medical-marijuana-dispensers-trapped-by-conflicting-laws.html?\\_r=0](http://www.nytimes.com/2015/04/09/us/medical-marijuana-dispensers-trapped-by-conflicting-laws.html?_r=0) (last visited Apr. 18, 2015).

49. See GARVEY, *supra* note 45.

50. See Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 163-64 (2001) (reading the Supreme Court's *New York v. United States* and *Printz v. United States* decisions as prohibiting the federal

preemptory scope is to be evaluated by the relevant law's legislative intent. The central constitutional question is to determine whether the CSA prohibits marijuana altogether, which is defaulted to evaluating CSA's conflict vis-à-vis applicable state laws. Such inquiry, however, is complicated when the anti-commandeering doctrine interjects a significantly constitutional counterweight to the Supremacy Clause. The anti-commandeering doctrine prevents the federal government from commandeering the states by compelling them to enact laws in furtherance of the federal enforcement objective within the states' sovereign jurisdictions.<sup>51</sup>

In the marijuana context, the anti-commandeering doctrine tells us that the federal government cannot coerce states to enact laws to comply with the CSA.<sup>52</sup> A state can pass laws to decriminalize conduct that is illegal under federal law. So, while states are constitutionally prevented from stopping the federal government from enforcing federal law within their territory, the federal government cannot compel the state to enact laws criminalizing such conduct. Curiously, however, while Congress has the authority under the Commerce Clause to prohibit activities like cultivation and possession, the states cannot erect a legal shield to immunize its citizens from the ambit of the federal enforcement of the CSA. This opens up to a debate surrounding state rights under the laboratory for experiment doctrine.<sup>53</sup>

### C. IS A STATE'S RIGHT TO EXPERIMENT ENOUGH FOR A NEW MARIJUANA PARADIGM?

When voters within a state overwhelmingly approve certain measures, they are signaling that the controlling law must change. In the absence of a controlling federal law, we have neither a regulatory problem, nor a constitutional difficulty. Complexity arises when citizens call for an issue to be brought under the ambit of state law that is already controlled by federal law. Marijuana is already covered under federal law. Should the federal government extend its statutory authority to impinge upon such state intent on marijuana? If we were to follow the Brandeisian "laboratory for experiment" doctrine espousing a dynamic and robust federalism,<sup>54</sup> marijuana

---

government from commandeering state governments from imposing targeted, affirmative, and coercive duties on state legislators or state executive officers).

51. *Id.*

52. *Id.*

53. *See supra* text accompanying note 44.

54. Under this ideology, the states are seen as individual filtrations of governments, which form a system of laboratories. Justice Brandeis' metaphorical characterization of states as laboratories of experimentation within the Federal Union has become the accepted benchmark among the proponents of Federalism. *See* Michael S. Grave, *Laboratories of Democracy*, AEI ONLINE (Mar. 31, 2001), <http://www.aei.org/publication/laboratories-of-democracy/>. Within this experimentation, laws are conceived, crafted, and enacted from the

regulation within states' individual borders are unique state issues. Yet, state marijuana laws reveal the emergence of a fragmented and dichotomous national issue evolving along inconsistent lines of reasoning. Various factors may have contributed to its fragmentary nature—such as, commercial interest,<sup>55</sup> clever and manipulative marketing,<sup>56</sup> and political maneuvering for relative positioning within a fragmented political landscape. While all of these factors may have contributed towards a stronger push for marijuana legalization in individual state situations, they also signify the outgrowth of a regulatory composite borne out of inconsistent localized nuances. Thus, local nuances awake us to the requirement of a more in-depth analysis of marijuana regulation across states, where cultural issues, societal factors, and broader national sentiments have not been part of the contemporary discourse surrounding marijuana regulation. We must recognize, while the Tenth Amendment may bestow states with unique rights of experimentation, it brings in its wake panoply of issues that certainly animate a federal intent. It makes the marijuana regulation a potent federalism problem that is far from being solved.

Despite the tradition of Congress preempting state or local laws, increasing public support for marijuana liberalization may continue to provide states an impetus for enacting laws to remove prohibition. Proponents of liberal marijuana regimes have put forth a proposition for the removal of marijuana from the CSA in its entirety—thereby ignoring or disclaiming any congressional intent to preempt state marijuana laws.<sup>57</sup> Yet, a less than inclined Congress remains unwilling to curtail federal marijuana provisions, which have created an impasse.<sup>58</sup> It is time to ponder whether a permissive

---

lowest level of the democratic system, arriving at the highest level. *Id.* In his dissenting opinion in *New State Ice Co. v. Liebmann*, Justice Brandeis announced the arrival of this concept through his interpretation of the Tenth Amendment. He observed, “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.” *Id.*

55. See Mark Kleiman, *How Not to Make a Hash Out of Cannabis Legalization*, WASH. MONTHLY (Mar./Apr./May 2014), available at [http://www.washingtonmonthly.com/magazine/march\\_april\\_may\\_2014/features/how\\_not\\_to\\_make\\_a\\_hash\\_out\\_of049291.php?page=all](http://www.washingtonmonthly.com/magazine/march_april_may_2014/features/how_not_to_make_a_hash_out_of049291.php?page=all).

