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# PREEMPTION UNDER THE CONTROLLED SUBSTANCES ACT

ROBERT A. MIKOS\*

States are conducting bold experiments with marijuana law. Since 1996, eighteen states and the District of Columbia have legalized the drug for medical purposes, and two of them have legalized it for recreational purposes as well.<sup>1</sup> These states have also promulgated a growing body of civil regulations to replace prohibition. The regulations cover nearly every facet of the marijuana market. Colorado, for example, has adopted more than seventy pages of regulations governing just the distribution of medical marijuana.<sup>2</sup> Among many other things, Colorado's regulations require medical marijuana vendors to apply for a special

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1. See ALASKA STAT. § 17.37 (2010); ARIZ. REV. STAT. ANN. §§ 36-2801-19 (Supp. 2012); CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007), § 11362.7-9; COLO. CONST. art. XVIII, § 14; COLO. REV. STAT. ANN. §§ 12-43.3-101-106 (West 2012), § 18-18-406.3 (West 2012), § 25-1.5-106 (West 2012); 2012 CONN. ACTS 55 (Reg. Sess.); DEL. CODE ANN. tit. 16, §§ 4901a-4926a (2011); D.C. CODE §§ 7-1671 (Supp. 2012); HAW. REV. STAT. ANN. §§ 329-121-128 (LexisNexis 2008 & Supp. 2011); ME. REV. STAT. ANN. tit. 22, §§ 2421-2430-B (Supp. 2011); 2012 Mass. Legis. Serv. 369 (West); MICH. COMP. LAWS ANN. §§ 333.26421-26430 (West Supp. 2012); MONT. CODE ANN. §§ 50-46-301-344 (2011); NEV. CONST. art. IV, § 38; NEV. REV. STAT. ANN. §§ 453A.010-.810 (LexisNexis Supp. 2011); N.J. STAT. ANN. §§ 24:61-1-16 (West Supp. 2012); N.M. STAT. ANN. §§ 26-2B-1-7 (LexisNexis Supp. 2011); OR. REV. STAT. ANN. §§ 475.300-.346 (2011); R.I. GEN. LAWS §§ 21-28.6-1-12 (2011); VT. STAT. ANN. tit. 18, §§ 4472-741 (LexisNexis Supp. 2012); WASH. REV. CODE ANN. §§ 69.51A.005-.903 (West 2012). See also Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 8, 2012, at P15 (reporting passage of broader marijuana legalization measures in Colorado and Washington). In addition, at the time of this publication, the Maryland General Assembly has passed a law legalizing medical marijuana that is waiting for the Governor's signature. See Erin Cox, *BALT. SUN* (Apr. 8, 2013), [http://articles.baltimoresun.com/2013-04-08/news/bal-medical-marijuana-approved-20130408\\_1\\_medical-marijuana-program-maryland-senate-martin-o-malley](http://articles.baltimoresun.com/2013-04-08/news/bal-medical-marijuana-approved-20130408_1_medical-marijuana-program-maryland-senate-martin-o-malley).

2. See COLO. CODE REGS. § 212-1 (2011). Colorado has proposed similarly comprehensive regulations to govern the distribution of recreational marijuana. See BARBARA BROHL & JACK FINLAW, TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64, REGULATION OF MARIJUANA IN COLORADO 7-8 (2013), available at <http://www.colorado.gov/cms/forms/dor-tax/A64TaskForceFinalReport.pdf> (recommending extensive regulations to govern newly legalized recreational marijuana market).

license from the state;<sup>3</sup> maintain detailed records of inventory;<sup>4</sup> install advanced security systems;<sup>5</sup> submit to 24/7 web-based video monitoring;<sup>6</sup> and verify customer eligibility.<sup>7</sup> The state has even created a Medical Marijuana Enforcement Division within the Colorado Department of Revenue to enforce these regulations against the state's more than 1,400 medical marijuana dispensaries.<sup>8</sup>

But even as new marijuana laws multiply, questions linger about the states' authority to conduct these experiments.<sup>9</sup> Congress has banned outright the possession, cultivation, and distribution of marijuana<sup>10</sup> and authorized harsh criminal punishment for transgressions.<sup>11</sup> The federal government's unwavering commitment to marijuana prohibition has caused many to question the states' power to chart a different course. For example, private citizens and government officials have challenged state authority to legalize marijuana,<sup>12</sup> license marijuana vendors and consumers,<sup>13</sup> prohibit various forms of private discrimination against

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3. See COLO. CODE REGS. § 212-1:1.100.

4. See *id.* at § 1.205 (detailing procedures for handling inventory of medical marijuana).

5. See *id.* at § 10.200 (mandating that licensed vendors install alarms to protect the premises).

6. See *id.* at § 10.400 (identifying specifications for video surveillance of medical marijuana licensed premises).

7. See *id.* at § 13.100 (mandating that licensed vendors inspect customer medical marijuana identification cards).

8. See OFFICE OF THE STATE AUDITOR, MEDICAL MARIJUANA REGULATORY SYSTEM PART I: DEPARTMENT OF REVENUE DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT PERFORMANCE AUDIT 1 (2013), available at [http://www.leg.state.co.us/OSA/coauditor1.nsf/All/1BB1CBF38E313A1587257B320079E543/\\$FILE/2194A%20MedicalMarijuanaRegSys%20031813.pdf/](http://www.leg.state.co.us/OSA/coauditor1.nsf/All/1BB1CBF38E313A1587257B320079E543/$FILE/2194A%20MedicalMarijuanaRegSys%20031813.pdf/).

9. See, e.g., TODD GARVEY, CONG. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 11 (2012) (noting that courts have failed to resolve several key questions regarding the preemption of state medical marijuana laws and that it unclear how far states may go in legalizing or regulating medical marijuana); Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 160–61 (2012) (noting that case law surrounding state medical marijuana laws “reveals how complicated and contested preemption is in this context”).

10. See 21 U.S.C. §§ 841(a), 844(a) (2011) (banning the trafficking and possession of marijuana, respectively).

11. See *id.* at §§ 841(b), 844(a) (delineating punishment for trafficking and possession offenses, respectively).

12. E.g., Letter from Governor Pete Wilson to the Cal. State Senate (Sept. 30, 1994) (on file with author) (vetoing California medical marijuana legalization legislation because it conflicts with federal law); Charlie Savage, *Administration Weighs Legal Action Against States That Legalized Marijuana Use*, N.Y. TIMES, Dec. 7, 2012, at A20 (reporting that the Obama Administration is considering legal action against states that have legalized the recreational use of marijuana); Michael Tarm, *Former DEA Heads: Nullify Colorado, Washington Marijuana Laws*, HUFFINGTON POST (Mar. 15, 2013, 3:53 PM), [http://www.huffingtonpost.com/2013/03/05/dea-marijuana\\_n\\_2810347.html](http://www.huffingtonpost.com/2013/03/05/dea-marijuana_n_2810347.html) (reporting that former heads of DEA are urging DOJ to nullify state marijuana legalization laws); Andrea K. Walker, *O'Malley Would Veto Medical Marijuana Bill*, BALT. SUN (Mar. 9, 2012), [http://articles.baltimoresun.com/2012-03-09/health/bs-hs-medical-marijuana-20120308\\_1\\_medical-marijuana-marijuana-and-concerns-medical-necessity](http://articles.baltimoresun.com/2012-03-09/health/bs-hs-medical-marijuana-20120308_1_medical-marijuana-marijuana-and-concerns-medical-necessity) (reporting that Maryland's governor planned to veto medical marijuana legalization measure because it would not survive “federal scrutiny”).

13. E.g., *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 654 (Cal. Ct. App. 2011) (enjoining a local marijuana dispensary permit system because it poses an obstacle to the federal CSA), *appeal docketed*

marijuana users and their suppliers,<sup>14</sup> and return marijuana wrongfully seized by state agents from medical marijuana patients.<sup>15</sup>

No one has yet satisfactorily explained the extent of the states' authority to adopt reforms in the face of the federal ban.<sup>16</sup> Neither the United States Supreme Court, nor any federal appellate court, nor the United States Department of Justice (DOJ) has yet opined on Congress's intent to preempt state marijuana reforms.<sup>17</sup> State officials have been left to figure things out for themselves, and on common issues they have reached wildly different conclusions. For example, officials in different states disagree about whether states have the power to license marijuana distributors. A few states have embraced licensing, but others have deemed it preempted by federal law.<sup>18</sup> Even courts within the same state have disagreed about state authority to license marijuana distribution in the shadow of the federal ban.<sup>19</sup>

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*sub nom.* Pack v. S.C., 268 P.3d 1063 (Cal. 2012), and appeal dismissed as moot, 283 P.3d 1159 (Cal. 2012); Preemption of the Ariz. Med. Marijuana Act (Proposition 203), Op. Ariz. Att'y Gen., No. 112-001 (Aug. 6, 2012) (concluding that "to the extent that an identification card [for medical marijuana patients] purports to authorize an individual to cultivate marijuana or otherwise violate federal law, such language is preempted"); DIV. OF PUB. HEALTH, STATE OF DEL., MEDICAL MARIJUANA PROGRAM (last updated July 3, 2012), <http://dhss.delaware.gov/dhss/dph/hsp/medmarhome.html> ("The creation of the state-licensed, privately owned compassion centers [in Delaware] has been suspended by the state. Based on guidance from the US Attorney, the compassion centers concept conflicts with federal law. As a result there is no plan to open compassion centers at this time.").

