

## FRENEMY FEDERALISM

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### INTRODUCTION

Federalism scholars have long been fascinated by the unique relationship between the federal government and states that have legalized marijuana.<sup>1</sup> And with good reason. For the past fifty years, Congress has classified marijuana as a Schedule I drug under the federal Controlled Substances Act (“CSA”), deeming the drug to have a high potential for abuse and no accepted medical use.<sup>2</sup> Congress’s aim in establishing Schedule I of the CSA was to “eliminate the market in Schedule I substances.”<sup>3</sup> Thus, possessing, distributing, and manufacturing marijuana are federally illegal.<sup>4</sup> Congress’s objective notwithstanding, over two-thirds of the states (and territories) have legalized marijuana for medical or recreational purposes.<sup>5</sup> And, for the most part, the CSA does not

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1. See, e.g., Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009) [hereinafter Mikos, *On the Limits of Supremacy*]; Brannon P. Denning, *State Legalization of Marijuana as a “Diagonal Federalism” Problem*, 11 FIU L. REV. 349 (2016) [hereinafter Denning, *State Legalization of Marijuana as a “Diagonal Federalism” Problem*]; Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1282–83 (2009); Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015).

2. 21 U.S.C. § 812(b)(1) (establishing scheduling criteria for Schedule I drugs); *id.* § 812, sched. I(c)(10) (listing marijuana as a Schedule I drug).

3. Denning, *State Legalization of Marijuana as a “Diagonal Federalism” Problem*, *supra* note 1, at 353.

4. § 841(a)(1) (making it unlawful to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”); *id.* § 844(a) (making it unlawful to possess a controlled substance without a valid prescription).

5. See Robert A. Mikos, *The Evolving Response to State Marijuana Reforms*, 26

preempt state laws legalizing marijuana.<sup>6</sup> This creates a potentially volatile situation in which the substance is contraband under federal law but is legal under perfectly valid state laws.<sup>7</sup>

Nonetheless, the federal government and the states that have legalized marijuana have managed to establish a stable, functional relationship that has allowed the marijuana industry to flourish in the United States. While the federal government once prosecuted marijuana users and businesses operating under state law, in the past decade it has largely stopped that practice. That is to say, the federal government has begun cooperating with the states.<sup>8</sup> In exchange for its cooperation, the federal government has demanded reciprocal cooperation. States must implement robust legal and regulatory regimes to, *inter alia*, keep marijuana activity from spilling-over into other states.<sup>9</sup> This condition furthers the federal objective of reducing interstate marijuana activity and functions as a command for states to keep their markets insular and intra-state.

In this Article, I show how the bargain between legalization states and the federal government establishes a novel type of federalist relationship that I call *Frenemy Federalism*. The term “frenemy” is a portmanteau of “friend” and “enemy” that means “[a] person with whom one is friendly despite a fundamental dislike or rivalry.”<sup>10</sup> The term has been used to describe the relationships between nations, politicians, celebrities, and more.<sup>11</sup> A Frenemy Federalism relationship occurs when the federal and state governments work together in an area of policy despite having conflicting objectives in that area. In such situations, the governments work

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WIDENER L. REV. 1, 3 (2020) [hereinafter Mikos, *Evolving Response to State Marijuana Reforms*].

6. See *infra* section II.A.

7. See generally Brian M. Blumenfeld, *State Legalization of Marijuana and Our American System of Federalism: A Historio-Constitutional Primer*, 24 VA. L. SOC. POL'Y & L. 77, 92–93 (2017) (noting that the CSA declares Congress's intent to preempt state laws “only if there is a ‘positive conflict [sic] so that the two cannot consistently stand together” (quoting § 903)).

8. See *infra* section II.B.2.

9. See *infra* section II.B.3.

10. *Frenemy*, LEXICO (POWERED BY OXFORD), <https://www.lexico.com/en/definition/frenemy> [<https://perma.cc/27JY-CJX2>].

11. Ben Zimmer, *Keep Your ‘Frenemies’ Closer*, ATLANTIC (Oct. 16, 2019), <https://www.theatlantic.com/entertainment/archive/2019/10/cnn-democratic-presidential-debate-frenemies-political-term/600121/> [<https://perma.cc/Q56L-Y9CH>] (recounting the term's history after Democratic Presidential candidate Tom Steyer used it during a debate).

together (despite their conflicting objectives) because mutual incentives align to make cooperation conducive toward achieving their respective goals. That aligning of incentives allows what may otherwise be a contentious, divisive relationship to find some stability. And, as a corollary, if those incentives are disrupted, the frenemy relationship could back-slide into more uncooperative terrain.

Recently, the Frenemy Federalism relationship regarding marijuana has come under threat from an old doctrine of constitutional law: the dormant commerce clause (“DCC”). Article I, section 8 of the Constitution gives Congress the authority “[t]o regulate Commerce . . . among the several States.”<sup>12</sup> Although framed as an affirmative grant of power to Congress, the Supreme Court of the United States has long interpreted the clause to contain a “negative” or “dormant” aspect as well. By granting Congress the power to regulate interstate commerce, the framers sought to thwart states from obstructing such commerce through protectionist barriers.<sup>13</sup> Thus, with narrow exception, the Court has regularly invalidated state laws that favor in-state interests against those of nonresidents.<sup>14</sup>

Legalization states have heretofore operated under the assumption that because Congress has prohibited interstate commerce in marijuana, the DCC does not apply to state marijuana laws. These states thus routinely discriminate against nonresidents. Some require licensees of marijuana businesses to be residents, or at least

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12. U.S. CONST. art. I, § 8.

13. See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978) (explaining that “[t]he opinions of the Court through the years have reflected an alertness to the evils of ‘economic isolation’ and protectionism” such that “where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected”).

14. See, e.g., *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019) (invalidating a Tennessee law imposing residency restrictions on the ownership of liquor businesses); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (invalidating Oklahoma law that required Oklahoma power plants to use at least ten percent Oklahoma-mined coal); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (striking Ohio law for discriminating against out-of-state ethanol producers); *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (invalidating New Hampshire law that prohibited the exportation of hydroelectric energy without prior approval from a state agency); *Philadelphia*, 437 U.S. 617 (striking New Jersey law that prohibited the importation of waste); *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333 (1977) (striking North Carolina law that prohibited imported apples from bearing state grades or classifications). *But see* *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding a Maine law prohibiting the importation of out-of-state baitfish because the law promoted a legitimate local purpose and there was no available nondiscriminatory alternative to achieve that purpose).

give residents preference in licensing;<sup>15</sup> some allow residents to purchase marijuana in larger quantities than nonresidents or prevent nonresidents from purchasing marijuana altogether;<sup>16</sup> and, most significantly, every state prevents licensed marijuana businesses from importing marijuana from other states and exporting marijuana to other states.<sup>17</sup>

A small but growing number of federal courts have begun applying the DCC to state marijuana laws, striking states' residency restrictions in marijuana business licensing as violating the doctrine.<sup>18</sup> If this early trend continues to cascade, it could spell trouble for the federal-state marijuana relationship. That is, if state restrictions on interstate commerce—especially their import-export restrictions—violate the DCC, then states will be less able (or entirely unable) to reduce interstate marijuana activity emanating from their states, disrupting the arrangement at the heart of the Frenemy Federalism relationship.

The issue of whether and how the DCC applies to state marijuana laws thus provides a fascinating case study for Frenemy Federalism. I argue that, in light of the governments' Frenemy Federalism relationship, courts should depart from the ordinary DCC doctrinal rules in the context of state marijuana law.<sup>19</sup> The Frenemy Federalism relationship counsels for courts to take a more

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15. See, e.g., ME. STAT. tit. 28-B, § 202(2) (2021) (establishing residency requirements for applicants for marijuana establishment licenses in Maine); 410 ILL. COMP. STAT. 705/15-30(c)(8) (2021) (awarding points to license applicants that are majority owned by Illinois residents); OKLA. STAT. tit. 63, § 427.14(E)(7) (2021) (establishing durational residency requirements for applicants for medical marijuana business licenses in Oklahoma); ALASKA ADMIN. CODE tit. 3, § 306.015(b) (2021) (prohibiting the licensing authority from issuing marijuana business licenses to nonresidents in Alaska); 935 MASS. CODE REGS. 500.050 (2021) (requiring owners of craft marijuana cooperatives to be residents of Massachusetts).

16. See, e.g., 410 ILL. COMP. STAT. 705/10-10 (2021) (allowing Illinois residents to possess higher quantities of marijuana than nonresidents); W. VA. CODE § 16A-2-1(a)(22) (2020) (requiring a "patient," for purposes of purchasing medical marijuana, to be a West Virginia resident); 21 R.I. GEN. LAWS § 21-28.6-3(25) (2021) (defining "qualifying patient" as "a resident of Rhode Island" with a debilitating medical condition).

17. In 2019, Oregon became the first state to allow interstate trade in marijuana. See A Bill for an Act Relating to Cannabis, S.B. 582, 80th Leg. Assemb., Reg. Sess. (Or. 2019). However, the Oregon law prohibits the state from entering any interstate compact regarding the import and export of marijuana until such compacts are federally legal or are tacitly authorized by the U.S. Department of Justice. See *id.* § 3.

18. See *infra* section I.C.

19. This view is in tension with the other leading article to squarely address the DCC's application to state marijuana laws in light of federal prohibition. In *Interstate Commerce in Cannabis*, Professor Robert A. Mikos argues that federal marijuana prohibition does not

deferential approach to the issue than they ordinarily would, lest they interfere with the federalist relationship by disrupting the governments' mutual incentives to cooperate.

In Part I of the Article, I review the various ways states discriminate against out-of-staters in regulating marijuana. I then detail the ordinary DCC doctrinal rules and address the nascent case law applying those rules to invalidate states' residency requirements for marijuana business licensing. Part II unpacks the federal-state relationship regarding marijuana. This part of the Article establishes that what began as a purely uncooperative relationship has evolved into one that features a comparatively greater degree of cooperation. In Part III, I posit that the resulting relationship is an example of Frenemy Federalism, a novel type of federalist relationship that I situate on a spectrum between pure uncooperative federalism and pure cooperative federalism. I then caution that applying the ordinary DCC doctrinal rules to state marijuana laws could disrupt the rather delicate Frenemy Federalism relationship. And, in light of that risk, I offer doctrinal reforms that would prevent future courts from creating such disruptions. Part IV briefly concludes the Article.

## I. STATE MARIJUANA LAWS AND THE DCC

When states enact laws that facially discriminate against non-residents, the federal courts ordinarily subject the laws to strict scrutiny under the DCC. Yet, states that have legalized marijuana discriminate against nonresidents in several respects. Some states restrict how much marijuana nonresidents can purchase, some place restrictions on nonresident ownership of marijuana businesses, and all of the states prohibit marijuana businesses from

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suspend the DCC's application to the states, and that state laws restricting interstate commerce are thus constitutionally suspect. 101 B.U. L. REV. 857 (2021) [hereinafter Mikos, *Interstate Commerce in Cannabis*]. Notwithstanding our disagreement over the present status of the DCC's application to state marijuana laws, we agree that once Congress legalizes marijuana, the DCC will surely apply to such laws. In a forthcoming article, we argue that Congress should suspend the DCC's application to the states when it eventually legalizes marijuana. Scott Bloomberg & Robert A. Mikos, *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*, 49 PEPP. L. REV. — (forthcoming Mar. 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3909972](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3909972) [<https://perma.cc/6BJA-V8M6>] [hereinafter Bloomberg & Mikos, *Legalization Without Disruption*].

importing and exporting marijuana. Are these laws unconstitutional?

In this Part, I categorize these discriminatory state marijuana laws, review the traditional DCC doctrinal rules, and show how courts have applied those traditional rules to invalidate state residency restrictions on marijuana business ownership.

