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Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts

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VERTICAL FEDERALISM, HORIZONTAL FEDERALISM, AND LEGAL OBSTACLES TO STATE MARIJUANA LEGALIZATION EFFORTS

Brannon P. Denning[†]

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ABSTRACT

This Article highlights the tension between marijuana legalization efforts, on the one hand, and the continued criminalization of marijuana at the federal level on the other. I argue that the uncertain preemptive effect of federal law on more liberal state laws poses a threat to other states' experimentation with recreational or compassionate use regimes. I further argue that constitutional doctrines, like the Dormant Commerce Clause Doctrine, which are intended to preserve political union by interrupting cycles of discrimination and retaliation, could, ironically, hamper state efforts to minimize spillover effects resulting from legalization of marijuana. The Article concludes with suggestions how Congress could play a positive role, as it did during the national debate over alcohol policy that preceded Prohibition.

[†] Associate Dean and Professor, Cumberland School of Law, Samford University. I thank Jonathan Adler for the invitation to participate in this wonderful conversation about marijuana and federalism, as well as my panelists, Ernie Young and Rob Mikos. To Kirk Shaw and the staff of the *Case Western Reserve Law Review*, I owe a sincere debt of gratitude for their patience and understanding.

INTRODUCTION

As recently as a decade ago, legalization of marijuana for both medical and recreational use seemed (forgive me) a pipe dream. Today, Colorado and Washington allow marijuana for personal and medicinal use. Seventeen states and the District of Columbia have decriminalized possession for personal use. Twenty-one states permit the possession and use of marijuana for medical purposes. Public opinion is shifting rapidly as well: three-quarters of Americans support decriminalization for personal use of marijuana¹; 58 percent favor legalization.² The United States appears to be close to a tipping point in the debate over legalization. Legal obstacles remain, however, as evidenced by a recent suit filed by Nebraska and Oklahoma, asking the Supreme Court to exercise its original jurisdiction and enjoin Colorado's legalization regime.³

The most important of these obstacles is the Controlled Substances Act ("CSA"), which classifies marijuana as a Schedule I drug and bars its production, sale, and possession. The tension between permissive state regimes and the federal ban has been only partially eased by a 2013 memorandum in which the Department of Justice outlined its enforcement priorities and promised, in effect, to permit state legalization experiments to continue as long as the states policed themselves and minimized spillover effects in other states.⁴ Nevertheless, the fact that cultivation and sale of marijuana remains illegal under federal law has created legal uncertainty, causing

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1. Pew Research Center, *Section 2: Views of Marijuana—Legalization, Decriminalization, Concerns* (Apr. 2, 2014), <http://www.people-press.org/2014/04/02/section-2-views-of-marijuana-legalization-decriminalization-concerns/>.
 2. Lydia Saad, *Majority Continues to Support Pot Legalization in U.S.*, GALLUP.COM, <http://www.gallup.com/poll/179195/majority-continues-support-pot-legalization.aspx>.
 3. Motion for Leave to File Complaint, Complaint, and Brief in Support, *Nebraska & Oklahoma v. Colorado*, No. 22O144 ORG (U.S. 2014) [hereinafter *Nebraska & Oklahoma Complaint*], available at <http://www.ok.gov/oag/documents/NE%20%20OK%20v%20%20CO%20-%20Original%20Action.pdf>; see also Jack Healy, *2 Neighbors of Colorado Sue Over Marijuana Law*, N.Y. TIMES, Dec. 19, 2014, at A21 (providing background on spillover effects of Marijuana legalization in Colorado).
 4. See Memorandum from James M. Cole, Deputy Att'y Gen., to United States Att'ys, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013) [hereinafter *Cole Memorandum*], available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

numerous problems for businesses, especially in the areas of banking and insurance.⁵

Moreover, as the suit by Nebraska and Oklahoma highlights, there is considerable uncertainty surrounding the preemptive effects of the CSA on state legalization efforts. Because Colorado and Washington legalized marijuana in the face of continued federal criminalization, the states' efforts present questions of "vertical federalism"—"how power is or should be allocated between the federal and state tiers of government, and how to prevent the federal and state governments from encroaching on each other's prerogatives."⁶

Other aspects of legalization raise questions of "horizontal federalism," which Professor Erbsen has described "as encompassing the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions."⁷ Horizontal federalism doctrines are frequently described as designed to combat externalities and spillover effects.⁸ Colorado, for example, restricts the amount of marijuana that out-of-state residents can purchase per visit to a licensed dispensary in an effort to minimize spillovers.⁹ Such differential treatment, however, could garner Dormant Commerce Clause challenges,¹⁰ as did efforts to combat the importation

5. See Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597 (2015) (describing the legal difficulties banks have in handling money from marijuana-involved businesses).

6. Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 502 (2008).

7. *Id.* at 503.

8. As Heather Gerken and Ari Holtzblatt colorfully put it,

In horizontal federalism, the story of conflict is a tragedy in waiting—a cautionary tale about norms upended and the looming threat of instability. That tale centers on a single narrative: lawyers hate spillovers. And no wonder. There is something disquieting about one state's citizenry regulating another's. Spillovers don't just generate conflict but unsettle deeply held normative commitments to sovereignty, territoriality, and self-rule.

Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 66 (2014).

9. See Brannon P. Denning, *One Token Over the (State) Line: Constitutional Limits on "Pot Tourism" Restrictions*, 66 FLA. L. REV. 2279, 2280 (2014) (describing nonresident purchase limits).

10. *Id.* at 2283–99 (assessing the vulnerability of Colorado's nonresident purchase limits to challenges under the Privileges and Immunities Clause of Article IV and the Dormant Commerce Clause Doctrine).

of alcohol into dry states before the passage and ratification of the Eighteenth Amendment.¹¹

Of course, as Erbsen notes, vertical and horizontal federalism questions are often intertwined because “federal power is a mechanism for restraining state power.”¹² He notes that “federal institutions play a coordinating role in the exercise of concurrent state authority” by approving interstate compacts, for example.¹³ In addition,

some grants of exclusive or preemptive power to the federal government serve both a vertical allocation function and a horizontal conflict avoidance function. For example, Congress’s power to regulate interstate commerce both establishes federal supremacy over a national market and allows Congress to intervene when regulation of regional markets by multiple states creates a possibility of excessive friction.¹⁴

State legalization—and the recent suit by Oklahoma and Nebraska—furnish a vivid example of how these concepts quickly meld. Despite a certain artificiality, I will use the concepts of vertical and horizontal federalism as frames for particular aspects of the legalization debate I wish to explore in this Article. This Article examines the challenges that vertical and horizontal federalism doctrines pose to the ongoing legalization experiment and suggest a role for Congress (and perhaps the Supreme Court) to play in facilitating—as opposed to inhibiting or retarding—that experiment.

Part I examines the effect of federal law, under which marijuana is still illegal to produce, possess, or purchase, on state laws legalizing it. Part II discusses how horizontal federalism doctrines could inhibit states that legalize from trying to prevent spillover effects in neighboring states that have chosen not to adopt a more liberal regime. Here there are some lessons to be learned from the last intoxicant to pit states against one another and the federal government: alcohol. Finally, Part III closes with suggestions how the federal government could play a constructive role in the legalization experiment.

