FROM WHEAT TO MARIJUANA: REVISITING THE FEDERALISM DEBATE POST-*GONZALES V. RAICH*

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I. INTRODUCTION

This commentary emanates from my symposium presentation.[1] Thus, this brief monograph, edited from my live remarks will deviate from a traditional full length law review article, but will form the basis for an upcoming full length law review article. My intention in this limited scope is to identify some of the main guideposts towards developing a broader trajectory for state level marijuana reform. More specifically, my observations are intended to illuminate the federalism debate over marijuana reform by presenting a snapshot of law's complexity that emerges from jurisdictional conflicts. The focal point of current marijuana debate resides on federalism—the separation of state and federal government power. Let us explore the landscape.

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1. Saby Ghoshray, *Tenth Amendment Revisited: Exploring the Tension with the Commerce Clause through the Prism of State's Right to Decriminalize*, Wayne Law Review Symposium (Jan. 27, 2012).

The past decade has witnessed a growing movement to legalize marijuana, especially for medicinal purposes. This emerging national consensus is revealed in identifying more than two-thirds of the states in the Union developing favorable laws related towards prohibition and criminalization of marijuana.[2] Furthermore, more than one-third of the states have engaged in some form of experimentation by allowing medical marijuana in specific instances and decriminalizing the act in controlled circumstances.[3] However, when states' efforts to decriminalize medical marijuana usage come face-to-face with federal laws' criminal sanctions, the marijuana debate takes a more contentious hue. This is predominantly due to the prevalence of vague statutes in those states.[4] Not only do these vague statutes make some state laws ineffective, but increasingly states find themselves on a collision course with various voter-approved decriminalization and legalizations, or via state legislations.[5] On the contrary, under federal law, there is a blanket prohibition on all marijuana related activities, per the Controlled Substances Act (CSA).[6] Against this backdrop of a classic conflict between federal power and state right percolating within the marijuana legalization debate, I aim to uncover some of the interpretative dimensions of this conflict.

Looking at the national canvas at various state levels, it is important to keep in mind that sixteen states and the District of Columbia allow medicinal usage of marijuana.[7] Yet, our collective construct is punctuated by instances of federal encroachment against states' rights. For example, in the aftermath of the passage of Proposition 215[8] there were federal raids in California involving agents intruding upon private premises and destroying state-sanctioned dispensaries.[9] Similarly, battle lines have been drawn in states like, Montana, Connecticut, and

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2. MARIJUANA POLICY PROJECT, *State-By-State Medical Marijuana Laws: How to Remove the Threat of Arrest* 2 (2008), *available at* http://www.mpp.org/assets/pdfs/download-materials/SBSR_NOV2008_1.pdf.

3. *Id.*

4. *Id.* at O-8.

5. *Id.* at O-8-9.

6. 21 U.S.C.A. §§ 801-971 (West 2010). The Controlled Substances Act (CSA) was enacted into law via the Comprehensive Drug Abuse Prevention and Control Act of 1970.

7. Michael Vitiello, *Why the Initiative Process Is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215*, 43 MCGEORGE L. REV. 63, 76 (2012).

8. In 1996, the California voters passed the Compassionate Use Act, also known as Proposition 215. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2012).

9. MARIJUANA POLICY PROJECT, *supra* note 2, at O-11.

Michigan.[10] At times, through ballot initiatives, or through legislative initiatives, state actions are beginning to come into conflict with the federal power. It is important to ask, why are the states on such a collision course? As the broad power enshrined within the CSA invokes a sweeping generalization, marijuana is considered a "drug" under Schedule 1 and thus, subject to criminal sanctions.[11] Schedule 1 is more encompassing, which allows federal power of the CSA to criminalize various medicinal usage of marijuana prescribed by doctors, and sanctioned by the respective states.[12]

The narrative of legalization has two sides. While one side revolves around decriminalization effort by the states, the other side is premised on legalization initiatives by other states.[13] If we focus on decriminalization, questions arise as to what would be the prospective trajectory through which to decriminalize and which acts specifically are to be decriminalized. On this issue of legalization, first, we are to consider the question of how far the states can go. Then, we must identify the combination of actions and circumstances that are to be legalized. From this, the debate turns on examining who has the power to regulate the evolving trajectory of medical marijuana. Let us introduce the complex dimension of federalism deeply impregnated within the medical marijuana debate.

