

What the End of Prohibition May Look Like: Preemption and the Legalization of Marijuana

Authored By Justin Butler

Intern, NORML Legal Committee

George Washington University Law School,

Expected J.D., 2013.

Introduction	2
The Powers of the Federal Government	5
<i>The Commerce Clause</i>	7
<i>Federal Preemption and the Supremacy Clause</i>	10
<i>Marijuana and Federal Preemption</i>	14
<i>The Limits of the Necessary and Proper Clause</i>	16
Where To Go From Here and How To Get There	20
Decriminalization Provisions	20
Regulation and Taxation	25
<i>Regulating Marijuana</i>	26
<i>Taxation of Marijuana</i>	29
Severability and Marijuana Reform	33
Conclusion	39

What the End of Prohibition May Look Like: Preemption and the Legalization of Marijuana

Authored By Justin Butler

Intern, NORML Legal Committee

George Washington University Law School,

Expected J.D., 2013.

At the beginning of the 21st Century, America seems poised to make a serious change in our State and National policies surrounding the use and distribution marijuana. For the first time, a majority of the American public supports not just the decriminalization of marijuana or the medical use of marijuana, but full legalization, including new regulations to allow state governments to tax marijuana sales.¹ Yet, like in many other areas of the law, the federal government remains behind the times in matching the changes state governments have implemented. So far, seven states have decriminalized possession of small amounts of marijuana for recreational use,² and sixteen more, as well as the District of Columbia, have legalized marijuana for medicinal purposes.³ Some of these laws have been crafted and passed by state legislatures, but most have been enacted through popular referenda.⁴ Popular referenda are allowed in 23 states and currently appear to provide the most successful method of achieving marijuana reform at the state level. Since 1972, marijuana legalization has managed to get on to

¹ <http://www.reuters.com/article/2012/01/31/us-usa-marijuana-legalization-idUSTRE80U1Q220120131?feedType=RSS&feedName=topNews&rpc=71>

² California, Colorado, Maine, Massachusetts, Nebraska, and New York. Alaska's State Supreme Court ruled that the State Constitution gives residents the right to possess marijuana for personal use within their residences.

³ Alaska, Arizona, California, Colorado, Delaware, New Jersey, Montana, New Mexico, Oregon, Hawaii, Maine, Michigan, Nevada, Rhode Island, Vermont, and Washington have all legalized marijuana for medicinal use, with various levels of state control. <http://norml.org/marijuana/medical>

⁴ Of the 16 medical marijuana states, 10 states, Alaska, Arizona, California, Colorado, Maine, Montana, Oregon, Michigan, Nevada, and Washington, passed their medical marijuana programs through popular referendum.

eight statewide ballots, with six of these making the ballot since 2000.⁵ Most recently, California's Proposition 19, which would have legalized and taxed the sale of marijuana for recreational purposes, was rejected in 2010 with 54% of voters voting against the proposition.⁶ The elections of November 2012 will see two more full legalization bills placed on the ballot in Colorado and Washington.

Even if these referenda pass, however, there is no doubt that opponents of marijuana legalization, the federal government being opponent number one, will attempt to render these bills inoperative. Federal intervention is almost certain, if the precedent set in federal policy on medical marijuana is any indicator. In the first three years of the Obama administration, the federal government has participated in over 100 raids on medical marijuana dispensaries within states where medical marijuana is legal, even after promising shortly after assuming office to end federal raids on medical marijuana dispensaries that complied with state laws.⁷ In some cities, such as Oakland, the Obama administration's new war on marijuana has wiped out millions of dollars in city tax revenue that would have balanced the budgets of revenue hungry local governments.⁸

Of all of the tactics the federal government could employ to strike back against the public's increasing tolerance of marijuana use, the threat of prosecution against state employees appears to be one of the most effective. Recently, the Department of Justice has begun warning states that their civil servants may not be shielded from liability for their participation in state

⁵ California in 1972 and 2010. Oregon is 1986. Alaska in 2000 and 2004. Nevada is 2002 and 2006. Colorado in 2006. See Appendix 1 for further details.

⁶ Darren Samuelson, "Prop. 19 results: Marijuana Legalization Defeated," <http://www.politico.com/news/stories/1110/44590.html>, Posted on 11-2-10, Last Accessed 4-1-12.

⁷ Dickinson, Tim. "Obama's War of Pot," *Rolling Stone*, March 1, 2012. Accessed on 3/23/12 at: <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216#ixzz1mZRQyCZx>

⁸ In Oakland, the federal government has almost single-handedly wiped out nearly \$31 million in tax revenue. Dickinson, Tim. "Obama's War of Pot," *Rolling Stone*, March 1, 2012. Accessed on 3/23/12 at: <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216#ixzz1mZRQyCZx>

licensing and distribution regimes. U.S. Attorneys in at least six states⁹ have sent letters to the governors of those states threatening federal prosecution of state employees under the Controlled Substances Act.¹⁰ In both Delaware¹¹ and Rhode Island,¹² the governors put a hold on the implementation of medical marijuana programs due to this threat. To ensure that future legalization laws or referenda are upheld as a valid exercise in state power, it is necessary to write the legislation with an understanding of what powers the federal government does, and more importantly, does not have, in forcing states to follow a federal law.

To begin this inquiry, it is necessary to examine the explicit powers the federal government has under existing legislation. On the federal level, the Controlled Substances Act¹³ (CSA) has kept marijuana criminalized as a Schedule I illicit substance since 1970. The CSA was enacted following the striking down of the Marijuana Tax Act by the Supreme Court in 1969 as a violation of defendant's 5th Amendment right against self-incrimination.¹⁴ Implemented to replace the unconstitutional regime previously established by the Marijuana Tax Act, the CSA established five "schedules" for illegal substances based upon:

- (1) the drug's actual or relative potential for abuse,
- (2) current scientific knowledge of the substance and its pharmacological effects,
- (3) the substance's history, current pattern of abuse, and the scope, duration, and significance of abuse,
- (4) the risk the drug poses to public health, and
- (5) the risk of psychic or physiological dependence on the drug,

See 21 U.S.C. §801(c).

⁹ Vermont, Arizona, Colorado, Washington, Rhode Island, and Delaware.

¹⁰ http://www.huffingtonpost.com/paul-argentano/medical-marijuana-obama-b_858204.html

¹¹ <http://norml.org/news/2012/02/16/delaware-federal-threats-halt-efforts-to-implement-state-s-medicinal-cannabis-law> Accessed 3-25-2012.

¹² <http://www.reuters.com/article/2011/09/30/us-marijuana-rhodeisland-idUSTRE78T5LU20110930> Accessed 3-25-2012.

¹³ 21 U.S.C. §§ 801-904 (1976).

¹⁴ *See* *Leary v. US*, 395 U.S. 6 (1969).

Under the professed theory of the CSA, the most hazardous drugs will be controlled the most strictly by their placement in Schedule I, while less harmful drugs will be more loosely regulated pursuant to their placement in Schedule V. Schedule I drugs are tightly regulated and may be dispensed only for research uses. These are the drugs which the DEA has determined have no medicinal use, and possession or distribution of the drugs listed in Schedule I, including marijuana, heroin, LSD, peyote, and psilocybin, come with the most stringent penalties. Schedule II drugs are those substances the government deems dangerous but have government recognized medical uses, such as morphine, Oxycodone, PCP, and cocaine. Schedule III drugs are those used for medical purposes, such as codeine, that may be refilled at a pharmacy without explicit approval from a doctor for each refill. Schedule IV drugs, such as Valium and Equinol, are regulated as Schedule III drugs, with the important exception that importation of these drugs do not require a government permit and the penalty for illicit possession is somewhat less onerous. The Schedule V drugs are the substances which any adult can buy over-the-counter and include drugs such as cough medicine containing Codeine. The penalties surrounding Schedule V drugs are the most lenient. The CSA also gives the Attorney General (now the DEA through re-delegation) the emergency power to place newly discovered drugs into a Schedule temporarily, under §811(h).