56. See Jason Toon, *Legal Weed In Washington State Has Been Completely Screwed Up*, VICE NEWS (Mar. 10, 2014), <https://news.vice.com/article/legal-weed-in-washington-state-has-been-completely-screwed-up>.

57. See DRUG POLICY ALLIANCE, *Removing Marijuana From The Controlled Substances Act* (May 2013), [http://www.drugpolicy.org/sites/default/files/DPA\\_Fact%20sheet\\_Marijuana%20Reclassification\\_May%202013.pdf](http://www.drugpolicy.org/sites/default/files/DPA_Fact%20sheet_Marijuana%20Reclassification_May%202013.pdf).

58. See Jacob Sullum, *More Than Zero: Reclassifying Marijuana Could Have a Significant Impact on Drug Policy*, FORBES (Feb. 7, 2014), <http://www.forbes.com/sites/jacobsullum/2014/02/07/more-than-zero-reclassifying-marijuana-would-have-a-significant-impact-on-drug-policy/>.

or cooperative federalism approach can work. In such a framework, the federal government could allow states to govern its own marijuana laws by enacting such unique legal framework that the state regulatory schemes are in compliance with specified federal requirements. This permissive federalism approach could range from Congress allowing an administrative agency of the executive branch to create specific prohibitions within the CSA,<sup>59</sup> to allowing states to experiment with their own laws and regulations within a mutually agreed upon timeframe with a specific federal promise not to enforce criminal sanctions within the participating state's border.<sup>60</sup>

### III. INTRODUCING COOPERATIVE FEDERALISM

Constitutional jurisprudence tells us that federalism and administrative law may not have been in a coterminous trajectory. Marijuana regulation certainly is within the province of administrative law and thus, available history of constitutional jurisprudence will certainly point to an uneasy coupling between administrative law and variants of concurrent federalism. For example, in *Gonzales v. Oregon*, the State had challenged the Attorney General's implementation of the CSA by issuing an interpretive ruling.<sup>61</sup> The federalism conflict began when Oregon passed its Death with Dignity Act in 1997,<sup>62</sup> legalizing prescription of medicine for allowing terminally ill patients to commit suicide. The Attorney General's issuance of the interpretive rule mandated that prescribing controlled substances to assist suicide was grounds for suspending a doctor's controlled substance registration. The new ruling made state law facially invalid, in the process creating conflict between federal and state law.<sup>63</sup> If we proceed along this line of argumentation, distributors or cultivators of marijuana may be allowed to lawfully distribute controlled marijuana only if they are registered with the attorney general,<sup>64</sup> or with an agency permitted by the attorney general. However, it will certainly be problematic for recreational marijuana, which puts us back to square one with the brewing federalism crisis in statewide marijuana decriminalization initiatives currently underway.

---

59. See Discussion *infra* Part IV.

60. See Discussion *infra* Part IV.

61. See *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006).

62. Oregon Death with Dignity Act, OR. REV. STAT. ANN. §§ 127.800-995 (West 2012); see also *Gonzales*, 546 U.S. at 249.

63. *Gonzales*, 546 U.S. at 254.

64. *Id.* at 250-55; see also 21 U.S.C.A. § 823(f) (West 2014).

### A. SEEKING CONSTITUTIONAL INHERITANCE OF COOPERATIVE FEDERALISM

History of constitutional jurisprudence is replete with federal-state conflict in the aftermath of state legislative enactments. Further illuminated via constitutional cases like *Massachusetts v. EPA*,<sup>65</sup> where the Court highlighted aspects of federalism that “present[] a conflict of two competing spheres of influence, one emanating from states sovereign right to implement laws regulating behavior of its citizens within its own borders and the other revolving around federal jurisdiction of federal statutes within the said state’s border.”<sup>66</sup> Thus, “[t]he Court’s departure from reliance on executive decision making power signals, perhaps, a sentiment that goes far beyond expert override of executive power.”<sup>67</sup>

These constitutional cases provide a nuanced window through which to evaluate judicial interest in the variant of federalism that allows shifting authority from a single executive agency or executive officer to those comports with the consensus of the locality. In allowing the states to embark on Brandeisian experimentation, the Court may be restricting the limits of federal laws like the CSA. In this realization, the CSA may at best be limited in prevention towards drug abuse and drug trafficking,<sup>68</sup> and may not necessarily be restrictive to matters of personal life style choices or changing cultural norms.<sup>69</sup> Along the way, the Court may also be ushering in a nuanced trajectory of state power by confining states’ regulatory practices along predictable dimensions.<sup>70</sup> However, the development may not necessarily be an outgrowth of majority’s view. It might just be somewhat of a politicized outcome shaped by manipulative marketing by vested interests. Yet, such observation falls short of presenting us with a clear direction. We must still navigate out of this constitutional quandary.

