

# OWNING MARIJUANA

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## ABSTRACT

*Legal marijuana is the fastest-growing industry in the United States. It is premised on the assumption that marijuana ownership will be protected by law. But can marijuana be owned? This Article is the first scholarship to explore the issue.*

*Federal law classifies marijuana as contraband per se in which property rights cannot exist. Yet the Article demonstrates that marijuana can now be owned under the law of most states, even though no state statutes or decisions expressly address the issue. This conflict presents a fundamental question of federalism: Can property rights exist under state law if they are forbidden by federal law? The Article explains why federal law does not preempt state law on marijuana ownership.*

*This result creates a paradox: state courts and other state authorities will protect property rights in marijuana, but their federal counterparts will not. The Article analyzes the challenges arising from this hybrid approach to marijuana ownership. It also examines the fragmented status of marijuana ownership in the interstate context, where personal relationships or business transactions involve states with conflicting approaches to the issue.*

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INTRODUCTION

A plans to divorce B, who operates a marijuana<sup>1</sup> store, and obtain a share of B’s marijuana in the dissolution proceeding. C intends to make a loan to D that is secured by an interest in D’s marijuana. E sues F for damages after F negligently burns E’s marijuana crop. These hypothetical situations all present the same question: Can marijuana be owned?

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1. Marijuana consists of leaves, buds, and other parts of the plant *Cannabis sativa* L. 21 U.S.C. § 802(16) (2012). Accordingly, some authorities refer to it as “cannabis.” However, this Article uses the term “marijuana” because this word is more commonly used in U.S. law at present. This Article examines property rights in marijuana itself and, by extension, in products that contain marijuana or its active ingredient, tetrahydrocannabinol. *See infra* note 53. Thus, all references to “marijuana” include both marijuana and marijuana products unless the context indicates otherwise.

The traditional answer was “no” because federal and state laws uniformly criminalized the possession and transfer of marijuana.<sup>2</sup> The question arises today because thirty-three states have now legalized these actions, although they are still illegal under federal law.<sup>3</sup> Yet no case or statute expressly addresses the issue. The legalization tidal wave has generated extensive scholarship on the criminal and constitutional issues that it poses.<sup>4</sup> But less attention has been devoted to exploring how legalization affects relationships among private actors. This Article is the first scholarship to explore whether marijuana can be owned.<sup>5</sup>

The distinction between property and nonproperty is fundamental. As a general matter, the law protects property—such as rights in a home—from interference by private parties or government actors. By definition, nonproperty receives no protection. Yet the determination of what constitutes property is traditionally governed by state law, not federal law.<sup>6</sup> Legalization naturally leads to the questions of whether property rights in marijuana can arise under state law and, if so, to what extent the federal government and other states must respect those rights.

These issues are important because legal marijuana is the fastest-growing industry in the United States.<sup>7</sup> Over 34 million American

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2. Marijuana is considered to be contraband per se under federal law. As a result, it is subject to seizure by federal authorities without any payment or judicial process. *See infra* text accompanying notes 61–74.

3. *See infra* text accompanying notes 77, 81. States that have legalized marijuana, either for medical use or for all purposes, are collectively referred to in this Article as “legalization states,” while those that continue to criminalize it are referred to as “ban states.” States that have legalized marijuana for all purposes are referred to as “full legalization states,” while those that have legalized it only for medical purposes are referred to as “medical marijuana states.”

4. *See, e.g.,* Lea Brilmayer, *A General Theory of Preemption: With Comments on State Decriminalization of Marijuana*, 58 B.C. L. REV. 895 (2017); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015); Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 WASH. & LEE L. REV. 779 (2018); 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); Don Stemen, *Beyond the Wars: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL’Y REV. 375 (2017).

5. This Article does not address property rights in land, vehicles, aircraft, equipment, and other assets that are used in connection with marijuana cultivation, processing, or sale. Such items are classified as derivative contraband under federal law, not contraband per se. *See infra* text accompanying notes 50–51.

6. *See infra* text accompanying notes 23–41.

7. Chris Bennett, *Marijuana Farming Is Now for US Agriculture*, Jan. 8, 2018, <https://www.agweb.com/article/marijuana-farming-is-now-for-us-agriculture-naa-chris-bennett/>.

adults use marijuana regularly,<sup>8</sup> and thousands of new businesses have arisen to serve their needs.<sup>9</sup> The revenue from legal marijuana sales may exceed \$13 billion in 2019, and is projected to almost double by 2022.<sup>10</sup> Yet the legal marijuana industry is premised on the assumption that marijuana ownership will be protected by state law, despite the looming threat posed by contrary federal law. If property rights in marijuana cannot exist, this industry will eventually die, harming millions of Americans.

This Article demonstrates that marijuana can be owned under state law, despite conflicting federal law. More broadly, it explores a fundamental issue in our federal system—the respective roles of federal and state governments in defining “property”—and provides a template for navigating future property conflicts of this kind.

Part I of this Article examines the background doctrines that shape the analysis of property rights in marijuana: the positivistic view that “property” consists of legally-protected rights, not things, and the traditional primacy of state law in defining property rights.

Part II demonstrates that that property rights in marijuana do exist in legalization states pursuant to state law, but not under federal law. Broadly speaking, marijuana can be owned within certain parameters as a matter of state law. The Article then explores the uneasy tension between federal and state law on the issue, and analyzes the challenges arising from this hybrid approach to marijuana ownership.

Part III examines the fragmented status of marijuana property in the interstate context. Marijuana property conflicts may arise from relationships or transactions that involve both a legalization state and a ban state. These conflicts pose the risk that the ban state may undercut the property rights that exist in the legalization state. The Article analyzes how contract clauses, choice-of-law principles, and comity can be used to minimize this risk.

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8. Yahoo News/Marist Poll, *Weed & The American Family*, Apr. 17, 2017, [http://maristpoll.marist.edu/wp-content/misc/Yahoo%20News/20170417\\_Summary%20Yahoo%20News-Marist%20Poll\\_Weed%20and%20The%20American%20Family.pdf](http://maristpoll.marist.edu/wp-content/misc/Yahoo%20News/20170417_Summary%20Yahoo%20News-Marist%20Poll_Weed%20and%20The%20American%20Family.pdf) (finding that 34,688,319 Americans who are 18 or older use marijuana “regularly,” defined as “at least once or twice a month”).

9. Roger Vincent, *Here’s why pot sellers are paying prime rents for warehouse and storefront space*, L.A. TIMES, Mar. 31, 2018, <https://www.latimes.com/business/la-fi-cannabis-real-estate-20180331-story.html>.

10. Ed Keating, *2019 Marijuana Industry Predictions and Trends*, cannabiz media, Dec. 19, 2018, <https://cannabiz.media/2019-marijuana-industry-predictions-and-trends/>.

Finally, Part IV explores how potential permanent solutions to the marijuana debate may affect property rights. If legislation were adopted to legalize marijuana at the national level, regardless of conflicting state laws, it should be given retroactive effect. Under the more likely solution—where each state may choose whether to legalize marijuana—ban states should be required to respect marijuana property located in legalization states.

## I. PROPERTY AND FEDERALISM

### A. *The Bundle of Rights Metaphor*

The American property system is founded on legal positivism.<sup>11</sup> As Jeremy Bentham famously remarked: “Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”<sup>12</sup> Thus, “property” consists of rights enforced by government concerning things.<sup>13</sup> If government will protect a person’s rights in relation to a particular thing, the person has “property.” Conversely, if government will not protect such rights, the person has no “property.”

The scope of governmental protection for property rights has two dimensions: vertical and horizontal. The vertical dimension deals with the relationship between government actors and private actors; it bars government actors from unduly interfering with private property, even though regulation is permitted to a certain degree pursuant to the police power.<sup>14</sup> For example, the Fifth Amendment prohibits government from confiscating private property unless such

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11. See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 4–5 (4th ed. 2017).

12. JEREMY BENTHAM, THE THEORY OF LEGISLATION 69 (Oceana Publications, Inc. 1975) (1802). See also Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954) (“That is property to which the following label can be attached. To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The State.”).

13. Non-lawyers regularly use the term “property” to refer to an object. SPRANKLING, *supra* note 11, at 4. Judges, lawyers, legislators, and law professors also sometimes use the term in this everyday sense, as a shorthand reference for legally-protected rights in relation to a thing. For the purposes of this Article, I use the term in its technical sense. Thus, “marijuana property” as used herein means legal rights in relation to marijuana and marijuana products. Some scholars, however, have criticized the view that property consists of rights. See generally Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

14. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (“[T]o some extent values incident to property . . . are enjoyed under an implied limitation and must yield to the police power.”).

confiscation serves a public purpose and just compensation is paid.<sup>15</sup> The horizontal dimension, in contrast, concerns the role that government plays in regulating relationships among private actors. Here government prevents private actors from interfering with the property rights of others or resolves conflicts among claimants to such property.

The definition of “property” in a legal sense presents two questions.<sup>16</sup> First, what rights can a person have in relation to a thing? Second, what things may be the object of these rights? The conventional answer to the first question is the bundle of rights metaphor. Courts and scholars define the “bundle of rights that are commonly characterized as property”<sup>17</sup> as including the right to possess, the right to use, the right to exclude, and the right to transfer.<sup>18</sup>

Similarly, the standard answer to the second question is simple, if unsatisfying: property rights may exist in any thing except to the extent that some special prohibition exists. In other words, the baseline assumption in our system is that property rights may exist in virtually any type of thing, including land and buildings affixed to land, tangible objects, and intangibles.<sup>19</sup> The exceptions to this principle usually arise from major policy concerns, such as prohibiting property rights due to democratic values (e.g., votes),<sup>20</sup> morality (e.g., human beings),<sup>21</sup> or risks of widespread economic injury (e.g., counterfeit money).<sup>22</sup>

The logical consequence of the bundle of rights metaphor is that if the law prohibits a person from holding the core property rights in a particular thing—such as marijuana—then that person has no

15. U.S. CONST. amend. V, § 3.

16. SPRANKLING, *supra* note 11, at 4.

17. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

18. *See, e.g., Horne v. Dept. of Agric.*, 135 S. Ct. 2419, 2428 (2015) (observing that a government program eliminated “the entire ‘bundle’ of property rights in the appropriated raisins—‘the rights to possess, use and dispose of’ them”) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). *See also* SPRANKLING, *supra* note 11, at 7–9 (discussing rights in bundle).

19. SPRANKLING, *supra* note 11, at 10–12.

20. Every state prohibits the sale of votes. *See* Rebecca Murray, Note, *Voteauction.net: Protected Free Speech or Treason?*, 5 J. HIGH TECH L. 357, 363–64 n. 51 (2005) (collecting state statutes).

21. Convention to Suppress the Slave Trade and Slavery arts. 1(1), 2(b), Sept. 25, 1926, 60 L.N.T.S. 253.

22. Counterfeit money is contraband per se, in which no property rights can exist. *See infra* notes 44–49.

property in that thing. Conversely, if no governing law contains such a prohibition, then the thing may be owned.

### B. *State Primacy in Defining Property*

The boundary between property and nonproperty becomes blurred where state and federal laws differ about the categories of things in which property rights may exist.

Dual sovereignty is the heart of federalism. Both the federal government and the state government may exercise sovereign authority over certain activities within the state's territory. This poses the risk that each government may define property in a somewhat different manner. But it is well-settled that the definition of property—including the things in which property rights may exist—is usually determined by state law.<sup>23</sup> As the Supreme Court observed in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, “[g]enerally speaking, state law defines property interests . . . .”<sup>24</sup> Similarly, in *Giles v. California* the Court stressed that “States may allocate property rights as they see fit.”<sup>25</sup>

The principle that property rights arise from the states, not the national government, is a core component of the federal system that the Framers envisioned.<sup>26</sup> The foundation of international law is that each nation-state has sovereignty over its own territory and, accordingly, has the exclusive right to adopt laws governing how private actors use that territory, including laws governing property rights.<sup>27</sup> In a broad sense, the Framers envisioned each former colony as a separate “state,” with a high degree of sovereignty over its territory. Thus, each state was empowered to craft its own laws governing property, which might differ to some extent.<sup>28</sup> This allocation of authority made practical sense in that era, when the principal source of wealth was real property—which by definition was

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23. See Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 494 (2000) (“Property simply does not exist in the absence of state law.”); Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 84 (“[T]he content of property rights is determined by state law.”); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 257 (2004) (“Property rights are the product of positive state law.”).

24. 560 U.S. 702, 707 (2010).

25. 554 U.S. 353, 375 (2008). See also *Butner v. United States*, 440 U.S. 48, 55 (1979) (“[P]roperty interests are created and defined by state law.”).

26. See U.S. CONST. amend X.

27. JOHN G. SPRANKLING, *THE INTERNATIONAL LAW OF PROPERTY* 3 (2014).

28. See U.S. CONST. amend. X.

permanently located within state borders—and personal property that usually remained within such borders as well.

As James Madison explained in *The Federalist*:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and infinite. . . . The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and *properties of the people* . . . .<sup>29</sup>

The Framers structured a national legislature with limited powers.<sup>30</sup> These did not include the power to define property rights except in two areas: patents and copyrights;<sup>31</sup> and “Legislation in all Cases whatsoever” for the future District of Columbia and “like Authority” over forts and similar federal installations, which would presumably include property rights in these regions.<sup>32</sup> The Tenth Amendment specifically provided that “[t]he powers not delegated” to the federal government—including the power to define property rights in almost all situations—were “reserved to the States respectively, or to the people.”<sup>33</sup>

Under the Constitution, then, the states were to have the dominant role in the horizontal dimension of property rights: how government protection of property mediates relationships among private actors.<sup>34</sup> For example, state law regulates the manner in which property may be acquired in various transactions, including gifts, purchases, leases, and security interests. It protects property from interference by non-owners, in contexts ranging from enforcing the right to exclude to providing a remedy for property damage. It also determines how property is divided among families (e.g., at divorce or death) and among business owners (e.g., at the dissolution of a

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29. THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). *See also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (quoting this language with approval).