### A. *Discriminatory State Marijuana Laws*

Every state that has legalized marijuana for recreational or medical purposes discriminates against nonresidents.<sup>20</sup> While a comprehensive accounting of the states' discriminatory measures is not necessary, in this section I will provide a summary of three common categories of express discriminations found in state marijuana laws.

First, states discriminate against nonresidents in the purchasing and possession of marijuana. For simplicity, I shall group these discriminations and call them "purchasing discriminations." When a state legalizes marijuana for recreational use, purchasing discriminations tend to take the form of a discriminatory quantity limitation rather than a complete prohibition on purchasing marijuana. Colorado, which along with Washington, was the first state to legalize marijuana for recreational use, authorized residents to purchase up to an ounce of marijuana at a state-licensed dispensary but limited nonresidents to purchasing a quarter-ounce.<sup>21</sup> Colorado has since repealed this discrimination,<sup>22</sup> but another major marijuana market, Illinois, has now authorized residents to possess twice as much cannabis flower, cannabis-infused products, and cannabis concentrate as nonresidents.<sup>23</sup>

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20. These states also maintain numerous marijuana laws that restrict interstate commerce in a facially nondiscriminatory way. These laws would also be vulnerable to challenge under the DCC. See Bloomberg & Mikos, *Legalization Without Disruption*, *supra* note 19, at \_\_\_ ("Apart from dooming discriminatory state regulations, the DCC will also cast doubt upon a host of neutral state marijuana laws.").

21. Compare COLO. CONST. art. XVIII, § 16(3)(a) (decriminalizing possession or purchase of up to an ounce of marijuana), with COLO. REV. STAT. § 12-43.4-901(4)(f) (2013) (making it unlawful for "any person licensed to sell retail marijuana" to "sell more than a quarter of an ounce of retail marijuana . . . to a nonresident of the state").

22. See H.B. 1261, § 8 (Colo. 2016) (repealing the quarter-ounce limitation on nonresident purchasing).

23. See 410 ILL. COMP. STAT. 705/10-10(a), (b) (2021) (setting different possession limitations for residents and nonresidents).

When a state legalizes marijuana for medical use, the purchasing discrimination may take the form of a complete prohibition against nonresident purchases of marijuana. Some medical marijuana states accomplish this prohibition by limiting the definition of a “qualifying patient”—or a similar term used to denote persons authorized to purchase medical marijuana—to *state residents* with qualifying medical conditions.<sup>24</sup> In such states, a nonresident with an otherwise qualifying medical condition thus ordinarily cannot access the state’s medical marijuana dispensaries.<sup>25</sup>

Second, every state that has legalized marijuana for recreational or medical use prohibits licensed marijuana businesses from importing marijuana from other states and from exporting marijuana to other states.<sup>26</sup> These import-export prohibitions serve local interests to the detriment of nonresidents. Prohibiting importations insulates state-licensed marijuana businesses from out-of-state competition, while prohibiting exportations helps to ensure sufficient supply to meet in-state demand.<sup>27</sup> States enforce both prohibitions through careful track-and-trace programs, pursuant to

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24. See, e.g., CONN. GEN. STAT. § 21a-408(16) (2021); FLA. STAT. § 381.986(1)(l) (2021); MINN. STAT. ANN. § 152.22(9) (2020); Mo. Const. art. XIV, § 1(2)(16); see also ARIZ. REV. STAT. ANN. § 36-2804.03(c) (LexisNexis 2021) (allowing nonresidents with out-of-state medical marijuana cards to possess marijuana but not to purchase marijuana from Arizona dispensaries); N.H. REV. STAT. ANN. § 126-X:2(V) (2021) (same for New Hampshire).

25. Some medical marijuana states provide a level of reciprocity for qualifying patients from other states. For example, New Jersey defines “qualifying patient” as “a resident of the State who has been authorized for the medical use of cannabis by a health care practitioner,” N.J. STAT. ANN. § 24:6I-3 (West 2021), but also allows individuals registered as qualifying patients in other states to be qualifying patients under New Jersey law for up to six months, *id.* § 24:6I-5.3. As another example, Washington, D.C. recognizes registered medical marijuana patients from any state that issues medical marijuana cards. See *Mayor Bowser Announces DC Will Now Accept Medical Marijuana Cards From Any State*, OFF. OF THE MAYOR (Aug. 8, 2019), <https://mayor.dc.gov/release/mayor-bowser-announces-dc-will-now-accept-medical-marijuana-cards-any-state> [<https://perma.cc/Q3QR-2QLC>]. However, even D.C.’s qualifying patient regulations work some discriminations against nonresidents. If the District experiences a shortage of medical marijuana, dispensaries “shall not dispense medical marijuana to a nonresident qualifying patient.” D.C. Mun. Regs. tit. 22, § C503.4 (2021).

26. In 2019, Oregon became the first state to authorize their state executive to enter interstate cannabis trade agreements. See *A Bill for an Act Relating to Cannabis*, S.B. 582, 80th Leg. Assemb., Reg. Sess. (Or. 2019). However, the law does not go into effect until Congress amends federal law to authorize interstate transfers of cannabis or the United States Department of Justice issues a memorandum permitting the interstate transfer of cannabis between licensed marijuana businesses. See *id.* at § 3.

27. Cf. *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 339 (explaining how a state’s prohibition on exporting hydroelectric power was designed to “gain an economic advantage” for the state’s citizens); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194–96 (1994) (explaining how a tax scheme that effectively creates a tariff on milk importations advantages in-state businesses).

which every marijuana plant grown in the state must be tracked in a central database from the point at which it is a seedling through the time it is sold as a product to the end-user.<sup>28</sup> These tracking programs prevent licensed marijuana retail businesses from purchasing marijuana produced in other states and prevent licensed marijuana producers from selling their wares to businesses in other states.<sup>29</sup>

Third, states have enacted various discriminations regarding nonresident ownership of marijuana businesses. Some states require marijuana businesses to be wholly- or majority-owned by residents. Alaska, for instance, requires anyone holding a marijuana establishment license to be a resident of the state and prohibits anyone who does not hold a license from having any “direct or indirect financial interest” in the licensed business.<sup>30</sup> If the licensee is a business entity, this restriction on nonresident ownership encompasses all partners, members, or shareholders of the business.<sup>31</sup> The result is the complete foreclosure of nonresident participation in the ownership of marijuana businesses in Alaska.<sup>32</sup>

Other states maintain fewer absolute discriminations against nonresident owners. States such as New Jersey and Illinois have discriminated against nonresidents by giving residents extra points in their competitive licensing processes.<sup>33</sup> In some circumstances, however, awarding resident-owned businesses extra points in the license application process creates a de facto bar on

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28. See, e.g., Alex Kreit, *Marijuana Legalization and Nosy Neighbor States*, 58 B.C. L. REV. 1059, 1073–74 (2017) (noting that seed-to-sale tracking programs “provide a great deal of protection against the diversion of wholesale amounts of marijuana” such that “the chances that legally grown marijuana will be diverted out of state before it reaches the consumer are incredibly low”).

29. *Id.* at 1074.

30. ALASKA ADMIN. CODE tit. 3, § 306.015 (2021).

31. *Id.*

32. The State of Washington has a similar prohibition against nonresident cannabis business owners. The state imposes a six-month durational residency requirement for all owners and principals of marijuana businesses. See WASH. REV. CODE. § 69.50.331(b) (2020); WASH. ADMIN. CODE § 314-55-020(10) (2021).

33. See *Alternative Treatment Center’s RFA Document Library*, N.J. DEP’T OF HEALTH, DIV. OF MED. MARIJUANA (Feb. 9, 2021), <https://www.nj.gov/health/medicalmarijuana/alt-treatment-centers/approvalstatus.shtml> [<https://perma.cc/4XER-KXDK>] (click on “Scoring Instructions” under the “2018 Selection Documents” category) (awarding up to twenty points for applicants with owners, officers, and managers who are New Jersey residents); 410 ILL. COMP. STAT. § 705/15-30(c)(8) (2021) (awarding points to license applicants that are majority owned by Illinois residents).

nonresident ownership. Illinois' 2019 to 2020 recreational marijuana dispensary licensing application process resulted in more than seventy-five applications receiving perfect scores.<sup>34</sup> Since the state was only awarding seventy-five licenses, an applicant that was not majority-owned by Illinois residents could not have obtained licensure even if it submitted an (otherwise) perfect application.

Importantly, states also employ residency restrictions to determine eligibility for their social equity programs. Eligibility for such programs is commonly limited to residents of *local* areas that have been disproportionately impacted by the war on drugs.<sup>35</sup> Qualifying residents may be eligible to receive a range of benefits, including preference in marijuana business licensing, access to funding, and training opportunities.<sup>36</sup>

The constitutionality of a law that facially discriminates against nonresidents, like those discussed above, is ordinarily in significant doubt. Such laws receive strict scrutiny under the DCC and are routinely struck down.<sup>37</sup> For reasons I shall explain, this traditional approach to the DCC should not extend to the state marijuana laws discussed here.

### B. *Traditional DCC Doctrinal Rules*

The Supreme Court has long recognized that Congress's authority to regulate interstate commerce extends to virtually all facets

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34. See Ally Marotti, *Illinois Will Award 75 Marijuana Dispensary Licenses in Lottery, Ending a Monthslong Delay*, CHI. TRIB. (Sept. 3, 2020, 4:59 AM), <https://www.chicagotribune.com/marijuana/illinois/ct-biz-75-dispensary-licenses-20200903-wzmcgg5nhzdmta3bfiaii-pmjru-story.html> [https://perma.cc/9JB6-7E2L]. As of this writing, various lawsuits challenging Illinois's cannabis-business licensing process are ongoing. See Tom Schuba, *Following Months of Delays, State Again Moves Forward with New Cannabis Licensing*, CHI. SUN-TIMES (Jan. 26, 2021, 7:16 PM), <https://chicago.suntimes.com/cannabis/2021/1/26/22251175/illinois-licenses-craft-dispensary-infusion-transportation-marijuana-pot-cannabis-social-equity> [https://perma.cc/6Y5S-LY4F] (describing criticisms of Illinois' licensing process and noting the lawsuits filed against the state); Robert McCoppin, *Illinois Supreme Court Orders Consolidation of Lawsuits by Applicants Challenging the Recreational Cannabis Process*, CHI. TRIB. (Oct. 19, 2021, 4:28 PM), <https://www.chicagotribune.com/marijuana/illinois/ct-illinois-marijuana-lawsuits-consolidation-20211019-xof7g7r7jzd2tenrld4vjgb5sm-story.html> [https://perma.cc/4DYP-VLT3].

35. See Bloomberg & Mikos, *Legalization Without Disruption*, *supra* note 19, at 27 (detailing states' use of *local* disproportionate impact areas for determining eligibility for social equity programs).

36. *Id.*

37. See *infra* section I.B.

of the United States economy.<sup>38</sup> Marijuana is no exception. In *Gonzales v. Raich*, two medical marijuana patients and their caregivers in California sought to prohibit the government from enforcing the CSA against them for possessing and cultivating marijuana for personal medical use.<sup>39</sup> They argued that Congress's commerce clause authority did not extend to regulating "the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law."<sup>40</sup> The Court disagreed, reasoning that Congress had a rational basis for concluding that prohibiting the personal, intrastate possession and cultivation of marijuana was "necessary and proper" to regulating the interstate market for marijuana.<sup>41</sup> Exempting personal, intrastate uses of marijuana, the Court explained, would create a risk that marijuana might be diverted into interstate commerce, thus "frustrat[ing] the federal interest in eliminating commercial transactions in the interstate market in their entirety."<sup>42</sup>

The Court has also long recognized that Congress's authority to regulate interstate commerce carries a negative implication: the states cannot impinge upon this authority by "discriminat[ing] against interstate commerce."<sup>43</sup> This implied limitation on state authority generally prohibits "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."<sup>44</sup> State laws that

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38. See *Wickard v. Filburn*, 317 U.S. 111 (1944); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Gonzales v. Raich*, 545 U.S. 1 (2005). *But see* *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

39. *Raich*, 545 U.S. at 7.

