

A HYBRID APPROACH TO MARIJUANA FEDERALISM

by

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With the evident indulgence of the United States Department of Justice, states are jumping on the bandwagon of legalizing medicinal and recreational marijuana even though marijuana use is criminalized under the Federal Controlled Substances Act. The possibility that the federal government will at some point decriminalize marijuana use poses a challenge for the construction of a regulatory framework. In short, how should the states and the federal government divide regulatory responsibilities?

There has been significant academic discussion about possible regulatory frameworks to address this issue. Drawing upon existing federalism schemes in the environmental and natural resource area, this Article reviews a variety of ways the regulatory relationship between states and the federal government can be structured. It argues that the best framework is a hybrid model of regulation in which federal-state responsibilities differ based on the type and scale of marijuana-related activity.

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I. INTRODUCTION

Marijuana is currently regulated as a Schedule I drug under the federal Controlled Substances Act (CSA).¹ Listing marijuana as a Schedule I drug means that the Government has concluded that the drug “has a high potential for abuse,” “has no currently accepted medical use in treatment in the United States,” and there is a “lack of accepted safety for use of the drug under medical supervision.”² Under federal law, mere possession of a small amount of the drug can, technically, lead to a misdemeanor conviction carrying a maximum penalty of up to one year; a second offense is a felony carrying a mandatory minimum sentence of 15 days and a maximum sentence of two years; and distributing or dispensing the drug, or possessing it with intent to do so, carries penalties from five years to life depending on the amount of the drug involved.³ Opening, leasing, renting, using, or maintaining a place to distribute the drug carries a maximum penalty of 20 years.⁴ Yet notwithstanding the federal prohibitions, as of April 2019, ten states had legalized marijuana for recreational use, and 33 states had legalized the drug for medical use.⁵ In the November 2018 mid-term elections, Michigan approved legalization for adult use, and Utah and Missouri voted to approve medical marijuana; some Ohio cities voted to decriminalize marijuana, and some cities and counties in Wisconsin voted to call for reform of marijuana laws.⁶

¹ Controlled Substances Act, 21 U.S.C. §§ 812(b)(1), 812(c) Schedule I(c)(10) (2012).

² *Id.* § 812(b)(1).

³ *Id.* §§ 841, 844(a).

⁴ *Id.* § 856(a)–(b).

⁵ Conor Dougherty, *Cannabis, Marijuana, Weed, Pot? Just Call It a Job Machine*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/business/economy/jobs-in-cannabis-weed-marijuana.html>; see also Dean M. Nickles, Note, *Federalism and State Marijuana Legislation*, 91 NOTRE DAME L. REV. 1253 (2016) (summarizing state medical and recreational marijuana laws as of 2016).

⁶ Tom Angell, *Marijuana Won the Midterm Elections*, FORBES (Nov. 7, 2018), <https://www.forbes.com/sites/tomangell/2018/11/07/marijuana-won-the-midterm-elections/#41cbf8853a91>.

Many academic articles have traced the history of marijuana criminalization in the United States.⁷ In addition to understanding the racist motivations for criminalization,⁸ for our purposes it is important only to note that until recently the states that legalized medical or recreational use of marijuana had done so with the overt indulgence of the U.S. Department of Justice as set out in a series of Department guidance documents.⁹ In January 2018, the Justice Department rescinded the guidance documents.¹⁰ Thus, as of this writing, people engaging in marijuana-related activities in these states are insulated from prosecution only at the discretion of individual U.S. Attorneys applying the general prosecution guidelines in chapter 9-27.000 of the United States Attorneys' Manual.¹¹

The uneasy situation in which large numbers of citizens in some states are violating the CSA with impunity has inspired numerous academic articles on the federalism implications of state legalization of marijuana.¹² In suggesting solutions to

⁷ The most comprehensive history of marijuana regulation is found in Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 975 (1970). See also, e.g., Hope M. Babcock, *Illegal Marijuana Cultivation on Public Lands: Our Federalism on a Very Bad Trip*, 43 ECOLOGY L.Q. 723, 754–55 (2017); Brian M. Blumenfeld, *State Legalization of Marijuana and Our American System of Federalism: A Historio-Constitutional Primer*, 24 VA. J. SOC. POL'Y & L. 77, 81–84 (2017); Richard J. Bonnie, *The Surprising Collapse of Marijuana Prohibition: What Now?*, 50 U.C. DAVIS L. REV. 573, 576–77 (2016); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 81–90 (2015); J. Herbie DiFonzo & Ruth C. Stern, *Divided We Stand: Medical Marijuana and Federalism*, HEALTH L., June 2015, at 17, 17–18; Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1106–12 (2014) [hereinafter Kamin, *Cooperative Federalism*]; Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 791–809 (2019).

⁸ See sources cited *supra* note 7. This background is addressed at note 122, *infra*.

⁹ See, e.g., Memorandum from Att'y Gen. Jefferson B. Sessions III, to U.S. Att'y's, Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> (listing the guidance documents). This history is also addressed in the sources cited *supra* note 7.

¹⁰ *Id.*

¹¹ *Id.*

¹² E.g., Babcock, *supra* note 7; Blumenfeld, *supra* note 7; Brannon P. Denning, *State Legalization of Marijuana as a "Diagonal Federalism" Problem*, 11 FIU L. REV. 349 (2016); Jessica Bulman-Pozen, *Unbundling Federalism: Colorado's Legalization of Marijuana and Federalism's Many Forms*, 85 U. COLO. L. REV. 1067 (2014); Chemerinsky et al., *supra* note 7; DiFonzo & Stern, *supra* note 7, at 1; Saby Ghoshray, *Brandeisian Experiment Meets Federal Preemption: Is Cooperative Federalism a Panacea for Marijuana Regulation?*, 35 N. ILL. U. L. REV. 511 (2015); Brianne J. Gorod, *Marijuana Legalization and Horizontal Federalism*, 50 U.C. DAVIS L. REV. 595 (2016); Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597 (2015); Kamin, *Cooperative Federalism*, *supra* note 7; Matthew A. Melone, *Federal Marijuana Policy: Homage to Federalism in Form; Potemkin Federalism in Substance*, 63 WAYNE L. REV. 215 (2017); Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 DENV.

the federalism issue, these articles adopt a unified approach in which all aspects of marijuana regulation would follow a single federalism model. In summary, Hope Babcock arranges the models into three groups: “nullification” of the CSA; “opt outs and waivers” from the CSA; and “cooperative or shared federalism” similar to the approach taken to alcohol.¹³ Some authors in the “opt outs and waivers” category (who also adopt the “cooperative federalism” label) have pointed to the Federal Clean Water Act (CWA) or the Clean Air Act (CAA) as examples to follow.¹⁴

This Article aims to make a modest contribution to the reams of paper already devoted to marijuana federalism—not to mention federalism generally¹⁵—by suggesting that a one-size-fits-all approach is not ideal for the regulation of marijuana. Instead, the Article proposes a hybrid approach in which different approaches to federal-state interaction may be suitable for different types of marijuana-related activities.¹⁶ Environmental and natural resource laws provide a range of models.

Part II will briefly review four different models for shared federal-state regulation: the CWA’s National Pollutant Discharge Elimination System (NPDES) permit system, the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), and the federal government’s approach to non-federally protected species on federal lands. Part Three will discuss how these models—as well as a model of total federal preemption—might apply to the variety of marijuana-related activities that governments are likely to want to regulate.

II. MODELS PROVIDED BY ENVIRONMENTAL AND WILDLIFE CONSERVATION LAW

A. *Clean Water Act*

In a widely cited article, Chemerinsky, Forman, Hopper, and Kamin suggest that the CWA’s approach to “cooperative federalism” might serve as a model for legalized marijuana regulation.¹⁷ In particular, these authors point to the arrangement by which states have “primary responsibility for water quality standards, but

U. L. REV. 997 (2012); Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 CASE W. RES. L. REV. 769 (2015).

¹³ Babcock, *supra* note 7, at 758–60.

¹⁴ *E.g.*, Chemerinsky et al., *supra* note 7, at 117–18.

¹⁵ *E.g.*, ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (2011) and sources cited therein. Except where specifically noted, the present Article will use the term “federalism” broadly to refer to any situation in which state and federal governments and their agencies collaborate to some degree. Theories and subtleties of the concept of federalism are beyond the scope of this Article.

¹⁶ “Hybrid” is defined as “[d]erived from heterogeneous . . . sources; having a mixed character; composed of . . . diverse elements” OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/entry/89809> (last visited May 18, 2019).

