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### The U.S. Constitution, the U.S. Department of Justice, and State Efforts to Legalize Marijuana

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## THE U.S. CONSTITUTION, THE U.S. DEPARTMENT OF JUSTICE, AND STATE EFFORTS TO LEGALIZE MARIJUANA

*Zachary C. Bolitho*<sup>1</sup>

### I. INTRODUCTION

A hypothetical young entrepreneur named Ernest recently read an article reporting that marijuana distribution was a lucrative business. After extensive research and discussions with some friends who work in the “marijuana industry,” Ernest decided to open a retail store selling marijuana in his hometown of Raleigh, North Carolina. He entered a supply agreement with a local horticulturist who was also an expert marijuana grower. Ernest named his business “Best Buds Dispensary, Inc.,” registered it with the secretary of

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state's office, rented a storefront in a strip mall, outfitted the space with display cases and shelving, hung some signs, hired a few employees, and opened for business on December 1, 2016. His dispensary sold loose-leaf marijuana, marijuana joints, and so-called "marijuana edibles."

The business operated on a cash-only basis, and business was booming due in part to an advertising campaign Ernest started on social media. In the first week, Ernest sold over 60 kilograms of marijuana and generated a profit of \$50,000. To protect himself, his product, and his profit from would-be robbers, Ernest hired an armed security guard to serve as a sentry at the dispensary's entrance. Ernest opened a business account at the local bank. The bank manager asked some questions before eventually allowing Ernest to use the account to deposit large amounts of cash generated from the dispensary.

Ernest made no secret of the fact that Best Buds Dispensary, Inc. sold marijuana. Everybody in town knew what he was up to, and it did not take long for Ernest to appear on the radar screen of agents with the federal Drug Enforcement Administration (DEA). Within a month, DEA agents raided his dispensary while waiving a federal search warrant in the air. The agents not only seized the marijuana found in the dispensary, they also went to the local bank with a court order authorizing them to seize the contents of Best Buds Dispensary's bank account.

A short time later, the U.S. Attorney's Office presented the matter to the grand jury. The grand jury returned an indictment charging Ernest with a slew of serious federal charges, including distribution of marijuana,<sup>2</sup> renting a property for the purpose of drug distribution,<sup>3</sup> advertising the distribution of a controlled substance,<sup>4</sup> money laundering,<sup>5</sup> and

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<sup>2</sup>21 U.S.C. § 841(a)(1).

<sup>3</sup>21 U.S.C. § 856(a)(1). This provision of the federal code is commonly referred to as the "crackhouse statute." See generally Michael E. Rayfield, *Pure Consumption Cases under the Federal "Crackhouse" Statute*, 75 U. CHI. L. REV. 1805, 1805 (2008).

<sup>4</sup>21 U.S.C. § 843(c)(2)(A) ("It shall be unlawful for any person to knowingly or intentionally use the Internet, or cause the Internet to be used, to advertise the sale of . . . a controlled substance . . .").

<sup>5</sup>18 U.S.C. §§ 1956-1957.

aiding and abetting the possession of a firearm in furtherance of a drug trafficking crime.<sup>6</sup> The indictment also included an allegation seeking forfeiture of the bank account's contents, as well as any other property that Ernest obtained using the proceeds from his marijuana dispensary.<sup>7</sup> If convicted, Ernest would be sent to federal prison for a significant period of time.<sup>8</sup>

And, the charges were not limited to Ernest. The grand jury also charged the local bank with money laundering for allowing Ernest to conduct financial transactions using drug money.<sup>9</sup> Additionally, the grand jury charged the armed security guard who protected Ernest, his money, and his

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<sup>6</sup>18 U.S.C. § 2; 18 U.S.C. § 924(c)(1)(A).

<sup>7</sup>21 U.S.C. § 853(a) (providing for forfeiture of "any property constituting, or derived from, any proceeds the person obtained directly, or indirectly, as the result" of violating the federal drug laws).

<sup>8</sup>Conviction on the firearm charge alone would result in a five-year mandatory minimum term of imprisonment. See 18 U.S.C. § 924(c)(1)(A)(i) (stating that a defendant convicted of a § 924(c) offense shall "be sentenced to a term of imprisonment of not less than 5 years"). And, that five-year term of imprisonment would be served consecutive to the imprisonment imposed on the other charges. See 18 U.S.C. § 924(c)(1)(D)(ii) ("no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed").

<sup>9</sup>The bank would most likely face money-laundering charges under 18 U.S.C. § 1956 and/or 18 U.S.C. § 1957. See Julie Anderson Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 617 (2015) ("In sum, a financial institution that knowingly processes transactions for marijuana-related businesses commits the crime of money laundering."). That is so because, generally speaking, both statutes prohibit banks from knowingly engaging in transactions—such as deposits, transfers, and withdrawals—that involve the proceeds of drug trafficking. See generally Christie Smythe, *HSBC Judge Approves \$1.9B Drug-Money Laundering Accord*, Bloomberg, <http://www.bloomberg.com/news/articles/2013-07-02/hsbc-judge-approves-1-9b-drug-money-laundering-accord> (last visited January 19, 2017) (discussing the \$1.9 million deferred prosecution agreement between the U.S. Department of Justice and HSBC bank to resolve money laundering charges stemming from transactions involving the proceeds of drug trafficking).

marijuana with possessing a firearm in furtherance of a drug trafficking crime.<sup>10</sup>

Now, imagine that Ernest operated his marijuana dispensary in Denver, Colorado instead of Raleigh, North Carolina. The story would be much different. The DEA agents stationed in Colorado—agents who work for the *same* DEA and are sworn to uphold the *same* federal laws as the DEA agents stationed in North Carolina—would have conducted no raids, secured no search warrants, and seized no funds. The U.S. Attorney in Colorado—who works for the *same* U.S. Department of Justice and is sworn to uphold the *same* federal laws as the U.S. Attorney in North Carolina—would have sought no grand jury indictments and instituted no forfeiture proceedings. Instead of contemplating what life would be like inside of a Federal Bureau of Prisons’ facility, Ernest would be in his dispensary selling marijuana and counting his (large amount) of cash. He would be depositing that money in his account at the local bank, and his armed security guard would be standing by his side. Although federal law is the same in Colorado as it is in North Carolina, the DEA Agents and Assistant U.S. Attorneys in Colorado would drive by Ernest’s dispensary and do nothing about his blatant and unapologetic violations of crystal clear federal law.

This hypothetical, unfortunately, is not some far-fetched scenario dreamt up by an imaginative law professor. No, it is an illustration of exactly what has been happening in the United States. Marijuana is a controlled substance that is strictly prohibited under federal law;<sup>11</sup> nonetheless, seven states and the District of Columbia have passed measures legalizing

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<sup>10</sup>18 U.S.C. § 924(c)(1)(A); *see generally* United States v. Archuleta, 19 F. App’x 827, 829-30 (10th Cir. 2001) (affirming § 924(c) conviction for a defendant whose role in the conspiracy was “kind of like a guard,” and who “possessed the given firearm for the specific purpose of providing security”).

<sup>11</sup>*See* 21 U.S.C. § 812(b)(1) (explaining the criteria for listing a drug as a schedule I controlled substance); 21 U.S.C. § 812, Schedule 1(c)(10) (listing marijuana in schedule I); 21 U.S.C. § 841(a)(1) (stating that it is unlawful to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”); 21 U.S.C. § 844(a) (stating that it is unlawful for “any person to knowingly or intentionally possess a controlled substance”).

marijuana for recreational use.<sup>12</sup> And a total of twenty-six states have legalized marijuana for medical purposes.<sup>13</sup> Rather than challenging those state laws under the Supremacy Clause, and instead of continuing to enforce the longstanding federal law equally across the country, the U.S. Department of Justice under Attorney General Eric Holder announced that it would neither seek to preempt state legalization measures<sup>14</sup> nor (absent exceptional circumstances) bring federal marijuana charges against individuals in those states.<sup>15</sup> Moreover, the Department of Justice and the Department of Treasury have informed financial institutions that, money laundering laws notwithstanding, they may “offer[[financial] services to a marijuana-related business.”<sup>16</sup> And, an entire industry has sprung up to provide marijuana dispensaries with armed

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<sup>12</sup>State Marijuana Laws 2016 Map (available at <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>).

<sup>13</sup>*Id.*

<sup>14</sup>Aug. 29, 2013 Letter from Attorney General Eric Holder to Governors of Colorado and Washington (stating that “the Department will not at this time seek to challenge your state’s law”).

<sup>15</sup>Aug. 29, 2013 Memorandum from Deputy Attorney General James M. Cole to all United States Attorneys (announcing that, as an exercise of prosecutorial discretion, the Department would not prosecute marijuana cases in those states that have “legalized” marijuana, except in extreme cases where specified criteria were satisfied); *see also* October 19, 2009 Memorandum from Deputy Attorney General David W. Ogden to Selected United States Attorneys (stating that federal prosecutors in states that have authorized medical marijuana “should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana”).

<sup>16</sup>February 14, 2014 Memorandum from Deputy Attorney General James M. Cole to All United States Attorneys, “Guidance Regarding Marijuana Related Financial Crimes”; Fin. Crimes Enforcement Network, Dep’t of the Treasury, FIN-2014-G0001, BSA Expectations Regarding Marijuana-Related Businesses (Feb. 14, 2014) (providing guidance to banks that “should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses” in those states that passed “recent state initiatives to legalize certain marijuana-related activity”); *see also* Hill, *supra* note 9, at 604 (“The guidance explains that the agencies do not prioritize punishment of banks servicing state-legal marijuana businesses.”).

security guards.<sup>17</sup> That same Department of Justice, however, has continued to prosecute marijuana cases in the remaining states.<sup>18</sup> This is a problem. Indeed, some have called it a “crisis,”<sup>19</sup> others a “quagmire.”<sup>20</sup> Regardless of what it is called, one thing is for certain – it must be resolved.

It should be noted at the outset that this Article has little do with marijuana per se. There is a legitimate debate to be had regarding our national marijuana policy. Perhaps the time has come to move marijuana out of Schedule I of the Controlled Substances List, which would authorize it to be used medicinally. Or, maybe we should consider decriminalizing marijuana altogether. The fact of the matter, however, is that neither of those things has happened. Instead, federal law is clear – marijuana is illegal in all fifty states. If that is going to change, it must be done in the way our Founding Fathers

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<sup>17</sup>Will Yakowicz, *The Highly Trained Security Force Protecting Colorado's Weed Stash, Inc.* (Apr. 20, 2015) (available at <http://www.inc.com/will-yakowicz/inside-the-backbone-of-the-cannabis-industry.html>) (reporting on the activities of Blue Line Protection Group's business of providing armed security for Colorado's marijuana dispensaries and marijuana growing operations); see also Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE W. RES. L. REV. 689, 693-94 (2015) (recognizing that “every Colorado marijuana business owner who employs an armed security guard could wind up serving an effective life sentence in prison” if the 18 U.S.C. § 924(c) were enforced).