II. CONFLICT OF LAWS—STATE VERSUS FEDERAL

Regulation of conduct is governed by the law that is controlling—state or federal. Conflict in the supervisory interest in governing such conduct emanates from two clauses of the U.S. Constitution, the Commerce Clause[14] and the Supremacy Clause.[15] The Commerce Clause allows Congress to regulate interstate commerce via enactment of legislation by virtue of the constitutional grant bestowed by the U.S. Constitution.[16] In this context, *Gonzales v. Raich*[17] is recognized as the constitutional guide with significant precedential value. Connecting local

10. *See* Adam Cohen, *Legal Recreational Marijuana: Not So Far Out*, TIME, Feb. 6, 2012, *available at* http://ideas.time.com/2012/02/06/legal-recreational-marijuana-not-so-far-out/?xid%3Dgonewsedit.

11. 21 U.S.C.A. §§ 811-812.

12. *See* MARIJUANA POLICY PROJECT, *supra* note 2, at B-2; *see also* 21 U.S.C.A. § 841.

13. *See* MARIJUANA POLICY PROJECT, *supra* note 2, at 12.

14. U.S. CONST. art. I, § 8, cl. 3.

15. U.S. CONST. art. VI, § 2.

16. U.S. CONST. art. I, § 8, cl. 3.

17. 545 U.S. 1 (2005).

cultivation with its impact on interstate commerce, *Raich* recognized the federal government's power to prohibit intrastate cultivation and possession.[18] *Raich* also illuminates our most recent understanding of the federal dichotomy in dealing with federal law's interference with upholding state law within a state's own jurisdiction.[19] Therefore, if a state allows cultivation that has been foreclosed by the federal regulatory authority, we are faced with the prospect of preemption. Under what circumstances could federal regulatory authority preempt state laws?

Both the Supremacy Clause of the Constitution and the opinion in *Raich* animate the jurisprudence of preemption. Leaving the question of whether *Raich* was rightly decided or not for a future occasion, we must recognize the controlling authority of federal law in the event of conflict with a state law and the Supremacy Clause under the U.S. Constitution.[20]

Yet, it is not so clear-cut. Preemption authority is complicated, and the contours of state and federal law's coterminous points are unmarked. Cases, including *Gonzales v. Oregon*,[21] thus far have identified categories of conflicts where preemption can occur. Here, the sources of such conflicts can arise in several specific instances, where the controlling power of federal law is challenged by a state's law.[22] There are two broader categories that create scenarios calling for simultaneous compliance. First, when Congress defines the explicit purpose of a federal law and second, when implied intent of preemption is revealed within a congressional enactment.[23] Clearly, an explicit purpose within a federal law would be much easier to decode than the situation where the congressional intent has to be understood via interpretation.

Therefore, implied intent of preemption is to be uncovered through identifying characteristics of conflict—conflict that exists between federal law and state law.[24] We must note that preemption possibilities arise as a result of scenarios that require simultaneous compliance and when a state's legislative enactment creates an obstacle for implementation of federal law.[25] In this context, the trajectory of

18. *Id.* at 17-21.
19. *Id.* at 22.
20. Altria Grp., Inc. v. Good, 555 U.S. 70, 108 (2008).
21. 546 U.S. 243 (2006).
22. *Id.* at 76-77.
23. *Id.*
24. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (citations omitted).
25. *Id.*

preemption must go through the issue of field preemption,[26] especially in the absence of a conflict.[27] Its application requires a strong presumption that Congress does not intend to displace state laws.[28] This presumption is strongly indicated in some of the language of the CSA and other times it must be uncovered through interpretation behind the Act.[29] Regardless, congressional purpose is the deciding cornerstone, as has been established in *Wyeth v. Levine*.[30]

Residing at the core of federal-state sovereignty, the Tenth Amendment allows experiments and exceptions to be carved out of the federal intent.[31] Since the Framing debates, this particular Amendment has continued to guarantee states or its citizens certain rights that have not been expressly delegated to the United States.[32] This important constitutional provision could very well become the single most defining element in shaping the evolution of medical marijuana laws. The federalism debate must, therefore, be seen as an interaction of three pillars of the Constitution: the Commerce Clause,[33] the Supremacy Clause,[34] and the Tenth Amendment.[35] Thus, the path to clarity over consistent and universally acceptable medical marijuana laws must come through specific coterminous areas of state and federal rights.

