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CONFLICTING FEDERAL AND STATE MEDICAL MARIJUANA POLICIES: A THREAT TO COOPERATIVE FEDERALISM

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ABSTRACT

The legal status of medical marijuana in the United States is something of a paradox. On one hand, the federal government has placed a ban on the drug with no exceptions. On the other hand, forty percent of states have legalized its cultivation, distribution, and consumption for medical purposes. As such, medical marijuana activity is at the same time proscribed (by the federal government) and encouraged (by state governments through their systems of regulation and taxation). This Article seeks to shed light on this unprecedented, nebulous zone of legality in which an activity is both legal and illegal, what one scholar on the subject has deemed "one of the most important federalism disputes in a generation." The issue has become heightened as two states have legalized marijuana for recreational (non-medical) purposes as a result of the 2012 Election.

This Article examines the issue from a federalism perspective. It begins by arguing that unpredictable enforcement by federal authorities in states that have legalized medical marijuana not only threatens state drug policy, but also the efficacy of federal enforcement. This argument is based on the premise that the federal drug ban exists as a collaborative effort between the states and the federal government. That the federal government relies on the assistance, infrastructure, and know-how of state and local governments is evinced by, as an example, the fact that ninety-nine percent of drug-related investigations and arrests are carried out by state agents. Federal enforcement in a state where medical marijuana is legal antagonizes the state authorities to the point where cooperating to enforce a dual-ban on drugs—like, for example, heroin—becomes more difficult. A solution to this problem, this Article proposes, would be for Congress to carve out an exemption from federal enforcement in states that have legalized the drug. This proposal would exhibit the federal government's respect for state drug policy, reestablish "cooperative federalism" between states and the federal government, and allow the federal authorities to allocate their limited resources to areas where they are likely to have lasting success.

It should be noted that this Article steers clear from making policy and public health judgments or arguments about whether medical marijuana or other drugs should be legal at the state or federal level. The policy arguments on both sides of the issue are vast and well-developed. Rather, this Article analyzes how the varying messages about whether and to what extent the federal government will enforce its ban poses a threat to cooperative federalism.

I. INTRODUCTION

On October 19, 2009, Deputy Attorney General David Ogden issued a memorandum with the subject line "Investigations and Prosecutions in States

Authorizing the Medical Use of Marijuana."[1] The purpose of this memo was to guide United States Attorneys in investigating and prosecuting marijuana-related offenses vis-à-vis various state laws that permit the cultivation, sale, and consumption of marijuana for medical purposes.[2] The Ogden Memo instructed that

> prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.[3]

While the Ogden Memo reaffirmed the illegality of all forms of medical marijuana at the federal level, it made clear that the federal executive policy with regards to medical marijuana permissible at the state level would be for the most part hands-off.[4]

Partially as a result of the Ogden memo, the medical marijuana industry began to mushroom. Administrative agencies of states with laws permitting the cultivation, sale, and consumption of medical marijuana began to issue licenses to farms and dispensaries. For example, in California—a state that permits the limited usage of medical marijuana[5]—the result has been a billion-dollar industry.[6] Anywhere between $50 and $100 million are collected in taxes—revenue that could prove vital to the state of California.[7] Despite their quasi-legal status, dispensaries and individual users of medical marijuana tight-rope-walked the fine line of legality. The 2005 United States Supreme Court decision *Gonzales v. Raich* made clear that persons engaging in the intrastate cultivation, sale, or consumption of medical marijuana—even in full compliance with state laws and regulations—could be prosecuted for violations of the

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1 Memorandum for Selected U.S. Attorneys, David W. Ogden, Deputy Attorney Gen. (Oct. 19, 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf [hereinafter Ogden Memo].

2 *Id.*

3 *Id.*

4 *Id.*

5 *See* CAL. HEALTH & SAFETY CODE § 11362.5 (West 2013).

6 Tim Dickinson, *Obama's War on Pot*, ROLLING STONE (Mar. 1, 2012), *available at* http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216?print=true; *see also* Katherine Mangu-Ward, *The Business of Medical Marijuana*, REASON (Apr. 7, 2012), *available at* http://reason.com/archives/2012/04/13/the-business-of-medical-marijuana.

7 DEP'T OF JUSTICE, THE DEA POSITION ON MARIJUANA 14 (2011), *available at* http://www.justice.gov/dea/docs/marijuana_position_2011.pdf; Francis Dinkelspiel, *Berkeley Cannabis Collectives Slapped with Huge Tax Bills*, BERKELEYSIDE (Feb. 3, 2011, 7:00 AM), http://www.berkeleyside.com/2011/02/03/berkeley-cannabis-collectives-slapped-with-huge-tax-bills/.

federal Controlled Substances Act (CSA), which characterizes medical marijuana as a Schedule I illegal drug.[8]

Despite the Ogden Memo, the Federal Department of Justice (DOJ) is now focusing efforts on prosecuting consumers and producers of medical marijuana who are acting in compliance with state laws. This was spurred by a memorandum on the subject issued on June 29, 2011, by James Cole, Ogden's successor as Deputy Attorney General, which limited the term "caregiver" only to individual physicians and nurses.[9] In California, United States Attorneys have shut down hundreds of growers and dispensaries that were licensed and regulated by the California Department of Health Services.

A looming problem with the changes in the federal executive policy involves the way in which the federal drug prohibition is enforced. Essentially, federal enforcement agents rely on the assistance, infrastructure, and know-how of the states; just one example of this is the estimate that 99% of drug-related investigations and arrests are carried out by state agents.[10] As such, the regulation of marijuana can be seen as a cooperation between the states and the federal government—what this Article will refer to as "cooperative federalism," a term that refers not just to a state-federal cooperation, but also a collaboration where states preserve authority to make policy and enforcement decisions.[11] However, conflicts and changes in marijuana laws and enforcement policy—especially as blatant as the Ogden-Cole Memos' shift—pose a potential disruption of this scheme of cooperation.

The 2012 Election heightened the stakes for the way in which marijuana is regulated. On November 6, 2012, voters in two states, Washington and Colorado, approved ballot initiatives, which essentially legalized the limited cultivation, distribution, possession, and usage of marijuana for *recreational*—in contrast to medical—purposes.[12] Since then, these two referenda were signed into law, making Washington and Colorado the only two states to have legalized non-medical marijuana.

But the legalization of recreational marijuana in Washington and Colorado is but one chapter in the history of the drug in the United States. Novel

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[8] 545 U.S. 1 (2005).

[9] Memorandum for Selected U.S. Attorneys, James Cole, Deputy Attorney Gen. (June 29, 2011), *available at* http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf [hereinafter Cole Memo].

[10] 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); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1283–84 (2009).

[11] One scholar characterizes "cooperative federalism" as a "state-federal partnership in carrying out federal policy." JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 170 (2009).

[12] COLO. CONST. amend. LXIV, *available at* http://www.fcgov.com/mmj/pdf/ amendment64.pdf; 2013 Wash. Legis. Serv. ch. 3 (I.M. 502) (West) (Initiative Measure-Marijuana-Legalization and Regulation).

about those ballot measures is that they legalize marijuana for recreational purposes; medical marijuana has been legal in California since 1996,[13] and is now permitted in one form or another in twenty-one of the fifty states as well as the District of Columbia.[14] As states began to take control of legislative policy with regard to medical marijuana by passing laws permitting its limited usage, a gray area of legality precipitated. On the one hand, the cultivation, distribution, and usage of medical marijuana is permitted and, arguably, encouraged, by many of the states through their systems of taxation and regulation; yet on the other hand, it remains categorically forbidden at the federal level.[15] This nebulous zone of legality has broader implications for the United States' system of federalism. Indeed, one prominent scholar deemed the state-federal conflict of marijuana laws to be "one of the most important federalism disputes in a generation."[16]

This Article focuses on this nebulous zone of law enforcement, in which an activity remains both a violation of federal law and one that is permitted and even, perhaps, encouraged by states and their regulatory schemes. The about-face in federal executive policy as shown by the shift from the Ogden to Cole Memos suggests that state regulation of medical marijuana can be *de facto* undermined by the federal government through prosecution of individuals who are otherwise following state laws and guidelines.[17] This can be seen as a threat to cooperative federalism: at one moment, state legislative acts and the voter referenda assure states that they will be permitted to regulate medical marijuana and implement the necessary bureaucracies and infrastructure to do so; at the next, changes in federal law enforcement initiatives disrupt states' regulatory schemes.

This Article—focusing on the conflict between federal law enforcement and California's laws and regulatory schemes over medical na[18]—will proceed as follows: Part II provides the background about the legal

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[13] California's Compassionate Use Act was approved via voter referendum in 1996, and is codified in California's Health and Safety Code. *See* CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2013).

[14] *See infra* text accompanying note 26.

[15] Marijuana remains prohibited at the federal level under the Controlled Substances Act. 21 U.S.C. §§ 841, 844 (2012).

[16] Robert Mikos, *On the Limits of Federal Supremacy: When States Relax (or Abandon) Marijuana Bans*, 714 CATO INST. POL'Y ANALYSIS 1, 3 (Dec. 12, 2012), *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/PA714.pdf. Professor Mikos has written extensively about the subject, particularly focusing on the questions of preemption and commandeering of state marijuana laws.

[17] *Compare* Ogden Memo, *supra* note 1, *with* Cole Memo, *supra* note 9.

