Does Federal Law Preempt State Marijuana Law?

Analyzing the "Conflict"

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This article considers whether federal law preempts state marijuana legalization laws.

In 1996, California effected a sea change in American jurisprudence when its voters approved the Compassionate Use Act,[1] the first state-backed, fully implemented, comprehensive medical marijuana program[2] in the United States. Since then, 31 other states as well as Washington, D.C., Guam, and Puerto Rico have followed suit, adopting comprehensive medical marijuana programs of their own.[3] In 2012, Colorado and Washington upped the ante by legalizing recreational marijuana for use by all adults, with seven states since following their lead.[4] Yet, even as the tide of marijuana legalization continues almost unabated, numerous political actors, including President Obama—a former constitutional law professor—and his administration,[5] eight former Drug Enforcement Agency (DEA) administrators,[6] and states such as Nebraska, Oklahoma,[7] and Arizona,[8] continue to pose the question: Don't the U.S. Constitution and federal law preempt state marijuana legalization laws?

The answer appears simple enough. Marijuana is, without exception, illegal according to the federal Controlled Substances Act (CSA), under which it is categorized as a Schedule I narcotic.[9] The states, for their part, have legalized marijuana to different extents, by either exempting individuals who possess, cultivate, distribute, and use it from state criminal and civil sanctions;[10] or by providing those individuals with an affirmative defense to any charges.[11] Further, states profit from marijuana via taxing licenses, registration cards, and sales.[12] With such flagrant state actions flying in the face of federal law, it seems apparent that a conflict exists and this is the end of the analysis, because federal law must always preempt conflicting state law.[13] However, federal supremacy law is not so simple.

To answer the question, this article examines federal preemption, including what constitutes a positive conflict; how the anticommandeering doctrine fits in, including application of *Murphy v. National Collegiate Athletic Association*,[14] a recent U.S. Supreme Court decision that appears to have direct implications on state legalization; and the effect of *Gonzales v. Raich*,[15] the Supreme Court's landmark medical marijuana decision.

Federal Preemption

Federal preemption is based on U.S. Const. art. XI, commonly known as the Supremacy Clause, which states "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."[16] To say that Congress's preemptive power is vast would be an understatement, as it is sometimes commonly understood to be nearly absolute.[17] Yet the power of preemption is constrained in meaningful ways, most notably by the fact that, unlike the Commerce Clause, it is not a substantive power.[18]

Preemption issues arise when both Congress and a state pass laws that regulate the same action. Preemption takes one of three forms: express, field, or conflict. Express preemption is the easiest to identify, as it is defined by federal statute as the "unambiguously expressed intent of Congress" to supersede any related state laws on a given subject.[19] If legislative intent does not exist or is unclear, courts may infer preemption, either by finding that the federal government has asserted "field" or "conflict" preemption.

Field preemption occurs when a federal statute is "so pervasive . . . that Congress left no room for the States to supplement it."[20] Conflict preemption requires a less pervasive showing than field preemption, but still requires proof that "'compliance with both federal law and state regulations is a physical impossibility' . . . or [] state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[21] Thus, conflict preemption requires a showing of either a direct or an obstacle conflict. While these definitions seem clear, they are subject to a number of inferences and exceptions. State marijuana legalization, federal marijuana prohibition, and the escalating conflict between the two must be analyzed against this background.

Positive Conflict: A Two-Prong Analysis

Congress created the CSA with a preemption provision, outlining its intent pertaining to the relationship between federal and state laws on the subject of narcotics enforcement. Congress not only excluded express preemption, but also made clear that it had no intent to occupy the field; thus neither express nor field preemption is an issue when determining what standard to apply in evaluating whether the CSA supersedes conflicting state laws.

The CSA states:

> 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.[22]

In hindsight, Congress's foreclosure of field preemption may seem odd, as Congress could have drafted the CSA to expressly preempt state law or to occupy the field, which would have allowed the federal government to undo state legalization schemes. But Congress's decision was likely a pragmatic one, based on the federal government's finite law enforcement resources. Without the assistance of state law enforcement, the CSA would be largely ineffective. In fact, in any given year, state law enforcement officers are responsible for 99% of all marijuana arrests throughout the United States, including those prosecuted by the federal government.[23] It is also

unlikely that Congress envisioned a future with states legalizing marijuana en masse.