<sup>18</sup>See generally David Sinclair, *Village Man to Forfeit \$1 Million in Drug Case*, The Pilot (April 28, 2016) (available at [http://www.thepilot.com/news/village-man-to-forfeit-million-in-drug-case/article\\_3a35452a-0d72-11e6-9e61-571d44b5d3fb.html](http://www.thepilot.com/news/village-man-to-forfeit-million-in-drug-case/article_3a35452a-0d72-11e6-9e61-571d44b5d3fb.html)) (reporting that a North Carolina businessman who was convicted on federal marijuana and money laundering charges faced a federal prison sentence and was required to forfeit \$1,000,000 in proceeds from the marijuana sales).

<sup>19</sup>Bradley E. Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, Note, 90 N.Y.U. L. REV. 289, 293 (2015) (quoting David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 575 (2013)).

<sup>20</sup>Melanie Reid, *The Quagmire that Nobody in the Federal Government Wants to Talk About: Marijuana*, 44 NEW MEX. L. REV. 169 (2014).

envisioned: the passage of a bill in Congress that is signed into law by the President.

Along with a host of other serious matters, the future of federal marijuana enforcement will soon be landing on the desk of Jeff Sessions, the newly appointed Attorney General. It is clear from his confirmation hearing testimony that Sessions is aware of the issue and recognizes that deciding how to handle it “won’t be an easy decision.”<sup>21</sup> He further stated that “the United States Congress has made the possession of marijuana in every state and distribution of it an illegal act. . . . If that . . . is not desired any longer, Congress should pass the law to change the rule. It’s not so much the attorney general’s job to decide what laws to enforce.”<sup>22</sup> At several other points during the hearing, Sessions reiterated his firm commitment to enforcing federal law and following the Constitution.<sup>23</sup>

Unless and until Congress changes the law, fulfilling that commitment will require the Department of Justice to alter its approach to those states that have legalized marijuana. The current approach is unsustainable and sets a dangerous precedent that threatens the very existence of our federal system. It also violates two provisions of the United States Constitution: (1) the Supremacy Clause; and (2) the Take Care Clause.

First, state laws authorizing the possession, manufacture, distribution, and use of marijuana conflict with the federal Controlled Substances Act (CSA). More specifically, the state laws stand as an obstacle to the federal goal of eliminating the manufacture, distribution, and possession of marijuana. The state laws, therefore, are preempted by operation of the Supremacy Clause. Second, the Department of

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<sup>21</sup>Alicia Wallace, *Jeff Sessions Vague About Marijuana Strategy at AG Senate Hearing*, *The Cannabist*, (Jan. 10, 2017) (available at, <http://www.thecannabist.co/2017/01/10/jeff-sessions-confirmation-hearing-marijuana-enforcement-first-day/71005/>).

<sup>22</sup>*Id.*

<sup>23</sup>See Steven Dennis & Chris Strohm, *Sessions Seeks to Reassure Senators on Race, Torture, Clinton, Bloomberg Politics* (Jan. 10, 2017) (available at, <https://www.bloomberg.com/politics/articles/2017-01-10/sessions-cites-crime-rebuts-racism-in-u-s-attorney-general-bid>) (reporting that Attorney General Sessions testified “he would enforce the laws and Supreme Court decisions—even those he disagreed with”).



Justice’s non-enforcement policy in those states that have legalized marijuana represents a breach of the Presidential obligation to “take Care that the Laws be faithfully executed.”<sup>24</sup> The Take Care Clause requires the President—and his surrogates—to enforce the laws passed by Congress, regardless of whether those laws align with his policy preferences.<sup>25</sup> The current approach is inconsistent with that requirement.

Prosecutors, of course, have broad discretion in deciding what cases to bring. As a former federal prosecutor, that discretion is something I know quite well. Prosecutorial discretion, however, is not boundless. And, it does not extend so far as to allow the Department of Justice to adopt a policy that bases the decision to prosecute on the law of the state where the conduct occurred. Similarly, a state should be unable to fill its coffers with hundreds of millions of dollars in tax revenue generated from an activity that flies in the face of federal law while other states are deprived of such revenue by their commendable choice to follow federal law.<sup>26</sup> There is something fundamentally wrong (and, frankly, offensive) about allowing people to be richly rewarded for their blatant and open defiance of well-settled law.<sup>27</sup> That is especially true

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<sup>24</sup>Art. II, § 3, U.S. Const.

<sup>25</sup>Robert J. Delahunty & John Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) (stating that the “Constitution’s Take Care Clause imposes on the President a duty to enforce all constitutionally valid acts of Congress in all situations and cases”).

<sup>26</sup>See generally Carlos Illescas, *Marijuana Sales Tax Revenue Huge Boon for Colorado Cities*, Denver Post (May 26, 2016) (available at, <http://www.denverpost.com/2016/05/26/marijuana-sales-tax-revenue-huge-boon-for-colorado-cities/>) (discussing the millions in dollars of tax revenue that have been generated by the Colorado law permitting recreational marijuana use and reporting that city of Denver alone “took in \$29 million last year from all sales by taxes and licensing fees”); see also Tanya Basu, *Colorado Raised More Tax Revenue From Marijuana Than From Alcohol*, Time Magazine (Sep. 16, 2015) (“Legal recreational marijuana is a boon for tax revenues in Colorado . . . Colorado collected almost \$70 million in marijuana taxes.”).

<sup>27</sup>See Lucy Rock, *Marijuana Millionaires Cashing in on Cannabis Legalisation*, The Guardian (May 22, 2016) (available at, <https://www.theguardian.com/society/2016/may/22/cashing-in->

when people doing the same thing in another part of the country are being sent to federal prison and having their money forfeited to the federal government.<sup>28</sup>

This Article explains why the Department of Justice's marijuana policy over the past eight years violates the Constitution. Part II tells the story of how we ended up where we are today. It discusses the history of federal marijuana regulation, including the CSA's treatment of marijuana as a Schedule I drug. Part III provides an overview of recent state marijuana legalization measures. It also discusses the federal government's response to those measures. Part IV discusses the Supremacy Clause, and Part V discusses the Take Care Clause. Part VI consists of a brief conclusion.

## II. THE FEDERAL PROHIBITION ON MARIJUANA

Marijuana has been regulated by federal law since 1937 when Congress passed the Marihuana Tax Act.<sup>29</sup> The Tax Act "allowed marijuana to be sold and prescribed medically so long

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on-cannabis-legalisation) (reporting that one marijuana business owner in Washington made over \$3 million in his first twenty months of business); *see also* Vickie Bane & Trevor Dodd, *Marijuana Millionaires* (July 28, 2014) (available, at <http://people.com/archive/marijuana-millionaires-vol-82-no-4/>) (reporting that one owner of a marijuana dispensary in Colorado "raked in \$47,000 in 24 hours; within three months, he says, he grossed \$1.5 million").

<sup>28</sup>*See, e.g.,* *United States v. White*, Case No. 12-cr-03045-BCW, 2016 WL 4473803, at \*1 (W.D. Mo. Aug. 23, 2016) (rejecting motion to dismiss filed by defendant who was being federally prosecuted for growing marijuana in Missouri—a state that has not legalized marijuana); *see also* David Sinclair, *Village Man to Forfeit \$1 Million in Drug Case*, *The Pilot* (April 28, 2016) (available at [http://www.thepilot.com/news/village-man-to-forfeit-million-in-drug-case/article\\_3a35452a-0d72-11e6-9e61-571d44b5d3fb.html](http://www.thepilot.com/news/village-man-to-forfeit-million-in-drug-case/article_3a35452a-0d72-11e6-9e61-571d44b5d3fb.html)) (reporting that a North Carolina businessman who was convicted on federal marijuana and money laundering charges faced a federal prison sentence and was required to forfeit \$1,000,000 in proceeds from the marijuana sales).

<sup>29</sup>Andrew Renahan, *Clearing the Haze Surrounding State Medical Marijuana Laws: A Preemption Analysis and Proposed Solutions*, 14 HOUS. J. HEALTH L. & POL'Y 299 (2014).

as the requisite tax was paid.”<sup>30</sup> Fourteen years later in 1951, Congress criminalized marijuana with the passage of the Boggs Act.<sup>31</sup> The Boggs Act was a hard-hitting statute that imposed a mandatory minimum sentence of two years’ imprisonment for first-time marijuana offenders, five years’ imprisonment for a second offense, and ten years’ imprisonment for any additional offenses.<sup>32</sup> The Boggs Act was largely replaced in 1970 by the CSA.<sup>33</sup> The CSA was a massive enactment intended to “combat[] drug abuse and control[] the legitimate and illegitimate traffic in controlled substances.”<sup>34</sup> To that end, the CSA “create[d] a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession”<sup>35</sup> of “various plants, drugs, and chemicals (such as narcotics, stimulants, depressants, hallucinogens, and anabolic steroids.”<sup>36</sup> Although it has been tweaked from time to time, the CSA remains the predominant federal drug law today.

The CSA divides the regulated substances into five different “schedules.” Drugs are “scheduled” based on their potential for abuse, accepted use for medical treatment, and their psychological and physical impact on the body.<sup>37</sup> Schedule I drugs are subject to the most stringent regulation, while Schedule V drugs are subject to the least.<sup>38</sup> The manufacture, distribution, possession, or use of Schedule I

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<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>See Alex Kreit, *Controlled Substances: Crime, Regulation, and Policy* at 408 (Carolina Academic Press 2013) (discussing the evolution of federal marijuana law).

<sup>33</sup>*Id.* at 409.

<sup>34</sup>*Gonzales v. Oregon*, 546 U.S. 243, 250 (2005).

<sup>35</sup>*Id.*

<sup>36</sup>Todd Garvey & Brian T. Yeh, *State Legalization of Recreational Marijuana: Selected Legal Issues*, Congressional Research Service (Jan. 13, 2014).

<sup>37</sup>*Gonzales v. Raich*, 545 U.S. 1, 10 (2005).

<sup>38</sup>*Id.*

drugs is flatly prohibited regardless of whether intended for medical or recreational use. Schedule I drugs “may not be dispensed under a prescription, and such substances may only be used for bona fide, federal government-approved research studies.”<sup>39</sup> That is so because a drug listed in Schedule I has been determined to have a “high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and “a lack of accepted safety for use . . . under medical supervision.”<sup>40</sup> From the CSA’s effective date until today, marijuana has been listed on Schedule I.<sup>41</sup> As a result, it cannot be lawfully manufactured, distributed, or possessed anywhere in the United States.<sup>42</sup>

For years, there have been efforts to move marijuana from Schedule I to one of the less regulated schedules.<sup>43</sup> The rescheduling of marijuana could occur in two ways: (1) legislatively by way of an amendment to the CSA, or (2) administratively by the Attorney General, acting in consultation with the Secretary of Health and Human Services.<sup>44</sup> Despite years of debate, Congress has taken no action to remove marijuana from Schedule I.<sup>45</sup> The most recent

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<sup>39</sup>Garvey, *supra* note 36, at 6.

<sup>40</sup>21 U.S.C. § 812(b)(1)(A)-(C).