[18] As noted, 21 states have legalized medical marijuana in one form or another. *See infra* note 26. In order to tighten the analysis, this Article focuses on the situation in California. Not only was California the first state to legalize medical marijuana—and thus has the longest history of the state-federal conflict of law—but it is also a hotbed of uncertainty when it comes to federal

status of medical marijuana at both the state and federal levels. Part III analyzes the state laws vis-à-vis the federal medical marijuana ban and the federalism issues that arise out of the conflicting sovereign policies. Specifically, Part III discusses the *de jure* power the federal government may or may not have to undermine the state laws through such doctrines as commandeering, preemption, and conditional spending. Part III also explores the limitations of federal enforcement of the CSA and the ways in which the federal authorities rely on state cooperation to enforce the drug bans. Part IV then analyzes the threat to cooperative federalism caused by the inconsistent federal enforcement policy of the federal drug enforcement scheme, which was designed to be a collaborative effort, or cooperation, with the states. Part V turns to a brief examination of the novel recreational marijuana initiatives of Washington and Colorado. Part V places these new measures into the cooperative federalism story and anticipates additional problems that may arise in light of this expansion of marijuana's legality. Finally, Part VI proposes a solution to the medical marijuana gray zone of legality: a Congressional exemption to the federal ban on medical marijuana, but only in states that have passed legislation allowing its limited usage.

It should be noted that this Article steers clear from making policy judgments or arguments about whether medical marijuana or other drugs should be legal at the state or federal levels. The policy arguments on both sides are vast and well-developed. Rather, this Article analyzes the conflict and threats to cooperative federalism posed by the varying messages about whether and to what extent the federal government will enforce the drug ban.

II. THE LEGAL STATUS OF MEDICAL MARIJUANA

A. *California's Medical Marijuana Laws*[19]

On November 5, 1996, California voters approved ballot measure referendum Proposition 215, effectively legalizing the limited and controlled usage and distribution of marijuana for medical purposes—the first state law of its kind. Proposition 215, which became known as the Compassionate Use Act (CUA), added section 11362.5 to California's Health and Safety Code.[20] Sub-

enforcement and state cooperation. As explored more fully *infra* Part IV, California's highly lucrative and burgeoning medical marijuana industry has been threatened as of late with an increased focus of federal efforts on the enforcement of the CSA.

[19] While this Article focuses on laws concerning marijuana for medical purposes, it should be noted that since 1976, California has a policy of decriminalization for possession of small amounts of marijuana. *See* S. B. 1449, 2010 Sess. (Cal. 2010), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB1449&search_keywords=; S.B. 95, 1976 Sess. (Cal. 1976); Prop. 36, 2000 Sess. (Cal. 2000).

[20] The stated purpose of the Act is:

> To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's

stantially, the CUA provides that the code sections prohibiting the possession and cultivation of marijuana[21] shall not apply "to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."[22] The CUA also protects physicians who recommend marijuana to patients for medical purposes from punishment under California's drug laws.[23] The list of conditions for which a physician may recommend medical marijuana is not exhaustive—"any . . . illness for which marijuana provides relief"[24]—but typically includes chronic conditions that involve severe pain, nausea, or muscle spasms.[25] Since the passage of the CUA in 1996, twenty other states and the District of Columbia have enacted laws—via the state legislative process, popular ballot referendum, and even amendment of the state constitution—permitting the use and/or distribution of marijuana for medical purposes in one form or another.[26]

> health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2013).

21 *Id.* §§ 11357, 11358.

22 *Id.* § 11362.5(d).

23 *Id.* § 11362.5(c).

24 *Id.* § 11362.5(b)(1) ("The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows: (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.").

25 Mikos, *supra* note 10, at 1428 & n.19.

26 The 21 states that have legalized medical marijuana in one form or another are Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *See* ALASKA STAT. § 17.37.030 (2013); ARIZ. REV. STAT. § 36-2811 (2012); CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2013); COLO. CONST. art. XVIII, § 14; CONN. H.B. No. 5389, 2013 Conn. Acts 12-55 (Reg. Sess.); DEL. CODE ANN. tit. 16, § 4903A (2013); HAW. REV. STAT. § 329-122 (2013); ILL. HB 0030 97th Gen. Assem. (2013); ME. REV. STAT. ANN. tit. 22, § 2383 (2012); MD. CODE ANN., CRIM. LAW § 5-601(c)(3)(ii) (2013); 2012 Mass. Acts ch. 369, *available at* https://malegislature.gov/Laws/SessionLaws/Acts/2012/Chapter369; MICH. COMP. LAWS SERV. § 333.26421 (LexisNexis 2013); MONT. CODE ANN. § 50-46-301 (2013); NEV. REV. STAT. § 453A.010 (2013); N.H. H.B. 575-FV (2013); N.J. STAT. ANN. § 24:6I-1 (West 2013); N.M. STAT. ANN. § 26-2B-1 (West 2013); OR. REV. STAT. § 475.300 (2013); R.I. GEN. LAWS § 21-28.6-1 (2011); VT. STAT. ANN. tit. 18, § 4471 (2013); WASH. REV. CODE § 69.51A.005 (2013).

The legality of medical marijuana in the District of Columbia is interesting. Like the 21 states which allow for medical marijuana, the District also has a code provision allowing for the limited usage, distribution, and cultivation of marijuana for medical purposes. D.C. CODE § 7-1671.02 (2013). However, unlike the states, after the passage of the Amendment Act B18-622

In 2003, California Governor Gray Davis signed into law Senate Bill 420, or the Medical Marijuana Program Act, which defined the scope of the CUA and laid the foundation for regulating access to and distribution of medical marijuana.[27] The Medical Marijuana Program (MMP) required the Department of Health Services to set up a comprehensive program to monitor the distribution of medical marijuana.[28] The Program mandated specific regulatory duties to county health departments related to the issuance and monitoring of identification cards issued to legitimate patients who are qualified to purchase, possess, and use marijuana for medical purposes.[29] The District of Columbia and many of the other states with laws permitting the possession of medical marijuana have also passed laws setting up similar regulatory schemes.[30]

California case law has refined the scope of CUA and MMP, and has attempted to clarify what protections the laws provide to patients and recommending physicians. The California Supreme Court has held that "the CUA provides an affirmative defense to the [prosecution of] the crimes of" possession, distribution, or cultivation of marijuana.[31] The CUA does not provide immunity from arrest to suspects where law enforcement officers have probable cause to believe an unlawful possession or cultivation has occurred.[32] However, the California Supreme Court has held that the MMP, with its regulatory system of voluntary identification cards for medical marijuana, was "designed to protect against [the] unnecessary arrest" of patients possessing or using marijuana in compliance with the CUA and MMP.[33] Additionally, the Court has also held that certain provisions in the MMP—which limit the amount of marijuana patients or caregivers may lawfully possess under the CUA—unconstitutionally

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and its signage into law by the mayor, the law underwent a 30-day Congressional review period, during which neither the Senate nor House of Representatives acted to reject the law, which therefore went into effect. Because the federal Controlled Substances Act—which categorically proscribes marijuana included that used for medical purposes—applies to the District of Columbia, it seems that the federal legislature has simultaneously and paradoxically approved and prohibited medical marijuana in the District.

27 *See* S.B. 420, 2003 Sess. (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0401-0450/sb_420_bill_20031012_chaptered.html.

28 S.B. 420, 2003 Sess. (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0401-0450/sb_420_bill_20031012_chaptered.html.

29 *Id.* The California Department of Health Services provides a list of local health department regulators on its website. *Medical Marijuana Program County Programs and Business Hours*, CAL. DEPT. OF PUB. HEALTH, http://www.cdph.ca.gov/services/Pages/MMPCounties.aspx (last visited Oct. 17, 2013).

30 *See supra* text accompanying note 26.

31 People v. Wright, 146 P.3d 531, 534 (Cal. 2006); People v. Mower, 49 P.3d 1067 (Cal. 2002).

32 *Mower*, 49 P.3d at 1073–74.

33 People v. Kelly, 222 P.3d 186, 212 (Cal. 2010); Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 485 (Ct. App. 2008).

burden the statutory defense of possessing or cultivating marijuana for medical purposes.[34]

B. *Federal Drug Laws Concerning Medical Marijuana*

In 1970, Congress passed the Controlled Substances Act (CSA),[35] a comprehensive federal law, which classifies marijuana in Schedule I—the most restrictive category—essentially making all forms of cultivation, distribution, and possession a federal crime.[36] The federal government's steadfast ban on marijuana is categorical and virtually without exception.[37] The cultivation, distribution, and possession of marijuana for medical purposes, of course, remain unlawful under the CSA. Both Congress and the Drug Enforcement Agency (DEA)—the federal administrative enforcer of the CSA—have rejected proposals to reschedule or suspend enforcement against persons who utilize the drug in compliance with state medical marijuana laws and programs.[38] The United States Supreme Court, in *United States v. Oakland Cannabis Buyers' Cooperative*, has deferred to Congress' steadfast determination that marijuana has no medical benefit and has interpreted the CSA in such a way that leaves no room for a common law medical marijuana exception or medical necessity defense.[39]

The seminal case of *Gonzales v. Raich* affirmed the constitutionality of the CSA even as applied to extremely localized marijuana-related activities.[40] The issue in *Raich* was whether the Commerce Clause[41] permitted Congress, via the CSA, to ban the growth and consumption of marijuana where that marijuana was grown locally, using only local inputs, and did not enter into the interstate markets.[42] The case involved the respondents' growth and consumption

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34 *Kelly*, 222 P.3d at 211–12.

35 Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801–971 (2012)).

36 21 U.S.C. §§ 841, 844 (2012).

37 The only means of legally obtaining marijuana are through the sole federally-approved grow-site at the University of Mississippi or by participating in an FDA-approved research study. However, only a tiny amount of the population could have access to marijuana through these means: the University of Mississippi program stopped accepting new applications in 1992 and only eight patients receive marijuana through it, while the FDA has only approved eleven research studies since 2000. Mikos, *supra* note 10, at 1433–34.