Notwithstanding the fact that neither express nor field preemption are applicable to the CSA, preemption can yet be asserted when "a positive conflict" exists between federal and state law "so that the two cannot consistently stand together."[24] Though seemingly self-explanatory, the positive conflict described in the CSA is the subject of extensive Supreme Court precedent and occurs where there is either a direct conflict or an obstacle conflict.

Is There a Direct Conflict?

As stated in *Barnett Bank, N.A. v. Nelson*, a direct conflict occurs when "[c]ompliance with both statutes . . . may be a 'physical impossibility.'"[25] The U.S. Supreme Court has consistently construed the concept of "impossibility" between federal and state laws narrowly, so much so that impossibility will not apply, for example, where a federal statute authorizes the sale of insurance and a state statute forbids the sale of the same insurance.[26] Recently, in *Wyeth v. Levine*, the Court reminded litigants arguing in favor of impossibility of their high burden in proving this "demanding defense." It ruled that impossibility did not apply where a state law required a drug manufacturer to change its warning labels after they had been approved by the Food and Drug Administration, because there was no evidence to suggest that the agency would have revoked the amended warning label.[27] Under the holdings of *Barnett Bank* and *Wyeth*, it appears that any action short of explicitly conflicting commands to act one way and also act the exact opposite way would be enough to meet the impossibility prong. It thus appears that the federal government would have a difficult time meeting its burden in arguing for the existence of a direct conflict between the CSA and state marijuana laws.

Further, millions of Americans presumably comply with state marijuana laws every day because no state marijuana law *commands* an individual to use, cultivate, or distribute marijuana. Rather, these state laws *permit* individuals to undertake action where the federal government has forbidden it; thus state marijuana laws cannot create impossibility per Supreme Court precedent. The fact that individuals in legalized state marijuana programs are simultaneously complying with both state and federal law frustrates the direct conflict prong.

Is There an Obstacle Conflict?

An obstacle conflict occurs when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[28] A minor inconvenience to federal power is not enough to support a claim that an obstacle conflict exists. In fact, obstacle conflict is construed so broadly that the Supreme Court has held that, when a court is reviewing a law to determine if an obstacle exists, it cannot read one provision or rule but must "be informed by examining the federal statute as a whole and identifying its purpose and intended effects."[29] Only when the purpose of the federal statute "cannot otherwise be accomplished" should a court find preemption via obstacle conflict and the "state law must yield to the regulation of Congress."[30]

Therefore, it seems that the federal government would be hard-pressed to argue that any state marijuana legalization laws, recreational or medical, present an obstacle to the accomplishment of either the CSA's general goals or those specific to marijuana. The Supreme Court has ruled that conflicting state laws do not prevent accomplishment of the CSA's objectives, even when the state has exempted the behavior or a medical necessity defense is available.[31] The Supreme Court further stated that where Congress legislates in an area that is not a "uniquely federal interest," such as state police powers of arrest and narcotics enforcement, an obstacle conflict has to be even more "significant" to reach the level required for preemption.[32]

Some may argue that by enacting marijuana legalization laws, states implicitly endorse marijuana use and cause increased marijuana consumption. While these allegations are both true, such conduct does not constitute a positive conflict under Supreme Court precedent.

The Anticommandeering Rule

Considering the federal government's lack of law enforcement resources and Congress's vast preemptive power, it seems reasonable that Congress could preempt all state laws in opposition to the CSA and force the states to either adopt the CSA or enact nearly identical state laws, which would be interpreted consistently with the federal statute.[33] In fact, a prevailing view of Congress's power is that if "Congress can legislate at all in a given area, then it can always preempt state power in that area."[34] Further, current scholarship suggests that Congress has been given vast power to supersede inferior state laws and could likely preempt any state regulation of marijuana, though such an action would likely have far-reaching unintended consequences.[35] So why doesn't Congress "commandeer" state law and shutter nascent state marijuana programs by making them illegal? The answer is, because of the "anticommandeering rule."[36]