¹⁷ Chemerinsky et al., *supra* note 7, at 117–18.

the federal government may take a more active role if a state fails to comply with the Environmental Protection Agency (EPA)'s mandates."¹⁸ The discussion also points out that if a state fails to review and update the standards periodically, subject to EPA approval, "the EPA is authorized to directly promulgate water quality standards on behalf of the state."¹⁹ The authors are attracted by the CWA's approach²⁰ to sharing authority and responsibility for promulgating water quality standards between the state and federal governments. Specifically, they propose that:

[S]tate law would govern in states that have legalized recreational or medical marijuana. Federal law would supplement state law only when states defer to federal law or fail to satisfy federal requirements. Just as the EPA works with states to enforce air and water pollution laws, federal agencies could continue to cooperate with opt-out states and local governments to enforce marijuana laws. But state laws and regulations would control within those states' borders rather than the CSA.²¹

While this view of cooperative federalism appears relatively seamless on the surface, the CWA's approach to the water quality standards referred to by Chemerinsky et al.²² is quite a bit more complicated in reality. The process through which EPA judges and approves or rejects state water quality standards can be time-consuming and resource-intensive for both EPA and the states.²³ More importantly, when discharge of a pollutant affects the water quality standards of a water body,

¹⁸ *Id.* at 117. The "more active role" referred to is the ability of EPA to impose federally promulgated water quality standards on a state if the state's proposed standards fail to meet federal criteria. *See* Clean Water Act, 33 U.S.C. § 1313(b)(1) (2012).

¹⁹ Chemerinsky et al., *supra* note 7, at 118. EPA's authority to review revisions to state water quality standards derives from 33 U.S.C. § 1313(c).

²⁰ The authors note similar approaches in the CAA and the Affordable Care Act (ACA). Chemerinsky et al., *supra* note 7, at 118–19. The CAA presents even more difficulties as a model for marijuana federalism, as it allows smaller governmental entities such as "any air pollution control agency" to be authorized to administer the federal permit program. Clean Air Act, 42 U.S.C. § 7661a(b) (2012). Discussion of the ACA is beyond the scope of this Article.

²¹ Chemerinsky et al., *supra* note 7, at 119.

²² 33 U.S.C. §§ 1311, 1313, 1314(a).

²³ A state must designate which of the uses set out in 33 U.S.C. § 1251(a)(2) apply to each body or sub-division of body of water, identifying whether each use is "existing" or "attainable." In order to do this, the state must conduct specified analyses. 40 C.F.R. § 131.10 (2018). The State must then adopt criteria, based on "sound scientific rationale," aimed at protecting the designated uses. *Id.* § 131.11(a); *see also* ENVTL. PROT. AGENCY, QUALITY CRITERIA FOR WATER (May 1, 1986), <https://www.epa.gov/sites/production/files/2018-10/documents/quality-criteria-water-1986.pdf> (setting suggested criteria); *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1271 (5th Cir. 1980) (approving EPA rejection of state criteria that did not meet its published suggestion). For a brief overview of water quality standards generally, see CRAIG N. JOHNSTON, WILLIAM F. FUNK, & VICTOR B. FLATT, LEGAL PROTECTION OF THE ENVIRONMENT 277–305 (4th ed. 2018).

the discharger must have a permit issued under the NPDES permit system or through the Section 404 permit system for dredged or fill material; the CWA defines “discharge of a pollutant” broadly enough that many common activities come under the auspices of these permit systems.²⁴ Violating a permit or operating without a required permit runs the risk of administrative, civil, and criminal enforcement.²⁵ The “persons” who can face enforcement actions include individuals, corporations, partnerships, state and local governments, and even the United States itself.²⁶ This means that it makes little sense to refer to the federalism of water quality standards without also examining the federalism of the permit programs. Our discussion will address the NPDES permit system.

The NPDES permit system imposes a complex set of rules and requirements.²⁷ EPA administers²⁸ and enforces²⁹ the requirements under the NPDES permit system. A state can, however, substitute its own environmental agency for EPA by establishing a program that meets articulated federal requirements and submitting its

²⁴ The CWA prohibits the discharge of a pollutant except in compliance with designated provisions. 33 U.S.C. § 1311(a). When discharge from a point source would interfere with attainment or maintenance of water quality, “effluent limitations . . . for such point source or sources shall be established.” *Id.* § 1312(a). Water quality standards are enforced by the permit systems when a “pollutant” affecting water quality is added to “navigable waters” from a “point source.” *Id.* § 1362(12). “‘Navigable waters’ means the waters of the United States.” *Id.* § 1362(7). The waterway need not in fact be navigable, and the term is broadly applied to lakes, flowing water, and wetlands, although it does not include “transitory puddles or ephemeral flows of water.” *Rapanos v. United States*, 547 U.S. 715, 730–33 (2006). “Point source” is also broadly defined. 33 U.S.C. § 1362(14). These effluent limitations are enforced through the NPDES permit system and Section 404 permit programs. *Id.* § 1342 (setting out the NPDES permit system); *id.* § 1344 (setting out the Section 404 permit system). It is beyond the scope of this Article to cover the details of the types of requirements a discharger must meet to obtain and comply with a CWA permit. *See also id.* § 1362(6), (12) (defining “pollutant” and “discharge of a pollutant,” respectively).

²⁵ 33 U.S.C. § 1319.

²⁶ *Id.* (regarding enforcement by the Federal Government); *id.* § 1365(a) (regarding enforcement through citizen suits); *id.* § 1362(5) (defining “person”).

²⁷ *E.g., id.* § 1311(b) (regarding effluent limitations); *id.* § 1312 (regarding water quality related effluent limitations); *id.* § 1313 (regarding water quality standards and implementation plans); *id.* § 1316 (regarding national standards of performance for new sources); *id.* § 1317 (regarding toxic and pretreatment effluent standards); *see also, e.g.*, 40 C.F.R. §§ 125–133 (2018). The CWA applies to “navigable waters” (*e.g.*, 33 U.S.C. § 1251(a)(1)), which are defined as “waters of the United States.” *Id.* § 1362(7).

²⁸ 33 U.S.C. § 1318(a) (authorizing the federal authorities to require records, reports, monitoring, sampling, and provision of other information and authorizing administrative inspections); *id.* § 1342(a) (authorizing issuance of federal NPDES permits); *id.* § 1344(a), (e) (authorizing issuance of federal dredge-and-fill permits).

²⁹ 33 U.S.C. § 1319(b)–(g) (authorizing federal civil and administrative actions and criminal penalties); *id.* § 1321(b)(5)–(7) (authorizing same); *id.* § 1344(s) (authorizing administrative and civil actions for violations of Section 404 permits).

program to EPA for approval.³⁰ Among other requirements, the state must have the power to bring administrative, civil, and criminal enforcement actions,³¹ and the state must ensure that discharges will be subject to permit conditions at least as stringent as conditions EPA would impose if it were running the program.³² Once EPA accepts a state's program, the state is authorized to be the primary administrator and enforcer of the NPDES permit system.³³ An authorized state issues and enforces the NPDES permits.³⁴ The federal regulations drop out, and the state regulations become the ones that entities in the state must follow.³⁵ Federal statutes, however, continue to exist in tandem with state statutes.³⁶

Approval of a state's program does not end EPA's role. On the administrative side, EPA continues to receive required reports and other information from regulated entities,³⁷ and the federal government continues to have the authority to engage in administrative inspections and criminal searches.³⁸ In addition, the federal government has the power to seek compliance orders, injunctions, civil penalties, and criminal sanctions against violators of approved state programs.³⁹ Finally, if

³⁰ *Id.* § 1342(b) (setting out the requirements for state-administered NPDES permits); *Memorandum of Agreements Between EPA and States Authorized to Implement the National Pollutant Discharge Elimination System (NPDES) Program*, ENVTL. PROT. AGENCY (Aug. 23, 2018), <https://www.epa.gov/compliance/memorandum-agreements-between-epa-and-states-authorized-implement-national-pollutant>. *Cf. id.* § 1344 (g)–(i) (regarding Section 404 permits).

³¹ 33 U.S.C. § 1342(b).

³² *Id.* § 1342(c)(1).

³³ *See, e.g., Memorandum of Agreements, supra* note 30 (providing State NPDES Memoranda of understanding for authorized States).

³⁴ In an authorized state, EPA suspends issuance of NPDES permits for discharges covered by the State program. 33 U.S.C. § 1342(c).

³⁵ *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (noting that state water quality standards become “part of the federal law of water pollution control” when EPA approves the state program); *United States Dep’t of Energy v. Ohio*, 503 U.S. 607, 611 (1992) (noting that in an approved state, state administrative regulations “supplant” federal regulations).

³⁶ 33 U.S.C. § 1318.

³⁷ *See id.* § 1318(a)(A) (authorizing EPA to require permittees to maintain records, make reports, use monitoring equipment, sample effluents, and provide information); *id.* § 1318(a)(B) (authorizing EPA to have a right of entry to make specified inspections); NPDES Electronic Reporting Rule, 80 Fed. Reg. 64064 (Oct. 22, 2015) (codified at 40 C.F.R. §§ 9, 122–24, 127, 403, 501 & 503(2018)); *CWA-NPDES Electronic Reporting*, ENVTL. PROT. AGENCY, <https://www.epa.gov/compliance/npdes-ereporting> (last updated Jan. 10, 2018) (summarizing and explaining the rule requiring regulated entities to report information to EPA electronically and requiring states to share information with EPA).

