On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime

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I. INTRODUCTION

It is taken for granted in federalism discourse that if Congress possesses the authority to regulate an activity, its laws reign supreme and trump conflicting state regulations on the same subject. When Congress legalizes a private activity that has been banned by the states, the application of the Supremacy Clause is relatively straightforward: barring contrary congressional intent, such state laws are unenforceable and, hence, largely immaterial in the sense they do not affect private decisions regarding whether to engage in the activity.[1]

When Congress bans some activity that has been legalized[2] by the states, however, both the legal status and practical import of state law are far less obvious. Contrary to conventional wisdom, state laws legalizing conduct banned by Congress remain in force and, in many instances, may even constitute the de facto governing law of the land. The survival and success of these state laws are the result of previously overlooked constraints on Congress's preemption authority under the Supremacy Clause as well as practical constraints on its enforcement power. Using medical marijuana as a case study, this Article closely examines the states' underappreciated power to legalize activity that Congress bans.

Congress has banned marijuana outright, recognizing no permissible medical use for the drug. Violation of the ban carries a variety of modest-to-severe sanctions, both criminal and civil. In *Gonzales v. Raich*,[3] the Supreme Court affirmed Congress's power to

1. For a classic example, see Gibbons v. Ogden, 22 U.S. 1 (1824) (federal law bars state from prohibiting vessels licensed under federal statute from navigating waters in its jurisdiction). For a more contemporary one, see Riegel v. Medtronic, Inc., 128 S.Ct. 999, 1007–11 (2008) (federal law bars state common-law claims challenging the safety or effectiveness of a medical device approved by the Food and Drug Administration).

2. By legalize, I mean the government *permits* some private conduct to occur free of *legal* sanctions, both civil and criminal. It means something more than decriminalize, which merely removes the threat of *criminal* sanctions. States can legalize conduct by repealing existing sanctions or by failing to enact sanctioning legislation in the first instance. In either case, the legal status of state law is the same, though the former method of legalization may have more practical impact than the latter, for reasons discussed in Part IV.B. I thank Bill Funk for bringing the distinction to my attention.

3. 545 U.S. 1 (2005). For commentary on the *Raich* decision, see, for example, Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the 'Federalist Revival' after* Gonzales v. Raich, 2005 SUP. CT. REV. 1.

enact the ban. In fact, it suggested that Congress's power to regulate, and hence to proscribe, medical marijuana (among other things) was almost unlimited.[4] The decision caused some commentators to declare that the war over medical marijuana was over, and that the states had clearly lost.[5] As long as Congress wanted to eradicate marijuana, the states could do seemingly nothing to stop it.

But *Raich* did not stop (or even slow) state legalization campaigns. At the time *Raich* was decided, when Congress's authority was still (somewhat) doubtful, ten states had legalized medical marijuana.[6] Since that time, however, three more states have passed legislation legalizing the use of medical marijuana,[7] and several more states may soon join the fray.[8] The flurry of legislative activity is puzzling: If the war on medical marijuana is truly over, why are the states still fighting?

I argue that states retain both de jure and de facto power to exempt medical marijuana from criminal sanctions, in spite of Congress's uncompromising—and clearly constitutional—ban on the drug. States may continue to legalize marijuana because Congress has not preempted—and more importantly, *may not* preempt—state laws that merely permit (i.e., refuse to punish) private conduct the federal government deems objectionable. To be sure, the objectives of the state and federal governments clearly conflict: states want some residents to be able to use marijuana, while Congress wants total abstention. But to say that Congress may thereby preempt state *inaction* (which is

4. *Gonzalez*, 545 U.S. at 49 (O'Connor, J., dissenting) (suggesting the Court's holding "threatens to sweep all of productive human activity into federal regulatory reach").

5. For example, Professor Susan Klein suggests that the Court must rein in federal power when Congress passes a law that bans an activity (such as the use of medical marijuana) that a minority of states allow, in order to preserve independent state norms. She reasons that without the Court's protection, independent state norms would disappear. Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1564 (2002) ("[W]hen a state chooses to pursue an independent moral norm and makes that choice clear to its citizens . . . some citizens will engage in this behavior . . . [but if] this same behavior is criminalized federally . . . the behavior will be chilled."). *See also* sources cited *infra*, Part II.D (reflecting common belief that state medical marijuana laws have been preempted by the CSA or are otherwise ineffectual).

6. California (1996); Oregon (1998); Washington (1998); Alaska (1999); Maine (1999); Colorado (2000); Hawaii (2000); Montana (2004); Nevada (2004); Vermont (2004). *See generally* MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS (2008), http://www.mpp.org/legislation/state-by-state-medical-marijuana-laws.html (last visited Sept. 12, 2009).

7. Rhode Island passed its own compassionate use act in January 2006, 2005 R.I. Pub. Laws Ch. 5, § 442; New Mexico followed suit in April 2007, 2007 N.M. Laws 210; and in fall 2008 Michigan became the thirteenth state to legalize medical marijuana, Michigan Medical Marijuana Act, MICH. COMP. LAWS § 333.26421 (2008).

8. Nineteen state legislatures considered proposals in 2008 to legalize medical marijuana. MARIJUANA POLICY PROJECT, *supra* note 6, at 12–13.

what legalization amounts to, after all) would, in effect, permit Congress to command the states to take some action—namely, to proscribe medical marijuana. The Court's anti-commandeering rule, however, clearly prohibits Congress from doing this.[9]

I develop a new framework for analyzing the boundary between permissible preemption and prohibited commandeering—the state-of-nature benchmark. The state-of-nature benchmark eliminates much of the confusion that has clouded disputes over state medical marijuana laws. It suggests that as long as states go no further—and do not actively assist marijuana users, growers, and so on—they may continue to look the other way when their citizens defy federal law.

On a more practical level, the fact that state exemptions remain enforceable is consequential; these states laws, in other words, are not merely symbolic gestures. The main reason is that the federal government lacks the resources needed to enforce its own ban vigorously: although it commands a $2 trillion dollar (plus) budget, the federal government is only a two-bit player when it comes to marijuana enforcement. Only one percent of the roughly 800,000 marijuana cases generated every year are handled by federal authorities.[10] The states, by virtue of their greater law enforcement resources (among other things), hold the upper hand. The federal ban may be strict—and its penalties severe—but without the wholehearted cooperation of state law enforcement authorities, its impact on private behavior will remain limited. Most medical marijuana users and suppliers can feel confident they will never be caught by the federal government.

Even more interestingly, analysis of the medical marijuana conflict reveals that states also have comparatively strong sway over the private (i.e., non-legal) forces that shape our actions, such as our personal beliefs about behavior and our social norms. Simply by allowing their residents to use marijuana for medical purposes, the states have arguably fostered more tolerant attitudes toward the practice, making it seem more compassionate, less dangerous, and less wicked, thereby removing or softening the personal and societal reproach that once suppressed medical use of the drug. The expressive power of permissive state legislation—largely ignored by the academy—cannot easily be undone or countered by Congress. As a

9. New York v. United States, 505 U.S. 144, 188 (1992) (holding that Congress may not order state legislature to enact laws). I explain why preemption sometimes constitutes impermissible commandeering in Part II.A, *infra*.

10. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, 2007, *available at* http://www.fbi.gov/ucr/cius2007/index.html.

result, the states may possess even more de facto power *vis-à-vis* Congress than is commonly perceived.

At a minimum, this Article provides a definitive study of one of the most important federalism disputes in a generation.[11] It shows that states have wielded far more power and influence over medical marijuana than previously recognized. The states have not only kept the patient breathing, so to speak, in anticipation of a day when federal policy might change; they have, for all practical purposes, already made medical marijuana de facto legal within their jurisdictions. In other words, the war on medical marijuana may have ended long before the Obama Administration began to suggest that a partial truce should be called,[12] and it may have been the states—not the federal government—that emerged as the victors.

More importantly, however, by shedding new light on the struggle over medical marijuana, this Article also has much broader relevance to our understandings of federalism and state resistance to federal authority. Although this Article focuses on medical marijuana, the insights generated here could be applied across a wide range of issues pitting restrictive federal legislation against more permissive state laws. Over the past decade, states have legalized a variety of controversial practices that Congress has sought to proscribe or restrict. For example, states now recognize same-sex marriages, legalize certain abortion procedures, and allow possession of firearms that Congress proscribes (or has sought to curtail), and several states are proposing to allow sports gambling—an activity banned under federal statute.[13] As the case study of medical marijuana

11. I demur on the substantive question whether marijuana *should* be allowed as medicine. Marijuana's harms and benefits have been catalogued and debated extensively elsewhere. For an excellent, unbiased review of the scientific literature on marijuana's beneficial and harmful effects, see INSTITUTE OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE, 83–136 (1999).

12. For example, in a February 2009 press conference, Attorney General Eric Holder suggested that DEA raids of California medical marijuana dispensaries should stop. Bob Egelko, *Feds Hint no More Raids on Pot Clubs in State*, S.F. CHRON., Feb., 27, 2009, at A1. He has stopped short of claiming that the federal ban would be lifted altogether. *Id. See also* Solomon Moore, *Prison Term for a Seller of Medical Marijuana*, N. Y. TIMES, June 12, 2009, at A18 (reporting that twenty-five federal criminal cases against medical marijuana dispensaries in California remained pending even after Attorney General Holder suggested the federal government would no longer target such dispensaries).

13. *See, e.g.,* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003) (recognizing state constitutional right to same-sex marriage and noting the Massachusetts Constitution is more protective of personal freedoms than is the federal Constitution); GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (2009), *available at* http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (reporting that only sixteen states ban partial birth abortions outright); BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, STATE LAWS AND PUBLISHED ORDINANCES – FIREARMS (28th ed. 2007) (compiling state

demonstrates, states (generally) possess legal authority to enact permissive legislation governing such issues, in spite of contrary congressional policy: states are merely restoring the state of nature. And as with medical marijuana, the ultimate outcome on such issues may hinge more on Congress's capacity to enforce its own laws and its ability to manage the non-legal forces that shape our behavior than on the Supreme Court's proclamations demarcating Congress's substantive powers *vis-à-vis* the states. The Article thereby highlights the need for courts, commentators, and lawmakers to distinguish between (1) federal laws authorizing conduct banned by the states (under which state power is significantly constrained), and (2) federal laws banning conduct authorized by the states (under which states wield considerably more power).

The Article proceeds as follows: Part II provides some background on the common features of state medical marijuana laws, including the steps (if any) that must be taken in order to qualify for exemptions under state law. It also discusses the Controlled Substances Act ("CSA"), the congressional statute banning marijuana for all purposes, and the conventional wisdom suggesting that the CSA preempts or at least overshadows state laws. Part III analyzes the legal status of state medical marijuana laws. It examines the anti-commandeering rule as a key overlooked constraint on Congress's preemption power and develops a new state-of-nature benchmark for distinguishing between permissible preemption and impermissible commandeering. Using this benchmark, the Article concludes that most state medical marijuana regulations have not been (and indeed *could not be*) preempted by congressional drug statutes. Part IV then proceeds to demonstrate that state exemptions have had more impact on private behavior than the federal ban, not only because the federal government lacks the resources to enforce its ban rigorously, but also because it wields less influence than do the states over the non-legal forces that shape our behavior, including personal beliefs, moral obligations, and social norms. Finally, Part V concludes by offering some observations on the significance and broader relevance of the Article.

laws pertaining to firearms, including state laws that allow the possession and transfer of certain machine guns proscribed by federal law). For a brief discussion of the sports gambling issue, see *infra* notes 208-212 and accompanying text.

II. MARIJUANA LAWS

This Part discusses state and federal marijuana laws in some detail in order to lay the necessary foundation for the analysis in Parts III-IV. Section A surveys current state laws governing marijuana. Though every state now bans marijuana for recreational use, thirteen states so far have adopted exemptions legalizing use of the drug for medical purposes. Section A discusses how these medical exemptions work, including how states police them. Section B explores the federal government's categorical ban on marijuana and its steadfast, aggressive opposition to medical-use exemptions. Finally, Section C shows that most commentators have dismissed the latest wave of state medical marijuana laws as another largely symbolic, doomed-to-failure experiment, by suggesting states lack the authority to legalize something Congress proscribes or by suggesting that medical use of the drug will succumb to the harsh federal ban.

A. Current State Laws

Since the 1930s, every state has banned the cultivation, distribution, and possession of marijuana for non-medical purposes.[14] In most cases, a violation of one of these bans constitutes a criminal offense. To be sure, a few states have *decriminalized* very minor marijuana offenses (i.e., simple possession of an ounce or less) without regard to use.[15] But it is important to recognize that marijuana remains forbidden in such states—minor offenses continue to trigger *civil* sanctions, and more serious offenses remain subject to criminal sanctions. Thus, outside the context of recently enacted medical use exemptions (discussed below), marijuana remains a strictly forbidden and usually (though not always) criminal drug at the state level.

Notwithstanding the tough treatment states continue to accord *recreational* marijuana, a growing number of states have recently adopted laws legalizing marijuana for medical use. California started the wave of reform in 1996 with the passage of Proposition 215,

14. For a contemporary survey of state marijuana laws, see NATIONAL SURVEY OF STATE LAWS 163 (Richard A. Leiter, ed., 4th ed. 2003) (surveying state drug laws and concluding that "virtually no state recognizes legal possession or use of *any* 'recreational drug' "). For more exhaustive discussions of the history of marijuana regulation in the United States, see RICHARD J. BONNIE & CHARLES H. WHITEBREAD, II, THE MARIHUANA CONVICTION (2d ed. 1999); LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA, THE FORBIDDEN MEDICINE (1993); and DAVID MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTICS CONTROL (3d ed. 1999).

15. *See* OFFICE OF NATIONAL DRUG CONTROL POLICY, WHO'S REALLY IN PRISON FOR MARIJUANA 14 (2005) (noting at the time that Colorado, Maine, Nebraska, New York, and Ohio treat simple possession as a civil offense).

popularly known as the Compassionate Use Act.[16] Since then, twelve more states have passed legislation permitting residents to possess, use, cultivate, and (sometimes) distribute marijuana for medical purposes,[17] and several more states seem poised to follow suit.[18]

The exemptions vary, but all thirteen states apply a common framework for determining who qualifies for them. To begin, they specify that a prospective medical marijuana user must have a debilitating medical condition that has been diagnosed by a physician in the course of a bona fide medical exam. The list of qualifying conditions typically includes cancer, glaucoma, AIDS (or HIV), and other chronic diseases that produce symptoms like severe pain, nausea, seizures, or persistent muscle spasms.[19]

In addition to being diagnosed with a qualifying condition, all states require a prospective user to obtain his or her physician's recommendation to use marijuana. A recommendation is not a prescription (for reasons explained below, this seemingly trivial distinction does matter). To recommend marijuana, the physician need only conclude, after considering other treatment options, that marijuana "may benefit" the patient;[20] as it sounds, this standard appears fairly easy to satisfy. In every state except California, the physician's recommendation must be made in writing.[21] In California, an oral recommendation is sufficient.[22]

Ten states require prospective users (and sometimes caregivers and suppliers) to register with the state *before* using (i.e., handling or cultivating) marijuana for medical purposes.[23] A person who fails to register ex ante is usually barred from claiming the medical marijuana exemption in a subsequent criminal investigation, even if he or she could satisfy all of the other requirements of the

16. 1996 Cal. Legis. Serv. Prop. 215 (West) (codified at CAL. HEALTH & SAFETY CODE §§ 11362.5 et seq. (2009)).

17. *See supra* notes 6–7.

18. *See supra* note 8.

19. *E.g.*, ALASKA STAT. § 17.37.070(4). The list is far from static, since most states allow patients or doctors to petition to have new conditions added. *Id.* California's list is more open-ended; it covers *any condition* for which marijuana may, in the opinion of the treating physician, provide relief. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A).

20. *E.g.*, WASH. REV. CODE § 69.51A.010. A few states set a (slightly) higher threshold for issuing a recommendation, by requiring the physician to certify that the benefits of marijuana use outweigh the risks. *E.g.*, HAW. REV. STAT. § 329-122(a)(2).

21. *E.g.*, WASH. REV. CODE § 69.51A.010.

22. CAL. HEALTH & SAFETY CODE § 11362.5(d) (requiring the "written or oral recommendation or approval of a physician").

23. N.M. CODE. R. § 7.34.3.3 (noting one purpose of registration is to prevent abuse of medical exemptions). A few states require caregivers to register separately, *e.g.*, HAW. REV. STAT. § 329-123, but caregiver registration will not be discussed separately here.

exemption.[24] The remaining three states—California, Maine, and Washington—impose few formal requirements on prospective users beyond obtaining the physician diagnosis and recommendation.[25]

To register, prospective users must provide a signed form from their physician. This form must attest that the physician has examined the patient, diagnosed the patient with a qualifying medical condition, and determined that marijuana might benefit the patient's condition.[26] The patient must also provide contact information for herself and her physician and designated caregiver.[27]

Once the registration application has been reviewed and the patient's eligibility confirmed,[28] the state will issue a registry identification card for the patient and the patient's designated caregiver. The card looks similar to a driver's license: it displays the patient's photo, name, address, and registration number, along with the name of the patient's physician and caregiver.[29] The registration must be renewed periodically—every year, in most states—for a patient to maintain eligibility for the state's exemptions.[30] All ten states using a registration system also require patients to report any changes that might alter their eligibility, such as a change in their medical condition.[31]

24. *E.g.*, ALASKA STAT. § 11.71.090(a) (registration is essential; no defense of medical necessity without it). In a few states that seem to require registration, the requirement has not yet been fully tested (e.g., it's not clear whether otherwise qualified patients will necessarily be barred from asserting the defense if they failed to pre-register).

25. WASH. REV. CODE § 69.51A.040 (2007) (person who meets requirements under statute may raise affirmative defense against marijuana charge); 22 ME. REV. STAT. ANN., tit. 22, § 2383-B(5) (2006) (same); People v. Mower, 28 Cal. 4th 457, 464, 482 (2002) (in order to dismiss drug charges, defendant need only raise a reasonable doubt as to his/her qualifications under California CUA). California has recently adopted a voluntary ID card program, under which medical marijuana users can obtain an ID card to enable them to prove their eligibility for the state's exemption more easily. To obtain the card, users must submit required documentation to a county health department for review, but the program is not mandatory. CAL. HEALTH & SAFETY CODE § 11362.71(f).