40. *Id.* at 15.

41. See *id.* at 22 ("Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.' U.S. Const. Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment.").

42. *Id.* at 19.

43. *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) ("It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce.").

44. *Id.*; see also *Granholm v. Heald*, 544 U.S. 460, 472 (2005) ("Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (quoting *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 99 (1994))).

“clearly discriminate against interstate commerce” are thus “routinely struck down.”<sup>45</sup>

Indeed, state trade barriers are ordinarily anathema to the constitutional system the founders designed. As the Court recently explained, “[u]nder the Articles of Confederation, States notoriously obstructed the interstate shipment of goods,” a problem that “culminated in a call for the Philadelphia Convention that framed the Constitution” and equipped the Constitution’s proponents with a powerful argument in promoting its ratification.<sup>46</sup>

This fear of “economic Balkanization,”<sup>47</sup> the Court has explained, warrants the application of strict scrutiny to state laws that “discriminate[] against out-of-state goods or nonresident economic actors.”<sup>48</sup> To survive, such laws must be “narrowly tailored to ‘advance a legitimate local purpose.’”<sup>49</sup> Under this rubric, the Court has invalidated state laws restricting the importation of waste,<sup>50</sup> prohibiting the exportation of minnows,<sup>51</sup> prohibiting the exportation of hydroelectric energy,<sup>52</sup> requiring harvested timber to be processed in state before it may be exported,<sup>53</sup> placing a surcharge on the importation of hazardous waste,<sup>54</sup> levying higher taxes upon entities that primarily serve nonresidents,<sup>55</sup> restricting out-of-state wineries from selling direct to consumers,<sup>56</sup> imposing residency requirements on liquor store licensees,<sup>57</sup> and more.

What has been strict in theory, however, has not been fatal in fact in the context of the DCC.<sup>58</sup> The limitation on state power imposed by the doctrine “‘is by no means absolute,’ and ‘the States

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45. *Limbach*, 486 U.S. at 274.

46. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2460 (2019) (describing how the issue of state trade barriers led to the Constitutional Convention and was cited as a reason for ratification by the Constitution’s proponents).

47. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

48. *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2461.

49. *Id.* (quoting *Dep’t of Rev. of Ky. v. Davis*, 553 U.S. 328, 338 (2008)) (alteration omitted).

50. *Philadelphia v. New Jersey*, 437 U.S. 617, 617 (1978).

51. *Hughes*, 441 U.S. at 322.

52. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1974).

53. *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

54. *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334 (1992).

55. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997).

56. *Granholt v. Heald*, 544 U.S. 460 (2005).

57. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019).

58. See Brannon P. Denning, *One Toke Over the (State) Line: Constitutional Limits on “Pot Tourism” Restrictions*, 66 FLA. L. REV. 2279, 2293 (2014) [hereinafter Denning, *One*

retain authority under their general police powers to regulate matters of “legitimate local concern,” even though interstate commerce may be affected.”<sup>59</sup> Thus, in *Maine v. Taylor*, the Court upheld Maine’s complete prohibition on the importation of baitfish because the discrimination served the legitimate local purpose of protecting Maine’s fisheries from parasitic and ecological harms, and there were no available nondiscriminatory means for achieving those objectives.<sup>60</sup>

Furthermore, states may restrict interstate commerce in ways that would otherwise offend the DCC when so authorized by Congress.<sup>61</sup> Because the implied prohibition on such measures derives from Congress’s authority to regulate interstate commerce, “Congress may ‘redefine the distribution of power over interstate commerce’ by ‘permitting the states to regulate the commerce in a manner which would otherwise not be permissible.’”<sup>62</sup>

Congress notably exercised this authority to assist dry states in restricting the importation of alcoholic beverages during the pre-Prohibition Era. During this time, the Supreme Court interpreted the commerce clause to prevent states from regulating articles of

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*Take Over the (State) Line*].

59. *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Lewis v. BT Inv. Managers*, 447 U.S. 27, 36 (1980)).

60. *See id.* at 141 (noting the threats to Maine’s fisheries); *id.* at 151 (concluding that Maine’s discriminatory law served these local purposes and “could not adequately be served by available nondiscriminatory alternatives”).

61. The DCC permits states to burden interstate commerce in other circumstances as well. First, state laws that burden interstate commerce in a nondiscriminatory manner are subject to far less scrutiny than discriminatory laws. Under *Pike v. Brice Church*, such laws are constitutional unless “the burden imposed on such [interstate] commerce is clearly excessive in relation to the putative local benefits.” 397 U.S. 137, 142 (1970); *see also* *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 520, 596 (1997) (“Where a State law facially discriminates against interstate commerce, we observe what has sometimes been referred to as a ‘virtually *per se* rule of invalidity;’ where, on the other hand, a state law is nondiscriminatory, but nonetheless adversely affects interstate commerce, we employ a deferential ‘balancing test,’ under which the law will be sustained unless ‘the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.’” (quoting *Pike*, 397 U.S. at 142) (alteration in original)). Many state laws burdening interstate commerce survive this balancing test. *See* *Dep’t of Revenue v. Davis*, 553 U.S. 328, 337–39 (collecting cases). Second, the Court has interpreted the commerce clause to allow states to discriminate when the state itself enters the marketplace to deal in goods or services. In such situations, principles of state sovereignty counsel toward allowing states to determine with whom they want to do business, just as if the states were private actors in the marketplace. *See* *Reeves, Inc. v. Stake*, 447 U.S. 429, 438–39 (1980) (describing the justifications for the market participant exception).

62. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87–88 (1984) (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945)) (alteration omitted).

interstate commerce that were still in their original packaging.<sup>63</sup> Goods in their original packaging remained articles of interstate commerce, subject exclusively to Congress's regulation under the interstate commerce clause, "until by a sale in the original package they [were] commingled with the general mass of property in the State."<sup>64</sup> This doctrine "left the States in a bind."<sup>65</sup> The bans in dry states prohibiting the domestic production of intoxicating liquors were "ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package."<sup>66</sup>

Congress soon intervened to help dry states get out of this bind. In 1890, Congress passed the Wilson Act to allow states to regulate imported spirits regardless of whether the beverages remained in their original packaging.<sup>67</sup>

The Court, in affirming the constitutionality of the Wilson Act, explained that the commerce clause gives Congress the power to authorize restrictions on commerce between the states. The Constitution "does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free *except as Congress might impose restraint*."<sup>68</sup> In other words, the Constitution does not secure for the states "absolute freedom" in interstate commerce, "but only the protection from encroachment [upon free commerce] afforded by confiding its regulation exclusively to Congress."<sup>69</sup>

Two decades later, the Court reasserted this understanding of the commerce clause in upholding the Webb-Kenyon Act, which Congress had passed to plug a loophole in the Wilson Act that allowed residents of dry states to continue to import alcohol.<sup>70</sup> The

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63. See *Granholt v. Heald*, 544 U.S. 460, 477–78 (2005) (describing the Court's "since-rejected" original package doctrine).

64. *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 445 (1898); see also *Heald*, 544 U.S. at 477–78 (discussing cases that relied on the original package doctrine); *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2464–65 (2019) (discussing additional cases that relied on the original package doctrine).

65. *Heald*, 544 U.S. at 478.

66. *Id.*

67. Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified as amended at 27 U.S.C. § 121 (2018)).

68. *In re Rahrer*, 140 U.S. 545, 555 (1891) (emphasis added).

69. *Id.* at 561.

70. See *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 326–31 (1917) (upholding Congress's power to permit states to prohibit liquor importations); Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. § 122 (2018)); *Tenn. Wine & Spirits*

Court has since repeatedly confirmed that “Congress has undoubted power to redefine the distribution of power over interstate commerce.”<sup>71</sup>

Importantly, when Congress exercises its power to allow states to discriminate against out-of-state interests in a manner that would otherwise violate the DCC, the Court has demanded that Congress makes its intent “unmistakably clear.”<sup>72</sup> Underlying this requirement is a default assumption that Congress ordinarily seeks to preserve an unrestrained interstate market for goods and services.<sup>73</sup> The Court will not override this assumption absent some plain indication from Congress.<sup>74</sup> Accordingly, the Court has

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Retailers Ass’n v. Thomas, 139 S. Ct. 2449, 2466 (2019) (explaining how the Court’s construction of the Wilson Act has allowed “residents of dry States could continue to order and receive imported alcohol” and that Congress passed the Webb-Kenyon Act to “patch this hole”).

71. S. Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945); see also New York v. United States, 505 U.S. 144, 171 (1992) (“While the Commerce Clause has long been understood to limit the States’ ability to discriminate against interstate commerce . . . that limit may be lifted, as it has been here, by an expression of the ‘unambiguous intent’ of Congress.” (quoting Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992))); Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 572 (1997) (declaring that “Congress unquestionably has the power to repudiate or substantially modify” the limitations upon the power of the States imposed by the commerce clause); S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87–88 (1984) (stating the proposition that Congress may “redefine the distribution of power over interstate commerce” by ‘permitting the states to regulate the commerce in a manner which would otherwise not be permissible’ (quoting *S. Pac. Co.*, 325 U.S. at 769) (alteration omitted)).

It is worth noting that in *Heald*, the Court determined that the Webb-Kenyon Act did not authorize states to treat imported liquors less favorably than domestic liquors. States had to regulate imported and domestic liquors on equal terms under the Act. See *Heald*, 544 U.S. at 482–84. The Court’s conclusion was specific to the language and history of the Webb-Kenyon Act and did not cabin Congress’s power to authorize state discriminations in interstate commerce. Indeed, the *Heald* Court distinguished the Webb-Kenyon Act from the McCarran-Ferguson Act, which the Court has held “removed all dormant Commerce Clause scrutiny of state insurance laws.” *Id.* at 482–83 (citing *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652–53 (1981)); see also *Ne. Bancorp v. Bd. of Governors of Fed. Rsv. Sys.*, 472 U.S. 159, 174 (1985) (holding that the Douglas Amendment to the Bank Holding Company Act of 1956 completely suspended the DCC as to state restrictions on interstate bank holding company acquisitions).

72. *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 91; see also *New York*, 505 U.S. at 171 (stating that Congress’s intent must be unambiguous).

73. See *Maine v. Taylor*, 477 U.S. 131, 138–39 (1986) (“[B]ecause of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been ‘unmistakably clear.’” (quoting *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 91) (emphasis added); *In re Rahrer*, 140 U.S. at 559–60 (explaining that Congressional silence on a matter of interstate commerce indicates “its will that such commerce should be free and untrammelled”).

74. *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 91–92 (“[W]hen Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be

declined to infer Congress's intent to authorize state restrictions on interstate commerce in several cases. It has rejected the argument that a "savings clause" designed to protect certain state hydroelectricity laws from federal preemption allowed states to restrict interstate commerce;<sup>75</sup> it has held that a federal law requiring local processing of timber harvested from *federal* lands in Alaska did not give Alaska permission to require local processing of trees harvested from *state* lands;<sup>76</sup> and it has declined to infer that some instances of federal deference to state water law implied that states could maintain discriminatory water laws.<sup>77</sup>

### C. *Applying the Traditional Rules to State Marijuana Laws*

Proponents of interstate commerce in marijuana have made state residency restrictions the first battleground for arguing that the DCC applies to state marijuana laws. In the early stages of this battle, the proponents of interstate commerce are winning. A small but growing number of courts have applied the traditional DCC doctrinal rules and concluded that residency restrictions violate the DCC.

The first case to address the issue on the merits was *NPG, LLC v. City of Portland*.<sup>78</sup> There, a Maine marijuana business and its parent company wanted to obtain a license from the City of Portland to operate an adult-use retail marijuana store.<sup>79</sup> By local ordinance, the Portland City Council authorized the City to issue twenty retail licenses based on a competitive application process.<sup>80</sup> Applicants would be graded along a number of dimensions, includ-

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in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow [a restraint on interstate commerce] is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and significantly reduces the risk that unrepresented interests will be adversely affected by restraints on commerce.”)

