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State Legalization of Marijuana as a “Diagonal Federalism” Problem

*Brannon P. Denning**

When I hear the term “vertical separation of powers,” I think primarily of how the Constitution allocates power within our federal system, as opposed to horizontal separation of powers, which allocates power among the branches of the federal government. But federalism itself has vertical and horizontal dimensions as well. Vertical federalism concerns the allocation of power between the national government and those of the states.¹ Horizontal federalism, by contrast, concerns the states’ relationships with one another.² The Constitution and constitutional law address both aspects. Article I, for example, enumerates powers that are given to Congress,³ while, say, Article IV addresses interstate comity in various ways.⁴

But some issues implicate both aspects of federalism. This essay will discuss one: the state-level push to decriminalize the use of marijuana for medical and recreational purposes. I suggest that it ought to be regarded as a “diagonal federalism” problem calling for multi-dimensional solutions.

What I am calling diagonal federalism is simply my too-clever-by-half term for an issue—like legalization of marijuana—that implicates federalism’s vertical *and* horizontal axes.⁵ In this regard, marijuana occupies a space not unlike that of alcohol in the late nineteenth and early twentieth

* Associate Dean and Professor of Law, Cumberland School of Law, Samford University. This is a revised and lightly footnoted version of remarks made at the “Separation of Powers” Symposium at Florida International University College of Law on March 11, 2016. It draws on two previously published articles. See Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567 (2015); Brannon P. Denning, *One Toke over the (State) Line: Constitutional Limits on “Pot Tourism” Restrictions*, 66 FLA. L. REV. 2279 (2014). Thanks to Professor Elizabeth Price Foley for the kind invitation to participate, and to the staff of the *FIU Law Review* for their gracious hospitality and skill in organizing the symposium.

¹ Allan Erbsen defines it as “how power is or should be allocated between the federal and state tiers of government, and how to prevent the federal and state governments from encroaching on each other’s prerogatives.” Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 502 (2008).

² See generally *id.*; Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014).

³ U.S. CONST. art. I, § 8, cls. 1–18.

⁴ U.S. CONST. art. IV; see generally Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007).

⁵ Hari Osofsky uses the same term, but gives it much more sophisticated and theoretically rich treatment. See Hari Osofsky, *Diagonal Federalism and Climate Change Implications for the Obama Administration*, 62 ALA. L. REV. 237 (2011).

centuries.⁶ As was true of alcohol, failure to appreciate the diagonal nature of the problem may produce suboptimal policies, public backlash, or both. In this essay, I describe the vertical and horizontal federalism aspects of legalizing cannabis and then suggest what I hope are some thoughtful diagonal federalism responses that involve both states and the federal government.

I.

The vertical federalism aspects of marijuana are fairly well known. Under the Controlled Substances Act⁷ (CSA), marijuana is still a Schedule I drug, meaning it has no recognized medical use.⁸ Its sale, possession, manufacture, and distribution, therefore, are illegal.⁹ The Supreme Court has twice refused to imply any exceptions to the CSA based on state laws permitting the use of medical marijuana.¹⁰ In 2001, for example, in *United States v. Oakland Cannabis Buyers' Cooperative*, the Court refused to recognize a medical necessity defense to prosecution under the CSA for a defendant authorized to purchase or sell marijuana under state law.¹¹ If there is any medical necessity defense to be had, it is one that Congress should create, the Court concluded.

In its 2005 decision in *Gonzales v. Raich*, the Court upheld the power of Congress to regulate local, noncommercial production, distribution, and possession of marijuana under the Commerce Clause.¹² It rejected arguments

⁶ For the Supreme Court's treatment of state alcohol regulation prior to the ratification of the Eighteenth Amendment, and the limits it imposed on that regulation, see OWEN M. FISS, 8 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 261–92 (1993); see also ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., 9 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–21, at 531–47 (1984) (discussing constitutional issues surrounding the proposal and ratification of the Eighteenth Amendment and Prohibition).

⁷ 21 U.S.C. §§ 801–971 (2012).

⁸ *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491–92 (2001) (discussing significance of marijuana's classification as a Schedule I drug).

⁹ Jonathan H. Adler, *Introduction*, 65 CASE W. RES. L. REV. 505, 506 (2015) (“The use, possession, cultivation, and sale of marijuana remains illegal under federal law. . . . Cultivation and distribution of marijuana are felonies, and CSA violations may authorize asset seizure.”).

¹⁰ *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (“[L]imiting the activity to marijuana possession and cultivation ‘in accordance with state law’ cannot serve to place respondents’ activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”); *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 491 (“[A] medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act. The statute, to be sure, does not explicitly abrogate the defense. But its provisions leave no doubt that the defense is unavailable.”) (citation omitted).

