Subject:	Cases versus Controvesies
From:	"Gordon Epperly" <enter7740@14th-amendment.com>
Sent:	1/27/2015 3:25:03 PM
To:	"Alaska Office of Attorney.General" <attorney.general@alaska.gov>
CC:	BoroughAssembly@juneau.org;wwmas@muni.org
Attachments:	Fear and Loathing in Colorado - Invoking the Supreme Court State-Controversy Jurisdiciton.pdf

An Open Letter

FEAR AND LOATHING IN COLORADO: INVOKING THE SUPREME COURT'S STATE-CONTROVERSY JURISDICTION TO CHALLENGE THE MARIJUANA-LEGALIZATION EXPERIMENT

Chad DeVeaux /* *and Anne Mostad-Jensen* /**

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We are gratefully indebted to our student, Bryan V. Norton, who first proposed the theory that a sister State could invoke the Supreme Court's state-controversy jurisdiction to challenge Colorado's marijuana-legalization experiment. He conceived the idea after a discussion of original actions in Concordia's Constitutional Law class.

Honorable Members of the Alaska State Legislature and Alaska Attorney General

As you may be aware, the States of "*Oklahoma*" and "*Nebraska*" have petitioned the "*U.S. Supreme Court*" for leave to sue the "S*tate of Colorado*" and its "*Marijuana Laws*" as being a nuisance to their "*States*." The "*U.S. Supreme Court*" has docketed the "*Petition*" with no further action taken at this time. The above entitled "*Paper*" of "*Chad DeVeaux" and "Anne Mostad-Jensen*" is very detailed in regard to that lawsuit and it is attached to this message as a PDF File for your viewing. It should be of great interest to the government of the "*State of Alaska*" and its "*Municipal Corporations*."

I have approached the "*Attorney*" for the "*City and Borough of Juneau*" (CBJ) and suggested that the "*Attorney*" initiate an "*action*" in the nature of a "*controversy*" involving "*The United States of America*" and the "*State of Alaska*" before the "*U.S. District Court for the District of Alaska*" on behalf of the CBJ "*Officers*" and "*Employees*." This litigation should be brought before the "*Federal Courts*" to resolve the conflict in "*jurisdiction*" that exist over a controlled substance known as "*Marijuana*" and its legal effects upon the duties of the "*Officers*" and "*Employees*" of our "*Cities*" and "*Boroughs*."

Unlike the "*U.S. Supreme Court*" case of "*Oklahoma*" and "*Nebraska*" versus "*Colorado*," this litigation by a "*City and Borough*" would not be a "*nuisance*" case, but a "*controversy*" to determine "*jurisdiction*," especially when the laws of the "*State of Alaska*" are in conflict with the "*Federal Controlled Substance Act*" of the "*U.S. Congress*." If the "*State of Alaska*" has the jurisdiction, then the CBJ "*Officers*" and "*Employees*" may proceed in adopting "*Marijuana Regulations*" and issuing forth "*Permits*" to establish "*Pot Shops*" with the blessing of a "*Federal Judge*" whereas on the other hand, if the government of "*The United States of America*" has jurisdiction, then any action taken by those CBJ "*Officers*" and/or "*Employees*" may subject them to an arrest for "*aiding*" and "*abetting*" the commission of "*crimes*" against the laws of "*The United States of America*," "*crimes*" that carry substantial "*fines*" and "*incarceration*" time and leaving those "*Officers*" and "*Employees*" with "*criminal records*." I can only hope that the "*Attorneys*" of our "*City and Boroughs*" will swallow their pride and use their "*Office*" to protect the interest of the "*Officers*" and "*Employees*" of their "*Cities*" and "*Boroughs*."

As I have pointed out in past messages, several "*Officers*" and "*Employees*" of local governments of other States have been placed under "*arrest*" and prosecuted by "*U.S. Attorneys*." It is best to be the "*Wolf*" going after the "*Sheep*" than being the "*Sheep*" trying to defend yourself from the "*Wolf*."

This letter will be posted on the Internet at: http://www.usa-the-republic.com/marijuana.html for public viewing.

Respectfully Submitted

Gordon Warren Epperly

FEAR AND LOATHING IN COLORADO: INVOKING THE SUPREME COURT'S STATE-CONTROVERSY JURISDICTION TO CHALLENGE THE MARIJUANA-LEGALIZATION EXPERIMENT

Chad DeVeaux[*] *and Anne Mostad-Jensen*[**]

"*One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. . . . Yet, whenever . . . the action of one State reaches . . . into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and [the Supreme Court] is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.*"[1]

INTRODUCTION

Louis Brandeis famously observed that "[i]t 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."[2] In the wake of Colorado's decriminalization of recreational marijuana,[3] Justice Brandeis's

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We are gratefully indebted to our student, Bryan V. Norton, who first proposed the theory that a sister State could invoke the Supreme Court's state-controversy jurisdiction to challenge Colorado's marijuana-legalization experiment. He conceived the idea after a discussion of original actions in Concordia's Constitutional Law class.

[1] Kansas v. Colorado, 206 U.S. 46, 97-98 (1907).

[2] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[3] COLO. CONST. art. XVIII, § 16. Washington voters likewise passed a referendum decriminalizing the sale of recreational marijuana. Mason L. Boling, *That Was the Easy Part: The Development of Arkansas's Public Safety Improvement Act of 2011, and Why the Biggest Obstacle to Prison Reform Remains Intact*, 66 ARK. L. REV. 1109, 1138 n.182 (2013). But unlike Colorado, which plunged ahead and licensed commercial dispensaries beginning on January 1, 2014, Washington has delayed the implementation of recreational-marijuana sales in order to explore safeguards that may limit diversion into the black market. Gene Johnson, *Bumpy Road for Marijuana Legalization in Washington*, DENVER POST, July 1, 2014, *available at* http://www.denverpost.com/marijuana/ci_26064762/bumpy-road-marijuana-legalization-

adage has become a shibboleth frequently wielded by pot-legalization advocates.[4] But the popular culture's exuberant embrace of the marijuana-legalization experiment,[5] undoubtedly fueled by the immense wealth the

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washington. Washington's first licensed dispensary opened on July 8, 2014. Katy Steinmetz, *Washington State Is Low on Legal Pot*, TIME, July 1, 2014, *available at* http://time.com/2946014/marijuana-pot-legalization-washington/. For the time being, the State has indicated that it only plans to license twenty-four such dispensaries, fourteen in western Washington and ten in eastern Washington. Gene Johnson, *Legal Marijuana in Washington State: How It Works*, ABC NEWS, July 8, 2014, *available at* http://abcnews.go.com/Health/wireStory/legal-pot-washington-sales-begin-24471063. In contrast, when Colorado rolled out its commercial pot market in January, it issued licenses to 348 retailers, covering all corners of the State. John Ingold, *Colorado Issues First Licenses for Recreational Marijuana Businesses*, DENVER POST, Dec. 23, 2013, *available at* http://www.denverpost.com/news/ci_24784227/colorado-issues-first-licenses-recreational-marijuana-businesses. Since the full scope of Washington's marijuana regime remains to be seen, we have limited our analysis to Colorado's program. If Washington's program ultimately expands to a scale approaching Colorado's, the arguments we present herein will apply with equal vigor to that State as well.

[4] *E.g.*, Nathaniel Counts, *Initiative 502 and Conflicting State and Federal Law*, 49 GONZ. L. REV. 187, 201 (2013) (quoting *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting)) ("As one of the first two states to legalize marijuana after the passage of the CSA, the citizens of Washington may see themselves as fulfilling the purpose of a federal system, where '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.'"); Michael Vitiello, *Joints or the Joint: Colorado and Washington Square Off Against the United States*, 91 OR. L. REV. 1009, 1028 (2013) (arguing that giving Colorado the "latitude to implement" its marijuana-legalization experiment exemplifies "Justice Brandeis' dictum that the states are the laboratory for democracy"); Charles F. Manski, *Drug Control Policy in an Uncertain World*, 91 OR. L. REV. 997, 1008 (2013) (arguing that "[t]he recent 2012 decisions by Washington and Colorado to eliminate state penalties for recreational use of marijuana" is a good example of Justice Brandeis's mantra); Joseph Tutro, *States Are Making Their Own Decisions Regarding Whether Marijuana Should Be Illegal: How Should the Federal Government React?*, 9 TENN. J. L. & POL'Y 233, 244 (2013) (arguing that Colorado's decriminalization of marijuana "is the ultimate 'novel social and economic experiment[]'"); Jacob Sullum, *The Cannabis Is Out of the Bag: Why Prohibitionists Have an Interest in Allowing Marijuana Legalization*, REASON, Aug. 1, 2013, at 12 (calling Colorado and Washington "laboratories of democracy").

[5] Marc Mauer, *Welcome Dinner: "The Drug War and Its Social Implications"*, 13 CHAP. L. REV. 695, 701 (2010) (stating that "we have marijuana being celebrated in popular culture"). As one commentator recently noted:

> Over the past several years, many commentators, including myself, have predicted that we are on the road to legalizing marijuana. More recently, with the passage of initiatives in Colorado and Washington "legalizing" marijuana, headlines in the mainstream media have echoed that view. For example, a CNN headline touted those initiatives as "the biggest victory ever for the legalization movement." The *Wall Street Journal* ran a headline asking "Reefer Madness or Investment Opportunity?" with a clear implication that marijuana may provide a lucrative

industry—"Big Cannabis"[6]—promises to generate, ignores a crucial caveat to this oft-quoted metaphor: The Constitution permits States to "try novel social and economic experiments" only when such measures come "*without risk to the rest of the country*."[7] Accordingly, a century ago when Tennessee permitted her copper smelters to release noxious gases into the atmosphere causing the "wholesale destruction of forests, orchards, and crops" in neighboring Georgia, Justice Brandeis's adage provided the Volunteer State no comfort.[8]

The decision in that case, *Georgia v. Tennessee Copper*, stands as a bulwark of the Supreme Court's *horizontal-federalism jurisprudence*—the body of law protecting State polities from incursions by sister States.[9] The Court unanimously recognized that while ultimate judgment whether a State's regulatory choices are "doing more harm than good to her citizens" is ordinarily reserved "for her to determine,"[10] the Constitution bars States from undertaking endeavors that conscript the citizens or property of their neighbors as guinea pigs in their experiments.[11] Thus, Tennessee's ability to embrace novel commercial endeavors was curbed by Georgia's right to be free from harmful *externalities*—"side-effect[s] of . . . economic activity, [that] caus[e] [neighbors] to suffer without compensation."[12]

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investment opportunity.

Michael Vitiello, *Joints or the Joint: Colorado and Washington Square Off Against the United States*, 91 OR. L. REV. 1009, 1009-10 (2013) (citations omitted).

[6] Rory Carroll, *Big Cannabis: Will Legal Weed Grow to be America's Next Corporate Titan?*, THE GUARDIAN, Jan. 3, 2014, *available at* http://www.theguardian.com/politics/2014/jan/03/legal-marijuana-colorado-big-tobacco-lobbying.

[7] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added).

[8] *Tennessee Copper*, 206 U.S. at 236. 206 U.S. 230, 236 (1907). The sulfuric-acid fallout produced by Tennessee's smelting operation was so toxic that a huge swath of vegetation-less land remains at the epicenter of the experiment to this day. Fred Pearce, *How Hellish Smoke Gave Tennessee a Poisoned Desert*, NEW SCIENTIST, June 7, 2011, *available at* http://www.newscientist.com/article/mg21028156.600-how-hellish-smoke-gave-tennessee-a-poisoned-desert.html.

[9] While commentators have sacrificed untold forests addressing the issue of "vertical federalism"—the distribution of sovereign powers between the state and federal governments, comparably little ink has been spilled analyzing the equally important field of horizontal federalism. *See* Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1019 (2011) (quoting N. Ins. Co. v. Chatham Cnty., 547 U.S. 189, 194 (2006)) (arguing that "a vibrant 'horizontal federalism' jurisprudence . . . comprises an equally important component to defending" the States' "'residuary and inviolable' . . . sovereignty" as does the Supreme Court's "vertical federalism" case law).

[10] Georgia v. Tennessee Copper Co., 206 U.S. 230, 239 (1907).

[11] *Id*. at 238-39.

[12] BLACK'S LAW DICTIONARY 664 (9th Ed. 2009). As one commentator observed:

When it comes to cross-border externalities, the Constitution dictates that States are "not compelled to lower [themselves] to the more degrading standards of a neighbor."[13] This limitation on State power derives from the ancient maxim that embodies the law of nuisance—"*sic utere tuo ut alienum non laedas*, that is, so use your own as not to injure another's property."[14] It is also inherent in the Constitution's commitment to a republican form of government.[15] While Tennesseans are empowered to determine for themselves whether the benefits of risky in-state innovations outweigh their costs, Georgians are "deprived of the opportunity to exert political pressure upon the [Tennessee] legislature in order to obtain a change in policy."[16] Georgians are also denied any share in the revenue that might justify the costs of the endeavor.[17] For these reasons, the Court declared Tennessee's smelting an interstate nuisance that violated the Constitution's federalist covenant and ordered its abatement.[18]

> The standard example of negative externalities is that of spillovers like air pollution that are emitted from a factory having harmful effects on the surrounding environment and population. While the factory benefits from the ability to produce its goods without paying for pollution reduction measures, the population bears the cost of the pollution: they may have health problems due to the pollution, the value of their property may decrease, and so forth.

Franz Xaver Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 ARIZ. J. INT'L & COMP. LAW 515, 527 (1998).

[13] Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972).

[14] Lussier v. San Lorenzo Valley Water Dist., 206 Cal. App. 3d 92, 100 (1988); *See* Elwood v. City of New York, 450 F. Supp. 846, 867 (S.D.N.Y. 1978) (applying the maxim to the federal common law of nuisance); *accord Tennessee Copper*, 206 U.S. at 238-39.

[15] *See* DeVeaux, *supra* note 9, at 1035 (quoting Nevada v. Hall, 440 US. 410, 426 (1979) (arguing that the Constitution divests States of the authority to regulate activities outside their borders because "each sovereign governs only with the consent of the governed").

[16] Edwards v. California, 314 U.S. 160, 174 (1941).

[17] A nuisance usually occurs where a landholder engages in acts that produce externalities that force his neighbors to "share his burden"—the costs imposed by his acts—without receiving any "share [of] his profits." 7 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765).

[18] *Tennessee Copper*, 206 U.S. at 238-39. The offending gases were emitted by private companies, not agents of the State. *Id*. at 235. Nonetheless, the facts warranted the invocation of original jurisdiction. The Supreme Court has consistently recognized that an aggrieved neighboring state may invoke state-controversy jurisdiction to abate nuisances committed by private actors acting with the knowledge and consent of their host state. *E.g*., Idaho v. Oregon, 444 U.S. 380, 385 (1980) (permitting Idaho to file complaint against Washington for allowing private fishermen to take inequitable share of fish from Columbia River); Vermont v. New York, 417 U.S. 270, 270 (1974) (permitting Vermont to file complaint against New York to abate the discharge of pollutants into Lake Champlain by a private New York corporation); Wyoming v. Colorado, 259 U.S. 419, 456 (1922) (permitting Wyoming to file complaint against Colorado for allowing two private

Tennessee Copper is just one of more than a dozen Supreme Court decisions standing in judgment of State experiments alleged to produce cross-border nuisances, or deplete resources shared by multiple States.[19] The Constitution expressly endows the Supreme Court with "original jurisdiction" over such "Controversies between two or more States."[20] This "state-controversy jurisdiction"[21] serves "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force."[22]

The "cardinal rule, underlying all the relations of the States to each other, is that of equality of right"—each "stands on the same level with all the rest."[23] Nonetheless, when "the action of one State reaches . . . into the territory of another, . . . the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them."[24] The Constitution entrusts the Supreme Court "to settle" these

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corporations to draw inequitable share of water from Laramie River).