30. *See* U.S. CONST. art. I, § 8.

31. *Id.* cl. 8.

32. *Id.* cl. 17.

33. *Id.* amend. X.

34. The principal exceptions are (1) patents and copyrights; (2) property rights on federal installations; and (3) bankruptcy. By regulating patents and copyrights, federal law effectively supersedes conflicting state laws dealing with intellectual property and thus precludes states from creating such rights. *See supra* note 31. Similarly, property rights on federal installations are exclusively governed by federal law. *See supra* note 32. Finally, the power of Congress to establish bankruptcy laws necessarily means that federal law will impact state-created property rights of creditors. U.S. CONST. art I., § 8, cl. 4.

partnership or the partition of a cotenancy). All of these examples and many others are governed by how the relevant state law defines property. In practice, as the Framers envisioned, the vast majority of property law today is state law.<sup>35</sup>

The respective roles of federal and state laws in defining the vertical dimension of property rights—the relationship between governments and private actors—are less clear. There is no body of general federal property law. Thus, the vertical dimension is largely the province of specialized bodies of law other than property law, such as constitutional law, criminal law, or tax law.<sup>36</sup> The definition of property is important in the application of these doctrines, but they are not viewed as property law.

Certainly, the Framers were concerned that the federal government might interfere with state-created property rights. In this light, the property-related provisions of the Bill of Rights can be seen as attempts to restrict such interference—largely in reaction to the British government’s infringement of colonial property rights before American independence.<sup>37</sup> For example, the Second Amendment bars the federal government from infringing the right to “keep and bear Arms,”<sup>38</sup> while the Third Amendment prohibits it from interfering with the right to use real property by quartering troops “in any house.”<sup>39</sup> More broadly, the Fifth Amendment restricts the federal government from depriving an owner of property absent due process, a “public use” for the property, and payment of “just compensation.”<sup>40</sup>

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35. See, e.g., JOSEPH WILLIAM SINGER, *PROPERTY* (5th ed. 2016); WILLIAM STOEBUCK & DALE WHITMAN, *LAW OF PROPERTY* (3d ed. 2000).

36. See, e.g., *Drye v. United States*, 538 U.S. 49, 58 (1999) (“We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer’s state-delineated rights qualify as ‘property’ or ‘rights to property’ within the compass of the federal tax lien legislation.”).

37. For an analysis of the property-related provisions of the Bill of Rights, see BERNARD H. SIEGAN, *PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT* 102–20 (2001).

38. U.S. CONST. amend. II. The Framers were aware that James II had attempted to expand the Catholic influence in England by seizing weapons from Protestants in the mid-1600s; the 1689 English Declaration of Rights, which expressly protected the right to bear arms in response to these seizures, was the forerunner of the Second Amendment. See *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008).

39. U.S. CONST. amend. III. The British violated the traditional property rights of American owners by quartering troops in private homes, one of the abuses chronicled in the Declaration of Independence; this experience prompted adoption of the Third Amendment. See Thomas G. Sprankling, Note, *Does Three Equal Five? Reading the Takings Clause in Light of the Third Amendment’s Protection of Houses*, 112 COLUM. L. REV. 112, 124–29 (2012).

40. U.S. CONST. amend. V, §§ 2, 3.

Even in applying these constitutional protections, however, federal courts usually defer to state law in defining the scope of property.<sup>41</sup>

More recently, particularly with the rise of the modern regulatory state after World War II, actions taken by the federal government have increasingly affected state-created property rights.<sup>42</sup> In particular, federal statutes adopted under the authority of the Commerce Clause that primarily deal with subjects other than property sometimes affect property rights. For example, federal environmental statutes constrain—and in some situations effectively nullify—property rights arising under state law, primarily in the interest of protecting public health or endangered species.<sup>43</sup>

Further—and directly related to this Article—federal criminal statutes governing activities linked to interstate commerce also affect state-created property rights. Federal law classifies certain things as contraband *per se*: objects that are “intrinsically illegal in character,”<sup>44</sup> “the possession of which, without more, constitutes a crime.”<sup>45</sup> An object is considered to be contraband *per se* “if there is no legal purpose to which the object could be put.”<sup>46</sup> Marijuana is classified as contraband *per se* under federal law.<sup>47</sup> The classification of an object as contraband *per se* directly affects property rights, particularly in the context of forfeiture to the government.<sup>48</sup> In general, property rights cannot exist in contraband *per se*. Accordingly, the federal

41. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000) (discussing the definition of “property” for purposes of the Constitution).

42. See generally JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 142–71 (3d ed. 2008) (discussing the modern regulatory state’s effect on property rights).

43. For example, the Endangered Species Act, 16 U.S.C. §§ 1531–44 (2012), may effectively bar the development of certain private lands. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687 (1995) (upholding regulation issued pursuant to Endangered Species Act that prevented logging of certain old growth forests).

44. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965).

45. *Id.* at 699.

46. *United States v. Harrell*, 530 F.3d 1051, 1057 (9th Cir. 2008).

47. See *Gonzales v. Raich*, 545 U.S. 1, 27 (2005) (“The CSA designates marijuana as contraband for *any* purpose.”) (emphasis in original). See also *Schmidt v. County of Nevada*, No. 2:10-CV-3022FCD/EFB, 2011 WL 2967786, at \*6 (E.D. Cal. July 19, 2011) (holding that the plaintiff had no “property interest” in marijuana because it is “undisputably [sic] illegal and contraband *per se*”).

48. Although marijuana is contraband *per se*, it is still considered to be “property” for the limited purpose of prosecuting property crimes such as robbery or theft. See, e.g., *Taylor v. Phillips*, No. 05-CV-2596, 2016 WL 5678582, at \*7 (E.D.N.Y. Sept. 30, 2016) (marijuana is property for the purposes of establishing a Hobbs Act robbery); *State v. Turner*, 2017 Iowa App. LEXIS 339, at \*9–10 (Iowa Ct. App. Apr. 5, 2017) (“We agree contraband may be considered property when prosecuting criminal offenses such as robbery and theft.”).

government may seize such contraband at any time without infringing the possessor's rights under the Constitution. In this context, the Fifth Circuit concluded in *Cooper v. City of Greenwood* that "one cannot have a property right in that which is not subject to legal possession."<sup>49</sup>

The counterpart to contraband per se is derivative contraband: "items which are not inherently unlawful but which may become unlawful because of the use to which they are put—for example, an automobile used in a bank robbery."<sup>50</sup> Because a property interest in such an item "is not extinguished automatically if the item is put to unlawful use, forfeiture of such an item is permitted only as authorized by statute" consistent with due process.<sup>51</sup>

## II. STATE V. FEDERAL GOVERNMENT: RECOGNIZING MARIJUANA PROPERTY

### A. *The Property-Nonproperty Boundary*

For decades, federal and state laws uniformly criminalized the possession or transfer of marijuana.<sup>52</sup> It was deemed to be contraband per se in which property rights could not exist. As a result, it could be confiscated at any time by federal or state officials without compensation. But the modern legalization of marijuana by most states challenges this approach. Today either property rights cannot exist in marijuana at all, or such rights can exist under the laws of legalization states but not under federal law or the laws of ban states.

Millions of Americans use marijuana for medical treatment or recreation. And the legalization wave has produced tens of thousands of new marijuana businesses, including growers, manufacturers, processors, and retailers.<sup>53</sup> These businesses all routinely possess large

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49. 904 F.2d 302, 305 (5th Cir. 1990). *See also* Bacon v. United States, No. 2-13-CV-392, 2014 WL 12531093, at \*2 (S.D. Tex. Sept. 22, 2014) ("A person may not claim a property interest in property he has no legal right to possess because the possession of the property is illegal.").

50. *Cooper*, 904 F.2d at 305.

51. *Id.* *See also* United States v. 37.29 Pounds of Semi-Precious Stones, 7 F.3d 480, 485 (6th Cir. 1993).

52. *See infra* text accompanying notes 61–70, 75. *See generally* MARK K. OSBECK & HOWARD BROMBERG, MARIJUANA LAW IN A NUTSHELL 71–87 (2017) (discussing federal and states laws that criminalize the possession and transfer of marijuana). However, "marijuana was legal to grow and consume" in all states until the early twentieth century, when some jurisdictions began to criminalize it. Chemerinsky et al., *supra* note 4, at 81.

53. Marijuana stores and dispensaries in full legalization states commonly sell both

quantities of marijuana.<sup>54</sup> For example, California growers alone produce 13.5 million pounds of marijuana each year.<sup>55</sup> Without legally-protected property rights in marijuana, these businesses could not exist—and millions of Americans would be deprived of the legal ability to obtain marijuana.

Consider hypothetical farmer G, who holds a license to cultivate marijuana in a legalization state. G cannot carry on her business unless the state recognizes her rights to possess marijuana and to exclude others from its possession. Otherwise, government officials or ordinary citizens could seize G's marijuana without payment. Similarly, G's right to sell or otherwise transfer her crop must be protected. As Richard Posner concludes, “without property rights there is no incentive” for a farmer to plant and nurture her crop “because there is no reasonably assured reward” for doing so.<sup>56</sup>

The legal marijuana industry is premised on the apparent belief that property rights in marijuana will be protected by law.<sup>57</sup> For example, the industry assumes that: contracts concerning marijuana, such as insurance policies, leases, loan agreements, and purchase contracts, will be enforced; marijuana will be viewed as an asset that corporations, partnerships, trusts, and other entities may legally hold; courts will provide a remedy against tortious conduct that damages

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marijuana itself and various marijuana products. These products may include marijuana concentrates (e.g., oils and waxes), infusions into other types of products (e.g., lotions, pills, and shampoos), and edibles. John Campbell & Sahib Singh, *Budding Torts: Forecasting Emerging Tort Liability in the Cannabis Industry*, 30 LOY. CONSUMER L. REV. 338, 346–48 (2018). Examples of edibles include “rice crispy treats, lollipops, lemonade, butter, cookies, cooking oils, agave nectar, caramels, and even bacon cheddar biscuits.” Mystica M. Alexander & William P. Wiggins, *The Lure of Tax Revenue from Recreational Marijuana: At What Price?*, 15 U.C. DAVIS BUS. L.J. 131, 159 (2015).

54. A single store or dispensary may sell thousands of pounds of marijuana per year. *See, e.g.,* Susan K. Livio, *2017 was banner year for medical marijuana*, STAR-LEDGER, May 23, 2018, 2018 WLNR 15375272 (noting that one New Jersey dispensary sold 2,302 pounds in 2017). Further, one farm can produce tens of thousands of pounds of marijuana per year. *See, e.g.,* Daniel Smithson, *New medical pot protections praised by industry advocate*, ORLANDO SENTINEL, Apr. 2, 2018, 2018 WLNR 9886420 (describing a Florida facility that will produce 27,000 pounds per year).

55. *Pushing pot back into the shadows with high taxes*, ORANGE CNTY. REGISTER, Nov. 11, 2017, <https://www.ocregister.com/2017/11/11/pushing-marijuana-back-into-the-shadows-with-high-taxes/>.

56. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 40 (9th ed. 2014).

57. It is axiomatic that every business in a market economy relies on enforcement of property rights. *See, e.g.,* Barry R. Weingast, *Capitalism, Democracy, and Counter-majoritarian Institutions*, 23 SUP. CT. ECON. REV. 255, 256–57 (2015).

marijuana; and investments in marijuana and marijuana-related businesses will be respected.<sup>58</sup>

Yet, as discussed below, the question of marijuana ownership is a conundrum. Under the American tradition that state law defines property rights, marijuana can be owned under state law in legalization states.<sup>59</sup> Thus, state law prohibits third parties or the state itself from illegally interfering with farmer G's marijuana. But under federal law, marijuana is contraband per se that cannot be owned.<sup>60</sup> As a result, federal authorities may seize G's marijuana at any time without judicial process or payment of compensation. The result is a legal paradox: G owns marijuana (under state law) but does not own marijuana (under federal law).

### B. *Federal Law: The Controlled Substances Act*

Federal regulation of marijuana is based on the Controlled Substances Act of 1970 (CSA), a comprehensive public health statute that covers hundreds of drugs.<sup>61</sup> Today, many authorities believe that marijuana poses little or no risk to human health and in fact has substantial medical value.<sup>62</sup> However, it is still classified as a Schedule I drug, meaning that it “has a high potential for abuse,” it “has no currently accepted medical use,” and “[t]here is a lack of accepted safety for use of the drug . . . under medical supervision.”<sup>63</sup> Examples of other Schedule I drugs include ecstasy,<sup>64</sup> heroin,<sup>65</sup> and LSD.<sup>66</sup>

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58. Yet under the federal Controlled Substances Act, the federal government is empowered to seize marijuana as contraband per se, without judicial process or payment of compensation. *See infra* text accompanying notes 61–71. Thus, marijuana businesses and their customers face the risk that their marijuana, which is legal under state law, may nonetheless be forfeited to the federal government. However, to date, the federal government has generally not exercised this authority in connection with sales that are legal under state law. *See infra* text accompanying notes 128–37. Presumably, the participants in the legal marijuana industry believe that the federal government will continue this policy.

59. *See infra* text accompanying notes 77–86.

60. *See infra* text accompanying notes 67–74.