<sup>41</sup>21 U.S.C. § 812, Schedule I (c)(10); Garvey, *supra* note 36, at 7 (“When Congress enacted the CSA in 1970, marijuana was classified as a Schedule I drug. Today, marijuana is still categorized as a Schedule I controlled substance and is therefore subject to the most severe restrictions contained within the CSA.”).

<sup>42</sup>Garvey, *supra* note 36, at 7 (“Pursuant to the CSA, the unauthorized cultivation, distribution, or possession of marijuana is a federal crime.”). The only exception to the flat prohibition is federally approved research. Raich, 545 U.S. at 13 (stating that the “sole exception being use of the drug as part of a Food and Drug Administration preapproved research study”).

<sup>43</sup>See Raich, 545 U.S. at 13, n.23 (describing various unsuccessful efforts to reschedule marijuana).

<sup>44</sup>21 U.S.C. § 811(a)-(b) (establishing the process that must be followed for the Attorney General to reschedule a controlled substance).

<sup>45</sup>See Paul Lewis, *A Gateway to Future Problems: Concerns About the State-by-State Legalization of Medical Marijuana*, 13 UNIV. N. H. L. REV.

attempt at administrative rescheduling was denied in August of 2016 during the tenure of Loretta Lynch, President Obama’s second Attorney General.<sup>46</sup> Moving marijuana from Schedule I to a less regulated schedule would not legalize marijuana for recreational purposes. It would, however, allow marijuana to be prescribed by a physician—much like opiate-based painkillers (Schedule II) or anabolic steroids (Schedule III).

Equally unsuccessful have been attempts by marijuana advocates to have the federal judiciary strike down the CSA’s regulation of marijuana. Advocates have challenged the constitutionality of applying the CSA to purely intrastate marijuana growers and users whose actions complied with a California law authorizing medicinal marijuana.<sup>47</sup> More specifically, the proponents argued that applying the CSA to homegrown marijuana would exceed Congress’ power under the Commerce Clause.<sup>48</sup> The Supreme Court rejected that argument in *Gonzales v. Raich*, holding that the “regulation [of intrastate marijuana] is squarely within Congress’ commerce power because production of the commodity meant for home consumption . . . has a substantial effect on supply and demand in the national market for that commodity.”<sup>49</sup> In support of its conclusion, the Court stated that Congress had reasonably found that allowing locally grown marijuana “would

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49, 57 (2014) (recognizing that “federal lawmakers have been, and continue to be, adamantly opposed to the legalization of marijuana”).

<sup>46</sup>Catherine Saint Louis, *DEA Keeps Marijuana on List of Dangerous Drugs, Frustrating Advocates*, New York Times (Aug. 11, 2016). The 2016 refusal to reschedule marijuana was not all that surprising, given Attorney General Lynch’s stated opposition to legalizing marijuana at the federal level. See generally Matt Ferner, *Loretta Lynch Says She Doesn’t Support Marijuana Legalization or Obama’s Views on Pot*, Huffington Post (Jan. 28, 2015) (available at, [http://www.huffingtonpost.com/2015/01/28/loretta-lynch-marijuana\\_n\\_6565962.html](http://www.huffingtonpost.com/2015/01/28/loretta-lynch-marijuana_n_6565962.html)).

<sup>47</sup>*Gonzales v. Raich*, 545 U.S. 1, 6 (2005).

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* at 20.

undermine the orderly enforcement of the entire regulatory scheme.”<sup>50</sup>

*Raich* was not the first time the Supreme Court addressed the applicability of the CSA to state medical marijuana laws. Four years earlier, the Court decided *United States v. Oakland Cannabis Buyers' Cooperative*.<sup>51</sup> In that case, a cooperative was formed to distribute medical marijuana under California law.<sup>52</sup> The U.S. Department of Justice sued the cooperative, seeking to enjoin the cooperative on the basis that its conduct violated the CSA.<sup>53</sup> The cooperative argued that the CSA contained an implied exception that allowed marijuana to be distributed and used when it was medically necessary.<sup>54</sup> The Supreme Court rejected that argument because by placing marijuana in Schedule I, “the balance already has been struck against a medical necessity exception” by Congress.<sup>55</sup> And, the judiciary lacks the authority to “override Congress’s policy choice, articulated in a statute, as to what behavior should be prohibited.”<sup>56</sup>

The lower federal courts have also repeatedly rejected claims that the CSA’s treatment of marijuana as a Schedule I drug violates substantive due process or equal protection.<sup>57</sup> Put simply, marijuana proponents have made very little progress at the federal level—marijuana is as illegal under federal law

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<sup>50</sup>*Id.* at 28.

<sup>51</sup>532 U.S. 483 (2001).

<sup>52</sup>*Id.* at 486.

<sup>53</sup>*Id.* at 486-87.

<sup>54</sup>*Id.* at 490.

<sup>55</sup>*Id.* at 499.

<sup>56</sup>*Id.* at 497.

<sup>57</sup>*See e.g., Raich v. Gonzales*, 500 F.3d 850, 861, 866 (9th Cir. 2007) (“*Raich II*”) (rejecting argument that CSA’s treatment of marijuana as a Schedule I drug violated substantive due process because “federal law does not recognize a fundamental right to use medical marijuana”); *United States v. Rogers*, 549 F.2d 107, 108 (9th Cir. 1976) (rejecting argument that CSA’s treatment of marijuana was “irrational”); *United States v. Kiffer*, 477 F.2d 349, 355 (2d Cir. 1973) (stating “we cannot say that [marijuana’s] placement in Schedule I is so arbitrary or unreasonable as to render it unconstitutional”).

today as it was on the day the CSA was enacted in 1970. But, the story has been much different in the states. That is especially true of the past ten years.

### III. STATE EFFORTS TO LEGALIZE MARIJUANA AND THE FEDERAL GOVERNMENT'S RESPONSE

For over twenty-five years after the passage of the CSA, marijuana was prohibited under federal law and the laws of every state.<sup>58</sup> That changed in 1996 when California passed the Compassionate Use Act.<sup>59</sup> The Act allowed “seriously ill” patients and their caregivers to “possess[] or cultivate[] marijuana for the patient’s medical purposes upon the recommendation or approval of a physician.”<sup>60</sup> Several years later, Oregon and Washington passed state laws authorizing medical marijuana.<sup>61</sup> By the year 2004, ten states had such laws.<sup>62</sup>

The initial federal response to those laws was understandably hostile given the existence of the CSA. Federal officials filed lawsuits,<sup>63</sup> obtained injunctions,<sup>64</sup> conducted raids, instituted prosecutions,<sup>65</sup> and developed a plan for

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<sup>58</sup>Raich II, 500 F.3d at 856 (explaining that “from 1970 to 1996, the possession or use of marijuana—medically or otherwise—was proscribed under state and federal law”).

<sup>59</sup>*Id.*

<sup>60</sup>United States v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483, 486 (2001).

<sup>61</sup>Robert A. Mikos, *On Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1423 n. 6 (listing states that have passed laws allowing medical marijuana).

<sup>62</sup>*Id.*

<sup>63</sup>*See id.*

<sup>64</sup>*See id.*

<sup>65</sup>*See* Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE W. RES. L. REV. 689, 690 (2015) (“By one estimate, the federal government spent \$483 million dollars interfering with state medical marijuana laws between 1996 and 2012, conducting at least 528 raids and dozens of prosecutions of people operating in compliance with state medical marijuana laws.”); *see also* Lewis, *supra* note 45, at 59

helping state and local police agencies fight against medical marijuana efforts.<sup>66</sup> Thus, the Department of Justice “under the Clinton and George W. Bush Administrations” aggressively fought state medical marijuana legalization efforts.<sup>67</sup>

The Department of Justice’s approach changed dramatically, however, after Eric Holder, Jr. was sworn in as the 82<sup>nd</sup> Attorney General of the United States.<sup>68</sup> The clearest sign that there was a new (and less stringent) sheriff in town took the form of a “Memorandum for Selected United States Attorneys” that was issued on October 19, 2009, by Deputy Attorney General David Ogden. In that memorandum, Ogden informed U.S. Attorneys that they “should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>69</sup> The Ogden Memorandum represented a major policy shift by the Department of Justice, and marijuana reformers viewed it as a turning point in the fight to loosen marijuana restrictions.<sup>70</sup> Although the Ogden Memorandum contained its fair share of

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(“The battle against state medical marijuana legalization intensified under the administration of George W. Bush, as Assistant U.S. Attorneys prosecuted several high-profile medical marijuana suppliers during these eight years.”).

<sup>66</sup>Florence Shu-Acquaye, *The Role of States in Shaping the Legal Debate on Medical Marijuana*, 42 Mitchell Hamline L. Rev. 697, 738 (2016) (explaining the historical approach of the federal government to state medical marijuana laws).

<sup>67</sup>*Id.*

<sup>68</sup>See Lewis, *supra*, note 45, at 60 (stating that President Obama’s administration, in which Eric Holder served as Attorney General, took a “180-degree turn from the medical marijuana policies of its predecessors”).

<sup>69</sup>October 19, 2009 Memorandum from Deputy Attorney General David W. Ogden to Selected United States Attorneys.

<sup>70</sup>Lewis, *supra* note 45, at 60 (stating that “[i]n 2009, the Obama administration declared that it would take a political 180-degree turn from the medical marijuana policies of its predecessors”); see also Shu-Acquaye, *supra* note 66, at 740 (explaining that the Ogden Memorandum was viewed initially as “a groundbreaking shift in federal drug policy”).



double-talk and caveats,<sup>71</sup> it was widely viewed as a clear signal that “the Department of Justice (DOJ) would stop enforcing the federal marijuana ban against persons who comply with state medical marijuana laws.”<sup>72</sup> There can be no denying that it provided a huge boost to the efforts of state marijuana legalization proponents. Additional states moved almost immediately to legalize medical marijuana, and “the nationwide medical marijuana industry . . . [has grown] at a rate of 13.8 percent since 2009.”<sup>73</sup>

In a move that surprised many observers, the Department appeared to take a step back on June 29, 2011 with the release of a Memorandum from Deputy Attorney General James Cole. That memorandum was entitled “Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use,” and it reaffirmed the Department of Justice’s commitment “to the enforcement of the Controlled Substances Act in all States.”<sup>74</sup> And, it further stated that the Ogden Memorandum was “never intended to shield” large commercial, industrial marijuana growing operations from “federal enforcement action and prosecution, even where those activities purport to comply with state law.”<sup>75</sup> Despite the 2011 Cole Memorandum, state marijuana legalization measures did not stop.

In fact, they intensified—branching out from medical marijuana to legalization of marijuana for recreational purposes.<sup>76</sup> Both Colorado and Washington passed measures

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<sup>71</sup>For example, the Memorandum stated that it was merely “guidance” and that “no State can authorize violations of federal law.”

<sup>72</sup>Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633, 633 (2011).

<sup>73</sup>Lewis, *supra* note 45, at 62 (quoting statistics compiled by IBSWorld, a marijuana industry reporting company).

<sup>74</sup>June 29, 2011 Memorandum from James M. Cole to All United States Attorneys.