11. See discussion *infra* Part II.

12. Erbsen, *supra* note 6, at 504.

13. *Id.*

14. *Id.*

I. VERTICAL FEDERALISM AND THE PREEMPTION PUZZLE

A. *Preemption Generally*¹⁵

1. Express Preemption

Under Article VI of the Constitution, treaties made by the United States and “the Laws of the United States which shall be made in Pursuance” of the Constitution are the “supreme Law of the Land,” notwithstanding contrary state laws or state constitutional provisions.¹⁶ If Congress exercises its valid legislative authority, conflicting state laws must give way.¹⁷ Easy cases include those in which Congress included explicit language preempting contrary state law.¹⁸

But Congress’s intent is not always so unequivocally stated. As the Court has noted,

Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where 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,” . . . and conflict pre-emption, where “compliance with both federal and state regulations is a physical impossibility,” . . . or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁹

15. This preemption summary borrows from Brannon P. Denning, *Environmental Federalism and State Renewable Portfolio Standards*, 64 CASE W. RES. L. REV. 1519, 1521–24 (2014).

16. U.S. CONST. art. VI; *see also* Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 98 (1992) (“Pre-emption may be either expressed or implied, and ‘is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977))).

17. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210 (1824) (concluding that possession of valid federal coasting license by steamboat operator preempted state law granting competitor a monopoly on passage service between New York and New Jersey).

18. *See, e.g.*, Nat’l Meat Ass’n v. Harris, 132 S. Ct. 965, 970 (2012) (concluding that the Federal Meat Inspection Act’s preemption clause “prevents a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse’s facilities or operations”).

19. *Gade*, 505 U.S. at 98 (citations omitted).

The Court's "ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole."²⁰

2. Implied Preemption

Where Congress has not expressly preempted state legislation, the Court has found an implied intent to preempt in two broad categories of cases. *Field preemption* "reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."²¹ *Conflict preemption*, on the other hand, impliedly preempts state laws that either make compliance with state and federal law impossible (impossibility preemption)²² or, if compliance with both is possible, nevertheless presents an obstacle to one or more congressional purposes (obstacle preemption).

Obstacle preemption is more subjective than impossibility preemption. In obstacle preemption cases, compliance with both federal and state regulatory regimes is possible, but in some cases the state regulatory choices are inconsistent with or harmful to broader federal policy objectives set by Congress. For example, in *Crosby v. National Foreign Trade Council*,²³ the Court invalidated a Massachusetts law prohibiting the Commonwealth from contracting with companies that did business with the government of Myanmar. Because Congress considered and rejected much more wide-ranging penalties for companies currently doing business in the country, choosing instead to prohibit only new investment, the Court concluded that "the state Burma law [was] an obstacle to the accomplishment of Congress's full objectives under the federal Act."²⁴

20. *Id.*

21. *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012); *e.g.*, *United States v. Locke*, 529 U.S. 89, 111 (2000) (preempting state regulations governing design, construction, repair, equipping, and crewing of tankers because the federal Ports and Waterways Safety Act meant that "Congress has left no room for state regulation of these matters"); *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941) (preempting state alien registration statute and rejecting argument that requirements were parallel to and not in conflict with federal requirements).

22. *See, e.g.*, *McDermott v. Wisconsin*, 228 U.S. 115, 133–34 (1913) (preempting state statute governing labeling of corn syrup because complying with state law would have violated federal law).

23. 530 U.S. 363 (2000).

24. *Id.* at 373–74. Similarly, one provision of Arizona's controversial immigration law, which prohibited undocumented aliens from working, applying for, or soliciting work in the state, was invalidated because it "enact[ed] a state criminal prohibition where no federal counterpart exists." *Arizona*, 132 S. Ct. at 2503. Congress, the Court held, "made a deliberate choice not to impose criminal penalties on aliens who seek, or

B. The Prohibitory Federal Regime

The Controlled Substances Act of 1970 classified marijuana as a Schedule I drug for which no medical uses existed and banned its production, transfer, and possession.²⁵ Under the federal regime, “all marijuana use is considered ‘drug abuse,’” its Schedule I classification “reflect[ing] the view that marijuana is dangerous and lacks any redeeming qualities.”²⁶ There are a number of ancillary laws, too, criminalizing various activities associated with marijuana production or transfer.²⁷ To put it mildly, the prohibitory federal regime is in considerable tension with the laws of states that permit medical marijuana use or—in the case of Colorado and Oregon—have legalized it completely.

*C. What Is the Preemptive Effect of the CSA
on State Legalization Regimes?*

So what *is* the effect of the near-complete federal prohibition on marijuana production and transfer on the more liberal state regimes? Until recently, the conventional wisdom was that states were simply unable to liberalize their laws, as any liberalization would either create

engage in, unauthorized employment.” *Id.* at 2504. Arizona’s law, however,

would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although [the Arizona law] attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. The Court has recognized that a “[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.” . . . The correct instruction to draw from the text, structure, and history of [federal law] is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.

Id. at 2505 (citations omitted).

25. See 21 U.S.C. §§ 823(f), 841(a)(1), 844(a) (2012); *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (“By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study.”).
26. Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 11 (2013).
27. *Id.* (describing laws prohibiting employing property to “manufacturing, distributing, or using property” for the production of controlled substances, as well as laws regarding aiding and abetting violations of the CSA or to commit conspiracy to violate the CSA).

a conflict between the states and the federal government or would fall under the Court's "obstacle preemption" cases. Prior to legalization, for example, the Oregon Supreme Court held that the CSA preempted portions of that state's medical marijuana statute, and thus an employer that discharged an employee for medical marijuana use had not engaged in prohibited employment discrimination.²⁸ As the court explained,

[Oregon law] affirmatively authorizes the use of medical marijuana. The Controlled Substances Act, however, prohibits the use of marijuana without regard to whether it is used for medicinal purposes. As the Supreme Court has recognized, by classifying marijuana as a Schedule I drug, Congress has expressed its judgment that marijuana has no recognized medical use. . . . Congress did not intend to enact a limited prohibition on the use of marijuana—*i.e.*, to prohibit the use of marijuana unless states chose to authorize its use for medical purposes. . . . Rather, Congress imposed a blanket federal prohibition on the use of marijuana without regard to state permission to use marijuana for medical purposes. . . .

Affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act. . . . To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so. But . . . [t]o the extent that [Oregon law] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it "without effect."²⁹

In the complaint filed against Colorado, Nebraska and Oklahoma make similar claims that the CSA is broadly preemptive of liberalized state regimes. The complaint argues that "a state may not establish its own policy that is directly counter to federal policy against trafficking in controlled substances or establish a state-sanctioned system for possession, production, licensing, and distribution of drugs in a manner

28. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 531–32 (Or. 2010) (en banc).