The anticommandeering rule is based on the Tenth Amendment[37] and was most fully articulated by the U.S. Supreme Court in *New York v. United States.*[38] There, the Court found unconstitutional a federal statute that ordered the states to either develop their own methods for responsibly disposing of radioactive waste generated within state boundaries or to become financially responsible for the presence of such waste within their borders.[39] In reaching this result, the Court succinctly stated that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[40] The majority further stated that Congress cannot compel the states to "enforce steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever."[41] In the simplest terms, the anticommandeering rule provides a meaningful distinction and reminder that "[s]tates are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government."[42] Even under the more expansive power of the Commerce Clause, Congress was not allowed to require the states to regulate radioactive wastes.[43]

The anticommandeering rule is broad and its application is not solely limited to state governments, as was illustrated in *Printz v. United States.*[44] In *Printz*, the Court found that Congress

had attempted to circumvent its ruling in *New York* by issuing orders directly to state officers instead of to the state as an entity.[45] In finding this action unconstitutional, the majority held that "Congress cannot circumvent [*New York*'s] prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program."[46] Indeed, the Court found this action so repugnant to the Constitution that policymaking concerns and "case-by-case weighing of the burdens or benefits" were unnecessary.[47]

In *Murphy*,[48] the National Collegiate Athletic Association (NCAA) and three major professional sports leagues sued New Jersey (collectively, plaintiffs) after that state passed a bill in 2014 repealing state law provisions that prohibited certain sports wagering.[49] The plaintiffs' cause of action rested on the Professional and Amateur Sports Protection Act (PASPA).[50] Enacted in 1992, PASPA makes it unlawful for states to legalize or facilitate sports wagering, or for individuals to engage in sports wagering if a state allows such activities.[51] PASPA does not make sports gambling itself a federal crime, but allows the Attorney General and professional and amateur sports organizations to bring civil actions to enjoin violations.[52]

Plaintiffs argued that PASPA, in effect, maintained the status quo because sports betting was already illegal and therefore it did not require New Jersey to take any action, and even if the state did act, it would not constitute authorization.[53] New Jersey argued that PASPA violates the anticommandeering principle by preventing states from modifying or repealing laws prohibiting sports gambling, because PASPA requires states to "maintain their existing laws against sports gambling without alteration" and that a state law allowing sports betting "amounts to an authorization."[54] The question of state authorization was heavily contested based on *New York* and *Printz*, as both the NCAA and United States conceded that PASPA would be unconstitutional if New Jersey's interpretation were adopted by the Court.[55]

The Court resoundingly sided with New Jersey, holding that when a "State completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that activity" because "all forms of sports gambling were illegal in the great majority of the States" at the time PASPA was created.[56] Justice Alito, writing for the majority, stated that "[t]he concept of state 'authorization' makes sense only against a backdrop of prohibition" (i.e., states don't authorize everything that is not regulated or prohibited, for example, brushing teeth) and that state authorization applies only where "the activity in question would otherwise be restricted."[57] Due to its interpretation of the state authorization question, the Court found that PASPA "violates the anticommandeering rule" as it "unequivocally dictates what a state legislature may and may not do."[58] Further, the Court declined to adopt interpretations of the anticommandeering doctrine espoused by the NCAA and United States, which could have greatly limited the doctrine's application. Each maintained that while the Constitution denies Congress the ability to "compel a State to enact legislation," it could simply "prohibit[] a State from enacting new laws."[59] However, the Court found this argument "empty" and akin to the proverbial distinction without a difference.[60] The majority struck PASPA in its entirety, holding that it served as an unconstitutional violation of the anticommandeering principle and that no provision was severable from the whole.[61]

Though it remains to be seen how *Murphy* will be interpreted by federal courts in the future, the decision appears to clearly support state marijuana legalization because while describing why authorization logically requires regulation or prohibition, Justice Alito directly and favorably compared New Jersey's law legalizing sports wagering to a Vermont law legalizing recreational marijuana;[62] the Court held that after a state has legalized marijuana, participants who operate within those laws are thereafter acting "pursuant to state law."[63] Second, the majority's argument that authorization occurs where a state "completely or partially repeals old laws banning" formerly-illegal activities is directly analogous to the situation faced by every state that has legalized marijuana, to whatever extent.[64] Third, because states have legalized marijuana by repealing or superseding old laws, and such actions constitute authorization in conflict with a preexisting federal law criminalizing marijuana for private actors, it is difficult to imagine how Congress could craft a regulation to invalidate those authorizations without unconstitutionally directly regulating the legislative actions of the states.[65]