[19] *E.g.*, *Idaho*, 423 U.S. at 813 (alleged Oregon and Washington allowed fishermen to take disproportionate share of fish from Columbia River); *Vermont*, 402 U.S. at 940 (accused New York of polluting Lake Champlain); Virginia v. Maryland, 355 U.S. 3 (1957) (alleged Maryland took disproportionate share of fish, oysters and crabs from Potomac River); Connecticut v. Massachusetts, 282 U.S. 660 (1931) (Connecticut sought to enjoin Massachusetts's diversion of waters from Connecticut River); New Jersey v. City of New York, 283 U.S. 473 (1931) (sought to enjoin off-shore garbage dumping by New York that caused trash to wash ashore on New Jersey beaches); New Jersey v. New York, 279 U.S. 823 (1929) (alleged New York drew an inequitable amount of water from Delaware River before it entered New Jersey); Wisconsin v. Illinois, 270 U.S. 631 (1926) (challenged Illinois's diversion of water from Lake Michigan to Mississippi River which substantially reduced water levels in lower Great Lakes); North Dakota v. Minnesota, 256 U.S. 220 (1921) (alleged Minnesota redirected water into Lake Traverse, causing flooding in North Dakota); New York v. New Jersey, 249 U.S. 202 (1919) (sought to enjoin New Jersey's discharge of sewage into New York Harbor); Wyoming v. Colorado, 243 U.S. 622 (1917) (alleged Colorado drew an inequitable amount of water from Laramie River before it entered Wyoming); Missouri v. Illinois, 180 U.S. 208 (1901) (alleging Illinois's discharge of untreated sewage into Mississippi River polluted drinking water in Missouri); South Carolina v. Georgia, 93 U.S. (3 Otto) 4 (1876) (challenged Georgia's obstruction of navigation on the Savanah River); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (poisonous gas emanating from Tennessee plant caused damage in Georgia); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851) (alleged low-hanging Virginia bridge over Ohio River obstructed passage of ships to ports in Pennsylvania).

[20] U.S. CONST. art. III, § 2. Congress has made the Court's jurisdiction over such cases "exclusive." 28 U.S.C. § 1251 (a).

[21] Robert D. Cheren, *Environmental Controversies "Between Two or More States"*, 31 PACE ENVTL. L. REV. 105, 106 (2014) (coining the term "state-controversy jurisdiction" to describe the Supreme Court's original jurisdiction over controversies between two or more states).

[22] North Dakota v. Minnesota, 263 U.S. 365, 372-73 (1923).

[23] Kansas v. Colorado, 206 U.S. 46, 97-98 (1907).

[24] *Id.*

disputes "in such a way as will recognize the equal rights of both and at the same time establish justice between them."[25]

Supreme Court intervention is necessary because "[t]he states of this Union cannot make war upon each other. . . . They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties."[26] The Constitution likewise prohibits States from conducting customs inspections of containers, vehicles, and persons entering their territory.[27]

Federal common law provides the rule of decision in original actions for nuisance.[28] "The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant."[29] Such claims "are founded on a theory of public nuisance" and essentially mirror the traditional common law of public nuisance familiar to property attorneys around the country.[30]

Historically, the bulk of the original nuisance actions heard by the Court involved pollution.[31] Congress's passage of the Clean Air and Water

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[25] *Id*.

[26] Kansas v. Colorado, 185 U.S. 125, 143 (1902).

[27] Torres v. Puerto Rico, 442 U.S. 465, 472-73 (1979). The *Torres* Court confronted a Puerto Rico statute that authorized customs inspections of persons and articles arriving from the U.S. mainland. *Id*. at 466. The statute was intended to curb "the importation of firearms, explosives, and narcotics from the mainland." *Id*. at 466-67. Puerto Rico asserted that because it is not a State, and because as an island, "its borders . . . are in fact international borders with respect to all countries except the United States" it was not subject to the restrictions that a State would be. *Id*. at 471-72. The Court rejected both contentions. First, it concluding that the Commonwealth is subject to the same Fourth Amendment restrictions as the States. *Id*. Second, the Court found that "Puerto Rico is not unique because it is an island" as "neither Alaska nor Hawaii are contiguous to the continental body of the United States." *Id*. at 474. Thus, Colorado's neighbors are subject to the very same restrictions recognized by *Torres*.

[28] *E.g*., Illinois v. Milwaukee, 406 U.S. 91, 103-04 (1972); Missouri v. Illinois, 180 U.S. 208, 241-42 (1901); HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 287 (5th ed. 2003) [hereinafter FEDERAL COURTS].

[29] Michigan v. United States Army Corps of Eng'rs, 667 F.3d 765, 781 (7th Cir. 2011); *accord* Georgia v. Tennessee Copper Co., 206 U.S. 230, 238-39 (1907); Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 855 (9th Cir. 2011).

[30] *Native Village of Kivalina*, 696 F.3d at 855; *accord e.g*., *United States Army Corps of Eng'rs*, 667 F.3d at 781; Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1235 (3d Cir. 1980).

[31] *E.g*., Vermont v. New York, 402 U.S. 940 (1971) (accused New York of polluting Lake Champlain); New Jersey v. City of New York, 283 U.S. 473 (1931) (sought to enjoin off-shore garbage dumping by New York that caused trash to wash ashore on New Jersey beaches); New York v. New Jersey, 249 U.S. 202 (1919) (sought to enjoin New Jersey's discharge of sewage into New York Harbor); Missouri v. Illinois, 180 U.S. 208 (1901) (alleging Illinois's discharge of untreated sewage into Mississippi River polluted drinking

Acts in 1960s and 70s, which established uniform national air and water-quality standards and invested the Environmental Protection Agency (EPA) with jurisdiction to administer them, put an end to virtually all such disputes.[32] Consequently, two generations of attorneys—and Justices—have matriculated without any experience with this once-common species of Supreme Court litigation.[33] Colorado's embrace of the recreational-marijuana industry has created a new form of cross-border pollution, re-awakening this long-dormant field of constitutional law.

Unlike other state vice-legalization experiments such as gambling,[34] prostitution,[35] and prize-fighting[36]—which involve *actions* undertaken at a

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water in Missouri); *Tennessee Copper*, 206 U.S. at 230 (poisonous gas emanating from Tennessee plant caused damage in Georgia).

[32] Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2536 (2011) (Clean Air Act preempts federal common law of nuisance with regard to interstate air pollution); City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) (Clean Water Act preempts federal common law of nuisance with regard to pollution of interstate bodies of water).

[33] Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 717 (2004) (asserting that "the federal common law of interstate nuisance" met "its ultimate demise following the enactment of the Clean Water Act").

[34] While many states have loosened restrictions on gambling in recent years, Nevada remains the only state where "wide-open gaming" is completely legal and exists in virtually every corner of her territory. Jamisen Etzel, *The House of Cards Is Falling: Why States Should Cooperate on Legal Gambling*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 199, 231 (2012). During the early twentieth century, the State coupled this vice with another unconventional law to attract revenues. As one commentator noted, "Nevada became the leading divorce destination in the early years of the Depression when it cut its residency requirement to six weeks and legalized wide-open gambling to entertain new residents waiting for their divorces." Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL OF RTS. J. 381, 384 (2007).

[35] Nevada permits prostitution in licensed brothels. NEV. REV. STAT. ANN. 201.354.

[36] As one commentator recently noted:

> [The lack of a central body governing the issuance of boxing licenses] gives state boxing commissions an incentive to promulgate and enforce lax regulations that bring boxing business into their states. In turn, boxers and promoters are encouraged to "forum shop" among the various state commissions in order to obtain licenses or to perpetuate unfair business practices with a minimum of oversight or interference. According to Senator John McCain . . . "this vacuum of state regulation invites forum shopping by unscrupulous promoters and managers and also provides a fertile breeding ground for fixed bouts, the exploitation of boxers, and a lack of adequate medical services at many events."

Brad Ehrlichman, *In This Corner: An Analysis of Federal Boxing Legislation*, 34 COLUM. J.L. & ARTS 421, 437 (2011).

fixed location—Colorado's initiative authorizes the trafficking of *goods*[37]—federal contraband[38]—that can easily cross state lines inside luggage,[39] through the mail,[40] or in the trunks of cars.[41] In this way, marijuana legalization produces regional externalities that closely resemble pollution. Just as contaminants released into rivers flow across state lines, marijuana introduced into the stream of commerce from Colorado dispensaries will predictably flow into neighboring States through the simple expediency of placing lawfully purchased cannabis in vehicles which are then driven across state lines. And just as interstate watercourses are guided by the laws of gravity and hydrology, the movement of Colorado pot is driven by greed. Marijuana is the most lucrative cash crop in the United States.[42] The resulting "high demand in the interstate market will draw" Colorado weed "into that market" thereby having a "substantial effect on the supply and demand" of the drug in the black markets of neighboring States.[43] The available data suggests that large quantities of Colorado cannabis are now being diverted into these markets.[44] The Court should employ the same principles it once applied in cases involving interstate environmental nuisances to resolve this problem.

The burden faced by the Court in an original action challenging Colorado's marijuana-legalization experiment is less onerous than that presented by the environmental-nuisance cases of the past. The Court is not comprised of scientists, and is ill-equipped to resolve controversies such as what concentration of a given pollutant in air or water is acceptable.[45] As

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[37] *See* U.C.C. § 2-105 (defining goods as "all things . . . which are moveable at the time of the identification for sale").

[38] 21 U.S.C. § 812 (c); Gonzales v. Raich, 545 U.S. 1, 19 (2005); *see infra*, Part II-A.

[39] *Washington, Colorado Have Few Ways to Stop Carry-On Weed*, N.Y. POST, Jan. 20, 2014, *available at* http://nypost.com/2014/01/30/washington-colorado-have-few-ways-to-stop-carry-on-weed/ [hereinafter *Carry-On Weed*] (noting that "[i]t can be easier to get through airport security with a bag of weed than a bottle of water").

[40] In 2012, before Colorado legalized recreational marijuana use, the Post Office reported a substantial uptick in intercepted marijuana packages emanating from the State, likely a result of Colorado's liberal medicinal marijuana statute. John Ingold, *Colorado Post Offices See Increase in Marijuana Packages*, DENVER POST, Feb. 28, 2012, *available at* http://www.denverpost.com/ci_20058373.

[41] Jenny Deam, *Colorado's Neighbors Dismayed by New Wave of Marijuana Traffic*, LA TIMES, May 27, 2014, *available at* http://www.latimes.com/nation/la-na-pot-trafficking-20140527-story.html#page=1 (noting a sharp rise in marijuana trafficking in Nebraska counties bordering Colorado).

[42] Nitya Venkataraman, *Marijuana Called Top U.S. Cash Crop*, ABC NEWS, Dec. 18, 2006, *available at* http://abcnews.go.com/Business/story?id=2735017 (marijuana is the most profitable cash crop in the United States).

[43] Gonzales v. Raich, 545 U. S. 1, 19 (2005).

[44] *See infra* notes 154-157 and accompanying text.

[45] The Court recently explained Congress's decision to endow the EPA with primary

such, in the days before the EPA, it was forced to rely on "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence" to resolve such disputes.[46] But it is well settled that "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual lawmaking by federal courts disappears."[47] Congress has not delegated adjudication of interstate nuisance actions involving marijuana to an administrative agency as it did with air and water-quality disputes. But it also has not left the question whether the introduction of marijuana into interstate commerce constitutes a nuisance to the "often vague and indeterminate . . . maxims of equity jurisprudence."[48] An activity constitutes a public nuisance when it creates "significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience."[49] Congress has conclusively determined that the "importation, manufacture, distribution, and possession" of marijuana has "a substantial and detrimental effect on the health and general welfare of the American people"[50] and that the intrastate "distribution and possession of [marijuana] contribute[s] to swelling the interstate traffic in such substances."[51] These findings rest on solid science. As a recent study published in the *New England Journal of Medicine* concluded, marijuana use causes "long-lasting changes in brain function that can jeopardize educational, professional and social achievements."[52]

The Supreme Court held that Congress's findings rest comfortably within its enumerated powers and that they must be accepted by reviewing courts.[53] Thus, the Supremacy Clause dictates that the introduction of

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responsibility for regulating greenhouse gases:

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.

Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2539 (2011).

[46] City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981).

[47] *Id*. at 314.

[48] *Id*. at 317.

[49] Restatement (Second) of Torts § 821B; *accord Am. Elec. Power Co*., 131 S. Ct. at 2536 (federal common law defines nuisance as activities "harmful to . . . citizens' health and welfare").

[50] 21 U.S.C. § 801 (2).

[51] 21 U.S.C. § 801 (3) & (4).

[52] Nora D. Volkow, Ruben D. Baler, Wilson M. Compton & Susan R.B. Weiss, *Adverse Health Effects of Marijuana Use*, 370 NEW ENG. J. MED. 2219, 2225 (2014).

[53] Gonzales v. Raich, 545 U.S. 1, 12 n.13, 20-22 (2005). The Justice Department announced that it would not seek to federally indict Colorado venders who sell marijuana

marijuana into the stream of commerce—even intrastate—constitutes an interstate public nuisance as that term is used in the Court's original-action jurisprudence.

While Congress has determined that the introduction of marijuana into commerce constitutes a public nuisance it remains the Court's duty to determine what remedy, if any, is available to Colorado's neighbors. Rather than issuing injunctive relief—the traditional remedy in original nuisance actions[54]—we posit that the Court should award damages to prevailing sister States compensating them for the injuries inflicted by the incursion of Colorado marijuana into their territory.

In making this contention, we draw inspiration from Nobel laureate Ronald Coase's Theorem for Externalities.[55] The Coase Theorem—"one of the most influential works on the law"[56]—posits that if transaction costs are

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pursuant to Colorado law. Press Release, Department of Justice, *Justice Department Announces Update to Marijuana Enforcement Policy*, Aug. 29, 2013, *available at* http://www.justice.gov/opa/pr/2013/August/13-opa-974.html. This in no way effects the legality of Colorado pot venders' conduct. "[F]ederal prosecutors may well choose to exercise their prosecutorial discretion and decline to seek indictments under the [federal Controlled Substances Act (CSA)] where the activity that is illegal on the federal level is legal under Colorado state law. Be that as it may, even if" marijuana venders are "never charged or prosecuted under the CSA, . . . [u]nless and until Congress changes that law," their activities "constitute a continuing federal crime." In re Rent-Rite Super Kegs W. Ltd., 484 B.R. 799, 805 (D. Colo. Bankr. 2012).

[54] Cheren, *supra* note 21, at 161 (noting that injunctive relief is the usual remedy for States prevailing in original actions).

[55] In its original incarnation, the Coase Theorem was premised on two criteria. First, Coase asserted the law must clearly assign property rights—*i.e.*, the right of neighbors to receive compensation from polluters for externalities. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2 (1960) [hereinafter Coase, *Social Cost*]. Second, he contended that transaction costs need to be practically eliminated. *Id*. In such an environment he postulated that because more profitable enterprises that are able to internalize the costs of their venture and earn profits sufficient to justify the harms they produce will be able to "buy out" their afflicted neighbors by providing them a share of the profits in exchange for allowing the nuisance to continue. *Id*; Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. LAW & PUB. POL'Y 107, 114 n.31 (2011). Coase later acknowledged that it is impossible to eliminate transaction costs. RONALD COASE, THE FIRM, THE MARKET, AND THE LAW 174 (1988). In later life, he clarified his theory, asserting that the goal of the law should be to focus on the first of the two criteria addressed in his early work—the establishment of "an appropriate system of property rights"—one driven by predictable rules forcing polluters to internalize the cost of externalities resulting from their enterprises. Ronald H. Coase, *The Institutional Structure of Production*, *in* NOBEL LECTURES IN ECONOMIC SCIENCE 11, 17 (Torsten Persson ed., 1997). Such rules enable the most economically efficient of competing land owners to prevail in property disputes. *Id*.