<sup>75</sup>*Id.*

<sup>76</sup>COLO. CONST. art. XVIII, § 16.

in November of 2012 that legalized recreational marijuana.<sup>77</sup> A short time later, the Department of Justice issued yet another Memorandum relating to state marijuana legalization efforts. In that Memorandum issued on August 29, 2013, Deputy Attorney General James Cole told federal prosecutors in those states that have legalized marijuana to leave even the large-scale industrial marijuana growers alone, so long as they were operating in compliance with eight principles: (1) not selling to minors; (2) preventing money from going to criminal gangs and cartels; (3) preventing diversion to those states that have not legalized marijuana; (4) not using the distribution of marijuana as a cover for trafficking in other drugs; (5) avoiding violence and the use of firearms; (6) preventing impaired driving and other public health issues associated with marijuana use; (7) not growing marijuana on public lands; and (8) not possessing or using marijuana on federal property.<sup>78</sup>

Also on August 29, 2013, Attorney General Holder sent a letter to the governors of Colorado and Washington. In that letter, Attorney General Holder informed the governors that the Department of Justice would “not at this time seek to challenge your state’s law.”<sup>79</sup> Put another way, Attorney General Holder assured the governors that the Department of Justice would not seek to preempt the Colorado and Washington laws under the Supremacy Clause. That letter, combined with the Cole Memorandum issued the same day, was tantamount to the Department of Justice waving the white flag of surrender. It was surrender, however, to a battle that the Department had stopped trying to win four years earlier. And, the marijuana industry responded by aggressively expanding the list of states

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<sup>77</sup>Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNNMoney (Nov. 8, 2012) (available at <http://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/>).

<sup>78</sup>Aug. 29, 2013, Memorandum from James M. Cole to All United States Attorneys at 1-2.

<sup>79</sup>Letter from Attorney General Eric Holder to Governors of Colorado & Washington (Aug. 29, 2013).

that allow marijuana to be used in one form or another. California, Oregon, Nevada, Alaska, Massachusetts, Maine, and the District of Columbia have all recently joined Colorado and Washington by legalizing recreational marijuana.<sup>80</sup> The number of states authorizing medical marijuana is now at twenty-six, plus the District of Columbia.<sup>81</sup> Thus, over half of the states now expressly permit what federal law expressly prohibits. The Department of Justice has allowed blatant violations of the CSA's marijuana prohibition in those states, but at the same time it has continued to enforce those same marijuana prohibitions in other states. That is the status quo, and it raises serious constitutional problems. Those problems are discussed below.

#### IV. PREEMPTION

As things stand today, on one side there is a federal law that prohibits manufacturing, distributing, and possessing marijuana. On the other side, there are state laws that authorize manufacturing, distributing, and possessing marijuana. Under the Supremacy Clause of the U.S. Constitution when federal and state law clash, federal law prevails, and the state law is preempted.<sup>82</sup> That is what should happen here – the state laws legalizing marijuana must give way to the federal CSA.

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<sup>80</sup>State Marijuana Laws in 2016 Map (available at, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>.)

<sup>81</sup>*Id.*

<sup>82</sup>U.S. CONST. art. VI, (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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.”); see Mikos, *supra* note 61, at 1422 (explaining that “if Congress possesses the authority to regulate an activity, its laws reign supreme and trump conflicting state regulations on the same subject”).

Although some legal commentators have said as much,<sup>83</sup> the issue has not been addressed by the federal courts because the Department of Justice refused to file a lawsuit against the offending states.<sup>84</sup> There is, however, a new captain steering the ship at the Department of Justice. With the swearing in of Jeff Sessions as Attorney General comes the possibility of a lawsuit seeking to preempt state laws that conflict with the CSA. If Attorney General Sessions chooses to go down that road, he will have a strong legal argument.

Preemption is a “doctrine of American constitutional law under which states and local governments are deprived of their power to act in a given area” due to the existence of a federal law that operates in that same area.<sup>85</sup> The Supreme Court has recognized two broad categories of preemption: (1) express preemption, and (2) implied preemption.<sup>86</sup> Express preemption occurs when Congress passes a statute that explicitly withdraws certain powers from the states.<sup>87</sup> In circumstances where Congress has failed to make an explicit

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<sup>83</sup>See, e.g., Brandon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567, 579 (2015) (explaining that “[i]t seems axiomatic that the Supremacy Clause and preemption doctrine prohibit states” such as Colorado and Washington from allowing marijuana when federal law prohibits it); Garvey, *supra* note 36, at 7 (“The Colorado and Washington laws, which legalize, regulate, and tax an activity the federal government expressly prohibits, appear to be logically inconsistent with established federal policy and are therefore likely subject to a legal challenge under the constitutional doctrine of preemption.”); *but see* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize a Federal Crime*, 62 VAND. L. REV. 1421, 1423-24 (2009) (opining that preemption of state marijuana laws would run afoul of the Tenth Amendment’s anti-commandeering principle).

<sup>84</sup>Aug. 29, 2013 Letter from Attorney General Eric Holder to Governors of Washington & Colorado

<sup>85</sup>James T. O’Reilly, *Federal Preemption of State and Local Law: Legislation, Regulation and Litigation* at 1 (ABA Publishing 2006).

<sup>86</sup>See generally Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000) (providing overview of preemption law).

<sup>87</sup>*Id.*

statement, state law may still be displaced under the doctrine of implied preemption.<sup>88</sup> Implied preemption “occurs where Congress, through the structure or objectives of a federal statute, has impliedly precluded state regulation of that area.”<sup>89</sup> Regardless of whether a case involves express or implied preemption, the judiciary’s task is the same: “to determine whether state regulation is consistent with the structure and purpose of the [federal] statute as a whole.”<sup>90</sup> Or stated another way, “the purpose of Congress is the ultimate touchstone in every pre-emption case.”<sup>91</sup>

Over the years, the Supreme Court has come to recognize two types of implied preemption: (1) field preemption, and (2) conflict preemption.<sup>92</sup> Field preemption occurs when federal law has been so dominant in a particular area that “Congress left no room for the States to supplement it.”<sup>93</sup> Conflict preemption can take two forms. The first is called physical impossibility preemption, and it occurs when “compliance with both federal and state regulations is a physical impossibility.”<sup>94</sup> The second is called obstacle preemption, and it occurs when “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>95</sup>

With respect to the battle between state marijuana laws and the CSA, express preemption is inapplicable because the CSA does not explicitly remove the possibility of state regulation of drugs. The CSA does, however, contain a

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<sup>88</sup>O’Reilly, *supra* note 85, at 65.

<sup>89</sup>*Id.*

<sup>90</sup>Denning, *supra* note 83, at 572 (internal quotations omitted).

<sup>91</sup>Wyeth v. Levine, 555 U.S. 555, 565 (2009) (internal quotations omitted).

<sup>92</sup>*Id.* at 572.

<sup>93</sup>Nelson, *supra* note 86, at 227 (internal quotations omitted).

<sup>94</sup>Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n, 461 U.S. 190, 204 (1983) (internal quotations omitted).

<sup>95</sup>*Id.* (internal quotations omitted)

preemption provision in 21 U.S.C. § 903. Section 903 provides as follows:

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.<sup>96</sup>

Section § 903 clearly takes field preemption off the table.<sup>97</sup> Equally clear from § 903 is Congress's intent to ensure that conflict preemption remains on the table. Looking to the two subsets of conflict preemption, it has traditionally been very difficult to succeed on a physical impossibility preemption theory.<sup>98</sup> To do so, it must be proven that "state law *requires* what federal law *prohibits*, or state law *prohibits* what federal law *requires*."<sup>99</sup> That is not present here because a person in, say, Colorado could comply with both federal and state law by

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<sup>96</sup>21 U.S.C. § 903.

<sup>97</sup>Garvey, *supra* note 36, at 9 (stating that § 903 "clarifies that Congress did not intend to entirely occupy the regulatory field concerning controlled substances or wholly supplant traditional state authority in the area").

<sup>98</sup>*Wyeth v. Levine*, 555 U.S. 555, 573 (2009) ("Impossibility preemption is a demanding defense."); *see also* Garvey, *supra* note 36, at 10 ("Courts have only rarely invalidated a state law as preempted under the impossibility prong of the positive conflict test.").

<sup>99</sup>Garvey, *supra* note 36, at 10 (emphasis in original); *see also* Erwin Chemerinsky, *Constitutional Law: Principles & Policies* at 391 (2d ed. 2002) ("If federal law and state law are mutually exclusive, so that a person could not simultaneously comply with both, the state law is deemed preempted.").

refraining from the manufacture, distribution, and possession of marijuana.<sup>100</sup>

But, there is an argument to be made that this is not the correct way to view physical impossibility preemption. According to Professor Brandon Denning, viewing physical impossibility preemption in that way renders the doctrine meaningless because “a finding of impossibility could always be avoided simply by refraining from engaging in the activity that is the object of the conflicting regulatory regimes.”<sup>101</sup> As Professor Denning has explained, physical impossibility preemption only serves a purpose if it is “viewed from the perspective of one who is engaging in the very conduct regulated by both state and federal governments.”<sup>102</sup> Under that conception of physical impossibility preemption, state laws legalizing marijuana would be preempted because it would be physically impossible for a person in Colorado to open a marijuana dispensary under state law without simultaneously violating federal law.<sup>103</sup> Although it is certainly an appealing argument, Professor Denning’s approach is somewhat difficult to reconcile with language found in the Supreme Court’s decision in *Barnett Bank of Marion County, N.A. v. Nelson*.<sup>104</sup>

In *Barnett Bank*, the Court was considering whether a federal law that authorized national banks to sell insurance in small towns preempted a state law that prohibited national

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<sup>100</sup>Nelson, *supra* note 86, at 228 n.15 (nothing that the Supreme Court has held that “if one sovereign’s law purports to give people a right to engage in conduct that the other sovereign’s law purports to prohibit, the ‘physical impossibility’ test is not satisfied; a person could comply with both state and federal law simply by refraining from the conduct. Thus, even when state and federal law contradict each other, it is physically possible to comply with both unless federal law requires what state law prohibits (or vice versa)”).

<sup>101</sup>Denning, *supra* note 83, at 578.

<sup>102</sup>*Id.*

<sup>103</sup>*Id.* at 578-79.

<sup>104</sup>517 U.S. 25, 31 (1996).

banks from doing precisely that.<sup>105</sup> Although the Court found the state law to be preempted under the doctrine of obstacle preemption, it rejected the physical impossibility preemption argument. In doing so, the Court explained that this was not a situation where “the federal law said, ‘you must sell insurance,’ while the state law said, ‘you may not.’”<sup>106</sup> Because a national bank could comply with both state and federal law by refusing to sell insurance, there was no physical impossibility preemption.<sup>107</sup> Thus, the argument goes, physical impossibility preemption is inapplicable to the marijuana conundrum because there is an easy way to comply with both laws – do not grow, distribute, or possess marijuana. Given the language of *Barnett Bank* and the Court’s treatment of physical impossibility preemption as a “very narrow” doctrine,<sup>108</sup> it is unlikely that state marijuana legalization measures would be preempted under that doctrine.