What is in store for the future of this federalism debate surrounding marijuana decriminalization or its subset of medical marijuana? Jurisprudence has clearly established Congress has the power to regulate interstate commerce. Generally, this is a simple proposition, yet its connotations are replete with complexities. The difficulty comes from potential implementation of decriminalization at the state or local levels.[36] Moreover, the Supreme Court, over a period of several decades,

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26. *Id.* Field preemption is a situation in which "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it[.]" *Id.* (internal quotation and citations omitted).

27. *Id.*

28. *Altria Grp.*, 555 U.S. at 77 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

29. *Id.* (citing Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 449 (2005)).

30. 555 U.S. 555, 565 (2009) (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

31. United States v. Darby, 312 U.S. 100, 124-25 (1941).

32. *Id.*

33. U.S. CONST. art. I, § 8, cl. 3.

34. U.S. CONST. art. VI, § 2.

35. U.S. CONST. amend. X.

36. Here I generally draw attention to the federal-state dichotomy instances of decriminalizing small amount of the product for personal usage. Even if such acts were to be decriminalized at the state or local level, the act would still be illegal at the federal level as federal law will have the supervisory impact over state or local law, effectively generating untenable situations for law enforcement.

has overreached the ambit of the Commerce Clause by, at times expanding its power, and at times encroaching into the terrain of the states.[37] This has caused severe confusion, or in the words of John Milton, "confusion worse confounded."[38] Looking through the prism of *Gonzales v. Raich*, I find the continued interaction between state and federal law is a complex conundrum that resembles utter chaos. Therefore, let us retrace the trajectory and holdings of *Gonzales v. Raich* and its relevance to the marijuana debate. Decided in 2005, we may not be able to escape the implication of that case, but understanding the rationale of the majority will help in our understanding of the evolving jurisprudential view of federalism.

The Court in *Raich* expanded the scope of the Commerce Clause of the Constitution by suggesting that Congress has the power to criminalize acts that have been ruled legal by the state.[39] At issue was the production and use of home-grown cannabis that has been recognized as legal by voters in California as they passed Proposition 215 in 1996, which explicitly legalized medical usage of marijuana.[40] The Court took great effort in articulating as its starting point the facts of the case as presented, which concedes congressional power to control marijuana for non-medical usage.[41] Although the starting point may have helped the Court in extending its argument to the medical usage of marijuana, it derived the force of its argument from a parallel constitutional case decided in 1942.[42] Drawing from the *Wickard v. Filburn* holding, which affirmed government regulatory oversight over personal cultivation and consumption of crops on account of their aggregate impact upon the broader interstate wheat market,[43] the Court in *Raich* followed more than

37. Although the recent U.S. Supreme Court opinions exhibit the tendency to impose limits on Congress's power to regulate commerce among the several states, as seen most notably in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012), the Court's legacy has been marked by its steady expansion of the Commerce Clause. Besides scholars, even Justice Scalia has observed that the Supreme Court "expanded the Commerce Clause beyond all reason." *See* ANTONIN SCALIA & BRYAN A. GARNER, *Making Your Case: The Art of Persuading Judges* (2009). According to Professor Randy Barnett, the originalist evidence of the meaning of texts of the Commerce Clause would suggest that the Supreme Court has overreached in imputing a much broader meaning. *See* Randy E. Barnett, The *Original Meaning* of the *Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

38. The saying, "confusion worse confounded" implies confusion made even worse. This term was made famous by John Milton's 17th century epic poem. *See* 2 JOHN MILTON, PARADISE LOST, line 995 (Samuel Simmons Publisher 1667).

39. *Raich*, 545 U.S. at 32-33.

40. *Id.* at 5-6.

41. *Id.* at 10-15.

