TESTING THE BOUNDS OF FEDERALISM:

CAN STATE AND FEDERAL MARIJUANA LAWS COEXIST?

BY MARK S. MILLS, ESQ.

In a 1932 dissenting opinion, U.S. Supreme Court Justice Louis Brandeis famously wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[1] Brandeis' artful language spawned the phrase "laboratories of democracy"—a term commonly invoked to describe states under our system of federalism, which allows states to pass their own laws and thereby conduct unique social and economic experiments.

One such experiment was commenced in Nevada on November 8, 2016, when Nevada voters approved a ballot initiative legalizing the recreational use of marijuana. That initiative, now codified under NRS 453D.110, authorizes persons 21 years of age or older to "possess, use, consume, purchase, obtain, process, or transport marijuana paraphernalia, one ounce or less of marijuana other than concentrated marijuana, or one-eighth of an ounce or less of concentrated marijuana."

Moving forward, one of the most vexing constitutional concerns raised by the legalization of marijuana is the apparent conflict between state and federal law that Nevada's marijuana laws present. Notwithstanding Nevada's legalization of simple possession of less than an ounce of marijuana, under the federal Controlled Substances Act (CSA), possession of *any* amount of marijuana remains a crime under federal law. *See* 21 U.S.C. § 844(a). This apparent conflict between state and federal law has created widespread uncertainty and perplexity regarding the legality and practicability of state marijuana laws legalizing conduct that federal law continues to criminalize. The federalism issues raised by state legalization of marijuana are not easily resolvable. Indeed, some legal scholars have concluded that "[t]he struggle over marijuana regulation is one of the most

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important federalism conflicts in a generation."[2]

Some observers may reasonably question whether state marijuana laws that conflict with or impede federal law are preempted by the Supremacy Clause of the U.S. Constitution. This conclusion is bolstered by the U.S. Supreme Court's decision in *Gonzales v. Raich*, in which the court upheld the federal Controlled Substances Act. The court observed that state marijuana laws must give way to conflicting federal law, commenting that marijuana use "'in accordance with state law cannot serve to place [a person's] activities beyond congressional reach," and that "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Raich*, 545 U.S. 1, 29 (2005); *but see id.* at 74 (O'Connor, J. dissenting) (criticizing the majority's "rush to embrace federal power" and arguing that the majority's decision prevents states from devising their own drug policies).

However, some scholars have concluded that state marijuana laws are not—and indeed, cannot be—preempted by federal law. For example, Robert Mikos, a law professor at Vanderbilt University Law School, has argued that federal preemption of a state law permitting private conduct, such as possession and use of marijuana, would be unconstitutional, because it would run afoul of the U.S. Supreme Court's anti-commandeering rule, which prohibits Congress from requiring state legislatures to pass certain laws or state officials to administer them.[3]

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Nevertheless, irrespective of the issue of whether the CSA preempts state marijuana laws, what is clear is that the CSA is constitutional—as the Supreme Court held in *Gonzales v. Raich*—and is enforceable by federal authorities. One might assume that the mere possibility of prosecution by federal authorities would create a chilling effect

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on marijuana use. However, in order for federal law to deter the private conduct of Nevada citizens, there has to be some possibility of the law actually being enforced. It is clear that federal authorities are not interested in prosecuting private citizens who possess and consume personal-use quantities of marijuana in compliance with state law.

Indeed, in 2013, the Department of Justice issued a memorandum to federal prosecutors providing guidance in prosecuting federal marijuana crimes. In that memorandum, Deputy Attorney General James M. Cole stated a number of federal priorities, including preventing the distribution of marijuana to minors, preventing revenue from the sale of marijuana from going to criminal gangs and cartels, preventing violence and the use of firearms in the cultivation and distribution of marijuana, preventing drugged driving, and preventing the growing or possession of marijuana on public lands or federal property.[4] Notably, in that memorandum, Deputy Attorney General Cole stated, "Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws."

In other words, it appears that the federal government has no intention of going after private citizens using marijuana responsibly (either recreationally or for medicinal purposes) in accordance with the laws of their states. Indeed, even if the federal government wanted to prosecute low-level marijuana offenses, given the federal government's limited resources, it may not be feasible or cost-effective to prosecute private citizens for possessing and consuming small quantities of marijuana in accordance with state law.

Although the ordinary recreational user of marijuana—using marijuana in compliance with state law—has little reason to fear being federally prosecuted, the continued federal criminalization of marijuana poses significant practical problems for cultivators and purveyors of marijuana. For example, many legal marijuana businesses are forced to conduct their businesses in cash, because banks won't allow them to open bank accounts.[5]

In light of this continued tension between federal and state law, some scholars have suggested that the federal government should adopt an approach of "cooperative federalism," which would exempt states from the marijuana provisions of the CSA,

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providing that the states' marijuana laws meet certain criteria (such as those specified in the Cole memorandum cited above). This is a potentially workable solution, but would require action on the part of Congress to effectuate—and Congress has not yet amended the CSA to allow marijuana-legal states to opt out of the CSA marijuana provisions. Until Congress does so, marijuana businesses will continue to operate in doubt and uncertainty.

To be sure, the federalism conflict created by state legalization of marijuana does not have an easy resolution. That conflict will persist until resolved by the courts or Congress, and only time will tell how Nevada's social experiment will play out. **NL**

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, (1932).
2. Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74 (2015).
3. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1446 (2009).
4. James M. Cole, U.S. Department of Justice, Memorandum for all United States Attorneys, Guidance Regarding Marijuana Enforcement, (August 29, 2013), *available at* https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.
5. Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. Times, January 12, 2014, at A1, *available at* https://www.nytimes.com/2014/01/12/us/banks-say-no-to-marijuana-money-legal-or-not.html.

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