75. *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 337–38, 344 (1982) (holding that “Section 201(b) of the Federal Power Act does not provide an affirmative grant of authority” to “restrict the flow of privately owned and produced electricity in interstate commerce”).

76. *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 88, 92–93 (“Congress acted only with respect to federal lands; we cannot infer from that fact that it intended to authorize a similar policy with respect to state lands.”).

77. *Sporhase v. Nebraska*, 458 U.S. 941, 959–60 (1982).

78. No. 20-cv-00208, 2020 U.S. Dist. LEXIS 146958, at \*23–25 (D. Me. Aug. 14, 2020).

79. *Id.* at \*1.

80. *Id.* at \*4.

ing whether the applicant was “[a]t least 51% owned by individual(s) who have been a Maine resident for at least five years.”<sup>81</sup> The plaintiffs asked the court to enjoin the City from applying this criterion on the grounds that it violated the DCC.<sup>82</sup>

Applying the ordinary DCC doctrinal rules, the court had little difficulty in concluding that the plaintiffs had a likelihood of success on the merits of their claim.<sup>83</sup> It reasoned that the residency preference was facially discriminatory and that Congress’s prohibition of marijuana in the CSA was not an unmistakably clear authorization from Congress to discriminate against out-of-state economic interests.<sup>84</sup> The City also failed to establish that the residency preference was necessary to achieve a legitimate local purpose.<sup>85</sup>

Since *NPG*, federal courts in Missouri, Michigan, and Maine (again) have ruled that residency restrictions for marijuana business licensing violate the DCC.<sup>86</sup> A minority of courts, meanwhile, have creatively avoided reaching the merits of the issue, one by applying the unclean hands doctrine and the other by invoking the *Pullman* abstention doctrine.<sup>87</sup>

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81. *Id.* at \*4–6.

82. *Id.* at \*22. The plaintiffs also argued that a criterion awarding points based on whether the applicant has been previously licensed to own a non-marijuana related business in Maine violated the DCC. *Id.* As this argument raises the same fundamental DCC issues as the residency preference, I will focus on the residency preference.

83. *Id.* at \*20–26.

84. *See id.* at \*23–26 (“As is clear from the text of the licensing scheme and the statements by councilmembers, the City sought to create a preference for resident-owned marijuana retail stores.”); *id.* at \*24 (reasoning that “the [CSA] nowhere says that states may enact laws that give preference to in-state economic interests”).

85. *Id.* at \*25–26 (“[G]iven the express language in the points matrix and the statements by City officials suggesting a protectionist purpose, I conclude that the City is unlikely to succeed in justifying the residency preferences in its points matrix.”). The result in *NPG* dovetailed with the Maine Office of Attorney General’s conclusion that a similar state residency requirement for marijuana business licensing violated the DCC. *See State of Maine Will Not Enforce Marijuana Residency Requirement*, OFF. MARIJUANA POL’Y (May 11, 2020), <https://www.maine.gov/dafs/omp/news-events/news/aump-lawsuit-residency-requirement> [<https://perma.cc/8BFU-9N52>] (explaining the Attorney General’s position on the constitutionality of the state’s residency requirement and the Attorney General’s decision to file a joint stipulation of dismissal announcing that it would not defend the residency requirement in court). This conclusion led the Office of Attorney General to enter a stipulated dismissal in a separate lawsuit brought by *NPG* challenging the state provision. *Id.*

86. *See* Preliminary Injunction Order, *Toigo v. Dep’t of Health & Senior Servs.*, No. 20-cv-04243 (W.D. Mo. June 21, 2021); Preliminary Injunction Order, *Lowe v. City of Detroit*, No. 21-cv-10709 (E.D. Mich. June 17, 2021); *Ne. Patients Grp. v. Me. Dep’t of Admin. & Fin. Servs.*, No. 20-cv-00468, (D. Me. Aug. 11, 2021).

87. *See* Motion to Dismiss Order, *Original Invs. v. Oklahoma*, No. 20-cv-00820 (W.D.

If the majority position continues to cascade, then the first battleground over the DCC and state marijuana laws will not be the last. As courts establish a pattern of applying the traditional DCC doctrinal rules to state marijuana laws, proponents of interstate commerce in marijuana will likely turn attention to a new frontier, one with far-reaching consequences: import-export restrictions. Indeed, under traditional DCC principles, it is hard to imagine how the outcome in such cases would be any different than in the residency restriction context.<sup>88</sup> If (When?) courts begin invalidating states' import-export prohibitions, it will spell a rapid end to the insular state-based market system that has heretofore governed the U.S. marijuana industry. That system will be replaced, overnight and by judicial decree, with a national marijuana marketplace where the substance flows unrestricted across the lines of legalization states.

## II. THE FEDERALIST RELATIONSHIP REGARDING MARIJUANA

As I shall develop over the remainder of this Article, courts should tread far more carefully when applying the DCC to state marijuana laws. Invalidating laws that restrict interstate marijuana commerce could disrupt the stable, yet fragile, relationship that the federal government and legalization states have developed over marijuana. In Part II, I unpack this unique federalist relationship, showing how it has evolved from a purely uncooperative relationship to one that involves a healthy degree of cooperation. I then posit, in Part III, that this more cooperative relationship should be categorized as a novel type of federalist relationship that I call Frenemy Federalism.<sup>89</sup>

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Okla. June 4, 2021) (dismissing a DCC challenge to a state residency requirement by invoking the “unclean hands” doctrine); Motion to Dismiss Order, *Brinkmeyer v. Washington State Liquor & Cannabis Bd.*, No. 20-vs-5661 (W.D. Oct. 5, 2020) (dismissing a DCC challenge to a state residency requirement under the *Pullman* abstention doctrine).

88. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 19, at 864 (applying ordinary DCC doctrinal rules and concluding that import-export restrictions likely violate that doctrine).

89. For other thoughtful descriptions of marijuana and federalism, see generally MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE (Jonathan Adler ed., 2020) (collecting essays on marijuana and federalism); Blumenfeld, *supra* note 7 (describing the interplay of the Controlled Substances Act, the federal preemption doctrine, and the anti-commandeering doctrine in the area of marijuana law); Chemerinsky et al., *supra* note 1 (detailing the consequences of federal marijuana prohibition, state marijuana legalization, and the federal preemption doctrine, and proposing a federal reform rooted in cooperative federalism principles); Mikos, *On the Limits of Supremacy*, *supra* note 1 (describing the limits of federal

### A. *Sharing Authority Over Marijuana*

At first blush, the notion that the states can authorize conduct expressly prohibited by Congress seems to violate the core principle of federal supremacy embodied in our Constitution.<sup>90</sup> State laws creating and regulating marijuana markets are nonetheless generally valid as a constitutional matter. This is so due to the CSA's limited preemptive effect and due to constitutional constraints on the federal government's authority over local marijuana regulation.

Because federal law is indeed the "supreme Law of the Land," state laws that prevent or obstruct the effective execution of a federal law are deemed preempted and thus unlawful.<sup>91</sup> Pursuant to this preemption doctrine, Congress can preempt state laws expressly or by implication. Express preemption occurs when Congress declares its intent to preempt state law in the text of a statute.<sup>92</sup> Implied preemption occurs in two situations. First, implied "field preemption" occurs when Congressional legislation in an area is so pervasive that courts can infer Congress's intent to "occupy the legislative field" and preempt state laws regulating the same subject matter.<sup>93</sup> Second, "conflict preemption" occurs when there is a conflict between federal and state law such that complying with both laws is impossible ("impossibility preemption") or such that the state law obstructs implementation of the federal law ("obstacle preemption").<sup>94</sup>

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authority over marijuana created by the preemption and anti-commandeering doctrines as well as resource constraints).

90. See U.S. CONST. art. VI, cl. 2 (proclaiming that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

91. See, e.g., *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 479–80 (2013) ("The Supremacy Clause provides that the laws and treaties of the United States 'shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.' U. S. Const., Art. VI, cl. 2. Accordingly, it has long been settled that state laws that conflict with federal law are 'without effect.'" (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981))); *Blumenfeld*, *supra* note 7, at 91.

92. See, e.g., *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) ("Congress may indicate preemptive intent through a statute's express language or through its structure and purpose.").

93. See *id.* ("Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field . . .").

94. See, e.g., *Mut. Pharm. Co.*, 570 U.S. at 480 ("Even in the absence of an express preemption provision, the Court has found state law to be impliedly pre-empted where it is

When Congress enacted the CSA in 1970, it did so against the backdrop of a long tradition of state and local control over drugs and dangerous substances.<sup>95</sup> To avoid disrupting the states' traditional authority in this area, Congress disclaimed any intent to preempt state law except in the narrowest of circumstances:

No provision [of the CSA] shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . , to the exclusion of any State law on the same subject matter . . . unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.<sup>96</sup>

Courts applying this “savings clause,”<sup>97</sup> 21 U.S.C. § 903, have concluded that the CSA’s preemptive effect is extremely limited. This conclusion derives in part from the assumption that Congress does not intend to preempt the “historic police powers of the States,” such as regulating controlled substances, unless “that was the clear and manifest purpose of Congress.”<sup>98</sup> Thus, some courts have reasoned that § 903’s use of the phrase “positive conflict . . . so that the two cannot consistently stand together” shows Congress’s intent to limit the CSA’s preemptive effect to impossibility preemption situations; that is, when compliance with both the federal and state laws is a physical impossibility.<sup>99</sup> Such situations ordinarily occur when the state law *requires* conduct that violates the CSA but not when state law merely *permits* conduct that violates the CSA.<sup>100</sup> With narrow exception, nearly all state marijuana laws are

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“impossible for a private party to comply with both state and federal requirements.” (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)); *Maryland*, 451 U.S. at 747 (explaining that a state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” is preempted).

95. See generally Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970) (detailing the history of marijuana regulation in the United States prior to Congress’s enactment of the CSA in 1970).

96. 21 U.S.C. § 903.

97. The term “savings clause” is commonly used by courts to describe a provision of a federal law that limits the law’s preemptive effect. See, e.g., *Ky. Ass’n Health Plans v. Miller*, 538 U.S. 329, 335–36 n.1 (2003) (discussing ERISA’s savings clause); *Oullette v. Mills*, 91 F. Supp. 3d 1, 11 (D. Me. 2015) (describing § 903 as a savings clause).

98. *Mut. Pharm. Co.*, 570 U.S. at 498 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

99. See, e.g., *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 479–80 (Cal. Ct. App. 2008) (construing § 903 as limiting the CSA’s preemptive effect to only impossibility preemption and not obstacle preemption); *Reed-Kalisher v. Hoggatt*, 347 P.3d 136, 141 (Ariz. 2015).

100. See, e.g., Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How?*, 50 U.C.

valid under this standard because they do not *require* people to use or deal in marijuana.<sup>101</sup> Other courts have construed § 903 slightly more broadly to allow for obstacle preemption. However, these courts commonly reject the proposition that state laws legalizing and regulating marijuana pose an obstacle to Congress's objectives in passing the CSA.<sup>102</sup> The upshot is that in enacting the CSA, Congress limited the reach of its otherwise supreme law, acquiescing to state laws regulating drugs differently than the CSA except in narrow and unusual circumstances.<sup>103</sup>

In addition to Congress's self-imposed restraint, the Constitution contains an inherent limit on the federal government's ability to fulfill Congress's objective of eliminating the interstate market in marijuana. Under our system of federalism, the federal government cannot require state officials to implement federal laws or force states to enact or repeal state laws.<sup>104</sup> In the context of marijuana, this "anti-commandeering" principle prevents the federal government from compelling the states to enforce the CSA and

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DAVIS L. REV. 617, 625 (2016) ("[I]t is only if the state were to *require* that which the federal government forbids that compliance with both state and federal law would become impossible."); *Beek v. City of Wyoming*, 846 N.W.2d 531, 537 (Mich. 2014) (observing that impossibility preemption "results when state law requires what federal law forbids, or vice versa").