14. *E.g.*, Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 523–28 (Or. 2010) (refusing to extend state employment discrimination law to cover medical marijuana patients due to preemption concerns). See also Washburn v. Columbia Forest Prods., Inc., 134 P.3d 161, 166 (Or. 2006) (Kistler, J., concurring) ("Federal law preempts state employment discrimination law to the extent that it requires employers to accommodate medical marijuana use.").

15. Op. Mich. Att'y Gen., No. 7262 (Nov. 10, 2011) (concluding that the provision of Michigan law that requires police to return marijuana seized from qualified medical marijuana patients poses a direct conflict with and is preempted by the CSA); Op. Or. Att'y Gen., No. OP-2012-1 (Jan. 19, 2012) (reaching the same conclusion regarding Oregon's comparable law).

16. See *supra* note 9 and accompanying text. I have also addressed the states' power to legalize marijuana in an earlier Article. See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1481 (2009) (concluding that "[t]hrough Congress has banned marijuana outright through legislation that has survived constitutional scrutiny, state laws legalizing medical use of marijuana not only remain in effect, they now constitute the de facto governing law in thirteen states"). This Article applies, refines, and extends my prior analysis to the broad array of new regulations states have adopted since that Article was published.

17. See Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1490 (2006) (observing that *Gonzales v. Raich* did not decide whether the CSA preempted California's medical marijuana law); Savage, *supra* note 12 (reporting that DOJ has not yet announced how it will respond to marijuana legalization measures).

18. Compare OFFICE OF THE STATE AUDITOR, *supra* note 8, at 26 (reporting that Colorado has licensed nearly 500 medical marijuana dispensaries), with DIV. OF PUB. HEALTH, STATE OF DEL., *supra* note 13 (announcing that Delaware has suspended its marijuana licensing program because it conflicts with federal law). For a detailed discussion of the licensing issue, see *infra* Parts II.A & III.B.

19. Compare Pack v. Superior Court, 132 Cal. Rptr. 3d 633, 654 (Cal. Ct. App. 2011) (finding that federal law preempts local marijuana dispensary permit program), appeal docketed *sub nom.* Pack v. S.C., 268 P.3d 1063 (Cal. 2012), and appeal dismissed as moot, 283 P.3d 1159 (Cal. 2012), with City of Lake Forest v. Evergreen Holistic Collective, 138 Cal. Rptr. 3d 332, 361 n.12 (Cal. Ct. App. 2012),

Unfortunately, there is no relief in sight. Members of Congress have proposed legislation that would help clarify the states' power to reform their marijuana laws.<sup>20</sup> But these proposals seem doomed to remain just that.

It is time to clear the smoke. The stakes involved are enormous. Every year, nearly 900,000 people are arrested for marijuana-related offenses, the vast majority of them by state officials.<sup>21</sup> And every year, a sum of nearly \$9 billion is spent on marijuana prohibition, the bulk of it coming from state coffers.<sup>22</sup> Many states have come to the conclusion that this long-standing war on marijuana is not worth the cost, and more states will likely sound the retreat as popular support for marijuana grows.<sup>23</sup> More than ever, we need to figure out what the states are allowed to do.

This Article aims to shed some light on state authority in this realm and perhaps to generate more generalizable insights about the dangers of broad preemption doctrines. It argues that courts and commentators have needlessly muddied the waters by assuming that Congress sought to preempt all state laws that might somehow conflict with the federal Controlled Substances Act (CSA). Under the test now employed by courts and commentators, state marijuana reforms are preempted if they require someone to violate federal law, or—more controversially—if they simply pose an obstacle to some ill-specified congressional objective. The Article shows how this test has been used to block three types of laws that Congress either could not or did not want to preempt, namely state laws that legalize marijuana-related activities, state regulations that restrict such activities, and state laws that only indirectly promote such activities. To remedy these mistakes and to dispel confusion, the Article proposes that courts employ a narrower, and simpler direct conflict rule. Under that rule, state law is preempted only if it requires someone to violate federal law.

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*review granted and opinion superseded by* 275 P.3d 1266 (Cal. 2012) (finding that federal law does not preempt local permit program).

20. See, e.g., Respect States' and Citizens' Rights Act of 2013, H.R. 964, 113th Cong. (1st Sess. 2013) (amending CSA to provide that it shall not be construed to preempt any state law pertaining to marijuana); see also Letter from Patrick Leahy, U.S. Senator, to R. Gil Kerlikowske, Director of the Office of National Drug Control Policy (Dec. 6, 2012), available at <http://www.leahy.senate.gov/imo/media/doc/12-6-12%20copy%20PJL%20to%20Kerlikowske%20re%20-%20fed%20drug%20control%20policy.pdf> ("Legislative options exist to resolve the differences between Federal and state law in this area and end the uncertainty that residents of Colorado and Washington now face.").

21. JEFFREY A. MIRON & KATHERINE WALDOCK, THE BUDGETARY IMPACT OF ENDING DRUG PROHIBITION 3, tbl. 1, 7, tbl. 4 (2010) (estimating that federal government makes only 5,700 marijuana-related arrests every year, while states make roughly 872,000 marijuana-related arrests).

22. *Id.* at 5–6, tbl. 3, 7, tbl. 4 (estimating that prohibition enforcement costs state governments \$5.4 billion annually and the federal government another \$3.4 billion).

23. See PEW RESEARCH CTR., MAJORITY NOW SUPPORTS LEGALIZING MARIJUANA 1 (2013), available at <http://www.people-press.org/files/legacy-pdf/4-4-13%20Marijuana%20Release.pdf> (reporting results of national survey showing fifty-two percent of adults support legalization of marijuana).

The direct conflict test is not, of course, a panacea for all that aches this growing field. For example, it does not address the nettlesome intra-state preemption issues now arising in some jurisdictions, nor does it alleviate concerns over how the federal government might choose to enforce its own drug laws against private citizens operating in compliance with state law. However, it should alleviate one of the most serious pains now affecting state marijuana law reform efforts.

The Article proceeds as follows. Part I discusses the broad conflict preemption rule courts now employ to judge preemption disputes under the CSA. Part II explains why courts should abandon this approach in favor of a narrower direct conflict rule. Part III then shows how this direct conflict rule would apply to a wide range of provisions found in state marijuana law reforms.

## I. EXTANT VIEWS OF PREEMPTION UNDER THE CSA

This Part provides some background on preemption. It begins by briefly reviewing the law of preemption. It then discusses preemption under the CSA, including how courts and other government actors have interpreted Congress's intent to preempt state marijuana reforms.

### A. *Background on the Law of Preemption*

The issue of preemption arises anytime Congress and the states pass laws that govern the same activity. The Constitution, of course, makes federal law the Supreme law of the land, meaning that Congress can normally preempt (i.e., void) state laws if it so desires.<sup>24</sup> The key in every preemption case is thus divining Congress's preemptive intent.<sup>25</sup>

The best indication of Congress's preemptive intent comes from statutory language addressing the preemption issue.<sup>26</sup> As the Supreme Court has explained, when Congress speaks directly to preemption, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation."<sup>27</sup>

When Congress neglects to address preemption, courts will nonetheless infer that Congress intended to preempt state law in two situations. First, the courts infer

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24. U.S. CONST. art. VI, § 2 ("[The] Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."). The preemption power is qualified in two important respects. First, Congress must have the authority to regulate the activity (i.e., to pass legislation) in the first instance. Second, as discussed below in Part II.A.1, Congress may not use preemption to commandeer state governments into passing their own regulations.

25. *E.g.*, *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963) (noting that Congressional intent is the "ultimate touch-stone" for determining whether state laws are preempted).

26. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 895 (2000) (Stevens, J., dissenting) (reasoning that the plain wording of statutes with express preemption provisions provides the best evidence of Congress's intent to preempt) (citing *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

27. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (internal citations omitted).

that state law is preempted when Congress passes a “framework of regulation ‘so pervasive . . . that Congress left no room for the States to supplement it’ or where there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”<sup>28</sup> This is called field preemption.

Second, the courts find state law preempted when it conflicts with federal law. Conflicts come in two basic varieties: direct conflicts and obstacle conflicts. The narrower of the two, a direct (or impossibility) conflict arises when it is physically impossible to comply with both state and federal law.<sup>29</sup> This would happen, say, if state law orders an individual to distribute marijuana to all qualified medical marijuana patients, because it would be impossible for this person to fulfill his obligation under state law and simultaneously heed the federal ban on distributing marijuana.<sup>30</sup>

The broader type of conflict, called an obstacle (or impediment) conflict, arises anytime state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>31</sup> This would happen, say, if state law barred employers from discriminating against individuals who participate in the state’s medical marijuana program.<sup>32</sup> This particular state law does not require employers to violate federal law; i.e., it does not pose a direct conflict, because federal law does not require employers to terminate known drug users.<sup>33</sup> Yet the law would still arguably undermine Congress’s goal of combating drug abuse because it would protect marijuana users from adverse employment sanctions, sanctions that might otherwise deter their drug use.

## *B. Background on Preemption Under the CSA*

### *1. Substance and Purpose of the CSA*

The CSA represented a major expansion and reform of federal drug law and policy.<sup>34</sup> Congress passed the CSA primarily to “conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.”<sup>35</sup> Under the statute,

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28. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (internal citations omitted).

29. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (“A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility . . .”).

