



4-2016

Federalism and State Marijuana Legislation

Dean M. Nickles

University of Notre Dame Law School

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law and Society Commons](#), [Medical Jurisprudence Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

91 Notre Dame L. Rev. 1253 (2016)

This Note is brought to you for free and open access by the Notre Dame Law Review at NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

FEDERALISM AND STATE MARIJUANA LEGISLATION

*Dean M. Nickles**

INTRODUCTION

An increasing number of states have passed legislation legalizing medical and recreational marijuana. This Note provides a survey of the language utilized by these states in their legislation and legislative materials, searching for and highlighting those purposes and intentions of the states, which implicate, explicitly or implicitly, federalism. Through this survey of mostly primary source materials, various trends and similarities among the materials will be apparent, and this Note will provide a useful resource for those trying to understand why the states may have enacted these laws.

The Note proceeds in four Parts. Part I provides information on the current legal landscape surrounding marijuana and its regulation as a controlled substance, briefly exploring the federal position on marijuana to provide necessary context for the actions of the states. Part II explores the state legislation and materials related to medical marijuana legalization, examining and surveying the primary source material from many states. Part III explores state legislation and materials related to recreational marijuana legislation in a similar way. Part IV takes a brief glance at a historical issue, which presented a conflict between state and federal law, and provides tentative suggestions for why marijuana legalization might be unique. Throughout, this Note puts forward propositions regarding why states may have included particular language, also noting when explicit and implicit federalism arguments could be at work.

* Juris Doctor Candidate, University of Notre Dame Law School, 2016; B.A., History, Villanova University, 2013. I would like to thank Professor A.J. Bellia for his guidance and assistance throughout the writing process. I would also like to thank the staff of the *Notre Dame Law Review* for their edits and revisions. All errors are my own.

I. CURRENT LEGAL LANDSCAPE

A. *Controlled Substances Act*

The Controlled Substances Act (CSA)¹ was enacted in 1970 by Congress as part of the Comprehensive Drug Abuse Prevention and Control Act.² In the CSA, Congress declared that while many “drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people,” it was nonetheless true that “[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.”³ To further this purpose, the CSA created a classification system comprised of five “schedules,” designated I, II, III, IV, and V.⁴ Schedule I substances are those considered to have no accepted medical use and high potential for abuse.⁵ Schedules II through V have increasing levels of accepted medical use and decreasing potential for abuse.⁶ The Attorney General is charged with applying the provisions of the CSA to the controlled substances and is also able to add or alter the scheduling of any controlled substance.⁷ For the purposes of this Note, what is most relevant is that marijuana was placed in Schedule I,⁸ and since that time has been considered by the federal government to have no accepted medical uses, a high potential for abuse, and a lack of accepted safety for use under medical supervision.

B. *State Action*

Beginning with California in 1996,⁹ numerous states have passed their own measures legalizing the medical use of marijuana, and recently recreational use as well. Currently, twenty-four states and the District of Columbia have laws permitting the medical use of marijuana,¹⁰ and Washington,¹¹ Col-

1 21 U.S.C. § 801 (2012).

2 Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at titles 18, 21 26, 31, 40, 42, 46, 48, and 49 U.S.C. (2012)).

3 21 U.S.C. §§ 801(1)–(2).

4 *Id.* § 812.

5 *Id.* § 812(b)(1).

6 *See id.* §§ 812(b)(2)–(5).

7 *See id.* § 811(a). It should be noted that federal rulemaking proceedings to change the schedule of the drug can be “initiated by the DEA, the U.S. Department of Health and Human Services (HHS), or by petition by any interested person.” TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES 7 (2014) (citing 21 U.S.C. § 811(a)).

8 21 U.S.C. § 812(c)(10).

9 *See CAL. HEALTH & SAFETY CODE* § 11362.5 (West 2014).

10 *See State Medical Marijuana Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (Oct. 16, 2014), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#2>. The states are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washing-

orado,¹² Alaska,¹³ Oregon,¹⁴ and the District of Columbia¹⁵ passed laws legalizing the recreational use of marijuana. The states have offered various reasons for the passage of these laws, and federalism has explicitly and implicitly been among them.

While the Supreme Court in recent years has discussed the importance of federalism in numerous cases, in 2005 *Gonzales v. Raich*¹⁶ dealt with Congress's ability to prohibit the cultivation, possession, or use of medical marijuana pursuant to the Commerce Clause as part of the regulatory scheme of the CSA. California's Compassionate Use Act permitted such conduct.¹⁷ The Court ultimately decided Congress could regulate this conduct,¹⁸ but statements from amicus briefs, submitted by various states, are illustrative of some federalism arguments made by the states. Alabama, Louisiana, and Mississippi submitted one brief, and California, Maryland, and Washington another, but both asserted this area of regulation was one within the States' "police power" to protect the health, safety, and welfare of their citizens.¹⁹ Although Congress's ability to regulate this type of local conduct under the CSA was made clear by the Court, this decision stopped neither the passage of numerous medical marijuana laws since 2005, nor the passage of laws legalizing recreational marijuana.

ton, with the District of Columbia also permitting medical usage. *Id.* Alabama, Florida, Iowa, Kentucky, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Utah, and Wisconsin currently permit limited access to marijuana products with low THC and high cannabidiol.

11 See WASH. REV. CODE ANN. § 69.50.401(3) (West 2015).

12 See COLO. CONST. art. XVIII, § 16.

13 See ALASKA STAT. ANN. § 17.38.010 (West 2015).

14 See Measure 91 (Or. 2014). The ballot measure has yet to be codified, but there is a House Bill that will amend and add to relevant sections of the Oregon Revised Code. See H.B. 3400, 78th Leg. Assemb., Reg. Sess. (Or. 2015).

15 See D.C. CODE ANN. § 48-904.01 (West 2015).

16 545 U.S. 1 (2005).

17 See *id.* at 5–6.

18 See *id.* at 22.

19 See Brief for the States of Alabama et al. as Amici Curiae in Supporting Respondents, *Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 2336486, at 10–11 [hereinafter Amicus Brief of Alabama et al.] ("This case arises against the backdrop of the States' unquestioned 'police power' to make and enforce laws protecting the health, safety, welfare, and morals of their citizens. Indeed, of the 'numerous' powers reserved to the States under the Constitution, one of the most fundamental is the power to define and punish criminal conduct. . . . [I]n our federalist system, a State has the right to set its own criminal policy free of congressional interference."); Brief of the States of California et al. as Amici Curiae in Support of Respondents, *Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 2336549, at 6 ("The federal government has limited authority to interfere with State legislation enacted for the protection of citizen health, safety, and welfare. . . . And it cannot reasonably be doubted the regulation of health and safety matters is primarily and historically a matter of state concern." (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996))).

C. *Current Department of Justice Policy*

There has not been another Supreme Court decision on the issue since *Raich*, but important statements of federal policy have been issued by the Department of Justice in a series of memoranda, the most recent of which was issued on August 29, 2013.²⁰ The Department of Justice acknowledged in this memorandum that “Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime. . . . [and the] Department of Justice is committed to enforcement of the CSA consistent with those determinations.”²¹ However, the memorandum recognized the Department of Justice has limited resources. For the purpose of utilizing its resources in the most efficient way, the memorandum lists enforcement priorities which are “particularly important to the federal government,”²² and thus more likely to encourage the federal government to intervene.

It is also made clear that there is an expectation that states which have authorized the use of marijuana will effectively regulate the practice,²³ and there is a greater chance the federal government will intervene if the state actions are deemed ineffective.²⁴ The August 2013 memorandum does depart slightly from the previous memoranda in that it extends the recommended exercise of prosecutorial discretion to instances of recreational and commercial marijuana use and production, beyond instances of medical

20 See Memorandum from James M. Cole, Deputy Att’y Gen., to All United States Attorneys (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. The other two memoranda were issued in October 2009, Memorandum from Deputy Att’y Gen. David W. Ogden, to Selected United States Attorneys, (Oct. 19, 2009), <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>, and June 2011, Memorandum from James M. Cole, Deputy Att’y Gen., to All United States Attorneys (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

21 Memorandum from James M. Cole, Deputy Att’y Gen., to All United States Attorneys, at 1 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

22 *Id.* These enforcement priorities include preventing the following: distribution of marijuana to minors, revenue from marijuana sales going to criminal organizations, marijuana being diverted interstate, connected violence and use of firearms, drugged driving, public health consequences, marijuana production on public lands, and possession or use of marijuana on federal property. See *id.*

23 See *id.* at 2 (“The Department’s guidance . . . rests on its expectation that states . . . will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice.”).

24 See *id.* at 3 (“If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.”).

use.²⁵ As with previous memoranda on marijuana, this memorandum disclaimed any provision of a legal defense to violations of federal law and emphasized that while investigation and prosecution are most likely in those situations which implicate one of the enforcement priorities listed previously, it is not an exhaustive or exclusive listing.²⁶

D. Preemption

With these state laws appearing at first glance to potentially conflict with federal law, the possibility of preemption being used to challenge them is a possibility. There are currently three main types of preemption: express preemption, conflict preemption, and field preemption, all of which have been recognized and established by the Supreme Court.²⁷ Express preemption occurs when Congress uses express, explicit terms to preempt state authority.²⁸ Field preemption is implied in situations where 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,’ because ‘the Act of Congress may touch 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.’²⁹

Conflict preemption occurs where state law actually conflicts with federal law, to the extent that compliance with both regulations is impossible (sometimes called impossibility preemption),³⁰ or where state law presents an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (sometimes called obstacle preemption).³¹ The CSA does contain a statement by Congress of its intended preemptive effect, stating:

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

25 See *id.* (“[P]revious memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. . . . [H]owever, both the existence of a strong and effective state regulatory system, and an operation’s compliance with such a system, may allay the threat that an operation’s size poses to federal enforcement interests.”).

26 See *id.* at 4 (“[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.”).

27 See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203–04 (1983) (discussing three types of preemption); see also *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990) (same).

