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# State Regulation and the Necessary and Proper Clause

William Baude

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# STATE REGULATION AND THE NECESSARY AND PROPER CLAUSE

*William Baude*<sup>†</sup>

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## INTRODUCTION

The new marijuana federalism is here, but is it here to stay? In this Article, I address that question by way of two related points, a practical one and a technical one, and I ultimately argue that state regulation should have a bigger role in fixing the limits of federal constitutional power.

The practical point is that the current regime of state marijuana legalization is unstable, and it is a miracle that it is working as well as it is. Because marijuana remains contraband at the federal level, businesses and lawmakers who invest in responsible legalization at the state level have no guarantee their investments are safe from the whims of federal law enforcement. Moreover, even if the federal drug laws are not actively enforced in those states, the laws create serious problems for banks, lawyers, and others who might otherwise want to work with the in-state marijuana industry.

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<sup>†</sup> Neubauer Family Assistant Professor of Law, University of Chicago Law School. This Article was prepared for a conference on Marijuana, Federal Power, and the States at Case Western Reserve University School of Law. Thanks to the other participants in that conference, as well as Josh Blackman, Josh Chafetz, Nathan Chapman, Heather Gerken, Aziz Huq, Allison LaCroix, Jim Leitzel, Michael McConnell, Robert Mikos, Zach Price, Richard Re, Nicholas Quinn Rosenkranz, and Catherine Sharkey for their comments. Further thanks to Nickolas Card for helpful and dedicated research assistance, and the Alumni Faculty Fund and SNR Denton Fund for research support.

The technical point is that this instability can be traced to an importantly erroneous footnote in the Supreme Court's decision in *Gonzales v. Raich*.<sup>1</sup> Footnote 38 claims that state law can never be relevant to the scope of Congress's power under the Commerce Clause or the Necessary and Proper Clause. That conclusion is wrong, is not required by the rest of the Court's enumerated powers jurisprudence, and should be cast aside.

The Necessary and Proper Clause<sup>2</sup> should be interpreted to give states a bigger role in determining when the federal drug laws are constitutional. Congress's power to reach purely in-state conduct is premised on the possibility of interstate spillovers. If a state legalizes and regulates a drug in a way that minimizes the risk of spillovers into the interstate black market, the federal drug laws should be forbidden to apply within that state. This both creates a more stable set of incentives for states to responsibly manage local behavior and provides a more satisfactory formal grounding for the executive nonenforcement policy.

## I. THE NEW MARIJUANA FEDERALISM

### A. *The Legal Landscape*

Federal law bans the distribution or possession of marijuana. That has been true since the Controlled Substances Act<sup>3</sup> was enacted in 1970 and remains unchanged today. The major blip was a constitutional challenge to the scope of the federal ban, which was ultimately rejected by the Supreme Court in *Gonzales v. Raich*.<sup>4</sup>

State marijuana law, however, has changed dramatically. Twenty years ago, marijuana was illegal in every state. In 2005, when the Court decided *Raich*, there were up to eleven states that authorized the use of marijuana for medical purposes.<sup>5</sup> The *Raich* Court upheld the federal ban in broad terms, which might have suggested that there was no point in further state legalization. Nonetheless, in the

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1. 545 U.S. 1, 29 n.38 (2005).

2. U.S. Const. art. I, § 8, cl. 18.

3. 21 U.S.C. ch.13, § 801 (2012).

4. 545 U.S. 1. *See id.* at 10–15 for the statutory scheme and historical background. The minor blips are the federal “Compassionate IND” program, which supplies four people with medical marijuana as the result of an old lawsuit, and a handful of research programs. 1 GERALD UELMEN, VICTOR HADDOX, & ALEX KREIT, DRUG ABUSE AND THE LAW SOURCEBOOK §§ 1:25, 3:83 (2012 ed.).

5. *Raich*, 545 U.S. at 5 n.1. I say “up to eleven” because the Court appeared uncertain about two states: Arizona and Montana. *Id.*

past nine years, the state legalizations have more than doubled. There are now twenty-three states in which medical marijuana is legal.<sup>6</sup>

More dramatically, four of those states—first Colorado and Washington, and more recently Alaska and Oregon—have also recently legalized marijuana for *recreational* purposes as well. The change came from popular initiatives and is now implemented by the state government in both Colorado and Washington.<sup>7</sup> In those two states, adults can now purchase marijuana without any need to show a medical purpose.<sup>8</sup>

All of this might remain largely symbolic if federal laws were aggressively enforced against illegal marijuana in every state. But of course they are not. Indeed, the federal government has announced an evolving policy of nonenforcement in states with legal marijuana.<sup>9</sup> In 2009, Deputy Attorney General David Ogden issued one memo to U.S. Attorneys suggesting that prosecuting seriously ill people who used state-legal medical marijuana was “unlikely to be an efficient use of limited federal resources.”<sup>10</sup> In 2011, Deputy Attorney General James Cole issued another memorandum purporting to clarify that “[t]he Ogden Memorandum was never intended to shield” profitable or “large-scale” cultivation of marijuana even where permitted under

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6. *State Medical Marijuana Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (Nov. 13, 2014), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.
  7. Oregon and Alaska legalized recreational use through voter referendums in 2014, but neither state will likely begin commercial states of marijuana until 2016. Shelby Sebens, *Legal Toking Still Months Away Despite Pot Votes in Alaska, Oregon*, REUTERS, Nov. 5, 2014, <http://www.reuters.com/article/2014/11/05/us-usa-elections-marijuana-idUSKBN0IP1EB20141105>.
  8. COLO CONST. art. 18, § 16 (codifying Colorado Amendment 64); WASH. REV. CODE. § 69.50.331 (Supp. 2015).
  9. In December 2014, as this Article was being edited, Congress passed and the President signed a continuing funding resolution that included the following provision: “None of the funds made available in this Act to the Department of Justice may be used, with respect to [various states] to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). It is unclear whether (or how) this language restricts federal marijuana prosecutions of private individuals, or whether it will be reenacted in future appropriations.
  10. Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected U.S. Att’ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 2 (Oct. 19, 2009), available at <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> (on file with *Case Western Reserve Law Review*).

a state's medical marijuana laws.<sup>11</sup> In 2013, Cole issued a memo regarding the Colorado and Washington initiatives, stressing that “prosecutors should not consider the size or commercial nature of a marijuana operation alone” but rather should also consider “the existence of a strong and effective state regulatory system, and an operation's compliance with such a system.”<sup>12</sup>

As a practical matter, states have been given some room to make decisions about whether marijuana should be legal and how its use should be managed. For those who accept the standard policy arguments for decentralization—diversity of preferences, localizing externalities, and policy innovation<sup>13</sup>—this should be welcome news. Yet marijuana's continued categorical illegality at the federal level renders this a costly and poor way to accomplish decentralization.

### *B. The Costs of the Status Quo*

The new marijuana federalism—a federalism accomplished through state legalization and federal nonenforcement—is problematic for those who support decentralization. First, the status quo imposes human costs on producers and consumers in the marijuana business. It might be good for those who opposed decentralization in the first place, but that is not the premise from which the relevant states or the executive branch appear to be proceeding. Second, the status quo gives states little incentive to behave well in setting up their own legal regime. As we will see, there are ways states might act to minimize interstate spillovers or otherwise legalize more responsibly, yet they are given little incentive to do so. It is therefore impressive that things are going as well as they are.