30. *See infra* Part III.C (discussing state distribution of marijuana).

31. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

32. *See infra* Parts II.A & III.C (discussing state anti-discrimination laws).

33. The only employment related provision in the CSA simply bars drug dealers from using minors in drug operations. 21 U.S.C. § 861(a) (2011) (“It shall be unlawful . . . to knowingly and intentionally—(1) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to violate any provision of this subchapter . . .”).

34. *Gonzales v. Raich*, 545 U.S. 1, 11–13 (2005) (discussing passage of the CSA).

35. *See id.* at 13.



all controlled substances are sorted into Schedules I–V based on their psychological and physical harms, their potential for abuse, and their redeeming therapeutic value (if any).<sup>36</sup> The substances in each category are subjected to varying levels of controls commensurate with the perceived risks, with Schedule I substances being the most tightly controlled.<sup>37</sup>

Congress itself placed marijuana on Schedule I, alongside such drugs as heroin and lysergic acid diethylamide (LSD).<sup>38</sup> This decision reflects the view that marijuana is dangerous and lacks any redeeming qualities.<sup>39</sup> In other words, all marijuana use is considered “drug abuse” under the federal scheme.

To combat the drug, the CSA proscribes the possession, cultivation, and distribution of marijuana,<sup>40</sup> and it imposes harsh criminal sanctions for violations of these bans.<sup>41</sup> The CSA also proscribes various marijuana-related activities.<sup>42</sup> Most importantly, for present purposes, Section 856 of the CSA prohibits knowingly renting, managing, or using property “for the purpose of manufacturing, distributing, or using any controlled substance.”<sup>43</sup> Section 846 makes it a crime to attempt or conspire to violate the CSA,<sup>44</sup> and a separate title, 18 U.S.C. Section 2, also makes it a crime to aid and abet a violation of the CSA.<sup>45</sup>

## *2. Existing Views of Congress’s Preemptive Intentions Under the CSA*

The CSA includes an express statement of Congress’s intent to preempt (or not) state drug laws.<sup>46</sup> Section 903 of the CSA provides:

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

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36. The scheduling criteria can be found at 21 U.S.C §§ 811, 812 (2011).

37. *See Raich*, 545 U.S. at 13.

38. *Id.* at 14 (discussing Congress’s decision to place marijuana on Schedule I).

39. *See United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491 (2001) (noting that Congress determined that marijuana had no appreciable medical benefits when it passed the CSA).

40. 21 U.S.C. §§ 841(a), 844(a) (2011).

41. *E.g.*, *id.* at § 841(b)(1)(B) (imposing large fines and a minimum five year prison term for distribution of more than one hundred kilograms of marijuana).

42. *See, e.g.*, § 843(c)(1) (prohibiting individuals from placing advertisements to buy or sell Schedule I drugs); § 854(a) (barring the investment or use of any income derived illegally from violations of the CSA); § 861(a) (making it unlawful to employ or use minors to commit CSA violations); § 863(a) (prohibiting the distribution of drug paraphernalia).

43. *Id.* at § 856(a).

44. *Id.* at § 846.

45. 18 U.S.C. § 2(a) (2011) (imposing accomplice liability on anyone who aids in the commission of any offense against the United States, including violations of the CSA).

46. 21 U.S.C. § 903 (2011).

between that provision of this subchapter and that State law so that the two cannot consistently stand together.<sup>47</sup>

Section 903 is clear in at least one important respect: it rejects any inference that Congress wanted to preempt the field of drug regulation.<sup>48</sup> Field preemption is Congress's nuclear option. It makes federal law the exclusive law governing a particular subject.<sup>49</sup> But Congress had—and continues to have—strong reasons for not assuming sole responsibility for drug control. Most importantly, the states have far greater law enforcement capacity than does the federal government. The states, for example, handle a very high volume of drug cases every year (more than 1.6 million drug arrests in 2011),<sup>50</sup> far more than does the federal government (roughly 31,000 drug arrests in 2009).<sup>51</sup> Notwithstanding their relatively permissive approach to medical marijuana, the states have adopted laws that generally mimic the substance of the CSA. For example, as of spring 2013, every state except Colorado and Washington continues to ban marijuana for non-medical purposes.<sup>52</sup> If Congress wanted to kick the states out of this field altogether, it would likely need to hire thousands more federal law enforcement agents, confirm more federal judges, and build more federal prisons to replace the monumental work now done by their state counterparts.<sup>53</sup>

Congress instead chose to preempt state law only to the extent that it “positive[ly] conflicts” with a provision of the CSA governing “the same subject matter,” such that “the two cannot consistently stand together.”<sup>54</sup> What did

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47. *Id.*

48. *Id.* (specifying, in relevant part, that “[n]o 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”).

49. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52, 81 (1941) (holding that federal law governs the registration of immigrants and preempts all state laws concerning such registration).

50. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2010 1 (2011) (reporting that over 1.6 million arrests were made in 2011 for drug violations); *see also* ORG. OF AM. STATES, *Guide to Criminal Prosecutions in the United States*, INFORMATION EXCHANGE NETWORK, [http://www.oas.org/juridico/mla/en/usa/en\\_usa-int-desc-guide.html](http://www.oas.org/juridico/mla/en/usa/en_usa-int-desc-guide.html) (last visited Feb. 14, 2013) (explaining that states prosecute more crimes than does the federal government).

51. CELINDA FRANCO, CONG. RESEARCH SERV., R40732, FEDERAL DOMESTIC ILLEGAL DRUG ENFORCEMENT EFFORTS: ARE THEY WORKING? 5 (2009).

52. *See* Healy, *supra* note 1 (reporting that Colorado and Washington were the first states to legalize recreational marijuana).

53. *See* Mikos, *supra* note 16, at 1464 (“Though the CSA certainly threatens harsh sanctions, the federal government does not have the resources to impose them frequently enough to make a meaningful impact on proscribed behavior.”). *See also* GARVEY, *supra* note 9, at 1 (explaining that the federal government has limited resources that it may rely upon for enforcement of federal drug laws).

54. *See* 21 U.S.C. § 903 (2011). As the reader will notice, I have moved the “same subject matter” language into the middle of the most widely quoted phrase of Section 903 (“positive conflict . . . so that the two cannot consistently stand together”). This move does not alter the intended meaning of the passage, but it does serve to highlight an important limitation on the preemptive impact of the CSA that most courts have ignored. *See infra* Part II.A.

Congress mean by this language? In particular, what sort of conflicts did Congress have in mind to preempt?

Unfortunately, there is very little known legislative history concerning the meaning of Section 903.<sup>55</sup> The express preemption provision apparently garnered little attention during congressional hearings concerning comprehensive drug law reforms.<sup>56</sup>

Prior to the adoption of state medical marijuana laws, the courts had remarkably few occasions on which to ponder Congress's preemptive designs. The issue did arise in a handful of early cases brought by defendants in state criminal proceedings.<sup>57</sup> The defendants in those cases challenged state drug laws as preempted because those laws imposed harsher sanctions than those prescribed by the federal CSA. In other words, the defendants claimed that the CSA established a ceiling on penalties for drug-related crimes. The preemption challenges were uniformly rebuffed and the courts spent very little time discussing the issue.<sup>58</sup>

But the rapid proliferation of state marijuana law reforms has occasioned the need for the courts to make more in-depth inquiries into Congress's preemptive intent under the CSA. Courts have been confronted by a growing docket of suits claiming that state reforms are preempted by the CSA. Indeed, a large number of courts has already weighed in on the issue.<sup>59</sup>

In deciding these cases, the courts have dutifully quoted the language of Section 903.<sup>60</sup> But none of them has yet undertaken a sustained effort to discern the

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55. The few statements on the record simply reiterate the language that became Section 903. *See* H.R. REP. NO. 91-1444, pt. 1, at 29, 60 (1970).

56. *Id.*

57. *See State ex rel. Lance v. Dist. Court of Thirteenth Judicial Dist., In & For Yellowstone Cnty.*, 542 P.2d 1211, 1213 (Mont. 1975); *Wilson v. State*, 525 S.W.2d 30, 31-32 (Tex. Crim. App. 1975); *Nichols v. Bd. of Pharm.*, 657 P.2d 216, 218 (Or. Ct. App. 1983).

58. *See State ex rel. Lance*, 542 P.2d at 1213 (holding that the CSA did not preempt the Montana Dangerous Drug Act despite significant differences in penalties between the two statutes); *Wilson*, 525 S.W.2d at 32 (rejecting the notion that differences in punishment constitute a positive conflict); *Nichols*, 657 P.2d at 219 (holding that Oregon law imposing stricter controls on sale of prescription drugs is not preempted because it furthers the purpose of the CSA).

59. The following cases discuss in some depth CSA preemption issues surrounding state or local marijuana laws. *Tracy v. USAA Cas. Ins. Co.*, No. 11-00487, 2012 WL 928186, at \*11-\*13 (D. Haw. Mar. 16, 2012); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 523-28 (Or. 2010); *Washburn v. Columbia Forest Prods., Inc.*, 134 P.3d 161, 166-68 (Or. 2006); *Ter Beek v. City of Wyoming*, 823 N.W.2d 864, 867-73 (Mich. Ct. App. 2012); *City of Lake Forest v. Evergreen Holistic Collective*, 138 Cal. Rptr. 3d 332, 353-56 (Cal. Ct. App. 2012), *review granted*, 275 P.3d 1266 (Cal. 2012); *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 638-42 (Cal. Ct. App. 2011), *appeal docketed sub nom. Pack v. S.C.*, 268 P.3d 1063 (Cal. 2012), *and appeal dismissed as moot*, 283 P.3d 1159 (Cal. 2012); *Qualified Patients Ass'n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 102-10 (Cal. Ct. App. 2010); *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 475-83 (Cal. Ct. App. 2008); *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 673-78 (Cal. Ct. App. 2007); *Haumant v. Griffin*, 699 N.W.2d 774, 776-79 (Minn. Ct. App. 2005).