28 See *Pac. Gas. & Elec.*, 461 U.S. at 203 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

29 *Id.* at 204 (citing *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982)).

30 See *id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

31 *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.³²

This statement clearly indicates Congress did not intend to occupy the field, thus eliminating field preemption as an option. In *Gonzales v. Oregon*,³³ a case decided one year after *Raich*, the Supreme Court interpreted this provision to not include field preemption. The Court asserted “[t]he CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision.”³⁴

It thus seems that conflict preemption was the preemptive effect Congress intended the CSA to have. There has been disagreement about whether this would include obstacle preemption, impossibility preemption, or both,³⁵ and this is a potentially important distinction because “[c]ourts have only rarely invalidated a state law as preempted under the impossibility prong of the positive conflict test.”³⁶ Impossibility tends to require state or federal law prohibit what the other requires, making compliance impossible. In the case of state medical or even recreational marijuana legalization, one is not required to possess, use, or cultivate marijuana, so refraining from use would in most jurisdictions be a sufficient possibility to avoid preemption.³⁷ Impossibility preemption could potentially have more of an impact on the state regulatory measures that go beyond just removing state criminal sanctions, and this is also the reality for obstacle preemption. With the Supreme Court declining to deal with preemption issues in its previous decisions involving the CSA and marijuana,³⁸ it is not entirely clear how this issue would be decided. This has not stopped states from passing laws legalizing medical and recreational marijuana, though as will be seen below, these concerns are addressed implicitly and explicitly in the amendments, statutes, and legislative materials produced by the states.

32 21 U.S.C. § 903 (2012).

33 546 U.S. 243 (2006).

34 *Id.* at 251.

35 See GARVEY & YEH, *supra* note 7, at 9 (arguing that the application of both types of conflict preemption “is further supported by a 2009 Supreme Court opinion that applied both impossibility and obstacle preemption in interpreting the effect of a similar preemption provision found within the Food Drug and Cosmetic Act” (citing *Wyeth v. Levine*, 555 U.S. 555, 565–68 (2009))).

36 *Id.* at 10 (noting that the impossibility prong is “vanishingly narrow” (citing Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000))).

37 See *id.* (citing *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 528 (Or. 2010)).

38 See *Gonzalez v. Raich*, 545 U.S. 1, 33 (2005) (holding state statute invalid on Commerce Clause grounds); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491 (2001) (holding state statute contravened language of Controlled Substances Act).

E. Consolidated and Further Continuing Appropriations Act

The Consolidated and Further Continuing Appropriations Act passed in December of 2014, and within this bill was a section providing that none of the funds appropriated to the Department of Justice would be used “to prevent [certain enumerated] States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”³⁹ The Appropriations Act lists thirty-two states, as well as the District of Columbia.⁴⁰ The clear language of the statute makes evident several points worth mentioning for the purposes of this Note. Congress only restricted Department of Justice funds with respect to medical marijuana.⁴¹ The restriction only applies to the states listed, so the Department of Justice could prevent states from implementing such bills in the future. The Department of Justice memorandum from 2013 is still representative of current policy,⁴² so any states implementing medical marijuana plans in the future can try tailoring their programs to address the issues targeted by the Department of Justice’s enforcement priorities.⁴³ It is also important to note that even though Congress defunded enforcement efforts against medical marijuana, medical use of the drug remains illegal under federal law. If any of the listed states, or a state implementing new medical marijuana legislation, were to do a poor job with their system, they would potentially still be open to federal action. On April 1, 2015, a Justice Department spokesman said that the Department did not believe “the amendment applies to cases against individuals or organizations.”⁴⁴ The Department of Justice instead reads the statute to stop it from hindering “the ability of states to carry out their medical marijuana laws,” instead of preventing prosecutions of individuals acting under those laws.⁴⁵ When one considers this stance along with the previous Justice Department memorandum from 2013, it does call into question whether Congress’s action really changed anything. If the Department of Justice continues to prosecute those individuals and dispensaries it deems not to be following their guidelines, it would seem nothing has changed. This could bring up questions of a lawsuit, but the reading adopted by the Department of Justice does seem to be at least one reasonable, permissible reading of the

39 Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2015).

40 *Id.* (listing “Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin”).

41 *Id.*

42 See Cole, *supra* note 20.

43 See *id.* at 1–2; see also *supra* notes 22–24 (discussing Department of Justice priorities in depth).

44 Timothy M. Phelps, *Justice Department Says It Can Still Prosecute Medical Marijuana Cases*, L.A. TIMES (Apr. 2, 2015), <http://www.latimes.com/nation/nationnow/la-na-nm-medical-marijuana-abusers-20150401-story.html>.

45 *Id.* (quoting Department of Justice spokesman Patrick Rodenbush).

text. Such an interpretation by the Department could be entitled to deference,⁴⁶ so that even a legal challenge may not change anything. However, a district court in California recently held “[t]he Government’s [reading of the statute] tortures the plain meaning of the statute. . . . It defies language and logic for the Government to argue that it does not ‘prevent’ California from ‘implementing’ its medical marijuana laws by shutting down these . . . heavily-regulated medical marijuana dispensaries.”⁴⁷

In the Congressional Record for the Consolidated and Further Continuing Appropriations Act (Appropriations Act), several members of Congress raised federalism concerns. Representative Rohrabacher offered an amendment to the bill that would become the previously mentioned Section 538 on May 28, 2014.⁴⁸ Representative Rohrabacher argued this is an area that should be left to the states under the Tenth Amendment, and that this area of criminal justice was for the states.⁴⁹ Representative Cohen, later in the record, cited Louis Brandeis for the proposition that the states are laboratories of democracy, and allowing experimentation in some states benefits the rest of the country, although he seemed to favor further restrictions by the Department of Justice pertaining to recreational marijuana prosecution.⁵⁰ Discussing the amendment one day later, Representative Broun of Georgia stated “this is a states’ rights, states’ power issue, because many States across the country . . . [are] considering allowing the medical use under the direction of a physician.”⁵¹ Representative Blumenauer of Oregon also asserted that the amendment was important for letting “this process work going forward where we can have respect for states’ rights.”⁵²

While the above quotations and arguments are all in favor of the amendment, several members of Congress also spoke out against the amendment. Their arguments largely focused on the “negative issues regarding health care and marijuana.”⁵³ Congressman Fleming of Louisiana asserted that

46 See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

47 Order re Motion to Dissolve Permanent Injunction, *United States v. Marin All. for Med. Marijuana*, No. C 98-00086 CRB, 7, 10 (N.D. Cal., Oct. 19, 2015).

48 160 CONG. REC. H4878 (daily ed. May 28, 2014) (statement of Rep. Rohrabacher).

49 *Id.* (statement of Rep. Rohrabacher) (“[T]his amendment gives us an opportunity to show . . . what we really believe about the 10th Amendment to the Constitution, and it gives us an opportunity to support the intentions of our Founding Fathers and Mothers. They never meant for the Federal Government to play the preeminent role in criminal justice.”).

50 *Id.* at H4907 (statement of Rep. Cohen) (“[T]he laboratories of democracy, the States, as Louis Brandeis called them, are doing a great service to this country, in Colorado and Washington, to see how it works. . . . And we can wait and see how those States’ experiments go. And the Department of Justice is allowing the experiment to go on for other States’ benefits.”).

51 *Id.* at H4984 (daily ed. May 29, 2014) (statement of Rep. Broun).

52 *Id.* (statement of Rep. Blumenauer).

53 *Id.* at H4907 (May 28, 2014) (statement of Rep. Fleming).

“[i]t is time for the . . . Justice Department to do their job and enforce current U.S. law that recognizes marijuana’s devastating impact on our children and society.”⁵⁴ The following day, he also cited Justice Scalia’s concurrence in *Gonzales v. Raich*⁵⁵ to support his argument that the CSA “does not violate the Commerce Clause or the principles of State sovereignty.”⁵⁶ Several other Representatives also spoke out against the amendment, including Representative Harris from Maryland and Representative Wolf from Virginia, who both argued against marijuana’s effectiveness as a medicine.⁵⁷ This Note, however, is focused on the federalism questions raised by the legalization of medical and recreational marijuana, so the medical effectiveness of marijuana is not considered here.⁵⁸ Overall, the federalism arguments used by members of Congress here seem to favor the amendment, but Representative Fleming provides an interesting example of an argument that considers the Supremacy Clause and enforcement of the federal law. Congress adopted the amendment and passed it as part of the Act, and it represents an important step in this issue’s progression. With the Appropriations Act, both the executive and legislative branches of the federal government have acquiesced at least partially to the states on the issue of medical marijuana. This is potentially an unprecedented movement in the history of the United States.

F. Current Inter-State Litigation

Besides Congress’s action, Colorado and its recreational marijuana legislation are the subject of several ongoing lawsuits.⁵⁹ Nebraska and Oklahoma border Colorado, and the attorneys general of both states are suing Colorado over several provisions of the 2012 marijuana legalization measure, which became Amendment 64.⁶⁰ The lawsuit “is aimed more at the commercial side of marijuana legalization, which created new systems of regulations and taxes as well as recreational stores, dispensaries and production facilities that are monitored and licensed by state officials.”⁶¹ State control and resources

54 *Id.* Representative Fleming also proposed his own amendment to the Consolidated and Further Continuing Appropriations Act, which would have reduced funds for the Deputy Attorney General’s office “until the Attorney General enforces the Controlled Substances Act.” *Id.* at H4906.

55 545 U.S. 1 (2005).

56 160 CONG. REC. H4983 (daily ed. May 29, 2014) (statement of Rep. Fleming).

57 *Id.*

58 I have included the names of the Representatives and their arguments in hopes of not distorting the debate in Congress, as there were several members of Congress on both sides of the issue.