42. Wickard v. Filburn, 317 U.S. 111 (1942).

43. *Raich*, 545 U.S. at 17-18.

six decades' of precedent in acknowledging government's legitimate supervisory framework for governing interstate markets.[44] In my view, applying *Wickard v. Filburn* is a forced construction, by construing federal statutory authority where none exists, in drawing analogy where none arises, and in construing causal impact on a national market, which does not in fact exist. Yet, the Court viewed it differently, as the majority in *Raich* observed:

> While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.[45]

A legitimate question can be posed as to the future of state's right to experiment. Further, when voters of a state overwhelmingly approve certain measures as state-sanctioned activity, could the federal government extend its statutory authority to impinge upon such state intent? Especially given that the concept of "laboratory for experiment" has long animated the core construct of federalism within the United States.[46] Under this ideology, the states are seen as individual filtrations of governments, which form a system of laboratories.[47] Within this experimentation, laws are conceived, crafted and enacted from the lowest level of the democratic system, arriving at the highest level.[48] In his dissenting opinion in *New State Ice Co. v. Liebmann*,[49] Justice Brandeis announced the arrival of this concept through his interpretation of the Tenth Amendment. He observed, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens

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44. *Id.* at 18.

45. *Id.* at 19.

46. Justice Brandeis' metaphorical characterization of States as laboratories of experimentation within the Federal Union has become the accepted benchmark among the proponents of Federalism. *See* Michael S. Grave, *Laboratories of Democracy*, AEI ONLINE (Mar. 31, 2001), http://www.aei.org/article/politics-and-public-opinion/elections/laboratories-of-democracy/.

47. *See* Grave, *supra* note 46.

48. *Id.*

49. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[50]

Incidentally, the Tenth Amendment states that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[51] As the Tenth Amendment relegates a slew of responsibilities to the lower level of state and local governments, it allows the state level experimentation to take shape, thus forming the basis for the laboratories of experimentation concept. The long-standing tradition of states' rights for individual experimentation and their judicial recognition causes us to ponder and take note of the sudden trajectory the Court undertook in *Raich*.

The above observation prompts us to take a look at the asymmetry between *Raich* and *Filburn*. The first point of departure in accepting the analogy the *Raich* Court used was establishing an equivalent relationship between wheat crop and marijuana.[52] Although the wheat crop is essentially a commodity, marijuana, at best, can be used as a medicinal crop by no more than five percent of the population in the most conservative estimates.[53] Even this broad relaxation of assumptions cannot equate the two. The second divergence comes from adopting *Filburn*'s casual leap from individual intrastate cultivation to aggregated impact upon interstate commerce,[54] an approach that is severely flawed for at least two reasons. There is no interstate market for marijuana that falls under the statutory authority of Congress or can be legitimately viewed as falling within the ambit of the Commerce Clause. Even *Filburn's* framework of aggregation may be considered suspect for having any meaningful impact on the broader arena of interstate commerce, especially in the much altered economic framework six decades later.

Therefore, *Raich*'s adherence to *Filburn* may be structurally flawed and temporally irrelevant, yet its constitutional impact on states' rights still looms large today. So, is it time for *Raich* to slip into oblivion? Or, is it more efficient perhaps to carve out exceptions to resurrect states' rights under the laboratory of democracy concept? These are areas that will require further analysis.

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50. *Id.*

51. U.S. CONST. amend. X.

52. *Raich*, 545 U.S. at 18-19.

53. *Id.* at 56 (O'Conner, J., dissenting). *See also Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings*, U.S. DEPT. OF HEALTH AND HUMAN SERVS. (Sept. 2011), http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.htm#5.3.

54. *Raich*, 545 U.S. at 18-19.

To begin with, one solution would be to identify and delineate the specific distinction between decriminalization and legalization, especially when medicinal usage cannot be decoupled from the issue of cultivation. Let us set the stage for a detailed analysis. More than two-thirds of states have been going through various types of decriminalization or repeal measures to become marijuana-friendly.[55] Cultivation requires and necessitates distribution and means of delivery, which brings additional complexity to the debate over marijuana decriminalization. Where is the necessary delineation as to which segment to decriminalize? Do we decriminalize one aspect of the value chain or the entire value chain? Looking through the individual components of the value chain, from cultivation, to distribution and delivery, it is clear that developing a legal framework for decriminalization of medicinal marijuana will require a comprehensive evaluation and understanding of interacting elements. This goes far beyond placing a narrow initiative on a state ballot. Rather, this must be encapsulated within comprehensive panoply of legislator-sponsored statutes.