38 *Id.* at 1434.

39 532 U.S. 483 (2001); *see* United States v. Burton, 894 F.2d 188 (6th Cir. 1990), *cert. denied*, 498 U.S. 857 (1990).

40 545 U.S. 1 (2005).

41 U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have Power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

42 *Raich*, 545 U.S. at 5.

of medical marijuana, in full compliance with the California CUA.[43] The Court, in a 6–3 decision, held that this activity, though wholly intrastate, was susceptible to regulation through Congress' Commerce Clause power because such activity, in the aggregate, could have a substantial impact on the interstate market for the extremely popular and fungible commodity that is marijuana.[44] *Raich* gave constitutional approval to the application of the CSA to individuals who were utilizing marijuana in compliance with state laws and regulations.[45] Therefore, since *Raich*, it remains clear that compliance with state drug laws and regulations cannot be used as a defense from arrest or prosecution under federal drug laws. Under the doctrine of the supremacy of the federal government, those state laws, of course, cannot take precedence over the CSA.[46]

III. A SCHRÖDINGER'S CAT OF LEGALITY[47]

As shown, California's laws and regulations permitting the limited utilization of medical marijuana are, on their surface, in conflict with the federal CSA, which categorically prohibits marijuana even for medical purposes. This creates a virtually unchartered situation where an activity is lawful at the state level, while at the same time is prohibited by federal law.[48] Many jurists, often looking for uniform rules of general applicability, might see this as a problem. And proponents of a uniform system may argue that the confusing quasi-legal status of medical marijuana can and should be resolved by a robust assertion of the federal government of its supremacy over the states. Accordingly, this Part explores possible ways in which the federal government, through its *de jure*

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43 *Id.* at 7.

44 *Id.* at 28–33.

45 *Id.* at 27–29.

46 *See* U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . ."); *see also Oakland Cannabis Buyers' Coop.*, 532 U.S. 483.

47 Physicist Erwin Schrödinger's famous thought experiment places a cat inside a box containing a flask of poison that is cracked open at a random time. As an explanation to explain quantum theory, Schrödinger proposed that before the box is opened, the cat can be thought of as simultaneously dead *and* alive. *See* Erwin Schrödinger, *Die gegenwärtige Situation in der Quantenmechanik*, 23 DIE NATURWISSENSCHAFTEN 807–12, 823–28, 844–49 (1935), *cited in* Denke v. Shoemaker, 198 P.3d 284, 302 n.2 (Mont. 2008). Justice James C. Nelson of the Montana Supreme Court used this analogy when discussing the precarious legal state of medical marijuana. *See* Mont. Cannabis Indus. Ass'n v. State, 286 P.3d 1161, 1169 (Mont. 2012) (Nelson, J., dissenting).

48 This Article takes the position that this situation—where the federal government, pursuant to a legislative act, bans one activity yet the states permit and regulate that very same activity, also pursuant to legislation—is without precedent. However, Professor Mikos has suggested otherwise, offering as examples of activities federal government attempts to ban "certain abortion procedures, physician-assisted suicide, needle exchange programs, and possession of certain types of firearms" that would otherwise have been permitted at the state level. *See* Mikos, *supra* note 10, at 1479–80; Mikos, *supra* note 16, at 26.

constitutional authority or *de facto* executive powers of law enforcement, may resolve this Schrödinger's Cat of legality in which activities related to medical marijuana are simultaneously lawful and unlawful.[49] Part IV then explores the threat to federalism caused by the most effective remaining means for the federal government to undermine state drug laws—federal law enforcement.

A. De Jure *Possibilities to Reconcile the Conflict of Laws*

Several federalism doctrines—the most apparent of which include legislative preemption, federal commandeering, and Congressional conditional spending—have been suggested as the vehicle by which the federal government can ensure that either (1) state laws conform to the federal marijuana ban, or (2) state officials continue to assist in executing the federal proscription of medical marijuana in spite of state laws that would otherwise allow it. However, this Part argues that state allowances of medical marijuana will remain immune to attempts by the federal government to subvert them through such federalism doctrines as those listed above. In other words, the federalism doctrines of preemption, commandeering, and conditional spending are not an effective means for the federal government to *de jure* undermine state laws.

1. Commandeering

Though it has not attempted to do so, Congress would not be able to compel California to subvert its own medical marijuana legislation by requiring the state to expend its own funds to carry out the federal ban. The so-called "anti-commandeering" doctrine prevents the federal government from requiring states to pay for a federal policy.[50] Nor would the federal government be able to commandeer state officials to enforce or administer the CSA because of the same principle.[51] While the option of federal commandeering is easily dismissed as unconstitutional, it is important to note this given that the federal drug laws were designed as a cooperative scheme the federal drug laws. Indeed, the states do willingly assist in the enforcement of federal and state drug laws, often in exchange for federal resources, but the anti-commandeering doctrine makes clear that they cannot be forced to do so.

2. Preemption

The California medical marijuana laws would not be subject to principles of federal preemption. The CSA explicitly states:

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49 *See supra* text accompanying note 47.

50 New York v. United States, 505 U.S. 144, 202–03 (1992).

51 Printz v. United States, 521 U.S. 898, 913–17 (1997).

> No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.[52]

Therefore, in order for a state medical marijuana law to be preempted by the federal scheme, it would have to be in direct conflict with the federal ban.[53] Thus far, courts have not read the CUA or MMP as directly conflicting with the CSA.[54] The basic rationale for this is that California drug laws do not positively encourage or require the use of medical marijuana (which may result in a direct conflict with the CSA); rather, they prevent the *state* executive branch from prosecuting the limited usage of marijuana for medical purposes as a *state*—as opposed to a federal—crime.[55] Preemption also does not apply because the California laws do not purport to provide an exemption or immunity from prosecution under the federal drug laws.[56]

Various California state courts have also ruled that the CUA and MMP are not preempted by federal drug laws like the CSA under a very similar rationale as the federal courts.[57] This is also the affirmative position taken by the

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[52] 21 U.S.C. § 903 (2012).

[53] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992); *In re* Tobacco Cases II, 163 P.3d 106 (Cal. 2007).

[54] *See* Gonzales v. Raich, 545 U.S. 1 (2005) (upholding the constitutionality of the CSA as applied to federal drug offenses acting in compliance with California state law, and not making a ruling on the issue of preemption); *see also* Mikos, *supra* note 16, at 9.

[55] *See* Arizona v. United States, No. CV 11-1072-PHX-SRB (D. Ariz. Jan. 4, 2012) (upholding, despite contrary federal law, an Arizona state voter referendum legalizing the limited sale and use of medical marijuana); United States v. Stacy, 734 F. Supp. 2d 1074, 1079 n.1 (S.D. Cal. 2010) ("The federal government's enforcement of federal drug laws does not *preempt* state law. California is free to pass and enforce its own laws regarding medical marijuana."); United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1094 (N.D. Cal. 1998) ("Indeed, Proposition 215 on its face purports only to exempt certain patients and their primary caregivers from prosecution under certain *California* drug laws . . . ."); *but see* United States v. Landa, 281 F. Supp. 2d 1139, 1143–45 (N.D. Cal. 2003) (suggesting, with regard to an issue of a departure from sentencing guidelines, that California law permitting limited use of medical marijuana could be preempted by federal law because it could compromise federal interest in discouraging marijuana use).

[56] *Cannabis Cultivators Club*, 5 F. Supp. 2d at 1094.

[57] *See* Qualified Patients Ass'n v. City of Anaheim, 115 Cal. Rptr. 3d 89 (Ct. App. 2010) (holding that state laws decriminalizing possession of marijuana for medical purposes are not preempted by federal laws); Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461 (Ct. App. 2008) (holding that the CUA and the MMP's identification card program are not preempted by the CSA because they do not positively conflict with the federal law nor impede the objectives behind the CSA); City of Garden Grove v. Superior Court, 68 Cal. Rptr. 3d (Ct. App. 2007) (re-

California Attorney General, who has stated that neither the CUA nor the MMP conflicts with the federal CSA because in enacting those state laws, "California did not 'legalize' medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition."[58] In that regard, the Attorney General recommends that "state and local law enforcement officers not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws."[59]

Also, it has been argued that even if courts would hold that the CSA preempts some aspects of the California medical marijuana laws, the anti-commandeering doctrine may block the preemption or prevent it from having any affect. The rationale proceeds as follows: the CUA and MMP are laws that prevent the California state government from taking action; namely, they prevent California law enforcement officials from prosecuting and punishing those who engage in medical marijuana activity as an exception to the state ban on marijuana, generally. Striking the CUA or MMP from the California Code—as preemption would do, rendering them unconstitutional vis-à-vis the Supremacy Clause—would result in re-instating the medical marijuana ban at the state level. Therefore, it can be argued, such preemption would in fact be an unconstitutional commandeering if the federal government were to require California to implement legislation and take executive action against medical marijuana.[60]

3. Conditional Spending

In theory, Congress could coax the California state legislature to repeal the medical marijuana laws or enforce the CSA through its conditional spending powers.[61] For example, if California retains the CUA and MMP and continues to fail to prosecute users and distributers of medical marijuana, Congress could threaten to revoke federal monetary assistance to state drug enforcement agents or even to take money away from anti-drug programs in public

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turn of seized marijuana pursuant to the MMP was not precluded by principles of federal preemption). *But see* Pack v. Superior Court, 132 Cal. Rptr. 3d 633, 651 (Ct. App. 2011) (finding that California ordinances which "establish[ ] *a permit scheme* for medical marijuana collectives stand[ ] as an obstacle to the" CSA and thus are preempted by the federal law), *rev granted* 268 P.3d 1063 (2012).