³⁸ 33 U.S.C. § 1318(a)(B)(ii) (authorizing EPA to conduct inspections).

³⁹ *Id.* § 1319(a) (authorizing compliance orders); *id.* § 1319(b) (authorizing civil actions for injunctive relief); *id.* § 1319(c) (authorizing criminal actions); *id.* § 1319(d) (authorizing civil penalties); *id.* § 1319(g) (authorizing administrative penalties); *id.* § 1344(n) (2012) (reiterating the Government's authority to enforce dredge-and-fill permit violations in authorized states).

EPA believes that an approved state is not administering or enforcing its program adequately, EPA can take those responsibilities back and de-authorize the state as administrator of the NPDES permit system within its borders.⁴⁰

While EPA has never de-authorized an approved state, it has brought administrative and civil enforcement actions and criminal prosecutions against violators in authorized states. At times, these actions may involve “overfiling,” or bringing a federal enforcement action even though the relevant state has already acted against the violator.⁴¹ When the Federal Government enforces an authorized state’s permits and regulations, it proceeds in *federal* court under the *federal* enforcement statute, 33 U.S.C. § 1319. The federal government can enforce state requirements that are “more stringent or more extensive than those required” by federal law,⁴² but not those that are part of a program with “greater scope of coverage than that required by Federal law.”⁴³ The CWA imposes modest conditions the Government must meet in order to bring an administrative or civil enforcement action against a violator in an authorized state, and the conditions differ for the different types of actions.⁴⁴ The statute imposes no special conditions on federal initiation of criminal prosecutions,⁴⁵ and the following discussion will focus on non-criminal enforcement.

⁴⁰ *Id.* § 1342(c)(3).

⁴¹ See, e.g., Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part Two: Statutory Preclusions on EPA Enforcement*, 29 HARV. ENVTL. L. REV. 1, 97 (2005) (citing 33 U.S.C. § 1319(a)(1), (a)(3), (g)(6)) (“Congress precluded or limited EPA overfiling against some types of violations, but not others.”).

⁴² 40 C.F.R. § 123.1(i)(1) (2018).

⁴³ *Id.* § 123.1(i)(2) (“If an approved State program has a greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.”); *Atl. States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 358 (2d Cir. 1993) (applying this interpretation in civil enforcement context). *But cf.* Darrell A. Fruth, *Touby or Not Touby: The Constitutional Question When Congress Authorizes State and Local Governments to Legislate the Contours of Federal Criminal Law*, 44 ENVTL. L. REP. 10072, 10075 (2014) (discussing cases in which the courts upheld a federal criminal conviction for violation of *any* requirement imposed in state-issued NPDES permits).

⁴⁴ 33 U.S.C. § 1319(a) (imposing conditions on federal issuance of a compliance order in an authorized state); *id.* § 1319(b) (imposing conditions on initiation of civil actions against an entity licensed by an authorized state); *id.* § 1319(g)(1) (imposing conditions on imposing civil penalties on an entity licensed by an authorized state); *id.* § 1319(g)(6) (imposing conditions on civil penalty actions against entities licensed by an authorized state if the state has “commenced and is diligently prosecuting an action” under a comparable state administrative provision or has “issued a final order not subject to further judicial review and the violator has paid a penalty assessed under . . . such comparable State law”).

⁴⁵ *Id.* § 1319(c).

The CWA also authorizes entities other than the federal government to bring non-criminal CWA enforcement actions. Plaintiffs can initiate federal suits for injunctive relief and civil penalties to enforce NPDES permits, even in authorized states; defendants can include both private and governmental entities.⁴⁶ Plaintiffs can also sue EPA for alleged failure to carry out certain non-discretionary acts or duties.⁴⁷ Details of the CWA's citizen suit mechanism are addressed below.⁴⁸ Citizen suit enforcement has turned out to be crucial in ensuring, to the extent possible without an unaffordable expenditure of federal resources, that states and regulated entities adhere to the requirements of the NPDES permit system and that EPA itself takes its enforcement tasks seriously.⁴⁹

In sum, the NPDES system authorizes non-criminal enforcement by states, the federal government, and private plaintiffs. However, this complex, three-prong enforcement system has its costs.

Federal civil litigation initiated by both the government and citizens has given rise to a number of thorny issues beyond those involved in administrative and enforcement coordination and duplication of efforts. For example, in non-criminal CWA cases that have come before the Supreme Court, issues have included the extent of a trial court's discretion under the CWA to fashion a remedy;⁵⁰ whether the petitioner had a right to jury trial to determine both liability for and the amount of penalties where injunctive relief was also sought;⁵¹ whether a course of conduct involves a single violation or multiple violations in calculating civil penalties;⁵² the ability of a permit holder to challenge permit conditions when the challenge was not made at the time the permit was issued;⁵³ whether certain requirements are governed

⁴⁶ *Id.* § 1365(a) (authorizing civil actions in federal court against persons, including the United States and other “governmental instrumentalit[ies] or agenc[ies]”). Note that as with enforcement by the federal government itself, citizen suits enforce *state* NPDES permits and regulations.

⁴⁷ *Id.* § 1365(a)(2).

⁴⁸ See *infra* Part III.B.

⁴⁹ See generally James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at Thirtysomething: A Celebration & Summit*, 10 WIDENER L. REV. 1, 1–5 (2003) (addressing citizen suits).

⁵⁰ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (holding the CWA did not require the court to issue an injunction, as that was not the only remedy available to ensure compliance).

⁵¹ *Tull v. United States*, 481 U.S. 412, 427 (1987) (holding a jury trial is required by the Seventh Amendment to determine liability but not to assess penalties).

⁵² *E.g.*, *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 76 (3d Cir. 1990).

⁵³ *Id.* at 78.

by state law, removing federal enforcement authority;⁵⁴ whether *res judicata* or collateral estoppel prevent federal enforcement after a state administrative order is agreed upon between the state agency and the regulated entity;⁵⁵ and whether the ability to impose civil penalties is eliminated if the violator has complied but violations were ongoing when the suit was filed.⁵⁶ Additional issues are unique to citizen suits and are addressed below.⁵⁷

In short, using water quality standards as a model for marijuana federalism seems attractive when focusing only on the establishment of such standards. Establishment of rules cannot be divorced from enforcement of those rules, however, and the CWA enforcement structure is simply too complex for many aspects of legalized marijuana regulations. Other possible models exist in the natural resource protection field, as the next Sections will explore.

B. *Wildlife Conservation*

Congress has enacted a variety of laws to protect specific categories of fauna.⁵⁸ These statutes involve some form of federal-state cooperation that is different and less formally complex than that involved in the CWA's NPDES permit system. In addition, the federal government has had to deal with the treatment of non-protected fauna on federal lands, and Congress has adopted yet another approach to that issue. Section 1 will briefly review the approaches adopted for protected species under ESA and the MBTA. Section 2 will review the approach to non-protected species on federal land.

⁵⁴ *United States v. Envtl. Waste Control, Inc.*, 710 F. Supp. 1172, 1201 (N.D. Ind. 1989), *aff'd* 917 F.2d 327 (7th Cir. 1990).

⁵⁵ *Id.* at 1196–201 (rejecting the argument on the facts of the case).

⁵⁶ *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1130 (11th Cir. 1990).

⁵⁷ See *infra* Part III.B.

⁵⁸ *E.g.*, The Lacey Act, 16 U.S.C. §§ 3371–3378 (2012); Bald Eagle Protection Act, Pub. L. No. 567, 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. § 668 (2012)); Migratory Bird Treaty Act, Pub. L. No. 188, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–712 (2012)); Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195, 85 Stat. 649 (1971) (codified as amended at 16 U.S.C. §§ 1331–1340 (2012)); Marine Mammal Protection Act, Pub. L. 92-522, 86 Stat. 1027 (1972) (codified as amended at 16 U.S.C. §§ 1361–1421 (2012)); Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531–1544 (2012)).

1. *Federally Protected Species*

a. *Endangered Species Act*⁵⁹

The goal of the ESA is to conserve endangered and threatened species and their ecosystems.⁶⁰ Our discussion will focus on the administration of the ESA by the Department of Interior's Fish and Wildlife Service (FWS), which covers terrestrial non-plant species.⁶¹ The ESA authorizes the federal government to list endangered and threatened species, requires federal agencies to conserve and avoid jeopardizing such species or destroying their critical habitat, and prohibits a variety of public and private actions including the unpermitted "taking" of such species.⁶² To enforce the prohibitions, the ESA authorizes federal administrative penalties, misdemeanor penalties, property forfeiture, injunctions, and citizen suits.⁶³ As with the CWA, the citizen suit provision encompasses both actions against violators and actions to compel the relevant Secretary to apply the prohibitions and to perform non-discretionary acts and duties.⁶⁴

Although the ESA mandates federal-state collaboration, it does not establish true cooperative federalism.⁶⁵ State involvement is minimal and does not normally

⁵⁹ 16 U.S.C. §§ 1531–1544.

⁶⁰ *Id.* § 1531(b) (setting out congressional goals).