Despite *Raich*'s structural weaknesses, it remains one of the predominant modern authorities through which to examine the Supreme Court's states' rights jurisprudence. *Raich*, when considered together with the Supremacy Clause, provides us with a broad interpretation of federal authority under the CSA as it relates to the ongoing marijuana debate. However, this is complicated, as the whole preemption issue is not so clear. From *Raich*, we must explore the other specific ways federal regulatory authority can preempt state laws. Although the Commerce Clause has outlined federal government's statutory authority in controlling intrastate commerce,[56] the trajectory of preemption is primarily animated and controlled by the Supremacy Clause when conflict between the state law and the federal law arises.[57] However, the Supreme Court's own journey makes the issue of federalism complicated. Why?

After *Raich*, the Court embarked on a different constitutional contour in its rulemaking in *Gonzales v. Oregon*,[58] which focused on Oregon's Death with Dignity Act.[59] Here, the Court neither specifically disputed the power of the federal government, nor did it empower the U.S.

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55. MARIJUANA POLICY PROJECT, *supra* note 2, at 2.

56. U.S. CONST. art. I, § 8, cl. 3.

57. *Gade*, 505 U.S. at 108 (citations omitted).

58. 546 U.S. 243 (2006).

59. The Oregon Death with Dignity Act, OR. REV. STAT. ANN. §§ 127.800-995 (West 2012). *See also Gonzales*, 546 U.S. at 249.

Attorney General with a broader authority to preempt Oregon's assisted suicide act.[60] How are we to interpret this inconsistency? Is it a departure from precedence or a course correction? Clearly, the Court's expansion of the Commerce Clause and its narrow application in *Gonzales v. Oregon* has caused confusion in interpretation and tension in jurisprudence. Such fuzzy interpretative paradigm prompts us to seek further clarity as to how the Court might rule in a possible conflict scenario based on marijuana decriminalization or state-sponsored medical usage of marijuana. So, where is the common trajectory? Or, is there one?

III. CONFLICT PREVENTION VIA PREEMPTION

Canvassing the landscape of marijuana legalization across the states, I draw the inference that the majority of state-sponsored initiatives go far beyond decriminalization. Following the laboratory of democracy framework of federalism, these initiatives revolve around the state legislatures enacting laws to regulate and tax marijuana at different parts of the value chain.[61] Clearly, such a scheme would create a situation in which compliance with state laws and regulations will prevent simultaneous compliance with the CSA. Thus, compliance with the applicable federal law in this context will be impossible. This would invariably set up a positive conflict that would require preemption via conflict analysis. I would characterize this as the trajectory of preemption that our current discourse on marijuana regulation at the state level must go through. In this context, the Supreme Court's observation in both *Wyeth v. Levine* and *Gonzales v. Oregon* is worth noting as they provide the most recent insight from the Court in the area of federal preemption.

Wyeth v. Levine explicitly articulates the fundamental threshold of federal preemption by observing that such preemption is based on "two cornerstones."[62] The Court presented as the first cornerstone, stating that "the purpose of Congress is the ultimate touchstone in every pre-emption case."[63] As the second cornerstone, the Court imposed a dividing line for field preemption by restricting Congress' role in cases that have traditionally been regulated by the states, unless Congress has established clear intent.[64] The Court's operating assumption is noteworthy in this

60. *Gonzales*, 546 U.S. at 268.

61. *See generally* Michelle Patton, *The Legalization of Marijuana: a Dead-end or the High Road to Fiscal Solvency*?, 15 BERKELEY J. CRIM. L. 163 (2010).

62. *Wyeth*, 555 U.S. at 565.

63. *Id.* (quoting *Lohr*, 518 U.S. at 485).

64. *Id.* (citing *Lohr*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230)).

context, stating, "[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.'"[65]

Therefore, the right for federal preemption of state initiatives relating to decriminalization of medical marijuana introduces tension between state and federal policies on medicinal marijuana. Among the states that have been at the forefront of the pro-marijuana movement, California is relatively advanced in terms of a well developed history of its legislation and the support for the movement.[66] With the basic premise of California's policy being at odds with that of the federal government, the point of inquiry is whether the California state law is in conflict with the federal government's objective to criminalize marijuana. Under the broader ambit of the CSA, possession of marijuana is illegal.[67] So, the question I pose is whether *Wyeth*'s guidance alone is sufficient to understand the future trajectory of preemption?