26. Minors must usually take additional steps in order to use marijuana for medical purposes with the state's blessing. The minor's physician must advise him/her of the risks of using marijuana; at least one parent (and sometimes both) must consent in writing; and a parent must agree to serve as the minor's caregiver and supervise his/her use. *E.g.*, MONT. CODE ANN. § 50-46-103(3).

27. *Id.* at § 50-46-103(2). Oregon even requires the patient to indicate on the form where she will obtain her marijuana. OR. REV. STAT. § 475.309(6)(a)(D).

28. The states do not simply rubber stamp applications. New Mexico's regulations detail the steps that registration states commonly take to screen applications. N.M. CODE R. § 7.34.3.9 (2008).

29. *E.g.*, MONT. CODE ANN. § 50-46-103(6).

30. *E.g.*, ALASKA STAT. § 17.37.010(k) (annual renewal required); HAW. REV. ST. § 329-123(b)(registration valid as long as physician certifies).

31. *E.g.,* ALASKA STAT. § 17.37.010(k)-(l).

States impose some restrictions on residents who satisfy these criteria. States limit, for example, how much marijuana each qualified patient may lawfully possess at any given time. The limits vary, but most states allow patients to possess between one and three ounces of "usable" marijuana, and between six and twelve marijuana plants.[32] A few states allow physicians to set the amount based on the patient's needs.[33] States also bar qualified patients from using or possessing marijuana in certain contexts, such as on public property or while driving.[34]

Medical marijuana laws provide significant legal protection for qualified patients. Qualified patients are exempt from arrest and prosecution for possessing, cultivating, or using marijuana.[35] They are also exempt from every other civil sanction (e.g., forfeiture) that normally applies under state drug laws.[36] For this reason, I claim that states have *legalized* marijuana, and not merely *decriminalized* it. Many states go one step further and give qualified patients the right to recover any marijuana that has been seized by state law enforcement agents in the course of an investigation.[37] And a few bar landlords from terminating the lease of any person who possesses, uses, or cultivates marijuana in compliance with state law.[38]

32. *E.g.*, COLO. CONST. art. XIII, § 14(4)(a) (patients may possess up to two ounces of usable marijuana and up to six plants); 22 ME. REV. STAT. § 2383-A(3)(2006) (2.5 ounces usable marijuana and six plants); NEV. REV. STAT. § 453A.200(3)(b) (patient and caregiver may possess combined total of one ounce usable marijuana and seven marijuana plants).

Oregon's limits are notably generous (twenty-four ounces of usable marijuana and six mature marijuana plants). OR. REV. STAT. § 475.320(1)(a). California's legislature only recently attempted to impose quantity restrictions on users—eight ounces of usable marijuana, six mature plants, and twelve immature plants per person—but the restrictions have been held up in court challenges. *E.g.*, People v. Kelly, 77 Cal. Rptr. 3d 390, 399 (Cal. App. 2d 2008) (holding that legislated quantity limits constituted unconstitutional amendment of 1996 referendum because the original law passed by the voters imposed none).

33. WASH. REV. CODE § 69.51A.010 (physician determines what constitutes a sixty-day supply for patient); 2007 N.M. STAT. § 26-2B-3 (ninety-day supply).

34. N.M. STAT. § 26-2B-5(A) (barring use of marijuana in all public places, schools, and workplaces).

35. *E.g.*, *id.* at § 26-2B-4(A) ("A qualified patient shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the use of marijuana if the quantity of cannabis does not exceed an adequate supply.").

36. *E.g.*, *id*. at § 26-2B-4(G) ("Any property interest that is possessed, owned or used in connection with the medical use of cannabis . . . shall not be forfeited under any state or local law . . . .").

37. *E.g.*, *id*. at § 26-2B-4(G) ("Cannabis, paraphernalia or other property seized from a qualified patient . . . in connection with the claimed medical use of cannabis shall be returned immediately upon the determination . . . that the qualified patient . . . is entitled to the protections of the [New Mexico] Compassionate Use Act.").

38. *E.g.*, OR. REV. STAT. § 90.396(1)(f)(B)(i). States have been somewhat reluctant to grant patients protection from adverse employment actions. *Compare* Ross v. RagingWire Telecomm.,

Caregivers and physicians are also afforded some legal protections under state laws. Most states allow designated caregivers to legally possess, handle, and even cultivate marijuana on behalf of qualified patients without fear of state-imposed sanctions.[39] No state permits physicians to handle or dispense marijuana, but states do shield physicians from being sanctioned by government or private entities (e.g., employers and licensing boards) for recommending marijuana to their patients.[40]

Although states have adopted fairly detailed regulations specifying who may possess and use marijuana, they have been far more circumspect regarding how qualified patients are actually supposed to acquire marijuana in the first instance and far more reticent to shield marijuana suppliers from state sanctions. In the vast majority of states, there is simply no *legal* way for qualified patients to obtain usable marijuana or even the plants or seeds needed to grow their own supply. Indeed, some states have explicitly banned the *sale* of marijuana to qualified patients,[41] even though such patients may clearly possess, use, and cultivate the drug themselves. Most states, however, have simply refused or neglected to address the issue, thereby providing no guaranteed protection from strict state drug trafficking bans for suppliers of medical marijuana. This means that qualified patients must often resort to the black market to obtain the marijuana they are legally entitled to possess, cultivate, and use.

So far, only three states have directly addressed the supply issue. Oregon and New Mexico authorize licensed persons to grow and

Inc., 174 P.3d 200, 205 (Cal. 2008) (California CUA doesn't protect qualified patients from employment sanctions), *with* Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 186 P.3d 300, 308 (Or. App. 2008) (Oregon law bars employer from terminating qualified patient who uses marijuana outside of workplace). *See also* Vik Amar, *The California Supreme Court's Decision on Whether an Employee Can Be Fired For Testing Positive for Off-the-Job, Doctor-Suggested Medical Use of Marijuana*, FINDLAW WRIT, Feb. 1, 2008 (criticizing California court's refusal to recognize employment protection for beneficiaries of state's medical marijuana law), *available at* http://writ.news.findlaw.com/amar/20080201.html.

39. *E.g.*, ALASKA STAT. § 11.71.090(a)(3); COLO. REV. STAT. § 14(2)(b); NEV. REV. STAT. § 453A.200(3).

These caregivers are largely unregulated; almost any adult who has not been convicted of a serious drug offense may serve as a caregiver. *E.g.*, NEV. REV. STAT. § 453A.210(5) (caregiver must be eighteen years old with no prior drug trafficking conviction). No license is required for the job, though some states do require caregivers to register with the state and some limit the number of patients that each caregiver may serve. *E.g.*, ALASKA STAT. § 17.37.010(d) (each caregiver may serve only one qualified patient); HAW. REV. STAT. §§ 329-121, 123(c) (same).

40. *E.g.*, ALASKA STAT. § 17.37.030(c) (physician shall not be subjected to any sanction for recommending marijuana); HAW. REV. STAT. §§ 329-121, 123(c) (same); WASH. REV. CODE § 69.51A.030 (same).

41. *E.g.*, ALASKA STAT. § 17.37.040(a)(3).

distribute marijuana to qualified patients,[42] but both states limit the price growers can charge qualified patients and the amount of marijuana they may produce.[43] California allows qualified patients and their caregivers to grow marijuana collectively in so-called cannabis cooperatives.[44] The state imposes no registration or licensing requirements on these cooperatives, but it does bar sales to non-members. The state's Attorney General has also issued some non-binding "guidelines" for how cooperatives should operate.[45]

At least two states—New Mexico and Maine—have seriously considered supplying marijuana directly to qualified patients through state-run distribution centers.[46] The marijuana would be grown on state-run farms or diverted from drug seizures made by state police. Despite the obvious appeal of maintaining close state control over the medical marijuana supply chain, no state has yet directly participated in the manufacture or distribution of marijuana, and for good reason. As explained below in Part III.C, such state distribution programs are clearly preempted by federal law, and if they were ever executed, they would expose state agents to federal criminal liability.

42. OR. REV. STAT. § 475.304; N.M. STAT. § 26-2B-4(F) ("A licensed producer shall not be subject to arrest, prosecution or penalty, in any manner, for the production, possession, distribution or dispensing of cannabis pursuant to the . . . Compassionate Use Act.").

43. OR. REV. STAT. § 475.304 (growers may be reimbursed only for the cost of materials and utility bills, and not their labor); *id*. at 475.320(c) (each grower may serve only four qualified patients); N.M. CODE R. § 7.34.4.8 (licensed growers must be non-profit and may not provide volume discounts); *id.* (licensed growers may not possess more than ninety-five plants at any time).

44. CAL. HEALTH & SAFETY CODE § 11362.765, subdiv. § 1(b)(3) (exempting cooperatives that grow marijuana on behalf of qualified patients from legal sanctions).

45. See EDMUND G. BROWN, JR., GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE (2008), for a discussion of guidelines concerning marijuana cooperatives. A few cities/counties do attempt to impose some restrictions on marijuana cooperatives, such as limiting the number that may operate and barring use of marijuana on premises. *See* AMERICANS FOR SAFE ACCESS, LOCAL CALIFORNIA DISPENSARY REGULATIONS, http://www.safeaccessnow.org/article.php?id=3165 (last visited Sept. 12, 2009) (providing links to local ordinances).

46. Danny Hakim & Michael M. Grynbaum, *Legislators Grapple Over How to Legalize Medical Marijuana Use*, N.Y. TIMES, June 14, 2007, at B5 (discussing New Mexico proposal); Letter from Roy E. McKinney, Dir., Maine Drug Enforcement Agency, to Sen. Susan Longley and Rep. Thomas Kane (May 1, 2001) (on file with author) (discussing Maine proposal). A few cities have likewise considered growing marijuana for patients. San Francisco's Measure S actually passed in 2002, but it has never been implemented.

B. Current Federal Law

1. Substance of the CSA

Congress passed the Controlled Substances Act ("CSA") in 1970. The statute regulates the manufacture, possession, and distribution of drugs, including marijuana.[47] Under the CSA, drugs are classified into one of five schedules (I-V), depending on their medicinal value, potential for abuse, and psychological and physical effects on the body.[48] Congress placed marijuana on Schedule I, the most severely restricted category, based on a determination that marijuana had no accepted medical use and a high potential for abuse.[49] The manufacture, distribution, and possession of marijuana, like other Schedule I drugs, is thus forbidden at the federal level, though a few minor exceptions have been made and are discussed below.[50] Drugs on Schedules II-V are progressively less tightly controlled; for example, they may be legally prescribed for medical treatment.[51]

Only two limited exceptions to the federal ban on marijuana have been made. The first, a compassionate use program created under President Carter, is superficially analogous to extant state medical use programs; it allows patients to use marijuana legally for therapeutic purposes. The marijuana for the program is supplied by a federally approved grow-site at the University of Mississippi (the only federally approved grow-site in the United States). However, the program stopped accepting new applications in 1992, and only eight (yes, *eight*) patients currently receive marijuana through it. Over its entire history, only thirty-six patients have been enrolled.[52] The second and only other way to obtain marijuana legally under federal law is by participating in an FDA-approved research study. But since the federal government approves so few marijuana research projects—

47. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801–971).

48. 21 U.S.C. §§ 811–812.

49. *Id.* at § 812(b)(1). To give some perspective on the seriousness of this classification, consider some of the other notable drugs that have been placed on Schedule I—heroin, Ecstasy, LSD, GHB, and peyote—and a few that have not—cocaine, codeine, OxyContin, and methamphetamine (all on Schedule II). 21 C.F.R. §§ 1308.11–12 (2008).

50. 21 U.S.C. §§ 841, 844.

51. *Id.* at § 829 (detailing conditions under which Schedule II–V drugs may be prescribed).

52. GRINSPOON & BAKALAR, *supra* note 14, at 21 (discussing history of the Investigational New Drug program); Andrew J. LeVay, Note, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 705 (2000) (discussing participation in the program).

eleven since 2000[53]—only a small fraction of the population that currently qualifies for state exemptions could participate.

The federal government has steadfastly refused to expand legal access to marijuana. Congress has rejected proposals to reschedule the drug or to suspend enforcement of the CSA against people who may use marijuana under state law.[54] Likewise, the federal Drug Enforcement Agency ("DEA") has denied petitions to reschedule the drug administratively.[55] One may ask why the federal government has made such a fuss over a drug that so many consider harmless, particularly when used by the seriously ill. This hard-line stance against medical marijuana stems from several firmly rooted beliefs: that marijuana's medical benefits are at best unproven, that it harms users and third-parties, that legalizing marijuana for medical purposes suggests the drug is safe for other uses as well, and that marijuana grown for medical purposes would invariably be diverted onto the black market.[56] Though the Obama Administration has hinted it might adopt a softer approach toward the medical use of

53. *See* Drug Enforcement Agency, Lyle Craker: Denial of Application, 74 Fed. Reg. 2101 (Jan. 14, 2009) (noting that at any given time about 500 persons use marijuana in federally approved studies).

54. 153 CONG. REC. H8467-02 (2007) (reporting that House rejected 262-165— an amendment that would have barred federal law enforcement agencies from using appropriated funds against persons using marijuana legally under state law).

55. The CSA grants the Attorney General the power to reschedule drugs; rescheduling petitions must first pass through the DEA. 21 U.S.C. § 811; *see also* Alliance for Cannabis Therapeutics v. Drug Enforcement Agency, 15 F.3d 1131 (D.C. Cir. 1994) (denying rescheduling petition and discussing history of such efforts).

The federal courts could, in theory, create a medical marijuana exemption by recognizing a defense of medical necessity to the CSA. *Cf.* United States v. Bailey, 444 U.S. 394, 415 (1980) (suggesting, in dicta, that courts retain power to recognize a necessity defense even when Congress has not explicitly provided for one). The Supreme Court, however, has explicitly foreclosed this option. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) (concluding that terms of the statute "leave no doubt that the [medical necessity] defense is unavailable" under the CSA, given Congress's determination that "marijuana has no medical benefits worthy of an exception"). In any event, not every person authorized to use marijuana under state law would necessarily be able to satisfy the common law requirements of the necessity defense. Under the common law defense of necessity, defendant must prove that: (1) he chose the lesser of two evils, (2) he acted to prevent imminent harm, (3) he reasonably believed his conduct would avoid the other harm, and (4) there were no alternatives to violating the law. Raich v. Gonzales, 500 F.3d 850, 859 (9th Cir. 2007).

The federal courts have likewise refused to recognize any constitutional due process right of access to marijuana for medical treatment. *Id.* at 866 (concluding that the Constitution "does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering").

56. *Medical Marijuana Referenda in America: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Gen. Barry McCaffrey, Dir., Office of Nat'l Drug Control Policy), *available at* 1997 WL 606302 (elaborating on the rationales behind the federal government's categorical ban).

marijuana, it remains to be seen what (if anything) it will actually do differently.[57] In sum, it appears the categorical federal ban on marijuana is here to stay, at least for the foreseeable future. Anyone who possesses, cultivates, or distributes marijuana pursuant to state law commits a federal crime and is subject to federal sanctions.

Grading and punishment of marijuana offenses under the CSA depend on the nature of the offense (i.e., possession versus manufacturing and distributing), the quantity of marijuana involved, and the offender's criminal history. Most marijuana users would be criminally prosecuted, if at all, for simple possession under the CSA, though they could also be considered manufacturers if they grow their own marijuana. Simple possession of marijuana constitutes a misdemeanor under federal law, punishable by up to one year imprisonment and a minimum $1,000 fine plus costs.[58] Offenders with prior drug records, however, face tougher sanctions: one prior conviction triggers *mandatory* prison time of fifteen days, raises the minimum fine to $2,500, and extends the maximum prison term to two years; a second conviction triggers a minimum term of ninety days imprisonment, a minimum fine of $5,000 plus costs, and a maximum prison term of three years.[59] What is more, even minor drug convictions can trigger harsh collateral sanctions under both state and federal law, including loss of student financial aid and public assistance.[60]

57. *See* sources cited *supra* note 12.

58. 21 U.S.C. § 844(a). To be sure, a congressional amendment to the CSA gives federal prosecutors the *option* of treating some cases of simple possession as civil rather than criminal offenses. 21 U.S.C. § 844a. The civil provision, however, offers only limited reprieve. To begin, the provision is discretionary; defendants remain at the mercy of federal prosecutors, who retain almost unfettered discretion in deciding whether to treat simple possession as a civil or criminal matter. *See* Jonathan J. Rusch, *Consistency is All I Ask: An Exegesis of Section 6486 of the Anti-Drug Abuse Amendments Act of 1988*, 41 ADMIN. L. REV. 415, 424 (1989). It is also narrow. It applies to the simple possession of no more than one ounce of marijuana, which is far less than what most states permit qualified patients to have. 28 C.F.R. § 76.2(h)(6)(vi). Use of the civil provision is also unavailable when the defendant has a prior drug conviction. 21 U.S.C. § 844a(c). In any event, it carries an assessment which, though civil in nature, can be quite steep—up to $10,000. *Id.* at § 844a. And because the assessment is considered a civil sanction, the rights inhering in criminal prosecutions do not apply. This means, for example, that the federal government need only establish a violation of the CSA by a preponderance of the evidence, and that the respondent is not entitled to appointed counsel if he or she cannot afford one. *See* 28 C.F.R. §§ 76.4-.42 (detailing procedures for imposition of civil penalty). On balance, then, the civil provision gives marijuana users little comfort.

59. 21 U.S.C. § 844(a).

60. *See* RICHARD GLEN BOIRE, LIFE SENTENCES: THE COLLATERAL SANCTIONS ASSOCIATED WITH MARIJUANA OFFENSES (2007) (surveying collateral sanctions imposed by states for marijuana convictions); *see also* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411 (2005) (discussing various collateral federal sanctions that attach to drug

Those who cultivate or distribute marijuana face even more severe consequences under the CSA. The manufacture, distribution, or possession with intent to distribute *any amount* of marijuana constitutes a felony, carrying a maximum sentence of five years imprisonment and a maximum fine of $250,000 for individuals and $1 million for entities.[61] The maximum sanctions are doubled if the defendant has a prior felony drug conviction.[62] As quantities increase, so do the sanctions. Cases involving more than fifty kilograms of marijuana or more than fifty plants carry a maximum term of twenty years (absent aggravating factors) and a maximum fine of $5 million.[63] Cases involving more than one hundred kilograms or more than one hundred plants carry a *mandatory* sentence of five years imprisonment (the maximum is life) and a maximum fine of $10 million.[64] Lastly, cases involving massive quantities (i.e., more than 1,000 kilograms or 1,000 plants) carry a mandatory sentence of ten years imprisonment (the maximum is life) and a maximum fine of $20 million.[65]

2. Constitutionality of the CSA

The federal government categorically bans marijuana. Federal authorities have resisted efforts to reschedule marijuana ever since the CSA was enacted, and the federal policy on medical marijuana seems unlikely to change dramatically anytime soon. Opponents of the federal ban have thus sought to circumscribe Congress's constitutional

convictions, including deportation, denial of student financial aid, and loss of welfare and housing benefits).