⁶¹ The ESA uses the term "Secretary," which means, as relevant, the Secretary of the Interior or the Secretary of Commerce. *Id.* § 1532(15). The Secretary of Interior has the major responsibility regarding non-plant species, while the Secretary of Commerce has "jurisdiction over marine species and commercial fishing." George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. REV. 315, 328 (1974). The Department of Agriculture, the Treasury, the Coast Guard, and the State Department also have limited responsibilities. *Id.* at 328–29. The Fish and Wildlife Service carries out the Secretary of Interior's functions relevant to the present discussion. *See, e.g., Overview*, Endangered Species Program, FWS.GOV, <https://www.fws.gov/endangered/about/index.html> (last updated Feb. 28, 2018). The Department of Commerce's National Marine Fisheries Service, however, may also play a role in administering land-based activities through its responsibility over "marine" species, which include anadromous fish such as salmon. *See, e.g., Species Directory*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/species-directory>.

⁶² 16 U.S.C. § 1538 (setting out prohibited acts); *id.* § 1539 (authorizing the Secretary to permit exceptions to the prohibited acts); *see* Coggins, *supra* note 61, at 329–30; Martin Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENV'T L. 797, 840–47 (2017). Other mechanisms include promulgating regulations, acquiring habitat, administering a permit system for licensing importers and exporters, creating "exemptions in individual cases from the Act's requirements," and enhanced provisions for international cooperation. Coggins, *supra* note 61, at 329–32.

⁶³ 16 U.S.C. § 1540.

⁶⁴ *Id.* § 1540(g). Unlike CWA citizen suits, the ESA provision does not authorize actions for civil penalties.

⁶⁵ Accord J.B. Ruhl, *The Endangered Species Act's Fall from Grace in the Supreme Court*, 36 HARV. ENVTL. L. REV. 487, 518 (2012) (noting that the ESA "did not employ a cooperative federalism structure to enlist state involvement"). Other commentators, however, use the term

include direct administration or enforcement of the Act.⁶⁶ Instead, the ESA authorizes the FWS to enter into a “cooperative” agreement “for the purpose of assisting in implementation of”⁶⁷ a state program (sometimes called a “state endangered species act”⁶⁸) that conserves endangered and threatened species once the program is established and maintained as adequate and active.⁶⁹ The state’s role in this relationship is to provide expertise and information to the FWS, receive information and notices from the FWS, and collaborate with the FWS in planning various activities.⁷⁰ In return, the state is eligible to receive federal funding for its program.⁷¹

Unlike the NPDES permit system, the ESA does not set demanding “floor” requirements for a state to enter into a cooperative agreement.⁷² All that is needed is a state agency with authority “to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened”; “established acceptable conservation programs”; authorization “to conduct investigations to determine the status and requirements for survival of resident species of fish and

“cooperative federalism” in a more expansive way. *E.g.*, Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 211–12 (2005) (discussing how the ESA can be enhanced by adopting cooperative federalism); Robert L. Fischman et al., *State Imperiled Species Legislation*, 48 ENVTL. L. 81, 84 (2018) (“The ESA expressly addresses cooperative federalism in Section 6”); Nie et al., *supra* note 62, at 848 (asserting that ESA Section 6 encourages cooperative federalism).

⁶⁶ The statute does authorize the FWS to enter into “agreements [with states] for the administration and management of any area established for the conservation of endangered species or threatened species.” 16 U.S.C. § 1535(b). These are agreements “whereby the Secretary will agree to administer state habitat land for a fee, or vice versa.” Coggins, *supra* note 61, at 333.

⁶⁷ 16 U.S.C. § 1535(c)(1).

⁶⁸ Nie et al., *supra* note 62, at 847 (citing Deborah F. Buckman, Annotation, *Construction and Application of State Endangered Species Acts*, 44 A.L.R. 6th 325 (2009)); *cf.* Ryan Pellerito, *State Endangered Species Chart*, ANIMAL LEGAL & HIST. CTR. (2002), <https://www.animallaw.info/article/state-endangered-species-chart>.

⁶⁹ 16 U.S.C. § 1535(c)–(d). Subsection (c)(1) states that the Secretary “shall enter into a cooperative agreement” unless “he determines . . . that the State program is not in accordance with” the ESA requirements. The FWS must annually reconfirm that the state program continues to accord with the requirements. *Id.* § 1535(c). This authorization is one aspect of the ESA’s general directive that the FWS “cooperate to the maximum extent practicable with the States.” *Id.* § 1535(a).

⁷⁰ Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 81 Fed. Reg. 8,663 (Feb. 22, 2016) (to be codified at 50 C.F.R. ch. IV); Fischman et al., *supra* note 65, at 89–90.

⁷¹ 16 U.S.C. § 1535(d).

⁷² Nie et al., *supra* note 62, at 848 (“[T]he ESA provides a floor, not a ceiling, for species protection.”).

wildlife”; authorization to establish conservation programs; and provisions for public participation in designating endangered or threatened species.⁷³ What’s more, a savings clause in the ESA guarantees that a state can continue to maintain and enforce state laws that do not conflict with the ESA (including its permits and exemptions).⁷⁴

b. Migratory Bird Treaty Act

Congress enacted the Migratory Bird Treaty Act (MBTA)⁷⁵ to give effect to international treaties.⁷⁶ The MBTA prohibits a number of activities including unpermitted “taking,” killing, possessing, or transporting migratory birds or their parts, nests or eggs.⁷⁷ The MBTA authorizes both felony and misdemeanor sanctions for violating these prohibitions, as well as forfeiture of property upon conviction; it does not authorize administrative or civil judicial sanctions, and there is no citizen suit provision.⁷⁸ There are few birds that are not covered by the MBTA as the list of birds covered by the Act’s protections is lengthy and includes almost all common “backyard” birds.⁷⁹

The MBTA does not involve a federal agency approving a state program for administrative or enforcement purposes, or even for cooperative agreements. Instead, the MBTA relies on state laws to provide the basis for many of the federal prohibitions, making violation of state law a federal offense by incorporation.⁸⁰

⁷³ 16 U.S.C. § 1535(c)(1); *see also* 50 C.F.R. §§ 81.2, 81.3 (2018) (setting out requirements for an “adequate and active” state program); *cf.* 42 U.S.C. § 1342 (2012); 40 C.F.R. §§ 123.1–123.64 (2018) (setting out requirements for approval of state permit programs under the NPDES permit system).

⁷⁴ 16 U.S.C. § 1535(f); *see also, e.g.*, Nie et al., *supra* note 62, at 847–48 (discussing the role of the FWS and NFMS interagency policy in cooperation with States).

⁷⁵ 16 U.S.C. §§ 703–712 (2012).

⁷⁶ *See* Missouri v. Holland, 252 U.S. 416, 431–32 (1920) (noting Congress’s constitutional authority to do so). The conventions enforced by the MBTA are found at 50 C.F.R. § 10.13(a) (2018).

⁷⁷ 16 U.S.C. §§ 703, 705.

⁷⁸ *Id.* § 707.

⁷⁹ 50 C.F.R. § 10.13(c)(1) (providing an alphabetical list that includes blackbirds, bluebirds, bobolinks, bushtits, chickadees, cowbirds, crows, doves, finches, flycatchers, goldfinches, grackles, grosbeaks, hummingbirds, jays, juncos, kingfishers, larks, magpies, meadowlarks, mockingbirds, nuthatches, orioles, owls, pigeons, ravens, robins, siskins, snipes, sparrows, starlings, swallows, tanagers, vireos, towhees, warblers, waxwings, and woodpeckers); *see also* 50 C.F.R. § 10.13(c)(2) (providing a taxonomic list); George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 178 (1979) (noting that “exotic species” are excluded and that “[i]n spite of the consistent use of the word ‘migratory’ in the Act . . . some birds not commonly thought to migrate, such as cardinals, and birds born and raised in captivity are covered by the regulations promulgated under the Act”).

⁸⁰ 16 U.S.C. § 705 (prohibiting listed transportation activities contrary to state and territorial law); 50 C.F.R. § 20.72 (“No person shall at any time, by any means or in any manner,

When such federalized state law is violated, the federal government has not hesitated to bring federal criminal enforcement actions.⁸¹ Similarly, some states have adopted federal MBTA regulations or MBTA equivalents as state law and enforce those provisions in state court.⁸² (States are also free, of course, to make and enforce laws and regulations that are more protective of migratory birds than the federal rules as long as the state provisions do not allow violations of the federal laws.)⁸³

take, possess, transport, or export any migratory bird, or any part, nest, or egg of any such bird, in violation of any applicable law or regulation of any State.”); *see also* Coggins & Patti, *supra* note 79, at 180 (“In general, the Interior Department regulations controlling bird hunting create a system in which overall goals are set by the federal agency, cooperation between state and federal authorities is heavily emphasized, and the state agencies assume the lion’s share of actual enforcement responsibilities.”). Note that where a state lacks laws regarding the “taking” of birds outside the hunting context, the practical effect of the MBTA is to federalize the state’s hunting laws.