This trajectory of preemption can unfold in three broad scenarios. In the first, an explicit purpose has to be defined in the particular federal law conflicting with the state law.[68] Congress can define explicitly the extent to which its enactments preempt state law, as preemption has historically been identified by the Supreme Court as fundamentally derived from the congressional intent.[69] When Congress makes its intent clear through explicit statutory language, the adjudication becomes easy. With particular reference to the CSA, in order to preempt a state law, a specific purpose for prohibiting medical marijuana must be expressed in the language of the statute. Absent such an expression, the CSA may not be able to preempt state laws that would regulate cultivation and distribution of medical marijuana.

Failure under the first test will automatically draw us in to the second test, to find the implicit intent of Congress.[70] This is where the lines could become blurred as implied intent can be identified through various means, one of which is the field test.[71] In the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively.[72] Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room

65. *Id.*
66. *See* MARIJUANA POLICY PROJECT, *supra* note 2, at 5.
67. *See* 21 U.S.C.A. § 812(c)(10) (2010).
68. *Altria Grp.*, 555 U.S. at 76-77.
69. *See Wyeth*, 555 U.S. at 565.
70. English v. General Elec. Co., 496 U.S. 72, 79 (1990).
71. *See Gade*, 505 U.S. at 98.
72. *Id.*

for the States to supplement it,"[73] or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject[.]"[74] In the context of the CSA, the implied intent is to be construed through analysis using the field test. As I identified before, this conflict arises when there is a strong conflict between a state law and a federal law.[75] I must signal caution in this area. The Court's overtures in field preemption when finding implied intent has been marked by hesitation and requires robust proof of congressional purpose.[76] The Court has emphasized that "'[w]here . . . the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be '*clear and manifest.*'"[77]

Case law guides us to a third area of preemption, in which a positive conflict occurs where one law explicitly requires a conduct or action that is prohibited by the other.[78] Therefore, in enacting a particular state law, we must examine whether such enactment becomes an impediment to a congressional purpose or is an impediment to a full application of a federal statute.[79] The jurisprudence of preemption has been illuminated by a rich history of case law, not all of which can be highlighted in the limited scope of this discussion.[80] However, delving into the archives of history, several strands of guidance can be identified. The Court has identified preemption where it became "impossible for a private party to comply with both state and federal requirements," and "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[81]

Staying true to its trajectory, in the 1990 case of *English v. General Electric*, the Court clearly articulated that for field preemption to be established, an explicit purpose must be defined by Congress.[82] But, despite such a defined explicit purpose, preemption authority suffers from clarity of implementation. Often times, for preemption to occur, a federal law must go through an additional threshold.[83] For federal

73. *Id.* (internal quotations and citation omitted).
74. Wisc. Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991) (citations omitted).
75. *English*, 496 U.S. at 79.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *See, e.g.*, 81A C.J.S. *States* § 49 (2012).
81. *English*, 496 U.S. at 79 (internal citations omitted).
82. *Id.*
83. *Altria Grp.*, 555 U.S. at 76-77.

preemption to withstand, even after expression of the requisite intent, there must be a strong and substantive test—strong, in terms of how far the federal reach should go and substantive, in terms of whatever the focus of the federal statute can be construed as conflicting with the intended purpose of the state statute. In this case, for preemption of state-sponsored usage of medicinal marijuana laws, there has to be strong explicit and substantive intent of the CSA. What is the genesis of such strong inertia against preemption?

IV. FUTURE TRAJECTORY OF THE JURISPRUDENCE

History of constitutional jurisprudence suggests that federalism and administrative law is an unfamiliar dyad, particularly from a constitutional jurisprudence point of view. In my view, the seeds were sown in *Gonzales v. Oregon*, where the State challenged the Attorney General's implementation of the CSA by issuing an interpretive ruling.[84] In the context of medical marijuana, under the framework of the CSA, physicians could lawfully distribute controlled substances only if they are registered with the Attorney General.[85] According to the 2001 Interpretive Rule by the Attorney General, prescribing controlled substances to assist suicide was deemed grounds for suspending a doctor's controlled substance registration, which on the other hand, would make Oregon's Death with Dignity Act, which legalized prescribed medicine to allow terminally ill patients to commit suicide, invalid.[86]

In rejecting the Attorney General's determination that it is not legitimate medical practice under CSA for a physician to prescribe a controlled substance to patients who are seeking to lawfully commit suicide, the ruling in *Gonzales* was a huge step in the Court's acknowledgment of states' rights.[87] *Gonzales*, like its close progeny, *Massachusetts v. EPA*,[88] "presents a conflict of two competing spheres of influence, one emanating from states sovereign right to implement laws regulating behavior of its citizens within its own borders and the other revolving around federal jurisdiction of federal statutes within the said state's border."[89] Thus, "[t]he Court's departure from reliance on

84. *See Gonzales*, 546 U.S. at 249.