Despite the nonenforcement policy, the mere existence of the federal ban threatens the kinds of services that help regulated commercial enterprises thrive. For instance, federal law likely does not allow banks to serve the industry, though recent enforcement guidance indicates that these rules will not be enforced against banks

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11. Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 2 (June 29, 2011), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> (on file with *Case Western Reserve Law Review*).
  12. Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys, Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013) [hereinafter Cole Enforcement Memorandum], available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (on file with *Case Western Reserve Law Review*).
  13. See generally Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–1500 (1987).

that comply with certain additional requirements.<sup>14</sup> It is not clear whether lawyers can advise in-state dispensaries without being guilty of criminal conspiracy or accomplice liability.<sup>15</sup> And in the Western states, water is also critical: a recent policy issued by the Federal Bureau of Reclamation declared that “Reclamation will not approve use of Reclamation facilities or water in the cultivation of marijuana.”<sup>16</sup>

Dispensaries themselves are burdened by the unenforced federal law as well. For instance, they might be held civilly liable under the federal racketeering statute, which is outside executive control.<sup>17</sup> Some reports also suggest that the federal ban makes it “hard to form any contractual relationship” relating to marijuana at all.<sup>18</sup>

In addition to these costs from the unenforced federal ban, there is an additional cloud over any state marijuana regime: federal enforcement policy can change. The memoranda themselves illustrate this, as each takes a different position from the previous one on how to assess marijuana producers who comply with state law. If these policy changes can take place within a few years and in a single political administration, it is hard to see how there will be a secure space for state policy going forward.

In light of all this, it is striking that the states have done as well as they have. Legalized marijuana has not led to widespread anarchy. At least one study hints at positive effects from state medical marijuana laws.<sup>19</sup> A report by John Hudak of the Brookings Institu-

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14. See DEP’T OF THE TREASURY, FIN. CRIMES ENFORCEMENT NETWORK, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (Feb. 14, 2014); Memorandum from James M. Cole, Deputy Att’y Gen., to All U.S. Att’ys, Guidance Regarding Marijuana Related Financial Crimes 2–3 (Feb. 14, 2014), *available at* <http://www.justice.gov/usao/waw/press/newsblog%20pdfs/DAG%20Memo%20%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20%282%29.pdf> (on file with *Case Western Reserve Law Review*). *But see* Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597 (2015) (detailing “the marijuana banking problem”).
  15. Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 886–99 (2013).
  16. U.S. BUREAU OF RECLAMATION, PEC TRMR-63, USE OF RECLAMATION WATER OR FACILITIES FOR ACTIVITIES PROHIBITED BY THE CONTROLLED SUBSTANCES ACT OF 1970, 2 (2014).
  17. Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633, 649–56 (2011).
  18. Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, 89 DENV. U. L. REV. 977, 985 (2012).
  19. See, e.g., D. Mark Anderson, Benjamin Hansen & Daniel I. Rees, *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption*,

tion concludes that the “initial implementation” of Colorado’s recreational marijuana law has been “largely successful,” attributing this “strong rollout” to leadership by state officials and sustained effort from various institutions in the state.<sup>20</sup>

Colorado’s implementation in particular also includes some steps that may reduce the illegal diversion of marijuana to other states. Though Colorado does not prevent out-of-state visitors from purchasing marijuana, it has limited purchases to a modest amount.<sup>21</sup> There are arguments that such limits are an effective way to prevent black market diversions,<sup>22</sup> and the state also has a variety of regulations to protect the integrity of the production and distribution process.<sup>23</sup> The official task force also recommended “additional actions . . . to limit diversion out of Colorado, such as point-of-sale information to out-of-state consumers, signage at airports and near borders, coordination with neighboring states regarding drug interdiction, and restricting retail licenses near the borders.”<sup>24</sup>

Early reports, however, suggest that there may nonetheless be substantial diversion of marijuana out of Colorado. The quantity limits are easily evaded because purchases are not tracked and visitors can purchase the limit from multiple stores, even in a single day.<sup>25</sup> Moreover, interactions between the state’s growing limits and the state’s possession limits may be leading to leakage into the black market.<sup>26</sup> Officials in some neighboring states claim that Colorado marijuana has led to large increases in marijuana trafficking in their

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56 J. L. & ECON. 333, 334 (2013) (“The first full year after coming into effect, the legalization of medical marijuana is associated with an 8–11 percent decrease in traffic fatalities.”).

20. John Hudak, *Colorado’s Rollout of Legal Marijuana Is Succeeding: A Report on the State’s Implementation of Legalization*, 65 CASE W. RES. L. REV. 649, 651–52 (2015).
21. See STATE OF COLORADO, TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64, at 49–50 (2013) (“[One] ounce is the largest amount that should be sold at any one time to any one customer.”).
22. *Id.*
23. See, e.g., COLO. CODE REGS. §§ 212-2.202, 212-2.231, 212-2.801 (2014). See also COLORADO TASK FORCE REPORT, *supra* note 21, at 16–18 (providing recommendations for a regulatory structure in which to implement the Colorado Amendment).
24. COLORADO TASK FORCE REPORT, *supra* note 21, at 50.
25. MILES K. LIGHT ET AL., MARKET SIZE AND DEMAND FOR MARIJUANA IN COLORADO 21 (2014).
26. Steve Lynn, *Low-Cost Street Weed Gives Legal Vendors Heartburn*, BIZWEST, Apr. 18, 2014, <http://bizwest.com/low-cost-street-weed-gives-legal-vendors-heartburn-2/>.

state,<sup>27</sup> and two states have even filed suit against Colorado in the Supreme Court's original jurisdiction.<sup>28</sup> A report by an enforcement group claims that diversion to other states is extensive.<sup>29</sup>

Similarly, Washington's recreational marijuana regime imposes quantity limits<sup>30</sup> and gives the state liquor control board extensive control over dispensaries.<sup>31</sup> But fewer than half of the licensed stores have even begun selling recreational marijuana,<sup>32</sup> so it is too soon to tell what the spillovers are or will be.

Whatever the ultimate empirical judgments on these matters, if one thinks that decentralization has benefits, constitutional federalism doctrine can and should be structured to encourage the states to succeed. States have taken at least some steps to reduce spillovers and diversion, even without any incentive to do so. A sounder constitutional federalism doctrine would actually harness and encourage such state responsibility by making the constitutionality of federal law turn in part on what the state has accomplished.

## II. A CONSTITUTIONAL ROLE FOR STATE LAW

### *A. The Affirmative Case*

Let's start, as the Supreme Court once said, "with first principles."<sup>33</sup> The federal marijuana laws, like any federal law, are

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27. See Trevor Hughes, *In Tiny Nebraska Towns, a Flood of Colorado Marijuana*, USA TODAY, June 12, 2014, at 3A; Jenny Deam, *Colorado Pot Doesn't Stay Put; Neighboring States See an Uptick in Drug Arrests as Marijuana Flows Illegally Across Their Borders*, L.A. TIMES, May 27, 2014, at A1; Jack Healy, *After 5 Months of Sales, Colorado Sees the Downside of a Legal High*, N.Y. TIMES, June 1, 2014, at A14; see also *Trafficking Colorado's Pot to Neighboring States*, CBS NEWS (Aug. 4, 2014), <http://www.cbsnews.com/news/marijuana-drug-trafficking-colorado-pot-crosses-border-to-surrounding-states/>; Gene Johnson, *How Will Washington Keep Weed from Crossing the Border?*, KATU.COM, <http://www.katu.com/news/business/How-will-Washington-keep-weed-from-crossing-the-border-marijuana-188845081.html> (last updated Dec. 5, 2013, 4:49 PM).
28. *Nebraska & Oklahoma v. Colorado*, No. 22O144 ORG (U.S. docketed Dec. 18, 2014).
29. ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT 37-49 (2013).
30. WASH. ADMIN. CODE § 314-55-095(3) (West 2014).
31. WASH. REV. CODE § 69.50.334 (2014).
32. Donna G. Blankinship, *Washington Pot Sales Reach \$3.8M in 1st Month*, THE WASH. TIMES, Aug. 8, 2014, <http://www.washingtontimes.com/news/2014/aug/8/38-million-in-1st-month-of-washington-pot-sales/>.
33. *United States v. Lopez*, 514 U.S. 549, 552 (1995).