60. *E.g., Emerald Steel*, 230 P.3d at 527 ("Under the terms of section 903, states are free to pass laws 'on the same subject matter' as the Controlled Substances Act unless there is a 'positive conflict'

precise meaning of Section 903, that is, what it means for a state law to pose a positive conflict with a provision of the CSA governing the same subject matter. Instead, the courts have simply assumed that Congress necessarily intended to preempt *all* conflicts with the CSA.<sup>61</sup> Under this view, state law is preempted by the CSA if it makes compliance with federal law impossible or if it undermines the full achievement of Congress's objectives.<sup>62</sup> Notably, this is the same formulation of the conflict preemption rule courts apply in implied preemption cases.<sup>63</sup>

Applying this broad rule, courts have already struck down some state marijuana reforms. For example, courts have nixed state laws shielding medical marijuana users from employment discrimination<sup>64</sup> and state and local laws licensing marijuana distributors.<sup>65</sup> Though many reforms have thus far survived preemption challenges in court, not all of the decisions will necessarily survive further scrutiny.<sup>66</sup> In any event, an even larger number of state reforms has fallen prey to the rhetoric of conflict preemption outside the courts. To give just a few

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between state and federal law 'so that the two cannot consistently stand together.')

(quoting 21 U.S.C. § 903 (2011)).

61. The following cases clearly employ a broad conflicts preemption analysis under the CSA. *Ter Beek*, 823 N.W.2d at 867–73; *Pack*, 132 Cal. Rptr. 3d at 638–42; *Qualified Patients Ass'n*, 115 Cal. Rptr. 3d at 102–10; *Emerald Steel*, 230 P.3d at 523–28; *City of Garden Grove*, 68 Cal. Rptr. 3d at 673–78; *Haumant*, 699 N.W.2d at 776–79; *Tracy*, 2012 WL 928186, at \*11–\*13. See also Kamin, *supra* note 9, at 159 (discussing cases and noting that courts now generally hold state law preempted if it requires someone to violate the CSA or if it “presents an obstacle to enforcing the CSA”). Only one court of which I am aware has applied a narrower direct conflict analysis. *San Diego NORML*, 81 Cal. Rptr.3d at 479 (interpreting “positive conflict” language in Section 903 to endorse direct conflict test).

62. See Kamin, *supra* note 9, at 159.

63. See *supra* Part I.A (discussing the implied conflicts preemption test). Although the Supreme Court has employed implied conflict preemption rules in some express preemption cases, the use of the obstacle preemption prong “cannot be defended as a *general* doctrine of statutory interpretation. While some federal statutes may indeed imply an obstacle-preemption clause, others do not.” Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 266 (2000) (emphasis added). See also Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1158–65 (1998) (discussing cases in which the Court has found that the presence of an express preemption provision makes resort to implied preemption analysis inappropriate).

64. E.g., *Emerald Steel*, 230 P.3d at 523–28 (refusing to extend state employment discrimination law to cover medical marijuana patients due to preemption concerns); see also *Washburn v. Columbia Forest Prods., Inc.*, 134 P.3d 161 (Or. 2006) (Kistler, J., concurring) (“Federal law preempts state employment discrimination law to the extent that it requires employers to accommodate medical marijuana use.”).

65. *Pack*, 132 Cal. Rptr. 3d at 638–42 (holding that a local medical marijuana permit scheme was preempted by the CSA); *Haumant v. Griffin*, 699 N.W.2d 774 (Minn. App. 2005) (opining that if a city proposal to “authorize, license, and regulate a reasonable number of medical marijuana distribution centers in the City of Minneapolis were to pass, it would be, at least for now, in conflict with current federal law and would thus be without effect.”) (internal citations omitted).

66. See, e.g., *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 667 (Cal. Ct. App. 2007) (suggesting, without explanation, that an order requiring police officers to return marijuana to a patient was not preempted because it constitutes only a *de minimis* obstacle to congressional objectives). See also *infra* notes 178–190 and accompanying text (discussing and critiquing a state court order that prevented a landlord from evicting a medical marijuana dispensary).

examples, state officials have balked at passing marijuana legalization measures,<sup>67</sup> issuing licenses to marijuana vendors and identification cards to medical marijuana patients,<sup>68</sup> and returning marijuana wrongfully seized from such patients,<sup>69</sup> all ostensibly out of concern that these reforms have been preempted by the CSA.

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In sum, courts have applied a broad conflict preemption rule under the CSA. This rule finds state law preempted if it requires violation of federal law or otherwise undermines Congress's objective of curbing marijuana consumption. Under this rule, courts have enjoined and state officials have scuttled a number of important reforms to state marijuana laws.

## II. A NEW VIEW OF PREEMPTION UNDER THE CSA

This Part suggests that the CSA should be interpreted more narrowly to preempt only direct conflicts with the statute. Under a direct conflict rule, state law is preempted only if it requires someone to violate federal law. Section A suggests that the broad conflict preemption rule now favored by courts and officials has led them to condemn three types of state law that Congress either could not or did not mean to preempt. Section B then suggests that the direct conflict rule would help courts and lawmakers avoid these errors, without necessarily jeopardizing the objectives of the CSA. It further suggests that the direct conflict rule would be easier to apply and would thereby promote consistency and predictability.

### *A. Why the Obstacle Preemption Rule is too Broad*

#### *1. The Commandeering Trap*

First, although Congress has the power to preempt state laws that *regulate* marijuana, it has no authority to preempt state laws that merely *legalize* the drug. For present purposes, regulation entails state interference with marijuana-related activities (possession, distribution, etc.). Examples include prohibitions against selling marijuana to minors, requirements that marijuana vendors obtain special business licenses, and bans on employment discrimination against medical marijuana users.<sup>70</sup> As discussed below, regulations such as these either restrict or promote marijuana-related activities. Legalization, by contrast, entails a *laissez faire* approach in which the state allows some marijuana-related activity to occur

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67. See *supra* note 12 and accompanying text (discussing California and Maryland governors' refusals to enact medical marijuana legislation).

68. See *supra* note 13 and accompanying text (discussing Arizona and Delaware officials' refusals to implement marijuana licensing programs).

69. See *supra* note 15 and accompanying text (discussing Michigan and Oregon Attorneys General opinions declaring state laws requiring the return of marijuana preempted).

70. See *infra* Parts III.B–C for a more detailed discussion of state regulations.

free of state regulation. Examples include repeal of state criminal bans against the possession of marijuana for medical purposes and repeal of state licensing sanctions against physicians who recommend the drug to patients.<sup>71</sup> When a state legalizes marijuana, it simply chooses to leave marijuana-related activities to the vagaries of private market forces and federal regulation.

Pursuant to the Supremacy Clause, Congress may preempt any state regulation of marijuana-related activity.<sup>72</sup> It could circumscribe or eliminate altogether state regulation of private activity. When it preempts state regulations, Congress merely removes state interference—i.e., it forces the state to do nothing.<sup>73</sup>

Under the Supreme Court's anti-commandeering rule, however, Congress may not likewise preempt state legalization of marijuana-related activity.<sup>74</sup> In a nutshell, the anti-commandeering rule says that Congress may not force the states to "enact or administer a federal regulatory program."<sup>75</sup> This means that Congress could not force the states to enact a marijuana ban. Neither, logically, could it force the states to keep bans already enacted but no longer wanted.<sup>76</sup> To put it another way, Congress may not "preempt" state legalization, because doing so forces states to keep pre-existing marijuana bans—bans that Congress could not force the states to adopt in the first instance. (Congress may, of course, continue to enforce its own criminal prohibitions, notwithstanding state legalization, but that is only for purposes of federal proceedings.)

Nonetheless, some courts, officials, and commentators have failed to heed the distinction between regulating and legalizing marijuana. They have suggested that state laws that merely allow residents to use marijuana free of state-imposed constraints have been preempted by the CSA.<sup>77</sup> In 1994, for example, Governor

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71. See *infra* Part III.A for a discussion of laws legalizing marijuana-related activities.

72. See generally Nelson, *supra* note 63.

73. See Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and *Yeskey*, 1998 SUP. CT. REV. 71, 89 (positing that preemption compels state inaction).

74. See Mikos, *supra* note 16, at 1445–50 (explaining how the anti-commandeering rule limits Congress's power to preempt state law). Congress can always pressure the states to re-criminalize medical marijuana, but it cannot force them to do so. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (distinguishing conditional spending and conditional preemption from prohibited commandeering).

75. *New York v. United States*, 505 U.S. 144, 188 (1992).

76. See Mikos, *supra* note 16, at 1446–47 (explaining why the anti-commandeering rule should be understood to allow states to repeal regulations).