29. *Id.* at 529 (citations omitted); *see also* *Butler v. Douglas Cnty.*, Civil No. 07–6241–HO, 2010 WL 3220199, at *3 (D. Or. 2010) ("There can be no doubt that federal law prohibits the use of medical marijuana. In addition, although use of medical marijuana and limited growing for others' use is permitted under [Oregon law], a recent decision of the Oregon courts confirms that federal law preempts [Oregon law].").

that interferes with the federal drug laws”³⁰ Later, the complaint notes that the federal regime would be “undercut unless the intrastate activity . . . were regulated as well as the interstate and international activity.”³¹ Any diversion of marijuana from Colorado to other states, moreover, “frustrates the federal interest in eliminating commercial transactions in the interstate controlled-substances market” and imposes externalities onto neighboring states.³² Colorado’s amendment “stands in direct opposition to the CSA” and “conflicts with and otherwise stands as an obstacle to the full purposes and objectives of Congress.”³³ In the brief accompanying its complaint, Nebraska and Oklahoma argue that the issue is “[w]hether a state can affirmatively authorize the violation of federal law.”³⁴ It concluded that a state like Colorado cannot and that there is a “positive conflict . . . between the CSA and Colorado’s Amendment 64.”³⁵

Professor Rob Mikos, however, says “not so fast.” He argues that the preemptive force of the CSA is much less than supposed. Where the preemptive effect is unclear, he further urges that doubts should be resolved against preemption, lest permissible preemption tip over into impermissible (and unconstitutional) commandeering of states.³⁶ In his most recent discussion of preemption and the CSA,³⁷ Mikos argues that both the CSA’s savings clause, as well as the Supreme Court’s

30. Nebraska & Oklahoma Complaint, *supra* note 3, at 2.

31. *Id.* at 6 (emphasis omitted).

32. *Id.*

33. *Id.* at 22, 23.

34. Brief in Support of Motion for Leave to File Complaint at 15, Nebraska & Oklahoma v. Colorado (filed 2014) (No. 22O144 ORG), Original, at 15 [hereinafter Brief in Support], available at <http://www.ok.gov/oag/documents/NE%20%20OK%20v%20%20CO%20-%20Original%20Action.pdf>.

35. *Id.* at 24.

36. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (invalidating provision of Brady Bill requiring local law enforcement officials to perform background checks on prospective handgun purchasers); *New York v. United States*, 505 U.S. 144 (1992) (striking down requirement that states either pass legislation to deal with disposal of low-level radioactive waste or be forced to take title to all such waste produced in the state). On the anticommeneering principle generally, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.9, at 329–33 (4th ed. 2011).

37. Mikos, *supra* note 26. For his earlier writing on the issue, which predated Colorado’s vote to legalize marijuana, 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 (2009).

anticommandeering decisions impose “three important limitations on the preemptive scope of the CSA.”³⁸

First, under the Court’s anti-commandeering doctrine, Congress may not preempt state laws that merely legalize marijuana-related activities. Second, given the federal government’s very limited law enforcement capacity, Congress likely did not want to preempt any state regulations that help reduce drug abuse. Third, even when state regulations increase drug abuse, Congress expressly indicated that it only wanted to preempt those that do so directly. The courts must heed these limits, and the best way to do so would be to adopt a direct conflict rule for adjudicating preemption disputes under the CSA.³⁹

As to his first point, Mikos posits a distinction between “regulating and legalizing marijuana,” and he maintains that only by eliding the two can one conclude that “state laws that merely allow residents to use marijuana free of state-imposed constraints have been preempted by the CSA.”⁴⁰ To preempt state *legalization*, he argues, crosses the line into “commandeering” the state into enforcing the federal prohibitory regime.⁴¹ Only measures that reduce the cost of marijuana use are preempted; those that *raise* the cost are not.⁴² Examples of the latter include taxing and licensing schemes that are part and parcel of existing state legalization efforts. To preempt these, he writes, “would have the very perverse effect of relaxing—*not tightening*—state controls on marijuana.”⁴³

In other words, if Nebraska and Oklahoma were to win in the Supreme Court, they would actually lose, according to Mikos. Under the anticommandeering principle, the Court could not *order* Colorado to recriminalize marijuana production, distribution, or use.⁴⁴ Assuming the federal government continues to refuse to devote substantial resources to enforcing federal law inside Colorado’s borders, the plaintiff states would be left with the worst of both worlds: legalized marijuana

38. Mikos, *supra* note 26, at 26.

39. *Id.* at 26–27.

40. *Id.* at 16.

41. *Id.* (“Congress may not ‘preempt’ state legalization because doing so forces states to keep pre-existing marijuana bans—bans that Congress could not force the states to adopt in the first instance.”).

42. *Id.* at 18 (writing that “there are strong reasons to believe that Congress only wanted to preempt regulations that promote marijuana”).

43. *Id.*

44. *See supra* notes 38–41 and accompanying text.

with no state oversight. Such an outcome would likely increase the number and magnitude of any spillover effects, not reduce them.

Under Mikos's proposed "direct conflict" rule, the CSA would preempt only those state laws that Congress directly intended to preempt by passage of the CSA, as opposed to those laws it either did not intend to preempt or those that only "indirectly frustrate[]" congressional aims.⁴⁵ An example of the former would be a state-run monopoly on marijuana retail, something along the lines of the control-state model for alcohol.⁴⁶ He argues, however, that neither legalization,⁴⁷ rules decriminalizing consumption,⁴⁸ nondiscrimination rules that prevent punishment of individuals for marijuana use,⁴⁹ nor the provision of public benefits to marijuana users are in direct conflict with the CSA.⁵⁰ Mikos stresses that because one may comply with state legalization regimes and the federal prohibitory regime by declining to use marijuana, there is neither a conflict between these laws nor do the legalization laws pose any obstacle to the accomplishment of the CSA's intended aims.⁵¹

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45. See Mikos, *supra* note 26, at 23–24 (distinguishing between Type I errors—condemnation of “state laws Congress could not or did not want to preempt” or that “indirectly frustrate[]” congressional aims—and Type II errors in which laws are upheld that Congress *did* wish to preempt).
46. *Id.* at 34–35 (“State cultivation and distribution of marijuana would clearly pose a direct conflict with the CSA. The state itself would be violating Section 841’s prohibition on the cultivation/distribution of marijuana, no less than private dispensaries do now.”).
47. *Id.* at 27 (arguing that “legalization of marijuana under state law does not pose a direct conflict with the CSA”).
48. *Id.* at 31–32 (explaining that marijuana consumption rules likewise “clearly do not pose a direct conflict with the CSA” because one may simply refrain from consuming marijuana and comply with both regimes).
49. *Id.* (arguing the same for state rules preventing punishment of “individuals based on their status as drug users” because “[t]he CSA does not prohibit anyone from housing drug users”).
50. *Id.* at 35 (“Unlike providing marijuana, providing public benefits to medical marijuana users does not necessarily pose a direct conflict with the CSA. After all, the CSA does not forbid anyone from feeding, housing, or providing medical care to people who use drugs.”).
51. *Id.* at 27–28.

I agree with Mikos⁵² that § 903 of the CSA⁵³ takes field preemption off the table. But I think that Mikos overreads the effect of that savings clause. I find it hard to believe that the Congress in 1968 had legalization regimes in mind and intended to signal to courts that they should not preempt them. It is more likely that Congress wrote § 903 to prevent the preemption of more draconian criminal penalties that some states then had in place. I likewise concede that there is no explicit prohibition of state legalization in the CSA. That omission would seem to take any argument for express preemption off the table as well. (Although I think it fair to point out that likely no one voting for the 1968 CSA likely envisioned a swift move toward legalization of marijuana for medical or recreational use either.)