[58] EDMUND G. BROWN, JR., ATTORNEY GEN., CALIF. DEP'T OF JUSTICE, *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*, Aug. 2008, at 3, *available at* http://medicalmarijuana.procon.org/sourcefiles/Brown_Guidelines_Aug08.pdf.

[59] *Id.* at 4.

[60] Professor Mikos explains this idea in great detail in Mikos, *supra* note 10, and in Mikos, *supra* note 16, at 10–12.

[61] *See* South Dakota v. Dole, 483 U.S. 203 (1987).

schools.[62] However, this is highly unlikely considering that the prosecution of drug crimes is executed almost entirely by state agents, as is explained in the next subpart of this Article.[63] Revoking drug enforcement-related funding would likely have an overall negative effect on the federal government's drug wars. Furthermore, it has been argued that, given the extremely popular support for medical marijuana laws and exemptions, Congress would be unlikely to pass legislation to that effect.[64] In fact, Congress has rejected proposed legislation which would effectively divert federal grants from state drug authorities to federal authorities in states that have adopted medical marijuana laws.[65]

B. Federal Executive Law Enforcement

Notwithstanding the arguments that constitutional limits on federal preemption, commandeering, and conditional spending would not allow the federal government to circumvent California's medical marijuana laws, the federal government still has another means at its disposal to subvert the state drug laws: enforcing the CSA itself. No constitutional barrier would likely confront this option as the federal executive branch is charged with the task of enforcing federal laws, like the CSA, within states.[66]

It is doubtful, however, that this strategy would prove effective. In his study on this subject, Professor Robert Mikos concluded that the federal government simply "does not have the resources to impose [CSA sanctions] frequently enough to make a meaningful impact on proscribed behavior."[67] Professor Mikos cites various DOJ statistics in reaching this conclusion. First, only about 4,400 federal law enforcement agents work for the DEA, or about 4% of all federal law enforcement agents.[68] Next, federal agents only account for about 30,000 annual drug arrests—roughly 7,000 of these are for marijuana—a number which Mikos calculates to be 1.6% of all drug arrests and less than 1% of all arrests for marijuana-related violations.[69] Furthermore, he estimates that

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62 *See id.* (allowing Congress to impose conditional spending as long as the conditions are related to a legitimate federal interest particular to the spending).

63 *See infra* Part III.B.

64 Mikos, *supra* note 10, at 1461–62 (citing that over 70% of the population supports medical exemptions to marijuana bans and claiming that President Obama would likely veto Congressional measures to withhold federal funds from states that have such exemptions).

65 H.R. 2086, 108th Cong, 149 Cong. Rec. H8962 (2003); Mikos, *supra* note 10, at 1462 & n.146.

66 *See* U.S. CONST. art. II, § 1, cl. 1.

67 Mikos, *supra* note 16, at 19.

68 *Id.* (citing BUREAU OF JUSTICE STATISTIC, U.S. DEP'T OF JUSTICE, *Drugs and Crime Facts* (August 17, 2009), http://www.ojp.usdoj.gov/bjs/dcf/enforce.htm).

69 BUREAU OF JUSTICE STATISTIC, U.S. DEP'T OF JUSTICE, *Drugs and Crime Facts* (August 17, 2009), http://www.ojp.usdoj.gov/bjs/dcf/enforce.htm); *Id.* (citing FEDERAL JUSTICE STATISTICS RESOURCE CENTER, *Persons Arrested and Booked by Offense*, 2007,

14.4 million people in the United States regularly use marijuana each year and about 1.4 million do so "legally" under a state exemption for medicinal marijuana.[70] Finally, Mikos concludes, in a world where states would not cooperate with the enforcement of the CSA's medical marijuana prohibitions, federal authorities would be able to discover and penalize only 0.05 % of medical marijuana infractions.[71] As such, the federal government's going-it-alone, so to speak, is not likely to make a sizeable dent in the reduction of medical marijuana usage, especially considering that "many deem it a life-changing medicine."[72]

Federal reliance on state agents in eradicating marijuana and other drugs could be one of the reasons for the CSA's language that expressly bars field preemption.[73] If Congress so intended or desired, it could have written the CSA to occupy the entire field of drug enforcement, thereby preventing the states from enacting their own drug-related criminal laws.[74] However, if this were the case, drug enforcement efforts would be all but futile: As explained earlier, the federal government hardly has the resources or know-how to pursue local drug crimes and the anti-commandeering doctrine would prevent Congress from conscripting state enforcement agents. Therefore, allowing states to dictate their own drug enforcement and regulatory policy, as the CSA indeed does, is essential to the CSA's mission of drug prohibition.

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http://fjsrc.urban.org/var.cfm?ttype=one_variable&agency=USMS&db_type=ArrestsFed&saf=IN.

70 *Id.*

71 *Id.*

72 *Id.* Professor Mikos also notes that federal efforts to shut down dispensaries and other large suppliers of medical marijuana have and would continue to prove futile. *See id.* at 20–21. This issue is explored *infra* Part IV.

The notion that the federal government relies on state and local law enforcement to execute the ban on marijuana and other drugs has been acknowledged by the federal government. In a recent memorandum issued in August 2013, Deputy Attorney General James Cole wrote the following on the subject:

> [T]he federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities . . . .

Cole Memo, *supra* note 9. For more on Cole's 2013 memorandum, see *infra* text accompanying notes 119–123.

73 21 U.S.C. § 903 (2012) ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State . . . .").

74 In other words, Congress could have expressly preempted the entire field of drug regulation. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992).

IV. SHIFTING IN FEDERAL EXECUTIVE ENFORCEMENT POLICY: A THREAT TO COOPERATIVE FEDERALISM

This Article now turns to the situation on the ground, exploring the ways in which the federal executive—through efforts of the DEA and DOJ—has sought to enforce the federal drugs ban on medical marijuana despite its limited legalization in California since the passage of the CUA in 1996. This Part then argues that these changes in federal enforcement policy threaten state autonomy and federalism itself because they unfairly subject the states to the whims of the federal government. This is especially true in an area—drug enforcement—with extremely limited federal resources, and which, arguably, was envisioned as a joint state-federal cooperative enforcement scheme. In other words, these federal executive fluctuations are a threat to cooperative federalism.

A. Recent Changes in Federal Enforcement of the CSA

June 29, 2011, marks a mid-Obama Administration shift in the federal executive policy concerning enforcement of federal drug laws against distributors and dispensaries operating in full compliance with state regulations. On that date, the DOJ released the Cole Memo, which sought to clarify confusion among United States Attorneys regarding the Ogden Memo.[75] Specifically, the Cole Memo revitalized the drug enforcement focus to prosecution of "commercial operations cultivating, selling or distributing marijuana," making no distinction between the cultivation, sale, or distribution of marijuana for non-medical purposes and that for medical purposes.[76] The memo also stated that the illegality of medical marijuana at the federal level—as well as compliance with state laws—provides no defense from federal prosecution and punishment.[77] Finally, in a foreshadow of the reality to come in the next months, the Memo noted that individuals as well as banking institutions "who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws."[78]

Since the Cole Memo, the federal government markedly shifted its policy and execution of drug laws in California, an about-face which has resulted in a crackdown some commentators consider to be more severe than the pre-

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75 Cole Memo, *supra* note 9.

76 *Id.*

77 *Id.* ("Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA.").

78 *Id.*; *see* text accompanying *infra* note 88.

Ogden Bush Administration policy.[79] The most pointed illustration of this new policy was a press conference on October 7, 2011, during which four of the top United States Attorneys in California announced a series of new measures they were planning to undertake to combat the spread of medical marijuana.[80] The group announced that distribution cooperatives have availed themselves of the CUA and MMP in order to earn profits on the sale of medical marijuana.[81] They also iterated that compliance with state laws is not a defense or justification for immunity from federal prosecution.[82] The measures the group outlined included filing civil lawsuits against owners of property that allow the distributors to operate, in addition to filing criminal charges.[83]

Right after the press conference, federal law enforcement agents began to take increased action. Since October, federal agents have closed nearly two-thirds of the more than 200 medical marijuana distributors in San Diego.[84] Within a month after the press conference, sixteen California dispensaries received warning letters from federal prosecutors to stop sales or risk criminal charges or property seizure.[85] The U.S. Attorney in San Diego announced that she would target media outlets that advertise for medical marijuana dispensa-

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79 *See, e.g.*, Dickinson, *supra* note 6 ("[O]ver the past year, the Obama Administration has quietly unleashed a multiagency crackdown on medical cannabis that goes far beyond anything undertaken by George W. Bush."); Joshua Sabatini, *Obama 'Worse' than Bush, Clinton on Pot, Lawmaker Says*, S.F. EXAMINER (Oct. 7, 2011), http://www.sfexaminer.com/sanfrancisco/obama-worse-than-bush-clinton-on-pot-state-lawmaker-says/Content?oid=2183172 ("Today's announcement by the Department of Justice means that Obama's medical marijuana policies are worse than Bush and Clinton." (quoting California Assembly member Tom Ammiano)); Jacob Sullum, *Bummer: Barack Obama Turns Out to Be Just Another Drug Warrior*, REASON (Oct. 2011) *available at* http://reason.com/archives/2011/09/12/bummer ("[M]edical marijuana raids have been more frequent under Obama than under Bush, when there were about 200 over eight years.").

80 *See* Michael B. Marois & Christopher Palmeri, *U.S. Takes Aim at California's $1 Billion Marijuana Dispensaries*, BLOOMBERG BUSINESSWEEK (Oct. 8, 2011), http://www.businessweek.com/news/2011-10-08/u-s-takes-aim-at-california-s-1-billion-marijuana-dispensaries.html.