The Powers of the Federal Government

The CSA is the principal legal means by which the federal government continues to enforce prohibition, but it does not explain why the federal government has the power to wage the war on drugs. It should be remembered that prior to the 1930's, the federal government required a Constitutional Amendment to implement a national prohibition of an intoxicating

product. At the core of the federal government’s current power in this sphere lie the legal doctrines of preemption and federal supremacy. To determine why the federal government has the right to interfere with any state’s administration of its own medical marijuana laws and to prohibit marijuana at the national level, we must look to three specific provisions of the Constitution: the Commerce Clause,¹⁵ the Supremacy Clause,¹⁶ and the Necessary and Proper Clause.¹⁷ These three clauses, when interpreted together, have provided the federal government with the power to implement many of the most important pieces of federal legislation since the end of the 1930’s, such as the “New Deal” under President Roosevelt, as well as early progressive laws such as the Sherman Anti-Trust Act.¹⁸ As far as marijuana reform is concerned, however, this expansive federal power has provided the federal government a justification, and the power, to enforce national prohibition.

To the lay person, the Constitution may not appear to grant the federal government this vast degree of power. It is in no way intuitive to conclude that Congress’s explicit power to “regulate commerce. . . among the several states” necessarily allows for the government to arrest a otherwise law-abiding citizen for growing four cannabis plants in her basement and consuming the plants within the privacy of her own home. The Constitution, however, is not always as simple as it appears.

¹⁵ The Commerce Clause reads, “[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” U.S. CONST. art. 1, §8, cl. 3.

¹⁶ The Supremacy Clause reads, “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” U.S. CONST. art. 6, cl. 2.

¹⁷ The Necessary and Proper Clause reads, “[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. 1, § 8, cl. 18.

¹⁸ See 24 Stat. 379, 49 U. S. C. § 1, et seq; see also Wickard v. Filburn, 317 U.S. 111, 120 (1942).

The Commerce Clause

The revolution in modern Commerce Clause doctrine began in the 1930's with the recognition that national economic problems, like the Great Depression, required truly national solutions. This revolution came to a head in 1942 when the Supreme Court delivered its fountainhead opinion in the case of Wickard v. Filburn.¹⁹ In that case, a family farmer was fined for producing too much wheat for use on his family's farm. The farmer, however, never sold his excess wheat on the open market, so he challenged the fine, claiming that the government could not ban his production of wheat for personal use because it never entered the national economy. Up until shortly prior to this point, the Commerce Clause was understood to allow Congress only to make laws relating to products for sale that physically traveled between states. This time though, the Court disagreed with the farmer, and extended the powers of the government to regulate the economy to also include the power to regulate any industry that "exerts a substantial economic effect on interstate commerce."²⁰ This power, the Court explained, gives Congress the power to ban even the growth of crops merely for use by one's family because of the possible "cumulative effects" of many individuals participating in the same activity. The goal of the government's ban on growing excess wheat was to raise the price of wheat on the open market. So, under the logic of the Court, no one farmer could be allowed to grow excess wheat, even for their private use, because this excess production, if conducted by thousands of family farmers throughout the country, would negatively affect the price of wheat because these farmers would be using wheat they would otherwise purchase on the open market. By preventing private growth, Congress could achieve their legislative goal of driving up the price of wheat in the national market, thereby "regulating commerce. . . among the states."

¹⁹ 317 U.S. 111 (1942)

²⁰ Wickard, 317 U.S. at 125.

The Court revisited its decision in Wickard twenty-two years later in Katzenbach v. McClung and again expanded the government's power to regulate apparently private action.²¹ In this decision, the Court held that even if discrimination against minorities at restaurants nationwide did not necessarily affect interstate commerce in their opinion, that it did in the opinion of Congress, and that Congress appeared to have a "rational basis" for so believing.²² Since this point in judicial history, Congress has had the power to regulate any aspect of the national economy that may be rationally construed to involve the channels of commerce (such as roads and accommodations), people or products or instrumentalities involved in trade across state boundaries, and all activities that substantially affect interstate commerce.²³

Marijuana, like all other products which are bought and sold, is regulated under the commerce power. The Supreme Court recently applied their "cumulative effects" theory from Wickard to the issue of state-sponsored medical marijuana programs in the case of Gonzales v. Raich.²⁴ At issue in the case was the destruction of six marijuana plants by federal law enforcement officers, that were grown legally under California's medical marijuana law. The plaintiffs in the case claimed that the government's actions went beyond the power provided by the Constitution's Commerce Clause. The Supreme Court, however, disagreed. Like in the Wickard case, the Supreme Court said that Congress has the power to prevent an individual from growing a plant for private, non-commercial, uses as part of "Congress' power to regulate interstate markets for medicinal substances."²⁵ The Court also found that the enforcement of the CSA against a medical patient was rationally related to the legitimate purpose of the CSA, "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled

²¹ 379 U.S. 294 (1964)

²² See Katzenbach, 379 U.S. at 304.

²³ See United States v. Lopez, 514 U.S. 549 (1995).

²⁴ 545 U.S. 1 (2005).

²⁵ See Raich, 545 U.S. at 9.

substances.”²⁶ The Court sided with the government’s attorneys, who claimed that the only way to accomplish these ends was to ban not only the sale or transfer of marijuana across state lines, but also the production and sale of marijuana that will never actually enter into the stream of commerce between states and is intended to be produced and sold within the same state. In deciding the Raich case in particular, the Court went even farther to declare that prohibiting the production of the substance purely for personal use, meaning that there is absolutely no “commerce” involved to regulate, was acceptable. While this may not seem to make sense strictly from the text of the Constitution, it makes sense to the Justices, who examine not only the law itself, but also their previous cases in interpreting what the Constitution “really means.” Under the Court’s interpretation, the government can “regulate purely intrastate activity that is not itself “commercial,” in that [the product] is not produced for sale, if it [rationally] concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”²⁷ In other words, the Court states:

“Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in Wickard, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to “make all Laws which shall be necessary and proper” to “regulate Commerce among the several States.” That the regulation ensnares some purely intrastate activity is of no moment.”²⁸

²⁶ See Raich, 545 U.S. at 12.

²⁷ See Raich, 545 U.S. at 18.

²⁸ See Raich, 545 U.S. at 22.

Federal Preemption and the Supremacy Clause

As the Court explained in Raich, Congress's power to regulate the national economy, and therefore the illicit drug trade, is almost unlimited. But what of States who decide to pursue a different path in attempting to regulate the illicit drug trade? What happens when federal and state laws are in conflict?

Under the Constitution, federal law is always supreme to state laws regulating the same conduct. The Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."²⁹ The basic effects of this clause ensure that states cannot prevent the effectuation of the will of Congress by passing laws that obviously frustrate the purpose of an enacted federal law. When the federal government has passed a law that conflicts with state law, or a state passes a law that conflicts with an already existing federal law, the state law is sometimes "preempted" by the federal law. If a court determines that a state law is "preempted" by a federal statute, then state law is unconstitutional and cannot be enforced by the state. Philosophically, this clause is expected to ensure that our Country stays united and that one state cannot go against the will of the country at-large and therefore undermine majority rule.

When the federal government sues to prevent a state law from taking effect because of a conflict between state and federal law, the first part of any court's analysis will be to determine if there is a conflict, and if there is, what type of conflict exists. This determination is not a simple, "yes, there is a conflict," or "no, there is not a conflict," choice. The main focus of any preemption analysis is the purpose for which Congress enacted the law. As the Supreme Court

²⁹ See U.S. CONST. art. 6, cl. 2.

says, “the purpose of Congress is the ultimate touchstone in every preemption case.”³⁰ The Supreme Court has broken down the types of conflicts that may exist between state and federal laws into three categories: 1) “express” preemption, 2) “implied” or “field” preemption, and 3) “conflict” or “obstacle” preemption. Each of these three types of preemption is intended to categorize the various ways state and federal laws can possibly be in conflict.