[56] Alexander Pearl, *Of "Texans" and "Custers": Maximizing Welfare and Efficiency Through Informal Norms*, 19 ROGER WILLIAMS U. L. REV. 32, 33 (2014); *accord* Coltman

eliminated, "parties will negotiate the efficient solution to . . . private nuisance problem[s]."[57] This is so because in the absence of such costs, an enterprise that can exploit its property rights more efficiently than its neighbors will be able to contract with them to buy their interests,[58] in effect, "shar[ing] . . . the profits associated with the nuisance . . . in exchange for allowing the nuisance to continue."[59]

Because transaction costs plague modern life,[60] real-world application of the Coase theorem is attained through the application of legal rules that best approximate the way disputes would be resolved in the absence of such costs.[61]

In the present case, such an outcome is best effectuated by a rule "charg[ing] the nuisance with the damages it cause[s]."[62] As Coase observed, "when [a] damaging business has to pay for all damage caused" market forces will determine which of the competing enterprises should prevail, coercing the partisans to allocate their resources in the most economically efficient manner.[63] If compelling a polluter to internalize the cost of his pollution drives him out of business, then his enterprise was not the most economically efficient use of the property and his interests should yield to that of his neighbors.[64] This is so because his prior success was premised upon his

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v. Comm'r of Internal Revenue, 980 F.2d 1134, 1137 (7th Cir. 1992) (celebrating Coase's "a long-belated but much-deserved Nobel Prize"); Daniel S. Levy & David Friedman, *The Revenge of the Redwoods? Reconsidering Property Rights and the Economic Allocation of Natural Resources*, 61 U. CHI. L. REV. 493, 493 (1994) (noting that the Coase Theorem is "[o]ne of the most influential ideas in the field of law and economics"); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 669 (1979) (calling the Coase Theorem "the most significant legal-economic proposition to gain currency since the early utilitarians identified the maximization of individual satisfaction with consumer freedom from conscious state regulation").

[57] Michael J. Meurer, *Fair Division*, 47 BUFFALO L. REV. 937, 952 (1999).

[58] Jill E. Fisch, *Start Making Sense: an Analysis and Proposal for Insider Trading Regulation*, 26 GA. L. REV. 179, 226 n.205 (1991).

[59] Dogan & Young, *supra* note 55, at 114 n.31.

[60] Coase identified at least two types of transactions costs: "the cost of discovering what the relevant [market] prices are," and "the costs of negotiating and concluding a separate contract for each exchange transaction which takes place on a market." R.H. COASE, THE NATURE OF THE FIRM, IN THE FIRM, THE MARKET, AND THE LAW 38-39 (1988).

[61] Steven N. Bulloch, *Fraud Liability Under Agency Principles: New Approach*, 27 WM. & MARY L. REV. 301, 307 n.29 (1986) (citing Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67, 69 (1968) [hereinafter Calabresi, *Transaction Costs*]).

[62] Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 534-35 (1961) [hereinafter Calabresi, *Some Thoughts on Risk Distribution*].

[63] Coase, *Social Cost*, *supra* note 55, at 2.

[64] Calabresi, *Some Thoughts on Risk Distribution*, *supra* note 62, at 534-35.

ability to force others to assume the costs of his business.[65] He was a free-rider.[66] In contrast, if the polluter assumes responsibility for *all* the costs of his venture and still realizes a sufficient profit to stay in business, then his use of the land is most efficient, and his neighbors should yield to his interest.[67]

If Colorado's venture generates sufficient revenue to compensate her neighbors for the damage caused and remains profitable her enterprise will have proven efficient and she will prevail by "shar[ing] . . . the profits associated with the nuisance" with her neighbors "in exchange for allowing the nuisance to continue."[68] Conversely, if internalizing the extraterritorial damage her program causes results in a net loss, her neighbors' interests will ultimately prevail. In either case, the viability of Colorado's program will turn on whether the profits it generates exceed the harm it creates—exactly the metric that would govern in a transaction-cost-free environment.

From a policy standpoint, we do not express an opinion whether marijuana legalization (or prohibition) is objectively "good" or "bad." We remain agnostic. We simply posit that along with the wealth it generates, Colorado's marijuana-legalization experiment produces harmful externalities that transcend her borders. A judgment forcing Colorado to compensate her neighbors for these injuries is consistent with Coase's thesis that maximum utility is achieved by forcing "the damaging business to pay for all damaged caused."[69]

This Article consists of three Parts. Part I explores the history and purposes underlying the Supreme Court's state-controversy jurisdiction—particularly cases involving interstate nuisances. We contend that sister State challenges to Colorado's marijuana-legalization experiment—like interstate environmental nuisances of the past—fall squarely within the jurisdiction conferred upon the Court by the Constitution.

Part II examines the federal common law of nuisance. While Congress has left the common law governing original nuisance actions not premised on air or water pollution largely unmolested, it has partially preempted the question presented here. Congress's finding that the commercial exploitation of marijuana has "a substantial and detrimental effect on the health and general welfare of the American people"[70] renders

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[65] J. Otto Grunow, *Wisconsin Recognizes the Power of the Sun:* Prah v. Maretti *and the Solar Access Act*, 1983 WIS. L. REV. 1263, 1285 n.131 (1983).

[66] Lisa Schenck, *Climate Change Crisis—Struggling for Worldwide Collective Action*, 19 COLO. J. INT'L ENVTL. L. & POL'Y 319, 336 (2008) ("Free-riding occurs when some parties bear the costs of an action, while others, the free-riders, bear no burden, but still enjoy the benefits.").

[67] Calabresi, *Some Thoughts on Risk Distribution*, *supra* note 62, at 534-35.

[68] Dogan & Young, *supra* note 55, at 114 n.31.

[69] Coase, *Social Cost*, *supra* note 55, at 2.

[70] 21 U.S.C. § 801 (2). As it would be impracticable for a nine member panel to make

Colorado's regime a nuisance *per se*.

Finally, Part III analyzes the remedies available to a State prevailing in such an action. Inspired by the Coase Theorem, we contend that the Court should award a prevailing State damages compensating her—as well as can be done by a monetary award—for the injuries inflicted by Colorado's experiment.

I. THE SUPREME COURT POSSESSES ORIGINAL JURISDICTION OVER SISTER STATES' CHALLENGES TO COLORADO'S MARIJUANA-LEGALIZATION EXPERIMENT

A. State-Controversy Jurisdiction

The Constitution endows the Supreme Court with original jurisdiction over suits between States "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force."[71] The first Congress made the Court's jurisdiction over such matters "exclusive"[72] and it remains so to this day[73]—"as in its very nature it necessarily must be."[74] This jurisdiction is limited "to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment."[75] "If the constitution ha[d] given to no department the power to settle" such quarrels, "the large and powerful states" would inevitably always prevail, forcing the "weak ones" to "acquiesce and submit to [their] physical power."[76]

Recalling the "horrid picture of the dissensions and private wars" between states that plagued fifteenth-century Germany, Alexander Hamilton

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factual findings, when the Court accepts jurisdiction over an original action, it appoints a Special Master to conduct the proceedings. JOSEPH F. ZIMMERMAN, INTERSTATE DISPUTES: THE SUPREME COURT'S ORIGINAL JURISDICTION 215 (2006). "[T]he special master performs a role similar to the one performed by the U.S. District Court." *Id*. The Master ultimately submits proposed findings of fact, conclusions of law, and a recommended decree, all of which are "subject to consideration, revision, or approval by the Court." Arizona v. California, 373 U.S. 546, 551 (1963); *accord* Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 654 (2002).

[71] North Dakota v. Minnesota, 263 U.S. 365, 372-73 (1923).

[72] Kansas v. Colorado, 185 U.S. 125, 139 (1902) ("The original jurisdiction of this court over 'controversies between two or more States' was declared by the judiciary act of 1789 to be exclusive . . . .").

[73] 28 U.S.C. § 1251 (a).

[74] *Kansas*, 185 U.S. at 139.

[75] *North Dakota*, 263 U.S. at 372-73.

[76] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 726 (1838).

argued in *The Federalist* that it is "essential to the peace of the Union" to entrust "that tribunal . . . having no local attachments" to resolve the "bickerings and animosities" that will inevitably "spring up among the members of the Union."[77] Hamilton's fears were prescient. As recently as 1922, Supreme Court intervention "narrowly averted" an "armed conflict" between Texas and Oklahoma over a boundary dispute.[78] Even as the Court heard the case, "the militia of Texas" was amassing "to support the orders of [the Texas] courts, and an effort was being made to have the militia of Oklahoma called for a like purpose."[79]

"[T]here is no definition or description, contained in the Constitution, of the kind and nature of the controversies" encompassed by state-controversy jurisdiction.[80] Thus, in exercising such jurisdiction, the Court "look[s] not merely to" the Constitution's "language," but also to "its historical origin" and to prior opinions in which the "meaning and the scope" of original jurisdiction "have received deliberate consideration."[81] While "it would be objectionable, and indeed impossible, for the court to anticipate by definition what controversies can and what cannot be brought within [its] original jurisdiction,"[82] historically, such cases generally fall into three categories: conflicts over boundary lines,[83] water-rights disputes,[84] and cross-

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[77] THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[78] Oklahoma v. Texas, 258 U.S. 574, 580 (1922).

[79] *Id*.

[80] Missouri v. Illinois, 180 U.S. 208, 219 (1901).

[81] *Id*.

[82] *Id*. at 241.

[83] *E.g*., New Jersey v. New York, 526 U.S. 589 (1999) (settling dispute regarding jurisdiction over Ellis Island); Nebraska v. Iowa, 145 U.S. 519 (1892) (concluding sudden shift in Missouri River did not change boundary between states); Missouri v. Kentucky, 78 U.S. 395 (1870 (settling ownership of Mississippi River island); Missouri v. Iowa, 48 U.S. 660 (1849) (settling Missouri's northern boundary with Iowa); Rhode Island v. Massachusetts, 32 U.S. 651 (1833) (settling Rhode Island's northern border with Massachusetts).

[84] *E.g*., New Jersey v. New York, 279 U.S. 823 (1929) (alleged New York drew an inequitable amount of water from Delaware River before it entered New Jersey); Wisconsin v. Illinois, 270 U.S. 631 (1926); (challenged Illinois's diversion of water from Lake Michigan to Mississippi River which substantially reduced water levels in lower Great Lakes); Wyoming v. Colorado, 243 U.S. 622 (1917) (alleged Colorado drew an inequitable amount of water from Laramie River before it entered Wyoming).

border nuisances.[85] This latter class of cases has proven the most vexing.[86]

"When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done."[87] Rather, the Constitution entrusts the Court to equitably resolve such feuds.[88] "The States by entering the Union did not sink to the position of private owners subject to one system of private law."[89]

1. Examples of Original Nuisance Actions

States have invoked the Court's original jurisdiction on more than a dozen occasions to thwart a neighbor's alleged nuisance.[90] While the Court's original nuisance cases are too numerous to chronicle in detail here, a few notable examples merit discussion.

In 1851, Pennsylvania was the first State to successfully utilize the Court's original jurisdiction to abate a sister State's nuisance, obtaining an order compelling the removal of a Virginia bridge over the Ohio River that prevented high-stacked steamships from reaching Pittsburgh's harbor.[91] The

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[85] *E.g.*, Vermont v. New York, 402 U.S. 940 (1971) (accused New York of polluting Lake Champlain); New Jersey v. City of New York, 283 U.S. 473 (1931) (sought to enjoin off-shore garbage dumping by New York that caused trash to wash ashore on New Jersey beaches); New York v. New Jersey, 249 U.S. 202 (1919) (sought to enjoin New Jersey's discharge of sewage into New York Harbor); Missouri v. Illinois, 180 U.S. 208 (1901) (alleging Illinois's discharge of untreated sewage into Mississippi River polluted drinking water in Missouri); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (poisonous gas emanating from Tennessee plant caused damage in Georgia).

[86] "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' . . . There is general agreement that it is incapable of any exact or comprehensive definition." W. PROSSER & P. KEETON, THE LAW OF TORTS, § 86 at p. 616 (5th ed. 1984).

[87] *Tennessee Copper*, 206 U.S. at 237.

[88] *See Rhode Island*, 37 U.S. (12 Pet.) at 726 ("Bound hand and foot by the prohibitions of the constitution, a complaining state can neither [negotiate treaties], or fight with its adversary . . . .").

[89] *Tennessee Copper*, 206 U.S. at 237-38. Original actions involving interstate nuisances are governed by federal common law. *E.g.*, Illinois v. Milwaukee, 406 U.S. 91, 103-04 (1972); Missouri v. Illinois, 180 U.S. 208, 241-42 (1901); FEDERAL COURTS, *supra* note 28, at 287. But the Court "[s]itting, as it were, as an international, as well as a domestic, tribunal," looks to "Federal law, state law, and international law, as the exigencies of the particular case may demand" in promulgating the common-law rules that govern such disputes. Kansas v. Colorado, 185 U.S. 125, 146-47 (1902).

[90] *See* cases cited *supra* note 19.

[91] Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 564-65 (1851). The site of the bridge, Wheeling, is in present-day West Virginia. The Court's decision predated West Virginia's formation. Robert W. Milburn, *Congress Attempts to Remove Federal Court Supervision Over State Prisons: Is 3626(b)(2) of the Prison Litigation Reform Act Constitutional?*, 6 TEMP. POL. & CIV. RTS. L. REV. 75, 83 n.62

Court recognized that because "the Ohio being a navigable stream" is capable of carrying "commerce upon it which extends to other States . . . the act of Virginia" authorizing a bridge that "obstruct[s] navigation . . . could afford no justification for its construction."[92]

Four years later, the Court reversed itself, allowing the bridge to be rebuilt after Congress enacted statutes declaring it part of a federal post road, essential "for the passage of mails."[93] The Court—confronting the first instance of congressional preemption of federal common law—concluded that its 1851 holding was no longer binding because "[i]t was in conflict with [subsequent] acts of congress" governing interstate commerce "which [are] the paramount law."[94]

In the early 1900s, Illinois found herself in the cross-hairs of two prominent nuisance actions involving the Illinois Waterway, a man-made system of rivers and canals connecting Lake Michigan with the Mississippi River.[95] In 1901, Missouri sued Illinois seeking to enjoin Chicago from releasing untreated sewage into the Mississippi through the waterway.[96] The bill alleged that St. Louis had suffered a typhoid-fever outbreak after Illinois began diverting waste to the Mississippi.[97] The Court unanimously overruled Illinois's demurrer, concluding that Missouri's claims, if substantiated, "threatened" the "health and comfort" of all Missourians and thus constituted a nuisance under federal common law.[98] Such cases fall squarely within the Constitution's grant of state-controversy jurisdiction. "If Missouri were an independent and sovereign State . . . she could seek a remedy by negotiation, and, that failing, by force."[99] Since Missouri's "diplomatic powers" were "surrendered to the general government," the Constitution entrusted the Supreme Court "to provide a remedy"—abatement of the nuisance.[100]

After the case was tried, the Court ultimately denied relief because Illinois successfully invoked the unclean-hands doctrine—an affirmative defense positing that a plaintiff will be denied equitable relief if it is proven that "he has engaged in the same conduct that he describes in his

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(1997).

[92] *Wheeling & Belmont Bridge Co*., 54 U.S. (13 How.) at 564-65.

[93] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 429 (1855).

[94] *Id*. at 430.

[95] *See* U.S. ARMY CORPS OF ENGINEERS, ROCK ISLAND DISTRICT, HISTORIC AMERICAN ENGINEERING RECORD: ILLINOIS WATERWAY, *available at* http://lcweb2.loc.gov/pnp/habshaer/il/il0900/il0930/data/il0930data.pdf (presenting history and specifications of Illinois Waterway).

[96] Missouri v. Illinois, 180 U.S. 208, 248 (1901).

[97] Missouri v. Illinois, 200 U.S. 496, 522-23 (1906).

[98] *Missouri*, 180 U.S. at 241.

[99] *Id*.

[100] *Id*.

Complaint."[101] Illinois proved that Missouri allowed her own towns to discharge the very same pollutants into the river.[102] Noting that the offending Missouri discharges were "above the intake of St. Louis," the Court averred that "[w]here, as here, the plaintiff . . . deliberately permits discharges similar to those of which it complains," it cannot claim that the defendant's acts were wrongful and "courts should not be curious to apportion the blame."[103]

The Illinois Waterway became the subject of litigation once again in 1929—this time a challenge by the State's northerly neighbors. In that case, Michigan and Wisconsin obtained an injunction compelling Illinois to reduce the amount of water diverted from Lake Michigan to the Mississippi after water levels dropped precipitously in the lower Great Lakes and the St. Lawrence River.[104]

In 1931, New Jersey successfully invoked the Court's powers, obtaining an injunction putting an end to New York's long-standing practice of dumping garbage off-shore.[105] The Court awarded relief because New Jersey proved that her beaches had become inundated with New York trash.[106]

Original actions such as these once comprised a relatively common part of the Court's docket, "run[ning] like threads of gold"[107] through some 4,100 pages of the United States Reports.[108] The number of these actions fell dramatically in the late-1970s following Congress's passage of the Clean Air and Water Acts. These statutes set uniform national air and water-quality

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[101] Pujals *ex rel*. El Rey de los Habanos, Inc. v. Garcia, 777 F. Supp. 2d 1322, 1332 (S.D. Fla. 2011).