61. 21 U.S.C. § 841(b)(1)(D). Distribution of a small amount of marijuana for no remuneration is considered simple possession under the law (a misdemeanor), but only when it involves social sharing among friends (a very limited circumstance). *Id.* at § 841(b)(4); United States v. Eddy, 523 F.3d 1268, 1271 (10th Cir. 2008). The CSA does not define what constitutes a "small amount" for purposes of section 841(b)(4), but given that provision's explicit reference to section 841(b)(1)(D) it clearly involves amounts less than fifty kilograms of marijuana (or fewer than fifty plants). The question is "how much less?" Some courts have ruled that a few grams of marijuana may be too much. *E.g.*, United States v. Damerville, 27 F.3d 254, 259 (7th Cir. 1994) (finding that 17.2 grams is not a "small amount" in federal prison). Additionally, due to an omission in the statutory language, the manufacture of or possession with intent to distribute *any* amount of marijuana (even for or among friends) does not qualify as simple possession. *See* United States v. Laakonen, 59 Fed. App'x. 90, 94 (6th Cir. 2003) (possession with intent to distribute unknown quantity of marijuana does not constitute simple possession under § 841(b)(4); § 841(b)(1)(D) sets the maximum sentence); United States v. Campbell, 317 F.3d 597, 603 (6th Cir. 2003) (possession with intent to distribute small quantity of marijuana among friends for no remuneration does not constitute simple possession).

62. 21 U.S.C. § 841(b)(1)(D).

63. *Id.* at § 841(b)(1)(C).

64. *Id.* at § 841(b)(1)(B).

65. *Id.* at § 841(b)(1)(A).

authority over the cultivation, distribution, and possession of marijuana, with hopes of preserving nascent state laws that accord medical marijuana far more favorable treatment.

Gonzales v. Raich[66] seemingly presented opponents of the federal ban their best shot at limiting congressional control over marijuana. *Raich* involved a challenge to Congress's power to regulate the non-commercial, purely intrastate production and consumption of marijuana for medical purposes—an application of the CSA that everyone would agree is at the outermost bounds of Congress's Commerce Clause authority.

The case arose after DEA agents raided Diane Monson's California home and seized her six marijuana plants. Monson and fellow Californian Angel Raich sought a preliminary injunction in order to block the DEA from enforcing the CSA's ban against them. Both women had been using marijuana legally under California law pursuant to the recommendations of their respective physicians to treat medical conditions that were not responding to more conventional therapies. Monson grew her own marijuana, while Raich got hers from two caregivers. They claimed (and the Court assumed) the marijuana they used was grown locally, using only local inputs, and was provided to them free of charge. Invoking the Court's recent Commerce Clause decisions in *United States v. Lopez*[67] and *United States v. Morrison*,[68] Monson and Raich argued that the local cultivation and consumption of marijuana lacked the commercial and interstate character seemingly required by those precedents.

In a 6-3 decision, however, the *Raich* Court flatly rejected the challenge. The Court found that the non-commercial, intrastate activities Raich and Monson sought to exempt from congressional control were hopelessly entwined with the interstate drug trade—in essence, Congress's dominion over the latter (which no one seriously questioned) necessarily required control of the former as well.[69] According to the majority, "One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana . . . locally cultivated for personal use . . . may have a substantial impact on the interstate market for this extraordinarily popular substance."[70] Specifically, the Court reasoned that because of

66. 545 U.S. 1 (2005).

67. 514 U.S. 549 (1995).

68. 529 U.S. 598 (2000).

69. *Raich*, 545 U.S. at 18 ("Congress can regulate purely intrastate activity that is not itself 'commercial' . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.").

70. *Id.* at 28.

"high demand" for the drug, some marijuana grown locally for personal use would be diverted onto the interstate drug market, frustrating congressional efforts to eradicate that market.[71] Thus, in order to preserve Congress's legitimate interest in eradicating the larger interstate drug trade, the Court upheld application of the CSA to the non-commercial, intrastate production and consumption of marijuana. In short, the Court quashed whatever doubts may have once existed about the constitutionally permissible reach of the CSA.

C. Something's Gotta Give

As the foregoing discussion demonstrates, a clear conflict exists between state and federal marijuana policy. Thirteen states have legalized marijuana when used for medical purposes. The federal government, by contrast, has banned the drug outright, and the Supreme Court has dispelled any doubts about the constitutionality of that ban. Considering the federal ban, what are we to make of state compassionate use laws? Are the states allowed to legalize something Congress forbids? Even if so, do state laws actually *matter*? In Parts III-IV below, I provide the first in-depth examination of these issues. But for now, I review how other legal authorities have assessed state medical marijuana laws in light of *Raich* and the federal ban.

Not surprisingly, post-*Raich* assessments of the states' authority over medical marijuana have been mostly grim. Justice O'Connor captured the prevailing sentiment in her *Raich* dissent. Condemning the Court's refusal to grant the states any reprieve from the federal ban, she gave a bleak appraisal of state power: "California . . . has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that *extinguishes that experiment . . . .*"[72]

71. *Id.* at 19 (noting that "high demand in the interstate market will draw [home grown] marijuana into that market", thereby "frustrat[ing] the federal interest in eliminating commercial transactions in the interstate market in their entirety").

72. *Id.* at 43 (O'Connor, J., dissenting) (emphasis added). For similar appraisals, see, for example, GRINSPOON & BAKALAR, *supra* note 14, at 358 (concluding that "federal laws and policies have strangled the medical potential of marijuana"); Klein, *supra* note 5, at 1563 (suggesting medical marijuana states "will never succeed" as long as they remain outliers); Ilya Somin, Gonzales v. Raich: *Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 539 (2006) (suggesting *Raich* has prevented states from responding to local preferences and competing for mobile citizenry on the issue of medical marijuana); LeVay, *supra* note 52, at 714 ("[U]nless medical marijuana defendants are entitled to assert a legal defense to prosecution under federal law, . . . the will of the people in those states legalizing medical marijuana will be frustrated."); Marcia Tiersky, Comment, *Medical Marijuana: Putting the*

These grim assessments stem from serious doubts about the legal status and practical significance of laws exempting marijuana from state sanctions. Consider, first, questions surrounding the states' de jure power—their power to enact and enforce such laws. Many scholars have suggested (or simply assumed) that state medical marijuana laws have been preempted by the CSA.[73] Though no one has considered the assertion at length, it seems to be based upon a straightforward application of conflict preemption doctrine as presently understood.[74] Caleb Nelson, one of the nation's leading scholars of preemption, explains the doctrine as follows:

Power Where it Belongs, 93 NW. U. L. REV. 547, 551 (1999) (claiming state laws are "merely symbolic" since marijuana is "still a Schedule I drug on the federal level", and that Congress, the DEA, or the federal courts must act if states are to have any control over the issue); NATIONAL PUBLIC RADIO, *States Can't Allow Medical Marijuana Use* (June 8, 2005) (suggesting *Raich* "effectively brought an end to local and state efforts to reduce or relax controls over domestically grown marijuana") (quoting Tom Heffelfinger, U.S. Attorney for District of Minnesota).

73. For the view from the academy that Congress *has* preempted state exemptions (or that it *could* do so), see, for example, Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1759 n.61 (2005) ("The [*Raich*] Court found that the Controlled Substances Act . . . preempted California's Compassionate Use Act of 1996."); Robert A. Burt, *Family Conflict and Family Privacy: The Constitutional Violation in Terri Schiavo's Death*, 22 CONST. COMM. 427, 454 n.67 (2005) (declaring that "Congress may use its commerce power to preempt state laws permitting medical use of marijuana"); K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 286–93 (2001) (arguing that state laws allowing medical marijuana could be preempted by Congress, but suggesting that Congress had not yet expressed an intent to do so); Michael Greenberger, *Did the Founding Fathers Do "a Heckuva Job"? Constitutional Authorization for the Use of Federal Troops to Prevent the Loss of a Major American City*, 87 B.U. L. REV. 397, 419–420 (2007) (suggesting Congress could preempt state laws allowing "intrastate commerce in the growth, distribution, and sale of marijuana for medicinal purposes"); Bradford C. Mank, *After* Gonzales v. Raich: *Is the Endangered Species Act Unconstitutional?,* 78 U. COLO. L. REV. 375, 459 (2007) (depicting *Raich* as holding that it was rational for "Congress to preempt state regulation of medical marijuana"); Brian W. Walsh, *Doing Violence to the Law: The Over-federalization of Crime*, 20 FED. SENT. REP. 295, n.16 (2008) (reporting that *Raich* Court held that the "federal Controlled Substances Act (CSA) preempted California's so-called medical marijuana law").

Conservative federal lawmakers evidently share this belief. *E.g.*, *"Medical" Marijuana, Federal Drug Law and the Constitution's Supremacy Clause: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources on the House Comm. on Gov't Reform*, 107th Cong. 2 (Mar. 27, 2001) ("[E]ven strong advocates of States rights . . . have to agree that States simply cannot pass their own laws contrary to Federal law whenever they disagree with the Federal law.") (statement of Rep. Mark Souder, Comm. Chair) *available at* http://ftp.resource.org/gpo.gov/hearings/107h/72258.pdf; *id.* at 50–51 (arguing that Congress intended to preempt state medical marijuana laws when it enacted the CSA) (statement of Rep. Bob Barr, Comm. Member); *id.* at 53 ("It is my view and many on our committee that Federal law preempts local law on [the medical marijuana issue] by virtue of the supremacy clause of the Constitution.") (statement of Rep. Benjamin Gilman, Comm. Member).

74. *E.g.*, H.R. REP. NO. 105-451(I) (1998) ("[State] initiatives, in seeking to make marijuana available as a medicine, *violate* the Controlled Substances Act . . . .") (emphasis added); *"Medical" Marijuana, Federal Drug Law and the Constitution's Supremacy Clause*, *supra* note 73, at 75–76 ("[T]he supremacy clause of the Constitution makes it clear that to whatever extent Congress

> If state law purports *to authorize something that federal law forbids* or to penalize something that federal law gives people an unqualified right to do, then courts would have to choose between applying the federal rule and applying the state rule, and the Supremacy Clause requires them to apply the federal rule.[75]

Nelson did not have medical marijuana laws in mind when he wrote this formula, but the implication of the highlighted passage seems abundantly clear: a state law that allows citizens to use marijuana must give way to a federal law that bans the use of marijuana.[76]

The preemption concerns must be taken seriously, given the obvious tension between state and federal marijuana policy and the consequences wrought by preemption. If preempted, state medical marijuana laws would be null and void. They would remain on the books, but they would be unenforceable—like Jim Crow laws and other vestigial legal provisions found lurking in state codes.[77] In other words, state bans on marijuana—all of which pre-date state compassionate use laws—would once again apply to medical users; these medical users and their suppliers, caregivers, and physicians would be subject to the same state legal sanctions as recreational users, leaving them vulnerable to harassment by state agents *even if federal agents chose not to enforce the CSA.*

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has exercised its legitimate powers, any inconsistent state powers are prohibited. It is hornbook law that a State law would be held void if it would retard, impede, burden or otherwise stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . .") (statement of Rep. Dan Lungren, Comm. Member); Letter from Reps. Mark Souder, Bob Barr, & Doug Ose, to Att'y Gen. John Ashcroft (May 23, 2001) (claiming that "state 'medical marijuana' initiatives which purport to allow the manufacture, distribution or individual possession of marijuana [are] contrary to the Controlled Substances Act [and] are clearly unconstitutional under the Supremacy Clause") (on file with author).

75. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 261 (2000) (emphasis added); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1180–81 & n.10 (3d ed. 2000) (stating that Congress may preempt state laws that "purport to require *or permit* conduct which would be a violation of [a] federal statute") (emphasis added).

76. One might question whether Congress actually intended to preempt state medical marijuana laws. *See, e.g.*, DuVivier, *supra* note 73, at 286–93. Congress included an express preemption provision in the CSA barring any "positive conflict" with the statute. 21 U.S.C. § 903. *See also infra*, Part III.B (discussing Congress's preemptive intent). However, focusing on congressional intent suggests that Congress has the power to preempt state laws, if it so chooses (and indeed, federal lawmakers have proposed language that would unmistakably preempt state laws). Hence, I think it is more useful to focus first on Congress's constitutional power to preempt, for, as I argue below, that power is rather limited in the paradigm discussed in this Article.

77. *See* Laura Smitherman, *Maryland Prepares to Repeal a Bad Law from the Civil Rights Era*, BALT. SUN, Nov. 30, 2008, at 1B (detailing legislative efforts to formally repeal a clearly unconstitutional Jim Crow-era law making it illegal in Maryland to receive any kind of payment for participating in a protest against racial discrimination); *New Mexico Voters Repeal Jim Crow Era Land Law*, ORLANDO SENT., Nov. 9, 2006, at A16 (reporting that New Mexico residents voted to formally remove an unenforceable provision in the state constitution barring Asian immigrants from owning property; also noting that Florida's constitution still contains such a provision).

Indeed, the enactment and implementation of state medical marijuana laws have already been frustrated by doubts about the states' de jure authority. The medical marijuana reform movement was delayed in 1994 when Governor Pete Wilson refused to sign a California Senate bill legalizing medical marijuana, claiming the measure was preempted by federal law.[78] Since then, state officials have refused to certify new ballot proposals seeking to legalize marijuana for medical purposes.[79] They have vetoed,[80] advised against,[81] and delayed[82] the adoption and implementation of registration and ID card programs. And they have refused to observe laws requiring the return of marijuana seized from qualified patients.[83] All these actions are due to the apprehension that state medical marijuana laws have been preempted. What is more, federal lawmakers have proposed amendments to the CSA that would make Congress's intent to terminate state medical marijuana programs unmistakable. The proposed language would preempt "any and all laws of the States . . . insofar as they may now or hereafter effectively permit or purport to authorize the use, growing, manufacture, distribution, or importation . . . of marijuana . . . ."[84]

To be sure, not everyone believes the CSA does—or that Congress necessarily even could—preempt state medical marijuana

78. Veto Letter from Governor Pete Wilson to California State Senate (Sept. 30, 1994) (on file with author) (returning Senate Bill 1364 without his signature).

79. Ark. Op. Att'y Gen. No. 2004-085 (2004) (refusing to certify proposed amendment to the Arkansas constitution that would have legalized marijuana for medical use, on the grounds that the it "fails to acknowledge that federal law that Congress has declared preemptive of state law likewise bars the medical use of marijuana. . . . [and that] the amendment, if enacted, might be subject to challenge under the supremacy clause of the U.S. Constitution").

80. Robert Gunnison, *Davis Moves Away from OK of Card for Marijuana Use*, S.F. CHRON., July 14, 1999, at A11 (reporting that Governor Gray Davis vetoed a voluntary medical marijuana registry because it was "clearly in conflict with federal law") (quoting Michael Bustamante, Governor's Press Secretary).

81. Letter From Steve Suttle and Zachary Shandler, Asst. Att'y Gens. for N.M., to Dr. Alfredo Vigil, Cabinet Sec'y Designate, N.M. Dep't of Health (Aug. 6, 2007), *available at* 2007 WL 2333160 (concluding that state employees "may be subject to federal prosecution under the Controlled Substances Act . . . for implementation or management of the medical use marijuana registry and identification card program"). New Mexico eventually established a registry, but not until almost eighteen months after this legal advice was given.

82. Ed Fletcher, *Issuing medical pot IDs on agenda*, SAC. BEE, Mar. 16, 2008, at B1 (reporting that Sacramento County supervisors voted down a county ID program, citing concerns that the program violates federal law); Bob Egelko, *California's Pot Law Upheld in Appeals Court*, S.F. CHRON., Aug. 1, 2008, at B2 (reporting that San Diego County was refusing to issue ID cards because California's law is preempted by federal law).

83. *E.g.*, City of Garden Grove v. Superior Court of Orange County, 157 Cal. App. 4th 355, 380–86 (2008) (discussing city's assertion that CSA preempts state law that requires police to return marijuana to qualified patients).

84. H.R. 4802, 106th Cong. (2d Sess. 2000).

laws.[85] The Supreme Court has never squarely addressed the preemption issue,[86] despite many claims to the contrary,[87] and some states have carried on despite lingering doubts about their de jure authority (though not without struggles, as just noted). The problem is that the analysis on both sides of the preemption debate has been largely conclusory[88] or misguided,[89] leaving lawmakers frustrated and confused as they deliberate how to proceed.

85. MARIJUANA POLICY PROJECT, *supra* note 6, at 9 (baldly asserting that "*Raich* does not affect states' ability to pass medical marijuana laws—and it does not overturn the laws now protecting the right of more than 71 million Americans living in [states with compassionate use laws]"); *id.* at 8 ("Even though patients can be penalized by federal authorities for violating federal marijuana laws, a state government is not required to have identical laws. Therefore, a state may still allow its residents to possess, grow, or distribute marijuana for medical purposes.").

86. *See, e.g.*, Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1490 (2006) (observing that *Raich* "neither declared [the CUA] invalid on preemption or any other grounds nor gave any indication that California officials must assist in the enforcement of the CSA").

87. *See* sources cited *supra*, note 73.

88. *See* sources cited *supra*, notes 73 and 85. Those who conclude state laws are preempted reason that states may not pass laws that conflict with federal legislation, while those who suggest state laws remain in force argue that states aren't required to follow Congress's approach. Both lines of reasoning contain a kernel of truth, but neither is particularly helpful in answering the question whether, why, and to what extent states retain authority to legalize and regulate marijuana for medical purposes.