“Express” preemption exists when a law passed by Congress contains an express provision stating that the law is intended to supplant all existing state regulation governing the same conduct. For a law to fit within this category, the law must contain the requisite language to overcome the judicial doctrine the “presumption against preemption.” When analyzing the preemption clauses in federal laws, courts are guided by two constitutional principles which make up the so-called “presumption against preemption.” The first consideration is that due to our country’s federal structure (both the federal government and the individual states have the independent power to enact laws to govern the conduct of their citizens) the intent of Congress to regulate the area of conduct named in the law is not presumed to override co-existing state legislation on the same subject. Historically, it was the role of the federal government to regulate matters of national importance, while the states’ traditional sphere of legislation consisted of the power to “legislate for the general health, safety, and welfare” of their citizens.³¹ While these topics are the traditional legislative sphere of the states, Congress can regulate these areas as long as the Constitution gives Congress the power, such as under the Commerce Clause or other broad grants of power.

The second principle stems directly from the first: Because the states have general power under federalism to regulate conduct broadly in their own states, judges should not presume that

³⁰ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

³¹ Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 227 (2000).

national laws override state laws unless Congress shows it's express intent to do so by including an express provision in the text of the national law stating that the law is intended to replace existing state laws on the subject.³² If a court determines that the language in Congress's law expressly overrides similar state laws, then the will of Congress prevails as supreme, and the state law cannot be constitutionally enforced by the state.

Even if Congress does not expressly state that a new federal law overrides existing state law, a federal law may still void a state law through "implied" or "field" preemption. Under this theory of federal supremacy, Congress can block the enforcement of state laws on a particular subject without explicitly stating so in the text of the law if a court determines that Congress's law so completely "occupies the field" through comprehensive regulation that there is no room left for state regulation of the same conduct. This occupation of the field can be inferred to exist when a "scheme of federal regulation ... [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or, in other words, where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."³³ Field preemption also applies in cases where a state attempts to regulate a zone of conduct that has been placed under the sole purview of the federal government by the Constitution, such as regulating commerce with foreign nations, determining immigration policies, enforcing money counterfeiting laws, granting patents, declaring war, and taxing commercial importation of goods.³⁴

The theory behind implied preemption is that when Congress sets out a comprehensive plan for the regulation of a category of conduct, state action going over and above the law in

³² See Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996).

³³ Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

³⁴ See U.S. Const. art. I, §§ 9-10.

setting more stringent regulations may thwart the intent of Congress by imposing dual regulatory standards. When it comes to the complex and often pluralistic political process of federal legislating, courts have recognized that federal silence on an issue is often intentional. Massive comprehensive federal statutes are often the product of political compromises between differing parties, so courts assume that if Congress set certain standards as part of a comprehensive plan to regulate an area, that these standards were the result of the political process and represent the deliberate limits set by Congress to produce the most efficient cost-benefit ratio for regulations of a certain activity. In the past, the principle of implied preemption has been utilized to strike down a variety of state laws including, state sedition laws,³⁵ state laws restricting welfare benefits for legal immigrants,³⁶ state laws allowing for the censoring of televised political speeches,³⁷ and state laws regulating nuclear power plants at a standard higher than the standard imposed by Congress.³⁸

The final category of preemption involves state laws that are overruled and declared unconstitutional by similar federal laws, in that those state laws positively “conflict” with an Act of Congress or, even if they do not directly conflict, those laws that stand as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³⁹ The first subcategory of this third category of preemption, “conflict” preemption, is pretty clear in its demands. When a state passes a law that directly conflicts with a national law, the Supremacy Clause requires that the state law must fail and that the federal law must prevail.⁴⁰ In determining if a state law comes into direct conflict with federal law, courts will seek to

³⁵ Pennsylvania v. Nelson, 350 U.S. 497 (1956)

³⁶ Graham v. Richardson, 403 U.S. 365,

³⁷ Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 497 (1956),

³⁸ See Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 46 U.S. 190, 212 (1983); see also, Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 550 (1978).

³⁹ Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

⁴⁰ See Gibbons v. Ogden, 22 U.S. 1, (1824).

determine if compliance with both laws is impossible, or if following one law would open up the individual to prosecution under the other law.

The second subcategory, “obstacle” preemption, comes into play when a state law or action “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴¹ Crosby v. Nat’l Foreign Trade Council provides a good illustration of how obstacle preemption operates.⁴² In Crosby, the Supreme Court ruled that a Congressional statute empowering the President to “devise a strategy for imposing economic sanctions on Burma to induce it to improve its human rights performance” stood as a basis for preempting and invalidating a Massachusetts law that banned the State’s departments or agencies from contracting with companies who engaged in business with Burma.⁴³ The Court held that the Massachusetts law stood as an obstacle to effectuating the intent of Congress, which was to give the President the flexibility to devise a comprehensive strategy for persuading Burma to improve the human rights conditions within the country.⁴⁴ By taking action on its own, Massachusetts had deprived the President of the ability to be the sole decision maker when it came to sanctioning Burma.

Marijuana and Federal Preemption

It is under “conflict” or “obstacle” preemption that state marijuana distribution systems could run into Constitutional issues. The Controlled Substances Act does not contain an express preemption clause, so there is no express preemption at play. “Field” preemption can also not apply to state laws regulating illicit drugs because it is clear that Congress never intended to

⁴¹ See Louisiana Public Service Com’n v. F.C.C., 476 U.S. 335, 369 (1986).

⁴² 530 U.S. 363 (2000).

⁴³ Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet, and Pamela S. Karlan, *Constitutional Law* 279 (6th ed., Aspen Publishers 2009).

⁴⁴ *Ibid.*

replace all state laws criminalizing illicit drugs, effectively preventing the states from enforcing their own laws criminalizing the possession and distribution of illicit substances. Section 903 of the Controlled Substances Act makes this intent clear: “No provision of [the CSA] 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 . . . and that State law so that the two cannot consistently stand together.”⁴⁵

As the CSA states, preemption of state drug laws under the CSA will only occur if there is a “positive conflict” between the text of the CSA and the text of a state law. Positive conflicts traditionally occur through either “conflict” preemption or “obstacle” preemption. It is clear that any state law which sets up guidelines for the distribution of marijuana is at least an obstacle to, if not in full conflict with, the purposes of the CSA. As the Supreme Court held in Raich, the purposes of the CSA are to “conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.”⁴⁶ In pursuing these ends, Congress has seen fit to ban all marijuana and to criminalize its possession, sale, and manufacture. These purposes, and Congress’s chosen method for pursuing such ends, would be undoubtedly frustrated by a state’s operation of a distribution system for a substance Congress has outlawed. As the Court has already recognized in Raich, the “failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.”⁴⁷ Given this interpretation of the relationship between state laws legalizing medical marijuana and federal laws criminalizing marijuana, states that seek to legalize the sale and manufacture of marijuana for recreational purposes could

⁴⁵ 21 U.S.C. § 903 (2009).

⁴⁶ 545 U.S. at 12.

⁴⁷ 545 U.S. at 22.

potentially find themselves in “positive conflict” with federal law, under either a theory of “conflict” or “obstacle” preemption. This does not, however, necessarily mean that states will be prohibited from carrying out their own legalization programs.

The practical effects of Supremacy Clause preemption thus far can be seen in the continued persecution of medical marijuana patients in states where the state legislatures have legalized such a program. Because federal law is supreme, the federal government cannot be stopped from enforcing federal drug laws against patients or distributors who are following their own state’s laws.⁴⁸ As the Court explained in Raich, “limiting the activity to marijuana possession and cultivation in accordance with state law cannot serve to place [Raich]’s activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be.”⁴⁹ Until legislative change occurs at the federal level, we can expect to see the continued prosecution of medical marijuana program participants.

The Limits of the Necessary and Proper Clause

Although federal law is supreme over state laws governing the same conduct, and the federal government has the power to “make all Laws which shall be necessary and proper for carrying into Execution”⁵⁰ of laws so passed, this Clause does not give the federal government the power to force states to enforce federal law, nor does it give the federal government the

⁴⁸ See Raich 545 U.S. 1; See also, U.S. v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483 (2001).

⁴⁹ 545 U.S. at 29.