[102] *Missouri*, 200 U.S. at 522.

[103] *Id*.

[104] Wisconsin v. Illinois, 278 U.S. 367, 400 (1929). Ironically, the Illinois Waterway—now under the stewardship of the U.S. Army Corps of Engineers—became the subject of a federal common-law of nuisance action again in *Michigan v. United States Army Corps of Engineers*, 667 F.3d 765 (7th Cir. 2011). This time, Michigan sued the Waterway's federal custodians, alleging that the invasive Asian Carp would "migrate through waterworks operated by the defendants from rivers connected to the Mississippi into Lake Michigan and on to the other Great Lakes." *Id*. at 771. The court rejected the defendants' contention that they could not be held to answer in a nuisance action because the carp "travel on their own." *Id*. The court concluded that the defendants "bear responsibility for nuisance caused by their operation of a manmade waterway between the Great Lakes and Mississippi watersheds." *Id*. The fact that "they are not themselves physically moving fishing from one body of water to the other does not mean that their normal operation" of the waterway "cannot cause a nuisance." *Id*.

[105] New Jersey v. City of New York, 283 U.S. 473, 478-79 (1931).

[106] *Id*.

[107] JAMES BROWN SCOTT, JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION vii (1919).

[108] Cheren, *supra* note 21, at 107 (noting original jurisdiction decisions comprise 4,100 pages of the U.S. Reports).

standards and established an administrative agency, the EPA, to administer the new rules, rendering the Court's historic role of establishing and enforcing interstate environmental standards obsolete.[109] Because most interstate nuisance actions stemmed from such disputes, generations of jurists and lawyers matriculated without experience in these once-common suits.[110] Colorado's introduction of recreational marijuana into the stream of interstate commerce has reawakened this long-dormant body of constitutional law.

2. Colorado's Introduction of Marijuana into Interstate Commerce Satisfies the Requirements for an Original Nuisance Action

Like downstream pollution produced by industrial operations, the cross-border externalities resulting from Colorado's introduction of marijuana into the stream of interstate commerce fall squarely within the ambit of the Court's original jurisdiction. The exercise of this jurisdiction is most appropriately applied "to questions in which the sovereign and political powers of the respective states [are] in controversy"[111]—and in particular, those involving a quarrel for which a "sovereign State . . . could seek a remedy by negotiation, and, that failing, by force."[112] The present controversy presents just such a case. It strikes at the heart of the competing "sovereign and political powers of the respective states." And as independent nations, Colorado's sister States would possess the full panoply of diplomatic measures to limit the flow of marijuana into their territory.

Most importantly, neighboring States could step up customs enforcement by closely inspecting individuals, vehicles and vessels entering their domain. It is well settled that sovereign nations possess the unfettered right "to protect [themselves] by stopping and examining persons and property crossing into [their] country."[113] Thus, searches conducted by federal customs officials at the U.S. border are "not subject to the warrant provisions of the Fourth Amendment and [are] 'reasonable' within the meaning of [that] Amendment."[114]

But upon joining the Union, Colorado's neighbors gave up these

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[109] Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2536 (2011) at 2536; City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981); Cheren, *supra* note 21, at 107 (noting original jurisdiction decisions comprise 4,100 pages of the U.S. Reports).

[110] Percival, *supra* note 33, at 717 (asserting that "the federal common law of interstate nuisance" met "its ultimate demise following the enactment of the Clean Water Act").

[111] Missouri v. Illinois, 180 U.S. 208, 226 (1901).

[112] *Id*. at 241.

[113] United States v. Ramsey, 431 U.S. 606, 616 (1977).

[114] *Id*. at 617.

powers. The Constitution divests States of the power to conduct customs searches.[115] Such inspections both violate the Fourth Amendment and run afoul of each State's obligation to accord visitors "the privileges and immunities of [her] own residents."[116] As such, States "ha[ve] no sovereign authority to prohibit entry into [their] territory" and "border and customs control" for "all international ports of entry" must be exclusively "conducted by federal officers."[117]

Absent exigent circumstances, baggage cannot be searched without a warrant.[118] And the Supreme Court has recognized that vehicle searches conducted by State law-enforcement officers are "unreasonable" within the meaning of the Fourth Amendment "unless supported by . . . probable cause."[119] Thus, so long as they abstain from conduct providing law enforcement probable cause to search their vehicles, nothing prevents citizens of states where marijuana is illegal from driving to Colorado, filling their trunks with lawfully purchased pot and returning to their home states with their illicit bounty.[120]

Airports likewise are ill-equipped to detect marijuana inside luggage. Most domestic airports lack the capability to meaningfully screen passengers for cannabis.[121] As the Associated Press reported, "[i]t can be easier to get through airport security with a bag of weed than a bottle of water."[122]

Once outside Colorado, this marijuana is easily diverted into the black market of neighboring states. As Justice Scalia observed, rejecting arguments that the federal-marijuana ban unconstitutionally intrudes upon state sovereignty,[123] when a State permits marijuana to be introduced into its

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[115] Torres v. Puerto Rico, 442 U.S. 465, 472-73 (1979). *See supra* note 27 and accompanying text.

[116] *Torres*, 442 U.S. at 473; U.S. CONST. art. IV, § 2, cl. 1.

[117] *Torres*, 442 U.S. at 473.

[118] *Id*. at 471. The Court has held that baggage within automobiles are subject to the "automobile exception" and can be searched without a warrant if supported by probable cause. Wyoming v. Houghton, 526 U.S. 295, 301 (1999).

[119] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 668 (1995).

[120] Colorado law permits marijuana vendors to sell their wares to Coloradans one ounce at a time, but limits sales to out-of-state residents to one quarter ounce at a time. COLO. REV. STAT. § 12-43.4-306(3)(a). While this provision limits the amount of cannabis non-Coloradans can buy at any one store, the statute does nothing to prevent visitors (or Colorado residents) from "smurfing"—going from store to store to accumulate large amounts of pot to sell into the out-of-state black market. *Just Say "Slow"*, WASH. POST, Jan. 13, 2014, at A16.

[121] *Carry-On Weed*, *supra* note 39, at http://nypost.com/2014/01/30/washington-colorado-have-few-ways-to-stop-carry-on-weed/.

[122] *Id*.

[123] Gonzales v. Raich, 545 U.S. 1, 41 (2005) (Scalia, J., concurring) (observing that federal preemption of state laws permitting marijuana use present no "violation of state sovereignty of the sort that would render this regulation inappropriate").

intrastate market, that marijuana "is never more than an instant from the interstate market—and this is so whether or not the possession is . . . lawful . . . under the laws of a particular State."[124] Moreover, it is a fundamental aspect of sovereignty that one State "need not accept on faith that" another's "law will be effective in maintaining a strict division between a lawful [intrastate] market for . . . marijuana" and the unlawful interstate market.[125] "To impose on" one sovereign, "the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution."[126]

Admittedly, Colorado's diversion of marijuana into interstate commerce differs from conventional pollution because it involves criminal acts carried out by third parties—purchasers who take marijuana across state lines. But it is well settled that "[t]he law reasonably imposes a duty on a possessor of land to ensure that activities on that land—where the possessor has control—do not produce a nuisance."[127] Consequently, a defendant is liable for criminal actions committed by third parties that emanate from his territory if he "had reasonable anticipation of harm and failed to exercise reasonable care to avert such harm."[128] "A property owner cannot knowingly allow his property to become a haven for criminals to the detriment of his neighbors and deny that his property has become a nuisance because the resulting criminal activities are those of third parties."[129] As will be explained in greater detail below, Colorado both had substantial notice that her marijuana market is harming sister states and has failed to exercise reasonable care to avert that harm.[130] Addressing Colorado's toothless warnings to marijuana purchasers that it is unlawful to take pot out of the State, the *Los Angeles Times* bluntly noted (no pun intended): "it's fantasy to

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[124] *Id*. at 41.

[125] *Id*. at 42.

[126] *Id*. (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

[127] Redevelopment Agency v. BNSF Ry., 643 F.3d 668, 676 (9th Cir. 2011).

[128] Kelly v. Boys' Club of St. Louis, Inc., 588 S.W. 2d 254, 257 (Mo. App. 1979); *accord* Restatement (Second) of Torts § 838.

[129] *Kelly*, 588 S.W. 2d at 257; *accord* Restatement (Second) of Torts § 383; *Redevelopment Agency*, 643 F.3d at 676; Sholberg v. Truman, __ N.W.2d __, 2014 WL 2595633, *9 (Mich. 2014); Mark v. State, 84 P.3d 155, 161 (Or. App. 2004); Eaton v. Cormier, 748 A.2d 1006, 1008 (Me. 2000); City of Seattle v. McCoy, 4 P.3d 159, 169 (Wash. App. 2000); Lew v. Superior Court, 20 Cal. App.4th 866, 871 (1993); Statler v. Catalano, 521 N.E.2d 565, 573 (Ill. 1988); State v. Charpentier, 489 A.2d 594, 598 (N.H. 1985).

[130] *See infra* notes 138-166 and accompanying text.

think that won't happen."[131]

A recent Seventh Circuit opinion—fittingly directed at the Illinois Waterway, the canal that was the target of two prominent original actions in the early twentieth century[132]—illustrates this principle. There, the court rejected arguments by the U.S. Army Corps of Engineers, the canal's modern-day custodian,[133] that the Corps is immune from liability for the threatened migration of an invasive species of carp into the Great Lakes through the waterway.[134] The Corps asserted it cannot be held to answer in a federal common law of nuisance action because the carp "travel on their own."[135] The court concluded that the Corps "bear[s] responsibility for nuisance caused by [its] operation of a manmade waterway between the Great Lakes and Mississippi watersheds."[136] The fact that the Corps is "not . . . physically moving fish from one body of water to the other does not mean that [its] normal operation" of the waterway "cannot cause a nuisance."[137] Likewise, the fact that Colorado is not herself "physically moving" marijuana over her borders "does not mean that [her] normal operation" of her commercial pot market "cannot cause a nuisance" in neighboring states.

In the first months of Colorado's experiment, authorities in surrounding States reported a surge in seizures of Colorado marijuana.[138]

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[131] Deam, *supra* note 41, at http://www.latimes.com/nation/la-na-pot-trafficking-20140527-story.html#page=1.

[132] *See supra* notes 95-104 and accompanying text.

[133] Jenco v. United States, 1991 WL 204964, *1 (N.D. Ill. Oct. 1, 1991) (noting that the Army Corps of Engineers now exercises jurisdiction over the Illinois Waterway).

[134] Michigan v. United States Army Corps of Eng'rs, 667 F.3d 765, 771 (7th Cir. 2011). The plaintiffs could not invoke the Court's original jurisdiction because the defendant was a federal agency, not a State.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] Trevor Hughes, *In Tiny Nebraska Towns, a Flood of Colorado Marijuana*, USA TODAY, June 11, 2014, *available at* http://www.usatoday.com/story/news/nation/2014/06/11/colorado-marijuana-exports/9964707/ [hereinafter Hughes, *In Tiny Nebraska Towns*]; Matt Ferner, *Keep Your Legal Weed in Colorado, Say Cops in Neighboring States*, HUFFINGTON POST, May 28, 2014, *available at* http://www.huffingtonpost.com/2014/05/28/colorado-marijuana_n_5405422.html; Deam, *supra* note 41, at http://www.latimes.com/nation/la-na-pot-trafficking-20140527-story.html#page=1; Amanda Kost & Jennifer Kovaleski, *Colorado Weed Blamed for Increasing Law Enforcement Costs in Nebraska*, DENVER CHANNEL, May 25, 2014, *available at* http://www.thedenverchannel.com/news/local-news/colorado-blamed-for-increasing-law-enforcement-costs-in-nebraska; David Hendee, *Nebraska on its Own with Drug Enforcement Costs Tied to Colorado Pot Sales*, OMAHA WORLD HERALD, April 20, 2014, *available at* http://m.omaha.com/news/nebraska-on-its-own-with-drug-enforcement-costs-tied-to/article_d76f74a4-b109-5080-9d7b-4e26264686bc.html?mode=jqm; *Carry-On Weed*, *supra* note 39, at http://nypost.com/2014/01/30/washington-colorado-have-few-ways-to-stop-carry-on-

States along the Interstate 80 corridor have been the hardest hit,[139] but agents have seized Colorado cannabis as far away as Florida and New York suggesting that Colorado has become a significant exporter of marijuana nationwide.[140]

Given the Colorado program's recent vintage, the available data at this point is mostly anecdotal. But studies conducted after Colorado liberalized her medicinal-marijuana program yield strong evidence that the State's decriminalization of recreational pot is having profound effects on interstate commerce.

Colorado voters legalized medicinal marijuana in 2000, permitting qualified individuals who obtained a "recommendation"[141] from a Colorado physician to receive a card authorizing them to grow and possess up to two ounces of the drug.[142] The law did not authorize the commercial sale of marijuana, medicinal or otherwise, and between 2001 and 2008 the number of individuals authorized to cultivate home-grown marijuana slowly grew to about 4,800.[143] Beginning in 2009, Colorado began licensing commercial dispensaries to sell marijuana to qualified cardholders.[144] By 2012, the State

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weed/; Ben Neary, *Wyoming Governor Braces for Influx of Colorado Pot*, MISSOULA MISSOULIAN, Sept. 14, 2013, *available at* http://missoulian.com/news/state-and-regional/wyoming-governor-braces-for-influx-of-colorado-pot/article_abd7b5b2-1c9f-11e3-ba78-001a4bcf887a.html; John Ingold & Eric Gorski, *More Colorado Pot Is Flowing to Neighboring States, Officials Say*, DENVER POST, Sept. 3, 2013, *available at* http://www.denverpost.com/breakingnews/ci_24008061/more-colorado-pot-is-flowing-neighboring-states [hereinafter Ingold & Gorski, *More Colorado Pot Is Flowing*].

[139] Hendee, *supra* note 138, at http://m.omaha.com/news/nebraska-on-its-own-with-drug-enforcement-costs-tied-to/article_d76f74a4-b109-5080-9d7b-4e26264686bc.html?mode=jqm.

[140] Ingold & Gorski, *More Colorado Pot Is Flowing*, *supra* note 138, at http://www.denverpost.com/breakingnews/ci_24008061/more-colorado-pot-is-flowing-neighboring-states.

[141] Seeking to avoid federal criminal liability for its physicians, Colorado law talismanically asserts that its doctors do not "prescribe" medicinal marijuana. Burns v. State, 246 P.3d 283, 285 (Wyo. 2011) (citing COLO. CONST. art. XVIII, § 14(2)(c). Rather, "Colorado law simply allow[ed] for a physician to certify that a patient might benefit from the use of marijuana as a medical treatment." *Burns*, 246 P.3d at 285. The State then left it "entirely up to the patient whether to apply for a medical marijuana registry card from the State of Colorado" and assigned the State itself (rather than a physician) to make "the final determination whether the patient qualifies for the registry card, thereby exempting the patient from criminal liability for possessing amounts of marijuana necessary for medicinal purposes." *Id.*

[142] HIGH INTENSITY DRUG TRAFFICKING AREA, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT 2, *available at* http://nrfocus.org/wp-content/uploads/2013/08/Legalization-of-MJ-in-Colorado-The-Impact.pdf [hereinafter LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1].

[143] *Id.* at 5.