81 *Id.*

82 *Id.*

83 Daniel B. Wood, *Showdown in California over Medical Marijuana, as Feds Crack Down*, CHRISTIAN SCIENCE MONITOR (Oct. 7, 2011), http://www.csmonitor.com/USA/Justice/2011/1007/Showdown-in-California-over-medical-marijuana-as-feds-crack-down.

84 Daniel B. Wood, *Confusion Reigns over Medical Marijuana as States and Feds Clash*, CHRISTIAN SCIENCE MONITOR (Dec. 13, 2011), http://www.csmonitor.com/USA/Justice/2011/1213/Confusion-reigns-over-medical-marijuana-as-states-and-Feds-clash.

85 Wood, *supra* note 83.

ries.[86] And most recently, federal authorities in Oakland raided four sites of Oaksterdam University—an organization on the front lines of the movement to legalize, tax, and regulate medical and recreational marijuana.[87] Other executive departments have come to the aid of the DEA and DOJ: The Treasury Department has pressured banks to close accounts of medical marijuana businesses; the IRS has imposed additional taxes on dispensaries; and the Bureau of Alcohol, Tobacco, Firearms and Explosives has ruled that card-carrying patients who receive medical marijuana cannot purchase firearms.[88]

B. The Threat to Cooperative Federalism

As was shown in Part III.A, the state medical marijuana laws are here to stay. Due to the state-federal cooperative aspect of the CSA, it is unlikely that Congress will attempt to preempt the state drug laws, and there have been no inklings that federal appellate courts will find an implied preemption.[89] Moreover, it remains unlikely that the federal government will be able to commandeer or coax the state executive agencies into increasing enforcement or abandoning the state policies regarding medical marijuana.[90] With reconciliation unlikely to come about via the federal legislature or judiciary, the federal executive has attempted to subvert the state medical marijuana laws through increased federal enforcement. This attempt, however, is an unsustainable, short-term fix to reconcile the conflicting state-federal laws because the federal government simply does not have enough resources to continue prosecuting all medical marijuana dispensaries acting in compliance with California state law.

Therefore, the Cole Memo's federal policy shift and increased federal enforcement of the CSA can only be seen as an attempt to disrupt state medical marijuana laws through the federal executive branch. The policy of unpredictable, increased enforcement has resulted in antagonizing states like California which were designated—under the CSA and comprehensive federal drug policy—as allies in fighting the War on Drugs. Examples of this range from the idiosyncratic to the more serious. Pertaining to the former category, after an increase in raids on California medical marijuana dispensaries in the early years of the Bush Administration, the mayor and several city council members of

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86 Michael Montgomery, *Feds to Target Radio, Newspapers for Medical Marijuana Ads*, CAL. WATCH (Oct. 12, 2011), http://californiawatch.org/dailyreport/feds-target-radio-newspapers-medical-marijuana-ads-13049.

87 Matthew Artz, Paul Thissen & Harry Harris, *Feds Raid Several Oakland Medical Marijuana Sites*, MERCURY NEWS (Apr. 3, 2012, 8:17 AM), http://www.mercurynews.com/alameda-county/ci_20307177/.

88 Julian Brookes, *Where Does Obama Stand on the Medical Marijuana Crackdown?*, ROLLING STONE (Nov. 7, 2011, 1:11 PM), http://www.rollingstone.com/politics/blogs/national-affairs/where-does-obama-stand-on-the-medical-marijuana-crackdown-20111107.

89 *See supra* Part III.A.

90 *See supra* Part III.A.

Santa Cruz observed a medical marijuana giveaway, specifically in protest of a federal raid on a local cannabis collective.[91] More seriously, though, in 2008, California state legislators introduced a bill that would bar state law enforcement officials from assisting federal executive agents in executing the federal drug policy that diverges from state law.[92] And, as described, the official policy of the California Department of Justice is also one of non-cooperation:

> In light of California's decision to remove the use and cultivation of physician-recommended marijuana from the scope of the state's drug laws, this Office recommends that state and local law enforcement officers *not arrest individuals or seize marijuana under federal law* when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws.[93]

In response to a statement by a spokesman for the Los Angeles U.S. Attorney General that "[a]t the end of the day, California law doesn't matter," the California State Attorney General expressed concern that "an overly broad federal enforcement campaign will make it more difficult for legitimate patients to access physician-recommended medicine in California."[94]

In the context of the CSA and nationwide drug enforcement, cooperation between the state and federal governments is crucial. Federalism in this sense, can be viewed as a cooperation between the states and the federal government, or, as noted, what one scholar characterizes as a "state-federal partnership in carrying out federal policy."[95] The term "cooperative federalism" is particularly *apropos* in this context, given the federal government's dependency on state enforcement and regulatory efforts to carry out the CSA.[96] The federal executive's disruption of the state drug enforcement and regulatory scheme abrogates the cooperative effort whereby the state and federal government have a unity of interests—for example, enforcing the marijuana prohibition against non-medical recreation users or users and distributors of other drugs that re-

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91 Charlie LeDuff & Adam Liptak, *Defiant California City Hands Out Marijuana*, N.Y. TIMES, Sept. 18, 2002, at A22, *available at* http://www.nytimes.com/2002/09/18/us/defiant-california-city-hands-out-marijuana.html.

92 A.B. 2743, 2008 Assemb., Reg. Sess. (Cal. 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2701-2750/ab_2743_bill_20080523_amended_asm_v97.html; *see also* Bulman-Pozen, *supra* note 10, at 1283 n.98.

93 Brown, *supra* note 58 (emphasis added).

94 Tim Fernholz, *Why Has the Obama Administration Declared War on Medical Marijuana?*, NEW REPUBLIC (Nov. 9, 2011), http://www.tnr.com/article/politics/97203/Obama-medical-marijuana-crackdown.

95 NUGENT, *supra* note 11, at 170.

96 *See supra* text accompanying note 11.

main prohibited on both the federal and state levels. In essence, the federal executive's unpredicted and unrestrained shifts in enforcement policy—with their disruption of the state regulatory scheme and antagonizing of the state governments—threaten cooperative federalism. If federalism is to be viewed as a cooperation between dual-sovereigns, then increased federal enforcement measures can even be viewed as a threat to federalism itself. Some scholars have even deemed this decriminalization and regulation of medical marijuana an example of "uncooperative federalism," where states like California attempt to assert their autonomy vis-à-vis the federal government despite the fact that the federal drug laws were set up as a state-federal cooperative enforcement scheme.[97]

V. COOPERATIVE FEDERALISM CONCERNS IN LIGHT OF THE RECENT LEGALIZATION OF RECREATIONAL MARIJUANA IN TWO STATES

While not central to the ultimate mission of this Article—to reconcile state laws permitting medical marijuana with the categorical federal ban on the drug—this Part briefly addresses the recently passed propositions in Colorado and Washington that effectively legalized certain quantities of marijuana for non-medical, recreational purposes. Essentially, the conflict between the laws permitting medical marijuana in 21 states (as well as in the District of Columbia) and the CSA is the same as the conflict between the federal ban and the new laws permitting recreational marijuana in Washington and Colorado. Both conflicts create zones of nebulous legality, a situation where an activity is permitted (and, arguably, encouraged) by the state government and at the same time criminally forbidden (and punishable) by the federal government.[98] This Article primarily seeks to explore the situation with medical marijuana; however, it is important to address a similar situation in light of the new laws in Colorado and Washington.

As a result of the 2012 Election, Colorado and Washington have become the only two states to legalize marijuana for recreational purposes. On November 6, 2012, voters in both states passed ballot referenda that permit the possession, cultivation, distribution, and sale of limited amounts of marijuana

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[97] Bulman-Pozen, *supra* note 10, at 1283–84 (noting that the federal drug enforcement actually *depends* on state law enforcement, a policy shown by the fact that approximately 99% of marijuana arrests are made by state and local law enforcement officials).

[98] Because of the similarity of the conflict, this Article suggests that the analyses of the issue and proposed solution will be the same or similar for the federal conflict with state laws permitting medical marijuana as they are for the new state laws permitting recreational marijuana. For example, Part III explores whether the federal methods of preemption, conditional spending, and commandeering could prove as a viable means of resolving by doing away with the state laws permitting medical marijuana in one way or another. The same analysis—it could be proposed—could apply to the new recreational marijuana laws. The same could be said for Part VI, which proposes a federal carve-out exemption to the CSA for states with laws that permit or regulatory schemes that encourage the usage of marijuana—whether medical or recreational.

for personal and recreational use.[99] In both states, the already-existing medical marijuana-related laws[100] will remain intact.

Voters in Washington passed Washington Initiative 502, a ballot measure which purported to remove state-law prohibitions of marijuana and allow for its possession in limited quantities.[101] The initiative went into effect on December 6, 2012.[102] Acting as an amendment to the Revised Code of Washington, Initiative 502 will permit adults aged 21 years and older to legally possess 1 ounce of useable marijuana, 16 ounces of marijuana-infused solid food, and 72 ounces of marijuana-infused liquid product.[103] The initiative allows licensed marijuana-related businesses to sell the drug regulated by the Washington State Liquor Control Board, which has until December 1, 2013, to establish the remainder of the related rules and regulations.[104]

Similarly, voters in Colorado approved a ballot measure[105] to amend the state constitution to allow for the personal use and regulation of marijuana under a scheme similar to the one regulating alcohol.[106] Colorado Amendment 64 amended the state constitution in order to allow the limited cultivation, possession, sale, and consumption of marijuana for recreational purposes.[107] The Amendment prescribes penalties for driving under the influence of marijuana that are similar to the penalties for driving under the influence of alcohol.[108] On

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[99] *See* COLO. CONST. art. XVIII, § 14, *available at* http://www.fcgov.com/mmj/pdf/amendment64.pdf (proposed as, "Colorado Amendment 64"); 2013 Wash. Legis. Serv. ch. 3 (I.M. 502) (West) (Initiative Measure-Marijuana-Legalization and Regulation).