It seems more likely that state marijuana legalization measures would be preempted under the second subset of conflict preemption—obstacle preemption.<sup>109</sup> Obstacle preemption is appropriate when the state law “stands as an obstacle to the accomplishment and execution of the full

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<sup>105</sup>*Id.* at 27 (“The question in this case is whether a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so.”).

<sup>106</sup>*Id.* at 31.

<sup>107</sup>*See* *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 528 (Or. 2010) (en banc) (explaining that in *Barnett Bank* it was not physically impossible to comply with both state and federal law because “[a] national bank could simply refrain from selling insurance”); *see also* *Wyeth v. Levine*, 555 U.S. 555, 590 (2009) (Thomas, J., concurring in judgment) (questioning the physical impossibility preemption doctrine in part because federal and state law may give conflicting commands even though “an individual could comply with both by electing to refrain from the covered behavior”).

<sup>108</sup>*Wyeth v. Levine*, 555 U.S. 555, 589 (2009) (Thomas, J., concurring).

<sup>109</sup>*Garvey & Yeh*, *supra* note 36, at 10-11 (focusing analysis more on obstacle preemption than physical impossibility preemption because the state laws “would likely survive the impossibility prong”).



purposes and objectives of Congress.”<sup>110</sup> To determine whether a state law serves as an obstacle, the courts must “examin[e] the federal statute as a whole and identify[] its purpose and intended effects.”<sup>111</sup>

Determining the purpose of the CSA is an easy task. It was drafted with one goal in mind—eliminating the abuse, production, and illicit trafficking of certain psychotropic drugs.<sup>112</sup> To achieve that goal, Congress created a comprehensive regulatory regime prohibiting the possession, distribution, or manufacture of certain drugs (i.e., Schedule I) and regulated the possession, distribution, or manufacture of other drugs (i.e., Schedules II-V).<sup>113</sup> In doing so, Congress made clear that the CSA applies to drugs that are manufactured, distributed, and possessed purely intrastate.<sup>114</sup> Congress found that such “[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents” of drug trafficking.<sup>115</sup> Congress believed that its ultimate objective could not be reached if there were an exemption that allowed the manufacture, distribution, or possession of locally grown marijuana.

The application of the CSA to purely intrastate activity was attacked in *Gonzalez v. Raich* as an unconstitutional exercise of Congress’s authority under the Commerce Clause. In *Raich*, the Supreme Court upheld the CSA and declared that Congress

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<sup>110</sup>*Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983).

<sup>111</sup>*Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (internal quotations omitted).

<sup>112</sup>See 21 U.S.C. § 801a(1) (setting forth Congress’s findings regarding the need for the CSA); see also *Gonzalez v. Raich*, 545 U.S. 13, 20 (2005) (“The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.”).

<sup>113</sup>*Raich*, 545 U.S. at 13-14.

<sup>114</sup>21 U.S.C. § 801(3)-(6).

<sup>115</sup>21 U.S.C. § 801(6).

had the authority to regulate even locally grown marijuana that never crossed a state line.<sup>116</sup> According to the Court, exempting marijuana that was “locally cultivated for personal use . . . may have a substantial impact on the interstate market for this extraordinarily popular substance.”<sup>117</sup> And, the Court recognized that a state law authorizing the use of medical marijuana (even if locally grown) would “have a significant impact on both the supply and demand sides of the market for marijuana.”<sup>118</sup> Perhaps most importantly for purposes of the current debate, the *Raich* Court spoke approvingly of Congress’s determination that allowing intrastate marijuana to escape the CSA’s reach “would undermine the orderly enforcement of the entire regulatory scheme.”<sup>119</sup>

Such undermining, however, has been occurring since the Ogden Memorandum was released in 2009. Because of state legalization efforts and Department of Justice acquiescence, the CSA’s regulatory scheme has been significantly undermined. The goal of the CSA was to eliminate the market for marijuana, and “[l]iberal regimes like Colorado’s and Washington’s are diametrically opposed to th[at] goal.”<sup>120</sup> It does not take a law degree to see that a state law authorizing the production, distribution, and use of marijuana makes it difficult for the federal government to achieve its goal of eradicating marijuana. It is made even more difficult when the state actually benefits from *increased* use of the substance that federal law is trying to *decrease*.

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<sup>116</sup>*Raich*, 545 U.S. at 19. For those unfamiliar with the case, *Raich* involved several individuals who sought to use and grow marijuana for medicinal purposes under California’s Compassionate Use Act. *Id.* at 5-7. The individuals sued the Attorney General of the United States, seeking a declaration that the CSA’s prohibition on the manufacture, distribution, and possession of marijuana was unconstitutional as applied to locally grown marijuana that did not travel in interstate commerce. *Id.* at 7.

<sup>117</sup>*Id.* at 28.

<sup>118</sup>*Id.* at 30.

<sup>119</sup>*Id.* at 28.

<sup>120</sup>Denning, *supra* note 83, at 579.

Take Colorado, for example. It legalized marijuana for recreational use in 2012, and in 2015 Colorado collected approximately \$135 million in tax revenue from the marijuana industry.<sup>121</sup> That money has been used to fund a variety of state programs and projects ranging from school construction and street paving to bullying prevention.<sup>122</sup> If people stop selling, smoking, and growing marijuana in Colorado, then the state and local governments will lose money. If the government loses money, it will cut programs and services. No government desires to do either of those things. So, what does Colorado want? More marijuana sales! When do they want them? Now!

The good news for Colorado is that it is getting what it wants. The data shows that when a state legalizes marijuana, use of the drug increases in that state.<sup>123</sup> That should come as

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<sup>121</sup>National Public Radio, All Things Considered, *Where Does Colorado's Marijuana Money Go?* (Oct. 1, 2016) (transcript available at, <http://www.npr.org/2016/10/01/496226348/where-does-colorados-marijuana-money-go>).

<sup>122</sup>*Id.* (reporting that money from marijuana tax revenues was used to build schools, provide for the homeless, and create college scholarships); see also Carlos Illescas, *Marijuana Sales Tax Huge Boon for Colorado Cities*, *Denver Post* (May 26, 2016) (available at, <http://www.denverpost.com/2016/05/26/marijuana-sales-tax-revenue-huge-boon-for-colorado-cities/>) (quoting an official of a small Colorado town as saying: "We have such a small tax base . . . . Medical and retail marijuana have definitely helped the town's bottom line. I'd be lying if I said it didn't."); Mahita Gajanan, *Colorado Will Use Extra Marijuana Revenue to Prevent Bullying in Schools*, *Time Magazine* (Sep. 28, 2016) (available, at <http://time.com/4511895/colorado-surplus-marijuana-tax-revenue-bully-prevention/>) (reporting that \$2.9 million in marijuana tax revenues was used to create a bullying prevention program at 50 schools).

<sup>123</sup>Beau Kilmer, *If California legalizes marijuana, consumption will likely increase. But is that a bad thing?*, *LOS ANGELES TIMES* (May 16, 2016) (reporting that after legalization, marijuana use increased in Colorado and Washington); see also Rocky Mountain High Intensity Drug Trafficking Area, *The Legalization of Marijuana in Colorado: The Impact* (Jan. 2016) (available at, <http://www.rmhidta.org/html/FINAL%20NSDUH%20Results->

no surprise. After all, allowing “profit-maximizing firms to produce, sell, and advertise”<sup>124</sup> an item that was previously only available on the black-market will result in an increase in that item’s use. So, state legalization efforts have led to an increase in the very activity that the CSA prohibits and seeks to eliminate altogether.

That type of conflict between the effect of a state law and the objective of a federal law is what obstacle preemption is designed to address. When previously confronted with an analogous situation, the Supreme Court struck down the offending state law in *Michigan Cannery & Freezers v. Agricultural Board*.<sup>125</sup> The *Michigan Cannery* Court held that the federal Agricultural Fair Practices Act preempted the Michigan Agricultural Marketing and Bargaining Act because the Michigan law stood “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>126</sup>

The federal law was designed to improve the bargaining power of farmers when they brought their food to market.<sup>127</sup> One provision of the federal law prevented an association of food producers from interfering with an individual producer’s decision about whether to bring food to the market individually or to sell it through a producers’ association.<sup>128</sup> The Michigan law, on the other hand, stated that a producers’ association was the exclusive bargaining agent for all producers of a particular

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%20Jan%202016%20Release.pdf) (stating that “in the two year average (2013/2014) since Colorado legalized recreational marijuana, youth past month marijuana use increased 20 percent compared to the two year average prior to legalization (2011/2012)” while at the same time “nationally youth past month marijuana use declined 4 percent”); Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 17 (2013) (“There is little doubt, then, that marijuana use will increase following state legalization.”).

<sup>124</sup>Kilmer, *supra* note 123.

<sup>125</sup>467 U.S. 461 (1984).

<sup>126</sup>*Id.* at 478 (internal quotations and citations omitted).

<sup>127</sup>*Id.* at 463-64.

<sup>128</sup>*Id.* at 464.

food item.<sup>129</sup> Individual producers were required to pay a fee to the association and abide by the terms of the association's contracts.<sup>130</sup> In other words, the Michigan law "empower[ed] producers' associations to do precisely what the federal Act forbids them to do."<sup>131</sup> The Michigan law, therefore, was struck down by the Supreme Court under the obstacle preemption doctrine.<sup>132</sup>

Just like the Michigan law authorized producers' associations to engage in conduct that federal law prohibited, those states that have legalized marijuana have "empower[ed] [marijuana growers, distributors, and users] to do precisely what the federal Act forbids them to do."<sup>133</sup> It is difficult to escape that reality.<sup>134</sup> So, why has no federal court ruled that the CSA preempts state marijuana legalization laws? Because the Department of Justice—through its "policy of benign neglect"<sup>135</sup>—has refused to bring a lawsuit challenging state marijuana legalization laws as preempted under the obstacle preemption doctrine.<sup>136</sup>

In response to the Department of Justice's decision not to file a preemption lawsuit, Oklahoma and Nebraska made a valiant effort to have the Supreme Court rule on the issue. They

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<sup>129</sup>*Id.* at 466.

<sup>130</sup>Michigan Canners & Freezers Ass'n, 467 U.S. at 467-68.

<sup>131</sup>*Id.* at 477-78.

<sup>132</sup>*Id.* at 478 (holding that the Michigan law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and "therefore, the Michigan Act is pre-empted") (internal quotations and citations omitted).

<sup>133</sup>*Id.* at 477-78.

<sup>134</sup>See generally Denning, *supra* note 83, at 580 ("At the risk of seeming obtuse, I find it self-evident that state legalization regimes permitting marijuana use for medical or recreational purposes present a substantial obstacle to the implementation of a federal law that (1) recognizes no medical use for marijuana and (2) seeks to eliminate the national market in marijuana by banning all production, possession, and transfer.")

<sup>135</sup>Denning, *supra* note 83, at 583.