constitutionally permissible only to the extent that they fall within Congress's enumerated powers. While those powers probably give Congress some power, even a broad power, to prohibit marijuana, there are some limits to that power. In particular, Congress's power to regulate in-state marijuana calls for some inquiry into whether that regulation is actually necessary. While the Court's cases do not always adopt this framework clearly, almost all of them are consistent with it.<sup>34</sup>

Congress has no affirmative, explicit power to regulate marijuana generally, or even all national commerce. Rather, its enumerated powers are "[t]o regulate commerce . . . among the several States" and to "make all Laws which shall be necessary and proper for carrying into Execution" that power.<sup>35</sup> In-state marijuana is outside the direct scope of the federal commerce power and must be justified under the Necessary and Proper Clause instead. Even if we grant several well-established assumptions that enhance the scope of the government's commerce power—the assumptions that Congress has the power to categorically prohibit interstate trade in marijuana<sup>36</sup> and to reach *in-state* commerce as necessary to its interstate prohibition<sup>37</sup>—it does not follow that its ancillary power is quite so categorical. Rather, the regulation must also be "necessary"—i.e., "convenient, or useful, or essential"<sup>38</sup>—to Congress's powers over *interstate* commerce. It must be a "means calculated to produce the end."<sup>39</sup>

The argument that the Controlled Substances Act's broad prohibitions are "necessary and proper" to the interstate commerce power relies on potential spillovers from the in-state market to the interstate market. The claim about spillovers might or might not be valid. It should be taken as a question of reality, not an article of faith.

In the ordinary case, respect for the political branches of the federal government might lead us to *presume* that there really are spillovers addressed by the federal law. But what happens if the political branches of a state make a different judgment and maintain

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34. See *infra* Part. II.B for a discussion of the chief exception, *Raich*.

35. U.S. CONST. art I, § 8, cl. 3, 18.

36. See *Champion v. Ames*, 188 U.S. 321, 357 (1903); *States v. Darby*, 312 U.S. 100, 120 n.3 (1941). But see Barry Friedman & Genevieve Lakier, "To Regulate," Not "To Prohibit": *Limiting the Commerce Power*, 2012 SUP. CT. REV. 255, 257 (2012).

37. See *Houston E. and W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 351–52 (1914); *Darby*, 312 U.S. at 122. But see *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) ("The power of . . . regulating commerce . . . cannot be implied as incidental to other powers.").

38. *M'Culloch*, 17 U.S. (4 Wheat.) at 413.

39. *Id.* at 413–14.

that the spillovers can be contained? If they do, the Controlled Substances Act's categorical prohibition on in-state marijuana will be "convenient, or useful, or essential,"<sup>40</sup> and therefore constitutional, only if the state-law regime will not work. That might be true, but it should not be irrebuttably presumed.

In other words, the federal power to reach in-state commerce is ultimately contingent on circumstances. It depends on how that in-state commerce relates to federally enumerated powers. The effects of a state regulatory regime are simply one such kind of circumstance. Such state regulations have sometimes been regarded with a wary eye, but as I will explain, they ought to be tolerated—even welcomed—instead.

The same analysis ought to hold if the case is looked at through the lens of the Commerce Clause alone rather than the Necessary and Proper Clause. As Alison LaCroix has noted, the Supreme Court's decision in *Raich* "blended the commerce and necessary and proper discussions to such a degree that [the] opinion reads as though they were a single unit of analysis."<sup>41</sup> And the same is true more generally of much of its twentieth-century Commerce Clause jurisprudence.<sup>42</sup>

Some founding-era materials engage in a similar blending. Alexander Hamilton and James Madison both argued that the Necessary and Proper Clause was only "declaratory" of how the enumerated powers would have been construed on their own.<sup>43</sup> The Court's analysis in *M'Culloch v. Maryland*<sup>44</sup> proceeds the same way.<sup>45</sup>

So regardless of whether the analysis is located, as a formal matter, in the Necessary and Proper Clause or in the Commerce Clause itself,<sup>46</sup> the point remains: Congress has no power to regulate

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40. *Id.* at 413.

41. Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2069 (2014).

42. *Id.*; see also Gary Lawson & David B. Kopel, *The PPACA in Wonderland*, 38 AM. J.L. & MED. 269, 282 (2012) (arguing that the two should be untangled).

43. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1750 (2013) (citing THE FEDERALIST NO. 33 at 158 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) & James Madison, Speech on Feb. 2, 1791, reprinted in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 39, 42 (photo. reprint 2008) (1832)).

44. 17 U.S. (4 Wheat.) 316 (1819).

45. Baude, *supra* note 43, at 1753–54 (discussing *M'Culloch*, 17 U.S. (4 Wheat.) at 409–12).

46. I am putting to one side the question of whether the federal government could use the treaty power to support its marijuana ban, which was not discussed in *Raich*. JIM LEITZEL, REGULATING VICE: MISGUIDED PROHIBITIONS AND REALISTIC CONTROLS 262–64 (2008). That question

in-state commerce as such. Rather, Congress can regulate it only to the extent it is part of the core power to regulate interstate commerce. Therefore, when in-state commerce has been separated from the interstate market over which Congress has power, Congress ought not to have the power to regulate in-state commerce.

This point is also in harmony with the more general theory of “collective action federalism” put forward by Robert Cooter and Neil Siegel.<sup>47</sup> Under this view, Congress’s Article I powers are generally supposed to occupy the field of all conduct that the several states would be unable to properly regulate themselves. Once again, if the states enact and enforce rules that prevent direct interstate spillovers, then there is no problem that triggers Congress’s constitutional authority.

Cooter and Siegel write the following:

If there is no spillover problem for state policing, then states and localities should be permitted to go their own way as far as constitutional federalism is concerned. But if there is a spillover—for example, medical marijuana use in California makes it more difficult to police drug traffickers at the Arizona border—then there is a rationale for federal intervention.<sup>48</sup>

Cooter and Siegel appear to credit the Court’s conclusion in *Raich* that there were spillovers,<sup>49</sup> but presumably if there were not, their conclusion would flip.

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would depend on the exact requirements of the treaties the United States has signed, see Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV. 1301, 1316–18 (2013), on the resolution of the constitutional question avoided in *Bond v. United States*, 134 S. Ct. 2077 (2014), and perhaps on the same questions of state implementation discussed in this Article. Cf. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 438 (2006) (requiring more than “invocation of . . . general interests” in alleged conflict between treaties and religious exemption from the Controlled Substances Act).

47. Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010). But see Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217 (2014). For an argument that a focus on spillovers is also the “hidden functional logic” of modern preemption doctrine, see Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1370–72 (2006).

48. Cooter & Siegel, *supra* note 47, at 164.

49. *Id.* (“Given the inability to distinguish marijuana used for medicinal purposes from marijuana used for other purposes . . . California’s authorization of marijuana use for medicinal purposes might make it more difficult for other states to ban marijuana use.”).