77. See *supra* note 12 and accompanying text. See also *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518, 529 (Or. 2010) ("To the extent that [Oregon law] authorizes persons holding medical marijuana licenses to engage in conduct that the Controlled Substances Act explicitly prohibits, it poses [an] obstacle to the full accomplishment of Congress's purposes (preventing all use of marijuana, including medical uses)."); *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 652 (Cal. Ct. App. 2011) (finding that dispensary licensing ordinance posed an obstacle to congressional objectives and was therefore preempted because it "authorizes [individuals] to engage in conduct that the federal Act forbids"), *appeal docketed sub nom. Pack v. S.C.*, 268 P.3d 1063 (Cal. 2012), and *appeal dismissed as moot*, 283 P.3d 1159 (Cal. 2012) (citations omitted); *Haumant v. Griffin*, 699 N.W.2d 774 (Minn. App. 2005) (holding that proposed ordinance to allow marijuana dispensaries would be preempted by the

Pete Wilson of California refused to sign legislation that legalized medical marijuana under state law, arguing that the measure “would be preempted by the federal controlled substances law [which] prohibits the use of marijuana for medical purposes.”<sup>78</sup> More recently, eight former heads of the Drug Enforcement Administration (DEA) implored the DOJ to pursue legal action to nullify Colorado’s and Washington’s recreational marijuana legalization measures.<sup>79</sup>

The obstacle preemption rule has arguably fueled these claims that state legalization has been preempted by the CSA. After all, it is easy to see how state legalization threatens to undermine congressional objectives. Congress has long depended upon the states to wage its war on marijuana. Among other things, the states have historically handled nearly ninety-nine percent of all marijuana related arrests.<sup>80</sup> The DEA simply cannot pick up the slack if a state legalizes marijuana or stops enforcing a state ban; the federal government would need to increase its own efforts nearly one-hundred fold just to maintain the same enforcement rate. There is little doubt, then, that marijuana use will increase following state legalization.<sup>81</sup> Nonetheless, the anti-commandeering rule does not allow Congress to force states to suppress the drug. Because the broad language of obstacle preemption does not incorporate this important constraint on Congress’s preemptive power, the obstacle preemption test has led courts and government agents astray.

## 2. *The False Conflict Trap*

Second, an examination of its purposes suggests Congress likely wanted to preempt only those state regulations that *promote* rather than *restrict* marijuana-related activities. Regulations that promote are those that *reduce* the cost of engaging in marijuana-related activities.<sup>82</sup> Examples include cash subsidies for the purchase of marijuana and bans on private discrimination against marijuana users.<sup>83</sup> Regulations that restrict marijuana-related activities are those that *increase* the cost,

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federal CSA); *Lott v. City of Livonia*, No. 10-013917-CZ, slip op. at 28 (Mich. Cir. Ct. July 22, 2011) (holding state Medical Marijuana Act preempted because the federal CSA “completely bans the use of marijuana”).

78. See Letter from Governor Pete Wilson to the Cal. State Senate, *supra* note 12. Other governors have adopted similar positions. See, e.g., Walker, *supra* note 12 (discussing Maryland’s governor’s plan to veto medical marijuana legislation because of preemption concerns).

79. See Tarn, *supra* note 12. See also Savage, *supra* note 12 (noting that the DOJ is considering a suit to block state marijuana legalization measures).

80. See, e.g., BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., DRUGS AND CRIME FACTS, <http://bjs.gov/content/DCF/enforce.cfm> (last visited Apr. 12, 2013) (noting that most drug violation arrests are done at the state and local level).

81. E.g., ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES 362 (2001) (“[W]e would expect an adult legal market for cannabis to produce significant increases in prevalence, and possibly intensity of use.”).

82. Importantly, the baseline here is the proverbial state of nature, i.e., the cost of the activity in question in a world free of any state interference. See Mikos, *supra* note 16, at 1445–50, for an elaboration upon the state-of-nature benchmark.

83. See *infra* Part III.C.

however minimally, of engaging in those activities. Examples include licensing requirements for marijuana vendors, taxes imposed on marijuana sales, and registration requirements for medical marijuana users.<sup>84</sup> For reasons just discussed, both types of regulation *could* be preempted by Congress, but there are strong reasons to believe that Congress only wanted to preempt regulations that promote marijuana.

Regulations that promote marijuana-related activities are preempted because they undermine one of the chief objectives of the CSA—curbing the consumption of marijuana.<sup>85</sup> By definition, such regulations reduce the cost of using, growing, or distributing marijuana, thereby stimulating more of these activities. For example, a state marijuana subsidy would reduce the market price of marijuana, resulting in greater consumption of the drug. Indeed, some of these regulations go so far as to require individuals to violate the CSA.<sup>86</sup>

By contrast, regulations that restrict the marijuana market are not preempted, because they help to *advance* Congress's objective of curbing marijuana consumption, at least to some extent. Consider, for example, a state excise tax on all marijuana sales.<sup>87</sup> This tax would be passed on to marijuana consumers, helping to boost the price of the drug. In turn, higher prices should suppress demand for the drug.<sup>88</sup> Indeed, that is a key assumption behind federal drug enforcement policy.<sup>89</sup>

It is even easier to see why Congress does not want to preempt these regulations once we consider what would happen if it did preempt them. Preemption would have the very perverse effect of relaxing—not *tightening*—state controls on marijuana. In other words, it would widen the gap between state and federal drug policy. Consider state marijuana licensing programs. Many states want to limit marijuana distribution (medical or otherwise) to a set of state-licensed distributors,<sup>90</sup> in effect, to create a state-licensed oligopoly. Among other things, this licensing regime is designed to help the states collect excise taxes from vendors and prevent unlawful sales to minors.<sup>91</sup> The licensing process enables states to screen out vendors they deem more likely to break state law, and it also enables states to keep a close eye on the operations of licensees. But if the licensing scheme

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84. See *infra* Part III.B.

85. See *supra* Part I.A (discussing congressional objectives).

86. See *infra* Parts II.B & III.

87. See BROHL & FINLAW, *supra* note 2, at 28–32 (discussing Colorado's forthcoming marijuana tax).

88. See CAL. STATE BD. OF EQUALIZATION, STAFF LEGISLATIVE BILL ANALYSIS OF THE MARIJUANA CONTROL, REGULATION, AND EDUCATION ACT, A.B. 390, at 6 (2009) (estimating that a \$50 per ounce tax on sales of legalized marijuana would reduce overall consumption by eleven percent).

89. JONATHAN B. CAULKINS ET AL., HOW GOES THE “WAR ON DRUGS”? AN ASSESSMENT OF U.S. DRUG PROBLEMS AND POLICY 7 (2005) (asserting that “a principal objective of drug control is to constrain supply sufficiently to reduce availability and drive up price, making drug use less attractive”).

90. See *infra* Part III.B.

91. E.g., JIM LEITZEL, REGULATING VICE: MISGUIDED PROHIBITIONS AND REALISTIC CONTROLS 161–63 (2008) (explaining how licensing requirements can be used to restrict supply).



is blocked by a court, it will be considerably more difficult for the states to collect taxes from or enforce other regulatory restrictions against marijuana vendors.<sup>92</sup> Congress may want the states to do more, but given how limited its own enforcement resources are,<sup>93</sup> it seems unlikely to refuse whatever drug control assistance the states might volunteer, no matter how meager.

It is telling that the DOJ itself has not sued to block state regulations of the medical marijuana market in the past. Indeed, in a twist of irony, the claim that state medical marijuana regulations are preempted by federal law has been championed instead by segments of the medical marijuana industry—hardly a group that shares common goal with Congress. In one suit, for example, a medical marijuana dispensary in California convinced a state court that a local licensing requirement was preempted by federal law.<sup>94</sup> It did not do so because it supported the federal ban, but because it wanted to operate free and clear of the local government’s interference—the local government had ordered the dispensary to close because it failed to comply with the licensing ordinance.<sup>95</sup> Again, it seems safe to say that the court erred in that case,<sup>96</sup> for Congress would clearly prefer to have some state-imposed restrictions on marijuana distribution than none at all.

Indeed, the argument that state regulations pose a conflict with the CSA if they go below some imaginary floor set by the CSA could have dramatic ramifications. Many states beyond those that have legalized medical and recreational marijuana outright now regulate the drug less aggressively than does the federal government.<sup>97</sup> For example, a number of states have decriminalized the simple possession of marijuana.<sup>98</sup> They continue to ban possession of the drug, but they treat violations of their bans as civil infractions subject to small fines.<sup>99</sup> If the CSA really sets a floor below which state regulations are preempted, it begs the

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92. *See id.* at 162 (noting that licensing requirements can help governments avoid being “swamped by the necessity of overseeing thousands of extremely small operations”).

93. *See supra* Part I.B (noting Congress’s comparatively limited drug enforcement capacity).

94. *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 638–42 (Cal. Ct. App. 2011), *appeal docketed sub nom. Pack v. S.C.*, 268 P.3d 1063 (Cal. 2012), and *appeal dismissed as moot*, 283 P.3d 1159 (Cal. 2012).

95. *Id.* at 645.

96. The California Supreme Court dismissed the appellate court decision on mootness grounds. *See generally id.*; Dennis Romero, *Marijuana Dispensaries See Hope in California Supreme Court Move on Pack Case*, LA Weekly Blog (Aug. 23, 2012, 3:23 PM), [http://blogs.laweekly.com/informer/2012/08/marijuana\\_pack\\_supreme\\_court\\_ruling\\_dispensary\\_ban.php](http://blogs.laweekly.com/informer/2012/08/marijuana_pack_supreme_court_ruling_dispensary_ban.php) (discussing the rationale behind the California Supreme Court’s decision to deny review in *Pack v. Superior Court*).