89. Here are just a few examples. First, the California Supreme Court has recently declared, without explanation, that there is no conflict between a California statute requiring police to return marijuana seized from qualified patients and the CSA, even though the CSA plainly bars *distribution* of marijuana and defines distribution quite expansively. City of Garden Grove v. Superior Court of Orange County (*Kha*), No. S159520, 2008 WL 794311, at *2 (Cal. 2008). Second, a California appellate court found the same state law was not preempted because the return of a small quantity of marijuana doesn't constitute a "real or meaningful threat to the federal drug enforcement effort," even though conflict preemption analysis normally does not include such a threshold impact requirement. City of Garden Grove v. Superior Court of Orange County (*Kha*), 157 Cal. App. 4th 355, 384 (2008). Third, in an *amici* brief before the *Raich* Court, one prominent pro-legalization organization claimed "the federal government could not preempt drug regulation even if it wished, *because the federal government possesses no general federal police power*", even though, it would seem, the federal government could not preempt state exemptions even if it *did have* such a general police power. Brief of the National Organization for the Reform of Marijuana Laws, et al., as Amici Curiae in support of Respondents, at 14–16, Gonzales v. Raich, 545 U.S. 1 (2005) (No. 03-1454), *available at* 2004 WL 2336547 (emphasis added). Part III explains more fully why, exactly, these commentators/authorities (and others) have gotten the preemption *analysis* wrong.

There is a notable exception. Ninth Circuit Judge Alex Kozinski has provided a thoughtful (and mostly correct) analysis of preemption in his concurring opinion in *Conant v. Walters*, 309 F.3d 629, 645–47 (9th Cir. 2002), a case invalidating (on First Amendment grounds) the federal policy of sanctioning doctors who recommend marijuana to their patients. In dicta, Judge Kozinski rightly notes that preempting state exemptions for qualified patients would amount to commandeering, because it would, in effect, compel the states to criminalize conduct. But Judge Kozinski doesn't provide a framework for distinguishing between permissible preemption and impermissible commandeering, and thus, for determining the precise metes and bounds of state

Consider next the practical significance of state laws removing state sanctions for marijuana. Do such laws actually affect private behavior, given that citizens continue to face steep federal sanctions for possessing, cultivating, or distributing marijuana? Generally speaking, assessments of the states' de facto power—their ability to change private behavior—have been more upbeat and more thoughtful than assessments of the states' de jure power. The basic thrust of the conventional wisdom is that the federal government does not have the capacity to enforce the CSA against marijuana users.[90] As a practical matter, most people can smoke marijuana for any purpose without having to worry much about being caught and punished by the federal government.

Nonetheless, questions about the practical import of state laws persist. Although the federal government has not criminally prosecuted many medical marijuana users in the past decade, it has aggressively targeted suppliers (e.g., the DEA has raided nearly 200 medical marijuana cooperatives in California alone),[91] their landlords,[92] and physicians who recommend the drug to patients[93] in order to disrupt essential components of state marijuana programs. Though new Attorney General Eric Holder has suggested the federal raids on cooperatives might cease, it remains to be seen if the DEA or local U.S. Attorneys' offices will, in fact, back down.[94]

More interestingly, some have suggested that the federal ban blocks states from fostering independent, marijuana-friendly norms in their jurisdictions. As long as the federal ban persists, so the argument goes, social norms condemning drug use and criminal behavior will continue to suppress use of marijuana for medical

power to legalize conduct Congress forbids. And he wrongly suggests that the anti-commandeering rule would block Congress from punishing doctors for participating in state programs, on the theory that that would make it difficult for states to apply their exemptions. *Id.* at 646. In any event, it seems that Kozinski's bottom-line conclusion (though largely correct) has not made headway—as discussed in the text above, many lawmakers and officials continue to believe state laws are preempted.

90. Klein, *supra* note 5, at 1564 (noting that federal government currently has few resources for handling marijuana cases); MARIJUANA POLICY PROJECT, *supra* note 6, at 8 (noting how ninety-nine of one hundred marijuana offenses are currently prosecuted at the state level).

91. MARIJUANA POLICY PROJECT, *supra* note 6, at S1.

92. Wyatt Buchanan, *Pot Dispensaries Shut in Response to Federal Threat*, S.F. CHRON., Feb. 7, 2008, at B1 (reporting that DEA had sent letter warning landlords of city's marijuana dispensaries they faced forfeiture proceedings and possible criminal sanctions for renting property to drug cooperatives; also noting that one-quarter of San Francisco's dispensaries had closed in response to the letter).

93. The DEA once threatened to rescind the prescription-writing authority of physicians who recommend marijuana. *See infra* Part IV.A.

94. *See* sources cited *supra* note 12.

purposes, even if the federal ban is not rigorously enforced.[95] As one prominent criminal law scholar reasoned, "If a seriously ill patient in California is denied legal medicinal marijuana by contrary federal law, he will simply suffer rather than attempt to obtain marijuana through the illegal drug market."[96]

In sum, depending on which source one consults, one might conclude that state medical marijuana programs are (1) preempted, and thus unenforceable, (2) enforceable but impotent, or (more rarely) (3) unencumbered by federal law. None of the extant accounts is satisfactory; analysis of state authority has been wanting, inconsistent, and unconvincing. As a result, confusion has and very well could continue to reign on medical marijuana and on other issues. Indeed, in many respects, despite important changes to state laws and developments in federal constitutional law, our understanding of states' power to legalize conduct Congress forbids has not evolved much since the 1970s and 1980s. Given the stakes involved in this dispute and the striking parallels across many other important and timely social issues, the time has come for closer scrutiny. It is to that task that I now turn.

* * *

Congress has exercised its Commerce Clause authority to ban marijuana without exception, and the Supreme Court has upheld that power. Nonetheless, as the next two Parts explain, the CSA has only limited influence over state lawmakers and private citizens—far less than what is commonly assumed. The states continue to wield both de jure and de facto power to legalize medical marijuana in the CSA's shadow. These Parts explain why the largely gloomy prognostications about state power over medical marijuana—among other issues—are largely mistaken.[97]

95. Criminal law expert Susan Klein insists, for example, that

> [W]hen a state chooses to pursue an independent moral norm and makes that choice clear to its citizens . . . some citizens will engage in this behavior. If this same behavior is criminalized federally, however, the behavior will be chilled. Even though federal resources for criminal prosecutions are small, the mere threat of a federal prosecution will stop all but the most hardy from engaging in this behavior, notwithstanding its legality on the state level.

Klein, *supra* note 5, at 1564 (citing social norms literature).

96. *Id.* at 1563.

97. Elsewhere, I expose an overlooked constraint on the states: though they wield enough power to legalize marijuana, they may not have the ability to supervise it effectively in the shadow of a categorical federal ban. Robert A. Mikos, *Commandeering States' Secrets* (2009 draft) [hereinafter Mikos, *Commandeering States' Secrets*] (on file with author).

III. DE JURE STATE POWER

In this Part, I attempt to dispel the confusion on what is an admittedly complex issue: the legal status of state medical marijuana laws. Contrary to many of the authorities discussed above suggesting state laws are preempted, I argue that most provisions of state medical marijuana laws actually survive the preemption analysis—they are legally enforceable despite the apparent conflict with federal law. Most importantly, this is the first Article to explain in detail *why* Congress has not preempted—and more importantly, *may not* preempt—most state medical marijuana laws. In so doing, it highlights an important and overlooked constraint on Congress's authority to preempt state laws that allow a behavior to go unpunished: the anti-commandeering rule.

Section A explains how the anti-commandeering doctrine constrains Congress's preemption power. It provides a new framework for assessing the distinction between *permissible preemption* and *unconstitutional commandeering*. This framework is better suited for the largely ignored paradigm analyzed in this Article—situations in which states allow behavior Congress has banned—than is the commonly employed action/inaction framework. Section B briefly examines congressional intent behind the CSA and notes how Congress itself has further limited the preemptive effect of the CSA, meaning the statute's preemptive reach is not even as broad as it *could be*, constitutionally speaking. Section C then examines the legal status of five common provisions of state medical marijuana laws and explains why most of the provisions remain enforceable. The detailed case study of these varied state legal provisions helps elaborate the state of nature theory introduced and outlined in Section A. Section D analyzes Congress's other options for undoing state legislation and ultimately concludes that, as a practical matter, Congress probably could not undo state laws legalizing medical marijuana through permissible means like conditional spending. In short, states have strong de jure power to legalize marijuana for medical purposes, at least for purposes of state law—far more power, in fact, than the conventional wisdom seems to suggest.

A. Congress's Preemptive Power

Congress's preemption power is, of course, expansive. It is hornbook law that Congress may preempt any state law that obstructs, contradicts, impedes, or conflicts with federal law. Indeed, it is commonly assumed that when Congress possesses the constitutional

authority to regulate an activity, it may preempt *any* state law governing that same activity.[98] Given that there are so few limits on Congress's substantive powers, there would seemingly be no limit to its preemption power either.[99] Or so it is commonly thought.

Though expansive, Congress's preemption power is not, in fact, co-extensive with its substantive powers, such as its authority to regulate interstate commerce. The preemption power is constrained by the Supreme Court's anti-commandeering rule. That rule stipulates that Congress may not command state legislatures to enact laws nor order state officials to administer them.[100] To be sure, the rule does not limit Congress's substantive powers but rather only the means by which Congress may pursue them. For example, Congress may designate the sites for new radioactive waste dumps, though it may not order state legislatures to do so, and it may require background checks for gun purchases, though it may not order state law enforcement officials to conduct them. All the same, the anti-commandeering rule constrains Congress's power to preempt state law in at least one increasingly important circumstance—namely, when state law simply permits private conduct to occur—because preemption of such a law would be tantamount to commandeering.

To see why, it is necessary to examine carefully the boundary between commandeering and preemption. Legal scholars suggest that boundary depends on a crucial distinction between action and inaction. Commandeering compels state *action*, whereas preemption, by contrast, compels *inaction*.[101] Congressional laws blocking state

98. *E.g.*, Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 797 (1996) (describing the conventional wisdom as follows: "If Congress can legislate at all in a given area, then it can always preempt state power in that area."); Nelson, *supra* note 75, at 264 ("The simple fact is that if a federal statute establishes a rule, and if the Constitution gives Congress the power to establish that rule, then the rule preempts whatever state law it contradicts."); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 286–87 (2005) ("Although the state political process enjoys constitutional protection, the particular outputs of that process do not. From the polyphonic perspective, *no state legislation is immunized* from the potentially preemptive effects of federal enactments.") (emphasis added).

99. Nelson, *supra* note 75, at 278 n.171 ("Even if Congress wants to displace all state law that stands as an obstacle to the accomplishment of certain purposes and objectives, the Constitution may not always give Congress the power to do so. . . . Given modern understandings of Congress's enumerated powers, however, this is not much of a limitation.").

100. Printz v. United States, 521 U.S. 898, 935 (1995); New York v. United States, 505 U.S. 144, 188 (1992).

101. *E.g.*, Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71, 89 ("[T]he commandeering/preemption distinction is most plausibly and sympathetically fleshed out in terms of (some version of) the action/inaction distinction."); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2111 n.140 (1998) (same); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal*

action (preemption) are permissible, whereas congressional laws requiring state action (commandeering) are not.

Obviously, drawing the boundary between commandeering and preemption based on an action/inaction distinction requires a clear definition of positive action. Matt Adler and Seth Kreimer are to my knowledge the only scholars to have proposed such a definition for use in this circumstance. Employing a definition widely used in philosophy, Adler and Kreimer suggest positive action connotes physical movement, and inaction connotes immobility.[102] As it sounds, this definition of action is very broad: it encompasses literally *any* physical movement by state officials—e.g., when state legislators "open their mouths or raise their hands to vote 'yea' " on legislation; or when state law enforcement agents "raise their pens, or touch their fingers to computer keyboards, so as to issue arrest warrants, subpoenas, indictments, and so on."[103]

The trouble with this broad definition of action is that it generates arbitrary results in an important subset of cases—namely, anytime a state must take one action (e.g., repeal a law) in order to stop taking another (e.g., impose sanctions under that law). To illustrate, suppose California currently has a law on the books imposing a minimum one-year prison term for simple possession of marijuana. Clearly, the imposition of the sanction entails positive action by the state: state agents must investigate, arrest, charge, prosecute, convict, and imprison offenders—all, presumably, positive actions. Congress could not, of course, compel California to enact this law. But suppose California is now considering repealing the law. If positive action entails any physical movement by state officials, then repealing an old law is indistinguishable from passing a new one; after all, both require positive action by state officials. Legislators must say "aye" to pass the measure, the Governor must sign the bill, and so on.[104] It follows that if Congress can block *any* positive action, it could seemingly bar California from repealing its law even though it could not compel California to adopt the law in the first instance. The result

Law?, 95 COLUM. L. REV. 1001, 1009–10 (1995) (same). For other useful commentary on the anti-commandeering rule, see, for example, MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 83–90 (2003) (discussing tension between anti-commandeering rule and preemption doctrine) and Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998) (suggesting commandeering may be unnecessary because Congress can always purchase state cooperation).

102. Adler & Kreimer, *supra* note 101, at 92–93.

103. *Id.*

104. *Id.* at 101 n.91 (noting that repeal of a law involves positive action).

is arbitrary, and I doubt anyone, including Adler and Kreimer,[105] thinks it accurately predicts how the Court would actually rule. Unfortunately, however, nothing in the unadorned action/inaction framework and expansive definition of action enables a court to avoid the result.

If not all positive actions by the states are preemptable, we must figure out how to distinguish the actions that are preemptable from the ones that are not. I suggest we can do that by asking whether the state action in question constitutes a departure from, or a return to, the proverbial *state of nature*.[106] In the state of nature, many forces shape human behavior: endowments, preferences, norms, and so on. Critically, however, government has no distinct influence on behavior. Government departs from the state of nature when it engages in some action, broadly defined, that makes a given behavior occur more or less frequently than it would *if we were to consider only the private and social forces shaping that behavior*. For example, imposing a fine of $100 (or awarding a subsidy of $100) for doing X would decrease (or increase) the incidence of X as compared to the state of nature. It is the state of nature—and not action/inaction, per se—that defines the boundary between permissible preemption and impermissible commandeering. Namely, Congress may drive states into—or prevent states from departing from—this state of nature (preemption), but Congress may not drive them out of—or prevent them from returning to—the state of nature (commandeering).

Using the state-of-nature benchmark to shield some state action from congressional preemption closes an arbitrary loophole in the action/inaction framework while also closely adhering to long-standing Supreme Court jurisprudence. First, by examining the consequences of positive action and not just its presence or absence, the state-of-nature benchmark avoids the arbitrary result illustrated above. Congress could not stop California from repealing its sanctioning law under the benchmark even though repeal of that law clearly entails some positive action, for the repeal merely restores the

105. Oddly, though the pair's action/inaction distinction would seemingly permit Congress to force states to maintain the status quo (because repeal of an extant statute involves positive action), they explicitly reject as arbitrary the idea that Congress's preemption power obliges the state to maintain the status quo. *Id.* at 91–92. In some places, Adler and Kreimer's seminal article does suggest a more limited and nuanced conception of positive action. *Id.* at 90 (suggesting particular concern for federal laws that oblige states to impose duties on their citizens). But even assuming such qualifications were intended, they don't get much (if any) attention in the piece, and so have been overlooked/forgotten by courts/scholars.

106. The concept originates, of course, in THOMAS HOBBES, LEVIATHAN. Unlike Hobbes, however, I posit a state of nature in which government (both state and federal) exists *but doesn't act*, at least on the issue at hand (here, marijuana).

state of nature in California—no direct state government influence on possession of marijuana. Second, the state-of-nature benchmark tracks an important and often overlooked feature of the Court's preemption jurisprudence. Namely, the Court has never held that Congress could block states from merely allowing some private behavior to occur, even if that behavior is forbidden by Congress.[107] To be sure, the Court has found myriad state laws preempted, but only when the states have punished or subsidized (broadly defined) behavior Congress sought to foster or deter—i.e., only when states departed from the state of nature.[108] Even field preemption, the ultimate exercise of preemption power, only restores states to the state of nature; it does not require them to depart from it.

Time and again, legal authorities have failed to distinguish between state laws that punish (or subsidize) behavior and those that merely tolerate it. This oversight has generated confusion and mistaken conclusions about state medical marijuana laws and other state legislation. I propose the state-of-nature benchmark as an interpretive guide that more accurately and completely captures the distinction between commandeering and preemption than does the unadorned action/inaction framework. It is intended as a positive synopsis of Supreme Court precedent and not necessarily a normative defense of it.[109] Though not a panacea, the state-of-nature benchmark should lessen the confusion that has emerged and generate more consistent results across cases.

107. Consider, for example, the Court's response to personal liberty laws passed by northern states prior to the Civil War. These laws, *inter alia*, forbade state agents from taking any part in the recapture of fugitive slaves (e.g., by jailing them). In *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), the Court seemingly approved of such laws on the theory that the states could not be obliged to assist federal (or private) authorities in rounding up or handling fugitive slaves. *Id.* at 615–16 (Story, J.) ("[The Fugitive Slave Clause] does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted [sic] to them by the Constitution."). The states, however, could not obstruct federal (or private) efforts to round up fugitive slaves. *Id.* at 618–19. Hence, in *Ableman v. Booth*, 62 U.S. 506 (1858), the Supreme Court invalidated a writ issued by a Wisconsin court that ordered a *federal* court to release a prisoner being held under the Fugitive Slave Act, finding that state courts had no such authority over federal officials. For helpful background on the battle over fugitive slaves and personal liberty laws, see MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE (1998) and THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH: 1780–1861 (1974).

108. The Reconstruction Amendments may create a fairly narrow exception to this rule, because the anti-commandeering doctrine arguably does not apply to congressional legislation passed pursuant to them. *See* Adler & Kreimer, *supra* note 101, at 119–33 (discussing the anti-commandeering rule and the Reconstruction Amendments).

109. For a normative critique of the Court's commandeering/preemption distinction, see generally Adler & Kreimer, *id.*

Lastly, before applying the new benchmark to several concrete legal provisions, I note that there is one important exception to the benchmark and the alternative action/inaction framework. In particular, Congress may require states to depart from the state of nature and to take positive action if it imposes a similar duty on private citizens—i.e., as long as that duty is generally applicable.[110] Thus, for example, Congress may require the states to pay their employees the same minimum wage private employers are obligated to pay, Congress may require states to seek the consent of citizens before selling their private information to third parties, and Congress may require states to maintain drug-free workplaces (and test employees, etc.).[111] All of these compel departures from the state of nature (and positive action), but because they apply generally and not just to the states, they are permissible under the Court's doctrine.