59 *See, e.g.,* Jack Healy, *Nebraska and Oklahoma Sue Colorado over Marijuana Law*, N.Y. TIMES (Dec. 18, 2014), <http://www.nytimes.com/2014/12/19/us/politics/nebraska-and-oklahoma-sue-colorado-over-marijuana-law.html>; Trevor Hughes, *Sheriffs Sue Colorado Over Legal Marijuana*, USA TODAY (Mar. 5, 2015), <http://www.usatoday.com/story/news/2015/03/05/sheriffs-from-three-states-sue-colorado-over-marijuana/24385401/>.

60 COLO. CONST. art. XVIII, § 16. This lawsuit has also been filed directly to the Supreme Court, as a legal dispute between states. *See* Healy, *supra* note 59.

61 Healy, *supra* note 59.

being used for implementation of recreational marijuana has been one of the most controversial aspects of marijuana legalization.⁶² Nebraska and Colorado allege that the law has led to “more arrests, more impounded vehicles and higher jail and court costs” and has forced law enforcement “to spend more time and dedicate more resources to handling marijuana-related arrests.”⁶³ Such accusations might raise interesting questions about the police power, and the role of states as laboratories,⁶⁴ when a state’s experimentation has potentially serious adverse effects on other states.

After Nebraska and Oklahoma filed their lawsuit, sheriffs from Kansas, Nebraska, and Colorado also filed suit in federal court in Denver.⁶⁵ The Colorado sheriff, who is the lead plaintiff, alleges that the conflict between federal and Colorado law forces him to choose between violating the U.S. and Colorado Constitutions. The Kansas and Nebraska sheriffs have similar claims to those of Nebraska and Oklahoma, alleging an increase in arrests, a burden on the justice system, and increased overtime.⁶⁶ With the earlier lawsuit filed directly to the Supreme Court, it seems likely that the decision in that case will control several of the issues presented in the case brought by the sheriffs. Similar questions about states’ abilities to experiment, potentially to the detriment of their neighbors, are presented here. For the Colorado sheriff, the Supremacy Clause would seem to dictate the law to follow,⁶⁷ but the federal decision to limit enforcement of the law creates an interesting scenario where federal officers will not enforce a federal law that state officials will. Although not in this instance, one could imagine the creation of interesting “no commandeering” questions, as Congress could enact a law, limit federal enforcement, and effectively force state officials to shoulder the responsibility of enforcement.

II. MEDICAL MARIJUANA STATE ARGUMENTS

A. *Methodology*

Having discussed the current legal landscape in Part I, this Part will go through—in alphabetical order—state constitutional, statutory, and legislative material that provides for the state permitted use of medical marijuana. Because the legalization of recreational marijuana is slightly different, it will

62 See *supra* Section I.D.

63 Healy, *supra* note 59.

64 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.”); see also *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy & O’Connor, JJ., concurring) (“[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”).

65 See Hughes, *supra* note 59.

66 *Id.* For example, one of the plaintiffs is a sheriff from Deuel County, Nebraska, where felony drug arrests have increased 400% over three years. *Id.*

67 U.S. CONST. art. IV.

be discussed in Part III. As was discussed in Section I.B, twenty-four states and the District of Columbia have permitted medical marijuana in some form as of this Note's completion, and many of the arguments and published purposes of the state statutes are very similar. The quantity and quality of available material has varied greatly, so that some states provided significantly more information than others.⁶⁸ This Part is designed to provide a survey of the available primary source material, and hopefully illuminate trends and similarities in the language and arguments utilized.

B. State Laws

1. Arizona

Arizona passed Proposition 203 in 2010, which was a ballot initiative amending section 36 of the Arizona Statutes to add Chapter 28.1, which is titled the "Arizona Medical Marijuana Act."⁶⁹ The Act features a list of "findings" set out in Section 2,⁷⁰ which includes several elements that are featured throughout many of these statutes. The first finding is a review of the historical use of marijuana as a medicine,⁷¹ and an assertion that in modern times its therapeutic utility has also been acknowledged by many organizations, "including the American Academy of HIV Medicine, American College of Physicians, American Nurses Association, American Public Health Association, Leukemia & Lymphoma Society and many others."⁷² This statement that the state perceives marijuana as medicinal and with beneficial uses could be seen as implying it to be within the state police power, which generally entrusts the state to protect the welfare of its citizens. The statute then cites a statistic from the FBI stating that 99 out of 100 arrests for marijuana occur under state law, and so legalizing medical marijuana will protect most patients.⁷³ This same statistic is cited by several other states in their marijuana statutes to imply that this is a state issue, evidenced by their role in current enforcement. The Arizona statute, as will be seen, is very close to

68 This may be due to different allocations of resources on the state level and related state efforts to make legislative records more readily accessible.

69 Proposition 203 (Ariz. 2010) (codified at ARIZ. REV. STAT. ANN. § 36-28.1 (West 2015)).

70 *Id.*

71 *Id.* § 2(A) ("Marijuana's recorded use as a medicine goes back nearly 5,000 years, and modern medical research has confirmed beneficial uses for marijuana in treating or alleviating the pain, nausea and other symptoms associated with a variety of debilitating medical conditions, including cancer, multiple sclerosis and HIV/AIDS, as found by the National Academy of Sciences' Institute of Medicine in March 1999.").

72 *Id.* § 2(C).

73 *Id.* § 2(D) ("Data from the Federal Bureau of Investigation's Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of every 100 marijuana arrests in the U.S. are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill patients who have a medical need to use marijuana.").

those of several other states (Delaware, Illinois, Michigan, New Jersey, Rhode Island, and Vermont).

A list of the other states which had at that time legalized medical marijuana is provided, and the state then explicitly asserts that “Arizona joins in this effort for the health and welfare of its citizens.”⁷⁴ Having provided background in the earlier parts of the section, Arizona explicitly declares the statute to be for the welfare of its citizens. The next section of the statute appears mindful of potential preemption and commandeering concerns, stating that complying with this Act does not put Arizona in violation of federal law, and that Arizona is not required to enforce federal law.⁷⁵ The findings section concludes by saying state law should differentiate between medical and recreational marijuana for the purpose of protecting its citizens, including patients, doctors, and providers, from penalties.⁷⁶ Asserting that state law should be the one to make a distinction could be another way for Arizona to assert that this is a state police power issue, and the federal government should allow the state to regulate it.

2. California

The Compassionate Use Act of 1996 was passed in California in 1996 and is codified in the California Health and Safety Code.⁷⁷ The Act declares its own purposes, and as it was the first such act passed it serves as a good basis for examining the evolution of medical marijuana statutes over the past twenty years. The purpose section of the Act is very close to the final section of the Arizona statute, declaring that it is to ensure the right of ill citizens to obtain and use medical marijuana, as well as to protect their caregivers.⁷⁸ The Act also lists several diseases wherein marijuana use purportedly might provide relief,⁷⁹ similar to the Arizona section that discussed the modern medical uses of marijuana. One difference is that this Act also declares as a purpose “encourag[ing] the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.”⁸⁰ Unlike the Arizona statute, which did not really acknowledge a federal role in regulating medical marijuana, California does so here.

The Act was passed prior to the decision in *Raich* (being the California statute involved in that case), and since that decision, the federal government has conducted numerous raids on medical marijuana dispensaries in Califor-

74 *Id.* § 2(E).

75 *Id.* § 2(F) (“States are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. Therefore, compliance with this act does not put the state of Arizona in violation of federal law.”).

76 *Id.* § 2(G).

77 CAL. HEALTH & SAFETY CODE § 11362.5 (West 2014).

78 *Id.* § 11362.5 (b)(1)(B).

79 *Id.* § 11362.5 (b)(1)(A).

80 *Id.* § 11362.5 (b)(1)(C).

nia.⁸¹ More recently, California has continued to ask the federal government to take action on this issue, including a Senate Joint Resolution in June 2010, which called for the end of federal interference with state medical marijuana laws, establishment of federal legal protections, encouragement of medical research trials, and the creation of a federal medical marijuana policy.⁸² Additionally, a California Assembly Bill in 2007 acknowledged that post-*Raich*, states have not

been able to completely legalize medical marijuana, [instead adopting a strategy] generally immuniz[ing] medical marijuana users from state criminal liability. . . . [M]edical marijuana users still generally remain protected under medical marijuana state laws because federal agents typically do not become involved in state criminal activities like marijuana possession.⁸³

This assertion is similar to the one Arizona made in quoting the FBI statistic, and will be seen in many of the state statutes. The states acknowledge they are enforcing marijuana prohibitions, and realistically their unilateral action will halt most enforcement.

3. Colorado

As one of the now four states that have legalized recreational marijuana use as well as medical use, Colorado is an important part of the state movement. For the purposes of this subsection of the Note, only the arguments regarding medical marijuana will be examined. Colorado voters passed an amendment to Article 18 of their state constitution in 2000, which legalized the use of medical marijuana for patients with “appropriately diagnosed debilitating medical condition[s].”⁸⁴ The Colorado Medical Marijuana Code (CMMC) begins with a strong legislative declaration: “The general assembly hereby declares that this article shall be deemed an exercise of the police powers of the state for the protection of the economic and social welfare and the health, peace, and morals of the people of this state.”⁸⁵ Unlike the statements of Arizona and California in their statutes, this section explicitly states that Colorado believes the statute to be an exercise of the state police powers, for purposes which the police power is typically understood to encompass. The Colorado legislature also made a less resounding declaration of purpose at a later point in the CMMC, stating a desire to help patients suffering from serious medical conditions without being subject to criminal prosecution.⁸⁶ Colorado has additional arguments which it makes for the legalization of recreational marijuana, but those arguments will be discussed in Part III.

81 See Cal. S. Health Comm., Bill Analysis, S.J.R. 14, 2009–2010 Reg. Sess. (“[S]ince the U.S. Supreme Court ruling in the *Gonzales* case, there have been 150 federal raids on medical marijuana dispensaries and distributors in California . . . [and] the DEA has increased enforcement actions against marijuana dispensaries.”).

82 See Cal. Assemb. Comm., Bill Analysis, S.J.R. 14, 2009–2010 Reg. Sess.

83 Cal. Assemb. Comm., Comm. Rep., Assemb. B. No. 2279, 2007–2008 Reg. Sess.

84 COLO. REV. STAT. § 18-18-406.3 (2014).

85 *Id.* § 12-43.3-102 (2014).