<sup>136</sup>*Id.* at 581 (stating that "[o]nly the DOJ's announced policy of forbearance keeps this conflict from coming to a head").

brought a lawsuit against Colorado directly in the Supreme Court pursuant to Article III, Section 2 of the U.S. Constitution and 28 U.S.C. § 1251(a), both of which vest the Supreme Court with “original jurisdiction” over a lawsuit between two states.<sup>137</sup> In that lawsuit, Oklahoma and Nebraska argued that Colorado’s marijuana legalization law “conflicts with and otherwise stands as an obstacle to the full purposes and objectives of Congress.”<sup>138</sup> For reasons unknown and unstated, the Supreme Court refused to exercise its jurisdiction to hear the case.<sup>139</sup>

Although no federal court has ruled on the preemption issue, a handful of state courts have addressed it.<sup>140</sup> Of that handful of courts, the most notable opinion is the Supreme Court of Oregon’s in *Emerald Steel Fabricators, Inc. v. Bureau of*

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<sup>137</sup>Motion for Leave to File Complaint, *Nebraska & Oklahoma v. Colorado*, Supreme Court of the United States (Dec. 18, 2014) (available at, <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/12/Neb.-Okla.-original-suit-vs.-Colorado-12-18-14.pdf>).

<sup>138</sup>*Id.* at 23.

<sup>139</sup>*Nebraska, et al. v. Colorado*, 136 S. Ct. 1034 (2016) (Thomas, J., dissenting from the denial of motion for leave to file complaint) (arguing that the Court should have exercised its original jurisdiction to hear the case instead of “denying, without explanation, Nebraska and Oklahoma’s motion for leave to file a complaint”). In the wake of the Supreme Court’s refusal to hear the case, Nebraska and Colorado sought permission to intervene in a lawsuit brought by some private parties against Colorado. That lawsuit had been previously dismissed by a U.S. District Court judge on the basis that private parties could not seek preemption under the Supremacy Clause. *Safe Streets Alliance, et al. v. John Hickenlooper, Governor of Colorado, et al.*, No. 1:15-CV-00349, 2016 WL 223815, at \*3, \*5 (D. Colo. Jan. 19, 2016). The plaintiffs appealed to the Tenth Circuit Court of Appeals, and Nebraska and Oklahoma sought permission to intervene in that appeal. The Tenth Circuit allowed the intervention, and the parties are awaiting a decision on the merits. *Safe Streets Alliance, et al. v. John Hickenlooper, Governor of Colorado*, Order Granting Motion to Intervene, Appeal No. 16-1048 (10th Cir. Dec. 22, 2016).

<sup>140</sup>*See* Garvey & Yeh, *supra* note 36, at 14-15 (summarizing several state court rulings).

*Labor and Industries*.<sup>141</sup> The *Emerald Steel* court concluded that the CSA preempted Oregon’s Medical Marijuana Act, which provided that people who had been issued a medical marijuana card could manufacture, distribute, and possess marijuana.<sup>142</sup> According to the court, the Oregon law stood “as an obstacle to the accomplishment of the full purposes of the federal law.”<sup>143</sup> The court further explained that when Congress passed the CSA, it “did not intend to enact a limited prohibition on the use of marijuana—i.e., to prohibit the use of marijuana unless a state chose to authorize its use.”<sup>144</sup> Instead, Congress meant for the CSA to “impose[] a blanket prohibition on the use of marijuana without regard to state permission to use.”<sup>145</sup> And, there is no U.S. Supreme Court precedent holding that “states can authorize their citizens to engage in conduct that Congress explicitly has forbidden.”<sup>146</sup> Some scholars<sup>147</sup> and a few

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<sup>141</sup>348 Or. 159 (2010) (en banc).

<sup>142</sup>*Id.* at 161; *but see* *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 482 (Cal. App. Ct. 2008) (holding that the CSA does not preempt California’s medical marijuana identification card law because “the purpose of the CSA is to combat recreational drug use, not to regulate a state’s medical practices”).

<sup>143</sup>*Emerald Steel Fabricators, Inc.*, 348 Or. at 186.

<sup>144</sup>*Id.* at 177-78.

<sup>145</sup>*Id.* at 178.

<sup>146</sup>*Id.* at 183.

<sup>147</sup>*See* Sam Kamin, *Pot Prohibition is Almost Over; Oklahoma, Nebraska’s Suit is Doomed*, *THE CANNABIST* (Jun. 29, 2015) (available at [http://www.thecannabist.co/2015/06/29/pot-marijuana-oklahoma-nebraska-lawsuit-colorado/37014/#disqus\\_thread](http://www.thecannabist.co/2015/06/29/pot-marijuana-oklahoma-nebraska-lawsuit-colorado/37014/#disqus_thread)) (law professor opining that Colorado’s marijuana legalization measure is not preempted by the CSA because “the federal government cannot force state officials (cannot commandeer them, to use the constitutional term) to enforce” federal law); *see also* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize a Federal Crime*, 62 *VAND. L. REV.* 1421, 1423-24 (2009) (arguing that “to say that Congress may thereby preempt state inaction (which is 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-

judges<sup>148</sup> have argued that a finding that the CSA preempts state marijuana legalization laws would run afoul of the anti-commandeering principle embodied in the Tenth Amendment to the U.S. Constitution. That argument is creative and thought-provoking. But, it is wide of the mark—at least as it relates to what has actually happened in those states that have legalized marijuana.

The Tenth Amendment provides as follows: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>149</sup> The Supreme Court has read that language to prevent the federal government from “commandeering” state governments by requiring them to enforce federal law.<sup>150</sup> Perhaps the most significant anti-commandeering case is *Printz v. United States*.<sup>151</sup> At issue in *Printz* was the Brady Handgun Violence Prevention Act, which contained a provision requiring state and local police officers to conduct background checks on handgun purchasers.<sup>152</sup> The Court struck down that provision under the Tenth Amendment because the federal government “may not compel the State to enact or administer a federal regulatory program.”<sup>153</sup>

Undoubtedly, the anti-commandeering doctrine applied in *Printz* would prevent the federal government from forcing state and local police officers to enforce the CSA’s marijuana prohibition. It is also beyond debate that the federal

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commandeering rule, however, clearly prohibits Congress from doing this.”).

<sup>148</sup>See, e.g., *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159, 191 (2010) (en banc) (Walters, J., dissenting) (citing the anti-commandeering doctrine as one of the reasons why the CSA does not preempt Oregon’s medical marijuana law).

<sup>149</sup>U.S. CONST. amend. X,

<sup>150</sup>*New York v. United States*, 505 U.S. 144, 188 (1992) (holding that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program”).

<sup>151</sup>521 U.S. 898 (1997).

<sup>152</sup>*Id.* at 903.

<sup>153</sup>*Id.* at 933 (internal quotations omitted).



government could not mandate that all states criminalize marijuana. Neither of those things, however, would result from a court holding that the CSA preempts state marijuana legalization laws. A finding that the CSA preempts a state marijuana legalization law would result in the state having no law—authorizing or forbidding—marijuana. And, that is entirely constitutional because states are free by virtue of the anti-commandeering doctrine to decriminalize marijuana through the repeal of their laws that prohibit the manufacture, distribution, and possession of marijuana.<sup>154</sup>

There is, however, a critical difference between decriminalizing marijuana by repealing existing law and authorizing marijuana, regulating it, and making a tremendous amount of money by taxing it. Recognizing as much, the law of preemption distinguishes between failing to criminalize an activity and making the activity lawful.<sup>155</sup> As a panel of the California Court of Appeals explained, “[w]hen an act is prohibited by federal law, but neither prohibited nor authorized by state law, there is no obstacle preemption.”<sup>156</sup> But, when a state moves beyond decriminalization and passes a law that affirmatively authorizes and regulates what federal law prohibits, the state’s law is preempted, and the anti-commandeering doctrine is not implicated.<sup>157</sup>

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<sup>154</sup>See Garvey & Yeh, *supra* note 36, at 13-14 (explaining that under the “Tenth Amendment and preemption precedent” a state could exempt marijuana-related activities from criminal penalties under state law).

<sup>155</sup>See *Pack v. Superior Court of Los Angeles*, 132 Cal. Rptr. 3d 633, 651 (Cal. App. Ct. 2012). In *Pack*, the court held that the CSA preempted a city ordinance requiring an expensive permit to grow or distribute medical marijuana. *Id.* at 638. The court’s decision was accepted for review by the Supreme Court of California, but the appeal was dismissed by request of the parties. *Pack v. Superior Court of Los Angeles*, Case No. B228781, Order of Aug. 22, 2012) (available at [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc\\_id=1961761&doc\\_no=B228781](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=1961761&doc_no=B228781)).

<sup>156</sup>*Pack*, 132 Cal. Rptr. 3d at 651.

<sup>157</sup>*Id.* at 652 (“The City’s ordinance, however, goes beyond decriminalization into authorization . . . . A law which authorizes

Looking again to Colorado as an example, the state's 2012 marijuana legalization measure did more than simply repeal the state's statute that criminalized marijuana—it created a regulatory scheme that authorizes, permits, and collects large fees<sup>158</sup> from marijuana-related activities that are prohibited by federal law. More specifically, Colorado developed “procedures for the issuance, renewal, suspension, and revocation of licenses; provide[d] a schedule of licensing and renewal fees; and specif[ied] requirements for licensees to follow regarding physical security, video surveillance, labeling, health and safety precautions, and product advertising.”<sup>159</sup> There is now an entire state bureaucracy focused on nothing more than administering the marijuana industry.<sup>160</sup> Because the state law expressly authorizes what federal law prohibits, it is preempted because it serves as an obstacle to the fulfillment of Congress' goal to eliminate the manufacturing, distribution, possession, and use of marijuana.

Of course, it is unlikely that a federal court will have the opportunity to reach that conclusion unless the Department of Justice changes its approach and files a lawsuit against the

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individuals to engage in conduct that the federal Act forbids stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and is therefore preempted.”) (internal quotations and alterations omitted); *see also* *Emerald Steel Fabricators, Inc. v. Bureau of Labor Statistics*, 348 Or. 159, 177-78 (2010) (en banc) (explaining that Oregon's law was preempted because it went beyond exempting marijuana offenses from state prosecutions by “affirmatively authoriz[ing]” marijuana manufacturing, distribution, and possession); *Garvey & Yeh*, *supra* note 36, at 14 (stating that the “affirmative act of regulating and licensing marijuana cultivation and distribution may not invoke the same Tenth Amendment protections enjoyed by the states' initial decision to simply remove marijuana-related penalties under state law”).

<sup>158</sup>*Garvey & Yeh*, *supra* note 36, at 5 (reporting that Colorado imposes a 25% tax on retail marijuana sales).

<sup>159</sup>*Id.*

<sup>160</sup>*See* <https://www.colorado.gov/pacific/enforcement/marijuanaenforcement> (website of the Marijuana Enforcement Division of the Colorado Department of Revenue).

offending states. Although the filing of such a lawsuit after years of sitting on the sidelines while state marijuana legalization measures spread like wildfire will ruffle feathers and disrupt what has become a billion-dollar industry, it is the approach dictated by the law (as opposed to personal preference or political expediency). Aside from the preemption issues discussed above, the Department of Justice's current approach violates the Take Care Clause.