Fundamentally, statewide marijuana regulations involve two segments with somewhat different characteristics: medical marijuana and recreational marijuana, each impacting the core value chain surrounding the other. For example, medical marijuana consists of cultivation, distribution, and deliv-

---

65. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

66. See Dr. Saby Ghoshray, *Massachusetts v. EPA: Is the Promise of Regulation Much Ado About Nothing? Deconstructing States Special Solitude Against an Evolving Jurisprudence*, 15 WIDENER L. REV. 447, 475 (2010).

67. *Id.*

68. Here, I draw attention to the conflicting and conflating possibilities generated by the Cole and Ogden memos that assert a federal intent on clamping on large-scale drug distribution and attendant criminal enterprise, yet provide somewhat of a confusing intent on personal recreational marijuana use. See *Gonzales*, 545 U.S. 1.

69. *Id.*

70. See *supra* note 61.



ery, as well as the issue of taxation and regulation.<sup>71</sup> Each of these components is not only a source of potential conflict between federal law and state law, but also, their resolution directly impacts corresponding areas of the recreational marijuana regulation.<sup>72</sup> Resolving the federalism crisis of marijuana requires understanding the scope and context of all of these areas, evaluating their implications, and identifying the corresponding trajectories within the context of preemption and federalism. Moreover, individual state nuances may impose additional complexity on a case-by-case basis. For example, if citizens of a state overwhelmingly approve medicinal usage of marijuana, experience of states that have gone through similar paths may be indicative of whether or not their aspirations will eventually materialize through legislative efforts at the state level.<sup>73</sup> On the other hand, despite legislative efforts, if such initiatives are defeated at the ballot, the states may not have other alternatives but to resort to the laboratory of experimentation.<sup>74</sup>

## B. FINDING POPULAR SUPPORT IN OTHER AREAS

Constitutional power distribution and delineation has caused significant tension between the federal law and the state laws.<sup>75</sup> Regulatory power

---

71. See *supra* note 11.

72. See *supra* note 48.

73. See *supra* note 55.

74. The Tenth Amendment categorically announces the inviolability and aspiration contained in the laboratory of experimentation principle by succinctly declaring that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. If there does not exist a coterminous trajectory within the ambit of the federal authority, any right incubated at the ballot initiative through individual state laboratory experiments will be the rights reserved to the state in question. *Id.* Abstraction along these lines has the potential to bypass the Supremacy Clause preemption dynamics discussed earlier. This indeed can decouple us from interpretative dynamics that we must engage in for extricating certain rights.

75. Here, I draw attention to the constitutional reality surrounding power distribution between the two sovereigns—the federal government and the state, which invites us to explore fundamental questions: does the answer to the marijuana debate reside at the core of the Tenth Amendment, or do we need to rescue the original meaning of the Tenth Amendment from its distortionary impact on the Supremacy Clause? More than two hundred years ago, James Madison’s vision of potential remedies against unpopular federal government measures had sown the seeds of the Tenth Amendment when he observed:

If an act of a particular state, though unfriendly to the national government, be generally popular in that state, and should not too grossly violate the oaths of the state officers, it is executed immediately and of course, by means on the spot, and depending on the state alone. The opposition of the federal government, or the interposition of federal officers, would but inflame the zeal of all parties on the side of the state, and the evil

flows from the interplay between the Supremacy Clause and the Tenth Amendment's Anti-Commandeering Doctrine. Their tension is heightened by the separation of legislative powers between the federal governments and the states, while each sovereign enjoys absolute and autonomous power within its own sphere. Increasing popular support for marijuana calls for proceeding along two distinct pathways. In the first, we must identify the drivers of such popular support to evaluate whether such support is an outgrowth of a manipulative paradigm and thus, facial appearance of support must be rationalized to determine the indicia of true support. In the second, we must identify if there are coterminous regions of regulatory space where the two sovereign governments can work collaboratively. Their working principles will be facilitated by developing unique relationships amongst them while utilizing legal instrumentalities to promote intergovernmental cooperation. With an established history of competitive federalism giving way to dual federalism,<sup>76</sup> time is ripe to experiment further with the expansive framework of cooperative federalism. Cooperative federalism was envisioned as an administrative tool for efficient resource allocation for promoting and maximizing public welfare, while showing fidelity to the ideals of the separation of powers.<sup>77</sup> Thus, premised on ensuring optimal enforcement power, cooperative federalism is predicated on efficient allocation and mutual delegation of administrative powers between the federal government and the state governments.<sup>78</sup> Lauding cooperative federalism as a concept, the Supreme Court described it as "a partnership between the States and the