⁵⁰ U.S. Const., Art. 1, § 9, clause 18.

ability to force states to repeal their own duly passed legislation.⁵¹ Since the founding of our country, Americans have been governed by two sovereigns, the federal government and our individual state governments. Historically, this represents a compromise by the Founding Fathers. On one hand, the Founding Fathers made the Constitution in order to overcome the ineffectual federal government set up under the Articles of Confederation. The Articles of Confederation were seen to be unwieldy due to the lack of power given to the federal government by the states. On the other hand, the so-called Anti-Federalists ensured that federal power would not be totally comprehensive, destroying the sovereignty of the states in the process. The document that resulted from this national political dialogue on the powers to be granted to the federal government, the Constitution, provided for a system of government of “dual federalism” wherein the state and federal governments hold co-existing powers to regulate the conduct of their citizens independently.

Although much of this dual federalist system has been diluted through the Supreme Court’s expansion of federal powers through the Commerce Clause and other shifting legal interpretations of the Constitution, one judicial doctrine which remains is the proscription on federal coercion of states to enforce federal laws.⁵² As the Supreme Court held in New York v. U.S., “Congress may not commandeer the States’ legislative processes by directly compelling them to enact and enforce a federal regulatory program, but must exercise legislative authority directly upon individuals.”⁵³ The federal government is also restricted from enlisting the state’s officials directly to enforce federal laws.⁵⁴ States can also not be forced to use their own tax

⁵¹ See Printz v. U.S., 521 US 898, 935 (1997); See also, New York v. U.S., 505 U.S. 144 (1992).

⁵² See New York v. U.S., 505 U.S. 144, 157-58 (1992).

⁵³ 505 U.S. at 145.

⁵⁴ See Printz v. U.S., 521 U.S. 898, 935 (1997) (striking down the “Brady Bill,” which required state officials to keep records on gun sales).

revenues to implement a federal law unless that law relates to the state as an employer.⁵⁵ This prohibition on federal coercion was used a decade ago to rule that the federal government could not force states to revoke the medical licenses of doctors who recommended the use of marijuana to their patients under California’s medical marijuana program.⁵⁶ Theoretically, this “anti-commandeering” doctrine “serves to prevent the accumulation of excessive power in any one branch. [A] healthy balance of power between the States and the federal Government will reduce the risk of tyranny and abuse from either front.”⁵⁷ As will be explained below, this prohibition on federal coercion gives anti-prohibition activists a powerful tool in their arsenal.

If the federal government wishes to “persuade” a state to follow and enforce federal laws, they may do this through economic incentives in the form of federal funding to the states, as long as the funding is related to the purpose of the specific federal spending.⁵⁸ The only other serious requirement for the providing of economic of incentives to states for enforcing a federal law is that the conditions imposed for receiving the federal money must be clear, unambiguous, and within the powers that the Constitution grants to Congress.⁵⁹ The most prominent use of this “persuasion” power was the federal government’s bludgeoning of South Dakota into accepting and enforcing the federal government’s preferred drinking age of 21 through a threat to withdraw a portion of their federal transportation funding.⁶⁰ In the words of the Court, “every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.”⁶¹

⁵⁵ See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

⁵⁶ See Conant v. Walters, 309 F.3d 629, 635-39, (9th Cir. 2002) *cert. denied* 124 S.Ct. 387 (2003) (holding that doctors have a First Amendment right to “recommend” the use of marijuana to their patients because of the nature of the doctor-patient relationship).

⁵⁷ Gregory v. Ashcroft, 501 U.S. 452 at 458 (1991).

⁵⁸ 505 U.S. at 166-67.

⁵⁹ See generally, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981).

⁶⁰ See South Dakota v. Dole, 483 U.S. 203 (1987).

⁶¹ Steward Mach. Co. v. Davis, 301 U.S. 548, 589-90 (1987).

As more and more states refuse to enforce the federal prohibition on marijuana, it is likely that the federal government will attempt to motivate the states to continue to enforce federal law through economic impositions similar to those used on South Dakota. While the federal government could again target infrastructure funding, it seems more likely that the federal funding of local and state law enforcement agencies, as well as the numerous grants the government gives to state agencies for preventing drug abuse, would be the lever used to exert pressure on the states. In 2011 alone, the Department of Defense gave state and local agencies almost \$117 million dollars, the Department of Education gave \$144.5 million in grants to state agencies and community groups, the Department of Health and Human Services gave \$1.8 billion in grants to states for substance abuse and treatment programs, the Drug Enforcement Administration gave \$6.7 million dollars to local law enforcement agencies, and the Office of National Drug Control Policy expended almost \$210 million in their High Intensity Drug Trafficking Areas program, which coordinates local, state, and federal law enforcement activities.⁶² In a time where many states are struggling just to pay their bills, the threat of losing federal money in these areas may make state legislators think twice before decriminalizing marijuana.⁶³ The Supreme Court has not enunciated where the fine pecuniary line between “coercion” and “motive” lies, but it may very well be that the end of marijuana prohibition will give the Court an opportunity to clarify this point soon. Only the future will tell if the federal government will target anti-prohibition states with similar cuts in funding for refusing to continue to fight the “war on drugs.”

⁶² *2011 National Drug Control Strategy and Budget*, Published by the Office of National Drug Control Policy, <http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/fy11budget.pdf>, Accessed April 1, 2012

⁶³ However, the threat of losing federal money has not dissuaded all municipalities from pushing forward with their own medical marijuana programs. San Jose, for instance, has already voluntarily withdrawn from the DEA’s High Intensity Drug Trafficking Area program after a DEA raid into a local medical marijuana dispensary. See Mark Simon, “San Jose cops off DEA squad,” *San Francisco Chronicle*, October 10, 2002. Last accessed on 4-13-12 at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2002/10/10/BA128957.DTL>.

Where To Go From Here and How To Get There

Now that the powers of the federal government have been outlined, it is easier to see how marijuana reformers must proceed in seeking an end of marijuana prohibition at the state level. As previously discussed, referenda will provide the best method of securing this change due to the pressures state law makers face in standing up to the federal government, and some of their own constituents, on the issue of prohibition. As was witnessed with medical marijuana reform, referenda can provide the rationale to give state legislators who support ending prohibition the cover they need to begin to change their state's criminal justice system through independent legislative enactments. Writing referenda, however, is not something that can be gone about lightly, especially when the federal government will certainly seek any grounds available to get the courts to strike down referenda legalizing marijuana. The purpose of this section is to serve as a guide for those wishing to pen a marijuana referendum for their own state with an eye towards preventing significant legal problems in the future. From a legal perspective, any state law attempting to establish a regulatory scheme for legalized marijuana must contain three parts: 1) Decriminalization, 2) Regulation and Taxation, and 3) Severability. Each of these three necessary aspects of a legalization referendum will be examined through a discussion of the relevant provisions in the upcoming ballot referenda in Washington and Colorado.

Decriminalization Provisions

The first part of the law or initiative must remove the State's criminal penalties for possessing, manufacturing, selling, and distributing marijuana. Most states currently prohibit marijuana through state statutes based upon, and nearly identical to, the federal Controlled Substances Act. Except for those states where marijuana has already been decriminalized,

marijuana is usually placed in the highest schedule of controlled substances or in a schedule of its own. In some states, the penalties for marijuana possession are different from the penalties for possession of other Schedule I substances and are listed directly in the State's CSA. For most states though, determining the actual penalties for marijuana offenses is an exercise of endurance, requiring flipping between the state's CSA and the state's penal code. To remove these penalties from the legal code, one may either go through the state's CSA and criminal code, line by line, and delete the word "marijuana" every time it appears, or a drafter can attempt to avoid this entirely by including a clause in the referendum explicitly stating that the referendum overrules all existing state laws that conflict with the text of the referendum.

The Colorado proposition⁶⁴ utilizes the overruling method. Subsection 3 of the Colorado initiative declares that "Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado. . . (a) Possessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana . . . for persons twenty-one years of age or older." This clause removes marijuana possession, use, and purchases from the Colorado criminal code criminal by effectively overruling the laws currently on the books that criminalize these actions. Subsection 3 goes on to legalize the growing of up to six marijuana plants for personal use (the marijuana cannot be sold), the transfer of one ounce or less of marijuana for no remuneration, the non-public use of marijuana, and the assisting of another person who is at least 21 years old in the exercise of the rights given in the rest of the subsection.

⁶⁴ Amendment 64: The Regulate Marijuana Like Alcohol Act of 2012. Last accessed at <http://www.regulatemarijuana.org/s/regulate-marijuana-alcohol-act-2012> on 4-8-12.