97. Michael O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 829–42 (2004) (discussing early state marijuana reforms).

98. *See* Jason Sattler, *14 States That Have Decriminalized Marijuana*, THE NATIONAL MEMO (Apr. 1, 2013, 5:23 pm), <http://www.nationalmemo.com/14-states-that-have-decriminalized-marijuana/>.

99. *Id.*

question whether these civil sanctions and other comparatively lenient criminal sanctions are likewise preempted by the CSA.<sup>100</sup>

Nonetheless, key decision makers have failed to appreciate the way that state regulations actually serve congressional interests. For example, the Arizona Attorney General has deemed the states' patient identification card program preempted;<sup>101</sup> the Delaware Department of Public Health has suspended the state's medical marijuana licensing program out of preemption concerns;<sup>102</sup> and a California appellate court enjoined a similar local permitting scheme on obstacle preemption grounds.<sup>103</sup>

The capriciousness of obstacle preemption has arguably enabled the argument that these state regulations are preempted. The rule simply gives courts too much discretion in framing congressional objectives and in deciding whether state laws undermine them.<sup>104</sup> As Mary Davis has observed, "[t]he flexibility of the Court's 'actual conflict' preemption, including as it does the amorphous obstacle preemption, would seem to support a finding of preemption in virtually all circumstances."<sup>105</sup> Consider the opinion of the Oregon Supreme Court showcasing the deceptive logic of obstacle preemption:

If Congress chose to prohibit anyone under the age of 21 from driving, states could not authorize anyone over the age of 16 to drive and give them a license to do so. The state law would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress (keeping everyone under the age of 21 off the road) and would be preempted. . . . To the extent that [Oregon law] authorizes persons holding medical marijuana licenses to engage in conduct that

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100. It is also worth noting that the federal government once employed many of the same regulations now championed by the states. The Marihuana Tax Act of 1937, for example, required all persons selling marijuana to register with the IRS and pay a tax on all sales of the drug. See Richard J. Bonnie & Charles H. Whitebread, Jr., *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1062 (1970) (discussing the Act and its requirements). Indeed, the federal government still uses taxes to combat the marijuana industry. Benjamin M. Leff, *Growing the Business: How legal marijuana sellers can beat a draconian tax*, Slate.com (Feb. 28, 2013, 12:02 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/02/how\\_legal\\_marijuana\\_sellers\\_can\\_beat\\_a\\_draconian\\_federal\\_tax.html?fb\\_ref=s\\_m\\_fb\\_share\\_chunky](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/how_legal_marijuana_sellers_can_beat_a_draconian_federal_tax.html?fb_ref=s_m_fb_share_chunky) (discussing federal tax rules designed to combat illicit drug distribution).

101. Preemption of the Ariz. Med. Marijuana Act, *supra* note 13 (declaring that the state medical marijuana identification card program is preempted to the extent that it "purports to authorize an individual to cultivate marijuana").

102. See DIV. OF PUB. HEALTH, *supra* note 13.

103. *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 654 (Cal. Ct. App. 2011), *appeal docketed sub nom. Pack v. S.C.*, 268 P.3d 1063 (Cal. 2012), and *appeal dismissed as moot*, 283 P.3d 1159 (Cal. 2012).

104. Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 882 (2008) (lamenting that "'obstacle' preemption based on federal statutes" is "vague and provide[s] little basis for confidence about outcomes").

105. Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 1021 (2002).

the Controlled Substances Act explicitly prohibits, it poses the same obstacle to the full accomplishment of Congress's purposes (preventing all use of marijuana, including medical uses).<sup>106</sup>

As noted above, one California appellate court employed similar logic to conclude that a local ordinance requiring medical marijuana dispensaries to obtain a permit from a city government posed an obstacle to the CSA. The court reasoned that the hefty fee charged by the city for such permits favored large scale marijuana producers of the sort that are prime targets of federal law enforcement agencies.<sup>107</sup> However, the court could easily (and more accurately) have found that the permitting requirement promoted rather than obstructed Congress's aims. After all, by charging dispensaries a hefty (\$14,742) annual fee<sup>108</sup> the city was no doubt helping to curb the marijuana market.<sup>109</sup> It seems Congress has little to gain (and much to lose) from preempting licensing schemes and other state regulatory restrictions, but the obstacle preemption inquiry is seemingly malleable enough to support a verdict to the contrary.

### 3. *The Indirect Conflict Trap*

Third, and finally, Congress more clearly indicated that it wanted to preempt state regulations only if they *directly* promote marijuana-related activities. Regulations that directly promote marijuana-related activities are those governing subjects explicitly addressed by the CSA. By contrast, regulations that only indirectly promote marijuana-related activities are ones that lower the cost of such activities, but do so in a way not addressed by the CSA. To illustrate the distinction, compare a state law shielding marijuana users from eviction with a state law shielding such users from employment termination. Both laws arguably promote marijuana-related activities—the landlord-tenant law because it lessens the risk of losing one's apartment and the employment law because it lessens the risk of losing one's job. But only the former law promotes marijuana activities in a manner that is directly addressed by the CSA. As noted above, the CSA expressly bars landlords from renting to anyone they know will use the property to consume or distribute drugs.<sup>110</sup> By contrast, the CSA does not purport to regulate the

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106. *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518, 529 (Or. 2010).

107. *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 653 n.31 (Cal. Ct. App. 2011), *appeal docketed sub nom. Pack v. S.C.*, 268 P.3d 1063 (Cal. 2012), and *appeal dismissed as moot*, 283 P.3d 1159 (Cal. 2012). The court reasoned that although the "high costs of compliance with the City's ordinance may have the practical effect of allowing *only* large-scale dispensaries . . . these large-scale dispensaries are precisely the type of dispensaries the licensing of which the U.S. Attorney General believes stands as an obstacle to the enforcement of the CSA." *Id.*

108. *Id.* at 643–44.

109. See LEITZEL, *supra* note 91, at 140–77 (explaining how licensing and other civil regulations can be used to curb drug consumption).

110. 21 U.S.C. § 856 (2011); see also *infra* Part III.C.

employer-employee relationship.<sup>111</sup> In other words, the CSA does not prohibit employers from hiring drug-using individuals.

Regulations directly promoting marijuana activities are plainly preempted because they immediately impact congressional drug control goals. Indeed, one could argue that such laws invariably make it impossible to comply with both state and federal law—a type of conflict Congress undoubtedly sought to prevent.<sup>112</sup>

By contrast, regulations that only indirectly promote marijuana are not preempted because Congress expressly spared them. This choice is evident from the language of Section 903. In particular, Section 903 provides that a state law is preempted only to the extent that it “positive[ly] conflict[s]” with a provision of the CSA governing the “*same subject matter*,” “so that the two cannot consistently stand together.”<sup>113</sup> The highlighted language suggests Congress did not want to preempt all state laws that impacted drug behavior but only those laws that did so in a way the CSA directly addresses, i.e., only when state law regulates a specific subject, say, the landlord-tenant relationship, that is also regulated by the CSA.

It is easy to see why Congress might want to spare state regulations that only indirectly promote marijuana-related activities. Although these laws might undermine somewhat Congress’s objective of curbing marijuana consumption, subjecting them to preemption challenges could prove enormously burdensome for the courts and for state and local officials. After all, countless state laws, including many wholly unrelated to the drug law field, could promote drug use at the margin. Suppose, for example, that a city imposes a special assessment to widen and abate congestion on a public road that happens to be connected to a popular marijuana dispensary. One could argue that this expenditure of public funds would undermine Congress’s goal of combatting marijuana distribution; among other things, the road improvement would likely make it easier for residents to shop at the dispensary. And any disgruntled payers of the special assessment would likely have standing (in state court, if not federal) to challenge the roadway program as preempted.<sup>114</sup> But it seems hard to imagine that Congress would want the CSA to be used as a sword against state laws having only tangential relevance to drug abuse. After all, preemption lawsuits could wreak havoc on the administration of mundane state and local government programs. As the Supreme Court has observed, it arguably

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111. See *supra* note 33 and accompanying text (noting that the only employment-related provision of the CSA simply bars using minors to commit drug crimes).

112. See, e.g., *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (“A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility . . .”).

113. 21 U.S.C. § 903.

114. See Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1854 (2001) (noting that states generally grant citizens standing to challenge public expenditures in state court); see also Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 Stan. L. & Pol’y Rev. 633, 661–64 (2011) (analyzing who would have standing to bring CSA preemption challenges against state laws).

“frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law,<sup>115</sup> given that “no legislation pursues its purposes at all costs.”<sup>116</sup>

Unfortunately, again, some courts and commentators have failed to heed this distinction. For example, the Oregon Supreme Court has held that a state law barring employment discrimination against medical marijuana users is preempted because it conflicts with congressional objectives.<sup>117</sup> The problem here is not the court’s capacity for applying obstacle preemption, for it is surely correct that extending employment discrimination to cover drug use would impair at least one congressional objective, as just discussed. Rather, the problem is the court’s assumption that obstacle preemption applies to this case despite Congress’s express statutory language disavowing such intent. In their dogged application of broad implied conflict preemption principles, courts have simply paid no attention to the “same subject matter” limiting language of Section 903.<sup>118</sup>

### *B. Why a Direct Conflict Rule Would be Better*

The obstacle preemption rule has arguably led courts astray. This Section suggests that courts should instead employ a narrower direct conflict rule under the CSA. It begins by demonstrating why the direct conflict rule would help courts to avoid the mistakes outlined above, without necessarily running the risk of permitting too many conflicts to go unresolved. It also suggests that the direct conflict rule would be simpler for courts and lawmakers to apply, thereby providing clearer guidance about state power to reform marijuana laws.