86 *Id.* § 25-1.5-106 (2014).

4. Connecticut

Connecticut passed its medical marijuana statute in 2012,⁸⁷ and unlike the statutes passed in Arizona, California, and Colorado, it does not contain a “purpose” or “findings” section. Under Connecticut’s previous statutory regime, any inconsistencies between federal and state scheduling of controlled substances were resolved in favor of the federal schedule, unless Connecticut placed the drug in a higher schedule than the federal government. This statute created an exception for marijuana, however, ordering it reclassified as a Schedule II substance and stating that Connecticut’s view on marijuana as having medical uses would prevail over the federal classification.⁸⁸ Connecticut’s Office of Legislative Research also published a report in 2014 which acknowledged that the Department of Justice would not challenge the legalization of recreational marijuana in Colorado and Washington, “as long as the states maintain strict regulatory control over marijuana.”⁸⁹ While Connecticut is not actively considering legalizing recreational marijuana presently, this is one of many instances wherein a state proposed strict state regulation of marijuana to avoid the potential ire of the Department of Justice.⁹⁰

5. Delaware

Delaware passed Senate Bill 17 in 2011, which amended Title 16 of the Delaware Code to add the Delaware Medical Marijuana Act (DMMA) in Chapter 49A.⁹¹ Passed a year later than the Arizona statute, section 1 of the Delaware statute is labeled “Findings,” and contains nearly word-for-word the same findings as the Arizona statute (and also Illinois, Michigan, New Jersey, Rhode Island, and Vermont). Beginning with the historical usage of medical marijuana, the DMMA then discusses the current medical uses, including the National Academy of Sciences’ Institute of Medicine report in 1999.⁹² Comparing this statute to Arizona’s, the main difference is the citation of a 2010 report that summarized studies demonstrating the medical efficacy of marijuana for numerous conditions.⁹³ The DMMA then quotes the same FBI sta-

87 H.B. 5389, 2012 Gen. Assemb., Feb. Sess. (Conn. 2012).

88 *Id.* § 18.

89 JAMES ORLANDO, OFFICE OF LEGIS. RESEARCH, MARIJUANA LEGALIZATION, 2013-R-0442 (Conn. 2014).

90 JAMES ORLANDO, OFFICE OF LEGIS. RESEARCH, MARIJUANA LEGALIZATION FOR NON-MEDICAL PURPOSES, 2014-R-0191 (Conn. 2014).

91 DEL. CODE ANN. tit. 16, §§ 4901A–4926A (2011).

92 NAT’L ACADS. PRESS, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE, INSTITUTE OF MEDICINE: DIVISION OF NEUROSCIENCE AND BEHAVIORAL HEALTH (Janet E. Joy et al. eds., 1999). This study is cited by many states as part of their statutory findings, which led to passage of their respective statutes.

93 DEL. CODE ANN. tit. 16, § 4901A(b) (“Specifically, in February 2010, the Center for Medicinal Cannabis Research released a lengthy report that summarized 15 recent studies clearly demonstrating marijuana’s medical efficacy for a broad range of conditions. These studies, many of which were double blind, placebo-controlled trials, included neuropathic

tistic that 99 out of 100 marijuana arrests occur under state law,⁹⁴ lists the states which at the time had legalized medical marijuana and asserts that “Delaware joins in this effort for the health and welfare of its citizens,”⁹⁵ and concludes with the same preemption, commandeering, and state responsibility claims made by Arizona.⁹⁶ Provided that the language is nearly identical, Delaware is likely seeking to make implicit and explicit claims similar to those of Arizona: the police power is reserved to the states, this power is to ensure the health and welfare of Delaware’s citizens, the State is convinced by the evidence that medical marijuana use will be beneficial, and with the vast majority of prosecutions under state law, legalization on the state level will effectively end prosecution of those using medical marijuana in Delaware.

Besides what was officially included in the statute, there is an additional statement of findings by the Health and Human Development Committee of the Delaware Senate. The committee found that “[t]he bill provides regulation at every step in the process and includes common sense safeguards. The committee was moved by the testimony of patients with chronic debilitating diseases and found that this bill properly protects the public while enabling patients to use a needed option for disease management.”⁹⁷ The emphasis on regulation and safeguards could be important for Delaware in avoiding federal intervention. Additionally, here the traditional state interests of protecting the public, while also providing options to improve health and well-being, could also be motivating factors.

6. Hawaii

Hawaii’s medical marijuana statute took effect in 2000, adding the Medical Use of Marijuana part to Chapter 329 of their revised statutes.⁹⁸ While the statute itself doesn’t provide findings, the implementing bill fortunately does. The legislature of Hawaii declared that modern medical research has discovered marijuana can be beneficially used in the treatment of certain illnesses, and although it “is aware of the legal problems associated with the legal acquisition of marijuana for medical use. . . . [The] medical scientific evidence on the medicinal benefits of marijuana should be recognized.”⁹⁹ The legislature then acknowledges the actions taken by other states to legalize medical marijuana and states that “[t]he legislature intends to join in this initiative for the health and welfare of its citizens,” and that the purpose of

pain trials published in the *Journal of Pain, Neuropsychopharmacology and Neurology*, a study on the analgesic efficacy of smoked marijuana published in *Anesthesiology*, a study on the mechanisms of cannabinoid analgesia in rats published in *Pain*, and a study on vaporization as a ‘smokeless’ marijuana delivery system published in *Clinical Pharmacology & Therapeutics*.”).

94 *Id.* § 4901A(d); *supra* note 73 and accompanying text.

95 DEL. CODE ANN. tit. 16, § 4901A(e); *supra* note 74 and accompanying text.

96 DEL. CODE ANN. tit. 16, § 4901A(f); *supra* notes 75–76.

97 S. 146-17, Reg. Sess. (Del. 2011).

98 HAW. REV. STAT. ANN. §§ 329-121–123 (West 2015).

99 S. 20-862, 20th Leg. (Haw. 1999).

the Act is to avoid penalizing ill citizens who use marijuana for medical purposes.¹⁰⁰ The statute is very similar to several of the other state statutes examined so far: it accounts for the medical research that justifies the state use of the police power for the welfare of its citizens despite the federal government not acknowledging medical use.

Additionally, in 2014 there was a concurrent resolution in the Hawaiian House of Representatives which had the goal of requesting the DEA initiate proceedings to reschedule marijuana.¹⁰¹ This resolution states explicitly that one of the powers reserved to the states under the federal system is the power to permit medical use of controlled substances.¹⁰² It also asserts that the federal system currently misclassifies marijuana given its accepted use for medical purposes in Hawaii, and by enacting the CSA with reclassification procedures Congress intended to allow changes in federal scheduling.¹⁰³ The clear mention of federalism differentiates this legislative resolution from the materials of many other states, although the same federalism concerns do appear to be implied by their arguments that this is within their police power.

7. Illinois

Illinois passed its medical marijuana statute in 2013, creating the Compassionate Use of Medical Cannabis Pilot Program Act.¹⁰⁴ This statute, like those of Arizona and Delaware, contains a “findings” section, with language nearly identical to those two.¹⁰⁵ This statute, though passed in 2013, does not contain the 2010 study found in the Delaware statute. The main differences are that it updated the statistic regarding the number of patients who have been recommended marijuana by licensed physicians¹⁰⁶ and added those states which have passed medical marijuana laws to the list included in

100 *Id.* (“Therefore, the purpose of this Act is to ensure that seriously ill people are not penalized by the State for the use of marijuana for strictly medical purposes when the patient’s treating physician provides a professional opinion that the benefits of medical use of marijuana would likely outweigh the health risks for the qualifying patient.”).

101 H.R. Con. Res. No. 234, 27th Leg. (Haw. 2014).

102 *Id.* (“[O]ur structure of government, known as federalism, allows for the distribution of power between the states and the federal government; and . . . one of the powers that remains with the states is the authority to allow the medical use of specified controlled substances under certain circumstances . . .”).

103 *Id.* (“[T]he Department of Health recognizes the medical use of marijuana pursuant to Hawaii law; and . . . Marinol [a drug with an active ingredient found naturally in marijuana] has been approved by the Food and Drug Administration and the Drug Enforcement Administration as a Schedule 3 medication . . . [thus] the acceptance of the use of marijuana for medical purposes in the State means that marijuana does not satisfy the criteria for scheduling as a federal Schedule I controlled substance . . .”).

104 Pub. Act 098-0122 (Ill. 2014).

105 *Supra* Sections I.B, I.F.

106 Pub. Act 098-0122 § 5(c) (“Cannabis has many currently accepted medical uses in the United States, having been recommended by thousands of licensed physicians to at least 600,000 patients in states with medical cannabis laws.”).

the earlier statutes.¹⁰⁷ Besides those alterations, Illinois makes the same claims as the many of the other states: the state is acting for the welfare of its citizens, complying with the statute does not put the state in violation of federal law, the state cannot be required to enforce federal law, and state law should provide a distinction between medical and non-medical marijuana use.¹⁰⁸

8. Massachusetts

Massachusetts voters approved a ballot initiative legalizing medical marijuana in 2012, under Chapter 369.¹⁰⁹ The Bill contains a comparatively brief statement of purpose and intent: “The citizens of Massachusetts intend that there should be no punishment under state law for qualifying patients, physicians and health care professionals, personal caregivers for patients, or medical marijuana treatment center agents for the medical use of marijuana, as defined herein.”¹¹⁰ The statute, in section 7, also claims that nothing contained in the law requires the violation of federal law, or poses an obstacle to federal enforcement of federal law.¹¹¹ The purpose statement does not deal very deeply with federalism claims, but the latter section appears to address the possibility of either type of conflict preemption, and disclaims any intent of Massachusetts to conflict with federal law.