[144] *Id.*

had licensed 532 dispensaries and the number of card holders swelled to over 108,000.[145]

While Colorado's pot program remained confined to medicinal purposes in name, it became an open secret that marijuana cards could be easily procured by anyone willing to feign the most innocuous ailment.[146] A 2013 audit revealed that just twelve doctors had authorized more than half of the cards issued by the State.[147] As the *Denver Post* candidly acknowledged in a 2013 editorial, "[w]e don't doubt some of those people fit the criteria for medical marijuana, but we also suspect many were just aching for marijuana."[148]

Thus, beginning in 2009, Colorado effectively legalized recreational pot—at least for Coloradoans willing to take the time to obtain a local doctor's recommendation. During this period, the Rocky Mountain High Intensity Drug Trafficking Area (HIDTA), a federal agency within the National Office of Drug Control Policy,[149] conducted two studies measuring the externalities—both inside Colorado and in surrounding states—arising from Colorado's lax marijuana laws.[150]

From 2007 to 2012—a period when Colorado traffic fatalities dropped nearly fifteen percent overall—the study reveals that fatal car accidents involving drivers who tested positive for marijuana increased 100 percent.[151] In 2012, more than sixteen percent of fatal car accidents involved

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[145] *Id.*

[146] Leonardo Haberkorn, *Uruguay Leader Calls Colorado Pot Law "a Fiction"*, DENVER POST, May 2, 2014, *available at* http://www.denverpost.com/marijuana/ci_25684993/uruguays-president-calls-colorado-pot-law-fiction; *Denver and Colorado Are Lost in a Fog on Pot Regulation*, DENVER POST, July 21, 2013, *available at* http://www.denverpost.com/ci_23688653/denver-and-colorado-are-lost-fog-pot-regulation [hereinafter *Denver and Colorado Are Lost in a Fog*]; Rebecca Tonn, *Attorney General, Drug Task Force Shut Down Marijuana Ring in Colorado*, COLORADO SPRINGS BUS. J., Jan. 7, 2011, *available at* http://csbj.com/2011/01/07/attorney-general-drug-task-force-shut-down-marijuana-ring/; Lynn Bartels, *Clouds Hang Over Pot Issue Sen. Romer Plans to Introduce Medical-Marijuana Bill to Clarify Regulations*, DENVER POST, Oct. 22, 2009, at A1.

[147] *Denver and Colorado Are Lost in a Fog*, *supra* note 146, at http://www.denverpost.com/ci_23688653/denver-and-colorado-are-lost-fog-pot-regulation.

[148] *Id.*

[149] *See* HIGH INTENSITY DRUG TRAFFICKING AREAS, http://www.whitehouse.gov/ondcp/high-intensity-drug-trafficking-areas-program (last visited July 10, 2014) (White House webpage link dedicated to the HIDTA Program).

[150] LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 142, at 1; HIGH INTENSITY DRUG TRAFFICKING AREA, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT, VOLUME 2 1, *available at* http://www.rmhidta.org/default.aspx/MenuItemID/687/MenuGroup/RMHIDTAHome.htm [hereinafter LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 2].

[151] LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 2, *supra* note 150, at 7.

a driver who was high on marijuana at the time of the crash.[152] In 2007, stoned drivers were responsible for just seven percent of the state's fatal accidents.[153]

These studies also reveal that Colorado has become a principal gateway through which marijuana enters the black markets of other states. In 2013 highway-patrol confiscations of Colorado pot in adjacent states increased 397 percent from the 2008 total.[154] Investigators determined that the seized pot was bound for the black markets of at least forty different states.[155] And from 2010 to 2013, the Postal Service reported a shocking 1,280 percent increase in intercepted parcels containing Colorado marijuana destined for other states.[156] These interdictions undoubtedly constituted a small fraction of the Colorado marijuana funneled into neighboring states during the course of the studies.[157]

As striking as these figures are, Colorado's full-scale legalization of recreational pot is surely proving much worse for her neighbors. While one did not have to suffer any real ailment to acquire cannabis under the State's "medicinal" marijuana program, the law required consumers to obtain a recommendation from a Colorado physician and a state-issued card before they could purchase legal weed.[158] These requirements made it difficult for out-of-state residents—and particularly tourists—to partake in Colorado's marijuana market.[159] The State's new recreational-use laws eliminated these impediments.[160] Predictably, since Colorado embraced its wide-open marijuana market in January, the State has witnessed an explosion in pot-based tourism.[161] HIDTA's studies strongly suggest that these out-of-state

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[152] *Id.*

[153] *Id.*

[154] *Id.* at 90.

[155] *Id.*

[156] *Id.* at 113.

[157] *Id.* at 108 (suggesting that authorities in neighboring states are "just scratching the tip of the iceberg comparted to what's out there").

[158] LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 142, at 4-5.

[159] Jack Healy, *In Line Early for Milestone on Marijuana*, N.Y. TIMES, Jan. 2, 2014, at A1.

[160] *Id.*

[161] Aaron Smith, *Tourists Flock to Colorado to Smoke Legal Weed*, CNN MONEY, Aug. 22, 2014, *available at* http://money.cnn.com/2014/08/22/smallbusiness/marijuana-tourism-colorado/index.html?hpt=hp_t2; Trevor Hughes, *Marijuana Tourists Sparking Up in Colorado's Ski Towns*, USA TODAY, July 10, 2014, *available at* http://www.usatoday.com/story/news/nation/2014/07/10/colorados-marijuana-market-is-far-larger-than-predicted/12438069/ [hereinafter Hughes, *Marijuana Tourists Sparking Up*]; John Ingold & Jason Blevins, *Marijuana Tourism Booms in Colorado, Though Officials Remain Skeptical*, DENVER POST, April 20, 2014, *available at* http://www.denverpost.com/marijuana/ci_25601236/marijuana-tourism-booms-colorado-though-officials-remain-skeptical [hereinafter Ingold & Blevins, *Marijuana Tourism*

consumers are substantially contributing to both highway deaths and black-market trafficking in neighboring states.[162]

This increased criminal activity has led to sharp increases in the law-enforcement budgets of surrounding States.[163] Nebraska Attorney General John Bruning summed up the sentiments of Colorado's neighbors: "We are very troubled by the fact that their change in law has become our problem."[164]

The very Task Force Colorado created to implement her new marijuana laws openly acknowledged that "[a]dditional actions" are necessary "to limit diversion out of Colorado."[165] Yet, short of instructing purchasers that it is unlawful to transport Colorado weed outside the State, it has done nothing to prevent diversion of marijuana into the interstate black market.[166]

Voters in Colorado—and other States—will ultimately be called upon to judge whether the benefits of marijuana legalization justify its costs. The attendant injuries Colorado inflicts on her neighbors should be a part of her cost of doing business. Only then can the polities of neighboring States decide whether Colorado's novel venture is worth emulating.

Blooms].

[162] LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 142, at 4-5, 38, 52; LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 2, *supra* note 150, at 7, 90, 113.

[163] Hughes, *In Tiny Nebraska Towns*, *supra* note 138, at http://www.usatoday.com/story/news/nation/2014/06/11/colorado-marijuana-exports/9964707/; Deam, *supra* note 41, at http://www.latimes.com/nation/la-na-pot-trafficking-20140527-story.html#page=1; Kost & Kovaleski, *supra* note 138, at http://www.thedenverchannel.com/news/local-news/colorado-blamed-for-increasing-law-enforcement-costs-in-nebraska; Hendee, *supra* note 138, at http://m.omaha.com/news/nebraska-on-its-own-with-drug-enforcement-costs-tied-to/article_d76f74a4-b109-5080-9d7b-4e26264686bc.html?mode=jqm.

[164] Hendee, *supra* note 138, at http://m.omaha.com/news/nebraska-on-its-own-with-drug-enforcement-costs-tied-to/article_d76f74a4-b109-5080-9d7b-4e26264686bc.html?mode=jqm.

[165] STATE OF COLORADO, TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64: REGULATION OF MARIJUANA IN COLORADO 50, *available at* http://www.colorado.gov/cs/Satellite/Revenue-Main/XRM/1251633708470 [hereinafter TASK FORCE REPORT].

[166] *Id*.

B. Marijuana Differs Fundamentally from Other Goods Whose Legality Varies from State to State

Many commercial goods may be legally possessed in one State, but are outlawed by others: moonshine,[167] fireworks,[168] radar detectors,[169] unpasteurized milk.[170] We recognize that our argument begs the question whether awarding Colorado's neighbors relief for pot-related damages will open a Pandora's box, inviting original actions challenging the intrastate sale of these products.

While we do not undertake a complete examination of the laws governing such chattels, it is doubtful a State may be successfully sued for creating a nuisance by introducing any of these articles into interstate commerce. The jurisprudence governing such actions includes two important limiting principles that likely thwart any such suits.

First, as the Court explained in *Missouri v. Illinois*, plaintiff-States are subject to the unclean-hands doctrine.[171] A State cannot obtain equitable relief if she engages—even to a lesser degree—in conduct of the kind challenged.[172] "Where . . . the plaintiff . . . deliberately permits" conduct "similar to [that for] which it complains," it cannot claim that the defendant's acts are wrongful and "courts should not be curious to apportion the blame."[173] Thus, in order to prevail in an equitable suit involving the sale of

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[167] State v. Altman, 106 So. 2d 401, 403 n.1 (Fla. 1958) (noting that the legality of various types of "moonshine" varies from state to state).

[168] *See* Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 668 (7th Cir. 1986) (finding Wisconsin possessed personal jurisdiction over Minnesota fireworks distributor based on sale of products that were legal in Minnesota but illegal in Wisconsin because it profited from sending fireworks to a neighboring state where it knew that fireworks were illegal).

[169] William A. Drennan, *The Patent Office Is Promoting Shocking New Tax Loopholes—Should the Empire Strike Back?*, 60 OKLA. L. REV. 491, 510 (2007) (noting that radar detectors are legal in some states and illegal in others).

[170] While the Food and Drug Administration requires that all milk that enters interstate commerce be pasteurized, the agency permits states to regulate intrastate milk sales. Damian C. Adams, Michael T. Olexa, Tracey L. Owens, & Joshua A. Cossey, *Deja Moo: Is the Return to Public Sale of Raw Milk Udder Nonsense?*, 13 DRAKE J. AGRIC. L. 305, 306 (2008). Some states require milk be pasteurized, while others permit the sale of raw milk. *Id*.

[171] Missouri v. Illinois, 200 U.S. 496, 522 (1901). The Court denied Missouri relief despite proving that Illinois had allowed Chicago to discharge substantial amounts of untreated sewage into the Mississippi River because Missouri had allowed its own towns north of St. Louis to engage in the same conduct. *Id*. The Court was unmoved by the apparent fact that the towns along the river above St. Louis were necessarily much smaller than Chicago and their sewage discharges were not of the magnitude of than those challenged. *Id*.

[172] *Id*.

[173] *Id*.

any of the chattels discussed above, the State bringing the action would likely have to ban those goods entirely.

Second, the law of nuisance does not reward the prudish. To qualify as a nuisance, the offending behavior cannot be of a type that would be offensive only to a person of "fastidious taste."[174] Whether something constitutes a nuisance "is measured by ordinary sensibilities, tastes, and habits."[175] Thus, before a State's decision to permit the sale of a good can be condemned as a nuisance, a general consensus must exist among the majority of States that the allegedly offending article constitutes a nuisance.

The Twenty-First Amendment gives Kansas the power to outlaw the sale alcohol within her borders if she chose to do so.[176] But if she enacted such a law, she would be an outlier. Since Prohibition's end, the ordinary sensibilities of every State have accepted the sale of alcohol as permissible.[177] While the Constitution entitles her to adopt such a policy, a State taking such an extreme position cannot use the federal common law of nuisance to force her "fastidious tastes" on her neighbors. Likewise, products like radar detectors and fireworks—while not universally accepted—are legal in most States.[178]

In contrast, to alcohol, radar detectors, and fireworks,[179] federal law

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[174] Fowler v. Fayco, Inc., 275 So. 2d 665, 241 (Ala. 1973).

[175] Shatto v. McNulty, 509 N.E.2d 897, 899 (Ind. App. 1987); *accord e.g*., North Carolina *ex rel*. Cooper v. Tennessee Valley Auth., 615 F.3d 291, 310 (4th Cir. 2011); Barrett v. Atlantic Richfield Co., 95 F.3d 375, 383 (5th Cir. 1996); *Fowler*, 275 So. 2d at 241; French v. Ass'n for Works of Mercy, 39 App. D.C. 406, 412 (D.C. App. 1912).

[176] In addition to repealing the Eighteenth Amendment, the Twenty-First Amendment also expressly prohibits "[t]he transportation or importation" of "intoxicating liquors" into "any State, Territory, or possession of the United States . . . in violation of the laws thereof." U.S. CONST. amend. XVIII.

[177] *See* Sharon E. Conaway, *The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability*, 82 NW. U.L. REV. 403, 438 (1988) (noting that "no state prohibits the purchase of alcohol by a sober adult").

[178] John W. Ragsdale, Jr., *Treaty Based Exclusions from the Boundaries and Jurisdiction of the States*, 71 UMKC L. REV. 763, 779 n.96 (2003) (noting that "'consumer fireworks,' are generally legal in the majority of states"); Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U.L. REV. 655, 683 (2006) (noting that "only two jurisdictions statutorily prohibit radar detectors: Virginia and the District of Columbia").

[179] While other banned chattels will invariably be drawn into interstate commerce, marijuana's high commercial value makes it more likely that the intrastate distribution of the drug will result in its introduction into interstate black markets. The drug is the most lucrative commercial cash crop in the United States. Venkataraman, *supra* note 42, at http://abcnews.go.com/Business/story?id=2735017. These factors virtually guarantee that "the high demand in the interstate market will draw marijuana" acquired intrastate "into that market" and will thereby have "a substantial effect on supply and demand in the national market for that commodity." Gonzales v. Raich, 545 U.S. 1, 19 (2005).

categorizes marijuana as a nuisance[180] and until 2014, every State regarded its possession, at least for non-medicinal purposes, as a criminal act.[181] In this case, it is Colorado—not her neighbors—that is the outlier. By marketing herself as a proverbial red-light district where otherwise nationally banned contraband is easily introduced into interstate commerce, Colorado has deviated from the federal compact.[182]

II. COLORADO'S MARIJUANA-LEGALIZATION EXPERIMENT CONSTITUTES AN INTERSTATE NUISANCE UNDER FEDERAL COMMON LAW

While federal courts "are not general common-law courts and do not possess a general power to develop and apply their own rules of decision," the Constitution charges the Judiciary with "develop[ing] federal common law" to govern "when there exists a 'significant conflict between some federal policy or interest and the use of state law.'"[183] It is well-settled that cross-border nuisances fall within this field.[184]

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[180] 21 U.S.C. § 812 (c); *see infra*, Part II-A.

[181] Keely N. Kight, *Back to the Future: The Revival of the Theory of Nullification*, 65 MERCER L. REV. 521, 523 (2014) ("in November 2012, two states, Colorado and Washington, defied federal drug laws by passing measures to permit recreational use of marijuana within their borders"); *see also* EDWARD M. BRECHER, CONSUMERS UNION, LICIT AND ILLICIT DRUGS 413 (1972) ("By 1937, forty-six of the forty-eight states as well as the District of Columbia had laws against marijuana.").

[182] In the first months of Colorado's experiment, the State has enjoyed a boom in "marijuana tourism." Hughes, *Marijuana Tourists Sparking Up*, *supra* note 161, at http://www.usatoday.com/story/news/nation/2014/07/10/colorados-marijuana-market-is-far-larger-than-predicted/12438069/; *accord* Smith, *supra* note 161, at http://money.cnn.com/2014/08/22/smallbusiness/marijuana-tourism-colorado/index.html?hpt=hp_t2; Ingold & Blevins, *Marijuana Tourism Blooms*, *supra* note 161, at http://www.denverpost.com/marijuana/ci_25601236/marijuana-tourism-booms-colorado-though-officials-remain-skeptical. It should be noted that Colorado has enjoyed a surge in marijuana-seeking visitors, despite the fact that visitors who lack access to a private home have few places to smoke marijuana in Colorado as the State bans public cannabis consumption and most hotels prohibit smoking marijuana on their premises. Jordan Schrader, *Law Has Barrier to Pot Tourism: Colorado Visitors Can't Smoke Marijuana in Bars, Coffee Shots or Other Public Places*, NEWS TRIBUNE, March 16, 2014, *available at* http://www.thenewstribune.com/2014/03/16/3098052/law-has-barrier-to-pot-tourism.html.

[183] City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).