B. Congress's Preemptive Intent

The anti-commandeering rule, properly understood, imposes an important and largely overlooked constraint on Congress's preemption power. Congress may neither dislodge states from nor keep states out of the state of nature. The state of nature thus demarcates the outer bounds of what Congress *may* do. Congress, of course, can always choose to do even less; thus, when it so desires, Congress can decline to preempt states laws that depart from the state of nature.[112]

The CSA is a case in point. The CSA preempts some but not all state medical marijuana laws that Congress could, in theory, preempt, i.e., all of the state laws that make proscribed drug use more common than it would be considering only the private and social forces shaping drug behavior. Section C delves into the CSA's impact on specific regulations, but for now I define more abstractly the statute's preemptive reach. Congress expressly addressed the preemption issue in section 903 of the CSA:

110. Reno v. Condon, 528 U.S. 141, 151 (2000); Printz v. United States, 521 U.S. 898, 932 n.17 (1997); New York v. United States, 505 U.S. 144, 177–79 (1992).

111. *See, e.g.,* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555–57 (1985) (holding that states are not exempt from federal laws). Though the text mentions largely uncontroversial cases, determining what constitutes a generally applicable requirement can pose a serious challenge. *See* Adler & Kreimer, *supra* note 101, at 110–12 (discussing troubles courts face in defining the concept).

112. The Court has generally favored interpreting federal statutes in a way that avoids difficult questions about the outer limits of Congress's *substantive* powers. *E.g.*, Solid Waste Agency of N. Cook County. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001). The emphasis on statutory construction and constitutional avoidance may help explain why so little attention has been paid to the constitutional limits of Congress's preemption power.

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is *a positive conflict* between that provision of this subchapter and that State law so that the two cannot consistently stand together.[113]

Broadly speaking, section 903 preempts any state law that *positively conflicts* with the CSA. That phrase hardly begets an easy interpretation. However, mindful of the constitutional principles discussed above, a positive conflict would seem to arise anytime a state engages in, requires, or facilitates conduct or inaction that violates the CSA. In the same way that a state law requiring X cannot be reconciled with a federal law banning X, state laws that engage in, require, or facilitate the possession, use, distribution, or manufacture of drugs cannot consistently stand together with the CSA. For example, states cannot grow marijuana for qualified patients as that would be engaging in conduct the CSA expressly forbids.[114]

Nonetheless, though the CSA surely preempts *some* state marijuana regulations, its preemptive reach is not as broad as it could be under the anti-commandeering principles discussed above. First, Congress has disavowed any intent to occupy the field of drug regulation. As the Court's anti-commandeering decisions make clear, Congress may constitutionally bar states from adopting *any* regulation of marijuana whatsoever. As a practical matter, of course, doing so would not undo medical-use exemptions; it would simply require states to treat recreational use the same way—perfectly legal. Since Congress has no interest in pushing states closer to full-scale legalization, it has left them free to regulate marijuana, so long as their regulations do not positively conflict with the CSA.

Second, though section 903 bars states from engaging in, requiring, or facilitating conduct that violates the CSA, the CSA itself does not proscribe all actions that conceivably contribute to drug use, nor does it proscribe *omissions* that do so. Broadly speaking, there are three ways one can violate the CSA. One is by violating its terms as a principal—i.e., by knowingly manufacturing, distributing, or possessing marijuana (or attempting to do so). Notably, the CSA does not proscribe omissions; that is, it does not impose any duty to act (generally applicable or otherwise), such as a duty to report known

113. 21 U.S.C. § 903 (emphasis added).

114. *See infra* Part III.C.4 for a more complete discussion of this example.

violations.[115] For this reason, the CSA does not oblige states to destroy marijuana they seize from qualified patients, as discussed below in Section C.5. The second way to violate the CSA is by conspiring with one or more persons to manufacture, distribute, or possess marijuana.[116] No overt act is necessary; only an agreement to commit a CSA violation is required for conviction.[117] Finally, the third way to violate the CSA is by aiding and abetting another person in manufacturing, distributing, or possessing marijuana.[118] Under federal law, aiding and abetting requires two basic elements: (1) committing an overt act that assists the crime (the actus reus), (2) and having the specific intent of facilitating the crime of another (the mens rea).[119] This sort of violation occurs, for example, when someone gives a drug dealer a ride to a drug transaction with the intent of facilitating that transaction, even if the driver does not gain financially from the crime.[120] The intent element circumscribes the preemptive impact of the CSA by sparing some state laws that only unintentionally facilitate CSA violations—e.g., the construction of a public road used by drug dealers.

In sum, Congress has expressed its intention to preempt some, but not all, of the state medical marijuana regulations that it could preempt consistently with the anti-commandeering principles explained above. The CSA's preemption command could be restated as follows:

> States may not take any action that constitutes a violation of the substantive provisions of the CSA, nor may they fail to take any action required by the CSA, so long as that action is required of private citizens and states alike.

So interpreted, the preemption rule is constitutional. A violation of the CSA by state action would presumably constitute a departure from the state of nature. In the case of an omission, Congress can make the states depart from the state of nature (or

115. *E.g.*, United States v. Santana, 898 F.2d 821, 824 (1st Cir. 1990) ("Defendant may not be convicted of aiding and abetting the possession of cocaine . . . merely on proof that he was a knowing spectator [to a drug transaction].").

116. 21 U.S.C. § 846 (proscribing conspiracies and attempts to violate the CSA).

117. For a discussion of the elements of a conspiracy offense under the CSA, see Kevin Jon Heller, Note, *Whatever Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and* United States v. Shabani, 49 STAN. L. REV. 111 (1996).

118. 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

119. *See, e.g.*, United States v. Zafiro, 945 F.2d 881, 887 (7th Cir. 1991) (Posner, J.) ("The crime of aiding and abetting requires *knowledge* of the illegal activity that is being aided and abetted, a *desire* to help the activity succeed, and some *act* of helping.").

120. *See* United States v. Poston, 902 F.2d 90, 93–95 (D.C. Cir. 1990) (Thomas, J.).

alternatively, take positive action) so long as it imposes a similar duty upon private citizens.

C. The Legal Status of State Medical Marijuana Regulations

Here I apply the constitutional and statutory preemption framework developed above to determine whether state medical marijuana regulations are preemptable, and if so whether they have indeed been preempted. I focus on five common state medical marijuana provisions, but the analyses could be applied to other marijuana regulations or to laws governing other subjects as well. The five provisions are (1) exemptions from state legal sanctions; (2) state registration/ID programs; (3) laws shielding users, suppliers, and physicians from private sanctions; (4) state operated marijuana cultivation/distribution programs; and (5) laws requiring state agents to return marijuana to patients.

1. Exemptions from State Sanctions

The core of all state medical marijuana programs are the state laws that exempt the possession, cultivation, and distribution of marijuana for medical purposes from state-imposed legal sanctions. In *enacting* such laws, the states have clearly taken positive action, broadly defined. In substance, however, these exemptions merely restore the state of nature that existed until the early 1900s. The states are doing no more than turning a blind eye to conduct Congress forbids; by exempting that conduct from state imposed punishment, they do not require or necessarily even facilitate it in the relevant sense (i.e., against the state-of-nature baseline).

So understood, the exemptions *cannot* be preempted. A congressional statute purporting do so—like the one mentioned in Part II.D—would be unconstitutional. In effect, Congress would be ordering the state legislatures to re-criminalize medical marijuana—to depart from the state of nature.[121] Just as Congress cannot order states to criminalize behavior in the first instance, it cannot order states to maintain or restore criminal prohibitions.

In fact, the suggestion that state exemptions are or even could be preempted has troubling implications, given that the states commonly treat many drug cases more leniently than does the federal government, even outside the context of medical marijuana. State law

121. *See* Conant v. Walters, 309 F.3d 629, 639-40, 645–47 (9th Cir. 2002) (Kozinski, J., concurring) (suggesting, in dicta, that preemption of state marijuana exemptions would constitute prohibited commandeering).

enforcement agents drop cases federal authorities would probably prosecute if they had the resources. They expunge drug convictions that trigger federal supplemental sanctions. And they punish offenders less severely than would federal sentencing authorities. None of these decisions by the states has been declared preempted, and for good reason.[122] A ruling any other way would force states to criminalize drugs Congress has banned, adopt mandatory prosecution policies, raise sanctions, revise sentencing laws, and shift resources toward marijuana cases—effectively treading on whatever values the anti-commandeering rule seeks to promote. Under the CSA, states remain free to proscribe or not to proscribe the same drugs that Congress bans and to punish violations more or less sternly than does Congress.

To be sure, private conduct has unquestionably changed as a result of the passage of the state exemptions. For reasons explained below, citizens almost certainly use marijuana for medical purposes more frequently now than they did when states punished the conduct. But this change in behavior has resulted not because the states have *departed* from the state of nature, but because the states have (albeit only partially) *restored* it, by removing an obstacle not found in the state of nature—namely, the threat of state-imposed punishment for the possession, use, and cultivation of marijuana for medical purposes. It seems safe to suppose that in the state of nature, marijuana use would be rampant. Thus, in lifting their sanctions, the states have not taken positive action that can be preempted, a point that is easy to see once that action is judged against the appropriate baseline, which is the state of nature rather than the status quo (or the unadorned action / inaction paradigm).

Of course, states may be changing private conduct in a more subtle way too. By declining to punish marijuana use, especially after banning it for so long, the states are arguably suggesting that marijuana use is safe, beneficial, and not wicked. In doing so, states may incidentally change people's beliefs about marijuana use—not just from what they would be in the status quo, but from what those beliefs would be in the state of nature without such a government signal. If the state merely suggests that marijuana is not harmful, for example, individuals might feel more confident about experimenting with the drug. As a result, there may be more marijuana use and thus

122. *See* Klein, *supra* note 5, at 1553–54 (noting that "the Supreme Court has not stricken a state criminal statute on preemption grounds for nearly half a century").

more CSA violations. Indeed, state exemptions probably have had an effect on public attitudes toward the drug.[123]

One could argue that by expressing something about conduct, good or bad, exemptions constitute a form of preemptable positive action and therefore a departure from the state of nature. But there must be some limit to what counts as preemptable positive action by states, even when it results in a change in behavior from what would otherwise exist in the state of nature. Allowing Congress to preempt state laws merely on the basis of their perceived expressive content and related impact on behavior would eviscerate the anti-commandeering limits on Congress's preemption authority: every state law conceivably has *some* expressive content and some impact on behavior. It also raises nettlesome First Amendment concerns. Assuming states have rights *vis-á-vis* Congress under the First Amendment, to the extent that state laws perform a purely expressive function, they arguably constitute protected speech and hence may not be preemptable.[124] Imagine Congress ordering states not to pass any pro-marijuana resolutions calling upon the federal government to reconsider its ban. Of course, there are some limits to what states may say through legislation, but those narrow limits do not apply here. While states cannot engage in crime-facilitating speech,[125] these exemptions do not constitute such speech. States have not explicitly encouraged, chided, cajoled, or tricked people into using marijuana; indeed, they have gone out of their way to warn prospective users that they are still criminally liable under federal law.

In sum, Congress may not preempt the exemptions at the core of state medical marijuana laws. The exemptions merely restore the proverbial state of nature. To be sure, marijuana use has increased following passage of these laws, but the increase not a result of anything the states have done. Rather, it is a result of what the states stopped doing: punishing medical use of the drug. Arguments that the CSA already does preempt—or that Congress even could preempt—state exemptions are mistaken. Properly understood, this is commandeering, not preemption.

123. *See infra* Part IV.

124. *Cf.* Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1029 n.84 (2000) (suggesting that preemption could be considered "suppression of speech" by state government).

125. *See generally* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

2. Registration/ID programs

Registration/ID programs are similarly safe from preemption. The registration/ID process described above in Part II.B is designed largely to help state agents confirm whether a suspect in a criminal investigation is a legitimately qualified patient entitled to assert a state exemption. State registration/ID programs do not stop federal authorities from sanctioning registrants. They do not remove any privately created barriers to using marijuana—i.e., barriers that exist in the state of nature. And they do not encourage registrants' use of marijuana. In short, they do not make marijuana use any more likely than it would be in a state of nature free of state legal sanctions. Since Congress cannot force states to impose legal sanctions, it cannot block states from adopting measures like registration that help them sort out who is exempted from sanctions—at least as long as the states do no more than that.[126]

3. Protection from private sanctions

State laws purporting to shield patients, caregivers, suppliers, and physicians from sanctions imposed by *private* persons or groups are on weaker footing. Some states, for example, bar private hospitals and clinics from taking adverse action (such as denying privileges) against any physician who recommends marijuana to a patient. Some states also bar landlords from terminating the lease of any qualified patient, caregiver, or supplier for possessing, using, or growing marijuana on rental property in accordance with state law.[127] Such protection is not, of course, found in the state of nature, where employers and landlords are free to punish marijuana use as they deem fit. To illustrate, suppose landlord L terminates tenant T's lease because T, a qualified patient, is growing marijuana on the rental property. To assert state protection from eviction, T would need to initiate a lawsuit against L. The lawsuit would be heard and any remedy would be enforced by a state agent. The involvement of state agents would constitute a clear departure from the state of nature and would thus be preemptable.

Arguably, however, Congress has not yet sought to preempt *all* state laws that protect marijuana users and suppliers from private

126. In theory, of course, Congress could preempt the entire field of marijuana regulations, thereby mooting registration programs; after all, the states would no longer need to distinguish between medical/non-medical users because they could punish neither group. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941).

127. *See supra* note 38.

sanctions. Under the CSA, the question is whether such protection aids and abets a violation of the CSA. The answer may vary by context. In the illustration, the state law *requiring* L to rent property to someone L knows will use it for growing marijuana probably does constitute aiding and abetting a violation of the CSA;[128] hence, the state law protecting marijuana growers from eviction would be preempted. In other situations, however, state protection laws might not yet be preempted. It would be a stretch to say that a state aids and abets a violation of the CSA by, for example, barring an employer from firing one of its employees simply because the employee was using marijuana outside of work. In this situation, a state law shielding such employees from termination would not necessarily be preempted by the CSA, though it might be preempted by other federal employment or licensing laws.

4. State Cultivation/Distribution Programs

A handful of states have proposed supplying marijuana directly to qualified patients via state-operated farms and distribution centers, similarly to the way the federal government grows and distributes marijuana for use in research projects and in its own compassionate use program. The CSA, however, clearly preempts any such state program. State cultivation and distribution of marijuana constitutes a departure from the state of nature. Though marijuana is available in the state of nature, the state distribution program would arguably provide something unique—a safe, cheap, consistent, and reliable supply of marijuana. Moreover, the CSA explicitly bars the cultivation and distribution of marijuana, leaving little doubt that Congress intended to preempt such state programs.[129]

To be sure, the preemptive effect of the CSA has been muddied somewhat by confusion over the meaning and significance of a relatively obscure provision of the CSA granting immunity to state agents who enforce state drug laws. The provision has escaped the attention of the legal academy but has recently caught the attention of state courts attempting to reconcile state medical marijuana laws with the CSA. The provision, section 885(d), provides that "no civil or

128. *Cf.* United States v. Zafiro, 945 F.2d 881, 887–88 (7th Cir. 1991) (Posner, J.) (upholding aiding and abetting conviction of defendant who allowed drug conspirators to use her apartment for drug sales, knowing they were dealing drugs, and intending to assist their enterprise); *see also* Buchanan, *supra* note 92 (reporting that DEA has threatened landlords who rent property to marijuana dispensaries).

129. Section 841(a) of the CSA applies to "any person", which, courts have presumed, covers government employees as well as private citizens.

criminal liability shall be imposed . . . upon any duly authorized officer of any State . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances."[130]

On the one hand, the plain language of section 885(d), referring as it does to *any* state law "relating to controlled substances", suggests the provision would allow state officials to grow and distribute marijuana (or any other banned drug) as long as they do so under color of state or even municipal law—i.e., while *enforcing* such law. A leading constitutional law scholar (qua advocate, not commentator),[131] among others, has pushed this reasoning, and so far two state courts, including the Supreme Court of California, have adopted it, albeit in a different context (the return of marijuana, discussed below).[132]

On the other hand, this expansive interpretation of section 885(d) immunity is difficult to reconcile with the CSA's express preemption language and congressional intent. First, granting state police (or other state officials) immunity under section 885(d) for distributing or manufacturing marijuana would render the express preemption language of section 903 meaningless. As explained above, section 903 means that states may not engage in, conspire to engage in, nor aid and abet conduct that violates the CSA. Clearly, a state law ordering state agents to cultivate and distribute marijuana to private citizens creates a "positive conflict" with federal law. The law would therefore be preempted and unenforceable, and a state agent cannot be immune from federal prosecution under section 885(d) for enforcing *an unenforceable* state statute.[133]

Second, a narrower interpretation of the immunity provision also more closely comports with Congress's purpose in conferring immunity on law enforcement agents in the first place. The purpose of section 885(d) immunity is readily apparent. In order to handle narcotics legally during drug investigations, both state and federal

130. 21 U.S.C. § 885(d).

131. Appellants' Reply Brief at *2–6, United States v. Oakland Cannabis Buyers' Coop., 259 Fed. App'x 936 (9th Cir. 2007) (No. 05-16466) (brief signed by Randy Barnett, among others).

132. State v. Kama, 39 P.3d 866, 868 (Or. App. 2002) (finding city police immune under Section 885(d) for returning marijuana to qualified patient, pursuant to state law); City of Garden Grove v. Superior Court of Orange County (Kha), 2008 WL 794311, at *1–2 (Cal. 2008) (same).

133. *Cf.* County of Santa Cruz v. Ashcroft, 279 F. Supp. 2d 1192, 1211–12 (N.D. Cal. 2003) (rejecting claim that city ordinance could immunize city-authorized marijuana cooperative under 21 U.S.C. § 885(d); city ordinance preempted, because it conflicts with CSA), *rev'd on other grounds*, 314 F. Supp. 2d 1000 (N.D. Cal. 2004); United States v. Rosenthal, 266 F. Supp. 2d 1068, 1079 (N.D.Cal. 2003) (Breyer, J.), ("Section 885(d) cannot reasonably be read to cover acting pursuant to a law which itself is in conflict with the Act."), *rev'd in part on other grounds*, 445 F.3d 1239 (9th Cir. 2006).

law enforcement agents must have immunity. Without it undercover agents and informants could not feel secure handling narcotics in the course of a drug sting; in theory, by handling the drugs, they could face the same charges as the drug pushers they investigate. Yet such technical violations of the CSA clearly help facilitate the Act's overriding purpose of eradicating the illicit drug trade. Hence, granting immunity for such infractions makes perfect sense. Congress could have relied on the good sense of U.S. Attorneys not to prosecute such violations, but one can hardly fault Congress for wanting to codify immunity and remove any doubts. But recognizing immunity broader than this would generate results that seem absurd in light of Congress's underlying purpose.[134] Whatever one thinks of the wisdom of granting such broad immunity, it seems implausible to suppose that Congress had anything like this in mind when it enacted section 885(d).