85. *Id.* at 250-51. *See also* 21 U.S.C.A. § 823(f).

86. *Gonzales*, 546 U.S. at 254.

87. *See* Dr. Saby Ghoshray, Massachusetts v. EPA*: Is the Promise of Regulation Much Ado About Nothing? Deconstructing States Special Solicitude Against an Evolving Jurisprudence*, 15 WIDENER L. REV. 447, 475 (2010).

88. 549 U.S. 497 (2007).

89. Ghoshray, *supra* note 87, at 475.

executive decision making power signals, perhaps, a sentiment that goes far beyond expert override of executive power."[90]

In my view, this staunch opposition to executive rulemaking is not an isolated observation, but rather based on the Court's interest in shifting authority based on a single executive agency or executive officer to those comporting with the consensus of the locality. In other words, the Court is staying true to the laboratory of experimentation principle. Clearly, through its analysis, the Court has framed the contours of power the CSA would have, and by default the administrative agency overseeing the dissemination of that Act would be limited only by prevention towards drug abuse and drug trafficking,[91] and not so much extending into the deeper confines related to matters of life and death.[92] Along the way, the Court is also mandating states' power or predicating reliance on state regulation of medical practice.[93] Does this signal a bend in constitutional jurisprudence where the majority's view based on interpretative administrative law is giving way to a state's assertion of power?

The above discussion certainly presents us with a trajectory, but not a clear direction. These are not simple issues. Rather, they are complex interacting issues cutting in multiple dimensions. More importantly, we have two broader themes that are intersecting with contrasting directionalities. At the heart of the current debate is the complexity of the core value chain surrounding medical marijuana that encompasses its basic components of cultivation, distribution, delivery, as well as the issue of taxing and regulation.[94] Emanating at the core, is the illuminating aspect of a potential conflict between federal law and state laws, the resolution of which is done either through preemption or superseding of one law over the other.[95] Scope and context of all of these areas have to be understood, their implications evaluated and laws' trajectory identified within the context of preemption and federalism. The complexity awaiting state legislators as they address the trajectory of conflicts and obstacles discussed above will become further highlighted. If citizens of a state overwhelmingly approve medicinal usage of marijuana, the history of jurisprudence suggests that their aspirations will eventually materialize through legislative efforts at the state level.[96]

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90. *Id.*
91. *See Raich*, 545 U.S. at 1.
92. *See Gonzales*, 546 U.S. at 243.
93. *Id.*
94. *See Raich*, 545 U.S. at 1.
95. *See Altria Grp.*, 555 U.S. at 76-77.
96. *See Raich*, 545 U.S. at 1.

The road ahead is not simple. Certainly it is neither smooth nor straightforward. State legislators must go through the painstaking process of making sure all potential conflict areas have been properly considered and that the language of state statutes is robust enough to overcome the established trajectory the Supreme Court has already set forth. Conflict at any level will ultimately come down to the interpretation of the interacting and contradictory objectives of the laws, where the meaning of the text becomes the most important indication of clarity. Avoiding conflict of law, therefore, depends on interpretation. Despite examining a plethora of case law, my analysis thus far has focused on either the Commerce Clause or the Supremacy Clause. Avoiding conflict invariably requires consideration of the interpretative dynamics surrounding these two clauses.

In my view, some of the jurisprudential difficulties or doctrinal stresses have arisen as an outgrowth of imputing broader meaning to the intent of these two clauses, while also respecting the original intent of the Tenth Amendment. Legitimate questions on this issue could be posed. Could a reinterpretation or a twenty-first century reconstruction of the Tenth Amendment make simpler the case for states' rights on marijuana decriminalization? How do we eliminate and how do we not let ourselves get taken hostage by this interpretation-dependent language? So, as emphasized earlier, it is not so simple. At the same time, it may be confusing, but it is definitely subject to interpretation.