The claim that state regulatory regimes should matter to federal power under the Necessary and Proper Clause is thus a subset of the claim that actual facts should matter. One could reject this claim if one thinks that federal power can never depend on *any* facts or developments after a law has been enacted. There is a hint of this view in *Raich*'s reference to "shifting" developments "uncontrolled" by Congress. It is defended more explicitly and more systematically by Nicholas Quinn Rosenkranz.<sup>50</sup> For now I will say that this extends the Necessary and Proper Clause beyond even the broad logic of the twentieth-century cases.

Alternatively, one might reject this claim because of a suspicion about states. The idea might be that allowing state action to be relevant to federal power would be a wedge for nullification, secession, and the usual bogeymen of constitutional federalism. But constitutional history and structure suggest that there is good reason for state law to matter.

Most fundamentally, there is nothing wrong with federal authorities occasionally yielding to state institutions. As Heather Gerken has recently written, the Supreme Court's most successful federalism doctrines "look to the states in describing the limits of *federal* power."<sup>51</sup> Gerken acknowledges that this "might seem odd . . . [b]ut the Court does so for a reason. It marks the outer limits of federal authority by identifying the bounds of state power, much the way an artist designates a shape using negative space."<sup>52</sup>

Gerken provides several examples, but here are a few of my own: When the Constitution was adopted and under settled practice for many decades thereafter, the federal government was thought not to have a general independent power of eminent domain.<sup>53</sup> This meant that when the federal government needed specific parcels of land for federal projects, like roads, lighthouses, or even military bases, it had to rely on state eminent domain power to take the land if the owner would not sell at an acceptable price.<sup>54</sup>

But one need not go nearly so far to accept the relevance of state regulation to federal power. Important doctrines today continue to

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50. See *infra* Part II.B.

51. Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 96 (2014).

52. *Id.* To be sure, Gerken also says that the theory of state sovereignty that underlies these negative-space cases is "mostly claptrap," but even then she acknowledges that "one should give the devil his due. The sovereignty account has managed to generate reasonably coherent doctrine." *Id.* at 99.

53. See generally Baude, *supra* note 43.

54. See *id.* at 1761–71 (discussing the early history of federal eminent domain).

reflect a constitutional faith in state institutions. For instance, the abstention doctrine of *Younger v. Harris*<sup>55</sup> generally forbids federal courts from entertaining a civil rights lawsuit to enjoin a pending state prosecution, because of principles of federalism that inform the courts' equitable powers.<sup>56</sup> An injunction can only issue if there is no adequate remedy at law, and as a rule, a state's own criminal justice system is presumed to be adequate. Hence, a criminal defendant must allow state institutions the first chance to handle their federal claims.

The presumptive faith in state institutions is not absolute. *Younger* abstention does not apply if the prosecution is brought for purposes of harassment—i.e., with indifference to whether the prosecution succeeds or fails.<sup>57</sup> Nor does it apply if a challenged law is so obviously unconstitutional that there is no good-faith way for the state to uphold it.<sup>58</sup> And there may be other “extraordinary circumstances” or “unusual situations” where *Younger* does not apply.<sup>59</sup> But in the mine run of criminal cases, state institutions are assumed to be adequate, with federal courts intervening only as a backstop if something can be shown to have gone wrong.

At a more general level, a rule that made federal power turn on state law would also create good incentives for states to affirmatively address potential problems. It is fortunate that Colorado has worked to harness creative energy into a peaceful market. But there were certainly incentives working against it. There is no guarantee other than the grace of a few executive branch officials that the Colorado experiment will be allowed to persist. (Remember “Hamsterdam”?)<sup>60</sup> And the federal statutory ban, even if it is not enforced criminally, threatens to put marijuana businesses outside the normal tools of law and order, like banks, lawyers, and contracts.

A constitutional ruling based on state law would provide both incentives and protection for well-regulated experiments like Colorado's. The possibility of immunity from federal regulation would inspire lawmakers to address potentially problematic spillovers rather

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55. 401 U.S. 37 (1971).

56. *Id.* at 44–45.

57. *Id.* at 53; *see also* Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1115 n.36 (1977) (discussing jurisprudence on “bad-faith harassment”).

58. *Younger*, 401 U.S. at 53–54; *see also* Trainor v. Hernandez, 431 U.S. 434, 446–47 (1977) (noting that the lower court erred in rejecting the application of *Younger* in part because the allegedly offending state statute was not “flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph” (internal quotations omitted)).

59. *Younger*, 401 U.S. at 53–54; *see, e.g.*, Mulholland v. Marion Cnty. Election Bd., 746 F.3d 811, 818 (7th Cir. 2014).

60. *The Wire: Hamsterdam* (HBO television broadcast Oct. 10, 2004).

than ignoring them as somebody else's problem. It would also encourage state officials to continue to ensure, over time, that the safeguards were effective in reality, not just on paper. In other words, states would have a reason to be responsible.<sup>61</sup>

Such a constitutional ruling would also provide protection for investments in those experiments once they succeeded. It takes economic capital and political capital to create a well-functioning market, especially where there has not been one before. The shadowy legal status of marijuana thus deters financial investment.<sup>62</sup> It also takes political will to allow such local experiments to proceed when they are contrary to the political fortunes of the ruling majority.<sup>63</sup> Indeed, delegations from Colorado and Washington have called upon the federal government to “provide more regulatory clarity” and reduce the “uncertainty” faced by citizens in their states.<sup>64</sup>

One important new statutory proposal suggests that a similar framework could and should be enacted by Congress.<sup>65</sup> It proposes an amendment to the Controlled Substances Act that would allow the Attorney General to exempt states from the Act's marijuana provisions for up to two years. Under that proposal, the Attorney General would be required to exempt a state unless he or she deter-

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61. I am assuming that such regulations would not raise any “dormant commerce clause” problems because they would be in service of the federal ban on interstate marijuana trade. *Cf.* *United States v. Pub. Util. Comm'n of Cal.*, 345 U.S. 295, 304 n.9 (1953) (discussing state regulation of interstate commerce that is specifically authorized by Congress and therefore poses no dormant commerce clause problems). Even if that assumption is wrong, there are other arguments that such regulations would withstand dormant-commerce scrutiny. *See* Brannon 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, 2291–99 (2014) (applying a dormant commerce clause analysis to Colorado's nonresident purchase limit).
  62. *See* Adrian A. Ohmer, *Investing in Cannabis: Inconsistent Government Regulation and Constraints on Capital*, 3 MICH. J. PRIVATE EQUITY & VENTURE CAP. L. 97, 108–18 (2013).
  63. *See* Lance McMillian, *Drug Markets, Fringe Markets, and the Lessons of Hamsterdam*, 69 WASH. & LEE L. REV. 849, 882–91 (2012).
  64. Letter from Senators Patty Murray, Mark Udall, Maria Cantwell & Michael F. Bennett to Denis McDonough, White House Chief of Staff, & Eric Holder, Att'y Gen. (July 28, 2014), available at [http://www.murray.senate.gov/public/\\_cache/files/075fc29f-3a87-4018-b412-3d22da1808f9/072514--wa-co-letter-final.pdf](http://www.murray.senate.gov/public/_cache/files/075fc29f-3a87-4018-b412-3d22da1808f9/072514--wa-co-letter-final.pdf) (on file with *Case Western Reserve Law Review*).
  65. Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 U.C.L.A. L. REV. 74 (2015).

mined that the state's laws would result in interstate spillovers, distribution to minors, or harm to certain other federal interests.<sup>66</sup>

I have no quarrel with that statutory proposal, but the same regime could be created through constitutional law, and, in fact, there are good reasons that it should be. A basic goal of federalism doctrine is to harness the creative energies of both levels of government.<sup>67</sup> That is part of the constitutional plan, not something to be left up to Congress's discretion.