The Washington referendum⁶⁵ takes a hybrid approach, combining the overruling method and the line-by-line approach. Under Section 4 of the WA initiative, the production, possession, delivery, distribution, and sale of marijuana by marijuana consumers, producers, processors, and retailers who follow the regulatory scheme “shall not be a criminal or civil offense under Washington state law.” Sections 15 through 17 of the initiative outlines which of these acts the people in each of the named categories may legally perform. In specific, marijuana retailers are entitled to purchase, possess, deliver, distribute, and sell marijuana, within stated quantities.⁶⁶ Marijuana processors may legally purchase, possess, process, package, label, deliver, distribute and sell marijuana.⁶⁷ Marijuana producers may legally produce, possess, deliver, distribute, and sell marijuana.⁶⁸ Sections 19 through 25 amend the WA CSA, line by line, to remove the provisions which currently make illegal the purchase, possession, production, and sale of marijuana to those individuals over the age of 21.⁶⁹

Both methods of rendering current criminal penalties unenforceable have drawbacks and benefits. The benefit of the overruling method, other than the time saved in drafting, is the clear intent conveyed by the language. This clear intent is a necessary aspect of drafting, for it prevents courts from later interpreting the referendum’s language in a way that allows for continued prosecutions of marijuana producers, retailers, and consumers. The major drawback of the overruling provision is that this strategy may have unattended consequences when the text

⁶⁵ WA Initiative Measure No. 502. Last accessed at <http://sos.wa.gov/assets/elections/initiatives/i502.pdf> on 3-28-12.

⁶⁶ Marijuana retailers may sell up to one ounce of loose marijuana, up to 16 ounces of solid marijuana infused product (such as edibles), and up to 72 ounces of a marijuana infused liquid, to a single customer. §15(3)

⁶⁷ Processors may only sell marijuana or marijuana products to retailers.

⁶⁸ Producers may only sell marijuana to processors or retailers.

⁶⁹ Section 21 of the Initiative creates an “open container” provision for public use of marijuana with civil penalties attached. Section 24 adds the state liquor control board to the list of government divisions which have the duty for overseeing the implementation of the WA CSA. Section 25 removes the penalties for marijuana paraphernalia possession and also removes the state forfeiture provision for individuals who comply with the terms of the initiative. Under the Initiative, only illegal possession of five or more plants, or at least one pound of marijuana, for commercial purposes would open an individual up for forfeiture.

of the law undergoes scrutiny from a court. With this method, courts will almost certainly be called upon to interpret the law because of the breadth and lack of specificity of the language. It will be up to the courts to interpret the language in a referendum such as Colorado's, and to determine what currently existing laws the initiative renders inoperable. This method will result in the state legislature rewriting the state's criminal code to fall into line with the requirements of the referendum, but conflicts over the less obvious ramifications of the referendum will eventually end up on the desk of a state judge. This judge will then be given the power to determine what the apparently clear language of the law "actually" means.

The Colorado initiative lists the specific acts that cannot be criminalized after the initiative is passed, but the text of Subsection 3 leaves open numerous discretionary aspects that a legislature could rationally use in attempts to restrict the practical impact of the law. For example, the CO referendum fails to name what constitutes "consumption that is conducted openly and publicly or in a manner that endangers others," even though Subsection (3)(d) gives the legislature the ability to regulate such behavior. This presents an obvious potential conflict between what the law says and what the legislature may rationally believe they can do. Once the legislature begins to regulate such conduct, the only protection the referendum will receive will come from the courts. In such a situation, the ambiguity in the text of the initiative could be interpreted to give the legislature the power to effectively eviscerate the law through end-around regulations. Or the language of the referendum may be read to restrict the legislature in passing laws the majority of the state views as necessary to the ensuring safe consumption of marijuana, creating a backlash against legalization within Colorado and nationally. It is impossible to predict all of the circumstances wherein such a problem may arise, but it is clear that solely

relying on the overruling method for restricting the powers of the legislature to stymie reform efforts may result in negative externalities.

The main benefit of the line-by-line approach is that it provides the drafters with the ability to be more precise when changing the criminal code, effectively removing the ability of the courts to interpret the law. Generally, when a law's text is unambiguous as to the effects of the law, courts will uphold the text of the law above future attempts by an executive to read new enforcement powers into the law. Furthermore, the precise nature of the line-by-line approach can avoid future problems of public backlash which may result from an overruling clause, by not limiting the state executive or legislature in their attempts to legislate for public safety. The main drawback of a solely line-by-line approach is that mistakes are easy to make in drafting these provisions. If the drafters of the line-by-line clause fail to remove even one reference to marijuana from the criminal code, this oversight will have the effect of keeping the criminal sanction on the books, and hence, enforceable against marijuana consumers. While this drawback can be overcome through the practice of due diligence, the catastrophic effects of such a mistake render the use of a purely line-by-line method hazardous.

The Washington initiative, by using a hybrid of both the line-by-line and overruling methods, limit the drawbacks of both methods. If the drafters failed to remove a reference to marijuana in the criminal code, the overruling provision, along with the clear intent of the law to remove criminal penalties for acts involving marijuana, could serve as a shield against overreaching by state governments in attempts to restrict the new law. The line-by-line approach will also clear up much of the ambiguity surrounding the interpretation of the law, effectively limiting the role that the state courts will play in interpreting the meaning and effects of the initiative. By utilizing both strategies in removing the criminal penalties for marijuana offenses,

the drafters of the WA initiative provided their initiative with the fullest level of protection possible from future adverse interpretations of the referendum's text. For future drafters of similar initiatives, including a hybrid of both methods will give the law protection from politicians and judges who may disagree with the policy and who will attempt to restrict the reform after losing at the ballot box. There is no reason not to give a controversial initiative, like one legalizing marijuana, as much protection as possible from its opponents.

Regulation and Taxation

The second part of any legalization effort will contain the regulatory scheme for the retail sale of marijuana and will provide for state taxation of the marijuana. These provisions must keep in mind the balancing act each provision must fulfill. The purpose of a regulatory regime is to provide for unfettered commercial access to marijuana by consumers of an appropriate age, while simultaneously assuring the public that the safety of the state's children will be assured in the face of the legalization of another mind altering substance. The taxation provisions, while potentially onerous to consumers, must be well written to ensure that the states that legalize marijuana will reap the economic benefits of taxing a new commercial trade. With the current state of the economy, new tax revenue (along with law enforcement savings from not prosecuting marijuana offenders) may provide one of the strongest impetuses for more conservative policy makers to take public, pro-reform, stances. Furthermore, if other states actually see a working regulatory and taxation regime in place that creates a massive influx of new tax revenue, it may spur action by legislatures in the states that do not allow law making through popular referenda.

Regulating Marijuana

In the Washington initiative, the proposed regulatory system is based around the preexisting regime for alcohol distribution and has provisions providing for both public safety and ease of access for consumers. Under the initiative, the State Liquor Control Board (LCB) will be charged with licensing marijuana producers, processors, and retailers. For each production, processing, and retail location, the initiative requires a separate license, costing an affordable \$1,250 per license. In determining who can be granted a license, the LCB can consider prior criminal convictions, previous violations of LCB policies by the applicant, the applicant's age and the age of the prospective employees (both must be at least 21 years old), the applicant's residency (must have been a resident of WA for at least three months), any outstanding child support claims against the applicant, the location of the proposed premise (cannot be within 1,000 ft. of a school, playground, recreation center, child care center, public park or transit center, library, or game arcade establishment that does not limit entrance to those 21 years or older), and any objections filed by the government of the town or county where the proposed business is going to be established. In order to insure that the law is not applied arbitrarily by the LCB to completely ban the implementation of the law, the initiative allows for adverse LCB decisions to be appealed to an administrative law judge.⁷⁰ The LCB has the discretion to refuse to renew a license only for "chronic illegal activity," which can be proved through a showing of a "pervasive pattern of activity that threatens the public health, safety, and welfare" of the municipality where the establishment is located in, or for an "unreasonably high number of citations" for violating the terms of the law.⁷¹ The drafters of the initiative also

⁷⁰ See WA Initiative Measure No. 502, Sec. 7.