My examination of the state-federal conflict has focused thus far on the interacting dynamics between state law, federal law, and the Commerce and Supremacy Clauses. Given that the concept of federalism and states' rights are as old as the Union itself,[97] it only makes sense to examine the contours of the marijuana debate through the prism of federalism. The scope of my current discourse restricts me from engaging in a detailed discussion on this issue. Nonetheless, I would like to take the opportunity provided by the current forum to raise a set of important questions that will serve as the basis of an in depth inquiry in my upcoming work.[98] As I look at the Tenth Amendment and the Commerce Clause together, the supervisory gloss of the Tenth Amendment becomes vivid. Yet, the full implication of the Amendment

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

98. Dr. Saby Ghoshray, *Administrative Law and the Tenth Amendment* (working paper) (on file with author). At the time of publication the author was currently in the process of writing the above-referenced work, which will explore states' sovereignty in the context of administrative law.

has not been apparent in the jurisprudence dealing with issues in which administrative law impinges on states' sovereign rights.[99]

The Tenth Amendment categorically announces the inviolability and aspiration contained in the laboratory of experimentation principle by succinctly declaring that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[100] If there does not exist a coterminous trajectory within the ambit of the federal authority, any right incubated at the ballot initiatives through individual state laboratory experiment will be the rights reserved to the state in question.[101] Abstraction along these lines has the potential to bypass the Supremacy Clause preemption dynamics discussed earlier. This indeed can decouple us from interpretative dynamics that we must engage in for extricating certain rights.

The above scenarios raise interesting questions. Despite significant Tenth Amendment cases illuminating the constitutional trajectory of state' rights, why has their interpretative impact been largely muted on the marijuana debate? Does the answer to the marijuana debate reside at the core of the Tenth Amendment, or do we need to rescue the original meaning of the Tenth Amendment from its distortionary impact on the Supremacy Clause? More than 200 years ago, James Madison's vision of potential remedies against unpopular federal government measures had sown the seeds of the Tenth Amendment when he observed:

> If an act of a particular State, though unfriendly to the national government, be generally popular in that State and should not too grossly violate the oaths of the State officers, it is executed immediately and, of course, by means on the spot and depending on the State alone. The opposition of the federal government, or the interposition of federal officers, would but inflame the zeal of all parties on the side of the State, and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty. On the other hand, should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with

99. *See* Ghoshray *supra* note 98.
100. U.S. CONST. amend. X.
101. *Id.*

> the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.[102]

Will the post-modern remedy against federal encroachment reside within such original intent of the Tenth Amendment? These are the questions we must evaluate in the upcoming days, as we examine the robust constitutional contours of marijuana decriminalization.

V. CONCLUSION

The future trajectory of marijuana decriminalization debate comes from the Court's inclinations gleaned from the panoply of constitutional cases, headed by *Gonzales v. Oregon*[103] and *Massachusetts v. EPA*.[104] Without doubt, it is a complex issue residing at the intersection of separation of powers and individual liberty interests. Dissected through the prism of a robust constitutional framework, federal encroachment may come up deficient. As such, the future of jurisprudential contours animating states' rights may seek guidance from the history of the Tenth Amendment and the intent of the Founding Fathers.

In witnessing a new vista, the Court has already ventured into its trajectory of *Gonzales* and *Massachusetts*. I see the emergence of a doctrinal development within the constitutional jurisprudence that may pave the way for a renewed awareness into states' rights. The Court, by providing a new interpretative guideline to evaluate agency actions, has raised the obligation threshold for agency actions, while empowering the states with an elevated set of rights. This paradigmatic shift in state-federal relationship will indeed provide a newer constitutional gloss in states' federalism rights in this evolving arena.

I would like to conclude this commentary with an expression of hope for a pain-free future for those long-suffering individuals who seek medicinal usage of a substance currently recognized as a controlled substance under federal law. However, the trajectory of the law must complete a full circle, as the lament of federal judges will transform into

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102. THE FEDERALIST NO. 46 (James Madison).
103. 546 U.S. 243 (2006).
104. 549 U.S. 497 (2007).

hope. Until then, we wait with the sentiments reverberated by Judge Pregerson of the Ninth Circuit Court of Appeals:

> For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day as not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected.[105]

105. Raich v. Gonzales, 500 F.3d 850, 866 (9th Cir. 2007).