[184] *E.g.*, Vermont v. New York, 402 U.S. 940 (1971) (accused New York of polluting Lake Champlain); New Jersey v. City of New York, 283 U.S. 473 (1931) (sought to enjoin off-shore garbage dumping by New York that caused trash to wash ashore on New Jersey beaches); New York v. New Jersey, 249 U.S. 202 (1919) (sought to enjoin New Jersey's discharge of sewage into New York Harbor); Missouri v. Illinois, 180 U.S. 208 (1901)

The Supreme Court has promulgated a body of nuisance law regulating "activity harmful to . . . citizens' health and welfare" which produce effects that cross state lines.[185] "The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant."[186] This body of law closely tracks the common law of public nuisance applied by state courts.[187]

The Restatement of Torts defines public nuisance as "an unreasonable interference with a right common to the general public."[188] By introducing a Schedule 1 controlled substance[189] into interstate commerce, Colorado is committing a quintessential public nuisance as contemplated by the criteria discussed above.

A. Congress Has Conclusively Established that Colorado's Recreational Marijuana Market Constitutes an Interstate Public Nuisance

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' . . . There is general agreement that it is incapable of any exact or comprehensive definition."[190] Consequently, the Supreme Court historically relied on "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence" to formulate this body of law.[191] But "when Congress addresses a question previously governed by a decision rested on federal common law the need

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(alleging Illinois's discharge of untreated sewage into Mississippi River polluted drinking water in Missouri); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (poisonous gas emanating from Tennessee plant caused damage in Georgia).

[185] Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2536 (2011).

[186] Michigan v. United States Army Corps of Eng'rs, 667 F.3d 765, 781 (7th Cir. 2011).

[187] Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 855 (9th Cir. 2011); Michigan v. United States Army Corps of Eng'rs, 667 F.3d 765, 781 (7th Cir. 2011); Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1235 (3d Cir. 1980). This body of law "traditionally has been understood to cover a tremendous range of subjects" including "interferences with . . . public morals, as in the case of houses of prostitution, illegal liquor establishments, gambling houses, indecent exhibitions, bullfights, unlicensed prize fights," and with interferences "with public convenience, as by obstructing a highway or a navigable stream, or creating a condition which makes travel unsafe or highly disagreeable. . . ." *United States Army Corps of Eng'rs*, 667 F.3d at 771-72.

[188] Restatement (Second) of Torts § 821B.

[189] 21 U.S.C. § 812 (c) (listing marijuana as a "Schedule One" controlled substance).

[190] PROSSER & KEETON, *supra* note 86, at 616.

[191] City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981).

for such an unusual lawmaking by federal courts disappears."[192] Thus, "new federal laws . . . may in time pre-empt the field of federal common law of nuisance."[193]

As noted above, the bulk of the Supreme Court's cross-border nuisance jurisprudence consists of air[194] and water pollution cases.[195] By establishing uniform national air and water quality standards in the Clean Air and Water Acts, Congress preempted the federal common law of nuisance in these areas, relieving the Court of historic role of determining what amount of air and water pollution is acceptable.[196] More importantly, these Acts divested the Court of jurisdiction over such matters, assigning primary responsibility for adjudicating interstate pollution disputes to the EPA.[197] As the Court recently explained, the EPA, as "an expert agency" is "better equipped" to apply the uniform standards created by the Clean Air and Water Acts because "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."[198]

An original action challenging Colorado's marijuana-legalization experiment would confront the Court with a first of its kind, hybrid statutory-common law problem. All the Court's original jurisdiction opinions to date involved situations where the question of federal preemption presented an all-or-nothing proposition: Congress had either left the matter entirely to the courts or had "completely occupied"[199] the relevant field by statute.[200] In

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[192] *Id*. at 314.

[193] Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972). The "displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2537 (2011) (quoting *City of Milwaukee*, 451 U.S. at 317).

[194] Georgia v. Tennessee Copper Co., 206 U.S. 230, 238-39 (1907).

[195] Percival, *supra* note 33 at 717 (asserting that "the federal common law of interstate nuisance" met "its ultimate demise following the enactment of the Clean Water Act").

[196] *Am. Elec. Power Co*., 131 S. Ct. at 2536 (Clean Air Act preempts federal common law of nuisance with regard to interstate air pollution); *City of Milwaukee*, 451 U.S. at 314 (Clean Water Act preempts federal common law of nuisance with regard to pollution of interstate bodies of water).

[197] *Am. Elec. Power Co*., 131 S. Ct. at 2539; *City of Milwaukee*, 451 U.S. at 320.

[198] *Am. Elec. Power Co*., 131 S. Ct. at 2539.

[199] Watters v. Wachovia Bank, N.A., 550 U.S. 1, 44 (2007) (Stevens, J., dissenting) (preemption occurs when federal law "so completely occupied a field that it left no room for additional . . . regulation").

[200] *Compare* Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972) ("It may happen that new federal laws . . . may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.") *with* Am. Elec. Power, 131 S. Ct. at 2537 ("We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide

contrast, an original action challenging Colorado's marijuana market involves the application of both federal common law and statutory law.

Unlike air and water pollution cases, Congress has neither displaced the federal common-law definition's of "nuisance" as applied to marijuana, nor has it divested the Court of jurisdiction over such disputes in favor of an "expert agency."[201] But Congress also has not left the question of whether opening an intrastate marijuana market constitutes an interstate nuisance to the "vague and indeterminate nuisance concepts and maxims of equity jurisprudence."[202] Rather, Congress has partially preempted the issue by concluding that the introduction of marijuana—even in an intrastate market—constitutes an interstate nuisance as the federal common law contemplates that term.

The federal Controlled Substances Act (CSA) criminalizes the cultivation, possession, or sale of any quantity of marijuana.[203] The statute also contains several important findings of fact concerning the effect of marijuana on public health and its propensity to be drawn into the stream of interstate commerce. The Supreme Court expressly concluded that these findings constitute the supreme law of the land and are thus binding both upon the States and on reviewing courts.[204]

The Restatement of Torts defines public nuisance as "an unreasonable interference with a right common to the general public."[205] Factors applicable to the determination of whether particular conduct constitutes such interference include:

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[206]

Applying Congress's findings to these factors conclusively demonstrates that Colorado's recreational-marijuana market constitutes a

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emissions from fossil-fuel fired power plants.").

[201] *See Am. Elec. Power Co*., 131 S. Ct. at 2539.

[202] *City of Milwaukee*, 451 U.S. at 317.

[203] 21 U.S.C. § 812 (c).

[204] Gonzales v. Raich, 545 U.S. 1, 12 n.13, 20-22 (2005).

[205] Restatement (Second) of Torts § 821B.

[206] *Id*.

nuisance under the maxims of federal common law.

First, Congress's findings demonstrate that Colorado's recreational-marijuana market significantly interferes with the public health of neighboring states. Congress has expressly found that the "importation, manufacture, distribution, and possession" of marijuana "ha[s] *a substantial and detrimental effect on the health and general welfare of the American people*."[207] This effect extends well beyond Colorado's borders. Congress concluded that marijuana "distributed locally usually ha[s] been transported in interstate commerce immediately before [its] distribution," and that the intrastate "distribution and possession of" marijuana "contribute[s] to swelling the interstate traffic in such substances."[208]

The Supreme Court affirmed these findings in *Gonzales v. Raich*.[209] As Justice Scalia explained in that case, pot is a "fungible commodit[y]" and as such, marijuana that enters commerce in an intrastate market "is never more than an instant from the interstate market—and this is so whether or not the possession is for . . . lawful use under the laws of a particular State."[210] This interstate effect derives from pot's "high demand"—and high street value.[211] The drug is the most lucrative commercial cash crop in the United States.[212] These factors virtually guarantee that "the high demand in the interstate market will draw marijuana" acquired intrastate "into that market" and will thereby have "a substantial effect on supply and demand in the national market for that commodity."[213] The CSA thus establishes that Colorado's pot market constitutes a significant health threat to neighboring states.

Second, Colorado's recreational-marijuana market is proscribed by statute—the supreme law of the land. The CSA criminalizes the cultivation, possession, or sale of any quantity of marijuana.[214] *Raich* upheld this law against a challenge that it infringed state sovereignty.[215] The Court even found that the law validly proscribed the State-sanctioned, non-commercial cultivation of six marijuana plants in a private garden for personal consumption.[216] In contrast to *Raich*'s tiny garden, Colorado's wide-open

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[207] 21 U.S.C. § 801 (2) (emphasis added); *see also* 21 U.S.C. § 812 (categorizing marijuana as a "Schedule 1" controlled substance).

[208] 21 U.S.C. § 801 (3) & (4).

[209] *Raich*, 545 U.S. at 19.

[210] *Id*. at 40 (Scalia, J., concurring).

[211] *Raich*, 545 U.S. at 19.

[212] Venkataraman, *supra* note 42, at http://abcnews.go.com/Business/story?id=2735017.

[213] *Raich*, 545 U.S. at 19.

[214] 21 U.S.C. § 812 (c).

[215] *Raich*, 545 U.S. at 41 (Scalia, J., concurring).

[216] *Id*. at 7.

commercial pot market is a multi-billion dollar industry—likely "the fastest-growing industry in America."[217] Accordingly, it easily falls within the valid reach of the CSA and demonstrates that Colorado's commercial weed market, notwithstanding local law, is proscribed by statute.

Third, Colorado's recreational marijuana market is both continuous and is producing long-lasting harms. Colorado's experiment does not come with a sunset provision.[218] It is intended to continue unabated into the future. The program is enshrined in the State's Constitution.[219] Moreover, Big Cannabis is quickly establishing itself as the State's most powerful commercial interest.[220] The market's intended permanent nature establishes that it will produce long-term harms. Until it is abated, Colorado pot will continue to "have a substantial and detrimental effect on the health and general welfare of the . . . people" of neighboring states.[221]

Finally, the record demonstrates that Colorado is aware of the effects that her recreational marijuana market is having on her neighbors. The Task Force charged with implementing Colorado's pot market acknowledged that "[a]dditional actions" are necessary "to limit diversion out of Colorado."[222] But short of suggesting signage advising buyers not to take marijuana out of state, the Task Force has provided no guidance regarding how to accomplish this goal.[223] As the *Los Angeles Times* noted, addressing such toothless warnings, "it's fantasy to think that won't happen."[224] Thus, Colorado is on notice that her program is harming her neighbors.

Congress has made binding factual findings concerning Colorado's recreational-marijuana market that correspond to every facet of the common-law definition of public nuisance. Because Congress's conclusions are "the paramount law" courts and States are bound by them.[225] As such, Congress has answered the question whether Colorado's experiment constitutes an interstate nuisance in the affirmative. This leaves the Court with a single

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[217] Sandra Fish, *Legal Marijuana, a Multi-Billion-Dollar Industry, Still Faces Legal Hurdles*, AL JAZEERA AMERICA, June 11, 2014, *available at* http://america.aljazeera.com/articles/2014/6/11/marijuana-industrygrowing.html.

[218] A sunset provision is a clause in a statute dictating that it "automatically terminates at the end of a fixed period unless it is formally renewed." BLACK'S LAW DICTIONARY 1574 (9th Ed. 2009).

[219] COLO. CONST. art. XVIII, § 16.

[220] Fish, *supra* note 217, at http://america.aljazeera.com/articles/2014/6/11/marijuana-industrygrowing.html.

[221] 21 U.S.C. § 801 (2) (emphasis added).

[222] TASK FORCE REPORT, *supra* note 165, at 50.

[223] *Id.*

[224] Deam, *supra* note 41, at http://www.latimes.com/nation/la-na-pot-trafficking-20140527-story.html#page=1.

[225] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430 (1855).

question: What remedy, if any, is appropriate?

B. Even in the Absence of the CSA's Findings, Colorado's Marijuana-Legalization Experiment Constitutes an Interstate Nuisance Under Federal Common Law

As previously noted, the federal common law of nuisance is essentially a repository of common-law public nuisance concepts with which a majority of jurisdictions find common ground.[226] Few concepts are more universally accepted than the notion that allowing one's land to serve as a location from which illicit drugs are introduced into surrounding communities constitutes a quintessential public nuisance.[227] State and federal reporters are replete with opinions abating such nuisances and even permitting the Government to take title to offending property from the perpetrators of such activities.[228]

These opinions rest on sound judgment. While the popular culture frequently portrays pot as "a harmless diversion,"[229] science yields very different conclusions. A recent study published in the *New England Journal of Medicine* concluded that marijuana use causes "long-lasting changes in brain function that can jeopardize educational, professional and social achievements."[230] Moreover, contrary to popular claims that pot is non-addictive,[231] "the evidence clearly indicates that long-term marijuana use can

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[226] *E.g.*, Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 855 (9th Cir. 2011); Michigan v. United States Army Corps of Eng'rs, 667 F.3d 765, 781 (7th Cir. 2011); Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1235 (3d Cir. 1980).

[227] *E.g.*, United States v. Ursery, 518 U.S. 267, 290-91 (1996); United States v. Abdullah, 903 F. Supp. 913, 918 (D. Md. 1995); Gonzalez v. State, 134 So. 3d 350, 354 (Miss. App. 2013); Olson v. State, 56 A.3d 576, 611 (Md. App. 2012); State v. Curtis, 2005 Ohio 604, 604 (Ohio App. 2005); Lewis v. City of Univ. City, 145 S.W.3d 25, 35 (Miss. App. 2004); City of Miami v. Keshbro, 717 So. 2d 601, 605 (Fla. App. 1998); City of Milwaukee v. Arrieh, 565 N.W.2d 291, 292 (Wis. App. 1997); Lew v. Superior Court, 20 Cal. App. 4th 866, 871 (1993); People v. Griffin, 633 N.E.2d 773, 775 (Ill. App. 1993).

[228] *E.g.*, *Ursery*, 518 U.S. at 290-91.

[229] Jesse Singal, *In "Marijuana Legalization," Hard Truths for all Sides of the Debate*, DAILY BEAST, July, 22, 2012, *available at* http://www.thedailybeast.com/articles/2012/07/22/in-marijuana-legalization-hard-truths-for-all-sides-of-the-debate.html.

[230] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2225.

[231] John Morgan, *"Nobody's Addicted to" Marijuana*, TAMPA BAY TIMES, Sept. 22, 2013, *available at* http://www.politifact.com/florida/statements/2013/oct/08/john-morgan/john-morgan-says-nobodys-addicted-marijuana/; *see also* Mauer, *supra* note 5, at 701 (noting that "we have marijuana being celebrated in popular culture").

lead to addiction."[232] There is widespread scientific recognition "of a bona fide cannabis withdrawal syndrome"—whose symptoms include "irritability, sleeping difficulties, dysphoria, craving and anxiety" and "which makes cessation difficult and contributes to relapse."[233] This addictive hold is particularly strong on users under twenty-five.[234] Half of patients who seek treatment for marijuana addiction are under twenty-five years of age.[235]

Pot's addictive properties come at a very high price for both users and for the polity at large. "Imaging studies" of regular pot users reveal "decreased activity in prefrontal regions and reduced volumes in the hippocampus."[236] This damage results in "impaired neural connectivity . . . in specific regions of the brain"—particularly those responsible for "learning and memory" and "self-conscious awareness."[237] Such brain damage manifests itself in reduced cognitive function, "impairments in memory and attention," and "significant declines in IQ."[238] In fact, those who become dependent on marijuana as adolescents can lose up to eight IQ points by the time they reach adulthood.[239] These "long-lasting changes in brain function . . . jeopardize education, professional and social achievements" yielding predictable negative social consequences.[240] "A clear association between cannabis use and the development of psychotic disorders has been repeatedly demonstrated."[241] And "[y]oung people who have dropped out of

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[232] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2219 (citing C. Lopez-Quintero, J. Perez do Los Cobos, D.S. Hasin, M. Okuda, S. Wang, B.F. Grant, *Probability and Predictors of Transition from First Use to Dependence on Nicotine, Alcohol, Cannabis, and Cocaine: Results of the National Epidemiologic Survey on Alcohol and Related Conditions*, 115 NAT'L EPIDEMIOLOGIC SURVEY ON ALCOHOL AND RELATED CONDITIONS 120, 120-30 (2011)); *accord* Chris Roberts, *Hooked on Legalization: Marijuana Is Addictive, Whether Legalization Backers Admit It or Not*, SF WEEKLY, July, 23, 2014, *available at* http://www.sfweekly.com/sanfrancisco/hooked-on-legalization-marijuana-is-addictive-whether-legalization-backers-admit-it-or-not/Content?oid=2989017.