⁷¹ WA Initiative Measure No. 502, Sec. 6, subsection (9).

included a public safety provision that allows the LCB to summarily suspend an establishment's license for a period of up to 180 days in emergency situations.

The LCB is also tasked with inspecting the industry after implementation of the initiative. Under Section 9 of the initiative, the LCB is required to adopt rules in regard to the equipment and management of retail outlets, the commercial records of all marijuana establishments, the methods of producing and packaging marijuana, security requirements for all marijuana establishments, the hiring of employees, the hours of operation of the retail outlets, labeling requirements for packaged marijuana, and the destruction of marijuana not produced and sold according to the initiatives' requirements. Section 10 of the law requires that these rules be developed prior to December 1, 2013. In order to ensure the safety of marijuana on the market, Section 11 requires that all marijuana producers and processors send a sample of their product to the state for testing on a regular schedule. The law also seeks to protect minors from unnecessary exposure to marijuana through the advertising restrictions in Sections 14 and 18. These restrictions prevent retailers from displaying any marijuana products in their windows and any signs advertising marijuana, other than a single sign with the retailer's registered trade name. The last public safety provision of the initiative is can be found in Part V (Sections 31 through 38). Part V lays out a very detailed drugged driving law that restricts the operation of a vehicle by any individual with a blood THC concentration above 5.00. The WA initiative shows a clear regard for the public safety concerns that could end up blocking the passage of the referendum, while simultaneously providing for cheap licensing and stringent requirements for state action blocking new marijuana establishments from entering the market.

The Colorado initiative takes a slightly different approach to the regulation of marijuana and focuses heavily on consumer protection, while leaving the necessary public safety aspects of

implementation almost entirely to the discretion of State Department of Revenue (SDR), the State agency tasked with overseeing the marijuana market in CO. While the Colorado initiative does legalize only the possession of marijuana by individuals above 21 years of age, the only other explicit restriction the initiative places on the SDR in further restricting the marijuana market is that the SDR may not implement regulations which would render the operation of marijuana establishments “unreasonably impracticable.”⁷² Other than this broad guideline, the SDR has the discretionary power to create all of the rules surrounding the licensing and security requirements of marijuana industry establishments, the marijuana production process, advertising restrictions, methods for ensuring persons under 21 do not have access, labeling requirements, and to set the civil fines for violations of the Act.⁷³ The Act fails to expressly define what rules would be too restrictive in setting the standards for the above categories, but the Act does require the rules to be developed by July 1, 2013, six months earlier than the WA initiative.

The CO Act goes beyond the scope of the WA initiative in providing explicit protections for marijuana market participants. The strongest protection found solely in the CO initiative prohibits the SDR from requiring marijuana retailers to collect and store information on their customers, outside of checking a government-issued identification to verify the customer’s age.⁷⁴ The referendum also contains a fail-safe mechanism to ensure that the state executive cannot delay the legalization of the marijuana by directing the SDR not to issue licenses or not to create the rules regulating the standards for licensing. Sections 5(e), 5(f), and 5(h) provide that if the SDR fails to issue guidelines by the July 1st deadline, or if the SDR fails to respond to a properly filed application within 90 days with specific reasons for the denial of that application, that the

⁷²See CO Amendment 64, Sec. 16, Subsection (5). This language is not further defined in the text of the initiative.

⁷³ See CO Amendment 64, Sec. 16, Subsection (5)(a).

⁷⁴ See CO Amendment 64, Sec. 16, Subsection (5)(c).

applicant can instead file their application with the city or county wherein the applicant plans to establish their business.⁷⁵

There is also far more local control under the CO initiative, undoubtedly easing the backlash that could develop against legalization in the more conservative Colorado communities, such as Colorado Springs. Section 5(f) gives localities the power to set restrictions on the location of marijuana establishments, the operating hours of retailers, and the total number of marijuana establishments within their city or county. For localities that wish to have no part of the marijuana market, Section 5(f) also allows cities and counties to ban marijuana establishments through an ordinance or through a local ballot referendum, as long as it occurs in an even-numbered year.⁷⁶ Although these local powers will undoubtedly be used to restrict the production and sale of marijuana in many localities, it will help to prevent future re-criminalization efforts at the state level by allowing the conservative localities to opt out of the program. Overall, the Colorado initiative attempts to strike a balance between giving the state and local governments the discretion to set necessary regulations for the regulation of the new industry, while simultaneously attempting to protect marijuana market participants from oppressive state government intervention.

Taxation of Marijuana

Emphasizing the excess tax revenue potentially gained from legalizing marijuana is one of the most persuasive arguments for convincing the fiscally conservative non-consumer of the propriety of marijuana market reform. For voters who do not partake in the substance

⁷⁵ All cities and counties are required by this statute to create their own regulations governing the marijuana trade within their jurisdiction by October 1, 2013, but these regulations will only come into effect in the case of state inaction. Section 5(h) declares that localities must issue a license within 90 days of receipt of a valid application, but there is no enforcement mechanism for this provision, effectively rendering it ineffective.

⁷⁶ Statewide elections only occur in Colorado during even numbered years.

themselves, and may even find the use of marijuana to be objectionable, showing them how much money the government could collect from marijuana taxes (and save by not jailing consumers), may be just the impetus needed to show these opponents that society has far more to gain than it has to lose from legalizing marijuana. According to Harvard economics professor Jeffrey A. Miron, legalizing marijuana at the national level and taxing the revenues would net governments \$20.1 billion in income they could then use on other projects.⁷⁷ It makes sense to include very explicit tax provisions in any legalization initiative, both to clearly state the public benefit that legalizing marijuana will bring, and to prevent the state from assessing such high taxes on the marijuana as to keep the black market profitable.

The taxation provisions⁷⁸ of the WA initiative allow for the state government to tax marijuana at all three stages of the marijuana production process. The state can levy a 25% tax on the wholesale price of marijuana sales from the marijuana producer to a marijuana processor, with the responsibility for paying the tax being on the producer. The state can then levy another 25% tax on the wholesale price of marijuana sold from a marijuana processor to a marijuana retailer, with the responsibility for paying this tax placed upon the processor. The state is given one last opportunity to gain tax revenue when the marijuana is sold at the retail level, with another 25% sales tax, in addition to pre-existing state sales tax, levied on the sale of marijuana to the consumer.⁷⁹ The LCB has the authority under the act to recommend changes in the rate of taxation in order to undercut “illegal market prices.” The money collected from these taxes, as

⁷⁷ This number is a combination of the \$13.7 billion dollars governments would save, annually, from no longer enforcing marijuana criminal penalties, and the estimated \$6.4 billion governments could gain from taxing commercial marijuana sales at a level similar to the taxes currently imposed on alcohol and cigarettes. Jeffrey A. Miron, *The Budgetary Impact of Ending Drug Prohibition*, CATO Institute, published on September 27, 2010. Accessed at <http://www.cato.org/publications/white-paper/budgetary-impact-ending-drug-prohibition> on 3-10-12.

⁷⁸ WA Initiative Measure No. 502, Part IV, §§ 26-30.

well as the money collected from the \$1,250 licensing fee, and the fines for violating the statute, are placed into the “Dedicated Marijuana Fund.” The initiative goes on to stipulate how this money will be spent, with \$500,000 per year going to the expansion of the “Washington State Healthy Youth Survey,” \$200,000 per year being invested in a cost-benefit analysis on the effects of Initiative 502, \$20,000 per year going to the University of Washington Alcohol and Drug Abuse Institute for the creation of a web-based resource on the health and safety risks posed by marijuana, and up to \$5,000,000 per year going directly to the LCB for the enforcement of the regulatory regime. The remaining revenue collected through the marijuana taxes and fees is divided between various state programs aimed at decreasing youth substance abuse and educating the public on the actual effects of marijuana. What the drafters of the WA initiative have effectively accomplished is to deflect criticism of the legalization of marijuana on the basis of the health impact by devoting the revenue gained from the taxes to the fight youth substance abuse. Framed in this manner, it is hard to argue that continuing to arrest adult marijuana consumers makes the state a better place than would expanding the state’s fight against drug abuse among the state’s children. Nobody on either side of the debate wants children to be smoking marijuana, and WA’s funding of youth drug education ensures that this remains a priority among all of the participants in the legalization debate.