⁸¹ *E.g.*, *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 681–82 (10th Cir. 2010) (regarding incidental takings); *United States v. Pitrone*, 115 F.3d 1, 2–3 (1st Cir. 1997) (regarding sale of taxidermied migratory bird); *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070, 1071 (D. Colo. 1999) (regarding incidental takings); *United States v. Edwards*, 976 F. Supp. 810, 811 (E.D. Ark. 1997) (regarding hunting violations). Note that under the Trump administration, the Department of the Interior has cut back on enforcing incidental takings. Memorandum from Principal Deputy Solicitor Daniel H. Jorjan to Sec’y, Deputy Sec’y, Assistant Sec’y for Land and Minerals Mgmt., & Assistant Sec’y for Fish & Wildlife & Parks, *Migratory Bird Treaty Act Does Not Prohibit Incidental Take* (Dec. 22, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf>.

⁸² *E.g.*, 14 CAL. CODE REGS. tit. 14, § 509 (2019) (“The regulations adopted by the United States through its Secretary of Interior under the Migratory Bird Treaty Act, as amended annually in Part 10, subparts A and B, and Part 20, Title 50, Code of Federal Regulations, are hereby adopted and made a part of this Title 14 except where said federal regulations are less restrictive than the provisions of Chapter 7 of this Title 14 (sections 500–509), the provisions of Chapter 7 prevail.”); 34 PA. CONS. STAT. § 2103 (2018) (“The provisions of the Federal Migratory Bird Treaty Act . . . or Federal Duck Stamp Act . . . are hereby made a part of this title. Federal regulations shall not apply if commission regulations or other provisions of this title prescribe stronger or more detailed restrictions for the taking of migratory birds, nongame birds or game or wildlife.”) (citations omitted); *Boydston v. Schnurr*, No. 108,829, 2013 WL 2972853, at *2–3 (Kan. Ct. App. June 7, 2013) (finding, under MBTA and “corresponding Kansas law,” that no bird nest was involved); *Commonwealth v. Neitzel*, 678 A.2d 369, 370 (Pa. Super. Ct. 1996) (affirming criminal conviction for violation of statute that incorporated MBTA and its regulations into state law); *cf.* *Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc.*, 83 Cal. Rptr. 3d 588, 592 (Cal. Ct. App. 2008) (affirming on procedural grounds denial of declaratory and injunctive relief under MBTA and related federal and state statutes and regulations).

⁸³ 16 U.S.C. § 708 (“Nothing in this subchapter shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said conventions or of this subchapter, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open seasons for such birds beyond the dates approved by

2. *Species Not Protected Under Federal Law: Federal Lands*

The ESA and MBTA are examples of federal statutes that extend conservation protection to specified species.⁸⁴ There are a number of animal species, however, that are not protected by the ESA, MBTA, or species-specific federal laws even though the federal government probably has the constitutional authority to legislate regarding them.⁸⁵ Deer, elk, and beavers, for example, do not have federal protection even though these animals can and do cross state lines and so could likely be regulated under the Commerce Clause regardless of where they are found.⁸⁶

Congress could legislate under its Property Clause powers regarding these non-protected species when they are on federal land.⁸⁷ Yet Congress has not done so.

the President”); see Coggins & Patti, *supra* note 79, at 177 (commenting that this provision preempts less stringent state laws “by negative inference”).

⁸⁴ See *supra* note 58.

⁸⁵ Such authority would be based on the Commerce Clause (U.S. CONST. art. I, § 8, cl. 3), the Treaty Clause (U.S. CONST. art. II, § 2, cl. 2), or the Property Clause (U.S. CONST. art. IV, § 3, cl. 2).

⁸⁶ Congress has the authority under the Commerce Clause to legislate regarding intrastate activities that have a “substantial effect on interstate commerce.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (quoting *United States v. Darby*, 312 U.S. 100, 118–19 (1941)). This power “extends to activities that do so only when aggregated with similar activities of others.” *Id.* (citing *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942)). Application of these standards varies with the nature of the legislation in question. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 7 (2005) (regarding the CSA); *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (regarding the Violence Against Women Act); and *United States v. Lopez*, 514 U.S. 549, 551 (1995) (regarding the Gun-Free School Zones Act).

⁸⁷ Relevant statutes include the National Park Service Organic Act, Pub. L. No. 235, 39 Stat. 535 (1916) (codified in scattered sections of 54 U.S.C. (2012)) (summarized in Nie et al., *supra* note 62, at 848–51); the National Wildlife Refuge System Administration Act of 1966, Pub. L. No. 105-57, 111 Stat. 1252 (1997) (codified as amended at National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd–668ee (2012)) (summarized in Nie et al., *supra* note 62, at 851–57); the Act of June 4, 1897, ch. 2, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–482) (regarding the National Forest System) (summarized in Nie et al., *supra* note 62, at 857–58); the Multiple-Use Sustained-Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified as amended at 16 U.S.C. §§ 528–531) (regarding National Forest System) (summarized in Nie et al., *supra* note 62, at 858–60); the National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614) (amending Forest and Rangeland Renewable Resources Planning Act of 1974) (summarized in Nie et al., *supra* note 62, at 860–68); the Federal Land Policy Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701–1787) (summarized in Nie et al., *supra* note 62, at 868–72); and the National Landscape Conservation System (NLCS), 16 U.S.C. § 7202 (summarized in Nie et al., *supra* note 62, at 873). Regarding Property Clause powers, see generally, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 531, 546 (1976) (upholding Congress’s Property Clause authority to enact the Wild Free-Roaming Horses and Burros Act); *Wyoming v. United States*, 279 F.3d 1214, 1226–27 (10th

Instead, it is almost always left to the relevant state to regulate hunting, trapping, and fishing these non-protected species on federal land.⁸⁸ Department of Interior regulations reflect the frequently stated statutory requirement that the government consult, coordinate, or both with the relevant state agencies in the states in which the federal land is situated.⁸⁹ Implementing the controlling legislation, one regulation requires cooperative agreements with state agencies.⁹⁰ Other regulations provide that the State in which the land is located retains primary authority for management of fish and resident wildlife.⁹¹

3. Summary

The ESA, MBTA, and federal lands models avoid the complexities of the CWA's NPDES permit system approach. They allow federal and state interests to operate independently except where true cooperation or borrowing fits the needs of both governments.

III. MODELS FOR MARIJUANA FEDERALISM

A. Introduction

The search for a model for marijuana federalism assumes that the move toward decriminalization will continue. The search does not question whether the federal

Cir. 2002) (finding Congress's power to make rules and regulations regarding federal public lands to be "plenary" under the Property Clause).

⁸⁸ Deer, elk, beavers, and similar animals may have indirect protection when they are on federal land through the Government's protection and management of habitat generally. *See generally* 43 C.F.R. § 24.4(c) (2018) (describing the federal government's authority to close federal lands to hunting).

⁸⁹ *E.g.*, 43 C.F.R. § 24.4(g)–(i). The Department of the Interior administers major federal lands through the Bureau of Reclamation, Bureau of Land Management, the National Wildlife Refuge System, and the National Parks System. *Id.* § 24.4(a).

⁹⁰ *E.g.*, *id.* § 24.4(b) (directing that lands administered by the Bureau of Reclamation "should be made available by cooperative agreement to the agency exercising the administration of these resources of the particular State involved").

⁹¹ *Id.* § 24.4(c) (indicating that the Secretary's power to close BLM-administered lands to particular activities "does not in and of itself constitute a grant of authority to the Secretary to manage wildlife or require or authorize the issuance of hunting and/or fishing permits or licenses"); *Id.* § 24.4(e) (noting that the legislation controlling the National Wildlife Refuge System does not affect "the authority of the several States to manage fish and resident wildlife found on units of the system"); *Id.* § 24.4(i)(3) (indicating that when they provide for hunting, fishing, trapping and related activities on federal lands, Department of Interior agencies shall ensure that these activities are conducted "within the framework of applicable State and Federal laws, including requirements for the possession of appropriate State licenses or permits"). States retain primary authority even though, for example on BLM-administered lands, the federal government "has custody of the land itself and the habitat upon which fish and resident wildlife are dependent." *Id.* § 24.4(d).

government is constitutionally empowered to regulate marijuana and preempt conflicting state laws: it surely has those powers under current constitutional interpretation.⁹² And it is important to acknowledge aspects of legalized marijuana that are legitimate federal concerns and that, in addition, can be handled more effectively by the federal government. However, many of the activities associated with legalized marijuana are more appropriately regulated at the state level. A hybrid approach to marijuana federalism—one in which different models of federal-state interaction are adopted for different types of marijuana-related activities—will reflect these realities better than exclusive federal control, the CWA model or any of the wildlife protection approaches alone.⁹³

Section B will discuss why no approach to marijuana federalism should include a provision for citizen suits. Drawing from the federalism models in Part II, Section C will discuss how a variety of approaches might together accommodate both state and federal interests in regulating marijuana.