The issue then is whether the CSA impliedly preempts state legalization efforts under either impossibility or obstacle types of conflict preemption and, if so, who might have *standing* to bring a claim to invoke the preemptive power of the CSA against permissive state marijuana regimes? The remainder of this section addresses the conflict preemption question; the next subsection will take up the standing issue.

Mikos dismisses any claim that permissive state regimes present impossibility conflicts. It is entirely possible to comply with the proscriptive federal regime embodied in the CSA and a more permissive regime like Colorado's, he argues, by simply not engaging in the activity that Colorado has authorized. This argument seems to me to carry "verbal wizardry too far, deep into the forbidden land of the sophists."⁵⁴ If that were the test, then a finding of impossibility preemption could always be avoided simply by refraining from engaging in the activity that is the object of the conflicting regulatory regimes. To make any sense, "impossibility" must be viewed from the perspective of one who is engaging in the very conduct regulated by both state and federal governments. Otherwise, one could say that *McDermott v. Wisconsin*⁵⁵ was wrongly decided because compliance with both regimes was not impossible as long as one refrained from bottling corn syrup.⁵⁶ It is impossible for a person who chooses to consume marijuana in

52. *Id.* at 12–14 (arguing that § 903 rebuts the notion that Congress meant to preempt the field of drug regulation or that "Congress necessarily intended to preempt all conflicts" with the CSA). Nebraska and Oklahoma likewise concede that the CSA does not occupy the field. Brief in Support, *supra* note 34, at 18.

53. Mikos, *supra* note 26, at 12–14.

54. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2656 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

55. 228 U.S. 115 (1913).

56. *Id.* at 131.

compliance with state laws where legal *not* to also be in violation of the CSA at the same time.⁵⁷

Even if the courts,⁵⁸ as well as commentators,⁵⁹ are correct and the universe of true impossibility conflicts is quite limited, the obstacle conflict argument against liberal state-legal regimes seems pretty solid. The goal of the CSA, as the Court has told us, was to eliminate the interstate market in marijuana (and other Schedule I drugs).⁶⁰ In order to do so, it passed the ban as part of its commerce power. That power, the Court further noted, extended to all participants in that market, no matter how local or how noncommercial their participation was.⁶¹ Liberal regimes like Colorado's and Washington's are diametrically opposed to the goal of eliminating the market for marijuana. It is difficult to characterize these as other than posing an obstacle to the accomplishment of a congressional objective. It seems axiomatic that the Supremacy Clause and preemption doctrine prohibit states authorizing conduct that federal law prohibits.

Mikos argues that because many of the state legalization laws contain requirements that attempt to prevent abuse, those laws further, rather than hinder, the achievement of the CSA's goal—to combat drug abuse.⁶² But I would argue that the *means* used by Congress to achieve that goal could also itself be seen as an independent goal: the elimination of the national market for marijuana. The elimination of

57. To be fair, however, the Supreme Court interprets impossibility preemption to require that “federal law may be in ‘irreconcilable conflict’ with state law,” meaning that they “impose directly conflicting duties on national banks—as they would . . . if the federal law said, ‘you must sell insurance,’ while the state law said, ‘you may not.’” *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

58. *Id.*; see also *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 528 (Or. 2009) (“The Court has applied the physical impossibility prong narrowly.”).

59. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000) (describing the scope of the impossibility prong as “vanishingly narrow”).

60. *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (“By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study.”).

61. *Id.* at 22 (“Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere . . . and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. . . . That the regulation ensnares some purely intrastate activity is of no moment.” (internal citations omitted)).

62. See *supra* note 39 and accompanying text.

that national market was at the heart of *Gonzales v. Raich*.⁶³ Because it was undoubtedly within congressional power to eliminate the cross-border movement of marijuana, Congress could also rely on the Necessary and Proper Clause to aid it in eliminating that market, including the noncommercial possession of locally grown marijuana for medical purposes as permitted by state law.⁶⁴

Had prevention of abuse been the sole purpose of the CSA, then the plaintiffs in *Raich*, it seems to me, would have had a stronger case. Because they were using marijuana for medical purposes under the auspices of state law, not abusing the drug or even using it recreationally, the plaintiffs could have made a case for isolating their use from the illicit uses the CSA was intended to stamp out. The *Raich* Court, however, simply focused on Congress's intent to eliminate the national market, then reasoned that because it could eliminate the interstate market in marijuana under its commerce power, it could reach all marijuana possession or production no matter how local or noncommercial.⁶⁵

At the risk of seeming obtuse, I find it self-evident that state legalization regimes permitting marijuana use for medical or recreational purposes present a substantial obstacle to the implementation of a federal law that (1) recognizes no medical use for marijuana and (2) seeks to eliminate the national market in marijuana by banning all production, possession, and transfer. The preemption puzzle, for me, remains. Only the DOJ's announced policy of forbearance keeps this

63. *Raich*, 545 U.S. at 24 (“The regulatory scheme [of the CSA] is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession of use of substances listed in Schedule I, except as a part of a strictly controlled research project.” (emphasis added)).

64. *Id.* at 22 (“Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce . . . among the several States.’” (citation omitted)).

65. *Id.* at 32 (“Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.”). As Nebraska and Oklahoma point out in their brief, the Court held that the CSA applied to the plaintiffs in *Raich* despite the fact that “[t]he California scheme was . . . a purely non-commercial compassionate use-based regime.” Brief in Support, *supra* note 34, at 18. Nevertheless, “[t]he Court . . . soundly rejected the notion that the marijuana growing and use at issue ‘were not ‘an essential part of a larger regulatory scheme’ because they had been ‘isolated by the State of California and [are] policed by the State of California,’ and thus remain ‘entirely separated from the market.’” *Id.* at 21 (alteration in original) (quoting *Raich*, 545 U.S. at 27).

conflict from coming to a head—unless the Supreme Court decides to hear Oklahoma and Nebraska’s lawsuit.

Mikos argues that broad obstacle preemption arguments, like the one I made above, cannot be correct, because they run afoul of the anticommandeering principle.⁶⁶ Holding that state legalization efforts pose an obstacle to the achievement of Congress’s aims in passing the CSA, he posits, would basically conscript state officials in the federal scheme to eliminate the market in Schedule I drugs. Congress may no more do this, he maintains, than it could require state and local executive officials to conduct background checks on prospective gun buyers.⁶⁷

But the Court has recognized that unless it has a limiting principle, the anticommandeering doctrine could read the Supremacy Clause out of the Constitution. In *Reno v. Condon*,⁶⁸ decided just three years after *Printz v. United States*,⁶⁹ the Court unanimously rejected South Carolina’s argument that forcing states to comply with a valid federal statute prohibiting the sale of driver’s license data impermissibly commandeered the officials who would have to obey the act.

South Carolina contends that the [Driver’s Privacy Protection Act] violates the Tenth Amendment because it “thrusts upon the States all of the day-to-day responsibility for administering its complex provisions,” . . . and thereby makes “state officials the unwilling implementors of federal policy” South Carolina emphasizes that the DPPA requires the State’s employees to learn and apply the Act’s substantive restrictions, which are summarized above, and notes that these activities will consume the employees’ time and thus the State’s resources. South Carolina further notes that the DPPA’s penalty provisions hang over the States as a potential punishment should they fail to comply with the Act.⁷⁰

66. See *supra* notes 36–51 and accompanying text.

67. *Printz v. United States*, 521 U.S. 898 (1997) (invalidating provision of Brady Bill requiring local law enforcement officials to perform background checks on prospective handgun purchasers); *New York v. United States*, 505 U.S. 144 (1992) (striking down requirement that states either pass legislation to deal with disposal of low-level radioactive waste or be forced to take title to all such waste produced in the state).