While no legal issue is ever set in stone and federal court decisions are subject to interpretation, it would take mental gymnastics to argue that *Murphy* would allow for federal preemption of state marijuana legalization. Further, both *New York* and *Printz* make it particularly clear that any action by Congress to force the states, either through governmental bodies or individual officers, to adopt or enforce the CSA—and thus render their legalized marijuana programs moot—would fail as an unconstitutional overreach of Congress' preemptory power.

The Elephant in the Room: *Gonzales v. Raich*

By all appearances, *Gonzales v. Raich*[66] should have been the final nail in the coffin for state medical marijuana programs, and it was indeed viewed that way by scholars.[67] Following a raid that led to the seizure or destruction of their marijuana plants by federal Drug Enforcement Agency agents, two California medical marijuana users sued numerous federal agencies, arguing that the CSA was an unconstitutional overreach by Congress and a violation of the Commerce Clause.[68] The individuals argued that that their actions in connection with marijuana were too attenuated to have any effect on interstate commerce because they were growing marijuana for personal medicinal use at a private residence.[69] The Supreme Court disagreed, holding that Congress may regulate purely local activity where such activity would have a "substantial effect on supply and demand in the national market."[70] Even growing small amounts at home for the sole purpose of personal medical use qualifies, because the federal government's "failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[71]

Justice Stevens, writing for the majority, argued that the actions of even one individual growing marijuana at her home could create a

black market and a "high demand" for marijuana in interstate commerce, although the majority noted that Congress never made "particularized findings" regarding such small amounts.[72] To the Court, Congress's legitimate interest in prohibiting all illegal drug production and possession was paramount, even if the "connection to commerce is not self-evident."[73] In the end, the fact that the concept of economics includes "the production, distribution, and consumption of commodities" was enough to link any individual activity to the larger interstate marketplace and halt any questions about the constitutionality of the CSA.[74]

Following *Raich*, the outlook for existing legalized marijuana laws[75] appeared dire, as Justice O'Connor expressed in her dissent, which openly questioned whether the role of states as laboratories of democracy was being extinguished by the Court's application of federal law.[76] Legal scholars agreed and stated that the *Raich* decision would lead to large-scale preemption of state medical marijuana programs.[77] And even assuming that state programs would survive for a time following the decision, their purpose would be frustrated without giving participants the ability to "assert a legal defense to prosecution under federal law."[78]

While Justice O'Connor may have been correct in asserting that the majority's opinion in *Raich* represented an erosion of one of the fundamental aspects of federalism, her pronouncement and the entire decision must be read in the context of the Commerce Clause, which unlike preemption, is a substantive power granted to Congress.[79] Thus, when Justice Stevens reasoned that the "Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail,"[80] he was doing so within the confines of the Commerce Clause and in direct response to the plaintiffs' argument that acting in accordance with California's laws placed their actions "beyond the 'outer limits' of Congress' Commerce Clause authority."[81] Thus, any argument that *Raich* supports preemption of state marijuana legalization laws misconstrues the opinion, which is couched exclusively in terms of the Commerce Clause and Congress's intent to obviate the need for the medical necessity defense. Finally, in concluding his argument on behalf of the majority, Justice Stevens stated, "It is beyond peradventure that federal power over *commerce* is superior to that of the States to provide for the welfare or necessities of their inhabitants."[82] So clearly the question of federal preemption of California's—or any other state's—marijuana legalization laws was not before the Court and was not addressed in *Raich*.[83]

> "Rather than faltering, legalization efforts have flourished, with 20 additional jurisdictions enacting comprehensive medical marijuana programs and 10 enacting recreational marijuana programs since 2005."