B. Federal Citizen Suit Provisions Are Not Appropriate for Marijuana Federalism

To understand why federal citizen suits are not appropriate for marijuana federalism it is necessary to understand how they work, and the provisions of the CWA and ESA are good illustrations. Both contain statutes authorizing “any person” to initiate a civil action in federal district court against “any person” who violates substantive provisions of the statutory scheme.⁹⁴ “Persons” include both individuals, private entities, and government entities and employees at federal, state, and local levels.⁹⁵ Plaintiffs have included not only individuals and public interest groups,⁹⁶ but also states.⁹⁷ Defendants can include the federal government and, unless barred

⁹² See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (upholding Congress’s Commerce Clause power to regulate marijuana); Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, 89 DENV. U. L. REV. 977, 978–79 (2012) [hereinafter Kamin, *Crossroads*] (discussing federal preemption in the context of medical marijuana).

⁹³ The issues of international and interstate commerce take exclusive state control out of the picture.

⁹⁴ 33 U.S.C. § 1365(a) (2012); 16 U.S.C. § 1540(g)(1) (2012).

⁹⁵ 33 U.S.C. § 1362(5) (defining “person”); 16 U.S.C. § 1532(13) (same).

⁹⁶ 33 U.S.C. § 1365(g) (defining “citizen” as “a person or persons having an interest which is or may be adversely affected”); see also, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 557–58 (1992) (deciding citizen suit brought by environmental groups under the ESA); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52 (1987) (deciding citizen suit brought by environmental groups to enforce NPDES permit violations).

⁹⁷ E.g., *United States Dep’t of Energy v. Ohio*, 503 U.S. 607, 612 (1992) (deciding citizen suit brought by Ohio to enforce the CWA and RCRA); see also 33 U.S.C. § 1365(h) (authorizing the governor of a state to bring a citizen suit against EPA for failure to enforce violation of “an effluent standard or limitation occurring . . . in another State”).

by the Eleventh Amendment, state and local governments.⁹⁸ In addition to authorizing suits against violators, the ESA and CWA also authorize civil actions against the federal agency administering the statutory scheme for alleged failure to carry out certain non-discretionary acts or duties.⁹⁹ The ESA also authorizes suit “to compel the Secretary to apply . . . [specified prohibitions] with respect to the taking of any resident endangered species or threatened species within any State.”¹⁰⁰

In both statutory schemes the citizen suit is barred if the plaintiff has not given a sixty-day notice of the alleged violation to the federal agency, the alleged violator, and, in the CWA, the state in which the violation allegedly occurred.¹⁰¹ The citizen suit is also barred if a relevant state or federal agency is already pursuing designated types of enforcement; sometimes the bar exists only if the enforcement action is being “diligently” prosecuted.¹⁰² In the CWA, the thwarted citizen can intervene in the government or state action “as a matter of right.”¹⁰³

Citizen suit provisions (including similar provisions in other statutory schemes¹⁰⁴) have engendered a significant volume of litigation in addition to the

⁹⁸ 16 U.S.C. § 1540(g)(1)(A) (authorizing injunctive relief); 33 U.S.C. § 1365(a)(1) (authorizing injunctions and civil penalties).

⁹⁹ 16 U.S.C. § 1540(g)(1)(C); 33 U.S.C. § 1365(a)(2).

¹⁰⁰ 16 U.S.C. § 1540(g)(1)(B); *see id.* § 1540(g)(1)(C) (adding that “[i]n any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence”).

¹⁰¹ 16 U.S.C. § 1540(g); 33 U.S.C. § 1365(b).

¹⁰² The ESA bars commencement of a citizen suit against persons alleged to be in violation if “the Secretary *has commenced* action to impose a penalty” or if “the United States *has commenced and is diligently prosecuting* a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.” 16 U.S.C. § 1540(g)(2)(A)(ii)–(iii) (emphasis added). The CWA bars commencement of a citizen suit against persons alleged to be in violation if “the Administrator or State *has commenced and is diligently prosecuting* a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order.” 33 U.S.C. § 1365(b)(1)(B) (emphasis added). Note that under the CWA, if the federal agency or relevant state has commenced and is diligently prosecuting such an action in federal court, the citizen has a right to intervene. *Id.*

¹⁰³ 33 U.S.C. § 1365(b)(1)(B).

¹⁰⁴ *E.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619(a) (2012); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2012); CAA, *id.* § 7604; Emergency Planning and Community Right-to-Know Act of 1986, *id.* § 11046.

litigation spurred by the environmental and resource protection statutes generally.¹⁰⁵ These suits address such issues as standing,¹⁰⁶ mootness,¹⁰⁷ compliance with statutory notice requirements,¹⁰⁸ mandatory versus discretionary administrative acts,¹⁰⁹ and the need to exhaust administrative remedies.¹¹⁰ Similar issues could easily arise in marijuana citizen suits.

Allowing for citizen suits makes sense in the context of pollution control, resource protection, and similar statutes that regulate previously unregulated (or less regulated) behavior. In authorizing citizen suits, Congress addressed the concern that the federal government would lack the resources (or the will) to enforce these statutes.¹¹¹ In fact, “the legislative histories of the Clean Air and Clean Water Acts reflect considerable skepticism, if not despair, over the prospect of effective government enforcement.”¹¹² Plaintiffs in environmental and resource citizen suits tend to

¹⁰⁵ For a summary of the types of problems faced by citizen suit provisions, see Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 838–39, 841 (1985) (noting doctrinal barriers that have to be litigated: “coordination of public and private enforcement”; “whether citizen suit provisions are creating the proper incentives for the regulators, the regulated, and the groups bringing enforcement actions”; and “the fundamental legitimacy of private regulatory enforcement”). For a discussion of legal issues raised by CWA litigation generally, see *supra* notes 50–56.

¹⁰⁶ *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 174 (2000) (CWA); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 86 (1998) (Emergency Planning and Right-to-Know Act); *Bennett v. Spear*, 520 U.S. 154, 157 (1997) (ESA); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 558 (1992) (ESA); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52 (1987) (CWA).

¹⁰⁷ *E.g.*, *Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) (CWA); *Friends of the Earth, Inc.*, 528 U.S. at 189 (CWA); *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016 (9th Cir. 2012) (ESA).

¹⁰⁸ *E.g.*, *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 22–23 (1989) (RCRA); *Karr v. Hefner*, 475 F.3d 1192, 1193 (10th Cir. 2007); *Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 516–17 (9th Cir. 1998) (ESA); see also *Gwaltney*, 484 U.S. at 59–60 (discussing CWA’s notice provision as an aid to interpreting whether wholly past violations can be addressed in a citizen suit).

¹⁰⁹ *Conservation Force v. Salazar*, 699 F.3d 538, 540–41 (D.C. Cir. 2012) (ESA); *Grand Canyon Tr.*, 691 F.3d at 1024 (ESA); *Our Children’s Earth Found. v. EPA*, 527 F.3d 842, 847 (9th Cir. 2008) (CWA).

¹¹⁰ *E.g.*, *Bennett*, 520 U.S. at 177 (ESA); *Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co., LLC*, 531 F. Supp. 2d 747, 756 (S.D.W. Va. 2008) (CWA).

¹¹¹ Boyer & Meidinger, *supra* note 105, at 846 (regarding the CAA and CWA); Cassandra Stubbs, *Is the Environmental Citizen Suit Dead?*, 26 N.Y.U. REV. L. & SOC. CHANGE 77, 78 (2000).

¹¹² Boyer & Meidinger, *supra* note 105, at 846; see also Stubbs, *supra* note 111, at 79–80 (early suits were to force the Reagan administration to enforce environmental laws).

be public interest non-profit groups interested in making sure the relevant regulations for environmental and resource protection are enforced.¹¹³

However, marijuana federalism presents a different enforcement problem: the *deregulation* of previously regulated behavior.¹¹⁴ If the federal role in marijuana regulation is thoughtfully crafted, federal law enforcement of marijuana prohibitions is likely to be vigorous. It is, of course, possible that some private individuals or groups might believe that the federal government is not being sufficiently diligent in enforcing federal marijuana laws and would want to sue the federal government or (should they exist¹¹⁵) federally licensed marijuana businesses.¹¹⁶ That said, however, plaintiffs in marijuana citizen suits would more likely be businesses concerned about competition from the marijuana industry, using the citizen suit provisions as a handy way to get into court.¹¹⁷

The bottom line is that a federal citizen suit provision is unnecessary, disruptive, and too complex for a dynamic in which a previously criminalized activity is being subjected to fewer, non-criminal regulations.

C. *A Hybrid Model for Marijuana Federalism*

The range of marijuana-related activities is vast. A one-size-fits-all approach to regulation is not an ideal way to address these various activities, either from the point of view of federalism or from the point of view of administrative efficiency and effectiveness. A hybrid approach may be best.

This Section suggests a possible hybrid approach based on the four different models discussed in Part II plus one additional model: exclusive federal control. This hybrid approach is different from what currently exists: “a pyramid, a hierarchy of

¹¹³ See, e.g., May, *supra* note 49, at 5 and cases cited therein.