61. 21 U.S.C. §§ 801–904 (2012). The CSA uses the term “marihuana,” which is defined as “all parts of the plant *Cannabis sativa* L.,” its seeds, its resin, “and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin,” with limited exceptions such as stalks or fibers. 21 U.S.C. § 802(16) (2012). This definition accordingly includes products that contain marijuana or its active ingredient, tetrahydrocannabinol.

62. *See OSBECK & BROMBERG, supra* note 52, at 404–14 (summarizing research on health effects).

63. 21 U.S.C. § 812(c), Sched. I(c)(10) (2012). There is widespread agreement that marijuana is not as dangerous as other drugs listed in Schedule I. For example, in *United States v. Kiefer*, 477 F.2d 349, 356 (2d Cir. 1973), the Second Circuit noted that “[i]t is apparently true that there is little or no basis for concluding that marihuana is as dangerous a substance as some of the other drugs included in Schedule I.” Yet in *United States v. Pickard*, 100 F. Supp. 3d 981,

The CSA imposes criminal penalties for the possession or transfer of any Schedule I drug, including marijuana. Section 844 provides that it is “unlawful for any person knowingly or intentionally to possess a controlled substance” such as marijuana, regardless of the amount involved or the purpose for the possession. The penalty for a first offense is imprisonment for up to a year and/or a fine of at least \$1,000.<sup>67</sup> Further, under section 841 it is unlawful for anyone to either “possess” marijuana “with intent . . . to distribute” it or to “distribute” it, regardless of amount.<sup>68</sup> In this context, “distribute” means “to deliver (other than by administering or dispensing) a controlled substance.”<sup>69</sup> This language is broad enough to encompass any intentional transfer of marijuana by one person to another, whether by gift, sale, or otherwise. The penalty for distributing 1,000 kilograms of marijuana is imprisonment for ten years or longer and/or a fine of up to \$50 million.<sup>70</sup>

Since the mere possession or transfer of marijuana is illegal under the CSA, the argument logically follows that marijuana is contraband per se that cannot be the subject of property rights under federal law. Indeed, this is the conventional view. As a federal court explained in *Schmidt v. County of Nevada*, “[u]nder the federal Controlled Substances Act . . . it is illegal for any private person to possess marijuana . . . [and, accordingly] under federal law marijuana is contraband per se, which means that no person can have a cognizable legal interest in it.”<sup>71</sup>

This result is consistent with the traditional view that property consists of legal rights in relation to a particular thing. As shown

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1009 (E.D. Cal. 2015), the court refused to find that “its placement on Schedule I is so arbitrary or unreasonable as to render it unconstitutional.” There is evidence that long-term marijuana use can cause adverse health effects. See GERALD F. UELMEN & ALEX KREIT, 1 DRUG ABUSE AND THE LAW SOURCEBOOK § 3:75, Dec. 2017 Update.

64. 21 U.S.C. § 812(c)(1) (2012).

65. *Id.* § 812(b)(10).

66. *Id.* § 812(c)(9).

67. *Id.* § 844(a).

68. *Id.* § 841(a)(1).

69. *Id.* § 802(11).

70. *Id.* § 841(b)(1)(A)(vii).

71. No. 2:10-CV-3022FCD/EFB, 2011 WL 2967786, at \*5 (E.D. Cal. July 19, 2011). See also *Barrios v. Cnty. of Tulare*, No. 1:13:CV-1665, 2014 WL 2174746, at \*5 (E.D. Cal. May 23, 2014) (“Because marijuana is contraband under federal law, Barrios had no property interest in the marijuana that was protected by the Fourteenth Amendment due process clause.”). The Supreme Court has never addressed the issue of property rights in marijuana, though it has held that Congress was empowered to adopt the CSA pursuant to the Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

above, the CSA expressly precludes the rights to possess or transfer marijuana. In practice, it also eliminates the rights to use and exclude. It is impossible for anyone to use a tangible object that cannot be possessed. Similarly, a person who has no right to possess such an object cannot protect her possession against intrusions by third parties. Because the CSA abrogates all the core rights in the metaphorical bundle, it effectively prohibits ownership of marijuana.

Moreover, an independent basis for finding that federal law bars property rights in marijuana is arguably found in section 881(a) of the CSA, its civil forfeiture provision.<sup>72</sup> This section provides that “[a]ll controlled substances which have been . . . distributed . . . or acquired in violation of this subchapter” and “[a]ll controlled substances which have been possessed in violation of this subchapter” “shall be subject to forfeiture to the United States *and no property right shall exist in them . . .*”<sup>73</sup> In *Mazin v. True*, a federal court quoted this provision and concluded that “marijuana is contraband *per se* under federal law, which expressly disavows any property right in such contraband.”<sup>74</sup> Accordingly, the federal government is empowered to seize marijuana from anyone who possesses it as a matter of federal law.

In summary, there are compelling arguments that marijuana cannot be owned—at least for the purposes of federal law. Yet this analysis does not resolve the separate question of whether property rights can exist in marijuana as a matter of state law.

### C. *State Law: The Legalization Tidal Wave*

Like federal law, state laws imposed criminal penalties for the possession or transfer of marijuana for decades.<sup>75</sup> Under this

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72. However, the better interpretation of the italicized language in § 881(a) is that it applies only *after* a forfeiture occurs. CSA § 881(h) provides that “[a]ll *right, title, and interest in property* described in subsection (a) of this section shall vest in the United States *upon commission of the act* giving rise to forfeiture in this section.” 21 U.S.C. § 881(h) (2012) (emphasis added). Thus, the effect of the forfeiture process is to transfer existing property rights from an owner to the federal government. It is important to note that the items listed in subsection (a) include both contraband *per se* and derivative contraband. In context, the references to “property” in § 881(a) and (h) can only refer to derivative contraband, because forfeiture of such property (and thus transfer of property rights) occurs only when an illegal “act” is committed. Because property rights can never exist in contraband *per se* under federal law, the possessor has no “right, title, or interest” to transfer.

73. 21 U.S.C. § 881(a)(1), (8) (2012) (emphasis added).

74. No. 1:14-CV-00654-REB-CBS, 2015 WL 1228321, at \*2 (D. Colo. Mar. 16, 2015).

75. All fifty states eventually adopted statutes similar to the CSA, largely based on the Uniform Controlled Substances Act of 1970 (hereinafter “UNIFORM CSA”). UNIF. CONTROLLED SUBSTANCES ACT 9 Part V U.L.A. 853, 860 (2007). As a result, the possession or

approach, marijuana was contraband per se in which property rights could not exist. But in recent years, most states have abandoned this absolutist position by adopting statutes that legalize the possession and transfer of marijuana under certain circumstances. These statutes do not expressly address the broader issue of marijuana ownership; nor has any court directly ruled on the question. However, analyzed in light of background principles of property law, these statutes support the view that marijuana can be owned—to some extent—as a matter of state law.<sup>76</sup>

Led by Colorado and Washington, ten states have legalized marijuana for all purposes—subject to various restrictions—and have thus sanctioned its possession and transfer.<sup>77</sup> For example, Colorado’s voter-approved amendment to the state constitution authorizes the cultivation, possession, purchase, transfer, transport, and use of marijuana.<sup>78</sup> Similarly, the successful voter initiative in Washington provides that the possession of marijuana by an adult and the production, delivery, distribution, sale, or possession of marijuana by state-approved businesses are permitted under state law.<sup>79</sup>

Broadly speaking, the legalization statutes in these states make a distinction between marijuana businesses and marijuana users. Under strict regulation, businesses are permitted to grow, possess, and

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distribution of marijuana became illegal in all states.

76. A number of states that prohibit the possession or transfer of marijuana for any purpose do permit the possession and sale of cannabidiol, a non-psychoactive substance that is derived from the cannabis plant. See OSBECK & BROMBERG, *supra* note 52, at 219. Cannabidiol would seemingly be classed as a “derivative” of cannabis, and thus fall within the definition of “marihuana” under the CSA. 21 U.S.C. § 802(16) (2012). However, the U.S. Food and Drug Administration has approved the use of cannabidiol for the treatment of seizures related to certain types of epilepsy. Press Release, U.S. Food and Drug Administration, *FDA approves first drug comprised of an active ingredient derived from marijuana to treat rare, severe forms of epilepsy*, June 25, 2018, <https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm611046.htm>.

77. Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington have legalized recreational use of marijuana. Jeremy Berke & Skye Gould, *States where marijuana is legal*, BUS. INSIDER, Mar. 26, 2019, <https://www.businessinsider.com/legal-marijuana-states-2018-1>.

78. COLO. REV. STAT. ANN., CONST. art. XVIII, § 16(3) (West 2017). For example, “possessing, using, displaying, purchasing, or transporting . . . one ounce or less of marijuana” is lawful. *Id.* But see *People v. Crouse*, 388 P.3d 39 (Colo. 2017) (holding that section of state’s medical marijuana law which required officers to return seized marijuana to patient was preempted by the CSA); Joel S. Neckers & Joel M. Pratt, *The Marijuana Industry after Crouse: Is the Glass Half Empty or Half Full?*, 47 COLO. LAW. 27, 29 (Jan. 2018) (warning that under *Crouse* “even an accusation of wrongdoing that leads to a cannabis seizure could mean the end of a business”).

79. WASH. REV. CODE ANN. §§ 69.50.360, 69.50.363, 69.50.366 (West 2017).

process large quantities of marijuana, and to sell small quantities. Marijuana users are authorized to possess and use small quantities in these states, and may grow a limited number of marijuana plants. For example, in California it is lawful for a person to possess up to 28.5 grams of marijuana and to cultivate up to six marijuana plants.<sup>80</sup>

Further, twenty-three states have legalized marijuana for the limited purpose of medical treatment.<sup>81</sup> Although their approaches differ to some extent, they share the same basic pattern: closely-regulated businesses may cultivate, process, possess, and sell large quantities of marijuana; patients with a doctor's prescription may purchase and possess small quantities and also grow a few marijuana plants. For example, North Dakota authorizes residents to “process or sell, possess, transport, dispense, or use marijuana” for medical purposes under limited circumstances.<sup>82</sup> A “manufacturing facility” can possess up to 1,000 plants, while a “dispensary” can have up to 3,500 ounces of marijuana.<sup>83</sup> A qualifying patient may purchase up to 2.5 ounces of marijuana from a dispensary over a 30-day period, and may possess up to 3 ounces during this time.<sup>84</sup>

These legalization statutes are based on the belief that marijuana is relatively harmless, and indeed can be an effective medical treatment for some patients. Viewed from this perspective, marijuana should not be listed as a Schedule I drug—unlike other Schedule I drugs that are clearly harmful such as heroin and LSD. Under this approach, marijuana is seen as far less dangerous than other things that are considered to be contraband *per se* under federal law.

The legalization wave has a profound impact on marijuana ownership. Although no statute or case directly addresses the issue, it now seems clear that marijuana may be owned in most states as a matter of state law. With the repeal of state statutes that criminalized marijuana, the traditional principle that property rights may exist in any thing now applies. Further, the state legalization statutes effectively recognize the core elements that constitute the traditional bundle of rights: the rights to possess, use, transfer, and exclude. These statutes expressly validate the rights to possess and transfer marijuana

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80. CAL. HEALTH & SAFETY CODE § 11362.1(a) (1), (3) (West 2017).

81. Berke & Gould, *supra* note 77.

82. N.D. CENT. CODE § 19-24.1-02 (2017).

83. *Id.* § 19-24.1-24.

84. *Id.* § 19-24.1-01(2).

under certain circumstances.<sup>85</sup> The legalization of possession, in turn, effectively recognizes the rights to use and exclude. Prior state law eliminated the right to use only indirectly; because marijuana could not be possessed, it could not be used. Further, given legal recognition of the right to possess, it logically follows that state law will protect this right by preventing third parties from interfering with that possession, thus recognizing the owner's right to exclude. In sum, because a person may now hold the core property rights in marijuana, marijuana property exists under state law.<sup>86</sup>

This historic transition affects both the horizontal and vertical dimensions of property rights. Under state law, each legalization state will respect marijuana ownership in disputes among private actors to at least some extent<sup>87</sup> and will refrain from seizing legally-owned marijuana from private actors.<sup>88</sup>

#### D. *Resolving the Federal-State Conflict*

##### 1. Joint Sovereignty in Context

Our hypothetical marijuana farmer G holds property rights in her crop under state law. But under federal law, she has no property rights in the crop—and federal officials may confiscate it at any time. These inconsistent approaches to marijuana property raise the question of preemption.

The Supremacy Clause of the Constitution provides that the “Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding.”<sup>89</sup> It arguably

85. *See supra* notes 77–84. Moreover, statutes in some legalization states provide that citizens are entitled to the return of marijuana that they legally possess when it is illegally seized by law enforcement authorities. *See, e.g.*, N.M. STAT. ANN. § 26-2B-4(G) (2007); OR. REV. STAT. § 475B.922(2) (2018).

86. Because all legalization states still restrict marijuana to some extent, however, the scope of marijuana property is limited. For example, because a legal marijuana user in California can possess only up to 28.5 grams, a person who possesses 100 grams does not hold property rights in the additional 71.5 grams. *See supra* note 80.

87. *Cf. Muridan v. Redl*, 413 P.3d 1072, 1081–82 (Wash. Ct. App. 2018) (affirming trial court's determination that proceeds from the sale of marijuana equipment constituted community-like property and were thus subject to “equitable property division” upon the termination of a couple's relationship).

88. *See, e.g., Oregon v. Ellis*, 316 P.3d 412 (Or. Ct. App. 2013) (holding trial court erred in denying defendant's motion to return “usable marijuana” after police seized it during defendant's arrest for driving while intoxicated since he held a medical marijuana card).