9. Michigan

Michigan passed its statute permitting the use of medical marijuana, known as the Michigan Medical Marihuana Act (MMMA), in 2008.¹¹² Section 2 of the MMMA declares its findings, and is a shorter version of the findings found in the Arizona, Delaware, Illinois, New Jersey, Rhode Island, and Vermont statutes. This statute contains only four of the elements: it cites modern medical research, the FBI marijuana arrests statistic (99 out of 100 are made under state law), declares states are not required to enforce federal law, and that Michigan joins the states that have legalized medical marijuana for “the health and welfare of its citizens.”¹¹³ Michigan did pass this law earlier than the states cited previously, so the additional parts added to the findings of the newer states could be seen as demonstrating the evolution of these findings as justification for passage of medical marijuana statutes.

10. Montana

Montana’s voters approved Initiative 148 in 2004, but this medical marijuana program was replaced by Senate Bill 423 in 2011, which enacted a new

107 *Id.*

108 *Id.* § 5(e), (f), (g).

109 H.B. 3885, 187th Gen. Court, 2012 Reg. Sess. (Mass. 2012).

110 *Id.* § 1.

111 *Id.* § 7(F).

112 MICH. COMP. LAWS ANN. §§ 333.26421–333.26430 (West 2015).

113 *Id.* § 333.26422.

medical marijuana program called the Montana Marijuana Act.¹¹⁴ Montana declared that its purposes were to protect persons with serious medical conditions who use marijuana for medical purposes, and to give local government a role in regulating marijuana to protect the welfare of their citizens.¹¹⁵ Although the language about protecting ill persons is fairly common among other statutes, declaring giving the local governments a role in establishing standards as a purpose is something different than most others. This is worth noting as a potential variable in the effectiveness of state regulation, where the potential for federal intervention is a looming question. This is explained further in M.C.A. Section 50-46-328, where the statute provided that for purposes of “public health, safety, or welfare” a local government can regulate providers of marijuana and prohibit them from operating as storefront businesses.¹¹⁶ Seeing as this appears to be a way for local governments to provide extra, as opposed to less, regulation, the additional power to regulate could potentially help Montana avoid federal intervention under the current Department of Justice policy. This policy could also potentially be a negative if local governments are inconsistent, lax, or ineffective in serving a regulatory role.

11. Nevada

Nevada voters passed a constitutional amendment in 2000 which permitted the medical use of marijuana.¹¹⁷ In the “Arguments for Passage” section of the ballot initiative, it was stated that “this proposal can make a difference in the lives of thousands of persons suffering from . . . serious illnesses. The initiative is an attempt to balance the needs of patients with the concerns of society about marijuana use.”¹¹⁸ The Nevada legislature in 2001 also passed a statute shortly after the constitutional amendment, which contained numerous justifications for the state action. The most important for the purposes of this Note was an assertion that regardless of the decisions of the federal government, it was the duty of the state to carry out the will of the people and regulate their well-being in the way they have decided and voted for.¹¹⁹

114 MONT. CODE ANN. §§ 50-46-301–344 (2011).

115 *Id.* § 50-46-301(2) (stating that the purpose of the Act is to “provide legal protections to persons with debilitating medical conditions who engage in the use of marijuana to alleviate the symptoms of the debilitating medical condition . . . [and] give local governments a role in establishing standards for the cultivation, manufacture, and use of marijuana that protect the public health, safety, and welfare of residents within their jurisdictions”).

116 *Id.* § 50-46-328.

117 NEV. CONST. art. IV, § 38 (LexisNexis, through the Seventy-Seventh (2013) and the Twenty-Seventh Special (2013) Session).

118 SEC’Y OF STATE DEAN HELLER, NEV. OFFICE OF THE SEC’Y OF STATE, STATE OF NEVADA: BALLOT QUESTIONS 2000, <http://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2000.pdf>.

119 Assemb. B. 453, 71st Reg. Sess. (Nev. 2001) (“The people of the State of Nevada recognized the importance of this research and the need to provide the option for those

Although these laws were enacted over ten years ago, the federalism principles and debates have persisted as Nevada has continued to refine its medical marijuana system. Sorting through the minutes of the Nevada Assembly demonstrates that federalism concerns recently emerged several times. In a series of meetings during 2013, Nevada state senators discussed the federal implications of medical marijuana legalization. In a meeting on June 1, 2013 of the Assembly Committee on Judiciary, several Nevada state senators and assemblymen discussed the federalism implications of legislating in this area.¹²⁰ One of the assemblymen, Ira Hansen, a plumber and self-professed rebel,¹²¹ asked his fellow committee members how he could uphold his oath to defend the U.S. Constitution and still pass laws legalizing and regulating marijuana, being mindful of the Supremacy Clause.¹²² Senator Hutchison responded that the voters of Nevada decided to amend the constitution of Nevada to allow for medical marijuana, and as a result he has a state constitutional obligation to enforce those provisions as approved by the people of the state.¹²³ He also seemed to suggest that since the CSA is statutory (not a constitutional provision), and that the federal government has claimed to not want to prosecute those using marijuana unless state regulation is lacking, his obligation as a Nevada state senator is to follow the state constitution.¹²⁴ While these assertions might not necessarily be correct,¹²⁵ they do serve as an example of a state legislative debate on this issue.

suffering from certain medical conditions to alleviate their pain with the medical use of marijuana, and in the general elections held in 1998 and 2000, voiced their overwhelming support for a constitutional amendment to allow for the medical use of marijuana in this state under certain circumstances; and . . . [w]hile the legislature respects the important and difficult decisions the Federal Government faces in exercising the powers delegated to it by the United States Constitution to establish policies and rules that are in the best interest of this nation, the State of Nevada as a sovereign state has the duty to carry out the will of the people of this state and to regulate the health, medical practices and well-being of those people in a manner that respects their personal decisions concerning the relief of suffering through the medical use of marijuana . . .”).

120 *Nev. Assemb. Comm. on Judiciary Minutes*, 77th Sess. (Nev. Jun. 1, 2013).

121 *Id.* (“I am a plumber . . . [and] a sagebrush rebel” (quoting Assemblyman Hansen)).

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

123 *Minutes*, *supra* note 120 (“The voters of this state said we, through an initiative, constitutional, and legal process, have decided we want to use medical marijuana and make it legal in this state. Once that occurred, I have a constitutional obligation to enforce those provisions. I do not get to pick and choose.”).

124 *Id.* (“I know that currently federal law and the Chief Law Enforcement Officer of federal law, by the way, it is not a constitutional right, under the *United States Constitution*—it is merely statutory law—prohibits the use of these substances. The current Chief Law Enforcement Officer of the federal government has said if you are following state law, we are not going to require you to shut down your establishments and facilities. That has been a policy decision by the Chief Executive Officer of the federal government. Our state *Constitution* says you must do this.”).

125 That federal law is supreme where it conflicts with state law seems to be a fairly uncontroversial reading of the Supremacy Clause, regardless of whether the federal law is statutory and the state law is constitutional. The better constitutional argument seems to

In a second Assembly Committee meeting held the next day, June 2, 2013, the Supremacy Clause and federal law were again discussed.¹²⁶ The committee members expressed concern about the federal government's interest in shutting down dispensaries in other states. Senator Segerblom argued that while the federal government has prosecuted some dispensaries in California, they have not done so in Colorado, and the difference to him was the high level of control and regulation that Colorado has in place, versus the less stringent regulations of California.¹²⁷ At the conclusion of the meeting, there was also a disagreement about whether the statute should include language which directly implicated the Tenth Amendment, but the Committee decided to instead base their power in the Nevada constitution.¹²⁸

The Nevada Assembly also had discussions regarding the legalization of recreational marijuana, although the state has not yet decided to take that action. On March 29, 2013, Senators Brower, Segerblom, and Jones discussed the potential conflict between federal and state law.¹²⁹ Senators Brower and Segerblom were concerned with the possibility of the legislature placing Nevadans in a conflicted position between federal and state law, where the only protection would be the current Administration's word that they would not prosecute dispensaries, although they could.¹³⁰ Senator Jones responded that the legislature is not putting Nevadans "into the Catch-22," because ultimately the legalization does not require action, it just enables the action under state law, and the conflict arises when they choose to act.¹³¹ This argument seems relatively similar to the idea that when it comes to conflict preemption, a state simply permitting conduct without any affirmative action would not be preempted.¹³²

In another Nevada Assembly meeting taking place on April 5, 2013, Assemblymen Hansen, Hogan, and Martin also discussed federalism concerns implicated by the passage of marijuana legalization.¹³³ Assemblyman Hansen asserted that as much as he is in favor of states' rights, he was concerned about what he considered "ignoring the federal law and trying to pretend it is legal, even though [they] know that others are doing this

be based on impossibility preemption, and the state and federal laws not actually being in conflict.

126 *Minutes of the Meeting of the Assemb. Comm. on Judiciary*, 77th Sess. (Nev. Jun. 2, 2013).

127 *Id.* at 4 ("In California there were some noncompliance issues, and the federal government did shut down some dispensaries. In Colorado, which is the ultimate model where everything is very tightly controlled, there have been no federal raids.").

128 *Id.*

129 *Minutes of the S. Comm. on Judiciary* 28, 77th Sess. (Nev. Mar. 29, 2013).

130 *Id.*

131 *Id.* ("We are not putting Nevadans into the Catch-22; we are enabling them to take action because they have a constitutional mandate to do so. If they want to put themselves into a Catch-22, it is their right.").

132 *See supra* notes 35–37.