## V. TAKE CARE CLAUSE

The Take Care Clause of the U.S. Constitution is, in comparison to other constitutional provisions, largely unknown and infrequently litigated.<sup>161</sup> It provides in simple and direct language that the President "shall take Care that the Laws be faithfully executed."<sup>162</sup> Despite its brevity and relative obscurity, the Take Care Clause packs a mighty punch. It ensures that the power of our federal government is dispersed among the different branches,<sup>163</sup> and it prevents executive "lawlessness in the form of overreach or inaction."<sup>164</sup>

The Take Care Clause was designed to prevent Presidents (and their surrogates, such as the Attorney General) from doing exactly what the Department of Justice has done by refusing to enforce the CSA's prohibition of marijuana in those states that have passed legalization measures. It has been argued that the Department's current approach is an unreviewable exercise of prosecutorial discretion rather than a

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<sup>161</sup>See Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J. L. & PUB. POL'Y 63, 70 (2015) (stating that "[o]nly a few Supreme Court cases have interpreted the Take Care Clause").

<sup>162</sup>U.S. CONST. art. II, § 3.

<sup>163</sup>See Todd Garvey, *The Take Care Clause and Executive Discretion in the Enforcement of the Law*, Congressional Research Service (Sept. 4, 2014) (explaining that the "Take Care Clause makes a significant contribution to the separation of powers").

<sup>164</sup>Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183, 196 (2016).

breach of the Take Care Clause.<sup>165</sup> That argument lacks merit because there is a difference between prosecutorial discretion in individual cases (constitutional and necessary) and a blanket policy of non-enforcement (unconstitutional and dangerous). As explained below, the Department's approach falls on the unconstitutional and dangerous side of the line.

To understand the Take Care Clause and its purpose, a brief historical review is necessary. Prior to the Glorious Revolution of 1688, the English crown possessed suspension and dispensation powers.<sup>166</sup> Generally speaking, those powers allowed the king to nullify or simply disregard statutes passed by Parliament.<sup>167</sup> Because Parliament rarely met and the king was viewed as the "source of all law," the suspension and dispensation powers were viewed for many years as "useful and broadly accepted lubricants" that allowed the king to adjust the law as the circumstances required.<sup>168</sup> Things changed when King James II came to power.<sup>169</sup> He drew the ire of Parliament and the people when he began using his suspension and dispensation to "systematically dispense with a vast array of religious legislation and rules governing the universities."<sup>170</sup> His actions contributed to the Glorious Revolution, which resulted in the ascension of William III to the crown and the elimination of the suspension and dispensation powers.<sup>171</sup> The elimination of those powers was a "central achievement of the English Revolution . . . [and] formed an important backdrop to the American constitutional enterprise."<sup>172</sup>

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<sup>165</sup>*Id.* at 200 ("In the context of federal marijuana law enforcement, it seems clear that the Obama administration's guidance to prosecutors regarding the allocation of scarce resources is nothing more than an exercise of prosecutorial discretion.").

<sup>166</sup>Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 690-91 (2014).

<sup>167</sup>Cruz, *supra* note 161, at 66.

<sup>168</sup>Price, *supra* note 166, at 691.

<sup>169</sup>*Id.*

<sup>170</sup>Delahunty & Yoo, *supra* note 25, at 805 (internal quotations omitted).

<sup>171</sup>See Price, *supra* note 166 at 691 (explaining that "William III and Mary II replaced King James on the throne. As part of the new constitutional settlement, the monarch was henceforth denied suspending and dispensing powers.").

<sup>172</sup>*Id.* at 692.

Given the experience of their English ancestors, our Founding Fathers took pains to ensure that the President lacked the authority to “make, or alter, or dispense with the laws.”<sup>173</sup> Thus, they drafted the Take Care Clause and included it in Article II, § 3. The Clause places upon the President “an obligation and affirmative duty” to enforce the laws passed by Congress.<sup>174</sup> It is worth emphasizing “how strong the language of the Take Care Clause is. It is pitched at the highest register of constitutional obligation. The President *shall* – not *may*.”<sup>175</sup> In fact, it has been argued that the Take Care Clause is one of only two duties expressly imposed on the President by the Constitution – “he *must* take the Oath of Office . . . and he *shall* take care that the Laws be faithfully executed.”<sup>176</sup> The obligation is not simply the President’s; rather, it is one that is borne by all Executive Branch officials.<sup>177</sup>

Although the President has a role in the legislative process (most notably, the veto power), when a bill becomes a law the President’s “legislative role comes to an end and is supplanted by his express constitutional obligation under” the Take Care Clause.<sup>178</sup> Noticeably absent from the Take Care Clause is a footnote clarifying that the President only has to faithfully execute the laws that he personally agrees with or those that are popular with his political base.<sup>179</sup> Permitting the

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<sup>173</sup>Garvey, *supra* note 163, at 5 (internal quotations omitted).

<sup>174</sup>Cruz, *supra* note 161, at 69.

<sup>175</sup>Brief for the Cato Institute, Professors Randy E. Barnett & Jeremy Rabkin as Amici Curiae, *United States v. Texas*, Supreme Court Case No. 15-674, 2016 WL 1377723, at \*10 (Apr. 4, 2016) (discussing the history and purpose of the Take Care Clause).

<sup>176</sup>*Id.* (internal citations omitted).

<sup>177</sup>See generally Kamin, *supra* note 164 at 196 (stating that under the Take Care Clause “the federal executive is charged with taking care that the laws of the United States are faithfully executed”); see also Garvey, *supra* note 163, at 5 (explaining that the “President and executive branch officers must ‘faithfully’ implement and execute the law[s]”).

<sup>178</sup>Garvey, *supra* note 136, at 5..

<sup>179</sup>See Cruz, *supra* note 171, at 73 (stating that “the President’s obligation to enforce the laws does not include the power to disregard duly enacted laws when they become politically inconvenient”); see also Delahunty & Yoo, *supra* note 25, at 794 (explaining that the Constitution “imposes on the President a duty to enforce existing

President to ignore or modify congressional enactments would violate the separation of powers doctrine by “cloth[ing] the executive branch with the power of lawmaking.”<sup>180</sup> If the Framers wanted the President to have that type of power, they would have given him suspension and dispensation powers instead of saddling him with an affirmative duty to faithfully execute the laws passed by Congress. As Professors Delahunty and Yoo have explained, a “deliberate decision to leave a substantial area of statutory law unenforced or underenforced is a serious breach of Presidential duty.”<sup>181</sup>

If you want to see an example of such a breach of Presidential duty, look no further than the Department of Justice’s approach to state marijuana legalization efforts. The CSA is a longstanding federal law that makes it clear as day that marijuana is prohibited nationwide for both medicinal and recreational use. Nonetheless, the Department announced that it would not prosecute marijuana offenders in those states that passed legalization measures. Similarly, the Department refused to institute preemption proceedings against the offending states. To the contrary, when two states (Oklahoma and Nebraska) tried to do the Department’s job for it by suing Colorado over its marijuana legalization law, the Department actually filed a brief supporting Colorado.<sup>182</sup> Yes, you read that correctly – the U.S. Department of Justice came to the aid of the state that was violating federal law instead of those that were seeking to enforce it.

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statutes, regardless of any policy differences with the Congresses that enacted them or the presidents who signed them”). The president may, however, refuse to enforce a law if he believes the law violates the Constitution. See *Cruz*, *supra* note 36, at 73-74 (“[I]f a President faces a decision between enforcing a law that Congress has passed and enforcing the Constitution, many scholars have argued that he is obligated to enforce the Constitution.”). But, there have been very few circumstances where a president’s nonenforcement decision was based on a constitutional concern. *Id.* at 74.

<sup>180</sup>Garvey, *supra* note 163, at 5.

<sup>181</sup>Delahunty & Yoo, *supra* note 25, at 785.

<sup>182</sup>Lyle Denniston, *U.S. Opposes Marijuana Challenge by Colorado’s Neighbors*, SCOTUSBlog (Dec. 17, 2015) (available at, <http://www.scotusblog.com/2015/12/u-s-opposes-marijuana-challenge-by-colorados-neighbors/>).

For the approximately thirty-nine-year period between the passage of the CSA in 1970 and 2009, the Department of Justice (in both Democratic and Republican administrations) took care to see that the CSA's marijuana prohibition was faithfully executed. That all changed approximately one year into President Obama's term when his Deputy Attorney General announced that the Department would no longer seek to prosecute "individuals whose actions [we]re in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."<sup>183</sup> A later announcement extended that policy of non-enforcement to those living in states that authorized recreational marijuana.<sup>184</sup> Further, those states have become marijuana meccas where people grow, sell, and smoke marijuana openly. But, the words written into law by Congress remain unchanged—marijuana is a Schedule I controlled substance that is strictly prohibited, and its manufacture, distribution, and possession are punishable by imprisonment. What had changed, however, is that the words written into law by Congress did not align with the policy preferences of those heading up the Executive Branch.<sup>185</sup>

So, the Department of Justice simply decided to suspend the CSA in certain states and to grant dispensations to people

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<sup>183</sup>October 19, 2009, Memorandum from Deputy Attorney General David W. Ogden to Selected United States Attorneys.

<sup>184</sup>Aug. 29, 2013, Memorandum from James M. Cole to All United States Attorneys.

<sup>185</sup>Both President Obama and Attorney General Holder have made public statements regarding their dissatisfaction with the CSA's treatment of marijuana as a Schedule I controlled substance. See, e.g. Jann S. Wenner, *The Day After: Obama on His Legacy, Trump's Win and the Path Forward*, ROLLING STONE MAGAZINE (Nov. 29, 2016) (available at, <http://www.rollingstone.com/politics/features/obama-on-his-legacy-trumps-win-and-the-path-forward-w452527>) (quoting President Obama as saying that he believes marijuana should be treated the "same way we do with cigarettes or alcohol"); see also Nick Wing, *Eric Holder Says It's Ridiculous To Treat Weed Like Heroin, But He Can't Do Anything About It Now*, HUFFINGTON POST (Feb. 24, 2016) (quoting Eric Holder as saying "we treat marijuana in the same way that we treat heroin now, and that clearly is not appropriate"). Ironically, as the Attorney General, Holder could have addressed the issue lawfully by exercising his authority under 21 U.S.C. § 811(a)-(b) to remove marijuana from Schedule I of the CSA. He failed to do so.

who grow, sell, and possess marijuana in those states. There is one slight problem. The American President and his surrogates in the Department of Justice are not 17th-century English monarchs who possess suspension and dispensation powers.<sup>186</sup> That was the whole point of the Take Care Clause.<sup>187</sup> If the President and the attorney general wanted marijuana to be treated differently by federal law, they should have lobbied Congress or followed the administrative rescheduling process that Congress set forth in 21 U.S.C. § 811.

Some have defended the Department's non-enforcement policy as a permissible exercise of prosecutorial discretion, rather than an abdication of the "take care" duty.<sup>188</sup> That argument has some surface appeal. But, it crumbles upon closer inspection because there is a difference between prosecutorial discretion and a policy of non-enforcement.<sup>189</sup> The former is entirely permissible and virtually unchallengeable, the latter is a violation of the Take Care Clause.<sup>190</sup> To understand why, it is necessary to look at what prosecutorial discretion is and the purpose that it serves.