101. One possible exception is state laws requiring law enforcement agents to return wrongfully confiscated marijuana to the person from whom it was seized. Courts are split on whether the CSA preempts such state laws. *Compare* *People v. Crouse*, 388 P.3d 39, 40 (Colo. 2017) (finding a positive conflict between the CSA and a provision of Colorado's Constitution that required the return of wrongfully confiscated medical marijuana), *with* *City of Garden Grove v. Superior Ct.*, 68 Cal. Rptr. 3d 656, 673–78 (Cal. Ct. App. 2007) (finding that the CSA does not preempt a requirement that officers return wrongfully confiscated marijuana).

102. *See, e.g., Reed-Kaliher*, 347 P.3d at 141–42 (concluding that the Arizona Medical Marijuana Act did not "frustrate the CSA's goals of conquering drug abuse or controlling drug traffic" by providing a limited immunity for medical marijuana users under state law); *Beek*, 846 N.W.2d at 539 (holding that the Michigan Medical Marijuana Act "does not frustrate the CSA's operation nor refuse its provisions their natural effect, such that its purpose cannot otherwise be accomplished"); *accord* *Nebraska v. Colorado*, 136 S. Ct. 1034, 1036 (2016) (Thomas, J., dissenting) (denying states' motion for leave to file a bill of complaint in case arguing that the CSA preempted Colorado's legalization and regulation of recreational marijuana).

103. *See, e.g., Chemerinsky et al., supra* note 1, at 104 ("Section 903 of the CSA includes an antipreemption provision expressly disclaiming preemptive intent in all but a narrow set of circumstances.").

104. *See* *New York v. United States*, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program."); *Murphy v. NCAA*, 138 S. Ct. 1461, 1481 (2018) (holding that a federal law prohibiting states from enacting laws that legalize sports gambling violates the anti-commandeering principles); *Printz v. United States*, 521 U.S. 898, 933 (1997) (concluding that a federal law requiring local law enforcement officials to perform background checks on prospective handgun purchasers "plainly runs afoul of" the anti-commandeering principles).

from forcing the states to enact their own laws prohibiting marijuana.<sup>105</sup> This limit impedes federal efforts to eradicate the interstate marijuana market, as the vast majority of marijuana arrests have traditionally been made by state and local officials.<sup>106</sup>

Taking the CSA's savings clause and the anti-commandeering doctrine together, the boundaries of the federal government's authority to regulate marijuana become clear: the CSA does not invalidate state laws authorizing the possession, manufacturing, and distribution of marijuana, and the federal government cannot force the states to repeal those laws or replace them with laws prohibiting marijuana. The validity of state laws legalizing marijuana, of course, does not imply the invalidity or unenforceability of federal laws prohibiting marijuana. Both sets of laws are valid and can be enforced by their respective sovereigns. As a result, the federal and state governments have shared authority to regulate marijuana. And within this sphere of shared authority the states are free to legalize marijuana and license businesses to deal in marijuana, while the federal government is free to arrest and prosecute marijuana users and businesses for violating the CSA.<sup>107</sup>

How do the federal government and legalization states manage to co-exist in this seemingly hostile arena of marijuana regulation? Delicately. The sustainability of this shared-authority model over marijuana depends on a good deal of cooperation from both the federal government and the states, notwithstanding the inherent tension between their respective policies of prohibition and legalization.

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105. See, e.g., Kamin, *supra* note 100, at 626–27 (explaining that “[t]he federal government cannot require a state to enforce federal law, to keep its own marijuana prohibition on the books, to recriminalize marijuana, or to enforce any law that it does have on the books”); Mikos, *On the Limits of Supremacy*, *supra* note 1, at 1462 (concluding that “the anti-commandeering rule bars Congress from preempting state medical marijuana exemptions and accompanying registration/ID programs”).

106. See, e.g., Bulman-Pozen & Gerken, *supra* note 1, at 1283–84 (“[D]ue to limited resources, the federal government prosecutes only a small percentage of high-profile drug offenders, with roughly 99% of all marijuana arrests made by state and local officials.”).

107. See Kamin, *supra* note 100, at 627 (explaining how “[m]arijuana law reform in the states exists largely because the federal government allows it to exist” and how the federal government could decide to enforce the CSA “at any time”).

## B. *An Increasingly Cooperative Relationship*

### 1. Uncooperative Federalism

Professor Jessica Bulman-Pozen and Dean Heather Gerken have categorized state legalization of marijuana as an instance of uncooperative federalism.<sup>108</sup> In their influential 2009 Essay, *Uncooperative Federalism*, Bulman-Pozen and Gerken observe that scholars had traditionally conceived of our system of federalism through one of two lenses. Under the “state autonomy” model of federalism, the states and the federal government are dual sovereigns who act as autonomous rivals, allowing states to act as dissenters to federal policies they deem undesirable.<sup>109</sup> In contrast, under the “cooperative federalism” approach, the states are like agents or servants of the federal government, dutifully carrying out a federal program to achieve a shared objective.<sup>110</sup>

Uncooperative federalism presents a third type of relationship between the states and the federal government, one that recognizes a principal’s or master’s dependence on their agents or servants, and the concomitant power of an embedded agent or servant to push back against their superior.<sup>111</sup> Sometimes, the states do not dutifully cooperate in administering a federal program, but actively seek to change or undermine that program. They are uncooperative.

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108. Bulman-Pozen & Gerken, *supra* note 1, at 1282–83 (explaining that “state decriminalization of medical marijuana, while concededly at the edges of our definition, might nonetheless be thought of as uncooperative federalism”); *see also* Heather K. Gerken, *Distinguished Scholar In Residence Lecture: A User’s Guide to Progressive Federalism*, 45 HOFSTRA L. REV. 1087, 1089 (2017) (“Perhaps the most spectacular example of uncooperative federalism we’ve seen in recent years has been marijuana enforcement.”).

109. Bulman-Pozen & Gerken, *supra* note 1, at 1261 (describing the state autonomy model of federalism and noting that the “emphasis on autonomy is particularly pronounced in a line of scholarship depicting the states as dissenters”).

110. *Id.* at 1262–63 (explaining that scholars of cooperative federalism believe “that states should serve not as rivals or challengers to federal authority, but as faithful agents implementing federal programs”).

111. *Id.* at 1266 (“One main source of the servant’s power is dependence. Because the master delegates responsibility, the servant has discretion in choosing how to accomplish its tasks and which tasks to prioritize.”); *id.* at 1268–69 (“Another source of the servant’s power is integration. When an actor is embedded in a larger system, a web of connective tissues binds higher-and lower-level decisionmakers. Regular interactions generate trust and give lower-level decisionmakers the knowledge and relationships they need to work the system.”)

Bulman-Pozen and Gerken identify three categories of state actions that constitute uncooperative federalism. The first is “licensed” dissent, which occurs when “Congress explicitly contemplates that states will deviate from federal norms in implementing federal policy, but states take that invitation in a direction the federal government may not anticipate.”<sup>112</sup> State efforts to catalyze federal welfare reform provide an example. In the 1980s, states such as Wisconsin and Michigan utilized a waiver provision of the federal Aid to Families with Dependent Children welfare program (“AFDC”) to “recast an entitlement for poor families struggling to raise children into a temporary grant for recipients who would quickly move into the private workforce.”<sup>113</sup> Departing from the existing federal policy, the states began enacting welfare-to-work requirements that required welfare recipients to actively seek employment and terminated AFDC benefits after a set period of time.<sup>114</sup> These uncooperative states largely succeeded in changing federal welfare law when Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>115</sup>

The second form of uncooperative federalism occurs when states exploit gaps in federal regulatory schemes. In such cases, “the federal government does not contemplate state variation but states have sufficient discretion that they find ways to contest federal policy.”<sup>116</sup> Bulman-Pozen and Gerken offer California’s efforts to regulate air pollution more stringently than the EPA as an example of this strain of uncooperative federalism. The state has successfully exploited a narrow exception to the Clean Air Act’s preemption provision to drive federal emissions standards for decades.<sup>117</sup>

The third, and “strongest,” form of uncooperative federalism is civil disobedience, where states “simply refuse to comply with the national program or otherwise obstruct it.”<sup>118</sup> Bulman-Pozen and Gerken cite state pushback to the Patriot Act as an example. After Congress passed the Act, several states enacted resolutions that prohibited their agencies from assisting the federal government in

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112. *Id.* at 1271–72.

113. *Id.* at 1274.

114. *Id.* at 1274–75 (describing Wisconsin and Michigan’s welfare-to-work programs).

115. *Id.* at 1276.

116. *Id.* at 1272.

117. *Id.* at 1277–78.

118. *Id.* at 1272.

enforcing the Act.<sup>119</sup> This uncooperative action had real effect, as “the federal government relies on the states for enforcement assistance.”<sup>120</sup>

In early 2009, the federal-state relationship regarding marijuana fit within the uncooperative federalism framework, falling into the civil disobedience bucket.<sup>121</sup> At that point, thirteen states had legalized medical marijuana, a costly blow to the federal government due to its dependence on the states for assistance in enforcing marijuana prohibition.<sup>122</sup> The DEA, meanwhile, was “actively working to undermine the decriminalization efforts underway in California, the state with the most nationally visible decriminalization policy.”<sup>123</sup> Indeed, federal prosecutions of individual medical marijuana users and marijuana businesses in California were commonplace in the early 2000s.<sup>124</sup>

## 2. Increased Federal Cooperation

There is a great deal more cooperation in the federal-state marijuana relationship than there was when Bulman-Pozen and Gerken originally described it as uncooperative federalism. Since 2009, dozens more states have legalized medical marijuana and many have also legalized the drug for recreational use. In conjunction with these state policy changes, the federal government’s policy changed as well: it became far more cooperative with the states.

Though the federal government indisputably has the constitutional authority to prosecute marijuana businesses and users operating in states where marijuana is legal, over the years it has agreed—expressly at times and tacitly at others—to allow those businesses and users to avoid prosecution. This form of federal cooperation began with a series of DOJ memoranda instructing U.S.

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119. *Id.* at 1278.

120. *Id.* at 1280.

121. *Id.* at 1282–83 (describing state legalization of medical marijuana as an instance of uncooperative federalism, albeit one “at the edges of [their] definition” due to the absence of a formal regulatory program like the Clean Air Act or the AFDC).

122. *See id.* at 1282–84 (describing federal dependence on the states in arresting participants in the illicit marijuana market).

123. *Id.* at 1283, 1283 n.98 (citing the agency’s efforts to punish doctors who recommended marijuana and the agency’s prosecution of California dispensaries).

124. *See id.* at 1283 n.98 (noting examples of federal prosecution of marijuana businesses); *Gonzales v. Raich*, 545 U.S. 1 (2005).

Attorneys not to prosecute marijuana businesses and users acting in compliance with state law.

In 2009, Deputy Attorney General David Ogden issued a policy memorandum to U.S. Attorneys titled “Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana.”<sup>125</sup> The “Ogden Memo,” as it has become known, instructed U.S. Attorneys in states that legalized medical marijuana to deprioritize the enforcement of federal marijuana law against individuals who use medical marijuana in compliance with state law.<sup>126</sup> As a result, the federal government largely stopped prosecuting medical marijuana users unless the user failed to comply with state law in a manner that implicated one of several “potential federal interest[s]” listed in the Ogden Memo.<sup>127</sup>

While the Ogden Memo provided relief to medical marijuana users, the DOJ continued to prosecute businesses operating under state medical marijuana laws.<sup>128</sup> This changed in 2013 following the issuance of a new DOJ memorandum known as the “Cole Memo” for its author, Deputy Attorney General James Cole.<sup>129</sup> On the heels of Colorado and Washington becoming the first states in the nation to legalize marijuana for recreational use, the Cole

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125. U.S. DEP’T OF JUST., MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS: INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA 1 (Oct. 19, 2009), <https://www.justice.gov/archive/opa/documents/medical-marijuana.pdf> [<https://perma.cc/R324-QLWX>].