[233] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2219; *accord* Alan J. Budney, Roger Roffman, Robert S. Stephens & Denise Walker, *Marijuana Dependence and Its Treatment*, 4 ADDICTION SCI. & CLINICAL PRAC. 4, 10 (2007).

[234] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2219.

[235] Budney, Roffman, Stephens & Walker, *supra* note 233, at 4.

[236] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2220.

[237] *Id.*

[238] *Id.*; *accord* LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 2, *supra* note 150, at 36.

[239] LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 2, *supra* note 150, at 36.

[240] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2225; *accord* Budney, Roffman, Stephens & Walker, *supra* note 233, at 4.

[241] Alan J. Budney & Catherine Stanger, *Cannabis Use and Misuse*, *in* IACAPAP TEXTBOOK OF CHILD AND ADOLESCENT MENTAL HEALTH ch. G-2, at 8 (Joseph M. Rey ed., 2012); *accord* Volkow, Baler, Compton & Weiss, *supra* note 52, at 2221 ("Regular marijuana use is associated with an increased risk of anxiety and depression.").

school . . . have particularly high rates of frequent marijuana use."[242] These externalities directly correlate to what many consider "the defining challenge of our time"—income inequality.[243] Studies reveal that frequent marijuana use leads to "lower income, greater need for socioeconomic assistance, unemployment, criminal behavior, and lower satisfaction with life."[244]

In the United States, "cannabis dependence is twice as prevalent as dependence on any other illicit psychoactive substance."[245] Accordingly, its negative social impact dwarfs other illicit controlled substances.[246] These externalities result not because pot is intrinsically more dangerous than drugs like heroin and cocaine—it is not[247]—but rather because pot's "legal status allows for more widespread exposure."[248] Sadly, the popular culture's embrace of Colorado's marijuana-legalization experiment[249] may portend a dire forecast: "As policy shifts toward legalization of marijuana, it is reasonable and probably prudent to hypothesize that its use will increase and that, by extension, so will the number of persons for whom there will be negative health consequences."[250] These consequences will be borne by all—users and non-users alike—in the form of increased social assistance[251] and higher health insurance premiums.[252]

The evidence thus demonstrates both that the marijuana trade qualifies as a nuisance as defined by federal common law—*i.e.*, it is "harmful

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[242] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2221.

[243] Jim Kuhnhenn, *Obama: Income Inequality Is "Defining Challenge of Our Time"*, HUFFINGTON POST, Dec. 4, 2013, *available at* http://www.huffingtonpost.com/2013/12/04/obama-income-inequality_n_4384843.html (President Obama has coined income inequality as "the defining challenge of our time").

[244] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2221; *accord* Budney, Roffman, Stephens & Walker, *supra* note 233, at 4; *accord* Budney & Stanger, *supra* note 241, at 8.

[245] Budney, Roffman, Stephens & Walker, *supra* note 233, at 5.

[246] *See* Adam Paul Weisman, *I Was a Drug-Hype Junkie: 48 Hours on Crack Street*, NEW REPUBLIC, Oct. 6, 1986, at 14, 16 (marijuana is America's most popular illegal drug).

[247] Budney, Roffman, Stephens & Walker, *supra* note 233, at 5 ("Marijuana produces dependence less readily than" heroine and cocaine, but "because so many people use marijuana, cannabis dependence is twice as prevalent as dependence on any other illicit psychoactive substance.").

[248] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2226.

[249] Mauer, *supra* note 5, at 701 (stating that "we have marijuana being celebrated in popular culture").

[250] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2226.

[251] *Id*. at 2221 (noting link between marijuana use and unemployment and "greater need for socioeconomic assistance").

[252] *See* Claire Andre, Manuel Velasquez & Tim Mazur, *Voluntary Health Risks: Who Should Pay?*, 6 ISSUES IN ETHICS 1, 1 (1993), *available at* http://www.scu.edu/ethics/publications/iie/v6n1/voluntary.html ("at least 25 cents of every health care dollar is spent on the treatment of diseases or disabilities that result from potentially changeable behaviors").

to . . . citizens' health and welfare"[253]—and that its negative externalities spill over into neighboring territory.[254]

The central tenet of nuisance law is the ancient maxim *sic utere tuo ut alienum non laedas*—"so use your own as not to injure another's property."[255] This adage is also the rock on which the federal common law of nuisance is built.[256] Colorado's marijuana experiment deviates from this covenant. While the State reaps the benefits of her venture—some $98 million in tax revenue this year alone[257]—her windfall is made possible by the suffering of neighboring States who are forced to endure the externalities that accompany her scheme.[258] The universally accepted norms of public-nuisance law demand that if Colorado is allowed to continue to enjoy the benefits of her venture, she must share some of this bounty with her afflicted neighbors.

III. DAMAGES ARE THE APPROPRIATE REMEDY

Congress's finding that the "importation, manufacture, distribution, and possession" of marijuana has "a substantial and detrimental effect on the health and general welfare of the American people,"[259] establishes that Colorado's experiment constitutes a public nuisance. But a more vexing question remains: what remedies, if any, are available to sister States who challenge Colorado's experiment?

Historically, most successful original actions culminated in injunctions abating the nuisance.[260] But Colorado's marijuana experiment

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[253] Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2536 (2011).

[254] LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 142, at 4-5, 38, 52.

[255] Lussier v. San Lorenzo Valley Water Dist., 206 Cal. App. 3d 92, 100 (1988).

[256] *See* Elwood v. City of New York, 450 F. Supp. 846, 867 (S.D.N.Y. 1978) (applying the maxim to the federal common law of nuisance); *accord* Georgia v. Tennessee Copper Co., 206 U.S. 230, 238-39 (1907).

[257] Robin Respaut, *Colorado Legalized Marijuana Tax Revs Ahead of Expectations: Moody's*, REUTERS, April 11, 2014, *available at* http://www.reuters.com/article/2014/04/11/us-colorado-marijuana-idUSBREA3A1X720140411.

[258] LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 142, at 4-5, 38, 52.

[259] 21 U.S.C. § 801 (2).

[260] Cheren, *supra* note 21, at 161 (noting that injunctive relief is the usual remedy for States prevailing in original actions). The Supreme Court has awarded damages to States in original-jurisdiction cases on only four occasions. South Dakota v. North Carolina, 192 U.S. 286, 321 (1904) (awarding South Dakota $27,400 in damages payable on or before the 1st Monday of January, 1905); Virginia v. West Virginia, 246 U.S. 565, 589 (1917) (awarding Virginia $12,393,929.50, with interest thereon from July 1, 1915, until paid, at the rate of five per cent per annum); Texas v. New Mexico, 494 U.S. 111, 111

presents a problem never confronted by the Court in an original nuisance action. Colorado law—indeed the State's Constitution—specifically permits the sale of marijuana.[261] Effective abatement of the nuisance created by her scheme thus poses three requirements: an amendment to Colorado's Constitution, affirmative legislative changes to her criminal code,[262] and implementation of these new statutes by state law-enforcement officers. None of the prior original-jurisdiction cases where the Court issued injunctive relief to abate a nuisance required affirmative legislative action by the defendant-States (much less a constitutional amendment), or implementation of federal mandates by State-law enforcement officers. Rather, in all such prior cases, the Court enforced its judgments directly using its contempt power to "bind the officers, agents, and citizens of the state from engaging in the proscribed conduct."[263] The Supreme Court Marshall cannot be expected to single-handedly enforce a renewed state-wide marijuana ban.[264]

In our view, a Court order compelling the Colorado legislature to amend her laws to prohibit marijuana sales and commanding State agents to enforce such prohibitions would run afoul of constitutional prohibitions against federal commandeering of the States.[265] In contrast, an award of money damages designed to compensate neighboring States for losses caused by the influx of Colorado pot, while an imperfect remedy, entails no constitutional obstacles.[266] In advocating this position, we posit that the

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(1990) (awarding Texas $14,000,000 in damages); Kansas v. Colorado, 543 U.S. 86, 96 (2004) (awarding Kansas $38,000,000 in damages).

[261] COLO. CONST. art. XVIII, § 16.

[262] *See* COLO. REV. STAT. § 12-43.4-201, *et seq*. (authorizing the "cultivation, manufacture, distribution, sale, and testing of retail marijuana and retail marijuana products" if certain conditions are satisfied).

[263] Cheren, *supra* note 21, at 161 (discussing how the Court has used its contempt powers to enforce judgments against recalcitrant states).

[264] In *South Dakota v. North Carolina*, 192 U.S. 286 (1904), the Court instructed the Supreme Court Marshall to seize and auction railroad stock owned by North Carolina to satisfy a damages judgment awarded to South Dakota. *Id*. at 321-22.

[265] New York v. United States, 505 U.S. 144, 161 (1992) (federal authorities "may not simply commandeer the legislative processes of the States by directly compelling them to enact . . . a federal regulatory program").

[266] The Eleventh Amendment denies federal courts the power to award monetary damages in actions "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. On its face, the Amendment is inapplicable in original actions between States because its text only affords states sovereign immunity in federal-court actions commenced by *Citizens*, not *States*. But *Alden v. Maine*, 527 U.S. 706 (1999), averred that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Id*. at 713. Rather, the Court concluded that "the States' immunity from suit is a fundamental aspect of the sovereignty which [they] enjoyed before the ratification of the Constitution and which they retain today . . . except as altered by the plan of the

Court should look to the Coase Theorem—a maxim designed to efficiently settle disputes involving externalities caused by pollution—to formulate appropriate remedies for States harmed by Colorado's marijuana-legalization experiment.

A. The Constitution's Anti-Commandeering Principles Prohibit Courts from Commanding States to Criminalize Conduct or Enforce Federal Laws

While the federal government "has substantial powers to govern the Nation directly . . . the Constitution has never been understood to confer upon" it "the ability to require the States to govern according to [its] instructions."[267] The "States are not mere political subdivisions" of the federal government, and "State governments are neither regional offices nor administrative agencies of the Federal Government."[268] Thus, federal authorities "may not simply commandeer the legislative processes of the States by directly compelling them to enact . . . a federal regulatory program."[269] The Constitution likewise denies federal authorities the power to conscript State law-enforcement officers by "press[ing] [them] into federal

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Convention . . . ." *Id*. Notwithstanding *Alden*'s expansion of sovereign immunity, the Court has limited the doctrine to the text of the Eleventh Amendment in original actions. Addressing the issue two years after *Alden*, *Kansas v. Colorado*, 533 U.S. 1 (2001), rejected Colorado's contention that the Constitution immunized her from damages in an original action. "We have decided that a State may recover monetary damages from another State in an original action, without running afoul of the Eleventh Amendment." *Id*. at 7. This is so because "[i]n proper original actions, the Eleventh Amendment is no barrier [to the award of damages], for by its terms, it applies only to suits by citizens against a State." *Id*.; *accord* Texas v. New Mexico, 482 U.S. 124, 130 (1987). While *Kansas v. Colorado* did not specifically address *Alden*'s contention that State sovereign immunity is broader than the text of the Eleventh Amendment, in earlier opinions the Court observed that "[b]y ratifying the Constitution, the States gave [the Supreme] Court complete judicial power to adjudicate disputes among the States . . . and this power includes the capacity to provide one State a remedy for the breach of another." *Texas*, 482 U.S. at 128. Thus, the States waived their sovereign immunity to suits by sister States "by their own consent and delegated authority" to the Supreme Court "as a necessary feature of the formation of a more perfect Union." Virginia v. West Virginia, 206 U.S. 290, 319 (1907). The *Kansas* Court's categorical rejection of the argument that States do not enjoy sovereign immunity in original actions, coming as it did on the heels of *Alden*, constitutes an implicit reaffirmation of its prior holdings that the States' pre-constitutional immunity in such actions has been "altered by the plan of the Convention . . . ." *Alden*, 527 U.S. at 713.

[267] *New York*, 505 U.S. at 162.

[268] *Id*. at 188.

[269] *Id*. at 161.

service . . . for the administration of federal programs."[270]

To date, the Court's anti-commandeering jurisprudence has all involved *congressional* attempts to conscript State authorities.[271] Yet, these same principles necessarily preclude federal *judicial* commandeering of State officials to implement a federal directive. The Court implicitly acknowledged such limitations in *Brown v. Plata*.[272] The *Plata* Court wrestled with the question of what remedies were available to prisoners following a judicial finding that overcrowding in California prisons had become so excessive that it violated the Eight Amendment's prohibition against Cruel and Unusual Punishment.[273]

Plata ultimately affirmed a district court order mandating the release of some 37,000 prisoners within two years to reduce the prison population to constitutionally permissible levels.[274] The district court recognized that California could "eliminate overcrowding" by simply "build[ing] more prisons," but implicitly acknowledged that the release order was necessary because commanding State authorities to construct more prisons or expend funds on specific projects were State legislative decisions that fell outside the judiciary's power.[275]

Allowing federal authorities—whether executive, legislative or judicial—to conscript state legislatures and law-enforcement officers to enforce federal mandates creates accountability problems that are incompatible with democratic principles. "[W]here the Federal Government directs the States" to enforce a policy that is locally unpopular "state officials . . . will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[276]

Colorado's experiment was enacted directly by voters through the initiative process, receiving fifty-five percent of the vote.[277] Thus,

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[270] Printz v. United States, 521 U.S. 989, 905 (1997).

[271] The Constitution enables to states to form interstate compacts, contracts between sister states with "the Consent of Congress." U.S. CONST. art. I, § 10, cl. 3. In 1918—more than seven decades before the birth of its anti-commandeering jurisprudence—the Court intimated that the limiting principles articulated by those decisions are inapplicable to congressional acts passed to enforce existing interstate compacts. "[T]he lawful exertion of . . . authority by Congress to compel compliance with [an] obligation resulting from [a] contract between . . . two States which it approved is not circumscribed by the powers reserved to the States [by the Tenth Amendment]." Virginia v. West Virginia, 246 U.S. 565, 601 (1918).

[272] Brown v. Plata, 131 S. Ct. 1910 (2011).

[273] *Id*. at 1928-29.

[274] *Id*. at 1923.

[275] Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 951 (E.D. Cal. 2009).

[276] New York v. United States, 505 U.S. 144, 169 (1992).

[277] Megan Mitchell, *Case Against Pot*, DENVER POST, Jan. 11, 2013, at 4A.

implementation of the federal mandate, while binding under the Supremacy Clause, will likely be unpopular locally. As such, achieving abatement of the nuisance by judicially commandeering the State legislature and law-enforcement officers would run afoul of the Constitution's accountability principles.

This does not mean that the Constitution leaves Colorado's aggrieved sisters with no remedy for the interstate nuisance created by her experiment. We contend that a damages award falls well within the Court's competence, will provide a suitable—albeit imperfect—remedy to Colorado's aggrieved neighbors, and respects the equal status of Colorado and her sisters as co-sovereigns.

B. The Court Should Look to the Coase Theorem to Fashion an Economically Efficient Remedy for Cross-Border Trafficking of Colorado Pot

In 1960, Nobel Laureate Ronald Coase propounded his signature Theorem for Externalities.[278] Coase challenged the paradigmatic approach to the law of nuisance. In the years that followed, the Coase Theorem fundamentally altered the way jurists view the problem of externalities.[279]

Coase's chief criticism of the common law's traditional conception of nuisance is that it viewed such cases two dimensionally to intrinsically involve "a perpetrator and a victim."[280] He posited that every nuisance suit, in fact, involves "a problem of a reciprocal nature"; in every nuisance action there are *two victims*.[281] To illustrate this point, Coase invoked the example of *Sturges v. Bridgman*,[282] a nineteenth century English case involving a dispute between a doctor and confectioner occupying adjoining lots.[283] The confectioner's business produced noise and vibrations that disturbed the doctor's clinic.[284] Coase argued that any resolution would inevitably inflict harm on one of the parties. If the court denied the doctor relief, his business

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[278] Dr. Coase was awarded the Nobel Prize in Economic Sciences in 1991 "for his discovery and clarification of the significance of transaction costs and property rights for the institutional structure and functioning of the economy." THE BANK OF SWEDEN NOBEL PRIZE IN ECONOMIC SCIENCES IN MEMORY OF ALFRED NOBEL 1991, *available at* http://nobelprize.org/nobel_prizes/economics/laureates/1991/.