---

could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty. On the other hand, should an unwarrantable measure of the federal government be unpopular in particular states, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people, their repugnance and perhaps refusal to co-operate with the officers of the union, the frowns of the executive magistracy of the state, the embarrassments created by legislative devices, which would often be added on such occasions, would oppose in any state, difficulties not to be despised; would form, in a large state very serious impediments, and where the sentiments of several adjoining states happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

THE FEDERALIST NO. 46 (James Madison).

76. See generally, Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663 (1979), available at <http://scholarship.law.berkeley.edu/facpubs/180>.

77. *Id.*

78. *Id.*

Federal Government, animated by a shared objective.”<sup>79</sup> Scholars have embraced the idea of concurrent regulation in modern U.S. governance,<sup>80</sup> while concomitantly struggling to identify its most efficient approach against a strong undercurrent of the Supreme Court’s dual federalist tendency.<sup>81</sup> Fundamentally, cooperative federalism is animated by federal statute, while in essence permitting cooperative agreements between the federal government and the states to solve issues of mutual concern. Other scholars have provided examples of cooperative federalism in the area of environmental regulation implementation,<sup>82</sup> the Affordable Care Act,<sup>83</sup> and even the immigration reform.<sup>84</sup> While each of these areas is conducive to a more effective administration of cooperative federalism, marijuana regulation is fundamentally different from the others.

In the context of environmental regulation, the statutory text of the CAA<sup>85</sup> and the CWA<sup>86</sup> clearly articulates a congressional intent for both the

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

80. See generally Ronald J. Krotoszynski Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599-1669 (2012), available at <http://scholarship.law.duke.edu/dlj/vol61/iss8/1>.

81. *Id.*

82. See William L. Andreen, *Delegated Federalism Versus Devolution: Some Insights from the History of Water Pollution Control*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION 257, 258 (William W. Buzbee ed., 2009) (observing that the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006 & Supp. IV 2010) is an example of cooperative federalism because the enforcement “structure is not just federal but also involves overlapping and intertwined federal and state roles”). See also CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP 43 (2003) (“Congress established a ‘cooperative federalism’ structure that makes EPA ultimately responsible for program delivery while reserving the primary front lines implementation role for willing and capable states.”).

83. See Brendan S. Maher, *The Benefits of Opt-In Federalism*, 52 B.C. L. REV. 1733, 1733–34 (2011) (identifying strands of cooperative federalism while noting that “[f]ew national debates have rivaled the intensity of those regarding the Patient Protection and Affordable Care Act” and attempting to establish a concurrent structure within the separation of power trajectory that “[t]he constitutional dispute is part of a larger argument that is perhaps America’s oldest: what is the proper role of the federal government?”) (citing e.g., RUFUS DAVIS, *THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING* 86-96 (1978)).

84. See Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1685 (2011) (“In theory, states working under an agreement with [Immigration and Customs Enforcement] should be able to serve federally defined goals while developing unique enforcement techniques based on local expertise.”) (citing Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 250 (2005)).

85. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7642 (2006 & Supp. III 2009)).

federal and state governments to work together to prevent environmental pollution. The CAA specifically allows the states to act as the primary supervisor for maintaining air quality for states' geographical boundaries. It is only when such a state is unable to meet the criteria set forth by the CAA that the federal involvement comes into purview.<sup>87</sup> By the same token, the CAA grants states a primary supervisory mandate to maintain water quality standards as per the Environmental Protection Agency Mandate (EPA Mandate).<sup>88</sup> It is again under the scenario when the state authority fails to periodically review and update such mandated standards that the EPA takes over.<sup>89</sup> The deference given under these federal statutes provide examples as to why they are deliberately constructed not to run afoul of the Anti-Commandeering Doctrine of the Tenth Amendment. Cooperative federalism has been recognized in healthcare as well. Section 13.21 of the Patient Protection and Affordable Care Act of 2010 (PPACA) explicitly outlines a framework whereby a cooperative federalism model can work very efficiently, while implementing and running healthcare exchanges in each state.<sup>90</sup> By authorizing states to establish their own healthcare exchanges, the PPACA provides them with the supervisory authority to regulate exchanges within its own jurisdiction subject to the standards established by the explicit mandate of the executive agency that supervises the Department of Health and Human Services.<sup>91</sup> It is only when a state is unable to comply with the standards established by the secretary of the agency, or when a state fails to make exchanges operational, that the federal agency intervention is triggered. In these variants of cooperative federalism, federal statutes create federal floors to ensure a minimum standard is maintained, while states can overlay their unique characteristics and nuances as per their own intentions. With these examples as precursors, an efficient cooperative fed-

---

86. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2006 & Supp. IV 2010)).

87. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54MD. L. REV. 1141, 1174 (1995) (“The cooperative federalism model seeks to . . . establish[] national environmental standards while leaving their attainment to state authorities subject to federal oversight.”). *Id.* (describing scenarios under which federal agencies take over when states fail to fulfill their obligations under the authorities delegated within the cooperative federalism framework).

88. See Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 18, 84 Stat. 1592, 1608 (codified as amended at 29 U.S.C. § 667 (2006)).

89. *Id.*

90. Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41,866 (July 15, 2011) (to be codified at 45 C.F.R. pts. 155–56).

91. Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. at 41,867.

eralism framework is certainly feasible to roll out in the context of marijuana regulation across the U.S.

#### IV. COOPERATIVE FEDERALISM IN MARIJUANA REGULATION

The central inquiry of U.S. marijuana regulation revolves around how and who should regulate the various components of marijuana regulation.<sup>92</sup> The cultivation, production, distribution, and dispensing are separate and identifiable aspects of the marijuana value chain that are associated with legally enforceable conduct with potential for criminal sanctions under federal law. The scope and implications of these sanctions vary as the underlying process shifts from medical marijuana to recreational marijuana. Introducing marijuana into the marketplace also comes with many socioeconomic consequences, neither the scope nor consequences of which have been fully evaluated. Yet, the political economy of marijuana cultivation and distribution is working overtime towards changing the national landscape for a comprehensive decriminalization—not only for medicinal purposes, but also for recreational usage as well.<sup>93</sup> Thus, both the political machineries and the regulatory apparatus across states are busy scrambling to usher in the economic bounty of marijuana.<sup>94</sup> This aggressive posturing for decriminalization initiatives is neither wary of medical fall out of sustained marijuana use, nor apprehensive of adverse cultural shifts across the nation. Yet, regulatory gaps in the marijuana industry are too well known to the participants of this grand experiment. Whether or not federal regulators must step up to the plate to augment the existing local regulations has been one of the concurring themes of this evolving state-federal dichotomy.<sup>95</sup> Marijuana's regulatory gap, thus, calls for bringing in a robust regulatory framework for marijuana management. Therefore, I present a rationale for developing a federally focused regulatory environment, which will be followed by charting the future regulatory trajectory for federal involvement at both levels—for the medicinal usage and for its recreational counterpart.

##### A. LINKING COOPERATIVE FEDERALISM WITH MARIJUANA REGULATION

An expansive array of state marijuana laws nationwide has thus far presented diverging issues for its participants. The need to accommodate localized aspects of citizen interest and consumption patterns calls for local-

---

92. See *supra* Part II.

93. See *infra* Part IV B.

94. *Id.*

95. See Discussion *supra* Part II.

ly focused regulations.<sup>96</sup> Operational aspects of cultivation and its socio-economic impact are dependent to some extent on local cultural norms and their prohibitory history.<sup>97</sup> However, localized features alone cannot be the sole determinant for developing regulatory guidelines along state lines. Despite the localized aspect of the cultural practices and economic conditions that make up the core regulatory drivers, marijuana regulation has deeper cross-border, macro-economic, and socio-political implications that transcend both state and local boundaries. State level marijuana has also a strong cross-border contagion effect that invites regulatory review.

First, marijuana involves uncertainties in evaluating unknown parameters related to both present and future impacts on cultural development, social habits, and human health-areas that a federal authority is better equipped to both evaluate and address.<sup>98</sup> Moreover, marijuana usage both impacts and penetrates deeper into the cultural and behavioral core of individuals—an aspect that can be sufficiently addressed within the expansive confines of federal law.<sup>99</sup> The drug may have unknown health consequences that may go beyond our current discourses, for which it is important to have federal involvement in its regulation.<sup>100</sup> As the analysis of some of the applicable federal statutes indicate, it is sometimes very difficult to encapsulate all the operational nuances within a localized regulatory framework, for which federal involvement would help developing minimum standards. Moreover, there remain areas of tax, insurance, and banking, where potential impacts of the affected participants are evolving. Certainly, federal agencies are better equipped to establish guidelines in these evolving com-

---

96. See Alan Johnson, *Officials Blast Marijuana Initiative: 'What's Next, Whorehouses?'*, THE COLUMBUS DISPATCH (Jan. 30, 2015), [http://www.dispatch.com/content/stories/local/2015/01/29/statewides\\_speak.html](http://www.dispatch.com/content/stories/local/2015/01/29/statewides_speak.html).