89. U.S. CONST. art. VI, § 2.

follows that even states which have legalized marijuana—and, more to the point, judges in these states—should follow the federal view that marijuana property cannot exist.

But both federal and state governments possess “elements of sovereignty the other is bound to respect.”<sup>90</sup> As the Supreme Court has explained, the states retain “substantial sovereign authority under our constitutional system.”<sup>91</sup> One traditional area of state sovereignty is the state’s right to determine what constitutes property within its borders, as discussed in Part I above. Accordingly, federal law will not supersede the state law definition of property absent either express preemption or implied preemption. However, the CSA probably does not preempt the state laws that effectively recognize marijuana property.

## 2. Preemption Is Unlikely

Express preemption exists when Congress clearly states that federal law will supersede state law.<sup>92</sup> Implied preemption occurs in three situations: (1) field preemption, where “Congress . . . has determined [that the field of law] must be regulated by its exclusive governance;”<sup>93</sup> (2) conflict preemption, where “compliance with both federal and state regulations is a physical impossibility;”<sup>94</sup> and (3) conflict preemption, where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>95</sup>

In applying these principles, courts use a presumption against preemption. As the Supreme Court observed in *Medtronic, Inc. v. Lohr*, in preemption cases, “particularly those in which Congress has ‘legislated in a field which the states have traditionally occupied,’ we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”<sup>96</sup> Because property rights are created under state law, this presumption applies with particular

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90. *Arizona v. United States*, 567 U.S. 387, 398 (2012).

91. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

92. *Mich. Canners & Freezers Ass’n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 469 (1984).

93. *Arizona*, 567 U.S. at 399.

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

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

96. 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715–716 (1985)).

force to the question of whether the CSA supersedes state-created property rights in marijuana.

The CSA is an example of “cooperative federalism.”<sup>97</sup> It was intended to be part of an integrated system for regulating controlled substances that federal and state governments would share. Under this framework, the federal government would take a lead role while states would have parallel authority under state law.<sup>98</sup> Accordingly, almost all states enacted legislation patterned on the CSA, most commonly by adopting the Uniform Controlled Substances Act of 1970 (Uniform CSA).<sup>99</sup> As its Prefatory Note observes, the Uniform CSA was “designed to complement the new Federal . . . legislation and provide an interlocking trellis of Federal and State law to enable government at all levels to more effectively control the drug abuse problem.”<sup>100</sup> The Uniform CSA largely criminalizes the same conduct that the CSA covers.<sup>101</sup> However, it allows each state to establish its own schedules of controlled substances as a matter of state law, which may differ from the federally-regulated substances listed in the CSA schedules.<sup>102</sup>

Because federal and state governments have concurrent authority over controlled substances, Congress took care to minimize the risk of preemption. CSA section 903 specifies that no provision in the act:

should be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, to the exclusion of any State law on the same subject matter that would otherwise be within the authority of the State, unless there is a

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97. See Chemerinsky et al., *supra* note 4; Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1 (2013); Matthew A. Melone, *Federal Marijuana Policy: Homage to Federalism in Form; Potemkin Federalism in Substance*, 63 WAYNE L. REV. 2015 (2018).

98. In practice, the federal government “has prosecuted large-scale traffickers and drug cartels and left prosecution of everyday, street level marijuana activity to the states.” OSBECK & BROMBERG, *supra* note 52, at 472.

99. UNIFORM CSA, *supra* note 75, at 853.

100. *Id.* at 854.

101. Compare 21 U.S.C. §§ 841, 844(a) (2012) with UNIFORM CSA § 401(a), (c), *supra* note 75, at 886–87.

102. UNIFORM CSA § 201(a) provides that a designated state agency may “add substances to or delete or reschedule all substances in the schedules.” UNIFORM CSA, *supra* note 75, at 866. The Comment to this section explains that “[t]he Uniform Act is not intended to prevent a State from adding or removing substances from the schedules.” *Id.* at 868. Thus, the drafters of the Uniform CSA contemplated that a state could choose not to criminalize the possession or transfer of a substance such as marijuana under state law.

positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.<sup>103</sup>

There is no serious argument that express preemption applies to the state laws that effectively recognize marijuana property. An example of express preemption is found in *Jones v. Rath Packing Co.*, where the Supreme Court held that a federal statute concerning meat packages which provided that “requirements in addition to, or different than, those made under this Act may not be made by any State” preempted state law.<sup>104</sup> No section of the CSA contains a similar express provision; in fact, Congress specifically restricted the preemptive scope of the CSA, as shown in the portion of section 903 quoted above.<sup>105</sup> It might be asserted that the phrase in CSA section 881(a)(1) that “no property right shall exist” in marijuana and other Schedule I substances supports express preemption. But nothing in that section expressly purports to affect state law.<sup>106</sup> Moreover, in context this language was intended to relate only to the status of property rights *after* forfeiture<sup>107</sup> to the federal government, not to property rights before forfeiture.<sup>108</sup> Because no provision of the CSA

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103. 21 U.S.C. § 903 (2012); *see also* H.R. REP. NO. 91-1444, 1970 U.S.C.C.A.N. 4629 (explaining that this section bars preemption unless there is a “direct and positive conflict” between federal and state legislation).

104. 430 U.S. 519, 530-31 (1977).

105. 21 U.S.C. § 903 (2012).

106. The only decision exploring the impact of this language on state-created property rights is *Mazin v. True*, No. 1:14-CV-00654-REB-CBS, 2015 WL 1228321 (D. Colo. Mar. 16, 2015). There the court interpreted it to mean that “there is no recognized or protected property right in marijuana under *federal law*.” *Id.* at \*2 (emphasis added). In response to the argument that “state law defines property rights,” the court reasoned that “[t]he plaintiff has no *federally protected* property interest in his marijuana even if that marijuana is legal under Colorado law.” *Id.* (emphasis added).

107. *See supra* note 72.

108. The statutory language makes this reasonably clear. The complete introductory phrase in section 881(a) reads: “The following shall be subject to forfeiture to the *United States* and no property right shall exist in them . . . .” (emphasis added). In context, this subsection was not intended to apply to state-created property rights. Legislative history also supports this interpretation. The House Report on the CSA explained that this subsection merely “sets forth the conditions for forfeiture and the property to be forfeited” under federal law. H.R. REP. NO. 91-1444, 1970 U.S.C.C.A.N. 4623. There is no indication that it was also intended to supersede state law. In fact, the Uniform Controlled Substances Act contains its own provisions that govern forfeiture under state law. UNIFORM CSA § 505(a), *supra* note 75. *Cf.* *People v. Odenwald*, 285 P. 406, 408 (Cal. Ct. App. 1930) (observing that nearly-identical language included in the Volstead Act, which prohibited the possession of liquor, “was clearly intended solely to protect government officials in the exercise of their duties,” not to eliminate state-created property rights).

expressly states that it will supersede state law, there can be no express preemption.<sup>109</sup>

Next, as section 903 makes clear, Congress has chosen not to “occupy the field” of controlled substances regulation.<sup>110</sup> Rather, the CSA contemplates that federal and state governments have shared authority in this area.<sup>111</sup> Therefore, field preemption does not apply to marijuana property laws.<sup>112</sup>

The question of conflict preemption based on physical impossibility is more complex. Most decisions conclude that the CSA does not preempt state legalization laws as a general matter.<sup>113</sup> For example, the Michigan Supreme Court rejected the defendant city’s impossibility claim in *Ter Beek v. City of Wyoming*,<sup>114</sup> because the state’s medical marijuana statute did not require the city to violate the CSA. A Rhode Island court reached the same conclusion, noting that nothing in the state law legalizing marijuana “requires the Town—or anyone—to ‘manufacture, distribute, dispense, or possess’ marijuana or otherwise violate the CSA.”<sup>115</sup> In short, the state laws legalizing marijuana do not require its cultivation, possession, or transfer by private actors, but merely permit it. By the same token, the recognition of marijuana property under state law merely permits such ownership, without requiring it. Accordingly, compliance with both federal and state law is not physically impossible. Under this analysis, federal and state law can “consistently stand together” as section 903 contemplates.<sup>116</sup>

109. See *White Mountain Health Ctr., Inc. v. Maricopa Cnty.*, 386 P.3d 416, 426 (Ariz. Ct. App. 2016) (finding no express preemption under the CSA); *R.I. Patient Advocacy Coal. Found. v. Town of Smithfield*, No. PC-2017-2989, 2017 WL 4419055 (R.I. Super. Ct. Sept. 27, 2017).

110. 21 U.S.C. § 903 (2012) (disclaiming any congressional intent to “occupy the field” as a general matter).

111. *Id.* See also *supra* notes 97–103.

112. See *White Mountain Health Ctr., Inc.*, 386 P.3d 416 (finding no field preemption under the CSA); *R.I. Patient Advocacy Coal. Found.*, 2017 WL 4419055.

113. See Brilmayer, *supra* note 4 at 902–11 (arguing that the CSA does not preempt state laws legalizing marijuana); Chemerinsky et al., *supra* note 4, at 100–13 (same).

114. 846 N.W.2d 531, 544 (Mich. 2014).

115. *R.I. Patient Advocacy Coal. Found.*, 2017 WL 4419055, at \*6; see also *City of Palm Springs v. Luna Crest, Inc.*, 200 Cal. Rptr. 3d 128, 131–33 (Ct. App. 2016) (affirming trial court’s determination that federal law does not preempt city’s regulation of medical marijuana).

116. Preemption on this basis might arise in the property context under narrow circumstances. For example, where a state court appoints a receiver in a dispute concerning a business whose assets include marijuana, the receiver would necessarily take possession of the marijuana; in this situation, it would be physically impossible to comply with both federal and state law. *Cf. People v. Crouse*, 388 P.3d 39, 43 (Colo. 2017) (finding preemption where state

Similarly, most courts reject preemption arguments based on the general assertion that state marijuana legalization laws pose an obstacle to the federal approach.<sup>117</sup> As the Arizona Supreme Court stated in *Reed-Kalither v. Hoggatt*, “[a] state law stands as an obstacle to a federal law ‘[i]f the purpose of the [federal law] cannot otherwise be accomplished . . . .’”<sup>118</sup> The court reasoned that the “state-law immunity” created by Arizona’s medical marijuana law did not “frustrate the CSA’s goal of conquering drug abuse or controlling drug traffic . . . [because] the people of Arizona ‘chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana.’”<sup>119</sup> Moreover, as another court explained, its state law legalizing marijuana “does not (and could not) deny the federal government the ability to enforce the CSA, and does not (and could not) immunize medical marijuana users from prosecution.”<sup>120</sup> In the same manner, state recognition of marijuana property is not an obstacle to enforcement of the CSA by the federal government.<sup>121</sup> The federal government is free to enforce the CSA within legalization states if it chooses to do so, even though these states recognize marijuana property under state law.

In short, the state laws that effectively recognize marijuana property are not preempted under any of the four tests. If there were any doubt about this outcome, the strong presumption against superseding state laws that govern property—a field traditionally occupied by the states—would tip the balance against preemption.

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law required police officers to return marijuana to acquitted medical marijuana patient because this was an illegal distribution of a controlled substance under federal law). *But see* City of Garden Grove v. Superior Court, 68 Cal. Rptr. 3d 656, 677–78 (Ct. App. 2008).

117. *See also* Chemerinsky, *supra* note 4, at 111 (arguing that state legalization laws are consistent with the purposes and objectives of the CSA).

118. 347 P.3d 136, 141 (Ariz. 2015) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

119. *Id.* (quoting *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 539 (Mich. 2014)).

120. *R.I. Patient Advocacy Coal. Found.*, 2017 WL 4419055, at \*7. *See also* City of Palm Springs, 200 Cal. Rptr. 3d 128, 131–33 (finding no obstacle preemption).

121. However, some courts have found conflict preemption to parts of state legalization laws in specific circumstances. *See, e.g.*, *People v. Crouse*, 388 P.3d 39, 41–43 (Colo. 2017) (finding preemption of law that required police officers to return marijuana to acquitted medical marijuana patient, because such return was a distribution of a controlled substance); *Emerald Steel Fabricators, Inc. v. BOLI*, 230 P.3d 518, 536 (Or. 2010) (finding limited preemption because state’s issuance of medical marijuana card to patient affirmatively authorized use of marijuana).

### 3. Federalism Policies and Preemption

Ultimately, the preemption doctrine seeks to preserve the constitutional balance between federal and state governments. The normative justifications that underpin our federal system further support the conclusion that state laws recognizing marijuana property are not preempted. The preemption question will almost certainly be resolved by state courts,<sup>122</sup> not federal courts, and accordingly state judges should consider these policies in the decision process.

As the Supreme Court explained in *Gregory v. Ashcroft*, the joint sovereign structure of federalism provides important benefits:

It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>123</sup>

These policy goals are best served by finding that state laws recognizing marijuana property are not preempted.<sup>124</sup>

First, recognition of marijuana property both addresses the diverse needs of our society and allows for experimentation in government. It accommodates the wishes of the millions of Americans who use marijuana in states that have chosen legalization. Further, it allows the states, as proverbial laboratories of democracy, to test the value of marijuana legalization.

A court considering preemption cannot ignore the legal environment in which the question arises. The ongoing tension between the federal government and legalization states over marijuana is akin to an unstable *détente*.<sup>125</sup> While maintaining that

122. In most states, decisions by lower federal courts are merely persuasive authority, not binding precedent. See Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 62 (2015). Therefore, even if federal courts of appeal and district courts have previously ruled on the question of preemption, state courts are entitled to decide the issue based on their own interpretation of the law.

123. 501 U.S. 452, 458 (1991).