The CSA's clear ban on state-run farms and dispensaries explains why states have thus far balked at supplying marijuana directly, in spite of the obvious advantages of directly controlling the growing and distribution of marijuana in medical use programs. A few states and cities have proposed state/local distribution centers, but none has followed through and actually implemented one.[135]

5. State Return of Seized Marijuana

States with medical marijuana exemptions commonly require law enforcement agents to return any marijuana that was seized from a qualified patient in the course of a criminal investigation. Such provisions have provoked much litigation (mostly brought by law enforcement agents) and debate, but as yet there are no satisfactory answers to the underlying question: Are these state laws preempted?

On the one hand, by returning marijuana state agents would seem to take positive action that violates the CSA—namely, distributing marijuana. As defined under the CSA, distribution simply means to transfer drugs from one person to another; no money need be exchanged.[136] Hence, at first glance, it would seem that laws requiring

134. *Cf.* United States v. Rosenthal, 454 F.3d 943, 948 (9th Cir. 2006) (granting immunity to a city-authorized marijuana cooperative "contradicts the purpose of the CSA").

135. Indeed, the Maine program described above was abandoned out of concern that the program was preempted by federal law; state officials also feared the state might lose $19 million in federal grants and that its employees could be held criminally liable for violating federal law. Letter from Roy E. McKinney, *supra* note 46.

136. *E.g.*, United States v. Washington, 41 F.3d 917, 919 (4th Cir. 1994) (sharing drugs with another person constitutes "distribution"; no exchange of money is required).

state agents to return marijuana to qualified patients are preempted because they require state agents to violate the CSA—this clearly poses a positive conflict with the CSA.

On the other hand, returning seized marijuana to its original possessor merely restores the state of nature. The quantity of marijuana in existence and the identity of the possessor are no different than had the state government never seized the drugs. Viewed this way, preemption of these state laws would compel state action and not merely block it: state agents who have seized marijuana would now be obliged to store it, destroy it, or transfer it to federal authorities. As discussed above, this is an obligation Congress may not impose unless it imposes a similar obligation on private citizens as well. And it appears Congress has not yet done so: private schools, stadiums, airlines, and shopping malls seize drugs from time to time, yet it appears none of these private entities is *required* to turn the drugs over to federal authorities (though most do so anyway) as opposed to their owner.[137] Until Congress imposes a generally applicable duty to store, destroy, or turn in seized marijuana, laws ordering state agents to return seized marijuana to its original owners are not preempted.[138]

D. Congress's Other Options

Congress cannot compel states to abandon their exemptions or most of the other medical marijuana provisions discussed above, but it can try to persuade them to do so voluntarily. The anti-commandeering rule permits Congress to encourage positive action it cannot oblige states to take. When it comes to marijuana, Congress could offer states (1) money or (2) regulatory power in return for a promise to re-criminalize use for medical purposes. As long as the inducement Congress offers is not coercive, it would not offend existing anti-commandeering doctrine.

Congress has immense fiscal resources relative to the states, and the Court has imposed few meaningful restrictions on how Congress may employ those resources to extract conditions from the

137. It would also appear that these private entities generally lack the specific intent required to be found guilty of aiding and abetting a CSA violation. *See supra* notes 118–120 and accompanying text (discussing contours of aiding and abetting liability).

138. It is thus unnecessary to address the claim made by some state courts that 21 U.S.C. § 885(d) immunizes state agents from criminal liability for the return of marijuana. That provision—and the problems confronting state court interpretations of it—is discussed above in Part III.C.4.

states.[139] It seems clear that Congress could offer the states grants in return for legislation that eliminates exemptions and reinstates categorical criminal bans on marijuana. Because the grants could, in theory, be refused, they do not compel state action, so there would be no commandeering problem.[140] Congress also has expansive regulatory authority that it can promise to share in return for similar concessions. Namely, Congress could agree to spare (i.e., not preempt) state bans on recreational marijuana in return for the states' agreement to broaden those bans to include medical marijuana.[141] Unlike state exemptions, state bans on marijuana are subject to congressional preemption because they—or more precisely, the sanctions behind them—constitute positive action that departs from the state of nature; after all, legal sanctions for drug use are not found in the state of nature. In essence, Congress could threaten to preempt *all* state marijuana laws (i.e., preempt the entire field) unless states agreed to adopt laws banning marijuana categorically as Congress does. This may seem unfair, coercive, and perhaps unsound, but the Court has upheld conditional preemption legislation giving states equally dire options.[142]

The conventional wisdom suggests that Congress's conditional spending and conditional preemption powers are federalism's Trojan Horses—powers that enable Congress to sidestep jurisprudential limits on its powers and accomplish otherwise impermissible objectives.[143] As regards state marijuana laws, however, the threat from Congress's conditional spending and preemption powers seems more apparent than real. It seems implausible that Congress could muster the votes needed to pass legislation conditioning federal grants

139. In particular, the conditions must be stated unambiguously; they must bear some relationship to how the funds will be used; and the funds offered must not be so large as to practically compel acceptance. South Dakota v. Dole, 483 U.S. 203, 207–11 (1987) (upholding federal grant that required, as condition of acceptance, that South Dakota increase its minimum legal drinking age).

140. New York v. United States, 505 U.S. 144, 171–173 (1992) (distinguishing conditional spending from commandeering).

141. Of course, Congress would be betting that no state would decline such an offer, and the fact that most states have continued to fight their war on recreational marijuana suggests that this is the case.

142. F.E.R.C. v. Mississippi, 456 U.S. 742, 765–66 (1982).

143. *E.g.*, Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1988–89 (1995); Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole: *Why the Court Should Abandon its Spending Doctrine, and How a Too-Clever Congress Could Provoke it to do so*, 78 IND. L. J. 459, 499–504 (2003) (discussing how Congress could use conditional spending to circumvent federalism limits); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85; Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987).

of money or power on the agreement of states to abandon permissive marijuana laws. Congress has banned marijuana and that ban seems likely to remain the official federal policy for the foreseeable future, but the opportunity for Congress to take any further action against medical marijuana (e.g., by passing legislation designed to repeal state exemptions) has clearly passed. Public support for medical marijuana exemptions has grown considerably since the CSA was originally enacted; indeed, a strong majority of citizens—over 70% in most polls—now supports medical exemptions for marijuana.[144] This majority, though perhaps not large enough to formally repeal the categorical ban, is large enough to block measures that would reinforce it.[145] It also has the ear of a sympathetic President who would likely veto any such measures. In fact, Congress has rejected recent proposals that would withhold grant monies from local law enforcement agencies in medical marijuana states and redirect the monies to federal drug enforcement agencies instead.[146]

* * *

In sum, the anti-commandeering rule bars Congress from preempting state medical marijuana exemptions and accompanying registration/ID programs. To be sure, medical use of marijuana will surely rise once states legalize it. However, that is not because the states have removed any *privately* created obstacles, such as wealth constraints, that inhibit marijuana use—i.e., not because states have departed from the proverbial state of nature. Some state laws, including those involving state distribution of marijuana, may be and have been preempted. And Congress could go a step further and preempt both state laws requiring police to return marijuana and laws protecting citizens from private sanctions, but for the most part it has not yet done so. Any further action—including action to exert pressure on states to abandon exemptions voluntarily—seems highly unlikely. The window of opportunity may have closed already, as public support for medical marijuana, while perhaps not yet high enough to undo the federal ban altogether, may at least block more aggressive congressional efforts to undo state laws. This means that most state

144. In an October 2002 national opinion poll, for example, 80 percent of respondents supported legalizing marijuana for medical uses. Time, Cable News Network, and Harris Interactive, Oct. 23-Oct. 24, 2002, iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut, *available at* http://www.ropercenter.uconn.edu/ipoll.html.

145. *See generally*, Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L. J. 1669 (2007) [hereinafter Mikos, *Populist Safeguards*] (demonstrating that public opinion significantly constrains the exercise of congressional power).

146. *See* H.R. 2086, 149 CONG. REC. H8962-02 (2002) (proposing that 5 percent of federal law enforcement grants be diverted from local drug authorities to federal drug authorities in states that adopt medical marijuana exemptions).

medical marijuana laws remain in place. Whether they matter is the topic to be considered next.

IV. DE FACTO STATE POWER

Congress cannot force states to abandon their medical marijuana exemptions, nor are the states likely to abandon those exemptions voluntarily. Even so, state exemptions would amount to little more than symbolic gestures if the intended beneficiaries were unwilling to disobey the federal ban. Though states may eliminate state-imposed sanctions for marijuana use and cultivation, they may not bar the federal government from levying its own.[147] In other words, the discovery that states have more de jure power than previously recognized would constitute a somewhat hollow victory for states' rights and medical marijuana proponents, unless that de jure power also carries practical ramifications.

At bottom, the question is which law has more sway over private conduct: a state law legalizing that conduct or a federal law banning it. This Part addresses that question. Section A demonstrates that the federal government's ability to enforce its ban is very constrained, thereby limiting its influence on private behavior (and also diminishing the significance of Attorney General Holder's recent suggestion that the DEA should stop targeting medical marijuana dispensaries). The federal government has too few law enforcement agents to handle the large number of potential targets. Simply put, the *expected* sanctions for using or supplying marijuana under federal law are too low, standing alone, to deter many prospective marijuana users or suppliers. Section B, however, considers whether Congress can discourage marijuana use by other means, including manipulating preferences, morally obliging compliance with its ban, or channeling social norms against marijuana. Once again, however, this Section concludes that the federal influence on private behavior is quite limited. Indeed, the impact of the federal ban may be even weaker than Section A suggests once we consider how these other forces—possibly shaped by state law—help to enable or even foster the behavior Congress bans.

147. Gonzales v. Raich, 545 U.S. 1, 29–33 (2005) (state medical marijuana defense does not bar prosecution under federal CSA).

A. Enforcement of Legal Sanctions

According to neoclassical economic theory, laws need the backing of incentives (i.e., carrots or sticks) to change human behavior. If the government wants to promote a certain type of behavior, it must reward that behavior (with a subsidy). Conversely, if the government wants to curtail the behavior, it must punish the behavior (with fines or jail time). Viewed from this perspective, the federal ban on medical marijuana does not actually deter possession or cultivation/distribution of the drug. Though the CSA certainly threatens harsh sanctions, the federal government does not have the resources to impose them frequently enough to make a meaningful impact on proscribed behavior.[148]

To begin, the federal law enforcement apparatus is small. The federal government employs 105,000 law enforcement agents, only about 4,400 of whom work for the DEA, the lead federal agency on drug crimes. The remainder work for dozens of departments—FBI, ICE, ATF, and so on—and spend only a fraction of their time handling drug crimes.[149] All told, federal agents made 154,000 arrests in 2007—30,000 for all drug offenses, including 7,276 for marijuana.[150] These figures amount to only 1 percent of all criminal arrests, 1.6 percent of all drug arrests, and less than 1 percent of all marijuana arrests made in the United States that year.[151] Compared to the number of federal law enforcement agents, the number of potential targets in the war on marijuana is enormous. More than 14.4 *million* people regularly use marijuana in the United States every year, including four million who live in states that legalize medical use.[152] While only a small portion of these users, perhaps 400,000 or so, do so legally under state law pursuant to medical exemptions,[153] there is no easy way for the federal

148. *See generally* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (explaining economic theory of optimal magnitude and probability of sanctions).

149. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., DRUGS AND CRIME FACTS (Aug. 17, 2009), http://www.ojp. usdoj.gov/bjs/dcf/enforce.htm (last visited Aug. 20, 2009).

150. FEDERAL JUST. STAT. RESOURCE CENTER, PERSONS ARRESTED AND BOOKED BY OFFENSE, 2007, http://fjsrc.urban.org/var.cfm?ttype=one_variable&agency=USMS&db_type=Arrests Fed&saf=IN (last visited Aug. 20, 2009).

151. BUREAU OF JUST. STAT., *supra* note 149.

152. SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH, fig. 2.1, http://www.oas.samhsa.gov/NSDUH/2k7NSDUH/2k7 results.cfm#Ch2 (reporting past-month usage of marijuana).

153. I have estimated the number of people using marijuana (legally) by extrapolating from the number of known users in a representative registration state, Oregon. Oregon, for example, currently has 20,307 registered users, representing approximately .56% of its population. OREGON MEDICAL MARIJUANA PROGRAM, STATISTICS (2009), http://www.oregon.gov/DHS/ph/

government to focus its scarce resources on them alone. After all, it is not as if these medicinal users wear a sign identifying themselves as such. Assuming it must select marijuana cases at random, the federal government, on average, would need to pursue roughly ten marijuana cases in the thirteen medical exemption states before coming across just one case that a state would dismiss pursuant to a medical exemption.

Given limited resources and a huge number of targets, the current expected sanction for medical marijuana users is quite low. Suppose that only five percent of all marijuana offenders are currently discovered by law enforcement (state and federal combined).[154] Of that figure, only one percent of offenders are handled by federal law enforcement.[155] Assuming no cooperation between the sovereigns, only 0.05 percent—or roughly 1 in 2,000—of medical marijuana users would be uncovered by federal authorities following current practices. Hence, even if nominal federal sanctions are set very high (as they currently are), the expected legal sanction remains quite low. For example, a fine of $100,000 results in an expected sanction of only $50 ($100,000 * .0005), a price many people would be willing to pay for access to marijuana—especially considering that many deem it a life-changing medicine.

Not surprisingly, federal authorities have largely forsaken criminal prosecutions of medical marijuana users[156] and have instead sought to curb medical use of marijuana by focusing on two potential chokepoints: physicians who recommend marijuana and growers who supply it.

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ommp/data.shtml. Since there are roughly seventy-one million people living in the thirteen medical marijuana states, there would be approximately 400,000 people currently using marijuana legally across the country. This figure is necessarily approximate, for several reasons. On the one hand, it could overestimate the number of total users; e.g., it's possible Oregon may have more qualified patients (per capita) than other states, if, say, some qualified patients migrated to Oregon to take advantage of its relatively generous health policies. On the other hand, my figure could underestimate total users; e.g., California may have more users (per capita) than my estimate suggests since it recognizes more qualifying conditions than does Oregon (or any other state). In spite of these concerns, however, the 400,000 number appears a reasonable approximation.

154. The states arrest more than 800,000 persons for possession of marijuana every year; that amounts to roughly 5 percent of all marijuana users. *See supra* note 10 and accompanying text.

155. *See* MARIJUANA POLICY PROJECT, *supra* note 6, at 8.

156. Only a few hundred simple possession (marijuana) cases are prosecuted by the federal government each year. *See* OFFICE OF NAT'L DRUG CONTROL POLICY, WHO'S REALLY IN PRISON FOR MARIJUANA 9 (2005) (finding federal courts sentenced only 186 defendants for simple possession of marijuana in 2001).

Immediately following passage of the 1996 California Compassionate Use Act, federal drug czar Barry McCaffrey issued a strongly-worded statement outlining the federal government's strategy to thwart the initiative.[157] One part of that strategy was to revoke the DEA registration of any physician who recommended marijuana to a patient, on the grounds that recommendation of an illegal drug is against the public interest.[158] Such registration is necessary to legally prescribe, dispense, or possess any controlled substance, including medications; without it, most physicians cannot practice medicine.[159] Not surprisingly, many physicians would be unwilling to prescribe marijuana (or any other Schedule I substance) if doing so jeopardized their DEA registration and exposed them to criminal sanctions for aiding and abetting CSA violations.

The states, however, seemingly anticipated this roadblock. All thirteen medical marijuana states require only a physician's recommendation, and not a *prescription*, to use marijuana legally under state law. To the DEA, this distinction was of no moment; it viewed both prescribing and recommending proscribed drugs as violations of federal law. The Ninth Circuit, however, disagreed. The court found that the DEA policy violated physicians' First Amendment rights to speak to their patients about the pros and cons of possible treatments.[160] The DEA policy was constitutionally problematic because it explicitly discriminated on the basis of both the content (marijuana) and viewpoint (pro-marijuana) of physician speech.[161] The court found there was no adequate justification for the DEA policy. According to the court, a recommendation, unlike a prescription, entails no more than simply discussing the pros and cons of marijuana

157. Administrative Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (1997).

158. *Id.* at 6164 (concluding that a practitioner's action of "recommending or prescribing Schedule I controlled substances is not consistent with the 'public interest' . . . and will lead to administrative action by the [DEA] to revoke the practitioner's registration") (citing 21 U.S.C. § 823(f)).

159. Conant v. Walters, 309 F.3d 629, 639–40 (9th Cir. 2002) (Kozinski, J., concurring) ("By speaking candidly to their patients about the potential benefits of medical marijuana, [physicians] risk losing their license to write prescriptions, which would prevent them from functioning as doctors. In other words, they may destroy their careers and lose their livelihoods.").

160. *Id.* at 636.

161. *Id.* at 637 ("The government's policy in this case seeks to punish physicians on the basis of the content of doctor-patient communications. Only doctor-patient conversations that include discussions of the medical use of marijuana trigger the policy. Moreover, the policy . . . condemns expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient. Such condemnation of particular views is especially troubling in the First Amendment context.").

use; it does not necessarily encourage or aid and abet marijuana use.[162] The court thus issued an injunction blocking the DEA from denying or rescinding the DEA registration of physicians who merely recommend marijuana. Though the court's reasoning is hardly unassailable, its decision has been followed nationally, and the DEA no longer threatens to sanction physicians for merely recommending marijuana. Thus, by carefully circumscribing the task that physicians must perform, the states have prevented the federal government from squeezing one of the most important chokepoints in state medical marijuana programs.

A second federal strategy—and one not constrained by the First Amendment—has been to target marijuana growers and suppliers, a second potential bottleneck in state programs. As mentioned previously, the DEA has raided nearly 200 medical marijuana cooperatives in California alone since 1996. It has also commenced forfeiture proceedings against landlords who knowingly rent property to marijuana growers. Targeting suppliers as opposed to users has two obvious advantages. First, there are far fewer of them. Some large-scale marijuana cooperatives in California purport to serve thousands of patients, so shutting down even one of them should, in theory, impact thousands of users. Second, the penalties for cultivation and distribution of marijuana are significantly higher than for simple possession, the charge most users would face. The biggest marijuana suppliers face possible life imprisonment and a $20 million fine under the CSA,[163] meaning that expected legal sanctions will be high even if the probability of being detected by federal law enforcement is not.