¹¹ *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 491.

¹² *Raich*, 545 U.S. at 22.

that state law authorizing such impacted the scope of federal power to regulate interstate commerce. Justice Stevens wrote that

limiting the activity to marijuana possession and cultivation “in accordance with state law” cannot serve to place respondents’ activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is “superior to that of the States to provide for the welfare or necessities of their inhabitants,” however legitimate or dire those necessities may be.¹³

Marijuana’s continuing illegality under federal law has far-reaching and potentially serious effects on those who choose to operate “canna-businesses” in states where it is legal to do so. For example, if you are a Colorado dispensary owner you essentially operate an all-cash business because you are deprived of access to the banking system.¹⁴ Dispensaries in Denver and elsewhere in Colorado spend enormous sums each year on security.¹⁵ Consider, too, the implications of having lots of businesses that operate on an all-cash basis. The federal government has warned states that choose to legalize marijuana to take steps to prevent organized crime from using dispensaries as vehicles for money laundering.¹⁶

Marijuana’s illegality impacts canna-businesses’ ability to access legal services as well.¹⁷ Under Rule 1.2(d) of the Model Rules of Professional Conduct—some version of which is in effect in nearly all states—lawyers are prohibited from helping their clients break the law.¹⁸ Because marijuana remains illegal, states have taken the position that, state law notwithstanding, lawyers are unable to provide legal services such as drafting and negotiating for clients involved in the cannabis trade.¹⁹ Some states are relaxing their interpretation of those rules,²⁰ but it still represents something that lawyers

¹³ *Id.* at 29 (quotations omitted).

¹⁴ See generally Julia Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597 (2015).

¹⁵ *Id.* at 601 (“From vaults, to cameras, to security personnel, to finding suppliers that accept cash payment, managing cash can quickly become a logistical and security nightmare.”) (citation omitted).

¹⁶ *Id.* at 601–03 (describing regulatory difficulties attending the all-cash nature of canna-businesses); *infra* notes 21–22 and accompanying text (discussing federal enforcement priorities outlined in the Cole Memorandum).

¹⁷ See generally Chris Hildebrand, *Hazy Ethics: Access to Legal Counsel for Marijuana Businesses*, 28 GEO. J. LEGAL ETHICS 583 (2015).

¹⁸ MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .”).

¹⁹ Hildebrand, *supra* note 17, at 591–92 (discussing states taking a strict view of Rule 1.2(d)).

²⁰ *Id.* at 592–95 (discussing movement in states to permit lawyers to provide legal services to clients despite continued federal illegality of marijuana).

have to think about when they are advising their clients' canna-businesses.

There is also some risk of federal prosecution. The Department of Justice finally issued some guidance in 2013 with the so-called "Cole Memorandum."²¹ That document laid out federal enforcement priorities and stated that as long as state experimentation did not involve any of the eight areas listed (access by minors and diversion to states where it is illegal are two), it was prepared to allow those experiments to continue.²² But the Cole Memorandum is worth no more than the paper on which it is written. If the Hillary Clinton administration decides that legalization has not been successful, she can order the memo revoked, shut down dispensaries, and arrest their owners overnight.

Even if you do not operate a dispensary, but simply patronize one, you are at risk for prosecution. Unlawful users of controlled substances, for example, are prohibited from owning firearms.²³ The Bureau of Alcohol, Tobacco, Firearms and Explosives is on record stating that medical marijuana users are prohibited from purchasing or possessing guns.²⁴ Thus, states that have legalized marijuana have inadvertently exposed some of their citizens to prosecution for federal firearms offenses that can carry hefty prison terms.

Even with the Cole Memorandum, the combination of state legalization and continued federal prohibition creates that sort of weird legal twilight zone noted by David Bernstein.²⁵ This odd standoff between experimenting states and the federal government gives rise to what is perhaps the most interesting and difficult question of all: What is the preemptive effect of the CSA vis-à-vis state legalization regimes? In *Raich*, Justice Stevens wrote that "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."²⁶

Does that mean that Colorado's creation of this legal recreational marijuana scene is preempted by the CSA? If so, what is the practical effect of that preemption? The answers to those questions are not entirely clear.

²¹ Memorandum from James C. Cole, Deputy Attorney General, U.S. Department of Justice, to All United States Attorneys (Aug. 29, 2013), www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

²² The others were (1) preventing proceeds from going to organized crime; (2) preventing state-authorized sales from becoming cover for other illicit drug sales; (3) preventing violence and use of firearms in connection with production and distribution; (4) preventing drugged driving; (5) preventing growing on public lands; and (6) preventing possession or use on federal property. *Id.*

²³ Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(g)(3) (2012).