Experience has shown that claims of legalized marijuana's downfall via *Raich* were greatly exaggerated. Rather than faltering, legalization efforts have flourished, with 20 additional jurisdictions enacting comprehensive medical marijuana programs and 10 enacting recreational marijuana programs since 2005.[84] And the federal government has yet to bring suit or join existing litigation against a state marijuana program. Instead of a death knell for marijuana legalization, *Raich* now appears to be an outlier, supporting the proposition that the CSA is a constitutionally permissible use of Congress's power under the Commerce Clause, and little else.

Potential Challenges to State Schemes

While the constitutionality of state marijuana legalization efforts appears to be on firm constitutional footing, certain regulatory aspects of state marijuana regimes may be ripe for challenge and may ultimately be found to be preempted by the CSA. These include general regulatory measures,[85] provisions for law enforcement officials to return marijuana and paraphernalia following raids or arrests,[86] state-issued registration cards,[87] protections against private discrimination and private civil sanctions,[88] and state-run dispensaries and cultivations centers.[89]

Conclusion

Today, state marijuana legalization appears to be an unstoppable force, with more states adopting laws every year and public sentiment favoring legalization at an all-time high.[90] Based on the number and diversity of states[91] adopting legalization programs, and the lack of precedent to support federal preemption, we are left with the Ninth Circuit's comments about *Raich* upon rehearing:

> For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected.[92]

Without the power of preemption, that day is likely coming much sooner than once thought possible. CL

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NOTES

1. 1996 Cal. Legis. Serv. Prop. 215 (codified as Cal. Health and Safety Code §§ 11362.7-.85 (Deering 2017)).

2. A "comprehensive" or "effective" medical marijuana program provides greater rights and protections than states where only "low-THC marijuana" has been made available and laws do not protect participants to an appropriate degree. *See* Marijuana Policy Project, "State-by-State Medical Marijuana Laws: How to Remove the Threat of Arrest 2015" at 9–12 (2016). *See also* Nat'l Conf. of State Legislatures, State Medical Marijuana/Cannabis Program Laws at Table 1 (Oct. 17, 2018), www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#2.

3. *See* Nat'l Conf. of State Legislatures, *supra* note 2. *See also* 31 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits, ProCon.org (June 26, 2017), https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881; Marijuana Policy Project, *supra* note 2. This article includes Louisiana in this number as of 2016 due to changes made by its legislature to existing medical marijuana laws, making its program comprehensive and available to the public in 2018. Deslatte, "Louisiana medical marijuana bill signed," *The Cannabist* (May 20, 2016), www.thecannabist.co/2016/05/20/louisiana-medical-marijuana-bill-signed/54539.

4. *See* Nat'l Conference of State Legislatures, State Marijuana Policies Timeline, www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx.

5. Savage, "Administration Weighs Legal Action Against States That Legalized Marijuana Use," *The New York Times* (Dec. 6, 2012), www.nytimes.com/2012/12/07/us/marijuana-initiatives-in-2-states-set-federal-officials-scrambling.html.

6. Tarm, "Ex-DEA Heads: Feds should nullify Colorado and Washington pot laws," *Aurora Sentinel* (Mar. 5, 2013), www.aurorasentinel.com/news/ex-dea-heads-feds-should-nullify-colorado-and-washington-pot-laws.

7. The two states, both of which border Colorado, filed suit jointly following the state's legalization of recreational marijuana, alleging, among other matters, "frustration of federal drug laws" by state laws. *Nebraska, et al. v. Colorado*, No. 144-orig. (2016), *denying motion for leave to file a bill of complaint* (Thomas, J., dissenting).

8. Following a successful referendum by voters, Arizona filed suit in the District Court of Arizona to determine whether federal law preempted the state's new comprehensive medical marijuana law, inventing hypothetical state officials who were supposedly to be sued in their official capacities by the federal government for allowing the law to be implemented. *Arizona v. United States*, 2012 U.S. Dist. LEXIS 19092 at 3–8 (D.C. Ariz. 2012). The judge ruled the case was not ripe as there was no "genuine threat" of prosecution by the federal government. *Id.* at 15, 18–19. Arizona neither appealed the ruling nor re-filed the case.