To be sure, not every state's current marijuana regime would obviously satisfy the appropriate constitutional test. As I've noted, for instance, there are arguments that Colorado's marijuana market sees a substantial amount of diversion to interstate black markets.<sup>68</sup> Rather, my point is that constitutional doctrine should have given states more of an incentive to take charge of their own policies and markets. Indeed, the potential tragedy of the current approach is that we may not ever see what kind of creative and effective regulatory approaches states are capable of, because they are given no particular reason to pursue them.

Finally, it is important to be clear that this is not a call for nullification.<sup>69</sup> It is not even a denial of Congress's power to regulate in-state marijuana in some circumstances. It would simply hold that the constitutionality of federal law under the Necessary and Proper Clause must be judged under the circumstances, and that those circumstances should importantly include a state's own success at solving the problem Congress has the power to address.

### *B. Some Counterarguments*

One challenge faced by the plaintiffs in *Raich* was how to face down the Supreme Court's precedent in *Wickard v. Filburn*.<sup>70</sup> In *Wickard*, the Supreme Court upheld federal regulations of wheat extending even to wheat that was grown and consumed on a single farm and therefore never entered commerce—interstate or otherwise.<sup>71</sup> And while many have suggested that *Wickard's* view of federal power may be overly enthusiastic, the Supreme Court does not seem to be interested in overturning it.

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66. *Id.* at 120–21.

67. See McConnell, *supra* note 13, at 1498–99.

68. See *supra* notes 26–29 and accompanying text.

69. For thoughts on nullification, see instead Ernest Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 CASE W. RES. L. REV. 769, 794 (2015) (“Nullification is dead . . . Long live nullification.”).

70. 317 U.S. 111 (1942).

71. *Id.* at 125.

But nothing about the state-law view of the Necessary and Proper Clause challenges *Wickard*. The Court could have continued to assume that Congress can regulate the in-state production and consumption of an agricultural commodity because of its relationship to the interstate market.

In *Wickard*, the Court held that “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”<sup>72</sup> In *Raich*, however, California law attempted to eliminate this effect: It tried to cut medical marijuana off from the interstate drug market by limiting consumption to Californians and to medical purposes.<sup>73</sup> It also enforced these requirements both through individual ID requirements<sup>74</sup> and by requiring the intervention of doctors, who could be sanctioned for failing to enforce the state’s rules.<sup>75</sup>

By contrast, there was no sign of such a state attempt in *Wickard*. So there was nothing to push against the broad federal definition of the market to “embrace all that may be sold without penalty but also what may be consumed on the premises.”<sup>76</sup>

That leads us to *Raich*. The dissents in *Raich* did argue that California state law was relevant, though this point was entangled with some of their larger disputes with the majority. Justice O’Connor argued that “[t]he Government ha[d] not overcome empirical doubt” that legal California marijuana had an effect on the interstate market.<sup>77</sup> Justice Thomas argued that California law “set[] respondents’ conduct apart from other intrastate producers and users of marijuana,” which made “[t]his class of intrastate users . . . distinguishable from others.”<sup>78</sup> But because of their broader disputes with the majority, the dissents did not articulate the role of states under the Necessary and Proper Clause in detail.

The majority’s chief response to this point was contained in one sentence of the text (“Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, so too state

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72. *Id.*

73. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A), (b)(2) (West Supp. 2005).

74. HEALTH & SAFETY §§ 11362.715–11362.76.

75. HEALTH & SAFETY § 11362.5(d); see *People v. Spark*, 16 Cal. Rptr. 3d 840, 843 (Cal. Ct. App. 5th 2004) (noting that a doctor’s license was suspended at the recommendation of undercover police officers).

76. *Wickard*, 317 U.S. at 119.

77. *Gonzales v. Raich*, 545 U.S. 1, 52–56 (2005) (O’Connor, J., dissenting).

78. *Id.* at 62–63 (Thomas, J., dissenting).



action cannot circumscribe Congress' plenary commerce power.")<sup>79</sup> The Court further elaborated this reasoning in a long footnote, number 38. The footnote said this:

That is so even if California's current controls (enacted eight years after the Compassionate Use Act was passed) are "effective," as the dissenters would have us blindly presume, *post*, at 53–54 (opinion of O'Connor, J.); *post*, at 63, 68 (opinion of Thomas, J.). California's decision (made 34 years after the CSA was enacted) to impose "stric[t] controls" on the "cultivation and possession of marijuana for medical purposes," *post*, at 62 (Thomas, J., dissenting), cannot retroactively divest Congress of its authority under the Commerce Clause. Indeed, Justice Thomas' urgings to the contrary would turn the Supremacy Clause on its head, and would resurrect limits on congressional power that have long since been rejected. See *post*, at 41 (Scalia, J., concurring in judgment) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 424, (1819)) ("To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution").

Moreover, in addition to casting aside more than a century of this Court's Commerce Clause jurisprudence, it is noteworthy that Justice Thomas' suggestion that States possess the power to dictate the extent of Congress' commerce power would have far-reaching implications beyond the facts of this case. For example, under his reasoning, Congress would be equally powerless to regulate, let alone prohibit, the intrastate possession, cultivation, and use of marijuana for *recreational* purposes, an activity which all States "strictly contro[l]." Indeed, his rationale seemingly would require Congress to cede its constitutional power to regulate commerce whenever a State opts to exercise its "traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens." *Post*, at 66 (dissenting opinion).<sup>80</sup>

Footnote 38 overstates how doctrinally radical it would be to give a role to state law.

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79. *Id.* at 29 (majority opinion) (citations omitted). It did go on to provide some speculation that the state scheme was still likely to have an effect on the interstate market. *Id.* at 30–32.

80. *Id.* at 29 n.38.

As for the sentence in the body of the opinion,<sup>81</sup> it is a non-sequitur. State “acquiescence” has been held irrelevant to the commerce power because expanding and contracting federal power are not symmetrical. In addition, it is dis-analogous to compare a state’s litigating position to the creation of a state institution. The question is not whether state *desire* is relevant to the Necessary and Proper Clause but rather whether state *action* can change the referents of the Clause.

As for the footnote, the holding and reasoning of *M’Culloch* do not require one to categorically reject the relevance of state enforcement regimes. *M’Culloch* gives Congress broad discretion to choose the means necessary for achieving its permissible ends; but the discretion is not unlimited, and *M’Culloch* repeatedly emphasized the connection between means and ends.

*M’Culloch* repeatedly stresses that the federal government’s powers cannot result in “a dependence . . . on [the governments] of the States,” or on “the necessity of resorting to means . . . which another government may furnish or withhold, . . .”<sup>82</sup> But the proposed state-law doctrine would not do that. Federal law would become unconstitutional only if a state law *actually addressed the harm to any federal interests* (to the satisfaction of the relevant interpreter, under the relevant standard).<sup>83</sup> There would be no state power to “withhold” effective federal enforcement and no “dependence” because federal law remains available as a backstop.

In that context, I would add that *M’Culloch*’s statement (not quoted in *Raich*) that “the existence of state banks can have no possible influence on the question”<sup>84</sup> should not be extended to the modern spillover context. It suggests a formal separation between state and federal spheres of activity that predates the twentieth-century cases that allowed Congress to reach in-state commerce in the first place. Since the premise of modern regulation of in-state commerce is its relationship to interstate commerce, it no longer makes sense to ignore state institutions that are relevant to that relationship.