The taxation provision of the CO initiative does not tax the transaction between the retailer and consumer, instead electing to tax the marijuana only when it is sold from the producer to the retailer or to the processor. Under Section 5(d), this tax is not allowed to exceed 15% of the total sales price until 2017, at which time the Act grants the CO General Assembly the power to raise the tax rate to a limit they determine to be reasonable. The Act also stipulates that the first \$40 million collected from this excise tax annually will be diverted to the “Public

School Capital Construction Assistance Fund,” the state fund that pays for public school construction and renovations. Section 5(a)(II) provides further revenue to the state government by making the price of a license for marijuana retailers and producers \$5,000. This is much higher than the cost of a license under the WA initiative, but the additional revenue cannot hurt the CO Act’s chance of passage. Furthermore, the amount does not appear unreasonable as imposed on an industry with such profit potential that will only be taxed at 15%. By declaring where the money goes, the CO initiative forces voters to weigh their values: Money for schools versus imprisoning marijuana consumers.

The strategies pursued by the drafters of the CO and WA initiatives show that they have the goal of gaining public approval at the forefront of their minds. Deciding where the tax revenue from a legalization system goes is mostly a strategic decision that should be based upon the needs of the individual state where the referendum is being attempted. WA’s drafters chose to use their money to fight substance abuse by children. CO’s drafters decided that school construction and renovation topped the priority list of the voters in their state. Other appealing candidates for marijuana tax revenue may be increased spending on local law enforcement, a scholarship fund for underprivileged teens who wish to go to college, or even the creation of a new state program to hire more qualified teachers and to pay them higher salaries. The question of how to spend the tax revenue is purely a local matter and using the tax money to address specific local needs can be used as a persuasive argument in attempting to gain the public support necessary to pass a referendum. While there is typically not a lot of opportunity to be creative in legislative drafting, this is the one area where reformers should focus on creative solutions to local problems.

Severability and Marijuana Reform

The third, and arguably most important, section of any state law or citizen referendum decriminalizing and regulating marijuana is a severability clause. A severability clause is a simple one or two sentence provision included in most laws that explicitly states that if any portion of the law is struck down by a court as unconstitutional, then the remaining portions of the law remain valid no matter what the effects of striking the provision are on the implementation the law. This is especially important in the context of marijuana legalization laws because of the pressure the federal government will apply in attempting to get the laws struck down. As was previously discussed, the theories of federal “obstacle” or “conflict” preemption provide a potential roadblock to states legalizing marijuana on their own. If the federal government desired to stymie the implementation of legalization referenda or laws, the Attorney General, at the direction of the President, could sue the state in federal court for an injunction blocking the state from carrying out the program. While the federal government has not thus far sought to enjoin the states from establishing their own medical marijuana programs, this tactic is not outside of the realm of possibility if states take the next step and implement complete legalization.

The issue of whether or not state marijuana programs can be preempted by federal law has been most recently analyzed in three California state court decisions, with two of those three courts proclaiming that the federal CSA does not preempt state medical marijuana laws or local ordinances created to implement the state system.⁸⁰ Currently, two of these decisions are

⁸⁰ See Qualified Patients Ass’n v. City of Anaheim, 115 Cal.Rptr.3d 89 (Cal. Ct. App. 2010) (holding no federal preemption); City of Riverside v. Inland Empire Patient’s Health and Wellness Center, Inc., 133 Cal.Rptr.3d 363 (Cal. Ct. App. 2010) (holding no federal preemption), *but see* Pack v. Superior Court, 132 Cal.Rptr.3d 633 (Cal. Ct. App. 2011) (holding the City of Long Beach’s medical marijuana dispensary licensing program to be preempted by federal law).

awaiting a hearing from the California Supreme Court to clear up the conflicting decisions of the lower courts.⁸¹

In Qualified Patients, Judge Aronson laid out a comprehensive case for why the California medical marijuana program was not preempted under any of the preemption methods previously discussed.⁸² On the topic of “conflict” preemption, Judge Aronson explained that because positive conflicts only arise “when simultaneous compliance with both state and federal directives is impossible,” and the California medical marijuana program does not mandate actions by its citizens which would violate the Controlled Substances Act, compliance with both state and federal law is not impossible.⁸³ Because the choice to participate in the medical marijuana program is voluntary, and therefore so is the choice to break federal law, the Court found that the medical marijuana program in California provides the opportunity for any of California’s residents who wish to, to easily comply with both state and federal law (those individuals not producing, selling, or consuming marijuana through the program).

On the topic of “obstacle” preemption, Judge Aronson found that the medical marijuana program in California did not stand as a significant “obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in passing the CSA.⁸⁴ Congress’ objective in passing the CSA, according to Judge Aronson, was to combat recreational drug use and was not intended to be an “‘expansive’ interposition of ‘federal authority to regulate medicine.’”⁸⁵ The opinion continued on to conclude, “In any event, obstacle preemption only applies if the state enactment undermines or conflicts with federal law to such an extent that its

⁸¹ Pack v. S.C., 268 P.3d 1063 (Cal. 2012).

⁸² Qualified Patients Ass’n v. City of Anaheim, 115 Cal.Rptr.3d 89, 105-11 (Cal. Ct. App. 2010).

⁸³ Qualified Patients, at 106-07.

⁸⁴ Qualified Patients, at 107.

⁸⁵ Qualified Patients, at 107 (citing Gonzales v. Oregon 546 U.S. 243, 272–273, (2006)).

purposes ‘cannot otherwise be accomplished.’”⁸⁶ In the opinion of Judge Aronson, it would be impossible to find that the federal government cannot otherwise accomplish its goal of combating recreational drug use because California chose not to prosecute its medical marijuana users, at least not without unconstitutionally commandeering California’s police power.⁸⁷ While California’s failure to prosecute medical marijuana users does not aid the federal government in its war on drugs, the states are not required to help enforce federal laws. So if the federal government wishes to accomplish the CSA’s mission of locking up all of California’s marijuana smokers, the proper response should be, in the words of Federal 9th Circuit Judge Kozinski, “to ratchet up the federal regulatory regime, not to commandeer that of the state.”⁸⁸ The Court in Inland Empire upheld Judge Aronson’s legal theory to decide that cities cannot rely on federal preemption under the CSA as grounds for banning medical marijuana dispensaries in their towns because the California law requiring them to allow the dispensaries did not conflict with the CSA.⁸⁹

The Court in Pack v. Superior Court, while agreeing with the Court’s decision in Qualified Patients that California’s medical marijuana program was not preempted by the CSA, relied on both “conflict” and “obstacle” preemption to strike down the City of Long Beach’s licensing procedure.⁹⁰ The Court held that the section of the Long Beach ordinance that required marijuana to be delivered by collectives to independent labs for testing to be preempted because it created a positive conflict between the local ordinance and the CSA by requiring the collective member to commit the crime of “distributing” marijuana to the tester, therefore making it an

⁸⁶ Qualified Patients, at 108 (citing Crosby, 530 U.S. at 373-74).

⁸⁷ Qualified Patients, at 108.

⁸⁸ Qualified Patients, at 108 (citing Conant v. Walters, 309 F.3d 629, 646 (9th Cir.2002)).

⁸⁹ Inland Empire, 133 Cal.Rptr.3d at 371-72.

⁹⁰ Pack v. Superior Court, 132 Cal.Rptr.3d 633, 647-55 (Cal. Ct. App. 2011).

impossibility for the producers to follow both laws.⁹¹ Based on this reasoning, the Court struck down that portion of Long Beach’s ordinance based on “conflict preemption.”

The Court went on, however, to declare that Long Beach’s permit scheme for dispensaries was an “obstacle” to the fulfillment of the purpose of the CSA because unlike the California law, which merely lifted criminal penalties on marijuana, the Long Beach ordinance took the affirmative step of “permitting” violations of federal law.⁹² In the words of the Court: “The conclusion is inescapable: the City’s permits are more than simply an easy way to identify those collectives against whom the City has chosen not to enforce its prohibition against collectives; the permits instead authorize the operation of collectives by those which hold them.”⁹³ The Court then struck down the entire permit scheme of the City of Long Beach. This case and Inland Empire are currently waiting to be heard by the California Supreme Court to resolve the conflict between the two decisions.