Nonetheless, efforts to take down large marijuana suppliers probably had only a limited impact on the supply or use of marijuana, even before Attorney General Holder announced an apparent (though still not enforceable) truce.[164] One of the main reasons these efforts have failed is because there are no substantial barriers to entry in the marijuana market. Marijuana can be produced in almost any climate. Unlike other drugs, no special skills, technologies, or special inputs are needed to cultivate the plant (or so I'm told). Indeed, one can

162. *Id.* at 638 (citing Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002)) (assuming that any crime-facilitating speech would not be protected).

163. *See supra* notes 61–65 and accompanying text.

164. *See* JON GETTMAN, MARIJUANA PRODUCTION IN THE UNITED STATES 3 (2006), *available at* http://www.drugscience.org/Archive/bcr2/MJCropReport_2006.pdf (estimating that domestic marijuana production surged ten-fold between 1981 and 2006, in spite of ongoing federal and state eradication campaigns; also concluding that marijuana is the largest cash crop in the United States).

easily obtain advice on how to grow the drug at bookstores and via various websites.[165]

This lack of barriers implies that if the federal government shuts down one large marijuana supplier, another one could easily take its place. Shut down all of the large growers, and smaller operators could step in to satisfy demand. Shut them all down—an expensive and extremely unlikely endeavor—and many marijuana users would simply grow the stuff themselves. To be sure, campaigns against large suppliers could dent the supply of marijuana and perhaps its use in the short-run. However, as long as demand for the drug remains high,[166] federal eradication campaigns may simply push marijuana production into smaller operations that are harder to detect, more costly to prosecute given their sheer numbers, and subject to lower sanctions under the CSA.[167] Simply put, without a substantial increase in federal law enforcement resources, the campaign against marijuana growers would likely be futile. Moreover, such a campaign may have an unintended and deleterious consequence: to the extent users turn to smaller (and more numerous) suppliers or simply grow the drug themselves, the federal campaign would frustrate state efforts to supervise the supply of marijuana.[168]

Apart from dramatically increasing the federal law enforcement budget, Congress has few options for giving the CSA some bite. It could, in theory, empower private citizens to enforce the ban similar to how private plaintiffs enforce Title VII bans on employment discrimination, but such a proposal seems unlikely to succeed.[169] Likewise, states probably have enough law enforcement

165. A search on Amazon.com, for example, turned up a litany of titles like MARIJUANA HORTICULTURE: THE INDOOR/OUTDOOR MEDICAL GROWER'S BIBLE and GROW GREAT MARIJUANA: AN UNCOMPLICATED GUIDE TO GROWING THE WORLD'S FINEST CANNABIS. Sheesh!

166. *See* UNITED STATES DEP'T OF JUST., NATIONAL DRUG THREAT ASSESSMENT 2009 18–19 (2008), *available at* http://www.usdoj.gov/ndic/pubs31/31379/31379p.pdf (suggesting high-profit margins for the drug have triggered large increases in indoor-marijuana production in the United States).

167. In a similar vein, federal drug authorities have warned that campaigns to eradicate marijuana grown outdoors may have simply pushed marijuana production indoors where it is harder to detect. *Id.*

168. As I discuss in *Commandeering States' Secrets*, *supra* note 97, such supervision is needed to prevent diversion of marijuana to recreational uses and to protect the health of legitimate medical users.

169. Title VII creates a private cause of action against employers who discriminate, thereby lessening the need for federal agencies to enforce the law. Creating a private cause of action (criminal or civil) against persons who grow (or use) marijuana, however, may not work nearly as effectively (assuming Congress could pass such a measure in the first place). To begin, citizens may not have a strong enough incentive to sue drug users/suppliers (it's considered a victimless crime), though offering them a share of any forfeited property could serve as an inducement. In any event, even assuming they are motivated to act, private citizens don't necessarily have the

resources to deter medical marijuana—they already handle one-hundred times as many marijuana cases as the federal government—but state law enforcement agents are under no obligation to help Congress enforce its laws. Just as Congress may not commandeer state legislatures to ban medical marijuana, it may not compel state officers to help Congress enforce its own ban either.[170] Hence, deterring the use or supply of marijuana, even in just thirteen states, through legal sanctions would require a dramatic increase in the federal criminal caseload and a corresponding increase in federal law enforcement staffing levels. This is a highly unlikely scenario.

B. Beyond Legal Sanctions—Why People Obey Law

At this point, a neoclassical economist would probably surmise that the federal ban does not significantly reduce the use or supply of marijuana because the expected legal sanctions for disobeying the ban are, for many people, outweighed by the expected benefits of disobedience. Contrary to this prediction, however, people often do obey the law, even when they do not expect to be punished by the government for non-compliance—i.e., even when they lack strong *legal* incentives to obey. This paradox suggests that law can affect behavior without granting formal legal rewards or imposing formal legal sanctions. Of course, these incentives help, but lawmakers do not necessarily *need* them to secure compliance with their edicts. The realization that people obey laws even when they do not face high expected legal sanctions suggests that the categorical congressional ban on marijuana could curb marijuana use even if it is seldom enforced; in other words, the states' de facto power may depend on more than just the federal government's enforcement resources.

In this Section, I consider three means, apart from imposing legal sanctions, by which lawmakers can curtail proscribed behaviors: re-shaping internal preferences, invoking moral obligations, and publicizing social norms. To the extent Congress is able to wield these behavior-shaping forces, it may have more de facto power than the previous Section would suggest. Conversely, to the extent *the states* are able to wield these forces and thereby foster—or at least enable—behavior that contravenes federal bans, they may have even more de facto power than a narrow focus on law enforcement resources alone would suggest.

information necessary to take action (unlike direct victims of employment discrimination)—many people who use/grow marijuana do so in private.

170. *See* Printz v. United States, 521 U.S. 898, 935 (1997).

1. Internal Preferences

Some people refrain from proscribed behavior not because they fear being punished, but because they simply do not want to engage in it. Marijuana use is an obvious example. Some people may refrain from using marijuana because they deem it ineffectual, dangerous, or depraved. Though they have not actually been deterred by legal sanctions, these people act as though they had.

Though it is commonly assumed that our preferences to engage in or refrain from a given behavior are exogenous to law, lawmakers arguably can change people's views of a given behavior, and thus their inclination to engage in that behavior.[171] One way lawmakers can do this is by passing laws that ban and therefore condemn the behavior. The theory is that the behavior—like the use of marijuana—will seem more dangerous or depraved if the law formally condemns it. A second way lawmakers can shape preferences is by "educating" (or more pejoratively, indoctrinating) the public. The federal government has, in fact, employed this strategy in its war on marijuana. Since 1998, the Office of National Drug Control Policy ("ONDCP") has spent more than $1.5 billion on an aggressive ad campaign designed to discourage marijuana use—medical or otherwise—particularly among youth, largely by portraying the drug as dangerous, wicked, and uncool.[172] To the extent lawmakers can shape preferences and redefine self-interest, they can diminish citizens' desire to engage in prohibited activity without having to impose costly legal sanctions.[173]

The federal government's campaign against marijuana, however, appears not to have altered public perceptions of marijuana use. Studies have shown that the anti-marijuana campaign has not reduced the likelihood of marijuana use, nor has it changed public attitudes toward the drug.[174] People do, of course, refrain from using

171. *See* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 1–3 (1990); *see also* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 944–50 (1995) (suggesting governments do/may influence public opinion).

172. GOVERNMENT ACCOUNTABILITY OFFICE, ONDCP MEDIA CAMPAIGN: CONTRACTOR'S NATIONAL EVALUATION DID NOT FIND THAT THE YOUTH ANTI-DRUG MEDIA CAMPAIGN WAS EFFECTIVE IN REDUCING YOUTH DRUG USE 10 (2006), http://www.gao.gov/new.items/d06818.pdf.

173. *Cf.* TOM TYLER, WHY PEOPLE OBEY THE LAW 64 (1990) ("The most important normative influence on compliance with the law is the person's assessment that following the law accords with his or her sense of right and wrong.").

174. ONDCP MEDIA CAMPAIGN, *supra* note 172 (finding "exposure to the [anti-marijuana] advertisements [from 2002–2004] generally did not lead youth to disapprove of using drugs and may have promoted perceptions among exposed youth that others' drug use was normal" and "exposure to the campaign did not prevent initiation of marijuana use and had no effect on curtailing current users' marijuana use"). Results of other studies have been mixed. Some

marijuana because they believe it is ineffectual, dangerous, or wicked, but those beliefs appear not to have been changed or reinforced by the ONDCP's aggressive anti-marijuana campaigns.

The reason the federal government's campaign is not shaping preferences may be that citizens simply do not trust the messenger. Not surprisingly, the persuasiveness of any campaign may depend as much on its source as on its content. Imagine, for example, Cheech Marin trying to convince students not to use drugs, or one-time General Motors' Hummer division trying to convince Americans that global warming is a hoax. The government's ability to shape citizens' preferences hinges in large part on lawmakers' credibility and trustworthiness.[175] And as a general matter, the public does not trust federal authorities very much, particularly compared to their state counterparts.[176] When it comes to drug policy in particular, the public seems to harbor doubts about the motive behind certain federal drug policies. One common concern is that the federal marijuana ban is not premised on science but is instead motivated by the financial interests of large drug manufacturers, which could lose billions in drug sales if an ordinary plant were to displace some of their patented medicines, or so the story goes.[177] Whether such beliefs are correct is beside the point; what matters is simply that as long as the federal government

studies suggest government campaigns backfire. *E.g.,* Maria Czyzewsk & Harvey J. Ginsburg, *Explicit and Implicit Effects of Anti-marijuana and Anti-tobacco TV Advertisements*, 32 ADDICTIVE BEH. 114, 122 (2006) (finding that "a sample of anti-marijuana public statement announcements used in national anti-drug campaign in the U.S. produced immediate effects opposite to intended by creators of this campaign on the youth's attitudes to marijuana"). Other studies suggest the campaigns do, in fact, reduce marijuana use, at least when combined with other anti-drug programs. *E.g.,* Douglas Longshore, et al., *National Youth Anti-Drug Media Campaign and School-Based Drug Prevention: Evidence for a Synergistic Effect in ALERT Plus*, 31 ADDICTIVE BEH. 496, 498 (2006) (finding that exposure to national anti-marijuana campaign *and* school-based drug curriculum significantly reduced past-month use of marijuana).

175. *See* Dau-Schmidt, *supra* note 171, at 17–18 ("The first requirement is that the person or group of people who are endeavoring to affect another's preferences have some legitimate claim to authority over the person, or at least have the confidence of the person. An untrusting and defiant person is probably a poor candidate for preference modification."); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 952 (1996) ("Purely governmental efforts at norm management may fail for lack of trust."); *id*. at 919 ("[A] serious problem with legal efforts to inculcate social norms is that the source of the effort may be disqualifying. Such efforts may be futile or even counterproductive. If Nancy Reagan tells teenagers to "just say no" to drugs, many teenagers may think that it is very good to say 'yes.' ").

176. *See, e.g.*, John Kincaid & Richard L. Cole, *Public Opinion on Issues of Federalism in 2007: A Bush Plus?*, 38 PUBLIUS: J. OF FEDERALISM 469, 477 (2008) (reporting survey data showing that more than forty-four percent of citizens had "Not very much" or "None at all" trust in the federal government).

177. *Cf.* GRINSPOON & BAKALAR, *supra* note 14, at 156 (claiming marijuana will never be rescheduled by the federal government because no company would profit from it).

suffers a trust deficit, it will have a difficult time nudging people's beliefs in the direction federal lawmakers deem desirable.

State lawmakers, by contrast, arguably have more influence over public beliefs and preferences. Owing to a variety of factors, citizens on average deem state and local governments far more trustworthy than the national government.[178] Consequently, state lawmakers may have an advantage *vis-á-vis* their federal counterparts when it comes to manipulating citizens' views of marijuana use or other behaviors. By legalizing medical use of marijuana, for example, state laws may have softened public attitudes towards it. The use of marijuana may seem more efficacious and less dangerous or wicked because it is permitted by state law. In addition, though states have not waged a public relations campaign to match that of the ONDCP, proponents of medical marijuana laws have run effective political campaigns in getting such laws passed. Those campaigns have generally portrayed medical marijuana in a very sympathetic light; they have portrayed exemptions as rooted in compassion and hope for the sick, rather than being about dangerous and reckless indulgences for the wicked.[179]

Federal drug authorities clearly appear troubled by the signal they believe is being sent by state medical marijuana laws and the political campaigns behind them. Indeed, their opposition to state medical marijuana laws stems in large part from the widely-shared view that these state laws are, in fact, changing people's beliefs about the dangers of marijuana use in particular, and perhaps drug use more generally. General Barry McCaffrey, the former federal drug czar, succinctly made the point to Congress: "Referenda that tell our children that marijuana is a 'medicine' send them the wrong signal about the dangers of illegal drugs—increasing the likelihood that more children will turn to drugs."[180]

178. Mikos, *Populist Safeguards*, *supra* note 145, at 1699–1704.

179. *DEA Regulation of Medicine: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Jud. Comm.*, 105th Cong. (2007) (testimony of Dr. David Murray, Chief Scientist, Office of National Drug Control Policy), *available at* 2007 WL 2009613 (describing and critiquing the message being sent by proponents of medical marijuana laws).

180. *Medical Marijuana Referenda in America*, *supra* note 56; *see also "Medical" Marijuana, Federal Drug Law and the Constitution's Supremacy Clause*, *supra* note 73, at 1–2 ("[State initiatives that legalized marijuana for medical purposes] sent even more confusing and contradictory messages to our already confused children at a time when their attitudes about marijuana use may be open to bad influences and they may lead to even harder drugs") (statement of Rep. Mark Souder); *id.* at 44 ("[State laws] soften[] the idea of the use of drugs . . . young people hear that and what they hear is that if it's a medicine it's not so bad. And then they begin to use more.") (statement of Mel Semblar, former Chairman of the Drug Free America Foundation); Brief of U.S. Reps. Mark E. Souder, et al., for Petitioners, at 28, Gonzales v. Raich, 545 U.S. 1 (2005) ("Repeated claims of marijuana's 'medicinal' value, coupled with the apparent

2. Moral Obligation to Obey Law

Some people refrain from behavior because they feel morally obliged to obey a legal prohibition. In this sense, people are prone to obey law not because they think it is in their self-interest (narrowly defined) to do so, but because it is the *right*, the *moral* thing to do; it is what people *should* do, even when they disagree with the law.[181] In his seminal work on obedience to law, Tom Tyler found that "[c]itizens who view legal authority as legitimate are generally more likely to comply with the law."[182] Tyler explains that "citizens may comply with the law because they view the legal authority they are dealing with as having a legitimate right to dictate their behavior; this represents an acceptance by people of the need to bring their behavior into line with the dictates of an external authority."[183]

In theory, a lawmaker can draw upon its legitimacy to goad compliance with laws the people (or some portion thereof) deem foolish or unwise.[184] To the extent Congress can oblige people into following its marijuana ban, it may have more practical (de facto) authority than the story sketched out in the previous Sections suggests, for it would not need to hire more federal agents, build more federal prisons, or buy more television ads to curb marijuana use. Indeed, as noted earlier, some scholars have dismissed state medical marijuana laws as ineffectual and largely symbolic measures because they believe most people are unwilling, on moral grounds, to defy Congress's ban.[185]

Nonetheless, in spite of the generalized obligation to obey law that many people feel, the obligation to obey the federal marijuana

ratification of those claims by state medical marijuana laws, have lowered the public perception of marijuana's scientifically demonstrated harmfulness—particularly among young people. . . . These public perceptions can have a significant impact on marijuana usage rates.").

181. TYLER, *supra* note 173, at 24 ("The key feature of normative factors that differentiates them from considerations of reward and punishment is that the citizen voluntarily complies with rules rather than respond to the external situation. Because of this, normative influences are often referred to by psychologists as 'internalized obligations,' that is, obligations for which the citizen has taken personal responsibility.").

Compliance with loosely enforced tax laws provides a stunning example. *See, e.g.,* Leandra Lederman, *The Interplay between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L. J. 1453, 1459 (2003) (noting that "the expected sanction of any particular tax evader is tiny, yet voluntary compliance with the federal income tax generally is estimated to be around eighty-three percent").

182. TYLER, *supra* note 173, at 62.

183. *Id.* at 25.

184. *Id.* at 65 ("People clearly have a strong predisposition toward following the law. If authorities can tap into such feels, their decisions will be more widely followed.").

185. *See, e.g.*, Klein, *supra* note 5, at 1544 (suggesting people won't use marijuana for medical purposes, in part, because of the moral duty to obey law).

ban is probably quite weak, for two main reasons. First, violations of the ban are commonplace, thus undermining its moral influence. When everyone knows a law is not being observed, the moral obligation to obey that law dissolves and compliance suffers.[186] As Dan Kahan explains:

> Most individuals regard compliance with law to be morally appropriate. But most also loathe being taken advantage of. The latter sensibility can easily subvert the former if individuals perceive that those around them are routinely violating a particular law. When others refuse to reciprocate, submission to a burdensome legal duty is likely to feel more servile than moral.[187]

Congress's ban may have lost its moral influence because so many people flout it, and federal authorities have done little thus far to punish them. In other words, the lack of enforcement of the federal ban may have undermined not only the deterrent effect of the ban's sanctions, but also the deterrent effect of the generalized moral obligation to obey the law.

Second, people may feel relieved of the obligation to obey the federal ban because state law permits marijuana use.[188] It is, of course, possible to obey both state and federal law by not using marijuana at all, but citizens may dismiss the obligation to obey federal law when they deem the state—and not Congress—as having the "legitimate right to dictate their behavior" regarding marijuana use.[189] Congress's perceived right to dictate behavior may be even weaker in the nine states where medical marijuana laws were passed by voter referenda. In such states, people may see themselves collectively as having the exclusive right to dictate marijuana policy, in which case the federal ban will command very little moral authority.[190]

186. *See* Lederman, *supra* note 181, at 1461 (reviewing research showing that "people tend to contribute to public goods *when they perceive that others contribute*, even though they would maximize their own return by not contributing") (emphasis added).

187. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 358 (1997) [hereinafter Kahan, *Social Influence*]; *see also* Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 334 (2001) ("Individuals who have faith in the willingness of others to contribute their fair share will voluntarily respond in kind.").