124. These federalism justifications endorsed by the *Gregory* Court were based on Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987) and Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988). *Gregory*, 501 U.S. at 458. See also David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 783 (2017) (listing additional justifications).

125. See, e.g., *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d

state legalization statutes are invalid under the Supremacy Clause as a theoretical matter, the federal government has diplomatically chosen to tolerate the status quo for years except in extreme situations<sup>126</sup>— and, accordingly, has tacitly accepted that marijuana property can exist under state law.<sup>127</sup> By its inaction, the federal government has acknowledged that legalization both responds to the diverse needs of our society and allows for potentially helpful experimentation.

For the last ten years, federal interest in enforcing the marijuana ban in legalization states has been tepid at best.<sup>128</sup> In a series of memoranda issued between 2009 and 2013 during the Obama administration, including the “Cole memorandum,” the Department of Justice gradually deprioritized federal enforcement in states that legalized marijuana as long as certain federal policy priorities were respected.<sup>129</sup> Because the state programs did not infringe these priorities, the memoranda effectively acquiesced to state legalization.<sup>130</sup> Moreover, in 2014 Congress adopted the Rohrabacher-

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821, 832–33 (D. Colo. 2016) (observing that “the nominal federal prohibition against possession of marijuana conceals a far more nuanced (and perhaps even erratic) expression of federal Policy” given public statements by federal officials “that reflected an ambivalence toward enforcement of the Controlled Substances Act where a person or entity’s possession and distribution of marijuana was consistent with well-regulated state law”); *Green Cross Med., Inc. v. Gally*, 395 P.3d 302, 308–09 (Ariz. Ct. App. 2017) (refusing to invalidate a contract on the basis that it facilitated the illegal possession, use, and sale of marijuana, in part because of “the federal government’s lack of interest” in prosecuting people who comply with the state’s medical marijuana law).

126. See *infra* text accompanying notes 128–37 (discussing federal responses to state legalization statutes).

127. Even within legalization states, however, federal law governs activities that occur on federal lands such as national parks, national forests, military installations, and lands governed by the Bureau of Land Management. See *infra* text accompanying notes 166–68.

128. The federal government has focused its anti-marijuana enforcement efforts on “large-scale traffickers and drug cartels.” OSBECK & BROMBERG, *supra* note 52, at 472. Given the limits imposed on marijuana possession and transfer by legalization states, it is highly unlikely that these state laws would shield such traffickers or cartels.

129. See Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>; Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), <http://files.ctctcdn.com/201bc6cf001/10f50403-6ee6-4e47-bbc3-ed48d1912bbb.pdf>; Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attorneys, Marijuana Enforcement (Aug. 29, 2013) (hereafter “Cole Memorandum”), <http://files.ctctcdn.com/201bc6cf001/10f50403-6ee6-4e47-bbc3-ed48d1912bbb.pdf>.

130. The eight federal priorities were to prevent the distribution of marijuana to minors; prevent revenue from marijuana sales from going to criminals; prevent diversion of marijuana to states where it was illegal; prevent marijuana activity from being used as a pretext for other illegal activity; prevent violence in the cultivation and distribution of marijuana; prevent adverse

Farr Amendment to an omnibus spending bill, which prohibited the Department of Justice from using federal funds to prevent the implementation of state laws legalizing medical marijuana.<sup>131</sup> In *United States v. McIntosh*, the Ninth Circuit concluded that this amendment not only barred direct action against such states, but also precluded federal prosecution of medical marijuana growers and retailers whose activities complied with state law.<sup>132</sup>

This lack of enforcement has continued under the Trump administration. On the one hand, former Attorney General Jefferson Sessions issued a new memorandum essentially rescinding the Obama-era approach.<sup>133</sup> Yet Congress extended the financial ban on medical marijuana prosecution in a 2018 spending bill, which President Trump signed.<sup>134</sup> Further, during the current administration “there have apparently been no federal raids or seizures at pot companies for sales that are legal under state law”—and thus in practice the Obama-era policy is still being followed.<sup>135</sup> Most recently, current Attorney General William Barr expressly revived part of this policy by indicating that the Department of Justice will not “go after companies that have relied on the Cole memorandum.”<sup>136</sup> Indeed, President Trump has expressed tentative support for federal legislation that would respect state legalization laws.<sup>137</sup>

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public health consequences associated with marijuana; prevent the growing of marijuana on public lands; and prevent marijuana possession or use on federal property. See Cole Memorandum, *supra* note 129.

131. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat 1230, 2217 (2014).

132. 833 F.3d 1163, 1177 (9th Cir. 2016).

133. Memorandum from Jefferson B. Sessions, Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attorneys, Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

134. *Trump Signs Spending Bill That Included Medical Marijuana Protections*, MARIJUANA BUS. DAILY, Mar. 23, 2018, <https://mjbizdaily.com/trump-signs-spending-bill-includes-medical-marijuana-protections/>.

135. Evan Halper, *Trump inclined to back ending pot ban*, L.A. TIMES, June 9, 2018, 2018 WLNR 17754974. The same article quotes John Vardaman, a former Department of Justice attorney who participated in creating the Obama-era approach, as saying: “Remarkably little, if anything, has changed. Almost every U.S. attorney in states where marijuana is legal has decided to apply the same principles.” *Id.* On an overall basis, “[t]here have been dramatic declines in marijuana arrests in states that have legalized.” Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 106 (2018).

136. Kyle Jaeger, *Trump Attorney General Nominee Won’t Go After Legal Marijuana Businesses*, MARIJUANA MOMENT, Jan. 15, 2019, <https://www.marijuanamoment.net/trump-attorney-general-nominee-pledges-not-to-go-after-legal-marijuana-businesses/>.

137. Halper, *supra* note 135 (quoting President Trump as saying that he would “probably . . . end up supporting” a proposed bill allowing states to legalize marijuana).

Second, legalization of marijuana—and the concomitant recognition of marijuana property—reflects citizen involvement in the political process. In many states, legalization occurred as a direct result of voter initiatives, while in others it stemmed from public pressure on legislators. Moreover, the arc of history is moving toward nationwide legalization at some point in the future. For example, a recent survey shows that 93% of Americans support the legalization of marijuana for medical purposes—including overwhelming majorities of Republican, Democratic, and independent voters.<sup>138</sup> Today 63% of Americans favor national legalization for all purposes, and this percentage will probably increase over time with demographic transition because support is strongest among those under 65 years old.<sup>139</sup>

Finally, honoring property rights in marijuana makes government more responsive to citizen needs, thus creating competition among the states for a mobile citizenry. As noted above, legal marijuana is the fastest-growing industry in the United States.<sup>140</sup> Businesses involved in growing, processing, and selling marijuana are premised on the existence of state laws that will protect their property rights. Third parties that do business with marijuana businesses—such as insurers, landlords, and lenders—similarly rely on the continued success of those entities, and hence on the existence of marijuana property. Consistent with our tradition of federalism, each state should be allowed to determine whether it will recognize marijuana property, and thus attract citizens from other states.

It is axiomatic that property rights comprise the foundation of every market economy. As intended by the Framers, this foundation is governed by state law. Thus, each state government is essentially administering its own property law system and must use a definition of property that is stable and functional in order to respond to societal needs. For example, state laws govern on-going business relationships involving property, including financing, insurance, investments, leases, sales, and other relationships. State courts must divide property

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138. Quinnipiac University Poll, *Support for Marijuana Hits New High*, Apr. 16, 2018, <https://poll.qu.edu/national/release-detail?ReleaseID=2539>. Legalization of medical marijuana is supported by 86% of Republicans, 97% of Democrats, and 95% of independent voters. *Id.*

139. Support for national legalization of marijuana is closely tied to demographics. Among Americans between 18 and 34 years old, 82% favor it; in the 35–49 year age group, support is at 70%; in the 50–64 year age group, it is at 63%. *Id.* In contrast, 52% of those 65 and over oppose legalization. *Id.*

140. *See supra* note 7.

among co-owners in many situations, such as divorce,<sup>141</sup> intestate succession, partition, and partnership dissolution. Further, state law provides remedies when property-related disputes occur, such as tort or contract claims. Having legalized marijuana under state law, state governments cannot turn their backs on the property rights they have created—and their decisions to create such rights in response to citizen needs are entitled to deference by the federal government.

### E. *Challenges Posed by the Hybrid System*

#### 1. Toward the Hybrid System

In sum, the CSA does not preempt state laws legalizing marijuana<sup>142</sup> and, accordingly, the state laws that effectively recognize marijuana property have full force and effect. The time has come to acknowledge that this conflict creates a hybrid property system: marijuana property exists under state law but not federal law. As a result, the executive, judicial, and legislative branches of each legalization state will respect and protect property rights in marijuana even though their federal counterparts will not.

For example, in *City of Garden Grove v. Superior Court*,<sup>143</sup> a California appellate court ordered that marijuana seized by police during a traffic stop be returned to the driver, who held a physician's approval to use marijuana for medical reasons. Acknowledging that the driver's "marijuana possession was legal under state law, but illegal under federal law,"<sup>144</sup> the court reasoned that the Controlled Substances Act did not preempt the California law on point. It accordingly held that "due process and fundamental fairness" required the return of the marijuana,<sup>145</sup> consistent with "the principles of federalism embodied in the United States Constitution."<sup>146</sup>

Recognition of the hybrid system is a first step toward mitigating the tension between the federal and state approaches. Once this practical reality is accepted, courts and scholars can begin charting the

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141. *Cf. Muridan v. Redl*, 413 P.3d 1072, 1081–82 (Wash. Ct. App. 2018) (affirming trial court's determination that proceeds from the sale of marijuana equipment constituted community-like property and were thus subject to "equitable property division" upon the termination of a couple's relationship).

142. *See also* OSBECK & BROMBERG, *supra* note 52, at 146–52.

143. 68 Cal. Rptr. 3d 656, 680 (Ct. App. 2008).

144. *Id.* at 670.

145. *Id.* at 680. *But see* Barrios v. Cnty. of Tulare, No. 1:13-CV-1665AWI/GSA, 2014 WL 2174746, at \*7 (E.D. Cal. May 23, 2014) (*contra*).

146. *City of Garden Grove*, 68 Cal. Rptr. 3d at 682.

legal terrain governed by each approach, and marijuana owners can structure their affairs to best protect their property rights.

## 2. Judicial Recognition of the System

The outline of the hybrid system can already be discerned in a handful of cases. No decision has expressly held that state law authorizes marijuana ownership despite conflicting federal law. But some courts have implicitly embraced this approach in cases dealing with property rights related to marijuana.<sup>147</sup>

The hybrid approach is reflected in certain decisions dealing with the vertical dimension of property rights. An example is *Schmidt v. County of Nevada*,<sup>148</sup> where a federal district court rejected the plaintiff's claim under the Constitution for damages following the destruction of his marijuana, even though his right to possession was protected by California's medical marijuana law. It reasoned that "plaintiff cannot recover damages as a result of the confiscation or destruction of marijuana because he had no cognizable property interest in the marijuana. Plaintiff asserts a due process claim under the *federal* Constitution in *federal* court where, under *federal* law, marijuana is undisputably [sic] illegal and contraband per se."<sup>149</sup> As a later federal court summarized in *Little v. Gore*:

[E]ven though "state law creates a property interest, not all state-created rights rise to the level of a constitutionally protected interest." With respect to medical marijuana, although California state law may create a property interest in the marijuana, California district [that is, federal] courts have found there is no protected interest *for purposes of the Fourteenth Amendment*.<sup>150</sup>

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147. See, e.g., *Barrios*, 2014 WL 2174746, at \*5 ("Although California may provide Barrios with the right to possess medical marijuana, federal law does not. Because marijuana is contraband under federal law, Barrios had no property interest that was protected by the Fourteenth Amendment due process clause."); *Mazin v. True*, No. 1:14-CV-00654-REB-CBS, 2015 WL 1228321, at \*2 (D. Colo. Mar. 16, 2015) ("The plaintiff argues that state law defines property rights and consideration of overlaying federal law is of no consequence when resolving his claims under the Fourth and Fourteenth Amendments. As a matter of law, this position is incorrect. 'Although the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.'" (quoting *Town of Castlerock v. Gonzales*, 545 U.S. 748, 757 (2005)).

148. No. 2:10-CV-3022FCD/EFB, 2011 WL 2967786, at \*7 (E.D. Cal. July 19, 2011).

149. *Id.* at \*6 (emphasis added).

150. 148 F. Supp. 3d 936, 955 (S.D. Cal. 2015) (quoting *Brady v. Gebbie*, 859 F.2d 1543, 1548 n. 3 (9th Cir. 1988)) (emphasis added). See also *River North Props., LLC v. City of Denver*, No. 13-CV-01410-CMA-CBS, 2014 WL 7437048, at \*5 (D. Colo. Dec. 30, 2014), (granting motion to dismiss plaintiff's claims on the basis that plaintiff had not pleaded a "cognizable

In contrast, the California appellate court in *City of Garden Grove v. Superior Court* mandated that local police return marijuana to the owner following its seizure because the “marijuana possession was legally sanctioned under *state law*.”<sup>151</sup>

Moreover, a few decisions implicitly utilize the hybrid approach in the horizontal dimension, recognizing the existence of marijuana property in litigation among private actors. For example, in *Green Earth Wellness Center v. Atain Specialty Insurance Co.*, a commercial marijuana grower sued its insurance company for compensation after smoke and ash damaged marijuana plants.<sup>152</sup> The policy provisions covered damage to “Business Personal Property.”<sup>153</sup> The federal district court denied the insurance company’s motion for summary judgment, reasoning that (1) “Property” as defined in the policy could include marijuana plants and (2) the policy exclusion for “Contraband” was “rendered ambiguous by the difference between the federal government’s *de jure* and *de facto* public policies regarding state-regulated medical marijuana.”<sup>154</sup>

Similarly, in *Green Cross Medical, Inc. v. Gally*, an Arizona appellate court refused to invalidate a lease between a landowner and a state-licensed medical marijuana dispensary operator on the theory that it was an illegal contract because it facilitated “possession, use, or sale of marijuana” in violation of the CSA.<sup>155</sup> In reaching this conclusion, the court emphasized “the federal government’s lack of interest in prosecuting individuals in compliance with [the state’s medical marijuana law], as well as a public policy that favors enforcement of the lease compliant with state law.”<sup>156</sup>

### 3. Contours of the System

Under the hybrid system, property rights in marijuana located within the borders of a legalization state should be treated like any other form of property under state law—no better and no worse. Assume again that farmer G grows marijuana in a legalization state in a manner that complies with state law. Her property rights should be recognized and enforced by the courts of that state in both the

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property interest” in the cultivation of marijuana under the federal Constitution).