97. See generally Magdalena Cerdá et al., *Medical Marijuana Laws in 50 States: Investigating the Relationship Between State Legalization of Medical Marijuana and Marijuana Use, Abuse and Dependence*, 120 DRUG & ALCOHOL DEPENDENCE 1, 22–27 (showing examples of how group norms shape individual behavior, which in turn exerts pressure on changing laws to codify such behavior), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3251168/>.

98. Several commentators have examined this issue from varying perspectives, leading to assertions that some issues are so complex and diverse that the requirement of convergence and creating a minimum threshold level would suggest that federal agencies are better equipped to supervise. See, e.g., Meredith Medoway, *Why the Federal Government, Not States, Should Regulate the Environment*, POLICY.MIC (Feb. 11, 2012), <http://mic.com/articles/4090/why-the-federal-government-not-states-should-regulate-the-environment>. See also Insight from the Experts, *Should the Federal Government Regulate Fracking?*, WALL ST. J. (Apr. 14, 2013), available at <http://www.wsj.com/articles/SB10001424127887323495104578314302738867078>.

99. See *supra* note 98.

100. See Amel Ahmed, *UN: Marijuana-Related Health Problems on Rise in US*, ALJAZZERA (June 26, 2014), <http://america.aljazeera.com/articles/2014/6/26/more-americans-usecannabissseektreatmentundrugsagency.html>.

plexities surrounding state marijuana regulation. Therefore, broader regulation involves setting guidelines on conduct surrounding economic activities with cross-border implications, for which local agencies cannot meet the complexities of evolving contagion issues.

Second, as current state-level initiatives and attendant legislative advances reveal,<sup>101</sup> individual states vary in their regulatory frameworks surrounding the economics of marijuana.<sup>102</sup> In the absence of a unifying federal supervisory authority, the development of an efficient market for the evolving economic enterprise might be stymied by the asymmetric impacts faced by both producers and distributors across various states. For example, there may be instances where one state prohibits certain commercial activities that the neighboring state may actively encourage. Diverging state practices introduce inefficiency within the national economic enterprise when a set of local regulatory paradigms may be working independently without any federal oversight mechanism. Lack of federal oversight may also cause undue civilian migrations due to changing cultural dynamics. Thus, by developing uniform rules across the region, the agency tasked with promoting and regulating marijuana related activities would be better equipped in both introducing business efficiency and ensuring population stability. Therefore, commercial uniformity and business efficiency present strong rationales for bringing marijuana under the federal regulatory ambit.

Third, marijuana decriminalization brings in the risk of a direct interstate contagion effect.<sup>103</sup> A particular community's pursuit of marijuana decriminalization may not be consistent with the cultural practices of a neighboring community. Yet, both have the legitimate right to live within the confines of their traditional cultural norms. Although, there is no credible measure to evaluate the cumulative impacts of decriminalization, however, as the pace increases, their cumulative impacts on surrounding communities may heighten.<sup>104</sup> Many adverse impacts—ranging from cultural shift, replacement of traditional practices, and shift in consumption patterns—have the potential to cross over state boundaries. A localized regulatory framework is simply inadequate to deal with these fallouts, which require a broader, intensive framework that a federally mandated regulatory framework can provide.

Fourth, evaluating marijuana regulation from a localized perspective misses a much broader picture—that of the potential for a significant trans-

---

101. See *supra* text accompanying note 4.

102. See *supra* text accompanying note 4.

103. See V. Thomas Mawhinney, Ph.D., *Bad Behavioral Contagion: Colorado Pot Floods Other States*, BOILING THE AMERICAN FROG: CULTURAL SURVIVAL SKILLS (Dec. 19, 2014), <http://culturalsurvivalskills.me/2014/12/19/bad-behavioral-contagion-colorado-pot-floods-other-states/>.

104. *Id.*

formation of the way of life. Sudden paradigm shifts in addictive substance consumption have been shown to not only transform traditional practices,<sup>105</sup> but it also erodes the historic qualities of cultural norms.<sup>106</sup> However, marijuana does have localized issues that may advance the argument in favor of decentralization as a response to satisfy both the local preferences and to tailor decisions to suit local cultural conditioning and economic necessities. The need for both an adaptive management and an economically efficient regulatory framework calls for a balanced federalism.