126. *Id.* at 1–2 (declaring that prosecuting medical marijuana users with serious illnesses and their caregivers “is unlikely to be an efficient use of limited federal resources”).

127. *Id.* at 2. These interests included “unlawful possession or unlawful use of firearms; violence; sales to minors; financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law; amounts of marijuana inconsistent with purported compliance with state or local law; illegal possession or sale of other controlled substances; or ties to other criminal enterprises.” *Id.*

128. A 2011 DOJ memo from Deputy Attorney General James Cole reflected this distinction between users and businesses. *See* U.S. DEP’T OF JUST., MEMORANDUM FOR UNITED STATES ATTORNEYS: GUIDANCE REGARDING THE OGDEN MEMO IN JURISDICTIONS SEEKING TO AUTHORIZE MARIJUANA FOR MEDICAL USE 1–2 (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [<https://perma.cc/9RVU-UGXL>]. The 2011 Cole Memo clarifies that the Ogden Memo applies to medical marijuana users, but “was never intended to shield [commercial] activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.” *Id.* at 2.

129. *See* U.S. DEP’T OF JUST., MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT 1 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/ABH6-9EHS>] [hereinafter COLE MEMO].

Memo instructed U.S. Attorneys in states where marijuana was legal to deprioritize enforcement of the CSA against marijuana businesses acting in accordance with state law.<sup>130</sup> This gave investors and entrepreneurs confidence that they could invest in and operate marijuana businesses without facing decades behind bars. State marijuana marketplaces flourished as a result.<sup>131</sup>

Former Attorney General Jefferson B. Session rescinded the Cole Memo in January 2018.<sup>132</sup> But even without the express dictates of the Cole Memo, the DOJ has tacitly continued its cooperative policy of nonenforcement.<sup>133</sup> State marijuana marketplaces are still able to function without an imposing fear of federal interference, a state of play that will almost certainly continue under Merrick Garland's tenure as Attorney General.

In late 2014, the legislative branch of the federal government followed the executive branch's lead in cooperating with the states. Congress included in the Consolidated and Further Appropriations Act—the federal government's budget—a DOJ spending rider known as the Rohrabacher-Farr Amendment.<sup>134</sup> The Amendment prohibited the DOJ from spending any funds to prevent states from “implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>135</sup> Because the Amendment is a budget rider, Congress must renew the provision every time it enacts a new federal budget. It has done so

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130. *Id.* at 3 (declaring that in states with adequate regulatory and enforcement systems, “enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity”).

131. *See, e.g., AG Sessions Rescinds Cole Memo, Roiling Marijuana Industry*, MARIJUANA BUS. DAILY, <https://mjbizdaily.com/report-sessions-rescind-cole-memo-creating-cloud-uncertainty-marijuana-businesses/?en-reloaded=1> [<https://perma.cc/Z39T-JUNT>] (Feb. 21, 2019) (describing the Cole Memo as “an Obama-era policy that paved the way for legalized marijuana to flourish in states across the country”); Hilary Bricken, *Breaking News: Bye, Bye Cole Memo, Hello Uncertainty for Marijuana*, CANNA L. BLOG (Jan. 4, 2018), <https://harrisbricken.com/cannalawblog/breaking-news-bye-bye-cole-memo-hello-uncertainty-for-marijuana/> [<https://perma.cc/B3HZ-BR38>] (stating that “cannabis operators who consistently complied with hardcore state marijuana regulations basically saw themselves as off-limits to the Feds because of the Cole Memo”).

132. *See AG Sessions Rescinds Cole Memo, Roiling Marijuana Industry*, *supra* note 131.

133. *See, e.g., Mikos, Evolving Response to State Marijuana Reforms*, *supra* note 5, at 10 (noting that Sessions' rescinding of the Cole Memo did not actually change federal enforcement practices).

134. Consolidated and Further Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 § 538 (2014).

135. *Id.*

every year since 2014.<sup>136</sup> As a result, medical marijuana businesses and users who “strictly comply” with their state’s medical marijuana laws have enjoyed legal protection from federal prosecution for the past seven years.<sup>137</sup> While this protection only applies to medical marijuana markets, and while Congress could decline to renew it any given year, it too has fostered the certainty states need for their marijuana markets to grow.

### 3. Reciprocal Cooperation from the States

The federal government’s increased cooperation with the states since 2009 has come with a condition: reciprocal cooperation. In exchange for the federal government’s détente in prosecuting marijuana users and businesses, it has required legalization states to meticulously regulate their marijuana marketplaces in service of federal interests. The states have gladly accepted this condition to the federal government’s cooperation, creating powerful state agencies, complex regulatory codes, and implementing the marijuana tracking programs discussed above.<sup>138</sup>

The Cole Memo articulates this condition of cooperation quite clearly. Traditionally, the federal government deferred to the states in prosecuting low-level marijuana offenses but took the lead on large-scale marijuana operations because such operations more directly implicate federal interests.<sup>139</sup> States’ decisions to legalize and regulate marijuana businesses upset this traditional

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136. For the most recent version of the Amendment, see Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 § 531 (2020).

137. See *United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016) (interpreting Rohrabacher-Farr Amendment rider language as preventing the DOJ from prosecuting persons who “strictly comply” with their states’ medical marijuana rules). The *McIntosh* court explained that “[i]ndividuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate [the Amendment].” *Id.* Shortly before this Article went to print, the First Circuit departed from the Ninth Circuit’s strict compliance standard, concluding that the Rohrabacher-Farr Amendment offers broader protection for medical marijuana businesses than that standard affords. *United States v. Bilodeau*, No. 19-2292, \_\_ F.4th \_\_, 2022 U.S. App. LEXIS 2383 (1st Cir. Jan. 26, 2022); see also Brief of Prof. Scott Bloomberg as *Amicus Curiae*, *Bilodeau* (No. 19-2292), 2022 U.S. App. LEXIS 2383 (critiquing the *McIntosh* court’s strict compliance standard).

138. See Bloomberg & Mikos, *Legalization Without Disruption*, *supra* note 19, section II.A (summarizing how states carefully regulate their marijuana marketplaces).

139. See COLE MEMO, *supra* note 129, at 1–2.

balance. Instead of the federal government policing large-scale marijuana operations—by shutting them down—the states have assumed the responsibility for policing such operations—by helping them flourish.<sup>140</sup> To ensure that this shift does not undermine the primary federal interests underlying marijuana prohibition, the Cole Memo demands that the states “implement strong and effective regulatory and enforcement systems.”<sup>141</sup>

Importantly, these regulatory and enforcement systems must address federal priorities by “implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states . . . and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for.”<sup>142</sup> In other words, states are required to minimize spillovers from their intrastate marijuana markets into interstate commerce; they must maintain conditions whereby their markets remain intrastate and insular.<sup>143</sup> As a result, even states that very much want to open up their borders for interstate commerce have declined to do so until the federal government authorizes such trade.<sup>144</sup>

### III. FRENEMY FEDERALISM (AND WHAT IT MEANS FOR STATE MARIJUANA LAWS)

Part II illustrates how the level of cooperation between the states and the federal government regarding marijuana has increased significantly from 2009 when Bulman-Pozen and Gerken first categorized it as uncooperative federalism. As I shall explain

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140. *Id.* at 2.

141. *Id.*

142. *Id.* at 3.

143. In an Article published shortly before this one, Professor Mikos argues that state restrictions on interstate commerce are primarily motivated by economic protectionism, rather than enacted in service of the states’ relationship with the federal government. *See* Mikos, *Interstate Commerce in Cannabis*, *supra* note 19, at 865–74. I hope to provide a more complete response to Professor Mikos’s position in future work. But, as an initial observation, I note that blanket import-export prohibitions do not necessarily serve the economic interests of several states. States where marijuana can be produced outdoors and inexpensively would presumably benefit from exporting marijuana. And, states that are just getting their marijuana programs off the ground may benefit from temporarily allowing imports until in-state production can meet demand. Yet these states continue to strictly prohibit marijuana imports and exports. This suggests that these restrictions serve a purpose separate and apart from rank protectionism; namely, to maintain good relations with the federal government.

144. *See* A Bill for an Act Relating to Cannabis, S.B. 582, 80th Leg. Assemb., Reg. Sess. (Or. 2019).

in Part III, the increased level of cooperation since 2009 changes how we should describe the relationship. The relationship has evolved to be something that—if not fundamentally different from uncooperative federalism—is at least a separately-identifiable genus of that concept.

#### A. *The Uncooperative-Cooperative Spectrum*

To explain why a reframing is warranted, it is useful to think of cooperative federalism and uncooperative federalism as points along a continuum, rather than separate concepts altogether. Indeed, this is the way Bulman-Pozen and Gerken approach the subject. They envision a spectrum where one end contains the “polite conversations and collaborative discussions that cooperative federalism champions,” while the various forms of uncooperative federalism—from restrained disagreements to civil disobedience—fill the remainder of the spectrum.<sup>145</sup>

Let me offer a slightly different conception of this spectrum as a descriptive tool for cooperative and uncooperative federalism. At one end of this spectrum exists what we might call *pure cooperative federalism*. In a pure cooperative federalism relationship, the state and federal governments’ objectives are in perfect harmony and they work hand-in-hand to achieve those objectives, much like friends or partners. There are endless examples of this relationship in our federalist system today. A joint effort between the federal EPA and a state EPA to clean up a body of water would be one good example. A partnership between federal and state law enforcement authorities to prevent narcotics trafficking would also fit the bill.

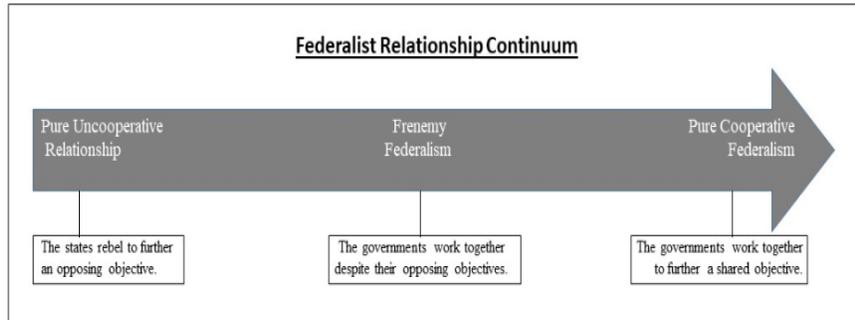
On the other end of the spectrum is *pure uncooperative federalism*, where the state and federal governments have fundamentally opposed objectives and the states rebel to undermine the federal objective or to achieve their own, as would an antagonist or (at the most extreme) an enemy. This is Bulman-Pozen and Gerken’s civil disobedience category of uncooperative federal.

The less extreme forms of uncooperative federalism identified by Bulman-Pozen and Gerken fall between these two ends of the spectrum. But so too does another type of federalist relationship. In between: (1) a relationship where the governments work together to further a shared objective; and (2) a relationship where the

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145. Bulman-Pozen & Gerken, *supra* note 1, at 1271.

states rebel to further an opposing objective; lies (3) a relationship where the governments *work together despite their opposing objectives*. This type of relationship is Frenemy Federalism.<sup>146</sup>



146. I use an arrow to depict the uncooperative-cooperative spectrum because, as I posit below, the presence of a frenemy relationship is a *point in time*, as well as in space, between the two ends. As time advances, an uncooperative relationship may evolve into a cooperative one. The Frenemy Federalist relationship is one stage that may occur during this progression.

B. *Frenemy Federalism and the Federal-State Marijuana Relationship*

The term “frenemy” is a portmanteau of “friend” and “enemy” that means “[a] person with whom one is friendly despite a fundamental dislike or rivalry.”<sup>147</sup> It has been deployed to describe the relationships between nations, politicians, celebrities, and more.<sup>148</sup> John Adams and Thomas Jefferson; Tip O’Neill and Ronald Reagan; Jim Halpert and Dwight Schrute from NBC’s “The Office”; and Shaq and Kobe on the early 2000s Lakers can all be understood as frenemies.