68. 528 U.S. 141 (2000).

69. 521 U.S. 898 (1997).

70. *Reno*, 528 U.S. at 149–50.

The Court responded that

the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.⁷¹

One might argue that, at most, *Reno* stands for the proposition that the CSA forbids states like Colorado or Washington from monopolizing the wholesale and retail marijuana market, as so-called “control states” do with liquor.⁷² As Mikos argues, the anticommandeering principle would prohibit a court from *ordering* either Colorado legislators to recriminalize marijuana production, possession, and sale or Colorado law enforcement officers to prosecute people under federal law.⁷³ Presumably, moreover, a federal court would be reluctant to order the *federal* government to enforce the CSA within the state. So what good would the injunction be that Oklahoma and Nebraska seek?

Arguably, the injunction would not only be futile but would be counterproductive, resulting in more problems, not fewer, for the plaintiff states, because an injunction would shut down the licensing and regulatory regime intended to minimize externalities. Disabling those controls could result into the “Wild West,” where anything goes because, under state law, marijuana use would not be illegal and the state could not be compelled by a federal court to recriminalize it.

I wonder whether the choice between an orderly marijuana market versus the “Wild West” is a false one. While it is true that the anticommandeering principle places limits on the ability to conscript state officials in enforcing the CSA, if a court enjoined the implementation of Amendment Sixty-Four, eliminating the orderly market envisioned by the drafters, there is the possibility that Colorado would, of its own accord, recriminalize marijuana as a matter of state law to prevent chaos that might accompany sudden deregulation. By the same

71. *Id.* at 151.

72. See Nat'l Alcohol Beverage Control Ass'n, *About NABCA*, NABCA.ORG, <http://www.nabca.org/page/about> (last visited Feb. 15, 2015) (“Founded in 1938, [the National Alcohol Beverage Control Association] is the national association representing the Control State Systems—those jurisdictions that directly control the distribution and sale of beverage alcohol within their borders.”).

73. See *supra* notes 36–51 and accompanying text.

token, a spike in illegal activity, including spillovers into other states, might be precisely the thing that would trigger federal intervention.⁷⁴

D. Would Anyone Have Standing to Enjoin Liberal State Laws?

Just because preemption remains an issue, however, does not necessarily doom any of the existing state regimes. *Because* the federal government has adopted a policy of benign neglect, the question arises, Who would have standing to enforce federal law against the states? In this section, I suggest that states may be able to invoke *parens patriae* standing to sue other states that have legalized marijuana or seek enforcement of federal law against individuals. States might even be able to sue the federal government in an effort to force the government to enforce its laws against states with permissive marijuana laws.

The core of Article III standing requires plaintiffs to demonstrate (1) injury-in-fact; (2) that the injury is fairly traceable to actions of the defendant; and (3) that a favorable court decision would, in fact, remedy the injury suffered by the plaintiff.⁷⁵ Injury-in-fact means that the plaintiff has suffered some kind of concrete and particularized injury that is either actual or imminent, as opposed to hypothetical or speculative.⁷⁶

At first blush, it seems difficult to conceive of a plaintiff who could satisfy those requirements. After all, an *individual* from, say, Nebraska or Oklahoma suing the state of Colorado to enjoin its legalization regime would seem to lack any injury-in-fact. Simply wishing to see federal law enforced or forcing state officials to comply with federal law seems to be precisely the kind of “generalized grievance” that the Court has held is better addressed to the political branches.⁷⁷

But imagine this scenario: A *state* bordering Colorado (for example, Nebraska or Oklahoma) finds itself awash in marijuana purchased legally in Colorado then brought back into the state illegally. Let us further assume that there has been a spike in hospitalizations of children for overdosing on Colorado-purchased edibles.⁷⁸ In such a case, an argument could be made that the State *itself* could sue either

74. See Cole Memorandum, *supra* note 4.

75. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

76. *Id.* at 560.

77. *E.g.*, Laird v. Tatum, 408 U.S. 1, 15 (1972).

78. See Steven Reinburg, *Kids Poisoned by Medical Marijuana, Study Finds*, U.S. NEWS & WORLD REP. (May 27, 2013, 4:00 PM), <http://health.usnews.com/health-news/news/articles/2013/05/27/kids-poisoned-by-medical-marijuana-study-finds>.

individuals or the State of Colorado as *parens patriae* seeking some sort of injunctive relief.⁷⁹

In the leading case, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*,⁸⁰ the Commonwealth sued a group of private apple growers for alleged violation of federal law governing the recruitment and importation of foreign agricultural workers.⁸¹ The growers challenged Puerto Rico's standing to bring suit; the Supreme Court affirmed the Fourth Circuit's conclusion that Puerto Rico could sue under *parens patriae* standing.

In order to sue as *parens patriae*, the Court emphasized that a state must be asserting a “a ‘quasi-sovereign’ interest” as opposed to a proprietary or other interest.⁸² Though emphasizing that this interest “is a judicial construct that does not lend itself to a simple or exact definition,” the Court did identify two such interests.⁸³ “First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal.”⁸⁴ The second is a “demand for recognition from other sovereigns—most frequently [involving] the maintenance and recognition of borders.”⁸⁵ The common thread, the Court explained, was that “[q]uasi-sovereign interests . . . consist of a set of interests that the State has in the well-being of its populace [and] must be sufficiently concrete to create an actual controversy between the State and the defendant.”⁸⁶

79. *C.f.* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.11.1 (3d ed. 2008) (discussing state standing); Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249 (2009) (analyzing state standing after the Court's decision changed the meaning of the standing elements depending on the type of litigant and claim); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995) (providing a historical overview of state standing). *See also* Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007) (discussing the effects of *Massachusetts v. EPA*).

80. 458 U.S. 592 (1982).

81. *Id.* at 595–99.

82. *Id.* at 601–02 (distinguishing semi-sovereign interests from a state's proprietary interests and those cases in which the state is but a nominal party and pursuing claims on behalf of its citizens in their private capacities).

83. *Id.* at 601.

84. *Id.*

85. *Id.*

86. *Id.* at 602.

By way of example, the Court in *Alfred L. Snapp & Son* summarized a number of cases, beginning with *Louisiana v. Texas*,⁸⁷ which “involved the State’s interest in the abatement of public nuisances, instances in which the injury to the public health and comfort was graphic and direct.”⁸⁸ The Court then summarized its holding:

In order to maintain [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest. . . . These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.⁸⁹

When deciding whether the state is truly representing distinct interests of its populace, as opposed to being a mere nominal party for private litigants, the Court said indirect effects on the population could be considered. Another factor was “whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.”⁹⁰ The Court then held that under either of the two quasi-sovereign interests it articulated, Puerto Rico had standing to sue the growers in federal court.⁹¹

Recently, the Court again found state standing in *Massachusetts v. EPA*,⁹² holding that the State of Massachusetts could sue the EPA for failure to make rules regulating carbon dioxide emissions from automobiles under the Clean Air Act.⁹³ The Court appeared to relax the injury-in-fact and redressability standards, at least in part because it was a state bringing the claim. Though the majority certainly evoked *parens patriae* in its decision,⁹⁴ it is difficult to characterize it as a pure example of *parens patriae*, in part because Massachusetts was asserting proprietary interests in the maintenance of its coastal properties that

87. 176 U.S. 1 (1900).