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81. The text also contained a citation to *United States v. Darby*, 312 U.S. 100 (1941), which says, like many similar cases from the period, that Congress’s Commerce “power can neither be enlarged nor diminished by the exercise or non-exercise of state power.” *Raich*, 545 U.S. at 29 (quoting *Darby*, 312 U.S. at 114). But as I’ve discussed, the marijuana cases present the different question of whether the in-state activity falls within that non-enlarged, non-diminished power.

82. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819).

83. See *infra* Part III for a discussion of interpreters and standards.

84. *M’Culloch*, 17 U.S. (4 Wheat.) at 424.

As for the *Raich* majority's complaint that this logic could "equally" extend to the "use of marijuana for *recreational* purposes,"<sup>85</sup> that might be so. It is true that the state-law theory would apply as much to state laws about recreational marijuana as to state laws about medical marijuana. It is unclear why the Court deemed that so implausible.

That said, as a practical matter medical marijuana laws seem more likely to be upheld under a state-influenced theory. Medical marijuana laws involve doctors and other professionals as part of the state distribution regime. Medicine is already regulated, meaning that there is an existing network of enforcement to tap. Moreover, doctors hold lucrative professional licenses and therefore have more to lose if they misbehave. So perhaps medical marijuana regimes are more likely to be spillover-free.

Moving on from *Raich* itself, Nicholas Quinn Rosenkranz is one of the only scholars to focus on and defend footnote 38. Indeed, he argues that the majority underplayed its hand, writing that the statement "is exactly right, but it does not belong in footnote 38. It belongs at the beginning."<sup>86</sup> Further, he says, "The opinion that follows should have been brief indeed, because the implications of that one sentence are enough to end the case."<sup>87</sup>

Rosenkranz's defense of the theory is different from the Court's, and it does not rely on *M'Culloch* or on a structural assertion in federal supremacy. Instead, Rosenkranz derives his version of footnote 38 from the Constitution's text. As he elaborates in a pair of articles, constitutional challenges must always be attentive to the "who" and the "when"—what government actor has violated the Constitution, and by doing what, at what time?<sup>88</sup>

In enumerated-powers challenges, he claims, the only possible violator is Congress, and state law cannot be relevant:

If the Constitution was violated here, it must be *Congress* that violated it. . . . [I]f Congress did violate the Constitution, then it did so decades ago, when it made the law. And so *subsequent* changes in state law cannot *retroactively* create a constitutional violation.<sup>89</sup>

And again:

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85. *Raich*, 545 U.S. at 29 n.38 (2005) (emphasis in original!).

86. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1279 (2010).

87. *Id.*

88. See generally *id.*; Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1018 (2011).

89. Rosenkranz, *supra* note 86, at 1279.

The *when* must be the moment that Congress made the law. The current state of state law cannot matter, because it cannot have “retroactive” effect. Indeed, for the same reason, no facts that arise after the enactment of the statute can matter to the merits of the claim.<sup>90</sup>

While there is much to be said for careful attention to the text of the Constitution, Rosenkranz’s textual analysis here relies on a pair of additional premises, and the premises do not hold up.<sup>91</sup>

One premise is the claim that the subject of an enumerated-powers challenge is necessarily Congress. Rosenkranz is on his strongest ground when he points to provisions like the First Amendment, which expresses a prohibition in which Congress is literally the subject: “Congress shall make no law . . . .” By its terms, the First Amendment restricts only Congress. The President’s actions—for example, suppressing speech—must be challenged on separate grounds, like due process.<sup>92</sup>

But the same logic does not fully apply to federalism challenges. To be sure, the grants of power in Article 1, Section 8 do have Congress as their subject: “The Congress shall have power . . . .”<sup>93</sup> But as Rosenkranz acknowledges, Article 1, Section 8 is a grant of power, not a restriction.<sup>94</sup> So a federalism challenge need not claim that Congress, in particular, has “violated”<sup>95</sup> the Constitution but rather that in this circumstance its actions lack legal effect. The argument is negative (“there is no power”) rather than positive (“X has violated”).<sup>96</sup> Reoriented this way, the claim is that one is at liberty to grow and use marijuana for some purposes and no one at the federal level—neither Congress nor the Drug Enforcement Agency—has the power to displace it in this case.

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90. *Id.*

91. The following critique expands on thoughts first published in William Baude, *Signing Unconstitutional Laws*, 86 *IND. L.J.* 303, 319–21 (2011).

92. See Daniel J. Hemel, *Executive Action and the First Amendment’s First Word*, 40 *PEPP. L. REV.* 601, 604–16 (2013) (“Some of the cases in which courts have found that the executive branch has violated the First Amendment should perhaps be recast as cases in which the executive branch has violated the Due Process Clause.”); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L. J.* 1672, 1723 (2012).

93. U.S. CONST. art. I, § 8, cl. 1.

94. Rosenkranz, *supra* note 86, at 1275.

95. *Id.* at 1279.

96. See generally John Harrison, *Power, Duty, and Facial Invalidity*, 16 *U. PA. J. CONST. L.* 501, 508–12, 514–19 (2013) (distinguishing between claims based on lack-of-power and claims based on violation-of-duty).

Moreover, if one *does* wish to look to a textual provision that says specifically that the limits of national power cannot be exceeded, the most relevant one is the Tenth Amendment, which says that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>97</sup> This provision does not make reference to any particular branch of the federal government and most naturally encompasses all of them. It reserves power from both Congress *and* the executive.

The second premise is that any constitutional challenge that does address Congress is necessarily premised on the facts in place at the time Congress acted.<sup>98</sup> Rosenkranz draws on an analogy to the criminal law,<sup>99</sup> but as I’ve written before, even the criminal law sometimes recognizes “acts whose criminality turns on their subsequent effects.”<sup>100</sup>

Perhaps more fundamentally, it is not at all clear that criminal law provides the right analogy here. Again, federalism challenges are a claim that federal action exceeds (or partly exceeds or potentially exceeds) granted authority, not necessarily that a specific constitutional duty was violated.<sup>101</sup> So perhaps a better analogy is to architecture.<sup>102</sup> Like a house upon a well-laid foundation, Congress must make laws on the basis of underlying constitutional authority. Even if that authority was fully adequate at the time the law was passed, it can erode over time because of subsequent events. And if it does erode, part of the law, like part of the house, must fall down.

One can also put the analogies aside and just talk common sense. Sometimes a law is constitutionally justified specifically because of certain real-world conditions—that it is “necessary and proper” for effectuating another power, or that it is an “appropriate” way to enforce rights against recalcitrant states.<sup>103</sup> If the real-world conditions go away, so does the justification. There is no *ex ante* reason to think that all prior exercises of power are “grandfathered” in when circumstances eat away at their constitutional basis.

The foregoing analysis assumes more generally that it is possible to raise a so-called “as-applied” federalism challenge to a federal statute—at least in the sense that one can say that a certain subclass

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97. U.S. CONST. amend. X.

98. Rosenkranz, *supra* note 86, at 1279.

99. *Id.* at 1212–13, 1212 n.9.

100. Baude, *supra* note 91, at 320.

101. *See* Harrison, *supra* note 96, at 502.

102. *Cf.* Akhil Reed Amar, *Architecture*, 77 IND. L.J. 671 (2002).