9. Pub. L. 91-513, 84 Stat. 1236 (1970) (codified at 21 USC §§ 801 to 971); 21 USC § 812(b)(1).

10. *See, e.g.*, Mass. Ann. Laws ch. 94C § 4; 35 Pa. Cons. Stat. § 10231.2103; Vt. Stat. Ann. tit. 18 § 4474b(a).

11. *See, e.g.*, Colo. Const. art. XVIII, § 14(2)(a); Or. Rev. Stat. § 475B.480; Nev. Rev. Stat. Ann. § 453A.310.

12. *See* Colo. Dep't of Revenue, State of Colorado Marijuana Taxes, Licenses, and Fees Transfers and Distribution Tax Revenue from August 2017 (Sept. 2017), www.colorado.gov/pacific/sites/default/files/0817%20Marijuana%20Tax%2C%20License%2C%20and%20Fees%20Report%20PUBLISH.pdf.

13. Mikos, "On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime," 62 *Vand. L. Rev.* 1421, 1445 (2009) (describing this overbroad approach to preemption doctrine as "hornbook law," due to its wide acceptance, before noting its incorrect application).

14. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461 (2018).

15. *Gonzales v. Raich*, 545 U.S. 1 (2005).

16. U.S. Const., art. VI, cl. 2.

17. *See* Schapiro, "Toward a Theory of Interactive Federalism," 91 *Iowa L. Rev.* 243, 286–87 (2005); Nelson, "Preemption," 86 *Va. L. Rev*. 225, 264 (2000) (stating that "if a federal statute establishes a rule, and if the Constitution grants Congress the power to establish that rule, then the rule preempts whatever state law it contradicts.").

18. *See New York v. U.S.*, 505 U.S. 144, 167–68 (1992) (explaining that Congress's powers under the Commerce Clause are not co-extensive with its other enumerated, nonsubstantive powers). *See also* the discussion in *Gonzales*, 545 U.S. 1.

19. *Norfolk & W.R. Co. v. Am. Train. Dispatchers Ass'n*, 499 U.S. 117, 128 (1991).

20. *Rice v. Santa Fe Elecator Corp.*, 331 U.S. 218, 230 (1947).

21. *Gade v. Nat'l Solid Waste Management Ass'n*, 505 U.S. 88, 98 (1992) (citations omitted).

22. 21 USC § 903 (emphasis added).

23. *See* Kreit, "The Federal Response to State Marijuana Legalization: Room for Compromise?," 91 *Or. L. Rev*. 1029, 1036–37 and n. 35 (2013) (using 2010 as an example to show that federal law enforcement officers made only 0.8% of all marijuana arrests in the United States that year); *Beek v. City of Wyo.*, 846 N.W.2d 531, 538 (Mich. 2014) (finding that data provided by the Federal Bureau of Investigation shows that 99% of all marijuana arrests are made by state, not federal, officials) (citing Mich. Comp. Laws Serv. § 333.26422 (LexisNexis 2017)).

24. 21 USC § 903.

25. *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (internal citations omitted).

26. *Id.* (stating that the "two statutes do not impose directly conflicting duties on national banks—as they would, for example, if the federal law said, 'you must sell insurance,' while the state law said, 'you may not'").

27. *Wyeth v. Levine*, 555 U.S. 555, 571–73, 581 (2009) (holding that impossibility and direct conflict preemption are not implied where a state law permits or encourages an action and federal law prohibits or appears to prohibit the same action).

28. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

29. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

30. *Id.*

31. *See generally U.S. v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496–99 (2001) (ruling that the CSA applied to a co-op created to distribute marijuana under California law, although California law exempted the co-op from criminal sanctions for such actions).

32. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 482 (4th Dist. Ct. App. 2008).

33. This would be similar to the inability of registered medical marijuana users to sue under many state disability anti-discrimination statutes because they are to be construed consistently with the Americans with Disabilities Act (ADA), which specifically forbids individuals who use drugs that are illegal under federal law from suing under its provisions. 42 USC § 12114(a); *James v. City of Costa Mesa*, 700 F.3d 394, 397 n. 3 (9th Cir. 2012) (holding that the "ADA does not protect medical marijuana users who claim to face discrimination *on the basis* of their marijuana use") (emphasis in original); *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 149–53 (Colo.App. 2013) (finding that use of marijuana legally under Colorado law still violated the CSA, which consequently also violated Colorado's anti-disability discrimination statute, which is based on the ADA).