88. *Alfred L. Snapp & Son*, 458 U.S. at 604–05.

89. *Id.* at 607.

90. *Id.* at 608 (footnote omitted).

91. *Id.* at 609–10.

92. 549 U.S. 497 (2007).

93. *Id.* at 526.

94. *Id.* at 518–19.

were threatened by rising sea levels.⁹⁵ Nevertheless, as one commentator observed, the most plausible explanation for the case's outcome is that it *is* a *parens patriae* case in which the Court had “definitely repudiated [the] broad assertion that only the federal government could act as *parens patriae* with respect to rights or obligations arising under federal law.”⁹⁶

Whatever *Massachusetts v. EPA* did or did not do to *parens patriae* standing, even under the *Alfred L. Snapp & Son* criteria, a state like Nebraska (or Oklahoma), under the conditions that I described above, could muster plausible arguments. First, a flood of illicit marijuana coming from Colorado combined with evidence that children and others were being harmed as a result would seem to qualify as quasi-sovereign interest. Nebraska no doubt has an interest in the “health and well-being” of its citizens, which under my scenario is being imperiled by Colorado's legalization. The analogy that comes to mind is that of one state permitting activity within its boundaries that produce pollution affecting another state. As I read the cases, Nebraska could either file suit in federal court seeking an injunction against all of the licensed dispensers of marijuana in Colorado⁹⁷ or—by invoking the Supreme Court's original jurisdiction—against the State of Colorado itself.⁹⁸ (Nebraska and Oklahoma, of course, chose the latter route.)

In addition to injury-in-fact, causation and redressability could be satisfied as well. But for the permissive regime or the sellers that have taken advantage of it to peddle their wares, the injury would not have occurred. And even if some illicit marijuana would fill the void left by a dismantling of Colorado's legalization regime, *Massachusetts* suggests that even some likely *reduction* in harm will suffice to satisfy redressability, at least where the state is a party.⁹⁹

* * *

95. *Id.* at 538–39 (Roberts, C.J., dissenting); Massey, *supra* note 79, at 262–63.

96. Massey, *supra* note 79, at 268.

97. *Cf.* *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (considering a case arising when the federal government sought an injunction against several California cannabis sellers for violating the Controlled Substances Act).

98. U.S. CONST. art. III, § 2, cl. 2 (defining “original jurisdiction” of the Supreme Court to include “all Cases . . . in which a State shall be Party”); 17 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 4045 (3d ed. 2007) (discussing suits between states under the Supreme Court's original jurisdiction).

99. *Massachusetts*, 549 U.S. at 525–26.

As courts and commentators have recognized, conducting a real experiment with legalization is difficult given the continued existence of the restrictive regime embodied in the CSA. More permissive state regimes are in considerable tension with marijuana's classification as a Schedule I drug at the federal level. Despite able arguments to the contrary, I continue to believe that preemption poses a real threat to state legalization efforts (and even initiatives like compassionate use that stop short of legalization). I also believe that judicial holdings that preemption of more permissive state approaches by CSA would not violate the anticommandeering principle. As I will argue in Part III, Congress could play a constructive role by clarifying the legal status of these policy experiments, while protecting the rights of states to make different policy choices when it comes to marijuana. The obstacles that constitutional federalism could present to states vis-à-vis other states are discussed in the next Part.

II. HORIZONTAL FEDERALISM AND THE PREVENTION OF SPILLOVER EFFECTS

Constitutional federalism not only structures the interactions between the federal and state governments, but it also places limits on how states interact with one another, one another's citizens, and with cross-border activity like interstate commerce. Doctrines governing horizontal federalism, then, also merit some consideration when discussing legalization efforts.

I will largely restrict my discussion here to two such doctrines: the Dormant Commerce Clause Doctrine (the DCCD) and, to a lesser extent, the Privileges and Immunities Clause of Article IV. Both play important roles in the prevention of favoritism or "naked preferences"¹⁰⁰ for states' own citizens that can fray the bonds of political union. But the doctrines can also hinder states either from taking action to protect their own citizens from perceived threats to their health and wellbeing *or* from taking action to prevent harmful spillover effects that might create friction with neighboring states.¹⁰¹

The DCCD is the set of judge-made decision rules that limit a state's ability to discriminate against or otherwise unduly burden

100. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (arguing that the Supreme Court's treatment of a number of seemingly disparate clauses of the Constitution "are united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want").

101. For an examination of aspects of Colorado's legalization regime that is relevant to what follows, see Denning, *supra* note 9.

interstate commerce. For non-tax regulations,¹⁰² constitutionality turns on whether or not a state or local law “discriminates” against interstate commerce or commercial actors.¹⁰³ Discriminatory laws will be subject to a form of strict scrutiny requiring the government to prove that (1) the law furthers “legitimate” (i.e., nonprotectionist) purposes and (2) no less discriminatory means are available to it to further those interests.¹⁰⁴ Truly nondiscriminatory laws are subject to a deferential balancing test that requires the challenger to demonstrate that the burdens on interstate commerce “clearly exce[ed]” the putative local benefits.¹⁰⁵

Another doctrinal branch of the DCCD is worth mentioning: older Supreme Court decisions barred “extraterritorial” legislation in which State A attempted directly to control activities taking place in State B.¹⁰⁶ Elsewhere,¹⁰⁷ I have suggested that this branch has been effectively limited to circumstances in which State A attempted to dictate the prices for goods in State B and that subsequent decisions have repudiated the much broader formulations of the doctrine.¹⁰⁸ Nevertheless, plaintiffs still bring broad extraterritorial claims; some could be

102. The DCCD’s limits on taxes are set out in the so-called *Complete Auto* test, named for the case in which they were announced. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). To pass muster under the DCCD, state and local taxing jurisdictions must (1) have a substantial nexus with the taxpayer; (2) the taxes may not discriminate against interstate commerce; (3) the taxes must be fairly apportioned; and (4) they must “fairly relate” to the services provided to the taxpayer by the taxing jurisdiction. *Id.* at 277–78. Each of these prongs has been extensively litigated. See generally 1 JEROME R. HELLERSTEIN ET AL., *STATE TAXATION* (3d ed. 1998) (providing an overview of constitutional limitations on state taxation).

103. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (noting that discriminatory regulation is subject to a “virtually per se” rule of unconstitutionality). Note that discrimination need not be explicit. The Court has held that a facially neutral law can be discriminatory in its purposes, as in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 268, 271 (1984), or in its effects, as in *Hunt v. Wash. State Apple Advertisers Comm’n*, 432 U.S. 333, 350–51 (1970).

104. *E.g.*, *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

105. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

106. See, e.g., *Healy v. Beer Inst.*, 491 U.S. 324, 335–37 (1989) (striking down an alcohol pricing law with effects on out-of-state prices); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527–28 (1935) (invalidating a New York law affecting out-of-state milk prices).

107. Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979 (2013).

108. *Id.* at 992–93.

made against certain state attempts to maintain restrictive marijuana regimes.

To get a sense of how horizontal federalism can restrict state policy choices, consider the experience of states in trying to control the spread of another popular intoxicant that produced quite serious externalities: alcohol. Despite the Court's early solicitude for states wishing to control the liquor trade,¹⁰⁹ beginning at the end of the nineteenth century, the Court issued decisions severely limiting the states' ability to interdict the importation of alcohol at the border. In *Bowman v. Chicago & Northwest Railway*,¹¹⁰ for example, the Court invalidated an Iowa law that restricted the production or sale of alcohol as applied to beer imported from Illinois.¹¹¹ The Court held that this was a "direct" regulation of interstate commerce that the several states were not competent to undertake.¹¹² Two years later, in *Leisy v. Hardin*,¹¹³ the Court formally overruled *The License Cases*,¹¹⁴ holding that "interstate liquor transactions were a subject matter calling for uniformity"¹¹⁵ and that liquor shipments in their "original packages" were not susceptible to state regulation. Moreover, the Court concluded, "the right to import included the right to sell the imported liquor in the original package, because the sale was integral to the importation."¹¹⁶ *Leisy* resulted in a proliferation of retail establishments in prohibition states that some termed "Supreme Court saloons."¹¹⁷

In response, Congress passed the first in a series of laws intended to safeguard states' policy choices on the alcohol question. In 1890, it passed the Wilson Act, which subjected all intoxicating liquors imported into a state "to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the

109. See, e.g., *The License Cases*, 46 U.S. (5 How.) 504, 573–86 (1847) (Taney, C.J.) (upholding restrictions on liquor sales as a permissible exercise of state police powers).

110. 125 U.S. 465 (1888).

111. *Id.* at 500.

112. *Id.* at 479.

113. 135 U.S. 100 (1890).

114. *Id.* at 124.

115. 8 OWEN M. FISS, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 274 (1993).

116. *Id.*

117. RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT* 69 (1995) (writing that "[w]ithin a month of [*Leisy*], 'original package houses' and 'supreme court saloons' had sprung up in every prohibition state").

same extent and in the same manner” as though they had been produced there, whether or not they were in their “original packages.”¹¹⁸ The Wilson Act was upheld, and the principle established that Congress had the ability to “overrule” the DCCD by “redelegating” power to the states by exercising its affirmative Article I powers.¹¹⁹

Personnel changes on the Court,¹²⁰ however, occasioned a somewhat more restrictive reading of the Act than was perhaps intended. In *Rhodes v. Iowa*,¹²¹ for example, the Court interpreted the Act to permit

a state to regulate foreign liquor after its “arrival” in the state and, according to [Chief Justice] White, liquor did not “arrive” in the state until it was delivered to the person who ordered it (the consignee). As a practical matter, . . . the states were able to prohibit the person to whom the liquor was delivered from selling it within the dry state; the states were allowed to outlaw the retail outlet. On the other hand, the states could not intervene prior to delivery to the consignee, even after the liquor crossed the state line.¹²²

The same year as *Rhodes*, the Court invalidated a South Carolina law prohibiting the importation of liquor as applied to consignments for personal use.¹²³ The Court’s stingy interpretation of the Wilson Act gave rise to the more effective Webb-Kenyon Act, passed in 1913.¹²⁴ By the time of its passage, however, sentiment for prohibition had grown, culminating in the ratification of the Eighteenth Amendment. However, the principle was now firmly established that Congress could, in the exercise of its affirmative power to regulate interstate commerce, effectively “disable” the DCCD and permit states to regulate in ways that the doctrine would otherwise prohibit.

118. Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified as amended at 27 U.S.C. § 121 (2006)). The impetus of the Act was a statement in *Leisy v. Hardin* seeming to invite Congress to use its affirmative power over interstate commerce to change the default rule against state action embodied in the DCCD. *Leisy*, 135 U.S. at 108; FISS, *supra* note 115, at 275.

119. *In re Rahrer*, 140 U.S. 545, 562 (1891).

120. FISS, *supra* note 115, at 278 (“By the late 1890s all the justices who had joined [Chief Justice Melville] Fuller’s opinion in *Leisy* had left the Court, and there were now five new justices . . . Brown, Shiras, White, Peckham, and McKenna.”).

121. 170 U.S. 412 (1898).

122. FISS, *supra* note 115, at 279.

123. *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 453–57 (1898).

124. Pub. L. No. 62-398, 37 Stat. 699 (1913). The Act was passed over a presidential veto, then upheld by the Court in *Clark Distilling Co. v. W. Md. Rwy. Co.*, 242 U.S. 311, 325–32 (1917).

The earlier experience with state regulation of alcohol has some lessons for marijuana. First, the DCCD could end up being a constitutional obstacle to states' regulatory efforts. Though doctrine no longer immunizes interstate commerce *qua* interstate commerce from state regulation, differential treatment between in- and out-of-state products or economic actors will trigger the DCCD's version of strict scrutiny. That means, for example, that Colorado's law limiting nonresidents to purchasing a quarter-ounce of marijuana per dispensary visit, as opposed to the full ounce that residents are entitled to buy, could be challenged. A host of licensing and permitting requirements treating residents and nonresidents differently are buried in state compassionate use and recreational use statutes. One could even imagine a future in which a state that legalized marijuana and devoted resources to ensuring uniform dosage and potency of marijuana produced in the state would seek to keep out "inferior" or "unsafe" out-of-state or foreign marijuana.

Just as in an earlier age the DCCD frustrated state efforts—presumably desired by their citizens—to limit the importation of alcohol, the DCCD could again frustrate state efforts to regulate the introduction of another intoxicant that could have deleterious effects on the health of its citizens. Even today, despite the Twenty-First Amendment's apparent grant of plenary authority to states over alcohol, the Supreme Court held (wrongly, in my view) in 2005 that the DCCD forbade efforts by states to grant an advantage to in-state wineries who sought to ship directly to consumers.¹²⁵ Moreover, the DCCD can also frustrate efforts of states to limit the spillover effects from their more liberal regime—efforts on which federal forbearance apparently hinges, according to the DOJ's memo.

As I have written elsewhere, Colorado's differentiation can be defended against a DCCD challenge.¹²⁶ I suspect that many of the arguments I made in favor of Colorado's law could be deployed to defend other allegedly discriminatory marijuana laws. That said, I confidently predicted, prior to the Court's *Granholm* case, that the DCCD would not be held to qualify states' power over alcohol conferred by Section 2 of the Twenty-First Amendment.¹²⁷ The point is that you never know what arguments will find favor with judges. Even if they win, moreover, states will have had to go to the trouble and expense of

125. *Granholm v. Heald*, 544 U.S. 460 (2005).

126. Denning, *supra* note 9, at 2283–99.

127. Brannon P. Denning, *Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, the Twenty-first Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENT. 297, 298 (2002) (“The plain text of that section suggests that these recent [lower] court decisions are mistaken.”).

defending these laws against legal challenge. Money spent on litigation, further, will not be available to pay inspectors and regulators tasked with superintending a state's legalization regime.