151. *City of Garden Grove*, 68 Cal. Rptr. 3d at 680 (emphasis added).

152. 163 F. Supp. 3d 821, 823 (D. Colo. 2016).

153. *Id.* at 827.

154. *Id.* at 833.

155. 395 P.3d 302, 306 (Ariz. Ct. App. 2017).

156. *Id.* at 308.

horizontal and vertical dimensions, including the following sample situations.<sup>157</sup>

Parties to business transactions in legalization states should be entitled to rely on state law to protect their marijuana property. For example, the law should recognize the authority of attorneys-in-fact, conservators, corporate officers, guardians, partners, trustees,<sup>158</sup> and others to hypothecate, lease, sell, or otherwise transfer such property. Similarly, parties to contracts that relate to marijuana property must be entitled to rely on the validity of such contracts under state law, without concern that such a contract might be held invalid as illegal or against public policy.<sup>159</sup> And state courts should adjudicate disputes concerning title to marijuana.

Property rights in marijuana should also be respected in legalization states in situations where property is to be divided among co-owners. Thus, in divorce proceedings, marijuana property should be deemed to be community property for allocation in community property states<sup>160</sup> and marital property subject to equitable distribution in separate property states. For example, if H divorces I in a separate property state that has legalized marijuana, marijuana owned by H should be subject to equitable distribution. Similarly, courts should treat marijuana property like any other type of property when distributing assets pursuant to a will, trust, or intestate succession. Further, courts should allocate marijuana property like

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157. Similarly, the owner of marijuana property will be subject to all liabilities that are generally imposed on property. For example, creditors should be able to levy on such property to satisfy judgments.

158. *Cf. Green Cross Med., Inc. v. Gally*, 395 P.3d 302, 303 (Ariz. Ct. App. 2017) (trustee leased trust property to tenant for use as medical marijuana dispensary).

159. Even certain federal courts have refused to invalidate marijuana-related contracts on this basis. *See, e.g., Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821, 834–35 (D. Colo. 2016) (insurance policy); *Mann v. Gullickson*, No. 15-CV-03630-MEJ, 2016 WL 6473215, at \*7–9 (N.D. Cal. Nov. 2, 2016) (promissory note). *Cf. Kinetic Dev. LLC v. Sky Unlimited LLC*, No. 17-CV-0562-WJM-MLC, 2017 WL 6523512 (D. Colo. Nov. 22, 2017) (granting motion to remand case involving real estate purchase contract to state court on basis that no federal question existed, despite contingency in contract that buyer obtain a license to sell marijuana on the property). *See also Green Cross Med., Inc.*, 395 P.3d 302, 309 (refusing to invalidate lease). *But see Haeberle v. Lowden*, No. 2011CV709, 2012 WL 7149098, at \*5 (Colo. Dist. Ct. Aug. 8, 2012) (refusing to enforce contract for sale of marijuana). *See also Luke M. Scheuer, Are “Legal” Marijuana Contracts “Illegal”?*, 16 U.C. DAVIS BUS. L.J. 31 (2015).

160. *Cf. Muridan v. Redl*, 413 P.3d 1072, 1081–82 (Wash. Ct. App. 2018) (affirming trial court’s determination that proceeds from the sale of marijuana equipment constituted community-like property and were thus subject to “equitable property division” upon the termination of a couple’s relationship).

any other asset when dissolving a corporation, partnership, or other business entity, or partitioning cotenancy property.

Finally, state courts should provide the owner of marijuana property with the normal remedies that any owner has against tortious actions of third parties that injure property. For instance, if J negligently burns K's marijuana, K should be entitled to recover damages from J. Similarly, marijuana property should be recognized in the context of other tort actions, such as conversion and trespass.

However, under the hybrid system marijuana property is not recognized under federal law and thus receives no federal protection. Thus, in the vertical dimension, there is a risk that federal authorities may seize marijuana from a farmer like G in a legalization state, with no obligation to pay compensation or otherwise respect her property rights under state law. Given the federal government's anemic enforcement efforts in recent years, however, this risk may be more theoretical than real.

A more direct consequence of the hybrid system is that marijuana owners are deprived of access to federal courts and agencies in any matter relating to the vertical dimension of property rights. For example, despite lackluster enforcement of the federal criminal laws governing marijuana, federal courts actively continue to treat marijuana as contraband *per se* in civil litigation governed by federal laws that involve the vertical dimension—such as banking law, constitutional law, environmental law, and tax law.<sup>161</sup>

Finally, the system also affects the horizontal dimension of property rights under federal law to some degree. For example, farmer G could not file for bankruptcy because a federal court cannot administer assets that include marijuana without violating the CSA.<sup>162</sup> Nor could she obtain a federal trademark for her marijuana or marijuana products.<sup>163</sup>

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161. *See supra* notes 148–50.

162. *See, e.g.*, *In re Arenas*, 514 B.R. 887, 891 (D. Colo. 2014) (dismissing bankruptcy action filed by marijuana growers because its administration would involve “the Court and the Trustee in the Debtors’ ongoing criminal violation of the CSA”); *In re McGinnis*, 453 B.R. 770, 772–73 (D. Or. 2011) (refusing confirmation of reorganization plan that involved sale and cultivation of marijuana).

163. *Cf. In re Morgan Brown*, 110 U.S.P.Q.2d 1350 (T.T.A.B. 2016) (denying federal registration of trademark for store that would sell marijuana).

#### 4. Reflections on the System

The concept that marijuana property can exist within the territory of a particular state under state law—but not under federal law—is fraught with legal and geographical complexity. This schism will inevitably cause confusion and generate litigation.

For example, the extent to which federal courts will recognize marijuana ownership in situations governed by state law, if at all, remains hazy. It is conceivable that a federal court in a legalization state might defer to state law on the point when adjudicating a state law claim,<sup>164</sup> such as a diversity action stemming from intentional destruction of a marijuana crop.<sup>165</sup> Until this uncertainty is resolved, there is a significant risk that litigants will take strategic advantage of the hybrid system in forum shopping or removal proceedings. A marijuana owner in a legalization state will presumably avoid filing actions in federal court, given the danger that the court will not honor her property rights. Conversely, a party to a dispute with a marijuana owner may file a preemptive lawsuit in federal court with the hope that the choice of forum will effectively prohibit the owner from obtaining relief. Similarly, where a marijuana property owner sues in state court, the defendant may seek to remove the action to federal court—solely to benefit from the federal view that marijuana property cannot exist.

In situations where state and federal courts have concurrent jurisdiction—for example, a claim against a city arising under both the federal Due Process Clause and a parallel clause in the state constitution—presumably a state court in a legalization jurisdiction would recognize marijuana property, even though a federal court would not do so in the same setting. Yet this outcome is by no means certain.

Individuals and businesses involved in transactions relating to marijuana property can minimize the risks inherent in the hybrid system by utilizing contract clauses that mandate arbitration, mediation, or other forms of alternative dispute resolution. Where the selected method requires application of law, the contract should contain a choice of law clause that selects the law of the legalization

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164. *Cf. Green Earth Wellness Ctr., LLC*, 163 F. Supp. 3d 821, 827–28 (treating marijuana plants as covered property under an insurance policy).

165. Just as marijuana is generally considered to be “property” for the purposes of property crimes such as theft, the same policy concern against intentional misconduct should extend to intentional torts that cause damage. *See supra* note 48.

state to govern disputes. Even if the parties to a transaction prefer not to use alternative dispute resolution, their contract should at least include such a choice of law clause.

The hybrid system also produces geographical uncertainty. The Constitution provides that Congress has broad power to enact legislation governing activities on lands owned by the federal government.<sup>166</sup> Thus, even within a legalization state, federal law will govern activities on public lands within that state that are owned by the federal government.<sup>167</sup> These include lands controlled by the National Park Service, the Forest Service, the Bureau of Land Management, the Department of Defense, and other federal agencies. In fact, the federal government owns huge tracts of land in states that have legalized marijuana. For example, federal lands comprise 45.8% of California and 35.9% of Colorado.<sup>168</sup> As a practical matter, it may be difficult for individuals and entities to know where marijuana property is legally recognized, even within legalization states. As an illustration, lands managed by the Bureau of Land Management are frequently leased to private parties for grazing or mineral extraction; the boundaries between these lands (subject to federal law) and adjacent private-owned parcels (subject to state law) may not be marked.

In sum, the hybrid system effectively creates two inconsistent sets of rules for marijuana property within a legalization state. Marijuana property can exist under state law—except on lands owned by the federal government. At the same time, under federal law, marijuana property will not be recognized by federal courts under most circumstances, nor will it be honored by other branches of the federal government.

### III. STATE V. STATE: THE MARIJUANA PROPERTY CONUNDRUM

#### A. *Interstate Conflicts*

Marijuana property conflicts can also arise in the interstate context.<sup>169</sup> Unsurprisingly, the categories of tangible things in which

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166. See U.S. CONST. art I, § 8, cl. 17.

167. *Id.* art IV, § 3, cl. 2.

168. Daniel Johnson & Pratheek Rebala, *Here's Where the Federal Government Owns the Most Land*, TIME, Jan. 5, 2016, <http://time.com/4167983/federal-government-land-oregon/>.

169. This Part assumes that the CSA does not preempt state legalization statutes, for the reasons discussed in Part II.

property rights may exist vary somewhat among states. For example, some states permit private ownership of certain animals (e.g., lions)<sup>170</sup> or drugs (e.g., peyote),<sup>171</sup> while others do not.<sup>172</sup> Historically, litigation involving conflicts between such state laws has been rare. But given the size and growth rate of the legal marijuana industry—and the sharp disagreement among state laws governing marijuana—it is inevitable that interstate conflicts will occur.

Many states still follow the view that the possession or transfer of marijuana is a criminal offense. For instance, Idaho classifies marijuana as a Schedule I substance under its controlled substances law.<sup>173</sup> It is unlawful for any person to cultivate, transfer, or possess marijuana in Idaho,<sup>174</sup> and any such marijuana is “subject to forfeiture.”<sup>175</sup> Thus, marijuana is contraband per se in the state and, accordingly, property rights cannot exist in marijuana located within its borders.<sup>176</sup>

Consider an example of a potential interstate conflict. Suppose L and M are married in a separate property state that recognizes marijuana property. L operates a legal business that sells recreational marijuana in that state; M later moves to another separate property state that does not recognize marijuana property, where he establishes a new domicile and files for divorce. Will the forum state treat L’s marijuana property as “property” for purposes of equitable distribution and accordingly award a share to M?

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170. See Born Free USA, *Summary of State Laws Relating to Private Possession of Exotic Animals*, [http://www.bornfreeusa.org/b4a2\\_exotic\\_animals\\_summary.php](http://www.bornfreeusa.org/b4a2_exotic_animals_summary.php) (last updated May 2016) (listing state laws on ownership of exotic animals).

171. See David Bogen & Leslie F. Goldstein, *Culture, Religion and Indigenous People*, 69 MD. L. REV. 48, 61–62 (2009) (discussing the exemption of religious use of peyote from federal drug laws and most state drug laws). Although peyote is a Schedule I drug under the CSA, there is a regulatory exception for its use in religious ceremonies. 21 C.F.R. § 1307.31 (2018).

172. For example, Connecticut and Kentucky prohibit private ownership of lions, with special exceptions for zoos and other research institutions. See Born Free USA, *supra* note 170. See also Bogen & Goldstein, *supra* note 171, at 61–62 (noting that some states did not allow the use of peyote for any purpose before the American Indian Religious Freedom Act Amendments of 1994 were passed).

173. IDAHO CODE ANN. § 37-2705(d)(19) (West 2018) (listing the substance as “marihuana”).

174. *Id.* § 37-2732(a) provides that “it is unlawful for any person to manufacture or deliver . . . a controlled substance.” The term “manufacture” includes “propagation” or growing, while the term “deliver” is defined as “the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance.” *Id.* § 37-2701(g), (s). Further, “[i]t is unlawful for any person to possess a controlled substance.” *Id.* § 37-2732(c).

175. *Id.* § 37-2744(a)(1).

176. See *supra* text accompanying notes 71–72.

The same issue can arise between a full legalization state and a medical marijuana state. Applying this variant to the L-M hypothetical above, would the forum state that has only legalized medical marijuana award M any share in L's recreational marijuana property?<sup>177</sup>

The common theme in these examples is that litigation arises from a relationship that involves two states: the state where the legal marijuana is located and the forum state that has a more restrictive approach.<sup>178</sup> It is unlikely that interstate conflicts would arise between two states that share the same legalization approach, either two full legalization states or two medical marijuana states. Similarly, such interstate disputes will not occur between two ban states because neither would recognize marijuana property.