34. Gardbaum, "Rethinking Constitutional Federalism," 74 *Tex. L.Rev*. 795, 797 (1996) (describing prevailing views of Congress' power to preempt state law).

35. Mikos, "Preemption Under the Controlled Substances Act," 16 *J. Health Care L. & Pol'y* 5, 16 (2013). Of course, preempting all state-level regulation would have drawbacks for state programs as it would likely lead to an end to state prohibition against sales to minors, and interfere with the issuance of licenses and zoning requirements. *Id.* at 31–32. However, the federal government might also face drawbacks, such as having to require states to treat recreational marijuana use the same as medical marijuana use, a trend the United States does not wish to see continue. Mikos, *supra* note 13 at 1451.

36. Commandeering may be viewed as the inverse of preemption. While preemption blocks a state from undertaking an action, commandeering requires a state to act, which is unconstitutional. *See* Adler and Kreimer, "The New Etiquette of Federalism: New York, Printz, and Yeskey," 1998 *Sup. Ct. Rev*. 71, 89–95 (1998).

37. *See Hodel v. Va. Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264, 286–87 (1981).

38. *New York v. U.S.*, 505 U.S. 144 (1992).

39. *Id.* at 150–51.

40. *Id*. at 161 (quoting *Hodel*, 452 U.S. at 288).

41. *Id.*

42. *Id*. at 188.

43. *Id*. at 175.

44. *Printz v. U.S.*, 521 U.S. 898 (1997). *Printz* concerned the requirements of the Brady Handgun Violence Prevention Act, which amended the Gun Control Act of 1968 to require, among other unaltered federal provisions, local law enforcement officers to perform background checks against individuals seeking to purchase firearms. *Id*. at 902–04. *See also* Pub. L. 103-159, 107 Stat. 1536 (1993).

45. *Printz*, 521 U.S. at 935.

46. *Id.*

47. *Id*.

48. The NCAA was joined by the "major professional sports leagues" in filing the case. *Murphy*, 138 S.Ct. 1461. The United States filed an amicus brief on behalf of the NCAA and the Court addressed the two simultaneously throughout much of the majority opinion. *Id.* at 1473–1474.

49. *Id.* at 1472.

50. *Id.*; Pub. L. 102-559, 106 Stat. 4228 (1992).

51. 28 USC § 3702. But PASPA grandfathered in four states where the practice had previously been legalized: Delaware, Montana, Nevada, and Oregon. PASPA would have allowed New Jersey to set up a sports gambling scheme within a year of its enactment, but New Jersey failed to act within that window and instead waited almost 20 years to enact its law. *Murphy*, 138 S.Ct. 1469.

52. *Murphy,* 138 S.Ct. 1469.

53. *Id.* at 1473–74.

54. *Id.* at 1473.

55. *Id.*

56. *Id.* at 1474.

57. *Id.*

58. *Id.* at 1478.

59. *Id.* The groups argued this because, in their estimation, *New York* and *Printz* described only "affirmative" commands from Congress and prohibitions were not forbidden by those rulings. *Id.*

60. *Id.*

61. *Id.* at 1478–1481.

62. *Id.* at 1474 and n. 28.

63. *Id.*

64. *Id.*

65. *See id.* at 1479–1481 (holding that preemption is based on a federal law that regulates the conduct of private actors, not the states).

66. *Raich*, 545 U.S. 1 (2005).

67. *See, e.g.*, Somin, "*Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs," 15 *Cornell J.L. Pub. Pol'y* 507, 539–40 (2006) (concluding that *Raich* would effectively strangle efforts at the state level to legislate medical marijuana use and thereafter reap the benefits); Young, "Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich," 2005 *Sup. Ct. Rev*. 1, 33–37 (2005); Klein, "Independent-Norm Federalism in Criminal Law," 90 *Cal. L.Rev*. 1541 (2002) (arguing, generally, that decisions such as *Raich*, which occurred three years later, chill the state laboratory of democracy and cause independent state laws to disappear).