²⁴ Open Letter to All Federal Firearms Licensees, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, U.S. DEP'T OF JUST. (Sept. 21, 2011), www.atf.gov/file/60211/download.

²⁵ David E. Bernstein, *The Abuse of Executive Power: Getting Beyond the Streetlight Effect*, 11 FIU L. Rev 289 (2016).

²⁶ *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

Early state court decisions took the position that state law legalizing marijuana created either an explicit conflict with or at least was impliedly preempted by the CSA. The Oregon Supreme Court, for example, held in 2010 that an employer that discharged an employee for medical marijuana use had not engaged in unlawful employment discrimination because the Oregon law permitting medical marijuana use was implicitly preempted by the CSA.²⁷

The CSA's preemptive effect has also come up in the suit by Nebraska and Oklahoma against Colorado.²⁸ Those states (ultimately unsuccessfully²⁹) asked the Supreme Court to exercise its original jurisdiction and to settle the question of the CSA's preemptive effects. The states argued that Colorado's legalization of marijuana was in direct conflict with the CSA and could not stand.³⁰

While the case for there being an express conflict between state and federal law is weak (the CSA does not forbid state legalization efforts) and because it is technically possible to comply with both regimes (if one does not engage in the activities permitted by state law),³¹ it seems to me that state legalization *at least* serves as an obstacle to the purpose of the CSA, which was to eliminate the market in Schedule I substances.³²

The question of preemption is further complicated by the anti-commandeering principle.³³ Because states retain some aspects of sovereignty, they cannot be made field offices of the federal government. That is, they cannot have their legislative or executive branches commandeered by Congress to enact legislation or enforce federal law. Congress, for example, could not pass a law requiring states legislatures, like Colorado's, to *recriminalize* marijuana, or require Colorado law enforcement personnel to enforce the CSA in the state. If the federal government wants to see the CSA enforced, it has its law enforcement agencies and Justice Department prosecutors who can do just that.

²⁷ Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 531–32 (Or. 2010) (en banc).

²⁸ Neb. & Okla. v. Colo., 136 S. Ct. 1034 (2016) (Thomas & Alito, JJ., dissenting from denial of cert).

²⁹ Richard Wolf & Trevor Hughes, *Justices Won't Hear Nebraska, Oklahoma Marijuana Dispute with Colorado*, USA TODAY (Mar. 21, 2016), www.usatoday.com/story/news/2016/03/21/marijuana-lawsuit-colorado-oklahoma-nebraska-supreme-court/81984006.

³⁰ Denning, *Vertical Federalism, Horizontal Federalism*, *supra* note *, at 574–75.

³¹ *Id.* at 578–80.

³² *Id.* at 579–81. *But see* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y (2013); Ernest A. Young, *Modern Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 CASE W. RES. L. REV. 769, 784–90 (2015).

³³ *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

Thus, commentators have argued that the anti-commandeering principle really limits the preemptive effect of the CSA as a practical matter.³⁴ If Oklahoma and Nebraska had succeeded in getting the Court to take their case, and they got some sort of order scrapping Colorado's regulatory regime, the result would be the worst of both worlds because it would mean a completely unregulated market. A vacuum would exist as a result of preemption because Colorado could not be forced to reinstate criminal penalties and it would fall on the federal government to enforce the CSA within Colorado's borders. The result, so the argument runs, would be the marijuana equivalent of the Age of the Saloon, to which Prohibition was a reaction and proponents of repeal sought to avoid when alcohol again became legal. I am not sure that that argument carries much force because I think that neither state lawmakers nor the federal government would allow a completely unregulated marijuana market to exist in a state.

II.

Those are the vertical federalism problems, and I think they are quite serious. The preemption issue, in particular, is complicated. In addition, there are horizontal federalism aspects to legalized marijuana, which I will describe briefly.

Much like attempts to regulate alcohol in the years preceding Prohibition, states are grappling with problems of cross-border externalities generated when legalizing and prohibiting states are living cheek-by-jowl. This is not merely an issue of comity because the federal government will be on the lookout for spillover effects from one state into another.³⁵ Colorado tried to address this by limiting the amounts that nonresidents can buy per dispensary visit. A resident of Colorado can purchase from a dispensary in a single transaction the one ounce that the resident is able to possess legally. A nonresident will have to go to four different dispensaries because each is allowed to sell a nonresident only a quarter ounce per visit.³⁶

Colorado's efforts to prevent diversion by pot tourists could run into constitutional problems. A particularly astute student of constitutional law will recognize that there is a potential Dormant Commerce Clause problem lurking in the Colorado law—and perhaps a Privileges and Immunities Clause problem as well. Courts generally take a dim view of state or local laws that explicitly treat nonresidents worse than residents, and I have argued that Colorado's provision—and I am sure that other states will adopt similar

³⁴ Mikos, *supra* note 32; Young, *supra* note 32.