Pack’s line of reasoning, while new to California’s jurisprudence, was utilized by the Oregon Supreme Court to strike down the enforcement of that state’s medical marijuana user identification cards in Emerald Steel Fabricators v. Bureau of Labor and Industries.⁹⁴ The Court in this case held that Oregon patients were preempted from using their ID cards to challenge an employer’s action in firing them for smoking marijuana outside of work hours. The Court stated that this state affirmation of the right to do something illegal under federal law stood as an “obstacle” to the achievement of the CSA’s purpose. In deciding this, the Oregon Supreme Court relied on the U.S. Supreme Court case of Michigan Canners & Freezers Association v.

⁹¹ Pack at 649-50.

⁹² Pack at 651-52.

⁹³ Pack at 654.

⁹⁴ 230 P.3d 518 (Or. 2010).

Agricultural Marketing and Bargaining Board.⁹⁵ The Court in Emerald found that Oregon’s ID statute effectively authorized patients to smoke marijuana, allowing them “to engage in conduct that the federal Act forbids. [Therefore] it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”⁹⁶ The decision in Emerald has also been interpreted in Oregon to allow state law enforcement officials to refuse to return wrongfully seized medical marijuana due to fears of state liability for “distribution” of marijuana by state law enforcement officials.⁹⁷

As these two lines of judicial reasoning illustrate, it is not clear if the state action of giving out permits or licenses for marijuana users, producers, or retailers violate federal law. Without the ability to create a licensing procedure at either the state or local level, however, it would be impossible for a state which so desired to regulate and tax a marijuana market. Due to the current legal ambiguity surrounding the ability of states to issue licenses, a severability clause is imperative. In the Oregon case, the severability clause found in Oregon Medical Marijuana Act was the only thing that saved the entire law from being struck down.⁹⁸ A severability clause may also have the added benefit of forcing judges to make the hard decision between upholding a questionable state licensing scheme or striking down that regime but being forced to leave the decriminalization provisions in place. This would effectively create a state system that has legalized marijuana, but has none of the benefits of regulation or taxation.

Both the WA and CO initiatives include provisions wherein state agencies would issue permits for marijuana producers and retailers, and WA’s initiatives includes an inspection provision like the one struck down through “conflict” preemption in Pack. Due to foresight, the

⁹⁵ 467 U.S. 461 (1984).

⁹⁶ Emerald, 230 P.3d at 529 (citing Michigan Cannery, 467 U.S. 461, 478).

⁹⁷ Butler v. Douglas Cnty., Civil No. 07-6241-H (D Or. August 10, 2010).

⁹⁸ Emerald at Fn. 21.

drafters of both of the initiatives considered this problem and attempted to deal with it. Subsection 8 of the Colorado initiative, however, provides for an express provision, stating that “All provisions of this Section are self-executing except as specified herein, are severable, and, except where otherwise indicated in the text, shall supersede conflicting State statutory, local charter, ordinance, or resolution, and other state and local provisions.” By including an express severability clause in their initiative, the CO drafters have provided the most protection possible to their marijuana regulatory regime.

The Washington initiative does not include an express severability clause because §69.50.605 of Washington’s Controlled Substances Act already provides for severability.⁹⁹ The WA drafters, while probably protected from a judicial finding of a lack of severability, are still somewhat at the mercy of a state court’s future interpretation of whether the bill itself was intended to be severable. While the severability clause in the text of the law being amended by the initiative seems to protect the initiative, it would still be possible for a court to find that the voters, in approving Initiative 502, did not intend for the provisions to be severable because they never actually voted on including a severability clause in the new law. Even if including a severability clause in the WA initiative would have possibly been redundant, redundancy seems a far better alternative than leaving the fate of such a bold step as marijuana legalization in the hands of a state judge whose biases on the issue cannot be known ahead of time. In the future, express severability clauses should be included in all marijuana legalization proposals in order to combat the effects of yet undetermined precedent on the constitutionality of state permit schemes.

⁹⁹ Section 69.50.605 reads: “If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.”

Conclusion

Fighting for marijuana law reform can often feel like a Sisyphean endeavor. However, at no time in recent memory has our nation been so close to actually seeing marijuana legally sold for recreational purposes and an end to the federal government's 40 year old war on marijuana consumers. If the tide of popular opinion continues to move in the direction of greater tolerance towards responsible marijuana use, the time will soon come when federal government will be left with either two options: to let the war on marijuana end, or to increase federal enforcement of its unpopular criminal laws. Thankfully, the federal government will never have enough manpower to fight the war on marijuana without the help of the states. If marijuana reform is coming, the states will be the epicenter of this battle. This makes today's conversations on the regulatory regime for marijuana we one day wish to see all the more imperative. In moving forward, legislative drafters and activists alike should remember what powers their states possess in fighting back against the federal government, while never forgetting the threat that the federal government poses to reform efforts. Towards this later end, drafters must remember that every line written in a bill to reform marijuana laws will be challenged by the opponents of reform. To ensure that sizable gains are not later erased by the judiciary, methods aimed at avoiding the threat of federal preemption must not be overlooked. Whether you are writing a taxation, regulation, or severability provision, always be mindful of the leviathan looming over your shoulder.

Appendix 1

Year	State	Name	Possession	Home Grow	Sales	Age	Amnesty	DUID	Support	Link
1972	California	California Marijuana Legalization Prop 19	"Personal Use"	"Personal Use"	NO	18	NO	NO	83.50%	http://library.uchastings.edu/ballot_pdf/1972a.pdf
1986	Oregon	Oregon Marijuana Initiative Measure 5	"Personal Use"	"Personal Use"	NO	18	NO	NO	24.00%	http://news.google.com/newspapers?id=YNeAAAAI8&sjid=DVNeAAAAI8&pg=6838,152419&dq=oregon+measure+5&hl=en
2000	Alaska	Alaska Marijuana Decriminalization Initiative, Measure 5*	"Personal Use"	"Personal Use"	YES	18	YES	NO	40.90%	http://www.elections.alaska.gov/doc/oeq/2000/bm00.htm#99hemp
2002	Nevada	Nevada Decriminalization of Marijuana Amendment, Question 9	3 ounces	NO	YES	21	NO	NO	39.13%	http://www.leg.state.nv.us/Division/Research/VoteNV/BalotQuestions/2002.pdf
2004	Alaska	Alaska Legalize Marijuana Act, Measure 2	"Personal Use"	"Personal Use"	YES	21	NO	NO	44.30%	http://www.elections.alaska.gov/doc/oeq/2004/2004_oeq_reg_1.pdf
2006	Nevada	Nevada Marijuana Initiative, Question 7	1 ounce	NO	YES	21	NO	NO	44.08%	http://nvios.gov/Modules/ShowDocument.aspx?documentid=357
2006	Colorado	Colorado Amendment 44, Relaxation of Laws on Marijuana Possession	1 ounce	NO	NO	21	NO	NO	41.08%	http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1211572730789&cbinary=true
2010	California	California Proposition 19, the Marijuana Legalization Initiative	1 ounce	25 sq ft	YES	21	NO	NO	46.50%	http://cdm.sos.ca.gov/vig2010/general/pdf/english/19-title-sum-analysis.pdf
2012	Colorado	Colorado Amendment 64, Regulate Marijuana Like Alcohol	1 ounce	6 plants	YES	21	NO	NO		http://regulatemarijuana.org/about#initiative
2012	Washington	Washington Initiative 502, New Approach Washington	1 ounce buds, 16 ounces products, 72 ounces liquids	NO	YES	21	NO	5mg/ml		http://www.newapproachwa.org/sites/newapproachwa.org/files/i-502%20bookmarked.pdf

* In Alaska - "Personal Use" had been defined as four ounces at home, one ounce in public when this was voted on

Accessed from <http://stash.norml.org/wp-content/uploads/legal-votes-2012.jpg> on 3-14-12.