¹¹⁴ See Nickles, *supra* note 5, at 1283 (making this distinction between the marijuana legislation and child labor laws).

¹¹⁵ The existence of such licenses is not out of the question given the Drug Enforcement Administration (DEA)’s current responsibilities to “register” those who research, manufacture, and distribute other scheduled substances. See, e.g., 21 C.F.R. § 1301.11 (2018) (requiring certain classes of individuals or businesses to register with DEA).

¹¹⁶ A group such as Smart Approaches to Marijuana, for example, might bring such a citizen suit. See SMART APPROACHES TO MARIJUANA, <https://learnaboutsam.org/> (last visited June 10, 2019).

¹¹⁷ E.g., Laura Williams, *Meet the Special Interests Keeping Marijuana Criminalized*, FOUND. FOR ECON. EDUC. (Dec. 1, 2017), <https://fee.org/articles/meet-the-special-interests-keeping-marijuana-criminalized/>. Note that Smart Approaches to Marijuana, cited *supra*, note 116, is funded in part by pharmaceutical companies that fear competition. Lee Fang, *The Real Reason Pot Is Still Illegal*, NATION (July 2, 2014), <https://www.thenation.com/article/anti-pot-lobbys-big-bankroll/>.

federal, state, and local regulation of marijuana.”¹¹⁸ In a hybrid approach, whether federal and state laws overlap or exist in separate spheres should depend upon what was most effective for the type of activity being regulated.¹¹⁹

Several premises affect the suggestion of which model to use for specific marijuana-related activities in the discussion that follows. The first premise is that marijuana activities would be decriminalized at the federal level, although an individual state would be free to retain or create criminal sanctions.

The second premise is that the federal government should not be assumed to have a significant interest in regulating marijuana based merely on the fact that it currently does so. This conclusion flows from the well-documented findings that marijuana prohibition has not been supported by legitimate, unbiased scientific research or studies of any kind; instead, racism was the motivating factor in federal marijuana criminalization both in its origin and in passage of the current version of the CSA.¹²⁰ While this motivation also existed for original state criminalization of marijuana, the impetus for current state legalization efforts often include conforming the law to scientifically-based findings (especially regarding laws allowing medical uses)¹²¹ and reducing the racial injustice caused by marijuana criminalization.¹²² States may be more motivated than the federal government to fulfill these goals.

A third premise is that the federal government’s involvement in regulating marijuana-related activities should be relatively limited. Such involvement should only exist where the nature of the activities makes it worthwhile for the federal government to expend significant administrative and enforcement resources, such as marijuana activities that have a strong effect on interstate commerce. Increasingly limited federal resources could then be devoted to more important national concerns.

A fourth premise is that states have a more legitimate interest in, and are better able to regulate, most marijuana-related activities, similar to the way states currently regulate alcohol retail operations.

The following discussion will suggest how the various models discussed in Part II might address regulating marijuana-related activities: the NPDES permit system model, the protected species model, and the federal lands model. The discussion will begin with what is best called “dual federalism,” proceed to a true “cooperative federalism” model, and end with what are best called “collaboration” models.

¹¹⁸ Kamin, *Crossroads*, *supra* note 92, at 977–78; *see also id.* at 978–80 (describing the levels of the hierarchy).

¹¹⁹ The extent of overlap or differentiation between state and local laws would, of course, be up to each state.

¹²⁰ *See* sources cited *supra* note 7.

¹²¹ *See generally, e.g.*, Nickles, *supra* note 5, at 1262–63.

¹²² *See* Angell, *supra* note 6 (citing the comments of J.B. Pritzker, winner of the 2018 governor’s election in Illinois).

1. *Dual Federalism*

This discussion uses the term “dual federalism” to apply to a situation in which, by law, some activities are exclusively regulated by the federal government while other activities are exclusively regulated by state governments.¹²³ The federal lands model is a good illustration: the federal government has exclusive authority over issues that are important to its interests but leaves other responsibilities to the states with no oversight and no “floor” conditions, despite Congress having the constitutional authority to legislate regarding the activities at issue.¹²⁴ This approach could work well for marijuana-related activities at the extremes of the spectrum.

a. *Areas Subject to Exclusive Federal Regulation*

Some marijuana-related activities can be handled best by federal regulation with no formal state involvement (although some informal interaction would inevitably occur). The federal government would have exclusive authority over every aspect of the activity in question; nothing would be left for the states to do, and any state laws on the subject would be preempted.

One of the activities that arguably fits best in this model is international import and export of marijuana and its products. Congress has specific constitutional authority over international imports and exports,¹²⁵ and unpermitted import and export of marijuana is currently illegal.¹²⁶ Similarly, the federal government currently regulates shipments of alcoholic beverages across international borders.¹²⁷ Thus, the federal government can be assumed to have already amassed the personnel, resources, and expertise necessary to enforce the movement of marijuana across the United States’ international borders.

A second marijuana-related activity that arguably should remain with exclusive federal enforcement is the movement of marijuana across state lines.¹²⁸ Congress, of course, has the specific authority to regulate interstate commerce,¹²⁹ including the power to criminalize interstate activities that are not criminal within a specific

¹²³ This usage differs from the constitutional meaning of “dual federalism.” See John Kincaid, *The Eclipse of Dual Federalism by One-Way Cooperative Federalism*, 49 ARIZ. ST. L.J. 1061, 1062 (2017).

¹²⁴ See *supra* Part II.B.2.

¹²⁵ U.S. CONST. art. I, § 8, cl. 3 (granting authority to regulate commerce with foreign nations); U.S. CONST. art. I, § 10, cl. 2 (prohibiting states from laying imposts or duties on imports or exports without congressional consent).

¹²⁶ 21 U.S.C. §§ 954, 955, 959, 960 (2012).

¹²⁷ Federal Alcohol Administration Act, 27 U.S.C. §§ 203, 205 (2012).

¹²⁸ *Accord, e.g.*, Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV. 1301, 1308 (2013).

¹²⁹ U.S. CONST. art. I, § 8, cl. 3.

state.¹³⁰ At least one crime specific to transportation of marijuana already exists.¹³¹ The government can regulate movement of marijuana across state lines without criminalizing such movement, however. For example, the government currently regulates a number of activities regarding meat and poultry to be sold in interstate or international commerce.¹³² And, of course, the federal government also regulates interstate transportation and shipment of alcohol.¹³³

A third activity that should probably remain a federal focus is packaging and labeling. Packaging and labeling of controlled substances is already regulated¹³⁴ as is packaging and labeling of alcoholic beverages.¹³⁵ Even if marijuana was taken off the list of controlled substances, marijuana products would certainly come within the scope of existing federal consumer packaging laws.¹³⁶

b. Areas Under Exclusive State Regulation

Some marijuana-related activities can be handled best by the state governments with no formal federal involvement (although some informal interaction would inevitably occur). A state would have exclusive authority over every aspect of the activity in question; nothing would be left for the federal government to do, and Congress would refrain from legislating in these areas notwithstanding its constitutional ability to do so.

Exclusive state regulation of marijuana activities within the state has precedent in the law regulating alcoholic beverages. Federal law provides that once alcoholic beverages are transported into a state, their use is “subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State.”¹³⁷ This approach could certainly be applied to marijuana as well. The current political climate may not, however, be receptive to such an extreme change from existing law. Thus, Subsections 2 and 3 below will discuss approaches that involve some federal involvement in state level marijuana activities.

¹³⁰ For example, the Mann Act, 18 U.S.C. § 2421 (2012), criminalizes interstate transportation for prostitution, although prostitution is not criminal in some Nevada counties. NEV. REV. STAT. § 244.345(1)(b) (2017) (allowing counties with populations under 700,000 to license brothels).

¹³¹ 21 U.S.C. § 849(b)–(c) (penalizing transportation safety offenses).

¹³² See generally *id.* §§ 601–626 (regarding inspection and labeling requirements). Section 601(h) defines “commerce” to exclude intrastate transportation, and the substantive provisions apply to activities affecting “commerce.” *E.g., id.* §§ 603, 610.

¹³³ 27 U.S.C. §§ 203, 205 (2012).

¹³⁴ 21 C.F.R. § 1302 (2018).

¹³⁵ 27 U.S.C. §§ 205(e), 213–219.

¹³⁶ See 15 U.S.C. §§ 1451–1461 (2012) (regarding consumer packaging).

¹³⁷ 27 U.S.C. § 121 (2012).

Activities involving purely individual use of marijuana and marijuana products should arguably be under exclusive state regulation.¹³⁸ State and local authorities already account for the majority of drug-related arrests even when marijuana-related activities are federal crimes.¹³⁹ Thus, it especially makes sense that the states should have exclusive authority over small-scale activities such as possession¹⁴⁰ and cultivation of amounts geared to individual use as opposed to distribution. In addition, by analogy to physician-assisted suicide, exclusive state regulation could conceivably extend to standards regarding physician-prescribed marijuana and marijuana products in legitimate medical practice.¹⁴¹ Finally, based on the small-scale nature of the activity, this model might be appropriate for retail sellers with only one outlet even if other retail activities were to come under one of the models discussed in Subsections 2 and 3.