Adversaries—like those listed above—with opposed objectives may nonetheless form friendly, cooperative relationships out of mutual necessity or convenience. Contenders for a political party’s nomination for elected office present a good example.<sup>149</sup> The contenders have diametrically opposed objectives: each wants to gain the party’s nomination at the other’s expense. Yet it is mutually desirable for them to be friendly and cooperative. They would like to impress, and not alienate, each other’s voters, whom they will need if they advance to the general election. They want their political party to appear unified and civil, not divided and contentious. And they may want to angle for a cabinet position in the victor’s administration in case they do not win the nomination. All of these are reasons to cooperate with their adversary despite wanting badly to defeat them.

The world of pop culture is also useful to illustrate the mutual incentives for cooperation that often drive the frenemy relationship. Take Leslie Knope and Ron Swanson of NBC’s comedy series “Parks and Recreation.” The characters, who are colleagues in the fictional city of Pawnee, Indiana’s Parks Department, have very different beliefs about how government should work. Knope, played by Amy Poehler, is a caricature of a big-government bureaucrat. She is a workaholic who believes Pawnee’s Parks Department should form a committee, host a public forum, and issue a lengthy

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147. *Frenemy*, *supra* note 10.

148. Zimmer, *supra* note 11.

149. Then-candidates Barack Obama and Hillary Clinton were often described as frenemies during their 2008 contest for the Democratic nomination for President. *See, e.g.*, Maureen Dowd, Opinion, *Team of Frenemies*, N.Y. TIMES (Nov. 15, 2008), <https://www.nytimes.com/2008/11/16/opinion/16dowd.html> [<https://perma.cc/RES5-S9LN>]; Paul Richter, *Will Clinton Be Obama’s Frenemy of State?*, CHICAGO TRIB. (Nov. 23, 2008), <https://www.chicagotribune.com/news/ct-xpm-2008-11-23-0811220298-story.html> [<https://perma.cc/Q3DC-F5HJ>].

governmental report for every little issue. Knope's boss is Ron Swanson, who is played by Nick Offerman. Swanson is a devoted libertarian who detests bureaucracy and believes that nearly all government activity should be privatized—including his own department. His perpetual goal is to personally do as little work as possible and to have the Parks Department accomplish as little as possible.

Despite their opposing objectives for Pawnee's Parks Department, Knope and Swanson manage to co-exist, and even thrive together. They share a mutual dependence that makes cooperation convenient, and perhaps necessary. Swanson needs Knope to get things done so that he's not fired and replaced by what he fears most: another big-government bureaucrat like Leslie Knope. For her part, Knope would rather have a do-nothing manager like Swanson because it allows her to do more of what she loves most: government work. If Swanson gets fired, he may be replaced by a manager who commandeers some of Knope's workload and takes credit for her successes.

The federal-state marijuana relationship has evolved from purely uncooperative to one more in line with the frenemy relationships described above. The governments have opposing objectives—the federal CSA prohibits marijuana nationwide while legalization states permit the drug within their jurisdictions. But, due to the constraints on federal power and the states' dependence on federal acquiescence, the governments have a mutual incentive to cooperate in furtherance of their opposing objectives.

It is easy to see why the states have been glad to comply with the federal government's proposed arrangement over marijuana regulation. Regulating their marijuana markets in accordance with the federal government's instructions in the Cole Memo allows them to achieve their primary objective of establishing well-functioning marijuana marketplaces. If they did not cooperate, the specter of federal prosecution could destabilize their marijuana marketplaces, making cooperation convenient—if not necessary—for the states.<sup>150</sup>

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150. Cf. Robert A. Mikos, *Jeff Sessions Rescinds Obama-Era Enforcement Guidance: Five Observations*, MARIJUANA L., POL'Y & AUTH. BLOG [hereinafter Mikos, *Jeff Sessions Rescinds Obama-Era Enforcement Guidance*], <https://my.vanderbilt.edu/marijuana-law/2018/01/jeff-sessions-rescinds-obama-era-enforcement-guidance-six-observations/> [http

Perhaps less obviously, it is also convenient for the federal government to institute a policy of nonenforcement in exchange for careful state regulation. Because the CSA does not preempt state marijuana laws and the federal government cannot compel the states to prohibit marijuana, the states are free to legalize marijuana without regulating it at all.<sup>151</sup> The result of such a policy would be antithetical to the federal government's objective in criminalizing marijuana: a robust interstate market in marijuana where neither the drug nor the revenue derived from its sale is monitored.<sup>152</sup> Policing this interstate market without the assistance of the states would place an insurmountable strain on federal resources.<sup>153</sup> By trading a policy of nonenforcement for a guarantee of strict state regulation, the federal government thus conveniently shifts the regulatory burden to the states and prevents the states from creating the type of unregulated, interstate marketplace it most wants to avoid.

What in 2009 was a purely uncooperative federalism relationship has since evolved into a Frenemy Federalism relationship. The states and the federal government continue to have opposed views on marijuana, but, like frenemies, they have a strong mutual incentive to work together in furtherance of their respective policy goals. As I shall explain below, this Frenemy Federalism relationship counsels for courts to take a far more deferential approach in applying the DCC to state marijuana laws.

### C. *Implications of Frenemy Federalism for the DCC*

As an initial observation, the governments' evolution from a purely uncooperative relationship to a Frenemy Federalism relationship regarding marijuana shows that uncooperative federalism

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s://perma.cc/8DQ3-BV28] (Jan. 12, 2018) (positing that to avoid interference from a potentially hostile Sessions DOJ, states should "continue to regulate the [marijuana] industry closely, e.g., to prevent diversion across state lines and distribution to minors").

151. See *supra* section II.A.

152. See *supra* section II.B.3 (discussing the federal interests listed in the Cole Memo, including preventing the unencumbered interstate flow of marijuana and money derived therefrom).

153. See *supra* note 106 and accompanying text (noting the federal government's reliance on state and local law enforcement authorities to enforce marijuana prohibition); Mikos, *Evolving Response to State Marijuana Reforms*, *supra* note 5, at 7 (noting that it would be unrealistic for the federal government to enforce marijuana prohibition on its own).

is working. Bulman-Pozen and Gerken posited that acts of uncooperative federalism can force the federal government to engage with dissenting states and to eventually accommodate or adopt the states' preferred policies.<sup>154</sup> The shift from a purely uncooperative relationship to a more cooperative frenemy relationship shows that this process has happened (and is ongoing) in the area of marijuana policy. Marijuana continues to be on Schedule I of the CSA, but, as Professor Mikos puts it, federal policy has shifted from one of "war" to one of "(partial) truce."<sup>155</sup>

Viewed as a step in the evolution of a federalist relationship, Frenemy Federalism is thus not just a point *in space* along the uncooperative-cooperative continuum, it is a point *in time*.<sup>156</sup> Appreciating this dimension of Frenemy Federalism is of significant consequence for courts asked to intervene in such relationships through the exercise of judicial review. If I am correct that Frenemy Federalism marks a point in time in an increasingly cooperative relationship between the federal and state governments, courts should be reluctant to intervene in that relationship, lest they disrupt the mutual incentives to cooperate that lie at the heart of the governments' "fragile" arrangement.<sup>157</sup> A judicially-imposed shift in the governments' incentives would at a minimum inject an undesirable degree of uncertainty into the frenemy relationship and would at worst cause the relationship to back-slide into more uncooperative terrain.

This observation indicates that courts should abandon the traditional DCC doctrinal rules in the context of state marijuana laws

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154. Bulman-Pozen & Gerken, *supra* note 1, at 1287.

155. Mikos, *Evolving Response to State Marijuana Reforms*, *supra* note 5, at 5, 10.

156. An uncooperative federalism relationship that shifts to a Frenemy Federalism relationship may stabilize at that point or may continue along the spectrum to become fully cooperative. We are seeing this play out in the area of marijuana law in the present. With the Democratic Party in control of the Presidency and Congress, the prospect for federal legalization of marijuana has never been higher. If (When?) the federal government legalizes marijuana, the states that have legalized marijuana will find their objectives aligned with the federal government's, and what once was a purely uncooperative relationship will be fully transformed into a cooperative one. In the meantime, the relationship has found stability in the governments' frenemy arrangement.

157. Kamin, *supra* note 100, at 630 (describing the federal-state marijuana relationship as "fragile"); Deborah Ahrens, *Safe Consumption Sites and the Perverse Dynamics of Federalism in the Aftermath of the War on Drugs*, 124 DICKINSON L. REV. 559, 582 (2020) (describing the federal government's "fragile" decision not to prosecute marijuana users and businesses in legalization states).

in favor of a more deferential approach. As detailed above, the federal government's cooperation with the states arose in an environment where states openly restricted interstate commerce in marijuana. Indeed, federal acquiescence to state legalization was conditioned upon each state "implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states," and to ensure that revenues generated from their marijuana markets are "tracked and accounted for."<sup>158</sup> Each state has accordingly gone to great lengths to keep their marijuana markets insular and to ensure that the goods exchanged in the closed-loop systems they have constructed are carefully regulated.

Discriminatory state marijuana laws are integral to maintaining this type of insular marketplace system. State import-export restrictions provide the paradigmatic example. Such restrictions prevent marijuana businesses from trading across state lines, thus ensuring that a state's marijuana marketplace remains insular and intrastate. Residency requirements and purchasing discriminations are different from import-export restrictions in degree, but not in kind. Both discriminations may be understood as measures that reduce the amount of marijuana—or, in the case of residency restrictions, revenues derived from marijuana—moving across state lines.

Accordingly, when courts invalidate these restrictions on interstate marijuana commerce, they risk disrupting the incentives that have fostered cooperation despite the governments' conflicting objectives. And, once the boat is rocked, it would not take much for the federal government to stymie states' marijuana markets. Consider, for instance, the impact of prosecuting a few well-known multi-state operators along with their investors, executives, employees, landlords, financial service providers, and so on.<sup>159</sup> This type of strategically targeted enforcement initiative is unlikely to fully extinguish states' marijuana marketplaces—the cat is probably too far out of the bag<sup>160</sup>—but it may well put a significant

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158. COLE MEMO, *supra* note 129, at 3; see Mikos, *Jeff Sessions Rescinds Obama-Era Enforcement Guidance*, *supra* note 150 (explaining that states should continue to "prevent diversion across state lines" to mitigate the risk of a federal crackdown under a hostile DOJ).

159. See Kamin, *supra* note 100, at 628 (explaining how "full enforcement would hardly be necessary to deal a serious blow to the pace of marijuana law reform" and describing how targeted prosecutions would drastically impact the marijuana industry).

160. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 19, at 872–73 (arguing that there is little the DOJ could do to end states' marijuana programs).

damper on investment and operations, causing a rapidly expanding industry to suddenly retract.<sup>161</sup>

This risk seems low in the moment. The laws that courts have heretofore invalidated (residency restrictions) are more peripheral to interstate commerce than direct import-export prohibitions. However, the risk of disrupting the Frenemy Federalism relationship will be quite a bit higher when courts start hearing DCC challenges to state import-export prohibitions, especially if those challenges arise under an administration more hostile to marijuana than the one currently in power. Moreover, the Frenemy Federalism relationship regarding marijuana is unlikely to be the last such relationship constructed upon states' abilities to restrict interstate commerce. Just in the area of drug policy, there is a movement afoot to persuade states to decriminalize or legalize other federally-prohibited drugs, such as psilocybin.<sup>162</sup> Some states and localities are also considering authorizing safe consumption sites—locations where people who use certain (federally illegal) drugs can do so safely under medical supervision.<sup>163</sup> The federal government and these states may well develop Frenemy Federalism relationships predicated on the states restricting interstate activity in these areas.