[100] COLO. CONST. art. XVIII, § 14; WASH. REV. CODE § 69.51A.005 (2013).

[101] *See* Letter from Jeffrey T. Even, Deputy Solicitor Gen. of the State of Wash., to The Honorable Sam Reed (July 15, 2011), *available at* http://www.newapproachwa.org/sites/newapproachwa.org/files/I-502%20(marijuana)%20BT%20and%20Summary.pdf.

[102] WASH. STATE LIQUOR CONTROL BD., FACT SHEET: INITIATIVE 502'S IMPACT ON THE WASHINGTON STATE LIQUOR CONTROL BOARD (2012), *available at* http://www.liq.wa.gov/publications/Marijuana/I-502/Fact-Sheet-I502-11-7-12.pdf.

[103] *See* 2013 Wash. Legis. Serv. ch. 3 (I.M. 502) (West) (Initiative Measure-Marijuana-Legalization and Regulation); AM. CIVIL LIBERTIES UNION of WASH., I-502: WASHINGTON'S NEW MARIJUANA REGULATION LAW: FREQUENTLY ASKED QUESTIONS, (2012), *available at* http://www.aclu-wa.org/sites/default/files/attachments/Marijuana%20I-502%20FAQs%20-%20110712.pdf.

[104] *Id.*

[105] COLO. CONST. art. XVIII, § 14, *available at* http://www.fcgov.com/mmj/pdf/amendment64.pdf (proposed as "Colorado Amendment 64").

[106] *See* John Ingold, *Colorado Marijuana Measure's Backers, Foes Buoyed by Out-of-State Support*, DENVER POST (June 11, 2012, 1:00 AM), http://www.denverpost.com/ci_20828371/out-state-support-buoys-backers-foes-colorado-marijuana.

[107] COLO. CONST. art. XVIII, § 16.

[108] *Id.*

December 10, 2012, Governor John Hickenlooper signed the measure, whereby it officially became part of the state's constitution.

The analysis as to whether these laws are legal in the face of the CSA would be virtually identical to the analysis with regard to laws permitting medical marijuana.[109] First, as noted in Parts II.A.1 and II.A.3, it is unlikely that the federal government could or would use commandeering or conditional spending to subvert the new recreational marijuana laws in Washington and Colorado.[110] Commandeering would likely prove unconstitutional.[111] The federal government has not proposed revoking federal drug enforcement-related funding so as to coax the states to do away with these laws. It is unlikely that the federal government would take such an action, especially considering the degree to which the federal government relies on the states to assist in the enforcement of the CSA.[112]

Whether these measures would be preempted by the CSA is more of an unsettled legal issue, in light of the Supreme Court's hesitation to decide that issue in *Raich*.[113] However, the expansion of legalization of recreational marijuana by Washington Initiative 502 and Colorado Amendment 64 might prove more of an affront to the CSA than the medical marijuana laws, which were limited to niche usage of the drug.[114] These two laws could prove fodder for a

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109 *See supra* Part III.

110 *See supra* Parts III.A.1, III.A.3.

111 *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

112 *See supra* Part III.B.

113 *See* 545 U.S. 1 (2005).

114 The issue as to whether California's medical marijuana laws are preempted was explored in Part III.A.2, *supra*. While that section concluded that the California CSA has not, as of yet, been preempted by federal law, the issue in other states is still up for debate. For example, the Arizona Attorney General released a statement suggesting that the provisions of the Arizona medical marijuana law that authorizes the growing or distribution of marijuana would be preempted, but the state's issuance of identification cards for that purpose would not. *See* Re: Preemption of the Arizona Medical Marijuana Act (Proposition 203), Op. Att'y Gen. No. I12-001 (2012), *available at* https://www.azag.gov/sites/default/files/sites/all/docs/Opinions/2012/I12-001.pdf; Tom Horne, Ariz. Att'y Gen., Press Release, Medical Marijuana AG Opinion Released, *available at* https://www.azag.gov/press-release/medical-marijuana-ag-opinion-released. The Attorney General of Michigan reached the same conclusion in an advisory opinion released November 10, 2011. *See* Michigan Medical Marihuana Act: Return of Marihuana to Patient or Caregiver Upon Release from Custody, Op. Att'y Gen. No. 7262 (2011), *available at* http://www.ag.state.mi.us/opinion/datafiles/2010s/op10341.htm. The Oregon Supreme Court took a similar stance in deciding that Congress could have the power to preempt the Oregon medical marijuana law because the law authorizes conduct that has been prohibited by federal law. *See* Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230 P.3d 518, 533–34 (Or. 2010).

test case of preemption in the federal courts, considering the press and buzz they have garnered in the months following the election.[115]

What is certain, as with the medical marijuana situation in California, is the uncertainty with which the federal enforcement branch will approach these new measures in Washington and Colorado. Immediately after the passage of the Washington and Colorado ballot measures, the DOJ released a statement, in which the Executive Branch unequivocally asserted that the newly approved laws would have no effect on the federal ban under the CSA.[116] Even Colorado governor John Hickenlooper echoed this sentiment in his infamous "Cheetos or Goldfish" comment which expressed concern about federal enforcement of the CSA in spite of Colorado Amendment 64.[117] President Obama, in an echo, perhaps, of the Ogden Memo, stated that federal authorities should not target recreational users in Washington and Colorado who are acting within the state laws and regulatory schemes.[118]

Sure enough, on August 29, 2013, Deputy Attorney General James Cole released yet another memorandum to United States Attorneys this one containing the simple subject line "Guidance Regarding Marijuana Enforcement."[119] This memorandum acknowledges the prior two (October 2009 and June 2011) and seeks to update federal marijuana enforcement policy in light of the Washington and Colorado initiatives. Echoing the Ogden Memo of 2009, this memo asserts that the Department of Justice "is . . . committed to using its limited investigative and prosecutorial resources to address the most significant

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[115] Jonathan Martin, *State Could Be Test Case in Marijuana Legalization*, SEATTLE TIMES (Sept. 23, 2012, 10:17 AM), http://seattletimes.com/html/localnews/2019235344_marijuana23m.html; Jacob Sullum, *Can the Feds Stop Colorado and Washington from Legalizing Pot?*, REASON (Nov. 12, 2012, 1:20 PM), http://reason.com/blog/2012/11/12/can-the-feds-stop-colorado-and-washingto.

[116] On November 7, 2012, DOJ spokesperson Nanda Chitre said, "The Department's enforcement of the Controlled Substances Act remains unchanged. In enacting the Controlled Substances Act, Congress determined that marijuana is a Schedule I controlled substance. We are reviewing the ballot initiatives and have no additional comment at this time." *See* Byron Tau, *DOJ: Federal Marijuana Enforcement Remains "Unchanged,"* POLITICO 44 (Nov. 7, 2012, 2:57 PM), http://www.politico.com/politico44/2012/11/doj-federal-marijuana-enforcement-remains-unchanged-148901.html.

[117] The full statement, posted on Governor Hickenlooper's Facebook page on the evening of Election Day, November 6, 2012, at 10:29 p.m., was: "'The voters have spoken and we have to respect their will . . . . This will be a complicated process, but we intend to follow through. That said, federal law still says marijuana is an illegal drug so don't break out the Cheetos or gold fish [*sic*] too quickly.'" *See* Rachel Weiner, *Hickenlooper on Colorado Pot Vote: 'Don't Break out the Cheetos,'* WASH. POST (Nov. 7, 2012, 12:05), http://www.washingtonpost.com/blogs/post-politics/wp/2012/11/07/hickenlooper-on-amendment-64-dont-break-out-the-cheetos.

[118] *See* Susan Heavey, *Users Should Not Be Targeted in States that Legalized Pot: Obama*, REUTERS (Dec. 14, 2012, 3:02 PM), http://www.reuters.com/article/2012/12/14/us-usa-marijuana-obama-idUSBRE8BD0Q720121214.

[119] Cole Memo, *supra* note 9.

threats in the most effective, consistent, and rational way."[120] The memo goes on to list "certain enforcement priorities that are particularly important to the federal government," which include, for example, preventing marijuana use and possession on federal land and in states where marijuana has not been legalized as well as preventing state-authorized marijuana activity carried out in conjunction with trafficking of other illegal drugs.[121] The memo encourages United States Attorneys to use their prosecutorial discretion in enforcing these priorities and notes that marijuana-related activity in compliance with the Colorado and Washington laws is less likely to threaten those objectives.[122] However, this memorandum reasserts the power of federal prosecutors to enforce the CSA in Washington and Colorado to the fullest extent, even against those acting in compliance with those states' new recreational marijuana laws and regulations.[123]

VI. A PROPOSED EXEMPTION FROM FEDERAL LAW ENFORCEMENT FOR STATE-LEGAL MEDICAL MARIJUANA

When it comes to enforcement of the CSA, the federal government has extremely limited resources. As noted, federal law enforcement only accounts for approximately one percent of all drug-related arrests in the United States.[124] Therefore, as the Ogden Memo indicated, the federal executive must choose to allocate its resources with the understanding that it simply will not be able to arrest and prosecute all offenders of federal drug laws. The federal government has already conceded this: in both the Ogden and Cole Memos the DOJ acknowledged that its "investigative and prosecutorial resources" are "limited" and it must therefore pick and choose which types of federal offenders are worth its resources.[125] The federal government, in essence, relies on the states to assist in the execution of the CSA.[126]

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120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.* ("[N]othing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.").