#### *1. Type I Errors*

A direct conflict rule would help courts avoid the three errors identified above. I label these “Type I” errors because they condemn state laws Congress could not or did not want to preempt. To begin, the narrower direct conflict rule would avoid the commandeering trap. This is because the CSA imposes only *negative* duties, i.e., duties to refrain from certain activities; it does not purport to

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115. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987).

116. *Id.* at 525–26.

117. *See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 520 (Or. 2010) (holding that an employer was not required to accommodate employee’s use of medical marijuana).

118. Indeed, one court has carelessly opined that “express preemption is inapplicable because *there is no express preemption provision in the CSA.*” *Ter Beek v. City of Wyoming*, 823 N.W.2d 864, 871 n.5 (Mich. Ct. App. 2012) (emphasis added). Lest the reader think that statement is an isolated incident of confusion, consider the following passage from a California appellate court: “With this language [of Section 903], Congress *declined to assert express preemption* in the area of controlled substances and directly foreswore field preemption, leaving only conflict preemption and obstacle preemption as potential bases supporting the trial court’s preemption ruling.” *Qualified Patients Ass’n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 106 (Cal. Ct. App. 2010) (emphasis added) (internal citations omitted).

require anyone to combat marijuana.<sup>119</sup> Hence, a state law that simply bars state agents from combatting marijuana-related activities could not plausibly be interpreted to pose a direct conflict with the CSA. When a state agent refuses to combat federally proscribed behavior, she neither helps nor hinders a citizen's decision to engage in that behavior, in the legally relevant sense; she simply leaves that decision to the whims of the market and the federal government. In other words, a citizen can obey the CSA's negative duties and state law's refusal to impose the same by not engaging in the federally proscribed behavior.<sup>120</sup>

The direct conflict rule likewise eliminates the risk of preempting state regulations that restrict the marijuana market on the dubious logic that such regulations somehow impede congressional purposes. Consider licensing programs. The act of issuing a state license to a drug dealer does not itself constitute a crime under the CSA. True, the drug dealer violates the CSA if she distributes marijuana, but that action is not attributable to the state. A license does not make the dealer a state actor or otherwise make the state responsible for her actions;<sup>121</sup> it does not force her to actually distribute marijuana;<sup>122</sup> and it provides no aid, at least in the relevant sense—i.e., it only protects her from legal sanctions the state is not obliged to impose.

Lastly, the direct conflict rule would eliminate the risk of mistakenly condemning state laws that only indirectly frustrate congressional aims. Almost by definition, a direct conflict pits a state law governing X against a provision of the CSA that also governs X (whatever X might be). As discussed above, for example, a state law that requires a landlord to rent property to a medical marijuana dispensary poses a direct conflict with the CSA, because Section 856 of the statute expressly forbids landlords from renting property they know is being used to distribute marijuana.<sup>123</sup> Not by coincidence, these two laws govern the same subject

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119. See Mikos, *supra* note 16, at 1451 (“[T]he CSA does not proscribe omissions; that is, it does not impose any duty to act (generally applicable or otherwise), such as a duty to report known violations.”). In theory, Congress could amend the CSA to impose some generally applicable affirmative duties on state officials. See *New York v. United States*, 505 U.S. 144, 177–78 (1992) (suggesting that Congress can impose generally applicable duties on states without violating the anti-commandeering rule).

120. *Cf. Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (illustrating a situation under which a direct conflict might arise). See also Nelson, *supra* note 63, at 228 n.15 (“The Supreme Court has made clear that even 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.”).

121. *E.g., Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 189 (3rd Cir. 2000) (holding that a state licensed casino is not a state actor).

122. See *City of Lake Forest v. Evergreen Holistic Collective*, 138 Cal. Rptr. 3d 332, 361 n.12 (Cal. Ct. App. 2012), *review granted and opinion superseded by* 275 P.3d 1266 (Cal. 2012) (“Local conditional use permits issued to [medical marijuana] dispensaries . . . generally would not trigger federal preemption because issuing a permit does not constitute a local government command to operate a dispensary . . . Simply put, a permit holder need not act on the permit.”).

123. 21 U.S.C. § 856 (2011); see also *infra* Part III.C.

matter—the landlord-tenant relationship in drug cases. By contrast, a state law that bars a private employer from discriminating against a medical marijuana user does not pose a direct conflict because the CSA does not purport to govern the subject of employer-employee relations.<sup>124</sup>

## 2. *Type II Errors*

The direct conflict rule would also safely avoid Type II errors, namely, upholding state laws that Congress did want to preempt. It is true that the direct conflict rule normally poses a real danger of Type II errors, because under most statutes that rule will be “vanishingly narrow.”<sup>125</sup> But the CSA is no ordinary statute. The danger of Type II errors is minimized by the sheer breadth of the statute. The CSA unequivocally proscribes a sweeping array of drug-related behaviors: the possession, cultivation, and distribution of drugs; renting property for said purposes; attempts and conspiracies to do any of the above; and even aiding and abetting another to do so.<sup>126</sup>

In the face of so many proscriptions, it seems improbable that a state could seriously undermine the CSA without creating a direct conflict. The direct conflict rule thus would be far from toothless. It preempts the most glaring and troublesome state challenges to federal drug authority. For example, it plainly stops states from distributing marijuana through state-owned and operated dispensaries.<sup>127</sup>

In any event, the Supreme Court has suggested that avoiding Type I errors is a more pressing concern than avoiding Type II errors. The Court’s preference for preserving state laws is evident from the oft-invoked presumption that “the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>128</sup> This so-called presumption against preemption clearly favors upholding state law even when it means potentially sacrificing some federal objectives.

## 3. *Simplicity*

A final argument in favor of the direct conflict rule is that it is comparatively simple to apply. Obstacle preemption is a notoriously difficult test to apply.<sup>129</sup> It

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124. See *supra* note 33 (noting that the only employment-related provision of the CSA simply bars using minors to commit drug crimes).

125. Nelson, *supra* note 63, at 228.

126. See *supra* Part I.A (discussing substantive provisions of the CSA).

127. See *infra* Part III.C.

128. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

129. E.g., Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L. J. 326, 335 (2007) (commenting that obstacle preemption is “too ambiguous” and “because of its uncertainty, risks improper incursions on federalism by overturning perfectly valid state laws”); Paul E. McGreal, *Some Rice with Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 833–34 (1995) (stating that obstacle preemption entails “a difficult and largely undefined inquiry into the policies underlying a statutory scheme”).

requires courts to look beyond statutory text to divine congressional purposes and to determine whether any number of distinct state laws might undermine those purposes. The Supreme Court has given little helpful advice as to how these tasks are to be performed.<sup>130</sup> No wonder, then, that courts and lawmakers have struggled mightily to understand preemption in the context of state marijuana law reforms.

The direct conflict rule places comparatively few demands on the courts. They need not look beyond the statute for its purposes, and they need not employ sophisticated social science reasoning to assess whether any given state law might hinder such purposes. Instead, courts need only determine whether a given state law requires someone to violate federal law, and on that question they can consult the substantive provisions of the CSA and employ familiar legal reasoning for answers. To be sure, there will continue to be some tricky cases<sup>131</sup> and mistakes will be made.<sup>132</sup> But the relative ease of this task should generate more accurate, predictable, and consistent judgments across cases. As one scholar surmised, “[a]mong the three forms of implied preemption, impossibility preemption is uncontroversial and unproblematic . . . .”<sup>133</sup>

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In sum, there are three important limitations on the preemptive scope of the CSA. First, under the Court’s anti-commandeering doctrine, Congress may not preempt state laws that merely legalize marijuana-related activities. Second, given the federal government’s very limited law enforcement capacity, Congress likely did not want to preempt any state regulations that help reduce drug abuse. Third, even when state regulations increase drug abuse, Congress expressly indicated that it only wanted to preempt those that do so directly. The courts must heed these limits, and the best way to do so would be to adopt a direct conflict rule for

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130. E.g., S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B. U. L. REV. 685, 687 (1991) (arguing that the Court has failed to detail a coherent standard for lower courts for preemption cases); Donald P. Rothschild, *A Proposed “Tonic” With Florida Lime to Celebrate Our New Federalism: How to Deal with the “Headache” of Preemption*, 38 U. MIAMI L. REV. 829, 857 (1984) (“[The] ‘frustration of federal purpose’ test enunciated in *Hines* has been applied with amazing inconsistency.”).

131. See *infra* Part III.A (discussing complicated issues surrounding the question of whether laws requiring police to return marijuana pose a direct conflict with the CSA).

132. For example, several county attorneys in Arizona recently issued a letter to Governor Jan Brewer, arguing (erroneously) that the “[t]he implementation and facilitation” of the state’s dispensary licensing and patient registration card programs “constitute federal crimes” and were thus preempted. Letter from Sheila Sullivan Polk, Yavapai Cnty. Att’y, to the Honorable Janice K. Brewer, Governor of Ariz. (July 24, 2012) (on file with the Journal of Health Care Law & Policy). It is difficult to imagine a theory under which a state official could actually be prosecuted simply for issuing a license to a marijuana dispensary. See *infra* Part III.B (explaining why licensing does not violate federal law).