133 *See Minutes of the Meeting of the Assemb. Comm. on Judiciary*, 2013 Leg., 77th Sess. 26–27 (Nev. Apr. 5, 2013).

illegally.”¹³⁴ However, he stated support of “a petition for [Nevada’s] federal delegation to ask the states to become 50 independent laboratories and try to come up with drug laws that actually work because current laws do not work.”¹³⁵ Assemblyman Joseph Hogan responded that there would certainly be issues to work out. However, while state legislators cannot change the policy of the federal government, “within the state, [they] have the authority to make it legal for people to use marijuana. [They] will try to assure that the federal government respects the rights of this state as [they] anticipate the wealth in other states.”¹³⁶ He considered the task at hand to be “ironing out behaviors that will meet the needs of the [Drug Enforcement Agency and Department of Justice] to enforce against larger-scale drug problems while [the Nevada Assembly] take[s] care of the needs of the children of Nevada by marketing and taxing the product.”¹³⁷ Assemblyman Andrew Martin continued this line of argument, asserting that “[t]his is really about our economy. Other states are doing this—Colorado, Hawaii, and Washington State. I do think there is precedent for what we are trying to do. We need to be a leader, not a follower.”¹³⁸ The economic argument is one which seems to be at least partially motivating the legalization of recreational marijuana in those states which have taken that action, as will be seen *infra* Part III.

12. New Jersey

New Jersey passed its medical marijuana legalization bill in 2009, known as the New Jersey Compassionate Use Medical Marijuana Act.¹³⁹ This statute’s findings are similar to those found within the statutes of Arizona, Delaware, Illinois, Michigan, Rhode Island, and Vermont. Passed the year after Michigan’s statute, New Jersey’s statute contains an additional section stating that “[c]ompassion dictates that a distinction be made between medical and non-medical uses of marijuana,” as well as the statement that “compliance with this act does not put the State of New Jersey in violation of federal law,”¹⁴⁰ both of which are found in the statutes of Arizona, Delaware, and Illinois which were enacted afterwards. The statute also makes the acknowledgement of modern medical research, the FBI marijuana arrest statistic, the listing of states where medical marijuana was legal, and that New Jersey was taking action for the welfare of its citizens, as those other statutes do.¹⁴¹

134 *Id.* at 26 (statement of Assemb. Ira Hansen, Member, Comm. on Judiciary).

135 *Id.*

136 *Id.* (statement of Assemb. Joseph Hogan, Guest Legislator).

137 *Id.*

138 *Id.* at 27 (statement of Assemb. Andrew Martin, Member, Comm. on Judiciary).

139 *See* N.J. STAT. ANN. § 24:6I-1 (West 2015).

140 *Id.* § 24:6I-2(e), (d).

141 *Id.*

13. New York

New York recently passed its medical marijuana bill in 2014.¹⁴² The language of the purpose statement appears to be different than many other states' purpose statements. The declared purpose of the bill was to "strike the right balance between potentially relieving the pain and suffering of those in desperate need of a treatment and protecting the public against risks to its health and safety."¹⁴³ Like the language of many other states' statutes, the language in New York's statute evokes the idea that it is the state's prerogative to find the balance between health, welfare, and safety concerns of its citizens. Given the federal position of likely allowing state regulation to operate as long as it is effective, finding a balance between safety and health is important for an effective regulation. The sponsoring memorandum for Bill 6357 also contains a justification section.¹⁴⁴ The National Academy of Sciences report from 1999 is cited here,¹⁴⁵ as well as several other studies and opinions of doctors to support the sponsor's premise that "[t]housands of New Yorkers have serious medical conditions that may benefit from medical use of marihuana . . . [and] [m]edical marihuana must be available to those patients."¹⁴⁶ The memorandum also argues that the active ingredient in marijuana, THC, has been legal in synthetic form under federal law, but the purportedly more effective natural form has been illegal, and legalizing "the medical use of effective medicine does not undermine the message that non-medical use of illegal drugs is wrong."¹⁴⁷ This language again demonstrates the state trying to find a balance between the health and welfare of its citizens and safety and security, a vital part of avoiding federal prosecution under the current administration's policy.

14. Oregon

Oregon is one of the four states that has currently legalized recreational marijuana, but Oregon voters previously passed an initiative in 1998 legalizing medical marijuana, called the Oregon Medical Marijuana Act (OMMA).¹⁴⁸ The findings contained in the OMMA are relatively short, with a brief statement that marijuana has been found by patients and doctors to be an effective treatment,¹⁴⁹ and that Oregonians should be allowed to use small amounts of marijuana when so advised by their doctor.¹⁵⁰ As will be

142 See Assemb. B. 06357, 237th Leg., Reg. Sess. (N.Y. 2014) (codified at N.Y. PUB. HEALTH LAW §§ 3360–3369-E (McKinney 2015)).

143 *Id.*

144 See N.Y. STATE ASSEMB., N.Y. SPONS. MEMO., 2013 Assemb. B. 6357, 236th Leg., Reg. Sess. (N.Y. 2013) [hereinafter N.Y. SPONSOR MEMO].

145 See DEL. CODE ANN. tit. 16, §§ 4901A–4926A (2011); N.Y. SPONSOR MEMO, *supra* note 144.

146 N.Y. SPONSOR MEMO, *supra* note 144.

147 *Id.*

148 See OR. REV. STAT. ANN. §§ 475.300–346 (West 2015).

149 *Id.* § 475.300(1).

150 *Id.* § 475.300(2).

seen, the statute permitting the recreational use of marijuana has a longer “purpose” section that is closer to those statutes passed by states that have legalized medical or recreational marijuana more recently, but seeing as the original Act was passed in 1998, the justifications seen in other statutes might not have been thought of as necessary to include in a pre-*Raich* statute.

15. Rhode Island

Rhode Island passed its medical marijuana statute in 2006, called The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act.¹⁵¹ This statute also contained a findings section much like those found in the statutes of Arizona, Delaware, Illinois, Michigan, New Jersey, and Vermont. The statute acknowledges modern medical research, the FBI marijuana arrest statistic, the listing of states where medical marijuana was legal, and that Rhode Island was taking action for the welfare of its citizens.¹⁵² Like the legislation of the other six states, Rhode Island may have been utilizing this findings section to justify its legalization of medical marijuana under its use of the state police power.

16. Vermont

Vermont passed its first law legalizing the medical use of marijuana in 2004, amending Chapter 86 of the Vermont Statutes to be titled “Therapeutic Use of Cannabis.”¹⁵³ Section 1 of Vermont House Bill 111 includes the “findings and purpose” section, which—as seen in the statutes of Arizona, Delaware, Illinois, Michigan, New Jersey, and Rhode Island—is nearly identical, and goes through the same procession of justifications in each state’s statute.¹⁵⁴ This, however, is the earliest medical marijuana statute, and could therefore be the source for some of the language other states have used; in 2003 the District Court for the Northern District of California¹⁵⁵ and the Ninth Circuit¹⁵⁶ made their decisions in the cases leading up to *Raich*.¹⁵⁷ It is plausible that the State of Vermont was aware of some of the issues that this legislation could present, and in using this language was attempting to justify its action on police power (and implicitly federalism) grounds.

17. Washington

Washington citizens passed Initiative Measure 692 (IM 692) in 1998,¹⁵⁸ which legalized the medical use of marijuana under Title 69 of the Revised

151 See 21 R.I. GEN. LAWS § 21-28.6-1 (2015).

152 See *id.* §§ 21-28.6-2(1)–(3), (6).

153 See VT. STAT. ANN. tit. 18, §§ 4471–4474m (2015).

154 See S. 76, 67th Biennial Sess. (Vt. 2004); *supra* subsections II.B.2, II.B.6, II.B.8, II.B.10, II.B.13.

155 See *Raich v. Ashcroft*, 248 F. Supp. 2d 918 (N.D. Cal. 2003).

156 See *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003).

157 545 U.S. 1 (2005).

158 See 1999 Wash. Sess. Laws 1–6.

Code of Washington.¹⁵⁹ IM 692 included a brief “purpose and intent” section, which asserted that the people of Washington found that some ill persons may benefit from medical marijuana,¹⁶⁰ and “humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician’s professional medical judgment and discretion.”¹⁶¹ The Washington legislature in the Revised Code of Washington also declared its findings that there are numerous conditions which persons suffer from that may be alleviated by the medical use of marijuana. Similarly motivated by “[h]umanitarian compassion,” the legislature found the use of medical marijuana should be a “personal, individual decision” based upon professional medical advice.¹⁶² The language seems basically identical to the IM 692 language because the legislature amended the statute in 2011 and replaced the “people of Washington state” phrase with “legislature.”¹⁶³ This might be more of a semantic point, but being mindful of the potential for review of what intent and purpose the legislature had in enacting the statute, perhaps the legislature thought it necessary to clarify that the above were their intent and purpose.

C. *State Medical Marijuana Legislation Conclusions*

Reading through the language of the various states’ legislation, there are common arguments and justifications to be found. Most clearly connected are the seven states that share very similar language in their statutes: Arizona, Delaware, Illinois, Michigan, New Jersey, Rhode Island, and Vermont. The language they use seems to implicate the same general ideas, which are tied to federalism concerns. They can be seen as arguing that the police power is reserved to the states, that under this power the state is able to ensure the health and welfare of its citizens, and that the evidence convinced the state that medical marijuana use will benefit the health and welfare of its citizens. With the citation of the FBI statistic showing the vast majority of prosecutions occur under state law, legalization on the state level will effectively end prosecution of those using medical marijuana in these states, and they appear to believe it is within their power to do so in the interests of their citizens. Other states outside of this group also explicitly (Colorado) and implicitly (Hawaii, Montana, and New York) appear to invoke the police power as justification for their action. Another main component included by several states was what appeared to be an anticipation of preemption claims, and the resulting sections disclaiming any intent to present an obstacle or directly conflict with federal law. Until this issue is resolved, either by the courts or Congress, it seems likely to be something states include in their statutes as a

159 See WASH. REV. CODE §§ 69.51A.005–69.51A.903 (2015).

160 See 1999 Wash. Sess. Laws 2.

161 *Id.*

162 WASH. REV. CODE. § 69.51A.005(1)(b) (2015).

163 2011 Wash. Sess. Laws 1346.

result of the legal uncertainty surrounding the preemption question. The issue of strong, tight regulation was also seen in the language of several states, and plausibly could be a reaction to the position of the Department of Justice. With federal policy favoring strong state regulation, some states seemed to want to make their intention of strong regulation apparent in the legislation itself.