#### B. RESPONSE TO STATEWIDE MARIJUANA – WILL COOPERATIVE FEDERALISM PAVE THE WAY?

Allocation of decision-making authority across the various levels of government has historically been steeped in tension.<sup>107</sup> The fundamental struggle to identify the most optimum level of regulation<sup>108</sup> often presents

---

105. See Michael C. Dorf, *Nebraska and Oklahoma Take Colorado to the Supreme Court Over Legalized Marijuana*, JUSTIA.COM (Dec. 31, 2014), <https://verdict.justia.com/2014/12/31/nebraska-oklahoma-take-colorado-supreme-court-legalized-marijuana>.

106. See Hillary Godwin, *How Marijuana Could Change America*, SERENDIP STUDIO (Oct. 26, 2010), <http://serendip.brynmawr.edu/exchange/node/8677> (observing how formalized and decriminalized marijuana may engineer a cultural shift towards a more permissive cultural signaling a break from traditional norms).

107. Regulation of conduct is governed by the law that is controlling—state or federal. Conflict in the supervisory interest in governing such conduct emanates from two clauses of the U.S. Constitution: the Commerce Clause and the Supremacy Clause. See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. VI, § 2. The Commerce Clause allows Congress to regulate interstate commerce via enactment of legislation by virtue of the constitutional grant bestowed by the U.S. Constitution. Residing at the core of the federal-state conflict, the Tenth Amendment allows experiments and exceptions to be carved out of the federal intent. See *United States v. Darby*, 312 U.S. 100, 124–25 (1941). Since the Framing debates, this particular Amendment has continued to guarantee states or its citizens certain rights that have not been expressly delegated to the United States. See U.S. CONST. amend. X. This important constitutional provision could very well become the single most defining element in shaping the evolution of cooperative federalism that I described in this Article. At its core, the federalism debate surrounding marijuana could evolve through an interaction of three pillars of the Constitution: the Commerce Clause, the Supremacy Clause, and the Tenth Amendment. Thus, the path to clarity over consistent and universally acceptable marijuana regulations must come through specific coterminous areas of state and federal rights, an area I have discussed elsewhere.

108. Here, I draw attention to identifying the optimal relationship between the supervisory regulatory framework and local nuances. The complexity of cooperative federalism is the existence of many internal inconsistencies that often stymie the agency efforts and create tension with the state apparatus, making it difficult for regulatory efforts to assimilate seamlessly within state process instrumentalities. Here, often times, a particular issue either gets aggressively enforced or gets ignored by system inertia. Therefore, how much local participation must be allowed within the context of federal rulemaking may be one of the thorniest issues in contemporary federal rulemaking initiatives. Moreover, federalism has a shaping



the choice between a top-down approach and a bottom-up approach.<sup>109</sup> At the core, how much responsibility is to be allocated to the various governmental authorities is a balancing act between meeting the broader policy objectives and satisfying localized interests. Some form of cooperative federalism might be best suited to regulate cultivation and dispensing, which would require both federal and state participation. Although a central agency may be required to develop guideposts along the way for the lower level governmental authorities to expand upon, this unique federalism must consist of a federal floor within states' heightened authority. In this version of cooperative federalism, the local nuances can adequately be responded to by empowering states in clarifying their role in enforcement and legislation. This would require establishing new standards that would enable adoption and enforcement of states' regulatory principles modeled under the broader federal mandate.<sup>110</sup> Allowing individual states to make diverging rules across the national landscape is not desirable. Imposing on the states a "one-size-fits-all" regulatory framework is not preferable either. However, a version of interactive federalism that draws its authority via an overlapping shared paradigm will not only promote beneficial cooperation, but shall certainly conform to the legitimate goal of federalism.<sup>111</sup>

Implicit within the objective premise of federalism is a reference to multiple governmental authorities. These authorities, through their quasi-autonomous existence, restrain usurpation of asymmetric power amongst

---

affect, which is manifested mostly in giving rise to a delay in granting approval for new enforcement mechanisms. This creates an apparent dichotomy within the general regulatory framework—that of finding the right balance between a bottom-up framework and a top-down mechanism.

109. *Id.*

110. Canvassing the landscape of divergence in the marijuana regulation across the country, I ponder as to what might happen when and if the majority of state-sponsored initiatives are in conflict with federal statutes. Following the laboratory of democracy framework of federalism, these initiatives revolve around the state legislatures enacting laws to regulate oil and gas activities at different parts of the value chain while drawing from the concept of "laboratory for experiment." Based on Justice Brandeis's metaphorical characterization of states as laboratories of experimentation within the Federal Union, individual states' ability to experiment with local laws has become the accepted benchmark among the proponents of Federalism. See Michael S. Grave, *Laboratories of Democracy*, AEI ONLINE (Mar. 31, 2001), <http://www.aei.org/article/politics-and-public-opinion/elections/laboratories-of-democracy/>. However, such a scheme might create a situation in which compliance with state laws and regulations will prevent simultaneous compliance with the broader provisions of the CSA and other applicable federal acts, which might make compliance with the applicable federal law impossible. This would invariably set up a positive conflict that would require preemption via conflict analysis. Although the trajectory of preemption is a well-understood area of jurisprudence, as animated by the Supreme Court's observation in both *Wyeth v. Levine* and *Gonzales v. Oregon*, in this Article, I argue for avoiding such conflicts by carefully calibrating state laws within the broader federal objectives.