The concept of prosecutorial discretion reflects an understanding that the executive branch's duty to enforce the

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<sup>186</sup>See 4A U.S. Op. Off. Legal Counsel 55 (1980) (opinion by Office Legal Counsel explaining that "[t]he President has no 'dispensing power[.]' meaning that the President and his subordinates may not lawfully defy an Act of Congress if the Act is constitutional").

<sup>187</sup>See Cruz, *supra* note 161, at 114 ("The Take Care Clause was explicitly included in the Constitution to prevent the President from wielding the suspension and dispensation powers that had been abused by English kings.").

<sup>188</sup>See Kamin, *supra* note 164, at 200 (opining that "the Obama administration's guidance to prosecutors regarding the allocation of scarce resources is nothing more than an exercise of prosecutorial discretion").

<sup>189</sup>See Brief of former U.S. Attorneys General as Amici Curiae, *United States v. Texas*, Supreme Court Case No. 15-674, 2016 WL 1319656, at \*3 (Apr. 4, 2016) (explaining that "the Executive's authority to exercise discretion in the enforcement of the laws does not encompass the far broader power to authorize . . . class-wide relief").

<sup>190</sup>See Cruz, *supra* note 161, at 77 ("[I]t would violate the Take Care Clause for a President to invoke prosecutorial discretion as a means of failing to enforce those laws of which the President disapproves.") (internal quotations omitted).



laws does not have to be “performed robotically.”<sup>191</sup> Rather, federal prosecutors (as the President’s surrogates) have the power to decide whether to bring charges in a particular case. Generally speaking, a prosecutor’s refusal to bring charges is not subject to judicial review. As the U.S. Court of Appeals for the Fifth Circuit has explained: “It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”<sup>192</sup>

Generally speaking, the decision of whether to institute a prosecution is made by a prosecutor after considering the facts and circumstances of a particular situation. It is a case-specific judgment call that is based on such things as the strength of the evidence, the credibility of witnesses, the constitutionality of police conduct, the preferences of a victim, the potential defendant’s criminal history, and resource constraints. A federal prosecutor’s exercise of discretion is to be guided by the parameters set forth in a chapter of the U.S. Attorney’s Manual entitled “Principles of Federal Prosecution.”<sup>193</sup> That chapter begins with the general rule that an “attorney for the government should commence or recommend federal prosecution if he/she believes that the person’s conduct constitutes a federal offense, that the admissible evidence will probably be sufficient to obtain and sustain a conviction, and that a substantial federal interest would be served by the prosecution.”<sup>194</sup> A case that meets those requirements should be prosecuted,<sup>195</sup> unless “(1) The person is subject to effective

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<sup>191</sup>See Price, *supra* note 166, at 696.

<sup>192</sup>United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).

<sup>193</sup>U.S. Dep’t of Justice, United States Attorneys’ Manual § 9-27.220 (available at, <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.200>).

<sup>194</sup>*Id.*

<sup>195</sup>See Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Discretion*, 79 NOTRE DAME L. REV. 221, 237 (2003) (discussing the Principles of Federal Prosecution and stating that “the expectation is that where legal evidence of an offense exists, a prosecutor is expected to initiate criminal proceedings”).

prosecution in another jurisdiction; or (2) There exists an adequate non-criminal alternative to prosecution.”<sup>196</sup>

As a trio of former U.S. Attorneys General<sup>197</sup> have explained, “[e]ach of these situations is intensely case—and person—specific. . . .the core of the discretionary authority exclusively reserved to the Executive is the authority to make a decision in *particular* cases regarding *particular* individuals.”<sup>198</sup> Put another way, “executive officials hold discretion only to make case-specific exceptions to enforcement.”<sup>199</sup> Thus, the doctrine of prosecutorial discretion does not provide the Attorney General with the authority to decline prosecutions “on a categorical or prospective basis.”<sup>200</sup> Nor can the Attorney General rely on the doctrine of prosecutorial discretion to justify the creation of a policy against enforcing a particular provision of federal law.<sup>201</sup> Prosecutorial discretion is not unfettered—the “mere invocation of prosecutorial or enforcement discretion is not to be treated as a magical incantation”<sup>202</sup> that allows the executive to disregard congressional enactments.

Although the judiciary generally refuses to review exercises of prosecutorial discretion, the courts have recognized that there is a difference between the exercise of prosecutorial discretion in an individual case and an agency non-enforcement policy.<sup>203</sup> As the Department of Justice itself previously

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<sup>196</sup>U.S. Dep’t of Justice, United States Attorneys’ Manual § 9-27.220 (available at, <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.200>).

<sup>197</sup>The trio consisted of Edwin Meese III, Richard Thornburg, and John Ashcroft. Brief of former U.S. Attorneys General as Amici Curiae, United States v. Texas, Supreme Court Case No. 15-674, 2016 WL 1319656, at \*1 (Apr. 4, 2016).

<sup>198</sup>*Id.* at \*11, \*13.

<sup>199</sup>Price, *supra* note 166, at 677.

<sup>200</sup>Cruz, *supra* note 161, at 76-77 (internal quotations omitted).

<sup>201</sup>See Brief of former U.S. Attorneys General as Amici Curiae, United States v. Texas, Supreme Court Case No. 15-674, 2016 WL 1319656, at \*13 (Apr. 4, 2016) (discussing the difference between individualized prosecutorial discretion and a blanket policy of nonenforcement).

<sup>202</sup>Garvey, *supra* note 163, at 25 (internal quotations omitted).

<sup>203</sup>See *id.* at 25-26 (discussing the judiciary’s attempts to distinguish between traditional prosecutorial discretion and an agency nonenforcement policy).

admitted, “the individual prosecutorial decision is distinguishable from instances in which courts have reviewed the legality of general Executive Branch policies.”<sup>204</sup> While the courts will not “assume the essentially Executive function of deciding whether a particular alleged violator should be prosecuted,” they will make the “conventionally judicial determination of whether certain fixed policies allegedly followed by the Justice Department and the United States Attorney’s office lie outside the constitutional and statutory limits of ‘prosecutorial discretion.’”<sup>205</sup> And, the question of whether a Department of Justice policy of not enforcing a particular law violates the Take Care Clause is one that can be reviewed by the judicial branch.<sup>206</sup>

It is a good thing that such review is available. Consider the consequences of allowing the Executive Branch to refuse the enforcement of duly-enacted laws under the guise of prosecutorial discretion. An Executive Branch that believed there was too much environmental regulation could refuse to prosecute people who dumped pollutants into the waterways. An Executive Branch that disagreed with federal firearm laws could refuse to prosecute people who sold guns to convicted

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<sup>204</sup>8 Op. O.L.C. 101, 126 (1984).

<sup>205</sup>*Nader v. Saxbe*, 497 F.2d 676, 679 (D.C. Cir. 1974).

<sup>206</sup>*Id.* at 679, n.19 (quoting the Take Care Clause and noting that the “law has long recognized the distinction between judicial usurpation of discretionary authority and judicial review of the statutory and constitutional limits to that authority. Judicial review of the latter sort is normally available unless Congress has expressly withdrawn it.”) (internal citations omitted). Interestingly, the Supreme Court of the United States last term asked the parties in the case of *United States v. Texas* to address whether the Obama administration’s policy of not enforcing certain immigration laws constituted a violation of the Take Care Clause. See Leticia M. Saucedo, *The Supreme Court Adds ‘Take Care Clause’ to the DAPA Debate*, AMERICAN CONSTITUTIONAL SOCIETY BLOG (Jan. 19, 2016) (available at <http://www.acslaw.org/acsblog/the-supreme-court-adds-%E2%80%98take-care-clause%E2%80%99-to-the-dapa-debate>). The issue was briefed and argued, but the Court did not issue a decision in the case because Justice Scalia died during the pendency of the case and the remaining justices deadlocked 4-4. See *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam) (“The judgment is affirmed by an equally divided court.”).

felons. An Executive Branch that disliked the tax system could refrain from prosecuting tax fraud cases. And, an Executive Branch that favored drug legalization could stop prosecuting drug dealers. If that is what prosecutorial discretion allows, then it “threatens to undermine the constitutional lawmaking process.”<sup>207</sup> And, we should stop referring to the bills passed by Congress and signed by the President as “laws.” A more apt description would be “suggestions for the Executive Branch.” The Take Care Clause was designed to prevent that very thing from happening.

At bottom, the Department of Justice’s refusal to enforce the CSA’s marijuana prohibition in those states that have legalized marijuana is not an exercise of prosecutorial discretion. The decision of whether to prosecute is not being made on an individualized basis—a federal prosecutor is not considering the evidence, looking at the circumstances, applying the factors set forth in the U.S. Attorney’s Manual, and deciding whether a prosecution is warranted against a particular suspect. Rather, there is an articulated non-enforcement policy that effectively exempts the residents of twenty-six states from federal marijuana law. As the U.S. House of Representatives, Committee on the Judiciary reported, “the breadth of the Justice Department’s position on marijuana non-enforcement goes well beyond the limits of prosecutorial discretion . . . the guidance to U.S. Attorneys establishes a formal, department-wide policy of selective non-enforcement of an Act of Congress.”<sup>208</sup> In his famous speech entitled “The Federal Prosecutor,” then-Attorney General (later Justice) Robert H. Jackson warned against such behavior, stating: “The federal government could not enforce one kind of law in one place and another kind elsewhere. . . . the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips

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<sup>207</sup>Cruz, *supra* note 161, at 78.

<sup>208</sup>Report No. 113-377 of the Committee on the Judiciary, U.S. House of Representatives, regarding Executive Needs to Faithfully Observe and Respect Congressional Enactments of Law (ENFORCE) Act of 2014 (Mar. 7, 2014).

fall in the community where they may.”<sup>209</sup> The Department of Justice has disregarded Justice Jackson’s admonition, choosing instead to adopt a policy that violates the President’s duty to “take care that the Laws be faithfully executed.”<sup>210</sup>

## VI. CONCLUSION

The approach that the Department of Justice has taken to state laws legalizing marijuana over the past eight years must not continue. At the end of the day, federal law is federal law – meaning that it applies equally in all fifty states regardless of what laws a state may pass. It is not only terrible policy for the federal government to allow states to make a mockery of federal law, but it is also unconstitutional. The notion that people in one part of the country can violate federal law with impunity while people in another part of the country go to federal prison for engaging in the same conduct is un-American. If the time has come to change the way federal law treats marijuana, then that change needs to occur in a lawful manner – either by passing a bill that is signed into law by the President or by following the administrative rescheduling procedure set forth in 21 U.S.C. § 811(a)-(b). Until that occurs, the Department of Justice should return to doing its job by enforcing federal marijuana law uniformly throughout the United States.

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<sup>209</sup>Robert H. Jackson, Attorney General of the United States, Speech at the Second Annual Conference of United States Attorneys: The Federal Prosecutor at 6 (Apr. 1, 1940).

<sup>210</sup>U.S. CONST., art. III, § 3.