[279] Coltman v. Comm'r of Internal Revenue, 980 F.2d 1134, 1137 (7th Cir. 1992); Pearl, *supra* note 56, at 33; Levy & Friedman, *supra* note 56, at 493; Kelman, *supra* note 56 at 669.

[280] Leo Katz, *An Exchange on the Nature of Legal Theory: What We Do When We Do What We Do and Why We Do It*, 37 SAN DIEGO L. REV. 753, 756 (2000).

[281] Coase, *Social Cost*, *supra* note 55, at 2.

[282] Sturges v. Bridgman, LR 11 Ch. D. (Eng.) 852 (1879).

[283] *Id*. at 852.

[284] *Id*.

would be thwarted.[285] On the other hand, "[t]o avoid harming the doctor" by enjoining the confectioner's operation "would inflict harm on the confectioner."[286] Accordingly, "[t]he real problem" presented by such a case is: "should A be allowed to harm B or should B be allowed to harm A?"[287]

Coase posited that in the absence of transaction costs, private parties would "negotiate the efficient solution" to such problems.[288] For even if the law's "initial distribution" of rights was "inefficient, the parties [would] simply relocate it through a voluntary transaction."[289] This is so because between competing landholders, the enterprise that most efficiently used its property—*i.e.*, generated the most profits—would buy out its less-profitable neighbors.[290] It would contract with them to "share . . . the profits associated with the nuisance . . . in exchange for allowing the nuisance to continue."[291]

Of course, it goes without saying that transaction costs plague modern life.[292] Accordingly, real-world application of Coase's thesis is only realized by the promulgation of "legal rules that . . . reduce transaction costs and provide incentives for efficient . . . use of resources."[293] As Judge Guido Calabresi explained "the role of the law is to make rules that approximate the results in Coase's utopia as closely and cheaply as possible"[294] thereby facilitating the "optimum allocation of resources."[295]

In some cases, equitable considerations counsel against affording a burdened party any remedy—for example, when someone decides to build his home next to an airport.[296] But when equitable principles do not favor

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[285] Coase, *Social Cost*, *supra* note 55, at 2.

[286] *Id*.

[287] *Id*.

[288] Michael J. Meurer, *Fair Division*, 47 BUFFALO L. REV. 937, 952 (1999).

[289] Christopher Jon Sprigman, Christopher Buccafusco & Zachary Burns, *What's a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U.L. REV. 1389, 1433 (2013).

[290] *Id*.; Fisch, *supra* note 58, at 226 n.205.

[291] Dogan & Young, *supra* note 55, at 114 n.31.

[292] Coase did not contend that a transaction-cost-free world is possible. Rather, he "was trying to demonstrate the danger of legal rules that have the opposite effect of raising transactions costs and of inhibiting the flow of information, two adverse conditions that combine to undermine allocative efficiency." Maxwell L. Stearns, *Grains of Sand or Butterfly Effect: Standing, the Legitimacy of Precedent, and Reflections on* Hollingsworth *and* Windsor, 65 ALA. L. REV. 349, 377 n.78 (2013).

[293] Megan Hennessy, *Colorado River Water Rights: Property Rights in Transition*, 71 U. CHI. L. REV. 1661, 1680 (2004).

[294] Bulloch, *supra* note 61, at 307 n.29 (1986) (citing Calabresi, *Transaction Costs*, *supra* note 61, at 69).

[295] Coase, *Social Cost*, *supra* note 55, at 13.

[296] As one commentator noted:

> Permitting the homeowner to recover [in such a situation] would subject many useful enterprises to extortion. People would seek

one neighbor's use of her property over the others,[297] rules awarding damages to afflicted neighbors most closely approximate the manner in which such disputes would be resolved in Coase's transaction-cost-free environment.[298]

As Judge Calabresi observed, under Coase's "allocation-of-resources theory," a polluter should be charged "with the damages it cause[s] and, if [it can] pay them and still stay in business," the "market place" has demonstrated that "the benefits derived from" the enterprise are "sufficiently great to justify its existence."[299]

Conversely, if forcing the polluter to internalize the cost of its pollution drives it out of business, "the same effect would be achieved as when a nuisance is enjoined."[300] Such a result, Judge Calabresi observed, likewise reflects a judgment by the "market place" that the polluter's enterprise was not the most economically efficient use of the property and its interests should yield to that of its neighbors.[301] This is so because its prior success was premised on the fact that the costs resulting from the negative externalities produced by its business were "simply passed on to others who, by absorbing the loss, subsidize[d] that activity."[302] It was a "free-rider"—one who enjoys the benefits of an activity while all the costs are borne by others.[303]

A legal rule awarding damages to afflicted neighbors best approximates the transaction-cost-free outcome because it enables the most

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> out airports, industrial sites, manufacturing plants, farms, dumps, and all manner of vital but unpleasant commercial undertakings, and extort damages from them by setting up homes and day care centers in their way. This is called "coming to the nuisance," and the law bars recovery to such cases. Without this restriction, no enterprise would be safe, and no one would have an incentive to invest in necessary and otherwise profitable though unpleasant industries.

Howard Gensler, *Property Law as an Optimal Economic Foundation*, 35 WASHBURN L.J. 50, 62 (1995).

[297] *See* Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 115 (2006) ("States interpret the coming to the nuisance doctrine under traditional principles of equity.").

[298] *See* Boomer v. Atlantic Cement Co., 257 N.E. 2d 870, 871-73 (N.Y. App. 1970) (awarding damages to homeowners exposed to "dirt, smoke, and vibrations" emanating from a neighboring cement plant because shutting down plant would have had devastating impact on local economy).

[299] Calabresi, *Some Thoughts on Risk Distribution*, *supra* note 62, at 534-35.

[300] *Id*.

[301] *Id*.

[302] Gunrow, *supra* note 65, at 1285 n.131.

[303] Schenck, *supra* note 66, at 336 ("Free-riding occurs when some parties bear the costs of an action, while others, the free-riders, bear no burden, but still enjoy the benefits.").

profitable of the competing enterprises to prevail, but at the same time requires it to "share . . . the profits associated with the nuisance" with its neighbors "in exchange for allowing the nuisance to continue."[304] Such a rule allows the free market to determine which of the competing neighbors' enterprises is most advantageous.

In our view, the Coase Theorem, as applied by Judge Calabresi, offers the best solution to interstate disputes concerning marijuana. It recognizes that Colorado and her neighbors are co-sovereigns in whom the Constitution invests equal respect and dignity.[305] Like the doctor and confectioner in *Sturges v. Bridgman*, Colorado's marijuana-legalization experiment involves "a problem of a reciprocal nature."[306] If the Court limits its options to the issuance of an injunction, Coase's central criticism of the historical law of nuisance will be implicated: The problem will be reduced to the question of whether Colorado should "be allowed to harm" her neighbors or whether they should "be allowed to harm [her]?"[307] If Colorado is allowed to proceed with her venture the flow of illicit marijuana across state lines will inflict harm on surrounding states. On the other hand, if her experiment is enjoined, a sovereign choice made by the State's voters will be thwarted.[308] The solution that best respects the sovereignty of all involved is not to paternalistically overturn Colorado's decision, but to force her to internalize the cost of the externalities produced by her venture.[309] Externalities, "the creation of smoke, noise, smells"[310]—or in the present case dependency,[311] crime,[312] and traffic fatalities[313]—are transaction costs that should be borne by the polluter. The courts' role is to fashion rules that ensure "what [i]s gained" by one's use of territory "[i]s worth more than what [i]s lost."[314]

To that end, the Court should award sufficient damages to sister States prevailing in original actions to compensate them for the injuries inflicted upon them by Colorado's experiment. Colorado is projected to reap $98 million in tax revenue this year alone from her marijuana venture.[315]

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[304] Dogan & Young, *supra* note 55, at 114 n.31.

[305] *See* Kansas v. Colorado, 206 U.S. 46, 97-98 (1907) ("One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. . . .").

[306] Coase, *Social Cost*, *supra* note 55, at 2.

[307] *Id*.

[308] COLO. CONST. art. XVIII, § 16.

[309] Coase, *Social Cost*, *supra* note 55, at 44.

[310] *Id*.

[311] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2219.

[312] *Id*. at 2221.

[313] *See supra* notes 151-153 and accompanying text.

[314] Coase, *Social Cost*, *supra* note 55, at 44.

[315] Respaut, *supra* note 257, at http://www.reuters.com/article/2014/04/11/us-colorado-marijuana-idUSBREA3A1X720140411.

Allowing her to retain all these profits while requiring her neighbors to shoulder all their losses caused by it makes Colorado a free-rider.[316]

Accordingly, if the Court awards a prevailing State damages, the success or failure of Colorado's experiment will turn upon which of the two competing approaches—legalization or prohibition—is most economically efficient. As the Supreme Court said in its very first original nuisance action, the outcome of such controversies should turn on "whether the benefit conferred," by the defendant-State's enterprise "is not greater than the injury done" to the plaintiff-State.[317] If, after compensating her neighbors for the harm she causes, Colorado still realizes a profit, the "market place" will have determined that "the benefits derived from" her venture are "sufficiently great to justify its existence"[318] and more States will likely emulate her approach. The dispute will be resolved, in effect, by awarding Colorado's afflicted neighbors a "share of the profits" her pot creates "in exchange for allowing the nuisance to continue."[319] The free market will have concluded "what [i]s gained" by the decriminalization of recreational pot "[i]s worth more than what [i]s lost."[320]

But if (as we suspect) forcing Colorado to assume responsibility for the extraterritorial harm her venture causes results in a net loss, her enterprise will prove inefficient and Colorado will likely decide on her own to terminate her experiment, thus achieving "the same effect" as if the nuisance had been

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[316] Admittedly, rule forcing polluters to internalize the cost of their pollution *in dollar terms* flies in the face of traditional nuisance law, for which injunctive relief was historically the exclusive remedy. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 17 (2011). Modern authorities "strongly recommend the use of damages rather than injunctions." A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1076 (1980). But until recent decades "there [wa]s no recorded instance . . . of any public nuisance action initiated by public officials yielding an award of damages." Merrill, *supra* note 316, at 17. Injunctive relief produces inefficient results. Injunctions are blunt instruments that cannot be tailored to match the specific economic consequences of particular conduct. Polinsky, *supra* note 316 at 1077. This inevitably leads to the so-called "extortion problem." *Id.* This occurs when the "cost that enforcement of [an] injunction would impose on the defendant exceeds the loss borne by the plaintiff if the activity in question occurs." *Id*. As one commentator explained, "[s]uppose . . . operation of a plant injures a pollutee by $1,000 while the polluter would lose $10,000 in profits if the plant were shut down by an injunction." *Id*. An injunction enables the plaintiff to "exact compensation well in excess of his actual damages" because the defendant will "pay up to his entire potential profit to prevent the shutdown." *Id*. In contrast, a damage award limits the plaintiff's recovery to $1,000 "leaving no scope for extortion." *Id.*

[317] Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 577 (1851).

[318] Calabresi, *Some Thoughts on Risk Distribution*, *supra* note 62, at 534-35.

[319] Dogan & Young, *supra* note 55, at 114 n.31.

[320] Coase, *Social Cost*, *supra* note 55, at 44.

enjoined in the first place.[321]

CONCLUSION

Popular culture—in its uncritical embrace of the pot-legalization movement[322]—all too often categorizes opponents of Colorado's experiment as prudes[323] who naively view marijuana as a pestilence that makes users "hear light and see sound."[324] This crude caricature belies a deeper and much more complex truth. Big Cannabis has done a remarkable job branding its constituents as entrepreneurs and job-creators.[325] But marijuana is a vice whose commercial exploitation comes at a high price: addiction,[326] lung damage,[327] diminished cognitive function,[328] traffic deaths,[329] and organized crime.[330] These externalities are accompanied by transaction costs that everyone—users and non-users—must pay: higher healthcare premiums,[331]

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[321] Calabresi, *Some Thoughts on Risk Distribution*, *supra* note 62, at 534-35.

[322] Mauer, *supra* note 5, at 701 (stating that "we have marijuana being celebrated in popular culture").

[323] *See* Matt Ferner & Nick Wing, *The 11 Stupidest Arguments Against Legalizing Marijuana*, HUFFINGTON POST, April 20, 2014, *available at* http://www.huffingtonpost.com/2014/04/20/stupid-arguments-against-legalizing-marijuana_n_5175880.html (asserting that marijuana-legalization opponents have premised their position in part on fears that "[l]egalization will cause mass zombification!").

[324] THE NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, NORML REPORT ON SIXTY YEARS OF MARIJUANA PROHIBITION IN THE U.S., 3 (2003), *available at* http://www.norml.com/pdf_files/NORML_Report_Sixty_Years_US_Prohibition.pdf (citing LESTER GRINSPOON, M.D., MARIHUANA RECONSIDERED, at 11(2d ed.) (San Francisco: Quick American Archives, 1994)) (quoting a 1930s public service campaign which contended that "a user of marijuana 'becomes a fiend with savage or 'cave-man' tendencies. His sex desires are aroused and some of the most horrible crimes result. He hears light and sees sound. To get away from it, he suddenly becomes violent and may kill'").

[325] Matt Ferner, *Colorado Recreational Weed Sales Top $14 Million in First Month*, HUFFINGTON POST, March 10, 2014, *available at* http://www.huffingtonpost.com/2014/03/10/colorado-marijuana-tax-revenue_n_4936223.html; Aaron Smith, *Colorado Stash: $184M in Marijuana Taxes*, CNN MONEY, Feb. 20, 2014, *available at* http://money.cnn.com/2014/02/20/news/economy/marijuana-taxes-colorado/; Carroll, *supra* note 6, at http://www.theguardian.com/politics/2014/jan/03/legal-marijuana-colorado-big-tobacco-lobbying.

[326] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2219.

[327] *Id.* at 2222; Budney, Roffman, Stephens & Walker, *supra* note 233, at 5.

[328] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2221.

[329] *See supra* notes 151-153 and accompanying text.

[330] *See supra* notes 154-157 and accompanying text.

[331] Andre, Velasquez & Mazur, *supra* note 252, at 1.

decreased productivity,[332] increased burdens on our schools,[333] law enforcement,[334] and the court system,[335] more highway deaths.[336] One can acknowledge these harmful side effects without recycling propagandistic anthems from the past.[337]

From a policy standpoint, we express no opinion regarding whether marijuana legalization is a good policy choice. We simply posit that along with the wealth it generates, Colorado's marijuana-legalization experiment—like Tennessee's copper-smelting venture condemned by *Georgia v. Tennessee Copper*[338]—produces harmful externalities that transcend her borders. Under the Constitution's federalist model, Colorado's right to embrace commercial marijuana is no greater than the right of her neighbors to be free from the cross-border harm Colorado pot generates. "[A] State with high . . . standards" is "not compelled to lower [herself] to the more degrading standards of a neighbor."[339]

The best way to resolve this impasse is to allow Colorado to retain the policy of her choice, but force her to compensate surrounding states for the damage caused. This remedy recognizes that Colorado and her neighbors are co-sovereigns in whom the Constitution invests equal respect and dignity.[340] It simply requires Colorado—the policy outlier—to make the externalities that result from her very lucrative experiment a part of her cost of doing business. Such a remedy leaves it to the free market to ultimately decide which of the competing States' policies should prevail.

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[332] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2221.

[333] *Id*. (noting that marijuana use results in "long-lasting cognitive impairments" which inhibit learning and achievement).

[334] *See supra* note 163 and accompanying text.

[335] Volkow, Baler, Compton & Weiss, *supra* note 52, at 2221 ("marijuana use has been linked to . . . criminal behavior").

[336] LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 142, at 5.

[337] *See* Mike Konczal, *Legalizing Marijuana Is Hard. Regulating a Pot Industry Is Even Harder*, WASH. POST., June 29, 2013, *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/29/legalizing-marijuana-is-hard-regulating-a-pot-industry-is-even-harder/ (discussing the negative externalities faced by sovereigns that legalize recreational marijuana use).

[338] Georgia v. Tennessee Copper Co., 206 U.S. 230, 236 (1907).

[339] Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972). Ironically, in the present controversy, it is Colorado whose standards are "high."

[340] Kansas v. Colorado, 206 U.S. 46, 97-98 (1907) ("One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest.").