111. *Id.*

rivals. This ultimately enables the creation of a sustainable equilibrium. Eventually, the framework would be better suited to provide multiple layers towards solving broader and complex problems within a dual, interactive regulatory framework.<sup>112</sup> Dual regulation may be a required safeguard to ensure public health and economic transparency, while preventing contagion effect. Moreover, it can work as a bulwark against asymmetric and unequal usurpation of power that may be subject to hijacking by broader corporate interests. This form of interacting federalism specifically focuses on harmonization of various state laws as opposed to federal preemption. This in turn minimizes the risk of succumbing to broader corporate interests.

There is no denying the fact that any variant of cooperative federalism brings with it the unnecessary costs related to information redundancy. Yet, within it resides the necessary ingredients for enhancing participatory democracy and regulatory integrity in a manner in which all the participants can be brought under a uniform regulatory umbrella. After all, federalism is both predicated on competition between multiple authorities and geared towards ensuring maximal public interests. Any variant of cooperative federalism, therefore, not only cures the ill effects of asymmetric power usurpation,<sup>113</sup> but it also prevents public interests from being subsumed under broader corporate domination. It does so through sharing responsibilities across multiple stakeholders and diverging interacting authorities. Within this interactive cooperative paradigm, statutes can act as guideposts along a broader spectrum. As a result, this cooperative federalism, therefore, would allow some states to enact more stringent regulatory framework as responses to local nuances. It certainly would allow some states to adequately respond in meeting these challenges by creating a framework that calls for relying on a federally mandated floor with room to maneuver and expand upon as the local need arises.

## V. CONCLUSION

Marijuana decriminalization is a complex issue residing at the intersection of separation of powers and individual liberty interests. Viewed through the lens of a robust constitutional framework, allowing states' unbridled right towards an ultra Brandeisian experimentation may not be constitutionally suspect, but must not be allowed for a variety of factors as identified in this Article. Prompted in part by vested interests manipulating public opinion, states across the U.S. are marching towards decriminaliza-

---

112. See Bruce Ledewitz, *The Present and Future of Federalism*, 43 DUQ. L. REV. 645 (2005).

113. *Id.*

tion. Yet, this paradigm shift has been largely oblivious to the cultural shift eroding away traditional norms, while states bask in the possibility of economic windfall. Public health consequences, shifting norms towards rampant drug use, and eventual monopoly by big corporations, are some of the potential fallouts of a nation-wide marijuana decriminalization. This certainly calls for a federal oversight in some form. As the debates surrounding how much to regulate and who shall regulate continue to evolve through diverging manifestations in federal and state legislatures, agency updates, and court proceedings, we must retrace our steps towards a more fundamental research. The pertinent inquiry must be indexed not at how much to regulate, but rather indexed at what are the risks and what does the future look like. Responses will undoubtedly illuminate our understanding in creating a more comprehensive federal guidepost towards mapping marijuana's future roadmap.

This Article is an outgrowth of emerging views on federalism. As I have highlighted, marijuana regulation involves a complex paradigm. I argue for cooperative federalism as a path forward, by outlining a set of precedents in areas of environment and health care. While environment and health care are laced with rights narrative, marijuana does not have a fundamental right component except perhaps in the medicinal aspect. Yet, its widespread decriminalization is fraught with potential dangers. Moreover, due to it being in a relatively nascent stage, a host of emerging issues exist for which robust laws are either non-existent or are extrapolated from other areas within administrative law. The legal theories shaping the marijuana debate are still uncertain and continue to evolve based on developments at state levels. Therefore, jurisprudential contours animating states' rights may seek guidance from the history of the Tenth Amendment and the intent of the Framers, for which I have outlined how a variant of cooperative federalism might be the way forward in this Article.

Finally, while the marijuana debate continues to challenge the conceptual confines of our regulatory paradigm, I see the deficiency within the contemporary discourse in its lack of properly contextualizing the intersecting rights framework, especially related to the applicability in public versus private rights. My Article attempts to place the marijuana debate within this frame. Doing so will undoubtedly allow the needed emphasis in exploring how the regulatory contours might need to be changed when viewed through a multi-dimensional prism consisting of safeguards surrounding cross-border contagion, cultural shift, injury to human health and long-term impacts from cumulative effects—issues that may not have been encapsulated within the panoply of state laws in their current versions.