III. RECREATIONAL MARIJUANA STATE ARGUMENTS

A. *Methodology*

Having at this point examined statutes and other sources from many of the states that have currently legalized medical marijuana, it is important to look at the arguments made in favor of legalizing recreational marijuana. Like Part II, Part III will provide a survey of the primary source material, once again illuminating trends and similarities in the language and methods used among the states

B. *State Medical Marijuana Laws*

1. Alaska

Alaskan voters passed Ballot Measure 2 in 2014, amending Alaska Statutes Title 17 to include a new chapter, 38, which legalized and regulated marijuana for recreational use. The measure and approved new chapter begin with a section on purpose and findings like many of the medical marijuana statutes. The Act first declares that “[i]n the interest of allowing law enforcement to focus on violent and property crimes, and to enhance individual freedom, the people of the state of Alaska find and declare that the use of marijuana should be legal for persons 21 years of age or older.”¹⁶⁴ This statement of purpose, and the one that follows,¹⁶⁵ appear to condition the legalization of marijuana on the use of the police power and the associated ability of the states “to make and enforce laws protecting the health, safety, welfare, and morals of their citizens.”¹⁶⁶ The statute also seems to envision the possibility of a preemption challenge in the future, and includes a clause which appears to claim that nothing in the Act would result in impossibility or obstacle preemption.¹⁶⁷

164 ALASKA STAT. § 17.38.010(a) (2015).

165 See *id.* § 17.38.010(b) (“In the interest of the health and public safety of our citizenry, the people of the state of Alaska further find and declare that the production and sale of marijuana should be regulated . . .”).

166 Amicus Brief of Alabama et al., *supra* note 19, at 10.

167 See ALASKA STAT. § 17.38.010(d) (“Nothing in this Act proposes or intends to require any individual or entity to engage in any conduct that violates federal law, or exempt any individual or entity from any requirement of federal law, or pose any obstacle to federal enforcement of federal law.”).

2. Colorado

Colorado citizens passed Amendment 64 to their state constitution in 2012, legalizing recreational marijuana twelve years after legalizing medical marijuana.¹⁶⁸ This constitutional amendment, like many of the statutes previously cited, included a purpose and findings section. The amendment first declares that:

In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.¹⁶⁹

This statement is very similar to that of Alaska's Ballot Measure 2, although Amendment 64 adds "enhancing revenue for public purposes" to the purposes of efficient use of law enforcement resources and promoting individual freedom. This idea of increasing revenue for the state was also one of the reasons seen in the Nevada Assembly meeting, and particularly was a reason the Nevada Assembly thought passing legalization measures sooner would be better for the state (and a means to increase revenue).¹⁷⁰ Amendment 64 also declares that marijuana will be regulated similarly to alcohol, "[i]n the interest of the health and public safety of our citizenry,"¹⁷¹ and asserts that besides the provided-for exceptions, "it is necessary to ensure consistency and fairness in the application of this section throughout the state and that, therefore, the matters addressed by this section are . . . matters of statewide concern."¹⁷² While some state regulatory schemes permit local governments some control, Colorado decided to pursue a more uniform approach, which may be the better policy. Facing the threat of potential federal action, keeping all regulation at the state as opposed to the local level might make it easier to demonstrate to the federal government that their policy interests¹⁷³ are accounted for.

In the wake of Amendment 64's passage, the Governor of Colorado created a task force to identify the legal, policy, and procedural issues needing resolution, and among these issues was the "[r]econciliation of Colorado and federal laws such that the new laws and regulations do not subject Colorado state and local governments and state and local government employees to prosecution by the federal government."¹⁷⁴ In the Amendment 64 Task Force Final Report, issued on March 13, 2013, the task force asserted that its plan was designed "to ease implementation and enforcement and to demon-

168 See COLO. CONST. art. XVIII, § 16; *id.* amend. 64 (2012).

169 COLO. CONST. art. XVIII, § 16(1)(a) (LexisNexis, through Second Regular Sess. Of Sixty-Ninth Gen. Assemb. of the State of Colo. (2014)).

170 See *Minutes*, *supra* note 133, at 24–25.

171 COLO. CONST. art. XVIII, § 16(1)(b).

172 *Id.* art. XVIII, § 16(1)(d).

173 See *supra* note 22.

174 Colo. Exec. Order B 2012-004 (2012).

strate to the federal government that Colorado is sticking with a regulatory model that has worked.”¹⁷⁵ Several times throughout the report, the task force stressed that its recommendations were meant to “reduc[e] the likelihood of federal scrutiny,”¹⁷⁶ demonstrating the strong effect the Department of Justice position has had. As the state senator from Nevada explained, the Colorado system has provided a great example for other states looking to avoid the ire of the federal government, so this focus of the state seems in line with their previous actions.¹⁷⁷

3. Oregon

Oregon voters passed Measure 91 in 2014, which was added to the Oregon Revised Statutes as the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act.¹⁷⁸ Although the purposes were not added to the Oregon Revised Statutes,¹⁷⁹ they were listed as part of Measure 91, under Section 1(1). Measure 91 stated that its purposes were to

eliminate the problems caused by the prohibition and uncontrolled manufacture, delivery, and possession of marijuana within this state . . . [and] protect the safety, welfare, health, and peace of the people of this state by prioritizing the state’s limited law enforcement resources in the most effective, consistent, and rational way¹⁸⁰

The purpose of protecting the general welfare of the people was also included in the statutes of Alaska and Colorado previously examined, as was utilizing limited law enforcement resources, and both appear within the scope of the state’s police power.¹⁸¹ The elimination of associated problems seems vague, and could implicate many issues.¹⁸² Perhaps following the example set by Colorado’s regulatory success, Measure 91 also declares that a purpose is to “establish a comprehensive regulatory framework concerning marijuana under existing state law.”¹⁸³ In addition, Measure 91 states that nothing within the Act (Measure 91) may be construed as requiring a person to violate a federal law or obstruct federal law.¹⁸⁴ Similar to the section

175 AMENDMENT 64 IMPLEMENTATION TASK FORCE, TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64: REGULATION OF MARIJUANA IN COLORADO 7 (2013), <http://www.colorado.gov/cms/forms/dor-tax/A64TaskForceFinalReport.pdf>.

176 *Id.* at 18; *see also id.* at 17, 24, 33, 50, 98.

177 *See Minutes of the Meeting of the Assemb. Comm. on Judiciary*, 2013 Leg., 77th Sess. 29 (Nev. June 1, 2013) (statement of Jennifer Soles).

178 Measure 91 (Or. 2014).

179 *Id.* § 2.

180 *Id.* §§ 1(1)(a)–(b).

181 *See supra* Sections III.A, III.B.

182 A potential understanding might be found in Washington’s statute, *infra* Section III.D.

183 Measure 91, *supra* note 178, § 1(1)(e).

184 *Id.* §§ 4(5)–(6).

included in the Alaska statute, this section seems potentially directed at any future obstacle preemption or impossibility preemption claims.¹⁸⁵

4. Washington

Washington voters passed Initiative Measure No. 502 (IM 502) in 2012, which added new sections to the Revised Code of Washington, Chapter 69.50, legalizing the recreational use of marijuana.¹⁸⁶ The “intent” section is within the first part of Initiative Measure 502, and has three intended goals. IM 502 intends to permit law enforcement to focus on violent and property crime,¹⁸⁷ generate “new state and local tax revenue for education, health care, research, and substance abuse prevention,”¹⁸⁸ and remove marijuana from the control of illegal organizations, instead subjecting it to strict regulation.¹⁸⁹ The need for law enforcement efficiency was mentioned by Alaska, Colorado, and Oregon in their laws, and Colorado’s amendment also had the stated purpose of generating tax revenue for “public purposes.”¹⁹⁰ The purpose of removing marijuana from control of illegal organizations could be similar to Oregon’s measure that sought to eliminate the problems associated with the prohibition of and illegal activities surrounding marijuana.¹⁹¹ Here, though, it is also connected to the other purpose, having a state regulatory scheme, and as has been discussed previously this could be a response of the states to the Department of Justice’s current policy.

C. *State Recreational Marijuana Legislation Conclusions*

As with the medical marijuana legislation, state statutes legalizing recreational marijuana share some similarities. Alaska, Colorado, Oregon, and Washington all emphasized the efficient use of law enforcement resources, and Alaska, Colorado, and Oregon stated that legalization was in the interest of public welfare. Both purposes appear aimed to place the legalization legislation within the state’s use of the police power. Similar language was utilized in the medical marijuana legislation as well, potentially for the same reason. Colorado, Oregon, and Washington also mention having strong regulation of the conduct. Oregon and Washington’s choice to highlight the removal of marijuana from illegal organizations could also be connected to an overall purpose of demonstrating to the federal government that the states’ regulation is sufficient and addresses their concerns. Alaska and Ore-

185 ALASKA STAT. § 17.38.010(d) (2014).

186 WASH. REV. CODE §§ 46.04, 46.20, 46.61, 69.50 (2015).

187 *Id.* § 1(1) (“Allow[ing] law enforcement resources to be focused on violent and property crimes . . .”).

188 *Id.* § 1(2).

189 *Id.* § 1(3) (explaining that the Initiative Measure intends to “[t]ake[] marijuana out of the hands of illegal drug organizations and bring[] it under a tightly regulated, state-licensed system”).

190 COLO. CONST. art. XVIII, § 16(1)(a).

191 Measure 91, *supra* note 178.

gon also included sections that could be meant to address future preemption claims. Lastly, increased revenue was a purpose included by Colorado and Washington, and the revenue is said to be for the benefit of the public, which could be a way the states meant to relate revenue generation to citizen welfare and the police power.

IV. HISTORICAL CONTEXT OF MARIJUANA LEGALIZATION

A. *Introduction: Child Labor Law Development*

The marijuana legalization process is perhaps a unique development. Many historical examples conclude with state governments acquiescing to the federal government. With marijuana legalization, states have opposed the federal government in increasing numbers, and the federal government appears to be backing off. To demonstrate how these developments are unique, this Section will discuss another historical example of a disagreement between federal and state law. Perhaps unsurprisingly, the federal government, backed by the Supremacy Clause, tends to prevail.