#### D. *Reforming the DCC for State Marijuana Laws*

In light of the risks of intruding on the delicate Frenemy Federalism relationship, courts need a new, more deferential approach to applying the DCC to state marijuana laws. Otherwise, decisions striking state residency requirements will pave the way to invalidating states' marijuana import-export prohibitions and to judicial interference with future Frenemy Federalism relationships. In this section, I propose two doctrinal changes courts can make to show

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161. See Kamin, *supra* note 100, at 626–28.

162. See *About Us*, DRUG POL'Y ALL. (Sept. 8, 2021), <https://drugpolicy.org/about-us> [<https://perma.cc/C4Z6-5EPQ>] (“The Drug Policy Alliance envisions a just society in which the use and regulation [of describing the organization’s goals as, inter alia, ensuring that] the fears, prejudices and punitive [drug] prohibitions of today are no more”); Ballot Measure 110, S.B. 755, 81st Leg. Assemb., Reg. Sess. (Or. 2021) (reducing the penalty for possessing small amounts of a controlled substance to a maximum \$100 fine); Ballot Measure 109, S.B. 755, 81st Leg. Assemb., Reg. Sess. (Or. 2021) (creating a program for licensed providers to administer psilocybin mushrooms to adults twenty-one years or older).

163. See, e.g., Ahrens, *supra* note 157; Alex Kreit, *Safe Injection Sites and the Federal “Crack House” Statute*, 60 B.C. L. REV. 413, 415 (2019).

an appropriate level of deference to the Frenemy Federalism relationship regarding marijuana.

### 1. Abandoning the “Unmistakably Clear” Rule

First, instead of searching for an “unmistakably clear” signal that Congress has authorized states to enact discriminatory marijuana laws,<sup>164</sup> courts should flip the presumption and assume that Congress has consented to such laws.

Where Congress has authorized or permitted an interstate market in a good or service, it makes good sense to demand unmistakable clarity from Congress before finding that it has authorized state discriminations. Due to the constitutional hazards of state efforts to interfere with the unencumbered flow of interstate commerce, we assume that Congress would not allow states to interfere with markets that it authorizes or permits unless we have a very good reason to think otherwise.<sup>165</sup>

But the inferential calculus is different where Congress has acted to *eliminate* the interstate market in a good or service. Where Congress’s position is that an interstate market in the subject good or service ought not to exist, it is strange to so strongly presume that Congress disfavors state laws restricting the interstate market in the good or service. The more reasonable inference, it would seem, is that Congress would invite states to restrict the interstate market in the good or service unless there were some good reasons to think otherwise.<sup>166</sup>

### 2. Presuming that Discriminations Serve a Legitimate Purpose

Under the traditional DCC doctrine, courts must ask whether a discriminatory marijuana law is narrowly tailored to a legitimate

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164. See *supra* note 72 and accompanying text.

165. See *supra* section I.B (discussing the justifications for presuming that Congress favors the free flow of goods and services in interstate commerce).

166. In *Interstate Commerce in Cannabis*, Professor Mikos argues that marijuana’s status as a Schedule I drug does not suspend the DCC’s application to the states. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 19, at 876–82. I do not claim here that prohibiting interstate commerce in marijuana *per se* suspends the DCC’s application to the states. Rather, I take the narrower approach of suggesting that federal prohibition counsels toward flipping the unmistakably clear presumption. Nonetheless, our respective analyses on this issue differ significantly, and, as I mention *supra* note 143, Professor Mikos’s thoughtful analysis warrants a more complete response at a later date.

local purpose.<sup>167</sup> This strict scrutiny framework is inappropriate given the risks attendant to judicial interference with the Frenemy Federalism relationship. Courts should thus abandon the narrow tailoring requirement in favor of a presumption that discriminatory marijuana laws are sufficiently related to a legitimate purpose: maintaining inter-governmental relations in service of the Frenemy Federalism relationship.

Without this presumption, it is uncertain whether that purpose would align with current doctrine. When the Court has spoken about legitimate local purposes in DCC cases, it has ordinarily used that phrase to refer to the states' "general police powers" to regulate for health and safety.<sup>168</sup> Maintaining inter-governmental relations arguably does not fit within this understanding of the term. It has nothing to do with health and safety; nor, strictly speaking, is it *local*. Indeed, under current doctrine it would be odd to justify a restriction on interstate commerce by touting the benefits the restriction creates for inter-governmental relations since a central premise of the DCC is that such restrictions *harm* inter-governmental relations.<sup>169</sup> My proposed doctrinal change thus ensures that the meaning of "legitimate local purposes" is broad enough to encompass the unique circumstances of the Frenemy Federalism relationship regarding marijuana, where restrictions on interstate commerce serve—rather than harm—inter-governmental relations.

### 3. Preserving a Narrow Role for the DCC

There is some argument that, because Congress has prohibited interstate commerce in marijuana, courts should not apply the

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167. See *supra* section I.B.

168. *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Lewis v. BT Inv. Managers, Inc.*, 477 U.S. 27, 36 (1980)); see also *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (describing state efforts to promote ecological conservation as a legitimate local purpose); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350 (1977) (attributing significance to "health and consumer protection" in identifying legitimate local concerns).

169. There is certainly room for disagreement about whether an interest in maintaining good relations with other states and the federal government constitutes a legitimate local purpose under current doctrine. See Denning, *One Toke Over the (State) Line*, *supra* note 58, at 2294–95 (arguing that "reduc[ing] friction with the federal government and other states" are legitimate local interests under the ordinary DCC doctrinal rules). The reform I propose here would remove all doubt on that question.

DCC to state marijuana laws at all.<sup>170</sup> I do not go quite so far here. Instead, the doctrinal changes that I propose would leave some room for courts to curb a narrow category of discriminatory state marijuana laws: laws that discriminate against nonresidents but (somewhat perversely) fail to reduce interstate marijuana activity. Since such laws do not reduce interstate marijuana activity, they are unnecessary to the Frenemy Federalism relationship, eliminating the justification for judicial deference that I identify in this Article. In such cases, the DCC should continue to provide out-of-state actors some protection against discriminatory marijuana laws.

To provide this limited protection, litigants should be able to overcome the presumptions proposed above by showing that the discriminatory law is not substantially related to reducing interstate marijuana activity. Courts could conclude that a discrimination is not substantially related to reducing such activity if: (a) it does not actually reduce the flow of interstate marijuana or money derived therefrom or (b) it potentially reduces interstate marijuana activity but discriminates more broadly than is reasonably necessary to meet that objective. In applying this substantial relation test, courts should continue to show deference to states' judgments about what restrictions on interstate commerce are desirable to preserve their relationships with the federal government.<sup>171</sup>

Importantly, a durational residency requirement like the one at issue in *NPG* is a prime example of a law that discriminates against nonresidents but is not substantially related to reducing interstate marijuana activity. In *NPG*, the court invalidated the City of Portland's preference for marijuana businesses majority-owned by persons who had been Maine residents *for five years*.<sup>172</sup> Although a residency requirement on its own (and perhaps with a

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170. See Mikos, *Interstate Commerce in Cannabis*, *supra* note 19, at 876–77 (summarizing and then disagreeing with this argument); see also William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. 513, 525 n.61 (2015) (“assuming” that state regulations designed to reduce local spillover into the interstate marijuana market “would not raise any ‘dormant commerce clause’ problems because they would be in service of the federal ban on interstate marijuana trade”).

171. I do not mean to suggest that “substantial relation” is the only workable standard that could be applied in this scenario. Similar formulations designed to assess the relationship between a discriminatory measure and interstate marijuana activity may also be suitable.

172. *NPG, LLC v. City of Portland*, No. 20-cv-00208, 2020 U.S. Dist. LEXIS 146958, at \*6, \*26 (D. Me. Aug. 14, 2020).

short durational requirement included) may reduce the interstate flow of marijuana-derived revenues, the City would be hard-pressed to explain how a five-year residency period is not grossly overbroad.<sup>173</sup> The *NPG* court (ironically enough) likely reached the right result, albeit through a mode of analysis that did not sufficiently factor the delicate Frenemy Federalism relationship.<sup>174</sup>

Allowing litigants to overcome the above presumptions in cases like *NPG* will enable courts to differentiate extant cases involving durational residency restrictions from future challenges to import-export restrictions. The former restrictions do not serve the delicate Frenemy Federalism relationship, while the latter restrictions do. Providing courts with this reasoned basis for distinguishing the two types of cases is essential to avoid the judicial invalidation of laws that support the insular, state-based marijuana marketplace

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173. This calculus may be different in the context of social equity programs, where the local purpose of the residency requirement is different. There, the purpose of the discrimination is to remediate the state's past injustices against its own residents.

174. I note that in the context of residency requirements, litigants may also have colorable claims under the Article IV privileges and immunities clause. See U.S. CONST. art. IV, § 2. That clause is generally understood to prevent states from discriminating against nonresident citizens in their fundamental rights, including their abilities to earn a living on equal terms as residents. See *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 386 (1978). However, states can discriminate against nonresident citizens in these areas when there is a substantial reason for the discrimination and the discrimination itself is substantially related to the reason for the discriminatory treatment. See *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 284 (1985) ("The Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.").

Based on my analysis of the Frenemy Federalism relationship, a court's inquiry under the Privileges and Immunities Clause would be materially similar as in the DCC context. The states would have a substantial reason for discriminating—maintaining the federal-state relationship—and, provided that the discrimination substantially relates to that goal by reducing interstate marijuana activity, the discrimination would be permissible.

The overlap between these two areas of law is unsurprising, as the Court has recognized that the commerce clause and the Article IV privileges and immunities clause have a "mutually reinforcing relationship." *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978).

The privileges and immunities clause would likely not be applicable to recreational marijuana purchasing discriminations, as purchasing such marijuana probably does not constitute a privilege or immunity. See *Denning, One Toke Over the (State) Line*, *supra* note 58, at 2284–86 (analyzing whether purchasing recreational marijuana is a privilege or immunity and concluding that it likely is not). While it is conceivable that purchasing medical marijuana is a privilege or immunity, the federal government's determination that the drug has no recognized medical benefit does not bode well for that conclusion. See *id.* at 2286–87. Finally, the clause would not protect licensed businesses from states' import-export prohibitions because, *inter alia*, the clause only protects citizens, not corporations. See *Blake v. McClung*, 172 U.S. 239, 259 (1898) ("[A] corporation is not a citizen within the meaning of the [Article IV privileges and immunities clause].").

system and the fragile, yet currently stable, federalist relationship upon which those markets are built.

### CONCLUSION

Frenemy Federalism is a unique type of federalist relationship that occurs when the federal and state governments have conflicting objectives but nonetheless work together because cooperation is mutually beneficial to furthering their respective goals. It can be understood as a point in time and in space between pure uncooperative federalism and pure cooperative federalism. When the federal and state governments' relationship evolves into a frenemy relationship, it serves as an indicator that the state's uncooperative efforts are working. This counsels for restraint in the exercise of judicial review, lest a court disrupt the governments' mutual incentives to cooperate and cause the frenemy relationship to backslide into more uncooperative terrain.

For the federal-state relationship regarding marijuana, courts thus need a more deferential approach to applying the DCC to discriminatory state marijuana laws. If courts continue to apply ordinary DCC doctrinal rules—as they have when evaluating residency restrictions—they risk undermining the Frenemy Federalism relationship the governments' have assiduously constructed. This Article equips courts with the doctrinal changes needed to avoid that result.

The federal-state marijuana relationship may be the leading example of a Frenemy Federalism relationship in practice, but it is unlikely to be the only such relationship or the last one. Future research should focus on identifying other substantive areas of law that involve Frenemy Federalism relationships. As noted above, state legalization of other controlled substances and state implementation of safe consumption sites are leading candidates for such a relationship to develop in the near future. As these (and other) state initiatives continue to develop, analyzing them through the lens of Frenemy Federalism will help courts adjudicate legal challenges without undermining what promises to be a delicate federalist relationship.