This interstate conflict concern applies with equal force to many other situations involving property rights, including: the authority of attorneys-in-fact, conservators, corporate officers, guardians, partners, trustees, and others to hypothecate, lease, sell, or otherwise transfer marijuana property; the validity of contracts for these purposes; disputes concerning title to marijuana; distribution of marijuana property pursuant to a will, trust, or intestate succession; dissolution of corporations, partnerships, and other business entities that own marijuana property; partition of cotenancies owning marijuana property; and tort actions stemming from injury to marijuana.

These situations all present a choice-of-law question: Will the forum state utilize its own law or the law of the legalization state?<sup>179</sup> Regrettably, modern choice-of-law theory is in “considerable disarray,” while “[t]he disarray in the courts may be worse” because a number of approaches are currently in use.<sup>180</sup> At bottom, however,

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177. Another variant situation is a conflict between a ban state and a Native American tribe that legalizes marijuana on its reservation in that state. See OSBECK & BROMBERG, *supra* note 52, at 166–71.

178. See, e.g., *Ginsburg v. ICC Holdings*, No. 3:16:CV-2311-D, 2017 WL 5467688, at \*8 (N.D. Tex. Nov. 13, 2017) (refusing to dismiss breach of contract claim relating to defendants' medical marijuana business where contract selected Illinois law, which authorized medical marijuana, but suit was brought in Texas because “defendants fail to cite any authority in support of their apparent position that, under federal and Texas law, a contract with the purpose of funding an organization that is violating or intends to violate federal law is automatically void or unenforceable”).

179. This analysis assumes that federal law does not preempt marijuana legalization statutes, as discussed in Part II.D above.

180. WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS 285 (4th ed. 2013).

interstate disputes related to marijuana property present two basic choice-of-law variants. First, where the applicable choice-of-law rule directs the forum state to use the law of the legalization state, should the forum state refuse to do so based on its own public policy? Second, where the applicable rule permits the forum state to use its own law, should it instead use the law of the legalization state as a matter of comity?

## B. *Legalization State v. Ban State*

### 1. Situs Law and Public Policy

In most relevant situations, the applicable choice-of-law rule will direct the forum state to use the law of the legalization state—thereby recognizing marijuana property. The forum state should not refuse to do so based on a public policy objection.<sup>181</sup>

As a general rule, ownership interests in a tangible thing are determined by the law of the state that “has the most significant relationship to the thing and the parties” in litigation.<sup>182</sup> The Restatement (Second) of Conflicts of Law provides that seven principles should be used in making this determination: (a) “the needs of the interstate or international system;” (b) “the relevant policies of the forum;” (c) “the relevant policies of other interested states and the relative interests of other states in the determination of the particular issue;” (d) “the protection of justified expectations;” (e) “the basic policies underlying the particular field of law;” (f) “certainty, predictability and uniformity of result;” and (g) “ease in the determination and application of the law to be applied.”<sup>183</sup> This analysis usually results in the forum state using the law of the state where the particular thing is located. Thus, a leading treatise concludes that “[s]itus law is likely to be most appropriately concerned with goods within the confines of the state.”<sup>184</sup> Under the Restatement approach, the law of the legalization state will usually

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181. Of course, a litigant may choose not to raise such an objection for strategic reasons. The plaintiff who brings a divorce action in a ban state against a spouse who operates a marijuana business in a legalization state, for example, would benefit from avoiding use of the forum state law.

182. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 222 (AM. LAW INST. 1971).

183. *Id.* § 6

184. PETER HAY ET AL., CONFLICT OF LAWS 1217 (6th ed. 2018). *Cf. Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 84 (2d Cir. 1998) (holding that Russian law determined ownership of a copyright, but that United States law determined whether the copyright was infringed in the United States).

have the most significant relationship to the marijuana and the parties to the dispute, and thus will normally govern, particularly because the marijuana is physically located outside of the forum state's territory.<sup>185</sup>

In addition, choice-of-law rules will direct the forum state to use the law of the legalization state in a number of specific situations. For example, the validity and effect of a contract for the sale of goods—including marijuana—is typically governed by the choice-of-law clause in the contract. Given the risk of interstate conflicts, prudent contracting parties will insert a clause selecting the law of the legalization state to govern disputes.<sup>186</sup> Similarly, the validity of security interests in personal property are governed by the law of the state where the debtor resides, which in the context of marijuana property litigation would usually be a legalization state.<sup>187</sup> A parallel rule applies to divorce proceedings, where interests in personal property are usually determined by the law of the marital domicile when the asset is acquired.<sup>188</sup> Another example is a tort action concerning injury to tangible personal property, which is governed by the law of the state where the injury occurs.<sup>189</sup>

However, it is well settled that the forum state may utilize its law when the use of another state's law would violate its own public policy.<sup>190</sup> As the Supreme Court noted in *Baker v. General Motors Corporation*, “[t]he Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’”<sup>191</sup> Moreover, the Court explained, “[a] court may be guided by the forum State's ‘public policy’ in determining the law applicable to a controversy.”<sup>192</sup>

185. The conflict between federal law and state law in legalization states arises because both the federal government and the relevant state government share sovereign authority over the territory where the marijuana is located. In the context of the interstate conflicts, however, the forum state has no sovereignty over the territory where the marijuana is located and, accordingly, lacks substantial justification for utilizing its own law.

186. U.C.C. § 1-301(a) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

187. *Id.* § 9-301(1).

188. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 258(2) (AM. LAW INST. 1971).

189. *Id.* § 147.

190. Unfortunately, “[p]ublic policy,” as every law student well knows . . . is all too often employed as a talisman to avoid reasoning on the underlying issues.” RICHMAN, *supra* note 180, at 185.

191. 522 U.S. 222, 232 (1998) (quoting *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)).

192. *Id.* at 233 (citing *Nevada v. Hall*, 440 U.S. 410, 421–24 (1979)).

Yet the parties to a consensual transaction relating to marijuana property—as in the contract examples above—can minimize the risk of a successful public policy objection by using a choice-of-law clause that selects the law of the particular legalization state.<sup>193</sup> Where the parties have utilized such a clause, the scope of the exception is narrow; the clause must be enforced unless the “chosen state has no substantial relationship to the parties or the transaction” or application of the chosen law would be “contrary to a fundamental policy of a state which has a materially greater interest in the determination of the particular issue.”<sup>194</sup> It would be difficult to argue successfully that this exception applies to a transaction in a legalization state that involves marijuana property. In this situation, the forum state has no relationship to the transaction and no substantial relation to any parties based in a legalization state. Further, the legalization state would have the “greater interest” in applying its own public policy in favor of marijuana property.

The public policy exception applies with somewhat greater force where no choice-of-law clause is involved—for example, in the divorce and tort illustrations discussed above. Restatement (Second) of Conflicts of Law § 90 provides that “[n]o action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.”<sup>195</sup> But the Comments to this section specify that “[a]ctions should rarely be dismissed because of the rule of this Section,” quoting Justice Cardozo’s conclusion that such a dismissal should not occur unless failure to do so “would violate some fundamental principle of justice, some prevalent conception of morals, some deep-seated tradition of the commonwealth.”<sup>196</sup>

A state law that criminalizes the possession or transfer of marijuana clearly embodies a public policy against such conduct. However, in a marijuana property dispute it is unlikely to qualify as a strong public policy. First, although a ban state may have a legitimate interest in enforcing this policy against conduct within its own

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193. *Cf. Ginsburg v. ICC Holdings*, No. 3:16:CV-2311-D, 2017 WL 5467688, at \*5 (N.D. Tex. Nov. 13, 2017) (parties to a contract relating to a medical marijuana business selected Illinois law, which recognized medical marijuana, to govern but suit was brought in Texas, which did not).

194. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187(2)(a), (b) (AM. LAW INST. 1971).

195. *Id.* § 90.

196. *Id.* cmt. c (quoting *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 202 (N.Y. 1918)).

territory, it has little or no interest in doing so when the conduct occurs outside of its borders. Second, given the federal government's anemic enforcement of the CSA, some federal courts have rejected public policy attacks in cases relating to marijuana property<sup>197</sup>—and the forum state may have similar misgivings. Finally, application of the marijuana ban policy might conflict with a more important policy of the forum state on the facts of the particular case. For instance, in a divorce action, a spouse domiciled in a legalization state might argue that her marijuana property should not be deemed “property” for purposes of equitable distribution given the forum's public policy—but this would disadvantage the spouse domiciled in the forum state, and thus conflict with the policy of allowing a resident spouse to receive a fair share of marital assets.<sup>198</sup> In sum, a public policy objection to the use of a legalization state's law is unlikely to be successful.<sup>199</sup>

Finally, even if a public policy objection were otherwise appropriate, its use might violate the Due Process Clause. The Supreme Court explained in *Allstate Insurance Co. v. Hague* that “if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional.”<sup>200</sup> An example is *John Hancock Mutual Life Insurance Co. v. Yates*, where a New York resident purchased an insurance policy from a

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197. See, e.g., *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821, 835 (D. Colo. 2016); *Mann v. Gullickson*, No. 15-CV-03630-MEJ, 2016 WL 6473215, at \*5 (N.D. Cal. Nov. 2, 2016).

198. Alternatively, suppose that a resident of a ban state intentionally destroys marijuana in a legalization state, and the owner then sues for damages in the ban state. Applying the anti-marijuana policy on these facts would conflict with the forum state's own presumed public policy against allowing a person to intentionally injure property owned by another. Even ban states will prosecute a person who steals marijuana from its possessor because this conduct conflicts with the public policy against theft. See *supra* note 48.

199. In contrast, a ban state is clearly required to enforce a judgment issued by a legalization state that relates to marijuana property, despite a public policy concern. Under the Full Faith and Credit Clause of the Constitution, each state is obligated to respect the “judicial Proceedings” of other states. U.S. CONST. art. IV, § 1. There is no public policy exception to this rule. See *Fauntleroy v. Lum*, 210 U.S. 230, 239 (1908) (White, J., dissenting) (“The court now reverses on the ground that the due faith and credit clause obliged the courts of Mississippi, in consequence of the action of the Mississippi court, to give efficacy to transactions in Mississippi which were criminal, and which were against the public policy of that state.”); see also RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 117 (AM. LAW INST. 1971) (stating that such a judgment must be enforced “even though the strong public policy of the [forum] State would have precluded recovery in its courts on the original claim”).

200. 449 U.S. 302, 310–11 (1981) (plurality opinion); see also *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930) (noting that the forum state's choice of law “may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them”).

Massachusetts corporation, and the insured's widow later moved to Georgia where she brought suit on the policy under Georgia law.<sup>201</sup> On these facts, the Court held that application of Georgia law was unconstitutional due to the state's de minimis connection.<sup>202</sup> Similarly, if two parties enter into a contract related to marijuana property in a legalization state, without a choice-of-law clause, and one later moves to a ban state where he is sued for breach of contract, this contact would probably be too minor to allow the use of the ban state's law.

## 2. Forum Law and Comity

In some situations, a choice-of-law rule will authorize the forum state to use its own law in cases involving marijuana—most commonly in connection with the division or distribution of property. For example, the law of the testator's domicile at death usually determines whether a will transfers any legal interest in tangible personal property such as marijuana,<sup>203</sup> and also governs rights to such property that pass through intestate succession.<sup>204</sup> Similarly, forum law normally governs the dissolution of a corporation incorporated in that state, including the distribution of its property.<sup>205</sup> Yet a ban state's mechanical use of its own law in such a situation produces a troublesome result: the court will not recognize marijuana property located in a legalization state as “property” and hence will not distribute it to the putative owners. As a result, title to such assets will be either appropriated by adverse possession<sup>206</sup> or escheat to the legalization state.<sup>207</sup> Either outcome will injure residents of the ban state and unjustly enrich residents of the legalization state.

Under these circumstances, the ban state might use the legalization state's law as a matter of comity—not because this is

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201. 299 U.S. 178, 179 (1936).

202. *Id.* at 182–83.

203. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 263(1) (AM. LAW INST. 1971); *see also* *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309, 313–16 (S.D.N.Y. 2007) (holding that law of domicile at death determined whether testatrix held a right of publicity that could be devised). However, a testator can avoid the risk that a ban state might invalidate a devise of rights in marijuana property by including a choice-of-law clause in the will that directs the use of the law of a legalization state. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 264(1) (AM. LAW INST. 1971) (providing that a will that devises “an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will”).

204. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 260 (AM. LAW INST. 1971).

205. HAY, *supra* note 184, at 1355.

206. *See* SPRANKLING, *supra* note 11, at § 7.02.

207. *See, e.g.*, CAL. CIV. PROC. § 1410 (West 2007).

required by choice-of-law rules, but rather because the court determines that it is appropriate under the circumstances.<sup>208</sup> While observing that attorneys who do not specialize in conflict of laws may “find the field mystifying, frustrating, and a bit silly,” Larry Kramer suggests a number of canons that courts could adopt to clarify the subject.<sup>209</sup> Two of those canons might be used in cases involving marijuana property: one based on obsolescence, the other on reliance.

First, Kramer argues that “[w]here one of two conflicting laws is obsolete (i.e., inconsistent with prevailing legal and social norms in the state that enacted it), the other law should be applied.”<sup>210</sup> A state statute that criminalizes marijuana possession and transfer is likely to be inconsistent with social norms even in a ban state because marijuana use is increasingly accepted. Further, even in such a state, the statute is unlikely to be enforced with vigor.