2. State Responsibility with Structured Federal Oversight: The NPDES Cooperative Federalism Model

As outlined above,¹⁴² the NPDES cooperative federalism model is one in which the federal government shares administrative and enforcement responsibility with states that meet minimum requirements. In the NPDES permit model, the federal government and the states are not co-equal partners.¹⁴³ Authorized states carry out the bulk of administrative and enforcement activities, but statutes authorize EPA to exercise significant oversight over state practices. In addition, the federal government is actively involved in its own administrative and enforcement activities. EPA

¹³⁸ Under this dual federalism approach, by analogy to non-federally protected fauna, such uses of marijuana on federal lands could also come under state law. See *supra* Part III.C.3.

¹³⁹ E.g., *Drug and Crime Facts*, BUREAU JUST. STATS. (Mar. 10, 2019), <https://www.bjs.gov/content/dcf/enforce.cfm> (“[M]ost arrests are made by state and local authorities.”).

¹⁴⁰ Justice Department statistics indicate that “[m]ore than four-fifths of drug law violation arrests are for possession.” *Id.* Note, however, that these statistics do not distinguish between simple possession and possession of large amounts.

¹⁴¹ Cf. *Gonzales v. Oregon*, 546 U.S. 243, 248–49 (2006). *Gonzales* upheld physician prescription of drugs listed in Schedule II of the CSA to patients who wanted to commit suicide in situations statutorily authorized by the state. The Court distinguished medical use of marijuana, a Schedule I substance, on the ground that Congress had expressly determined “that marijuana had no accepted medical use.” *Id.* at 269–70 (citing *United States v. Oakland Cannabis Buyer Coop.*, 532 U.S. 483, 486 (2001)). The premise of the current discussion is that marijuana would be decriminalized under federal law. If decriminalization involved a change in Congress’s determination regarding accepted medical uses of marijuana, *Gonzales* would arguably control.

¹⁴² See *supra* Part II.A.

¹⁴³ *Accord*, e.g., Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 738–40 (2006) (noting that the pollution control statutes involve a combination of “a primary role for the federal government in some areas” with “federal-state partnerships as the means by which . . . to pursue the relevant environmental protection goals,” but “the federal government, acting through authority delegated to EPA, [is unquestionably] in the driver’s seat”).

becomes the lead enforcer on a specific case when it feels the State is not handling the violation adequately; EPA can remove a state's authorization completely and become the sole enforcer in extreme situations.

The NPDES permit model (without citizen suits) may be appropriate for some aspects of marijuana regulation, but probably not many. To understand why, assume that Congress amended the CSA to add statutes and regulations for legal marijuana and that the amendments included a program similar to the NPDES permit system. Assume further that DEA was the agency chosen to administer and enforce the program from the federal end.

An early task for DEA (after promulgating regulations and so forth) would be to set minimum standards for every covered activity involving marijuana (including individual use). Following the NPDES permit model, the statutes and regulations could address numerous aspects of marijuana production, transportation, and use, and would involve a permitting system for at least some of those activities. DEA would then examine state applications to be the primary enforcer of the CSA. DEA would authorize a state to administer and enforce the federal program if the state had adopted its own laws and regulations that met minimum federal standards. Once DEA approved a state program that complied with the minimum federal standards, the state would be subject to DEA oversight and enforcement usurpation if DEA did not agree with the way the state was handling the regulated entities.

If the NPDES permit model of administration and enforcement were followed, DEA would, at least in some situations, duplicate the state agency's review of required reports and its inspections of regulated facilities. This task has not proved to be particularly burdensome for EPA. However, in administering and enforcing the NPDES permit system, EPA has not had to deal with a program that applies to vast numbers of individual actors (such as the numbers of individuals who would use medical or recreational marijuana in the increasing number of states where such usage is legal).¹⁴⁴ Although DEA does currently enforce against some individual violations of the CSA, the volume of legal users, manufacturers, transporters, and merchants is likely to be greater than the volume of illegal users who come to the attention of DEA currently.

Of course, DEA's bureaucratic and administrative tasks would be even more burdensome in states that did not choose to administer and enforce the federal pro-

¹⁴⁴ The NPDES permit system does not cover most discharges by individuals. While "person" includes an individual (33 U.S.C. § 1362(5) (2012)), "discharge of a pollutant" must be from a "point source" into "navigable waters." *Id.* § 1362(12). A "point source" must be a "discernible, confined and discrete conveyance" such as a pipe. *Id.* § 1362(14). A human being is not a "point source." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646–47 (2d Cir. 1993).

gram. If a state did not become authorized—and did not totally ban marijuana under state law¹⁴⁵—DEA would have to administer and enforce the federal statutes and regulations against companies and other actors in that state.

In addition to administrative and enforcement issues, even without a citizen suit provision, the NPDES permit approach would subject DEA—and the federal courts—to a potentially large volume of litigation geared to working out the details and nuances of the federal-state relationship.¹⁴⁶

A model as complex and duplicative as the CWA model would not work well for all aspects of legalized marijuana, but it might be a legitimate model for some activities. Very large-scale growers, manufacturers, and wholesalers might be presumed to affect interstate commerce in significant ways that would justify the complexities and resources of an NPDES-type approach. In addition, competition could easily develop between similar very large entities in different states, calling for the kind of federal oversight that could encourage or ensure a level playing field.

3. *The ESA and MBTA Models of Collaboration*

The ESA presents a collaborative model in which the federal government enters into statutorily authorized “cooperative agreements” with states meeting minimum requirements; these requirements are less demanding than those in the NPDES permit model, and federal oversight is less intensive.¹⁴⁷ The state provides expertise and information, and the federal agency provides information and supportive funding. State and federal agencies collaborate in planning activities and programs. The federal agency administers and enforces the Act.

The MBTA also presents a collaborative model in which the two governments do not share administrative or enforcement responsibilities.¹⁴⁸ The federal agency consults and cooperates with states where interests overlap and potentially conflict, but not under a formal agreement mandated by statute. The federal agency uses federal statutes and regulations to enforce state laws regarding migratory birds, and some states adopt federal laws as their own.

The ESA and MBTA Models overlap to a certain degree, but with subtle distinctions. These are best explored by imagining ways in which a collaborative model might apply to regulating some marijuana-related activities.

Under an ESA or MBTA-type collaborative model, Congress would enact legislation to regulate the activities at issue and would designate a federal agency to administer and enforce the federal program. States would be free to adopt laws that

¹⁴⁵ As with the NPDES permit program, under this approach states would be free to adopt laws that are more demanding than the federal laws, but the federal government would not enforce those. *See* sources cited *supra* notes 42–43.

¹⁴⁶ *See supra* notes 48–54.

¹⁴⁷ *See supra* Part II.B.1.a.

¹⁴⁸ *See supra* Part II.B.1.b.

are stricter than and do not conflict with the federal requirements. After this, the models diverge.

Under the ESA approach, that agency would enter into cooperative agreements with states whose own marijuana programs met minimum requirements set out in statutes and implementing regulations. Federal oversight of the state programs would be minimal, limited to a yearly review of whether the state program continued to meet the minimum requirements. As a trusted partner, the approved state would provide expertise and information to the federal agency regarding the marijuana activities covered by the programs. The federal agency would in turn provide support—including financial support—for the state programs. The agencies would work together to plan activities. The federal government would enforce the federal rules against actors in every state, including the approved states. States would be free to enact state laws and regulations that were more demanding than those on the federal level.

Under the MBTA approach, the federal agency would not enter into a formal agreement with states, and states would not have to meet any minimum federal requirements; as a corollary, there would not be any federal oversight of the state programs. Nevertheless, the federal agency and the relevant state agency would consult and cooperate where interests overlap and potentially conflict. Congress would enact statutes that in some situations would make violation of some state marijuana laws a federal crime or civil violation. States might adopt some federal laws as their own.

One of these models might be ideal for regulation of marijuana-related activities that have a minimal or merely potential effect on interstate commerce or national health and safety. These activities could include commercial growing, manufacturing, and wholesale operations that are not involved in interstate commerce; this model might also cover intrastate retail sales where more than one outlet is involved.

IV. CONCLUSION

A growing number of states have legalized medical marijuana, recreational marijuana, or both. The trend has arguably gone so far that it will be awkward at best for the federal government to enforce federal criminal laws regarding the marijuana-related activities legalized under state law. It is wise to search for viable federalism models to apply to legalized marijuana. In doing so, however, it is important to look below the surface of how existing federalism models work. The nuances of the federal-state relationship, as well as the authorized enforcement mechanisms, will determine the success or failure of a change in our nation's approach to marijuana. This Article has explored a number of possible models and has urged that the best

approach is to avoid choosing only one model to cover all marijuana-related activities. A hybrid approach, in which different models apply to different scales of activities, may be best suited to maximize both state and federal interests in regulation.