124 Bulman-Pozen, *supra* note 10, at 1283–84; Mikos, *supra* note 10, at 1464–65.

125 Ogden Memo, *supra* note 1; Cole Memo *supra* note 9. Professor Mikos hypothesizes that if the states did not cooperate with the federal government in enforcing the federal drug laws, only 0.05% of medical marijuana users were by uncovered by federal authorities. Mikos, *supra* note 10, at 1465.

126 *See supra* Part III.B (suggesting that the CSA's lack of field preemption languages shows that the federal government's policy of drug prohibition was designed to be a cooperation with the states).

Because of this reliance, instead of attempting to subvert the state medical marijuana schemes, the federal government should be engaging in a more "cooperative federalism" system by working with the states to prioritize federal enforcement resources in a manner consistent with state policy and regulations. In order to achieve this balance between the state and federal enforcement policies and to restore cooperative federalism, the federal government needs to adopt an enforcement policy with regard to medical marijuana that complies with state laws and regulations. Calling on the federal executive may prove to be futile in prosecuting those who violate the CSA by cultivating, possessing, or distributing marijuana for medical purposes—even in compliance with state laws and regulations—federal law enforcement agents are acting wholly within the scope of their duties and obligation to enforce and uphold the federal CSA. After elaborating on the improbability of executive self-restraint in Part VI.A, Part VI.B proposes that Congress act to restore the balance of cooperative federalism in the realm of nationwide drug enforcement. In order to do this, Congress needs to exempt the applicability of the CSA's proscription of medical marijuana to those acting in compliance with state laws and regulations.

A. The Futility of Internal Executive Restraint

The Ogden-Cole Memos' shift is a poignant illustration of the problems of assigning the task of preservation of cooperative federalism—or federalism in general for that matter—to the Executive Branch of the federal government. Seemingly on a whim, the DOJ and various United States Attorneys can focus and re-focus efforts on medical marijuana distributors acting in full compliance with state laws.

The federal executive policy can be characterized as spottily inconsistent at best and whimsical at worst. In addition to the recent crackdowns in California, federal medical marijuana enforcement policy in Colorado is illustrative of the rampant uncertainty that pervades the issue. In a December 2011 questioning by the House Judiciary Committee of Attorney General Eric Holder, Representative Jared Polis of Colorado asked Holder the following series of questions:

> *Polis*: I wanted to see whether I can get your assurance that our definition of "caregiver" in our state's constitution will be given some deference by the U.S. Attorney General's office.
>
> *Holder*: I'm not familiar with the provision, but what we said in the [Ogden] Memo we still intend, which is that given the limited resources that we have, and if there are states that are . . . that have medical marijuana provisions . . . if in fact people are not using the policy decision that we have made to use marijuana in a way that is not consistent with the state statute we will not use our limited resources in that way . . . .

> *Polis*: [Referring to the recent crackdown in California] I'd like to ask whether our state regulation—our thoughtful state regulation[s]—. . . provide any additional protection to Colorado from federal intervention?
>
> *Holder*: [O]ur thought was that where a state has taken a position, as it passed a law, and people are acting in conformity with the law—not abusing the law, but acting in conformity with it—and again given our limited resources that would not be an enforcement priority for the Justice Department.
>
> *Polis*: Is there any intention of the Department of Justice to prosecute bankers for doing business with licensed and regulated medical marijuana providers in the states?
>
> *Holder*: Again . . . consistent with the notion on how we use our limited resources, again, if the bankers, the people seeking to make the deposits are acting in conformity with state law that would not again be an enforcement priority for . . . the Justice Department.[127]

Within three months after this direct assurance by the head of the DOJ that entities acting in compliance with state law would not be a federal law enforcement priority, a Colorado-based United States Attorney announced that there exists no "safe harbor" for medical marijuana dispensaries acting in compliance with state law because their activities nonetheless remain illegal under federal law.[128] While the issue being addressed concerned dispensaries located within 1,000 feet of schools, the U.S. Attorney's office stated that it is "not possible to answer whether a shop in compliance with state rules and regulations and not located near a school would still face any trouble."[129]

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[127] JaredPolis31275, *Polis Questions AG Holder on Medical Marijuana Enforcement*, YOUTUBE (Dec. 8, 2011), http://www.youtube.com/watch?v=DCNutE9nUVk. President Barack Obama made similar promises. *See, e.g.*, Gary Nelson, *He Favors Long-Term Timber-Payment Solutions*, S. OR. MAIL TRIB. (Mar. 23, 2008), http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20080323/NEWS/803230336 ("As for medical marijuana . . . I think the basic concept of using medical marijuana for the same purposes and with the same controls as other drugs prescribed by doctors, I think that's entirely appropriate . . . . I'm not going to be using Justice Department resources to try to circumvent state laws on this issue.").

[128] Reman Rahman, *U.S. Attorney: No Pot Shop Safe from Federal Enforcement*, ASPEN TIMES, Mar. 3, 2012, *available at* http://www.aspentimes.com/article/20120303/NEWS/120309956/1077&ParentProfile=1058.

[129] *Id.*

At best, the shift from the Holder questioning to the latest Colorado U.S. Attorney letter can be viewed as confusion or uncertainty[130] among federal executive law enforcement. At worst, it can be viewed as a blatant attempt to subvert state medical marijuana laws, undermining popular state policies. However, notwithstanding specific policy-based law enforcement decisions made by the Obama Administration,[131] it still remains the duty of the federal executive branch to uphold federal law.[132] Ultimately, the CSA remains the law of the land, and the executive branch has the constitutional duty to enforce that law.[133] As such, that same governmental branch simply cannot be left to its own devices to preserve federalism and resolve the threat to cooperative federalism posed by the federal-state dichotomy in medical marijuana laws. The experience of the federal executive's inconsistent policy in Colorado, California,[134] and other states with medical marijuana exemptions[135] is a testament to that reality.[136]

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[130] A Colorado lawyer has noted that such "uncertainty" could "bring[ ] an 'entire economic sector of Colorado on its knees.'" *Id.*

[131] i.e., The Ogden-Cole Memos shift.

[132] U.S. CONST. art. II.

[133] *See id.* That federal enforcement agents have the obligation to uphold the CSA has been affirmed by the head of the Executive, President Barack Obama, who has stated the following:

> I can't nullify congressional law. I can't ask the Justice Department to say, "Ignore completely a federal law that's on the books." . . . [W]e put the Justice Department in a very difficult place if we're telling them, "This is supposed to be against the law, but we want you to turn the other way." That's not something we're going to do.

Jann S. Wenner, *Ready for the Fight: Rolling Stone Interview with Barack Obama*, ROLLING STONE (Apr. 25, 2012, 8:00 AM), http://www.rollingstone.com/politics/news/ready-for-the-fight-rolling-stone-interview-with-barack-obama-20120425?page=2.

[134] *See supra* Part III.A; *see also* Complaint, Americans for Safe Access v. Holder, No. 11 CV 5248 (N.D. Cal. Oct. 27, 2011), *available at* http://americansforsafeaccess.org/downloads/ASA_v_Holder.pdf (outlining various initiatives the federal executive has taken with regard to shutting down medical marijuana dispensaries in Northern California).

[135] *See, e.g.*, Bob Christie, *US Attorney Issues Warning Over AZ Medical Marijuana*, ARIZONA DAILY STAR, May 2, 2011 (Arizona); Dominic Holden, *Obama Administration Warns It May Prosecute State Employees if Gregoire Signs Medical Pot Bill*, THE STRANGER (Apr. 14, 2011, 6:53 PM), http://slog.thestranger.com/slog/archives/2011/04/14/obama-adminstration-warns-it-may-prosecute-state-employees-if-gregoire-signs-medical-pot-law (Washington); David Klepper, *US Attorney Issues Warning on Medical Pot Centers*, BOSTON.COM, Apr. 26, 2012, http://www.boston.com/news/local/rhode_island/articles/2012/04/26/ri_gov_us_attorney_meet_on_medical_pot_centers/ (Rhode Island); Matt Voltz, *U.S. Attorney Breaks Silence on Montana Medical Marijuana Probe*, MISSOULIAN, Apr. 23, 2012, http://missoulian.com/news/state-and-regional/u-s-attorney-breaks-silence-on-montana-medical-marijuana-probe/article_7df4fa6a-f260-53b0-9fca-c4c97fed1f64.html (Montana).

[136] Note that it is not the states' responsibility to enforce federal law.

B. *A Congressional Exemption for Medical Marijuana in Compliance with State Law*

Because it appears that the federal executive could not viably preserve the federalism balance, this Article turns to Congress. This Article proposes that Congress act to reconcile the state-federal conflict of laws regarding medical marijuana by creating an exemption from the CSA for medical marijuana usage and distribution in compliance with approved state laws and regulatory schemes. At the most, Congress could amend the CSA to expressly provide the exemption, or, at the very least, pass an act prohibiting the Executive from enforcing the CSA's medical marijuana proscription in states that permit it. Such an exemption would allow states to proceed with their medical marijuana programs while at the same time keeping the drug illegal at the federal level. The result would be that medical marijuana would be presumptively prohibited nationwide, except in states that take affirmative legislative and administrative steps (as some have already done) to legalize it.