Second, he suggests that “[w]here two laws conflict, but the parties actually and reasonably relied on one of them, that law should be applied.”<sup>211</sup> In many situations involving marijuana property, the parties will have relied on the belief that such property located in a legalization state would be judicially protected. For example, the partners who invest in marijuana assets or the testator who devises such property presumably all share the same good faith belief that their ownership rights will be respected.

### C. *Full Legalization State v. Medical Marijuana State*

The choice-of-law issues discussed above may also arise in litigation involving a full legalization state and a medical marijuana state because the scope of their respective laws will differ. For instance, assume that N and O are married in a separate property state that has legalized marijuana for all purposes. O establishes a farm that legally grows marijuana for recreational use, and N then moves to a state that only permits marijuana cultivation under tightly controlled circumstances and restricts marijuana use to medical purposes. When N files for divorce, will the forum state recognize O’s

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208. See generally Joseph William Singer, *Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV. 1923 (discussing the role of comity in conflict of laws).

209. Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 344 (1990).

210. *Id.* at 334–35.

211. *Id.* at 336–37.

marijuana property as “property” for purposes of the divorce if it was grown in a manner that violates the forum state’s law?

Where the applicable choice-of-law rule directs the forum state to use the legalization state’s law, it seems quite unlikely that a public policy objection would succeed. Both states would share the same view that marijuana property should be recognized as a general matter, even though they disagree on the parameters of ownership. Such disagreement can hardly be viewed as a convincing public policy objection. A helpful analogy is found in *Intercontinental Hotels Corporation v. Golden*, where the plaintiff brought suit in New York to enforce I.O.U.s given by the defendant in payment of gambling debts legally incurred at a casino in Puerto Rico.<sup>212</sup> Although gambling was generally illegal under New York law, the court refused to reject the use of Puerto Rico law on public policy grounds, noting that the legalization of limited forms of gambling in New York— “pari-mutuel betting and the operation of bingo games”—indicated that “the New York public does not consider authorized gambling” to violate public policy.<sup>213</sup> Similarly, the partial acceptance of legalized marijuana by a medical marijuana state indicates that it does not have a strong public policy against marijuana as a general matter.

Similarly, where the forum state is authorized to use its own law, the argument that it should defer to the legalization state’s law as a matter of comity is strong. Kramer’s obsolescence canon applies with even greater force to a medical marijuana state, since such a state already recognizes marijuana property to some extent. The reliance canon is also helpful in a medical marijuana state when one or more of the affected parties have relied on the law in a legalization state in entering into a contract or other relationship concerning marijuana located in such a state.

#### IV. THE FUTURE OF MARIJUANA PROPERTY

##### A. *End of Marijuana Détente?*

The legalization wave shows no signs of abating. Given the overwhelming popular support for medical marijuana, it is likely that additional states will adopt this position in the future. Moreover,

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212. 203 N.E.2d 210, 211 (N.Y. 1964).

213. *Id.* at 213.

campaigns are in progress in a number of states to legalize recreational marijuana.<sup>214</sup>

The current marijuana détente between the federal government and legalization states may ultimately be ended by aggressive federal enforcement of the CSA. But the more likely outcome is that the status quo will continue into the foreseeable future—as it has for many years. The possibility of future legalization should not overshadow the importance of grappling with the federal-state and interstate conflicts discussed above. Eventually, however, some form of new federal legislation may endorse the legalization effort, either by sanctioning marijuana on a nationwide basis or by allowing each state to decide the issue for itself. Under either approach, there is a risk that marijuana property will not be fully protected.

### B. *Impact of Nationwide Legalization*

Because most Americans now favor national legalization, in the long run the current impasse is likely to be resolved by federal legislation that legalizes the possession and transfer of marijuana for all purposes throughout the United States.<sup>215</sup> Congress clearly has the power to adopt such legislation under its authority to regulate interstate commerce. In *Gonzales v. Raich*, the Supreme Court rejected the claim that the CSA’s “prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes” was not authorized by the Commerce Clause.<sup>216</sup> It stressed that Congress was empowered to “regulate purely local activities” that have a substantial effect on interstate commerce, which includes the cultivation “for home consumption, of a fungible commodity for which there is an established, albeit illegal, interstate market.”<sup>217</sup> Under this logic, the legalization of marijuana cultivation, distribution, and possession

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214. These states include Connecticut, Illinois, and New Jersey. See Christopher Keating, *Marijuana taxation clears committee, setting stage for final legalization bill*, HARTFORD COURANT, May 2, 2019, 2019 WLNR 13597382; Tom Schuba, *Full, 300-page pot legalization bill could be introduced in Illinois within days*, CHI. SUN TIMES, Apr. 30, 2019, 2019 WLNR 13512198; Brent Johnson, *Sweeney: ‘50-50’ chance pot bill passes in May*, STAR-LEDGER, May 1, 2019, 2019 WLNR 13518623.

215. Another possibility is that national legislation would legalize the possession and transfer of marijuana only for medical purposes. This might be an interim step toward national legalization for all purposes. However, national legalization only for medical purposes would leave open the issues discussed in Part III.C above.

216. 545 U.S. 1, 15 (2005).

217. *Id.* at 18.

would similarly be valid, even as to “purely local activities” within a particular state.

Under this national legalization approach, property rights would clearly exist in marijuana in all states as a matter of federal law.<sup>218</sup> Presumably, such a statute would expressly provide that it preempts any contrary state laws, so that no uncertainty about preemption would arise. This would end the current impasse, but potentially leave an open issue: Would the recognition of marijuana property have retroactive effect?

There is a compelling argument that marijuana property already exists today in legalization states, as discussed in Part II above. However, a national legalization statute should retroactively validate marijuana property rights to obviate any lingering uncertainty. Today millions of people and tens of thousands of businesses rely on the existence of these rights as a practical matter, even though the legal status of marijuana property remains officially unsettled.<sup>219</sup>

Federal courts traditionally presume that a statute does not have retroactive effect “absent clear congressional intent favoring such a result.”<sup>220</sup> This presumption is applied most frequently in cases involving new legislation “affecting contractual or property rights, matters in which predictability and stability are of prime importance.”<sup>221</sup> In the context of marijuana property, however, predictability and stability would be enhanced—not imperiled—by retroactive application. For this reason, a court might choose not to apply the presumption. To avoid uncertainty, however, Congress should expressly provide that a national legalization statute has retroactive effect.

### C. *Impact of State-Option Legalization*

The more likely near-term approach would be federal legislation that, by analogy to the historic treatment of alcoholic beverages, amends the CSA to provide that each state may legalize the possession and transfer of marijuana at its option.<sup>222</sup> This recalibration could be accomplished through legislation that deletes the reference to “marihuana” in Schedule 1 of the CSA, without preempting

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218. See *supra* the analysis in Part II.

219. See *supra* text accompanying notes 57–58.

220. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

221. *Id.* at 271.

222. See Chemerinsky et al., *supra* note 4, at 116–22 (advocating this approach).

contrary state laws.<sup>223</sup> Of course, this state-option approach would not resolve the interstate conflict problems discussed in Part III above.

Driven by religious beliefs and health concerns, early twentieth-century reformers mounted a successful campaign to amend the Constitution to ban alcoholic beverages. In 1919, the Eighteenth Amendment accordingly prohibited the “manufacture, sale, or transportation of intoxicating liquors within [and] the importation thereof into . . . the United States . . . for beverage purposes . . . .”<sup>224</sup> The Twenty-first Amendment repealed this prohibition in 1933 but provided that any state could restrict such beverages at its option.<sup>225</sup> Its second clause stated that the “transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited.”<sup>226</sup> Accordingly, today each state has the power to restrict the distribution and use of alcoholic beverages.<sup>227</sup> This power is typically delegated to the county level and, as a result, today “dry counties” exist in some states where the sale of alcohol is either prohibited or tightly controlled.<sup>228</sup>

A confluence of public opinion, political reality, and federalism theory is fueling movement toward this state-option approach.<sup>229</sup> Although there is determined opposition to national legalization,<sup>230</sup> a recent poll shows that 74% of Americans favor “protecting states that

223. Alternatively, marijuana could be removed from Schedule I by an administrative decision of the Drug Enforcement Administration. For a discussion of past efforts to administratively reclassify marijuana, see UELMEN & KREIT, *supra* note 63, at § 3:85. This approach would not resolve the interstate conflicts discussed in Part III above.

224. U.S. CONST. amend. XVIII, § 1. Notably, the amendment did not prohibit the possession of alcoholic beverages. As a result, alcoholic beverages were not classified as contraband *per se* and could thus be the subject of property rights.

225. U.S. CONST. amend. XXI, § 1.

226. *Id.* § 2 (emphasis added).

227. *But see* Granholm v. Heald, 544 U.S. 460, 493 (2005) (holding that states do not have the power to prohibit interstate shipments of alcohol).

228. *See* Hunter Schwarz, *Where in the United States you can't purchase alcohol*, WASH. POST, Sept. 2, 2014, <https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/02/where-in-the-united-states-you-cant-purchase-alcohol/> (identifying ten states that allow counties to criminalize the sale or purchase of alcohol).

229. Bills implementing this approach have been introduced in Congress. *See, e.g.*, Marijuana Freedom and Opportunity Act, S. 3174, 115th Cong. (2018); Strengthening the Tenth Amendment Through Entrusting States Act, S. 3032, 115th Cong. (2018); *see also* Compassionate Access, Research Expansion, and Respect States Act of 2017, H.R. 2920, 115th Cong. (2017) (providing an exception for marijuana use for medical purposes if allowed by state law).

230. Quinnipiac University Poll, *supra* note 138. Although 63% of Americans favor the national legalization of marijuana, most Republicans disagree: 41% favor this step, while 55% oppose it. *Id.*

have legalized medical or recreational marijuana from federal prosecution.”<sup>231</sup> A variety of political figures,<sup>232</sup> including President Trump,<sup>233</sup> have expressed support for this approach because it accommodates the current political reality that states remain divided on two key questions: (1) Should marijuana be legalized at all? (2) If so, should it be legalized only for medical use or also for recreational use? Finally, this approach is consistent with our tradition of federalism, under which states are afforded broad discretion in areas of social and economic policy. As the Supreme Court acknowledged in *Arizona State Legislature v. Arizona Independent Restricting Commission*, it “long recognized the role of the States as laboratories for devising solutions to difficult legal problems.”<sup>234</sup>

Under the state-option approach, property rights in marijuana would clearly exist within legalization states because it would not be contraband per se under federal law. But presumably some states would retain their existing laws that criminalize its possession and transfer; as a result, property rights in marijuana would not exist in those states. This creates the risk that marijuana property conflicts may arise between legalization states and ban states, despite the solutions analyzed in Part III above.

Accordingly, federal legislation adopting the state-option approach should expressly provide that ban states must respect the existence of marijuana property in legalization states when interstate conflicts occur, whether they arise from business transactions or personal relationships. This would preclude a ban state from applying its own law to effectively nullify property rights in marijuana located outside of its borders.<sup>235</sup>

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231. *Id.* Notably, the same poll indicated that 52% of Republicans favor this approach.

232. See, e.g., Dan Adams, *Let states set own pot policies, Senator Warren says as she files bill to bar federal interference*, BOSTON GLOBE, June 7, 2018, <https://www.bostonglobe.com/2018/06/07/sen-warren-pushes-for-federal-clarity-marijuana/FhYzWQa6TJd4kEy9FN0z7I/story.html> (discussing support for state option approach by Senators Elizabeth Warren and Cory Gardner).

233. Evan Halper, *Trump inclined to back ending pot ban*, L.A. TIMES, June 9, 2018, 2018 WLNR 17754974 (discussing President Trump saying that he would probably support a bill that uses the state-option approach).

234. 135 S. Ct. 2652, 2673 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 211 (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may . . . serve as a laboratory; and try novel social . . . experiments without risk to the rest of the country.”).

235. In addition, legislation implementing this approach should be retroactive for the reasons discussed in Part IV.B.

## CONCLUSION

In sum, marijuana can be owned under state law despite conflicting federal law. Yet the hybrid property system produced by this divergence will generate uncertainty—and thus litigation—until either judicial decisions better chart the terrain between state and federal law or marijuana property is legalized through nationwide legislation. In the interim, legalization states and ban states will struggle with a similar challenge in the interstate setting.

More broadly, sovereign conflicts over the existence of property rights are inevitable in our federal system. The rights recognized by a particular state will sometimes be inconsistent with federal law or with the law of other states. After the current impasse over marijuana property is finally resolved, the problem will recur in other contexts. Although the question of marijuana ownership has unique facets, the approaches analyzed in this Article may provide a useful framework for navigating future conflicts.

Given the dominant role that state law plays in defining property rights under the Tenth Amendment, federal preemption of such rights should rarely occur. When it does, federal and state authorities will be confronted with a hybrid system where property exists under state law but not under federal law. But ultimately these conflicting sovereigns will need to accept a certain amount of inconsistency between their approaches.

Conflicts between states over property rights raise different problems due to the impossibility of preemption. Private actors can circumvent this jurisdictional inconsistency to some extent through litigation strategy, choice-of-law clauses, or alternative dispute resolution techniques. Where these approaches are not used, the forum state should give appropriate deference to the law of the situs state, consistent with the traditional view that the situs state has the greater interest in the application of its own law.

Ultimately, federalism is “messy, untidy, and always a little out of control,” as Charles Handy observes.<sup>236</sup> Our goal in dealing with marijuana ownership should be to reduce the systemic friction produced by federal-state conflicts and interstate conflicts, while appreciating that complete harmonization of property law doctrines is

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236. CHARLES HANDY, *THE AGE OF PARADOX* 111 (1994).

both unlikely to occur and arguably counterproductive given the traditional role of the states as laboratories of democracy.