³⁵ See *supra* notes 21–22 and accompanying text (describing the Cole Memorandum).

³⁶ Denning, *One Toke, supra* note *, at 2281–83 (describing Colorado's restrictions).

provisions to combat diversion—could face constitutional challenges.³⁷ However, I also argue that Colorado has strong arguments supporting this differential treatment.³⁸ The Dormant Commerce Clause exists primarily to thwart state economic protectionism.³⁹ Colorado is not trying to hoard marijuana for its citizens, in a bid, say, to drive down the price; nor is it attempting to give some economic advantage to in-state marijuana growers that it denies to those who come to Colorado from out of state. Rather, the state is trying to avoid scrutiny from the federal government and trouble with neighboring states that have chosen a different policy.

III.

What possible solutions exist to this diagonal federalism problem? For me, solutions would involve loosening both vertical and horizontal constraints to experimentation; in theory, this experimentation will in turn produce optimal policies that can be replicated. Here is where I think marijuana could take a page from the history of alcohol regulation.⁴⁰

Congressional exemptions from the CSA for states that pursue legalization, provided that they regulate marijuana responsibly, would obviously be most helpful.⁴¹ Models of this cooperative federalism can be found in environmental statutes.⁴² An opt-out would be an easy and elegant solution and might solve the attendant problems related to continued federal criminalization that plague businesses in states that have decided to legalize marijuana.

In addition, one of the big problems prior to Prohibition—one which might have hastened its appearance—was the inability of states to effectively

³⁷ *Id.* at 2283–94 (describing possible challenges to the restrictions on non-resident purchase).

³⁸ *Id.* at 2294–99 (sketching a possible defense to a Dormant Commerce Clause challenge).

³⁹ *McBurney v. Young*, 133 S. Ct. 1709, 1719 (2013) (noting that the Dormant Commerce Clause “is driven by a concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors’”) (citation omitted).

⁴⁰ One unlikely possibility is to propose and ratify a constitutional amendment, similar to the Twenty-first Amendment, clarifying both the legal status of marijuana and which level of government is primarily responsible for its regulation. However unlikely, that option should not be dismissed out of hand. I think that the constitutionalization of the repeal of Prohibition forced lawmakers to grapple with practical problems that would attend repeal, including who would do most of the regulating. The amendment process forced lawmakers to think through all of the repeal’s implications and make policy choices based on those implications. For some discussion of the (arduous) amendment process’s value, see Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Reply to David Strauss*, 77 TUL. L. REV. 247 (2002).

⁴¹ See Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE W. RES. L. REV. 689, 706–09 (2015). Other possibilities Kreit mentions include using appropriations riders to prevent enforcement of marijuana laws, permitting the sort of affirmative defense that the Supreme Court refused to imply in *Oakland Cannabis*, and directing federal regulation of marijuana.

⁴² See generally Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015); Young, *supra* note 32.

prevent importation of liquor. In a number of Supreme Court cases, the Dormant Commerce Clause was invoked to block state efforts to keep alcohol out. The enforcement problems these rulings created for states proved intractable.⁴³ Congress eventually passed the Wilson Act⁴⁴ and then the Webb-Kenyon Act,⁴⁵ which disabled the Dormant Commerce Clause and permitted states to enforce its liquor laws against cross-border traffic.⁴⁶ Congress should consider similar statutes to accompany any opt-outs from the CSA as an aid to states wishing to legalize marijuana for their citizens but which do not wish to become pot tourism destinations. Such statutes would similarly be a boon to states wishing to remain “non-toking” in the event that marijuana were to be legalized nationwide.

⁴³ These cases are described in Denning, *Vertical Federalism, Horizontal Federalism*, *supra* note *, at 589–91.

⁴⁴ Wilson Act of 1890, 27 U.S.C. § 121 (2012).

⁴⁵ Webb-Kenyon Act of 1913, 27 U.S.C. § 122 (2012).

⁴⁶ The Dormant Commerce Clause is a default rule. Congress may exercise its affirmative commerce power to permit state and local governments to take action the Dormant Commerce Clause would otherwise prohibit. *See Prudential Ins. v. Benjamin*, 328 U.S. 408 (1946).