68. *Raich*, 545 U.S. at 7.

69. *Id*. at 15.

70. *Id*. at 19. The Court noted the similarities between this case and the famous Commerce Clause case *Wickard v. Fillburn*, 317 U.S.111 (1942), and used the *Wickard* as the basis for much of its opinion. *Id*. at 17–19 (internal citation omitted).

71. *Id*. at 18.

72. *Id*. at 19–21.

73. *Id*. at 21.

74. *Id*. at 25–26 (internal citations omitted).

75. At the time of the decision, only 10 states had comprehensive medical marijuana programs. *See supra* note 3.

76. *Id*. at 42–43 (O'Connor, J., dissenting).

77. *See* Mikos, *supra* note 13 at 1438–39, nn. 72–73 (citing examples of scholarly reactions stating that state medical marijuana programs were doomed and would be preempted).

78. LeVay, "Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and The Medical Necessity Defense," 41 *B.C. L.Rev.* 699, 714 (2000).

79. *See* Nelson, *supra* note 15 at 277 and 298–303, n. 171.

80. *Raich*, 545 U.S. at 29.

81. *Id*. at 28 (quoting *id*. at 42 (O'Connor, J., dissenting)).

82. *Id*. at 29 (internal quotations omitted) (emphasis added).

83. *Id*. at 8–9.

84. *See supra* notes 3–4.

85. *See supra* note 35.

86. *Compare* N.M. Stat. Ann. § 26-2B-4(G) and Mikos, *supra* note 13 at 1459–60 (arguing that returning illegally seized marijuana and paraphernalia "merely restores the state of nature" and should not be subject to the doctrine of preemption, though he admits that there are as yet "no satisfactory answers") *with People v. Crouse*, 388 P.3d 39, 42–43 (Colo. 2017) (en banc) (holding that section 14(2)(e) of Colorado's medical marijuana code is unconstitutional as enacted as it requires state officials to return a federally-controlled substance in violation of the CSA, even where state law deems the substance to be legal). *See also id*. at 45–46 (Gabriel, J., dissenting) (arguing that a literal reading of the majority's holding means that any officer distributing narcotics in a sting operation would be actively and knowingly violating the CSA).

87. *See* Garvey, "Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws" at 13–14 (Cong. Research Serv. R42398, Mar. 6, 2012), www.votehemp.com/wp-content/uploads/2018/09/MedicalMarijuana-SupremacyClause-CRS-R42398-2012.pdf.

88. As more states legalize marijuana, state laws have become increasingly protective of individuals and private businesses that partake in such programs and have begun protecting individuals from discrimination by non-state actors such as schools, employers, and landlords on the basis of registration or participation in state marijuana programs. *See, e.g.*, Del. Code Ann. 16 § 4905A(c) (forbidding discrimination by schools, landlords, and employers); Ark Const. Amendment 98 § 3(f)(3)(A) (forbidding discrimination in employment decisions); Ariz. Rev. Stat. § 36-2813(A) (forbidding discrimination by schools and landlords). *See also* Mikos, *supra* note 13 at 1456–57.

89. *See U.S. v. Rosenthal,* 454 F.3d 943, 948 (9th Cir. 2006); *Cnty. of Santa Cruz v. Ashcroft,* 279 F.Supp.2d 1192, 1211–12 (N.D. Cal. 2003), *rev'd on other grounds,* 314 F.Supp.2d 1000 (N.D. Cal. 2004).

90. Recent polling suggests 61% of Americans support legalizing marijuana for any use, while 88% support legalizing it for medical purposes. De Pinto et al., "Marijuana Legalization Support at All-Time High," CBS News (Apr. 20, 2017), www.cbsnews.com/news/support-for-marijuana-legalization-at-all-time-high.

91. As of 2017, states in all geographic areas of the country have adopted comprehensive medical marijuana programs, including normally conservative or swing states such as Arkansas, Florida, Louisiana, and West Virginia. *See supra* note 3.

92. *Raich v. Gonzalez,* 500 F.3d 850, 866 (9th Cir. 2007).