It is extremely important to note that this proposal does *not* call for a federal exemption to the CSA for medical marijuana. On one hand, in states like California that elect to legalize medical marijuana, the proposed exemption would allow those states' legislation and regulation to operate unimpeded by federal disruption. This will also allow these states to work with the federal authorities in focusing on the state-federal unity of interests in drug enforcement; for example California state agents will still be able and encouraged to work with their federal counterparts to curb the distribution and possession of drugs that remain illegal on both the federal and state level. On the other hand, in states that wish to keep medical marijuana prohibited, state authorities will continue to cooperate with the federal government to execute the CSA and its state law counterpart.

The reason why this compromise is necessary stems from the so-called "laboratories of experimentation"[137] notion of federalism that a one-size-fits-all fix is not a viable or practicable solution to address an issue that affects over 300 million people with hundreds if not thousands of diverse values, principles, and beliefs. As mentioned, this Article does not purport to opine on the policy values of the legalization of medical marijuana. Rather, this Article argues that if the people or legislature of a state decides on a social issue like medical marijuana, then the federal government should give some deference to those decisions. When it comes to social issues, the state lawmaking process—especially in states that pass laws through popular referenda—is arguably better at achieving the will of the people than is the federal government. State governments are more localized, and thus more apt at deciding how to specifically address a

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[137] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

problem that affects its citizens. The very existence of federalism acknowledges that one solution in one state might not be best for another state, let alone the rest of the country.

A potential hurdle to this proposal is the argument that this would create a federal scheme that would have different consequences in different states. For example, a medical marijuana dispensary in California would not be subject to federal prosecution as would its counterpart (if such a thing existed) in, say, New York. This would, it can be argued, undermine the notion that federal laws are to be uniformly applied across the several states. However, such a Congressional exemption to federal law has been seen before, namely in the realm of social security. In *Charles C. Steward Machine Co. v. Davis*, [138] the U.S. Supreme Court, in an opinion by Justice Benjamin N. Cardozo, upheld a federal tax and spending unemployment compensation program to be applied across the nation as part of the Social Security Act. Built into the federal program was an exception for states that adopted unemployment compensation programs of their own: employers in these states would receive a 90% federal tax credit; employers in states without such comparable programs would not.[139] In upholding the state-specific exemption program as constitutional, Justice Cardozo mused on the importance of having local solutions to local problems. The state-by-state exemption to the Social Security Act—an early example of cooperative federalism—showed that "Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue . . . ."[140] If a state—Alabama, as was the case in *Steward Machine Co.*—created an unemployment tax and spending scheme that was better tailored to fit the needs of its citizens, Congress could very well allow that program to take the place of the broader federal one.[141]

The cooperative federalism principles from the *Steward Machine Co.* opinion are easily applicable to the medical marijuana conflict and the state-specific Congressional exemption to the CSA that this Article proposes. Generally, just like the Social Security Act, the CSA was meant to be a cooperative effort between the federal government and the states. If various states wish to experiment in unique ways to solve the problem of drugs, then Congress indeed can and should defer to those states, just like Congress did with the unemployment tax exemptions at issue in *Steward Machine Co.*[142] Such an exemption to

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138 301 U.S. 548 (1937).

139 *Id.* at 574.

140 *Id.* at 589.

141 *Id.* at 597–98 ("Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received.").

142 *Id.* at 593–94.

the CSA will allow states to work with the federal government while also promoting the general welfare through "local units."[143]

Such a proposal may already be gaining traction among circles of the federal legislature, especially in the aftermath of the 2012 Election. Senator Patrick Leahy of Vermont, Chairman of the Senate Judiciary Committee, has announced that he will hold a hearing on how to reconcile the CSA with the various state medical and recreational marijuana allowances early in the term of the 113th Congress.[144] Among the avenues Senator Leahy has already suggested is the following, which essentially mirrors this Article's federal exception proposal: "One option would be to amend the Federal Controlled Substances Act to allow possession of up to one ounce of marijuana, at least in jurisdictions where it is legal under state law."[145]

In addition, Congresswoman Diana DeGette of Colorado has introduced a bipartisan bill which hints at a similar exemption. The proposed Respect States' and Citizens' Rights Act of 2012 would amend the CSA to "provide that federal law shall not preempt State law."[146] While this bill would not affirmatively carve out an exception to the CSA in states that have allowances for medical and recreational marijuana usage, it would definitively resolve a lingering preemption question.[147] Interestingly, the bipartisan bill has received support and sponsorship from Congressman Mike Coffman who was a staunch opponent of Amendment 64.[148] "I strongly oppose the legalization of marijuana, but I also have an obligation to respect the will of the voters given the passage of this initiative, and so I feel obligated to support this legislation."[149] This line of reasoning is one happily endorsed by this Article, which, as Rep. Coffman appears to do, does not place a policy-judgment on state marijuana laws

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143 *Id.* at 589.

144 Press Release, Patrick Leahy, U.S. Senator, Leahy to Examine Marijuana Policy: Plans Senate Judiciary Committee Hearing Next Year (Dec. 13, 2012), *available at* http://www.leahy.senate.gov/press/leahy-to-examine-marijuana-policy.

145 Letter from Patrick Leahy, U.S. Senator, to Gil Kerlikowske, Director, Office of National Drug Control Policy (Dec. 6, 2012), *available at* http://www.leahy.senate.gov/imo/media/doc/12-6-12%20copy%20PJL%20to%20Kerlikowske%20re%20-%20fed%20drug%20control%20 policy.pdf.

146 H.R. 6606, 112th Cong. (2012), *available at* http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.6606:.

147 *Id.* ("In the case of any State law that pertains to marihuana, no provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of State law on the same subject matter, nor shall any provision of this title be construed as preempting any such State law.").

148 Kurtis Lee, *DeGette Files Bill to Require Feds to Respect Marijuana Law*, THE DENVER POST, Nov. 16, 2012, *available at* http://www.denverpost.com/ci_22011789/colorado-democrats-urge-u-s-attorney-general-marijuana.

149 *Id.*

when analyzing the federalism concerns and quandaries they raise, and offers solutions as to how to reconcile the federal-state conflict.

VII. CONCLUSION: THE VIABILITY OF A STATE-SPECIFIC FEDERAL EXEMPTION

The idea of an exemption from enforcement of the CSA in states that allow for the limited usage of medical marijuana may not be so far-fetched. The expansion of state-by-state medical marijuana exemptions—about forty percent of the states have legalized medical marijuana[150]— supports the notion that the national opinion on the issue is shifting. Additionally, since the passage of the CSA in the 1970s, popular support for medical marijuana exemptions has grown considerably; in several national polls, a strong majority of respondents support the legalization of marijuana for medical purposes.[151]

Furthermore, it should be noted that in 2010 the District of Columbia Council approved a measure that would allow patients to receive medical marijuana from state-regulated dispensaries.[152] After being signed into law by the District's mayor, Congress did not exercise its power to block the law from taking effect as it had done after a similar measure was passed via referendum by 69% of the voters in 1998.[153] On January 1, 2011, the District's medical marijuana law went into effect.[154] Since then, the District's Health Department has selected and approved locations for the medical marijuana dispensaries.[155]

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[150] The current count is 21 states plus the District of Columbia. *See supra* note 26. While an amendment to the federal constitution seems unlikely at the present—21 states being a far cry from the requisite three-fourths mark pursuant to Article V of the Constitution—40% of the states is a considerable figure considering the first of such laws, California's CUA, was only enacted about 15 years ago.

[151] *See, e.g.*, Press Release, Pew Research Center, Public Support for Legalizing Medical Marijuana (Apr. 1, 2010), *available at* http://www.people-press.org/2010/04/01/public-support-for-legalizing-medical-marijuana (73%); Fred Backus, *Poll: Public Supports Medical Marijuana, but Not Full Pot Legalization*, CBS NEWS (Nov. 18, 2011), *available at* http://www.cbsnews.com/8301-503544_162-57327004-503544/poll-public-supports-medical-marijuana-but-not-full-pot-legalization/ (77%); *see generally* NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, *Favorable Medical Marijuana Polls*, NORML, http://norml.org/library/item/favorable-medical-marijuana-polls (last visited September 7, 2013) (chronicling both nationwide and state-by-state polls on medical marijuana).

[152] Ashley Southall, *Washington, D.C., Approves Medical Use of Marijuana*, N.Y. TIMES, May 4, 2010, at A17.

[153] David C. Lipscomb, *D.C. Officials Cautious on Legal Marijuana*, WASH. TIMES, Dec. 10, 2009, *available at* http://www.washingtontimes.com/news/2009/dec/10/council-cautious-on-legal-marijuana/.

[154] *See* D.C. CODE § 7-1671.02 (2013); *see also supra* note 26.

[155] Tisha Thompson & Rick Yarborough, *Potential Medical Marijuana Dispensary Locations Revealed*, NBC WASH. (Apr. 27, 2012), *available at* http://www.nbcwashington.com/news/local/Prospective-Medical-Marijuana-Dispensary-Locations-Revealed-134933443.html.

From a cynical standpoint, the legality of medical marijuana in the seat of the federal government can be viewed as hypocritical: that Congress and the various executive law enforcement agencies that continue to assert the illegality of medical marijuana are turning a blind eye to its usage in its backyard. However, this Article takes the position that the District's medical marijuana law illustrates a changing of the mindset of Congress to one of cooperative federalism for drug regulation. Congress' implicit approval of the District's law—indeed, Congress had full authority to legitimately block it, like it did in 1998—evinces a recognition that a uniform drug policy that applies to each and every semi-autonomous subdivision of the United States may not be what's best for the "general welfare." Hopefully, for the sake of cooperative federalism, the next step will be for Congress to officially recognize this reality and enact an exemption to the federal ban on medical marijuana in states where its usage is legal and regulated.