188. Despite the importance of the issue, there is little research directly on point. Tom Tyler acknowledges that "[i]t is . . . unclear what the boundaries of legitimacy are. To which authorities and to which of their actions is it granted?" TYLER, *supra* note 173, at 66. Cass Sunstein briefly suggests that states may be best suited to change social norms because they are "closest to the people, and in that sense most responsive to it." *Supra* note 175, at 952.

189. *See* Mikos, *Populist Safeguards*, *supra* note 145, at 1711–12 (discussing citizens' federalism beliefs across various issue domains).

190. Surveys show that people consistently deem voter referenda more legitimate than laws passed by their representatives (state or federal). *See id.* at 1708–11 (discussing literature). Anecdotal evidence further suggests that citizens are particularly disdainful of legislative efforts to repeal, amend, or otherwise tamper with measures enacted by voter referenda. *Id.* (discussing

3. Social Norms (and Sanctions)

One final reason why people obey law has to do with social norms. Social norms are non-legal rules and precepts (e.g., "don't cheat on your spouse") that define what constitutes appropriate behavior and beliefs within a given community—a nation, state, city, neighborhood, workplace, church, and so on. Such norms are backed by a variety of non-legal sanctions (e.g., shame), giving these norms a powerful influence over behavior that may rival that of law itself.[191] Like law, and in contrast to personal beliefs or the internalized moral obligation to obey law, social norms exert *external* pressure on individuals to conform. Unlike law, however, that external pressure is applied by civil society rather than the government.

To the extent lawmakers can rely upon norms to discourage behavior they deem undesirable, norms greatly reduce the need to impose separate, costly legal sanctions.[192] On one view of the legislative process, lawmakers can shape social norms by manipulating whether society condemns or condones a given behavior, similarly to the way they can shape personal beliefs about that behavior.[193] Norms, of course, put added pressure on group members to behave a particular way (in addition to the pressure exerted by their own personal preferences). Indeed, because of this pressure to conform, norms may influence the behavior even of those outlier members who remain unconvinced by the government's message (i.e., members whose personal beliefs do not comport with the norm). Because the means by which lawmakers shape norms are largely the

Oregon voters' opposition to federal and state legislative efforts to repeal state's Death with Dignity initiative).

191. Richard McAdams discusses the conditions under which norms actually trigger sanctions. He suggests there must be consensus as to whether some behavior is worthy of esteem, that any such consensus must be widely known, and that violations of the consensus (i.e., the norm) must be detectable. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 358 (1997). For purposes of this article, I assume that use of marijuana for medical purposes is detectable. This seems plausible, for 1) patients need their doctors' recommendation to use the drug; and 2) oftentimes, patients have caregivers (relatives or others) who directly witness use of the drug. It is possible, of course, that detection of the medical use of marijuana is low, such that social norms would not significantly impact marijuana use.

192. *See, e.g.*, Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1601 (2000); Kahan, *Social Influence*, *supra* note 187, at 351; Sunstein, *supra* note 175, at 908.

193. Norms scholars often refer to this as managing the social meaning of behavior. For a sampling of the literature suggesting law can change (alter, shape, and so on) the *content* of norms, see, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); TYLER, *supra* note 173; Cooter, *supra* note 192; Kahan, *Social Influence, supra* note 187; Lessig, *supra* note 171; McAdams, *supra* note 191; Sunstein, *supra* note 175.

same as those by which they shape personal beliefs,[194] there is no need to discuss them again here. Suffice to say, states again have the upper hand in this regard. Just as they may be at an advantage when they seek to manipulate personal beliefs due to their greater trustworthiness, the states may be at an advantage *vis-à-vis* Congress when manipulating social norms as well.

On another view of the legislative process, norms are entrenched; lawmakers must take norms as they find them, meaning they cannot necessarily control whether society condemns or condones any given behavior. This, in effect, makes norms a double-edged sword.[195] Nonetheless, even if they cannot necessarily change the content of norms, lawmakers can augment or diminish the influence of a norm on behavior by educating citizens about the content and potency of that norm.

The passage of a new law may help reduce citizens' uncertainty about norms, particularly when they are in flux. The basic idea is that citizens demand laws that comport with community norms, and lawmakers, subject to constraints such as majority rule, respond by supplying such laws. Hence, the passage of a law banning marijuana use suggests the existence of a similar social norm condemning marijuana use—i.e., it educates citizens about the content and potency of community norms concerning marijuana.

In turn, clarifying the content and potency of norms—particularly new or evolving norms—can change people's behavior. To illustrate, suppose X is considering smoking marijuana to treat his glaucoma but is uncertain whether society now condemns use of marijuana for such purposes. As Robert Scott explains in a different example, the passage of a law regulating marijuana use provides X Bayesian information concerning what his fellow citizens now think about it.[196] The law thus helps X more accurately determine the

194. *See supra* Section B.1.

195. *See, e.g.*, Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1627–29 (2000) (criticizing the view the lawmakers actually spur creation of new norms). Scott aptly states the two contrasting views of the relationship between law and norms:

> On one view, a norm already exists and the law simply reflects the emerging norm. On the other view, the conditions for normative change are ripe, and the law stimulates the creation of the new norm. Which came first, the chicken or the egg? Without further, more rigorous analyses, the verdict on the expressive effects of law must remain unproven. The ideas are interesting, the question is important, but, thus far, the observations are largely speculative.

Id.

196. *See id.* at 1614–16 (suggesting law provides information about norms' content); *see also* McAdams, *supra* note 191, at 400–07 (arguing that law publicizes social consensus and thereby helps to create norms).

expected social sanction, if any, for using marijuana.[197] For example, the passage of a law proscribing marijuana signals society's disapproval of it. It informs X that he should expect to incur a cost apart from legal sanctions for smoking marijuana. On account of this cost, X might refrain from using marijuana, despite the absence of formal legal sanctions and even though X feels he might benefit from marijuana use.

In the case of marijuana, of course, state and federal laws send conflicting signals about the social acceptability of using the drug as medicine. The CSA strongly suggests societal disapproval, but permissive state laws suggest societal tolerance—and possibly even approval—of medical use of the drug. If citizens take their cues from federal law, Congress may have far more de facto impact on marijuana use than previous Sections have suggested. Conversely, if citizens take their cues from state law, Congress's influence in this domain is even weaker than previously noted.

When it comes to educating citizens about norms, state laws generally give citizens more current and relevant information, and as a result are more likely to shape their choices than are federal laws. For one thing, state laws typically convey more up-to-date information about *current* social norms. The main reason is that states employ comparatively majoritarian-friendly lawmaking processes, such as referenda, that make updating state laws to keep up with changes in societal views much easier.[198] To be sure, passage of a congressional law regulating activity X signals something about how the nation feels about X when the law is passed. Indeed, because it takes super-majority support to push any measure through Congress, laws that do emerge from the national process usually signal a strong national consensus and norm. But because federal laws are so resistant to change, the signal broadcast by the passage of federal law fades quickly with time.

The CSA illustrates the point. The federal ban on medical use of marijuana was adopted nearly forty years ago, when Congress placed marijuana on Schedule I of the CSA. Whatever society's views were circa 1970, they have since changed: the strict marijuana ban is out of sync with current social norms. Society no longer condemns the use of marijuana for medical purposes (assuming it ever did). On the contrary, opinion polls consistently show more than seventy percent of

197. Scott, *supra* note 195, at 1616–17. As Scott notes, law also educates citizens about the cost of *sanctioning* a behavior. *Id.* at 1618.

198. *See* Mikos, *Populist Safeguards*, *supra* note 145, at 1687–91 (comparing responsiveness of state and federal lawmaking procedures).

the American public now approves of the medical use of marijuana for medical conditions.[199] But given the enormous challenge of changing any congressional law,[200] the resilience of the now seemingly passé federal ban is hardly surprising. It would take an even more dramatic shift in public opinion to formally undo it.

By contrast, state medical marijuana laws have all been enacted more recently than the federal ban, starting with California in 1996 and continuing through Michigan in 2008. These state laws have been supported by large and growing majorities. Support for the most recently enacted measure—Michigan's Proposition 1—topped 63%. The passage of thirteen state laws, many by wide margins, signals that society is more likely to support than to censure medical use of marijuana. Thus, there is no social sanction for using marijuana for medical purposes, or at least no consensus to condemn such behavior, in these states.

In addition to being more current, state laws also convey more accurate information about *local* norms. This is important because norms held by local society exert far more influence on one's behavior than do norms held by distant strangers.[201] After all, we interact more—and care more about our standing—with neighbors, co-workers, close family, and fellow worshipers than we do with people who live far away. Thus, for example, the passage of California's Compassionate Use Act in 1996 may have signaled the emergence of a new, more permissive norm governing the medical use of marijuana in that state. This event may have been enough to foster use of the drug in California, even if drug norms elsewhere had not yet changed.

In short, even if they cannot shield people from federal legal sanctions or change federal law in the short term, states *can* make people feel secure from social sanctions by credibly signaling public approval of once taboo conduct.[202] In this way, states wield another powerful influence on private behavior, an influence that is not necessarily subject to congressional preemption.[203] What is more, by

199. *See supra* note 144 and accompanying text.

200. *See generally* Mikos, *Populist Safeguards*, *supra* note 145 (analyzing obstacles to passage of congressional statutes).

201. *See* McAdams, *supra* note 191, at 387–88 (explaining why group norms have stronger influence compared to larger societal norms).

202. In addition to broadcasting a more current and relevant signal concerning societal approval/disapproval of medical use of marijuana, state laws arguably broadcast a *clearer* signal as well. The reason is that state laws are more focused than the CSA; they address only the medical use of marijuana, whereas the CSA addresses a host of topics, meaning the signal it broadcasts on any one of them (e.g., should medical marijuana be legal) will be quite noisy.

203. In the lingo of the norms literature, states can play the role of norm critics or norm entrepreneurs, facilitating changes to social norms; this role may be particularly important when

signaling societal approval of marijuana use, states may even hamstring Congress's already limited ability to impose legal sanctions on those who violate the federal ban. For example, jurors may be unwilling to convict people who use marijuana for medical purposes (or the people who help them) if they know that local society generally approves of medical marijuana.[204] In fact, in order to avoid sympathetic juries, the DEA has been attacking medical marijuana suppliers primarily by using civil injunctions and civil sanctions such as forfeiture,[205] which are tactics that do not require jury participation.

* * *

Given the federal government's limited enforcement resources and its comparatively weak influence over personal preferences, moral obligations, and social norms, many citizens are not dissuaded from using marijuana by the existence of the federal ban. States have succeeded at removing—or at least diminishing—the biggest obstacles curbing medical use of marijuana: state legal sanctions and the personal, moral, and social disapproval that may once have inhibited use of the drug. To be sure, they cannot eliminate all of the barriers to medical use—those that exist in the state of nature (e.g., wealth constraints) or those posed by federal sanctions—but they have gone quite far, as participation rates in state programs demonstrate: roughly 400,000 people may now be using marijuana legally for medical purposes in thirteen states.[206] In short, though Congress's categorical ban on marijuana is constitutional, state exemptions have become the de facto governing law of the land.

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criticizing extant norms is costly. McAdams, *supra* note 191, at 396 (discussing norm critics and how they often incur a cost when challenging conventional wisdom); Sunstein, *supra* note 175, at 929–30 (discussing role of norm entrepreneurs).

204. Indeed, jurors in the federal prosecution of Ed Rosenthal (the so-called ganja guru) claimed they would have acquitted him of marijuana charges had they known he was growing marijuana for medicinal purposes. The problem, of course, is that jurors may not know they are entitled to acquit the guilty, and courts may bar attorneys and witnesses from informing jurors of the nullification power. United States v. Rosenthal, 454 F.3d 943, 946 (9th Cir. 2006) (noting that trial court correctly excluded evidence of medical marijuana defense that could be used only to secure jury nullification).

205. *See* Klein, *supra* note 5, at 1564 n.117.

206. *See supra* note 153 (explaining estimate). The number of lawful medical users has jumped over time, not only because more states have added exemptions but also because in-state participation rates have climbed. In Oregon, for example, the number of registered users has skyrocketed since the state's medical marijuana program was enacted in 1998; in 2002, for example, only 1,691 people had registered for an exemption, but by 2008, more than 20,000 people were registered to use marijuana legally. *See* GENERAL ACCOUNTING OFFICE, MARIJUANA: EARLY EXPERIENCES WITH FOUR STATES' LAWS THAT ALLOW USE FOR MEDICAL PURPOSES 28–29 (2002) (historical data); OREGON MEDICAL MARIJUANA PROGRAM, *supra* note 153 (current data).

V. CONCLUSION

Medical marijuana is but one example of a much broader phenomenon: situations in which states legalize private activity that Congress proscribes. Over the past few decades, the federal government has sought to ban a number of activities states have legalized, including use of marijuana for medical purposes, certain abortion procedures, physician-assisted suicide, needle exchange programs, and possession of certain types of firearms, to name a few.[207] In spite of its distinct character and prevalence, however, this category of state/federal conflict—pitting permissive state laws against restrictive federal ones—has largely escaped the attention of legal scholars.

Using medical marijuana as a timely case study, this Article is the first to analyze the legal status and practical significance of the permissive state laws that form the heart of this distinct category of conflict. To analyze the states' de jure authority, this Article develops a new analytical framework for distinguishing between permissible preemption and unconstitutional commandeering—the state-of-nature benchmark. The state-of-nature benchmark explains why state laws legalizing behavior Congress bans remain in force, even as state laws banning behavior Congress legalizes do not. In the latter case, state laws are preempted, barring contrary congressional intent, because the threat of state sanctions would discourage the behavior Congress has sought to foster or at least tolerate. The imposition of legal sanctions constitutes a departure from the state of nature and thus an action Congress may block. In the former case, however, state laws survive because removing state sanctions does not encourage the behavior Congress has sought to eliminate, at least in the *legally relevant sense*—as measured against the behavior's prevalence in the state of nature. The repeal of legal sanctions merely restores the state of nature; the fact that it results in more violations of federal law does not thereby make state permissiveness preemptable.

The state-of-nature benchmark introduced here provides a useful heuristic for assessing whether Congress may preempt any given state law. Consider, for example, recent proposals made by a few states to legalize sports gambling.[208] The Professional and Amateur Sports Protection Act of 1992 purports to preempt such proposals by

207. There is, in fact, a long history of this type of conflict (think of the personal liberty laws passed by northern states before the Civil War). *See supra* note 107.

208. *See, e.g.,* Letter from Sens. Orrin G. Hatch & Jon Kyl to Att'y Gen. Eric Holder (July 20, 2009), *available at* http://www.imega.org/wp-content/uploads/2009/07hatch-kyl_letter2holder.pdf (decrying proposals to permit sports gambling in Delaware and New Jersey).

making it unlawful for states to "sponsor, operate, advertise, promote, license, or authorize by law" sports gambling schemes not in existence prior to the Act.[209] Much of the Act's language is unproblematic. Operating a sports gambling scheme,[210] for example, constitutes a clear departure from the state of nature and is thus subject to congressional override. However, to the extent the Act seeks to preempt state laws that merely *authorize* sports gambling,[211] it raises serious constitutional questions. This language would seemingly bar states from repealing existing prohibitions on sports gambling[212]—i.e., it would force them to remain outside the state of nature, in violation of the anti-commandeering rule.

The Article also explains why permissive state laws *matter*—i.e., why states are able to foster or at least enable federally proscribed behavior, even when they cannot engage in, require, or facilitate it or block federal authorities from imposing their own harsh sanctions on it—i.e., even when states cannot depart from the state of nature. The federal government does not have the law enforcement resources needed to enforce its bans vigorously (although this could vary somewhat by context[213]), and its ability to marshal the most important private and social behavioral influences to enhance compliance with its bans is likewise limited. As a practical matter, by simply legalizing a given behavior, the states can remove or at least diminish the most significant barriers inhibiting that behavior, including state legal sanctions (which often can be enforced vigorously) and the personal, moral, and social disapproval of the behavior as well.

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209. 28 U.S.C. § 3702 (2008).

210. The Delaware statute contemplates a *state-operated* sports lottery. 29 DEL. CODE ANN. § 4825 (2009) (instructing Director of State Lottery Office to "commence a sports lottery as soon as practicable"). The Third Circuit has found the Delaware statute preempted by federal law. Office of the Comm'r of Baseball v. Markell, ___ F.3d ___ (3rd Cir. 2009).

211. In contrast to the Delaware statute, the New Jersey proposal authorizes *private* casinos to operate sports pools—i.e., it does not contemplate state operation of a sports gambling scheme. N.J. Senate Bill No. 143 (2009), *available at* http://www.njleg.state.nj.us/2008/Bills/S0500/143_I1.PDF. To be sure, private casinos are licensed by the state, but that alone does not make them state actors. *E.g.*, Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 189 (3rd Cir. 2000).

212. The Delaware and New Jersey Constitutions ban, inter alia, sports-related gambling. DEL. CONST. ART. II, § 17; N.J. CONST. ART. IV § 7.

213. Enforcing a (hypothetical) federal ban on physician-assisted suicide, for example, would not require the same resource commitment from Congress as would enforcing the marijuana ban: Only 341 residents have sought a physician's assistance to commit suicide *since the inception* of Oregon's physician-assisted suicide program in 1997, a far cry from the 20,307 patients *now* participating in Oregon's medical marijuana program. William Yardley, *On Washington's State Ballot: Doctor Assisted Suicide*, N.Y. TIMES, Oct. 30, 2008, at A12 (reporting data on Oregon physician-assisted suicide program); OREGON MEDICAL MARIJUANA PROGRAM, *supra* note 153 (reporting data on Oregon medical marijuana program).

Though Congress has banned marijuana outright through legislation that has survived constitutional scrutiny, state laws legalizing medical use of marijuana not only remain in effect, they now constitute the de facto governing law in thirteen states. These state laws and most related regulations have not been—and, more interestingly, *cannot be*—preempted by Congress, given constraints imposed on Congress's preemption power by the anti-commandeering rule, properly understood. Just as importantly, these state laws *matter*; state legalization of medical marijuana has not only eliminated the most relevant legal barrier to using the drug, it has arguably fostered more tolerant personal and social attitudes toward the drug. In sum, medical marijuana use has survived and indeed thrived in the shadow of the federal ban. The war over medical marijuana may be largely over, though skirmishes will undoubtedly continue, but contrary to conventional wisdom, it is the states, and not the federal government, that have emerged the victors in this struggle. Supremacy, in short, has its limits.