103. U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. amend. XIV, § 5.

of a federal statute's coverage is unconstitutional.<sup>104</sup> (Note that using a subclass, and a state-defined subclass, eases some of the difficulties raised by as-applied challenges where it is unclear what the relevant class of activity should be.)

Some scholars and courts have read the Supreme Court's decision in *Raich* to entirely foreclose as-applied challenges that a statute exceeds the commerce authority.<sup>105</sup> As a doctrinal matter, I believe that is an overreading of *Raich*,<sup>106</sup> which committed the more particular and limited error I address above. But if I am wrong, then that implication of *Raich* ought also to be limited to the extent necessary to disregard footnote 38.

### III. OPERATIONALIZING THE DOCTRINE

So it works in theory, but can it work in practice?

#### *A. In the Judiciary*

It is possible that footnote 38's rejection of state law does not really derive from a first-order view about the scope of constitutional power but rather from a view about judicial capacity. If so, then the more relevant question is how, as a practical matter, courts could account for state regulation under the Necessary and Proper Clause.

As is often the case with those who propose a new doctrinal path, I do not claim to know the only way that courts should travel it. That said, it seems to me that courts ought to ask two questions. First, does the state have a regime that seems likely, on its face, to eliminate whatever spillover problem Congress would otherwise have the power to address? For instance, does the state limit the purchase of marijuana to residents, limit the purchase quantities in a way that makes straw buyers infeasible, and also regulate production and sale in a way that makes diversion unlikely?

Second, if the regime seems likely to work on its face, is there also evidence that it works in practice? For example, does the state allocate significant resources to enforcement at the border or other

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104. This is in accordance with Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 905–07, 911 (2005).

105. See, e.g., David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 51 (2006) (noting that “the outcome in [*Raich*] strongly suggests that the Court simply disfavors as-applied challenges altogether in the Commerce Clause area”); see also Richard H. Fallon Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 936 (2011) (noting that “*Raich* can be read” this way).

106. See generally Misha Tseytlin, *As-Applied Commerce Clause Challenges*, 16 U. PA. J. CONST. L. 479, 494 (2013) (“This reaction rests on an overreading of *Raich*.”).

relevant nexus? Do studies or reports demonstrate a large amount of diversion?<sup>107</sup> States that have any interest in the preservation of their regulatory authority could themselves be the ones to amass some of this evidence and provide it to the court, whether as litigants or intervenors or amici.

Answering these questions should be no harder in principle than any other judgment about the scope of necessity. If one thinks that the judiciary had the capacity to say, as it did in *United States v. Lopez*<sup>108</sup> and *United States v. Morrison*,<sup>109</sup> that the law was too attenuated from any enumerated power, then in principle it should have the same ability when the attenuation is caused by state regulation. Contrariwise, if one is dubious of the entire project of judicially enforced limits on the enumerated powers, then one does not have any special complaint about the role of state law and one does not need footnote 38. Either way, the point is that looking to state law and state institutions does not pose a *special* judicial capacity problem.

In any event, there might be simpler ways to give some relevance to the role of state law through our current doctrinal frameworks. With some wrinkles, the Court often says that its review of Congress's enumerated powers judgments is subject only to "rational basis" scrutiny.<sup>110</sup> As Ernie Young has observed, that standard usually assumes that there is only one political decision to defer to.<sup>111</sup> Courts might instead shift the level of scrutiny in cases where *two* governments have made differing considered judgments. If the state has its own enforcement regime that seems plausibly designed to eliminate spillovers (we might say that there must be a "rational basis" for believing it will do so), then perhaps the court would apply some variation of "intermediate" scrutiny instead. This method would use

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107. One can also imagine different ways to calibrate *how much* of the spillover problem the state must control. One possibility is that the state must eliminate all but de minimis spillovers. Another is that it must do so at least as well as the proposed federal rule would.

108. 514 U.S. 549 (1995).

109. See *United States v. Morrison*, 529 U.S. 598, 614 (2000) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." (quoting *Lopez*, 514 U.S. at 557 n.2 (citation omitted))).

110. *E.g.*, Raich, 545 U.S. at 22 (citing *Lopez*, 514 U.S. 549, 557 (1995)).

111. Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v Raich*, 2005 SUP. CT. REV. 1, 32–33 (2005) (explaining that rational basis "has its impetus in the institutional advantages that legislative bodies enjoy over courts" but noting the complication in unique situations where the case "involves not one legislature but two"). *Raich*, again, is an exception.

state law to frame the amount of deference before proceeding to the court's other doctrinal tools, whatever they may be.

One can imagine variations on this approach as well. For instance, one might wish to give more deference to Congress when it has made a *specific* judgment that the specific state-law regime is not likely to be effective and less when it has not considered the problem. The Controlled Substances Act categorically banned marijuana more than twenty-five years before any state introduced an attempt to regulate in-state marijuana and control interstate spillovers. And Congress has never given any formal indication that it thinks the state regimes are unlikely to be effective, since it has not returned to marijuana's classification at all since the Act's enactment. Courts might respond to this dynamic by adopting an approach like so: When a state introduces a plausible regime for controlling spillovers, the federal law is presumptively judged under a stricter standard of scrutiny. If Congress responds with a specific, plausible doubt about the state regime, the level of scrutiny recedes back to the lower level.<sup>112</sup>

Aziz Huq has expressed skepticism about the judicial project of sorting different enumerated powers claims into seemingly different levels of scrutiny.<sup>113</sup> Huq's skepticism focuses on the Court's current project of seemingly invoking different levels of scrutiny for different congressional choices—the invocation of different enumerated powers or the regulation of economic vs. noneconomic activity under the Commerce Clause.<sup>114</sup> Huq suggests that varying the levels of scrutiny along those axes allows both legislative arbitrage and judicial activism and cannot be justified under most standard normative accounts.<sup>115</sup>

A level of scrutiny that varies with a state's plausibly effective regulatory regime, however, ought not raise the same objections. Because the level of scrutiny does not depend on congressional action, there is no serious opportunity for congressional arbitrage; nor does it seem to produce the same kind of "agency slack" that Huq criticizes. At the same time, the variation in scrutiny is justifiable under several interpretive theories: As a formal matter, it is a closer approximation of Congress's incidental powers, and as a practical matter, it provides

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112. *See id.* at 31–32 (suggesting a “process-based” “clear statement” rule); *see also* Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 103–08 (1991) (proposing that acts of Congress that implicate fundamental rights without adequate consideration be remanded to Congress).

113. *See* Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575 (2013).

114. *Id.* at 586–612.

115. *Id.* at 613–51.



sensible incentives for state participation in federal contestation. I would therefore submit that it is consistent with Huq's ambition to "render the political and policy stakes of such judicial review more transparent in ways that enable more meaningful public discussion."<sup>116</sup>

*B. In the Executive Branch*

Even if one is pessimistic about the ability of courts to coherently operationalize this theory, there remains another way in which the state-law theory of the Necessary and Proper Clause could work. It could be implemented through executive power. Such executive-branch constitutional implementation would be an improvement on the current state of marijuana enforcement.

Presidential implementation of the Constitution is well-established. There is scholarly and official disagreement about exactly how broad that power of implementation is—for instance, whether there is a categorical duty to ignore all unconstitutional statutes,<sup>117</sup> or a much more discretionary power.<sup>118</sup> There is also disagreement about how much the President's constitutional judgments should be subordinated to those of the Supreme Court.<sup>119</sup> I will not wade into that debate in this Article, but many of these theories could accept the President's ability to implement the reading of constitutional doctrine I suggest here.<sup>120</sup>

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116. *Id.* at 654.

117. Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

118. See Memorandum from Walter Dellinger, Assistant Att'y Gen., Dep't of Justice, to Honorable Abner J. Mikva, Counsel to the President (Nov. 2, 1994) available at [http://www.justice.gov/sites/default/files/olc/opinions/1994/11/31/op-olc-v018-p0199\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/1994/11/31/op-olc-v018-p0199_0.pdf) (on file with *Case Western Reserve Law Review*).

119. Compare Prakash, *supra* note 117, at 1617 (proposing that "the President has a duty to disregard statutes he believes are unconstitutional") and David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 L. & CONTEMP. PROBS. 61, 63 (2000) (challenging a "court-centered approach to the scope of the President's non-enforcement power"), with Memorandum from Walter Dellinger, *supra* note 118 ("[I]f the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his of beliefs about the constitutional issue."), and Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & CONTEMP. PROBS. 7, 12–13 (2000) ("Presidential non-enforcement policy should respect judicial precedent . . . but afford greater weight to the President's views when the President possesses special intuitional expertise of relevance.").

120. For instance, under Prakash's framework, Supreme Court precedent is, at best, a persuasive authority. See Prakash, *supra* note 117, at 1679. Under Dellinger's framework, nonenforcement would depend in part on

The President could implement this view through official memoranda concluding that marijuana laws are unconstitutional as applied to lawful in-state marijuana in particular states, like California or Colorado. Alternatively, rather than making specific judgments about which states' regimes are permissible, the administration could release a list of criteria relevant to both current and prospective regimes.

One advantage of such executive implementation is that the President can implement doctrine in a different way from the courts. All constitutional interpreters face the problem of translating terse constitutional commands into specific tests applicable to the facts at hand. We are more familiar with the implementing doctrines of courts, which fill up the law reports, but the executive does it too.

Moreover, the executive branch can craft constitutional doctrine differently than the courts. For instance, many concerns about the need for judicial deference in crafting doctrine do not apply to the executive branch. The courts are not politically accountable; the President is. Doctrines established by the courts are inflexible and difficult to revise; the President's need not be. The courts lack expertise and information necessary to make policy judgments; the President does not.<sup>121</sup> To be sure, the President's implementation is still ultimately supposed to be *legal* interpretation, not pure policy analysis, but it is legal interpretation under a different set of institutional constraints and abilities.

For instance, the current nonenforcement memos list eight "enforcement priorities," which include preventing interstate diversion, keeping lawful and illicit markets separate, and keeping profits from flowing to drug cartels.<sup>122</sup> Under a constitutional implementation approach, some of those priorities could be rewritten as state incentives. For instance, the President might publish a memo saying that states should endeavor to keep in-state marijuana out of the interstate market and away from interstate drug trafficking organizations. If a state could ensure that out-of-state diversions fall below a certain level, it would be entitled to a constitutional carve-out from the federal ban. This would give states strong motive to police doctors and dispensaries that might flout the state's rules.

Such a regime would turn Justice Stevens's concerns about the effectiveness of state law on their head. Rather than asking courts to "blindly presume" that state law is effective, it would ask the

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the Supreme Court's willingness to reinterpret or limit previous decisions if presented with the issue. See Memorandum from Walter Dellinger, *supra* note 118.

121. See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1240-44 (2006).

122. Cole Enforcement Memorandum, *supra* note 12, at 1-2.

government to create incentives for state law to actually become effective and then give that state law legal effect when it does so. For instance, because of low sales (and hence low tax revenue), Colorado lawmakers have not fully funded their enforcement regime.<sup>123</sup> Federal incentives might alter that behavior.

Moreover, a constitutional nonenforcement regime would be more legitimate and stable than the status quo. Right now, the President has allowed the state marijuana experiments to persist by simply declining (for the most part) to enforce the marijuana laws in those states. He has invoked the tradition of prosecutorial discretion to do so. But as Zachary Price has shown, federal prosecutorial discretion has not traditionally extended to “prospective licensing of prohibited conduct.”<sup>124</sup> Rather, prosecutorial discretion has traditionally been limited to resource-allocation decisions and case-specific equitable judgments.<sup>125</sup>

Specifically analyzing the most recent marijuana enforcement policies, Price concludes that one of the administration’s most recent nonenforcement policies “creeps closer to an [impermissible] express promise of nonenforcement,” though it “is defensible insofar as it promises only to focus resources on particular types of cases, not to avoid prosecution altogether.”<sup>126</sup> Moreover, even if the current regime is on the permissible side of the line, Price concludes that “a more definite nonenforcement policy, such as state officials and marijuana advocates sought, would exceed the Executive’s proper role by effectively suspending a federal statute.”<sup>127</sup> Prosecutorial discretion does not permit the executive to fix the pall of legal uncertainty that hangs over state markets and regulations.

A regime of *constitutional* nonenforcement cuts through these problems. The current memos expressly warn people and businesses that they have no legal right to rely on the promise of nonenforcement.<sup>128</sup> That is one of the sources of the legal uncertainty that rend-

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123. Jennifer Oldham, *Colorado Pot Revenue Lags Forecasts as Licensing Is Slow*, BLOOMBERG (May 1, 2014), <http://www.bloomberg.com/news/2014-05-02/colorado-pot-revenue-lags-forecasts-as-licensing-is-slow.html>.

124. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014).

125. *Id.* Cf. Michael B. Rappaport, *The Unconstitutionality of “Signing and Not-Enforcing,”* 16 WM. & MARY BILL RTS. J. 113, 119 n.21 (2007) (arguing that prosecutorial discretion is permitted only “on traditional grounds, such as the difficulty of proving a hard case or the belief that resources should be spent on other individuals who had committed worse offenses”).

126. *Id.* at 758 (analyzing Cole Enforcement Memorandum, *supra* note 12).

127. *Id.* at 758–59.

128. Cole Enforcement Memorandum, *supra* note 12, at 4.

ers the current system unstable. By contrast, a *constitutional* nonenforcement memo would amount to a representation by the government that marijuana possession was in fact lawful in some circumstances. Such representations are potentially judicially enforceable, providing a defense to criminal culpability for those who reasonably rely on them.<sup>129</sup>

A constitutional carve-out could also solve many of the problems with banks, lawyers and contracts. In each case, it is the continued presence of the federal ban that makes it hard for marijuana market participants to access these services. But if the federal ban is unconstitutional in a particular state, then within that state there is no federal ban in force. A regime of constitutionally based nonenforcement therefore could facilitate the personal and state investments that may be necessary for marijuana federalism to succeed.

### CONCLUSION

It is probably clear by now that none of these constitutional principles are really limited to marijuana or even to drug prohibition. Marijuana legalization is simply the policy context that currently happens to cast this problem in the sharpest relief.

The current doctrinal regime and its acceptance of footnote 38 is thus a twofold tragedy. It is first the loss of the chance to harness state energy and creativity to responsibly regulate marijuana and control interstate spillovers. But it is also the loss of the chance to more generally give states a proactive and responsible role in future challenges to federal policy. The contours of those debates are hard to even guess at now, just as the *Raich* Court probably did not guess that more than one state would legalize recreational marijuana less than ten years later.

Let us hope that future Justices and executive-branch officials are more willing to harness the power of state institutions in constitutional doctrine.

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129. See John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 37–47 (1997) (discussing *Raley v. Ohio*, 360 U.S. 423 (1959); *Cox v. Louisiana*, 379 U.S. 559 (1965); *United States v. Penn. Indus. Chem. Corp.*, 411 U.S. 655 (1973)).