Child labor law is one of the first areas that might come to mind when trying to find a historically analogous situation. A Congressional Research Service Report from 2005 provides an excellent summary of child labor history.¹⁹² For the purpose of framing the issue, this Section will briefly summarize this history. Child labor became a contested issue in the late nineteenth century, and this continued into the twentieth century.¹⁹³ Although some reform was attempted at the state level at first,¹⁹⁴ the complexity of the problem¹⁹⁵ led reformers to acknowledge that federal action would be needed to address the problem sufficiently.¹⁹⁶ There were several attempts at federal action, beginning with an unsuccessful attempt to ban child labor in factories and mines in 1906, though “the proposal raised the visibility of child labor as a public policy issue.”¹⁹⁷ In 1907, Congress passed a law permitting the Secretary of Commerce and Labor to conduct an investigation into the conditions of woman and child workers, which resulted in a survey spanning multiple volumes and years; this record provided a basis for Congressional

192 WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL31501, *CHILD LABOR IN AMERICA: HISTORY, POLICY, AND LEGISLATIVE ISSUES* (2005).

193 *Id.* at 3.

194 *Id.* at 4.

195 *Id.* Besides the various types of work children might do, industrial homework by children was especially difficult to restrain. . . . [C]hildren worked in tenement sweatshops making clothing, processing food, and engaging in whatever other work might profitably be conducted at home. Any tenement might become a little factory where conditions were adverse . . . and hours of work were unrestrained except by exhaustion.

Id.

196 *Id.* (stating concerns about employers moving to other states and creating a damaging race to the bottom).

197 *Id.*

attempts to tackle child labor.¹⁹⁸ Throughout the next twenty years, Congress made several legislative attempts, but encountered trouble in the courts.¹⁹⁹ The Owen-Keating Act banned the interstate movement of certain child labor products,²⁰⁰ but the Supreme Court declared it unconstitutional in *Hammer v. Dagenhart*.²⁰¹ After this attempt failed, Congress enacted the Pomerene Act in 1919 which added a ten percent tax on industries employing children in violation of specified standards.²⁰² The Supreme Court also declared this Act unconstitutional in *Bailey v. Drexel Furniture Co.*²⁰³

Following this second failure in the courts, Congress proposed a child labor amendment in 1924,²⁰⁴ but it failed to gather momentum in the states. Nearly a decade later, following the election of President Franklin D. Roosevelt, child labor provisions found a place within the New Deal. Congress passed the National Industrial Recovery Act in 1933 creating the National Recovery Administration, which encouraged industries to develop codes of fair competition.²⁰⁵ Unfortunately for child labor reform, the Supreme Court also held the National Industrial Recovery Act unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*.²⁰⁶ Following this decision against the National Industrial Recovery Act in 1935, there was a change in the Supreme Court's thinking in 1937. After striking down several aspects of the New Deal, the Court signaled that it might be willing to change how it viewed government power.²⁰⁷ The Court decided *West Coast Hotel Co. v. Parrish*, upholding a Washington state law fixing the minimum wage for women and children.²⁰⁸ One year later, Congress passed the Fair Labor Standards Act (FLSA).²⁰⁹ The FLSA included various child labor provisions²¹⁰ and, unlike its predecessors, remained constitutional.

198 *Id.* at 4. These reports appeared in nineteen volumes from 1910 to 1913.

199 There was, additionally, “[a] regional struggle . . . in progress [that] pitted one state against another in a contest for economic growth . . . [and] Southern manufacturers viewed child labor restriction as an ‘effort of northern agitators to kill the infant industries of the South.’” *Id.* at 5 (quoting Grace Abbott, *Federal Regulation of Child Labor, 1906–38*, 13 SOC. SERV. REV. 409, 411 (1939)).

200 *Id.*

201 247 U.S. 251 (1918). The Court, in this well-known case, held that the Act was unconstitutional because Congress's commerce power did not extend to purely local matters.

202 See WHITTAKER, *supra* note 192, at 5.

203 259 U.S. 20 (1922). The Court declared that “the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power.” *Id.* at 43.

204 See WHITTAKER, *supra* note 192, at 5.

205 *Id.* at 6.

206 295 U.S. 495 (1935).

207 See generally Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010) (discussing the Supreme Court's change in thinking); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's “Court-Packing” Plan*, 1966 SUP. CT. REV. 347 (discussing the lead up and evolution of President Roosevelt's plan).

208 300 U.S. 379 (1937).

209 See WHITTAKER, *supra* note 192, at 7.

B. Comparison

An immediately apparent distinction between marijuana legalization and child labor laws is that the child labor movement was a regulatory movement, whereas marijuana legalization can be considered a deregulatory movement.²¹¹ The states attempted to pass child labor laws, but they were ineffective, which necessitated the involvement of Congress to craft a national solution.²¹² However, federal law made marijuana illegal first,²¹³ and then states acted on their own to carve out exceptions: first for medical and then recreational marijuana.²¹⁴

Initially, some states resisted the federal efforts to enact child labor laws, which some have attributed to concerns about manufacturing capabilities post-Civil War.²¹⁵ The state resistance to the federal action on marijuana took considerably longer than state resistance to child labor laws, as the Controlled Substances Act was passed in 1970 and California passed the first state law legalizing medical marijuana twenty-six years later.²¹⁶ While the states eventually acquiesced to the federal position on child labor laws, the opposite has been true regarding medical marijuana laws as states continue to pass legalizing legislation.²¹⁷

Both issues involve separation of powers concerns. But while characterizing child labor law concerns as pertaining to horizontal separation of powers would be fair, marijuana legalization concerns the vertical separation of powers. The child labor laws can be located in the larger context of the battle between Congress and the Supreme Court (which eventually involved President Roosevelt as well) over the reach of Congress's legislative power. Marijuana legalization, meanwhile, has not been a battle fought in the courts but one between the states and the federal government.

Viewing the alignment differently, the situations could be similar in that both aligned several state government "entities," and some branches of the federal government, against another federal branch.²¹⁸ In the child labor law conflict, states, Congress, and the President²¹⁹ united in opposition to

210 *Id.*

211 Deregulatory insofar as Congress has already regulated marijuana under the Controlled Substances Act, and now the states want those regulations modified to various degrees. Deregulation here isn't meant to be complete, while there may be those who would remove any restrictions from marijuana altogether, they would likely be a very small minority.

212 *See supra* notes 194–96.

213 *See supra* Section I.A.

214 *See supra* Section I.B.

215 *See supra* note 199 and accompanying text.

216 *See supra* note 9.

217 *See supra* Section I.B.

218 Another way to phrase this would be branches of government, but seeing as that is typically reserved for describing horizontally related branches (executive, legislative, judicial), confusion is avoided.

219 The executive doesn't seem to have been as involved in the earlier efforts, but played a role once child labor became a part of the New Deal programs.

the Supreme Court, which continually declared the congressional acts unconstitutional. In the marijuana legalization debate, currently states are aligned in opposition to Congress (federal law), while the President (and executive branch) signaled a willingness to allow states to legislate as they see fit, and the courts are mostly uninvolved.²²⁰ Recent congressional action, such as passing the provision in the 2015 Appropriations Act, could potentially call into question how staunchly Congress is opposed.²²¹ The difference is that the states began the movement against federal regulation of marijuana, which seems singular compared to the regulatory development of child labor laws.

There may also be another, simpler explanation for the unique progression of marijuana legalization, which is that the political pressures in this situation are similarly unique. The state legislatures and governors, being closer to their constituencies and with more united concerns have been able to react to the changing public perception of the issue. Similarly, the President and executive branch, detecting this shift, have also altered their enforcement to take advantage of the changing public perception. The federal legislature, which has passed historically few laws in recent sessions,²²² has been unable to take action in accordance with the other political branches. This explanation might be unsatisfying, and seem simple, but sometimes the simplest explanations are best.

CONCLUSION

After surveying the current legal landscape and the state legislation legalizing both medical and recreational marijuana, several trends and similarities among the states' stated purposes and intentions emerge. Examining the primary source material as a whole demonstrates that with some exceptions, states that have legalized either form of marijuana have sought to justify their decisions on grounds related to the police power. The evidence also points to some states accounting for the policies of the federal government by emphasizing the strength of their regulations. Additionally, some states appear to have anticipated potential preemption challenges to their laws, and disclaimed any intent to conflict with federal law. Due to the rela-

220 *Gonzales v. Raich*, 545 U.S. 1 (2005), held that Congress was able to regulate medical marijuana under the Commerce Clause. However, the Court has not ruled on the preemptive effect of the CSA, which could provide room for the states to maneuver. See *supra* Section I.D.

221 These changes do not seem reflective of the attitude of Congress for much of the past forty-five years. Seeing as Congress has not yet come close to voting on a re-scheduling of marijuana, it remains to be seen how far they are willing to go towards allowing the states to regulate marijuana for themselves.

222 The 113th Congress enacted the second-fewest laws in history, with 296; the 112th Congress passed the fewest laws in history, with 283. See Drew DeSilver, *In Late Spurt of Activity, Congress Avoids 'Least Productive' Title*, PEW RES. CTR. (Dec. 29, 2014), <http://www.pewresearch.org/fact-tank/2014/12/29/in-late-spurt-of-activity-congress-avoids-least-productive-title/>.

tively uncertain nature of this area of law, there is potential for rapid change. A shift in federal policy or a federal court ruling on preemption could alter the assumptions much of the current system is based upon. States considering legalization must weigh the benefits of a strong regulatory framework that complies with current federal policy but is more likely to be preempted, and a weaker regulatory framework less likely to be preempted but potentially problematic under current federal policy. Regardless of how these unknowns are eventually resolved, the marijuana legalization question has potential to be one of tremendous importance for the overarching federalism debate and how the federal and state governments will interact moving forward.