Though it will likely play much less of a role, the Privileges and Immunities Clause of Article IV imposes a rule of substantial equality on states' treatment of nonresidents. There are important qualifications that limit its reach—it does not cover corporations, for example, and it only protects nonresidents in the exercise of “fundamental rights”¹²⁸—but there *is* an argument regarding access of nonresidents to health care services.¹²⁹ This might have implications at some point in the future for those entering a compassionate use state seeking medical marijuana.¹³⁰

The second lesson, however, is that the path to true experimentation with different regulatory regimes, while preserving state choices *not* to participate in these experiments, is also suggested by the earlier tug-of-war between dry and wet states. Congress could (though this is unlikely) propose a Twenty-Eighth Amendment for marijuana, which, as does the Twenty-First, constitutionalizes significant state autonomy in its regulation. Second, Congress could explore creating a Webb-Kenyon-like law for marijuana. Both are explored in the next section.

III. TOWARD A CONSTRUCTIVE FEDERAL ROLE

The notion of a Twenty-Eighth Amendment addressing legalization and regulation of marijuana may seem fanciful. The polling numbers for legalization do not suggest the kind of consensus necessary to garner a two-thirds vote in both houses of Congress, much less to receive the votes of three-quarters of the state legislatures necessary to ratify.¹³¹ However, it is worth brief consideration. Though there was considerable dissatisfaction with Prohibition, there was similar consensus that a

128. See generally Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 393–404 (2003) (discussing the limits to the scope of the Privileges and Immunities Clause of Article IV).

129. *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (invalidating state law prohibiting nonresidents from obtaining abortions in the state).

130. Denning, *supra* note 9, at 2286–87. But first marijuana would have to be rescheduled. Schedule I drugs are deemed to have no acceptable medical use. See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489–90 (2001) (noting that Schedule I's lone exception is for “Government-approved research projects”).

131. On the other hand, as was true with the Twenty-First Amendment, my hypothetical Twenty-Eighth Amendment, were it ever proposed, might be a good candidate for ratification by special ratifying conventions. See U.S. CONST. art. V (permitting Congress to select the mode of ratification).

return to the status quo ante—to the days of the hated saloon—was equally undesirable. In addition, supporters of repeal wanted to constitutionalize state control over importation and sale of alcohol. The fear was that either Congress or the Supreme Court might repeal or invalidate Webb-Kenyon; only by writing that control into any repeal amendment could states be assured of a measure of control over the alcohol trade.

The original draft of what became the Twenty-First Amendment contained a section permitting concurrent federal regulation of alcohol.¹³² Supporters of “Section Three” maintained that concurrent federal power was necessary to prevent a return of the saloon.¹³³ Opponents pointed out that Section Three could easily be construed to take back the measure of state power granted elsewhere in the amendment. If federal and state rules conflicted, opponents noted, it was not at all clear that the state rules would have precedence—that the federal rules would not be interpreted as a regulatory ceiling, rather than a mere floor.¹³⁴ The resulting debate over Section Three brought a clarity to the issue of state versus federal power, and, in the end, the Senate’s “insistence on an unambiguous grant of power over liquor to the states overcame [Senators’] professed horror at the prospect of the saloon’s return”¹³⁵

What is instructive about the debate over the Twenty-First Amendment, and relevant to the current debate, is how the process allowed for political consensus to coalesce on the question of state control. The rejection of Section Three was an emphatic statement in favor of state control and a rejection of federal interference with state prerogatives. The subsequent debate—to the extent records exist—confirm that those called upon to ratify the Amendment understood it in those terms.¹³⁶ While the precise contours of the Twenty-First Amendment would be marked out over time by the Supreme Court, Section Two meant that the presumption with alcohol regulation would initially favor the states.

Perhaps, then, we should not dismiss a constitutional amendment on marijuana too lightly. The Twenty-First Amendment was the product of dissatisfaction with a proscriptive legal regime that had turned otherwise law-abiding citizens into criminals and empowered and enriched vast criminal enterprises. Widespread noncompliance undermined the rule of law; official efforts to coerce compliance arguably produced concomitant infringements on citizens’ civil liberties. The

132. Denning, *supra* note 127, at 303–05.

133. *Id.* at 303.

134. *Id.* at 305–07.

135. *Id.* at 307.

136. *Id.* at 308.

state of affairs on the eve of the Twenty-First Amendment, then, bears some resemblance to the consequences of our decades-long War on Drugs.

A constitutional amendment legalizing marijuana and delineating the responsibility for its regulation might serve as a vehicle for a wide-ranging national debate on drug policy that the country has probably never properly had. If a pot amendment seems unlikely, one might reflect on how unlikely it would have seemed ten or twenty years ago that the DOJ would issue a memo setting terms on which it would refrain from enforcing the CSA in states that opted for legalization.

If an amendment is likely not in the offing, the second-best outcome for state experimentation would be legislation that (1) clarified the legal status of state decriminalization or compassionate use laws under the CSA and (2) permitted states to regulate marijuana free from the strictures of the DCCD. Something like the Wilson or Webb-Kenyon Acts, in other words.

The current situation cannot hold. The DOJ's memorandum is worth the paper it's written on. While it might provide some security to individuals who possess or produce marijuana for personal use, it provides precious little security for businesses that are incurring start-up costs to establish dispensaries, obtain insurance, and, crucially, make use of the banking system. Anecdotes abound of the measures dispensaries are taking to handle the vast amounts of cash many bring in each month; one of the largest costs many dispensaries incur each month is security. Some form of legalization or decriminalization is a fact in a number of states. At the very least, Congress should consider amending the CSA to bless legalization where it exists—perhaps seeing what problems emerge as a result, if any. Or Congress could permit other states to “opt out” of the CSA by legalizing marijuana and agreeing to adopt a regulatory scheme for its production, possession, and consumption in the state.

In addition, Congress could disable the DCCD when it comes to state regulation of marijuana. States should be able to legalize for their own citizens without necessarily embracing “pot tourism.” Even if they do not prohibit nonresident purchase, states should be able to take steps—as Colorado has done—that attempt to reduce spillover effects and respect the policy choices made by their neighbors, either as a matter of comity or to reduce the risk the feds will abandon their limited laissez-faire attitude and strangle experimentation in its crib. Limiting the reach of the DCCD would also enable states to, for example, require state residency for licensees, prohibit out-of-state ownership of dispensaries, and other measures that could ensure greater state and local accountability for those engaged in the sale of marijuana.

IV. CONCLUSION

As the suit by Nebraska and Oklahoma has demonstrated, the path toward widespread legalization of marijuana is not a clear one. The tentative, equivocal attitude of the federal government toward state experimentation is aggravating the situation. I have argued here that state experiments with legalization will continue to occupy a legal twilight zone: at the mercy of federal enforcement priorities, which could change with a new administration, and vulnerable to legal challenges from neighboring states less eager to be a part of this new “greening” of America.¹³⁷ I further argue that the nation’s experience with balancing the rights of wet and dry states in the late-nineteenth and early-twentieth centuries furnishes a template for constructive legislative action on Congress’s part. Congress should exercise some of the power available to it to establish vertical federalism boundaries in order to allow states to better manage the horizontal federalism challenges occasioned by legalization and compassionate use regimes.

137. *Cf.* CHARLES A. REICH, *THE GREENING OF AMERICA* (1970).