133. See, e.g., Ashutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?*, 45 TULSA L. REV. 197, 200 (2009).



adjudicating preemption disputes under the CSA.<sup>134</sup> The next Part demonstrates how that rule should be applied to a variety of common state drug law reforms.

### III. WHICH STATE LAWS POSE A DIRECT CONFLICT WITH THE CSA?

This Part discusses which, if any, state law reforms pose a direct conflict with and are thus preempted by the CSA. To organize the discussion, I categorize these laws according to the framework developed in Part II.A above: A) laws that legalize marijuana-related activities;<sup>135</sup> B) laws that restrict marijuana-related activities;<sup>136</sup> and C) laws that promote marijuana-related activities.<sup>137</sup> I will describe the laws falling into each of these categories and analyze which, if any, poses a direct conflict with the CSA.

#### *A. Laws that Legalize Marijuana-Related Activities*

The first type of law legalizes the possession, cultivation, and distribution of marijuana under state law. As discussed above in Part II.A, a state legalizes marijuana when it indicates that it will not impose its own sanctions for possessing, cultivating, or distributing the drug. The sanctions include both criminal penalties, such as jail and fines, as well as civil sanctions, such as the denial of privileges and forfeiture of property. For example, Maine law provides that individuals who meet the criteria of the state's medical marijuana program may not "be denied any right or privilege or be subjected to arrest, prosecution, penalty or disciplinary action" by state authorities for possessing or growing marijuana.<sup>138</sup> Similarly, most states prohibit state medical boards from discriminating against physicians who recommend marijuana to patients.<sup>139</sup> For example, California's Health and Safety Code provides that "no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes."<sup>140</sup>

As should be obvious at this point, the legalization of marijuana under state law does not pose a direct conflict with the CSA. A citizen can obey a state law allowing or even authorizing the possession, distribution, or cultivation of

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134. A direct conflict rule is not the only option, of course. In theory, the courts could modify the obstacle preemption rule to avoid the three Type I errors identified in Part II.A. But apart from serving no real purpose—the direct conflict rule already avoids these errors—the modification would make the obstacle preemption rule even more complex and difficult to apply.

135. See *infra* Part III.A.

136. See *infra* Part III.B.

137. See *infra* Part III.C.

138. ME. REV. STAT. ANN. tit. 22, § 2423-E (Supp. 2011). California has a similar law. See CAL. HEALTH & SAFETY CODE § 11362.5(d) (West Supp. 2012) (exempting patients and their caregivers who receive proper approval from a physician from criminal penalties for the possession and/or cultivation of marijuana).

139. CAL. HEALTH & SAFETY CODE § 11362.5(c) (West Supp. 2012).

140. *Id.*

marijuana and the CSA's express ban on these same activities by not engaging in them.<sup>141</sup> Importantly, legalizing the drug for purposes of state law does not pressure a citizen to violate federal law. No state, for example, imposes a marijuana mandate on its residents. States simply leave their choices to the vagaries of federal law enforcement and the private market. Neither do state officials somehow violate federal law when, pursuant to state law, they refuse to lift a finger against marijuana.<sup>142</sup> The CSA does not, and, as discussed above, cannot, oblige state officials to punish people for possessing, cultivating, or distributing marijuana.<sup>143</sup>

Several courts have drawn a spurious distinction between legalization and authorization.<sup>144</sup> Whether a state law speaks in terms of authorization or legalization is wholly immaterial, so long as the effect is merely to lift state-imposed sanctions. For example, a state might adopt a marijuana law that provides "Person A is authorized to use marijuana" or it might instead adopt a law that provides "It is legal for Person A to use marijuana." Despite the variance in language, both laws have the same practical effect; they bar state officials from punishing Person A for using marijuana.

A more tenable preemption challenge has been raised against state laws that require police officers to return any marijuana they have seized from patients and dispensaries in violation of state anti-seizure laws.<sup>145</sup> As just noted, those anti-seizure laws themselves do not pose a direct conflict with the CSA, because the CSA neither does nor could require state officers to seize marijuana they might observe. But what happens if a police officer disregards her state's anti-seizure law and seizes marijuana anyway? May the state undo the wrongful seizure by ordering the officer to return the marijuana to its original owner?

At first glance, this situation does seem to pose a direct conflict with the CSA because the police officer who returns marijuana to a private citizen arguably violates the CSA. To be sure, the officer is merely trying to undo a state-imposed sanction (the seizure of the drug) and does not necessarily want to help the citizen

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141. *See, e.g., Ter Beek v. City of Wyoming*, 823 N.W.2d 864, 871 (Mich. Ct. App. 2012) (finding Michigan's medical marijuana law does not pose direct conflict with CSA because, while the CSA prohibits use of marijuana in any context, Michigan's medical marijuana law permits but does not command use of marijuana, thereby making it possible to comply with both statutes).

142. *See supra* Part II.A.

143. *See supra* Part II.A.

144. *See, e.g., Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529–30 (Or. 2010) (opining that to the extent Oregon's medical marijuana law affirmatively authorizes marijuana use it is in direct conflict with the CSA); *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 651 (Cal. Ct. App. 2011) ("There is a distinction, in law, between not making an activity unlawful and making the activity lawful."), *appeal docketed sub nom. Pack v. S.C.*, 268 P.3d 1063 (Cal. 2012), and *appeal dismissed as moot*, 283 P.3d 1159 (Cal. 2012).

145. *E.g., MICH. COMP. LAWS* § 333.26424(h) (Supp. 2012) (requiring the return of medical marijuana paraphernalia that has been unlawfully seized from qualified patients); N.M. STAT. ANN. § 26-2B-4(G) (Supp. 2011) (same); OR. REV. STAT. § 475.323(2) (2011) (same); *see also City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 678 (Cal. Ct. App. 2007) (upholding an order requiring police officers to return seized medical marijuana to patient).

consume the drug. But the CSA, in relevant part, proscribes knowingly or intentionally distributing marijuana,<sup>146</sup> and it defines distribution simply as the “the actual, constructive, or attempted transfer of a controlled substance.”<sup>147</sup> In other words, on its face, the CSA does not require that the transferor have any particular purpose (commercial or otherwise) in mind.<sup>148</sup> Hence, a police officer who takes marijuana from an evidence lock-up room and transfers it to the private citizen from whom it was wrongfully seized has seemingly met all of the elements of a drug distribution offense under the CSA. Indeed, top law enforcement officials in at least two states have concluded that provisions of state law requiring them to return seized marijuana pose a direct conflict with the CSA for this reason and are thus preempted.<sup>149</sup> As the Attorney General of Michigan explains,

If a law enforcement officer returns [marijuana] to a patient or caregiver as required by [the Michigan Medical Marijuana Act], the officer is distributing or aiding and abetting the distribution or possession of [marijuana] by the patient or caregiver in violation of the [federal] CSA. Thus, a Michigan law enforcement officer cannot simultaneously comply with the federal prohibition against distribution or aiding and abetting the distribution or possession of [marijuana] and the state prohibition against forfeiture of [marijuana].<sup>150</sup>

Nonetheless, there are at least two arguments suggesting that a police officer who simply returns marijuana to its original owner does not, in fact, violate the CSA in the process. One textualist argument rests upon an obscure provision of the CSA, Section 885(d), to suggest that Congress has expressly immunized the actions of state police officers who distribute marijuana pursuant to state law.<sup>151</sup> Section 885(d) provides, in relevant part, that “no civil or criminal liability shall be imposed . . . upon any duly authorized officer of any State . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.”<sup>152</sup> A few courts have held that this provision immunizes the act of returning medical marijuana to its owner pursuant to a state statute or court order.<sup>153</sup> Not all courts agree with this view,<sup>154</sup> however, and I have criticized this

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146. 21 U.S.C. § 841(a)(1) (2011).

147. §§ 802(8), (11).

148. *See, e.g.,* United States v. Washington, 41 F.3d 917, 919 (4th Cir. 1994) (finding that “distribution,” as defined by the CSA, is not limited to merely selling controlled substances but broadly includes any transfer of a controlled substance).

149. *See supra* note 15 and accompanying text (discussing opinions of the Michigan and Oregon Attorneys General).

150. *Op. Mich. Att’y Gen., supra* note 15.

151. 21 U.S.C. § 885(d) (2011).

152. *Id.*

153. *See generally* State v. Okun, 296 P.3d 998 (Ariz. Ct. App. 2013) (holding that Section 885(d) gave state police officer immunity from CSA prosecution for returning marijuana to its owner pursuant

interpretation of Section 885(d) as being “difficult to reconcile with the CSA’s express preemption language and congressional intent.”<sup>155</sup>

A second purposivist argument instead suggests that state police officers do not actually violate the CSA when they return wrongfully seized marijuana to its owner because such distribution is innocent. Some state courts have recognized an “innocent distribution defense” to state drug charges when there is “evidence that the possession was incidental and lasted no longer than reasonably necessary to permit a return to the owner, a surrender to authorities, or other suitable disposal.”<sup>156</sup> The defense is designed to prevent egregious results that might otherwise arise from the rigid application of drug laws.<sup>157</sup> As one court explained,

A parent confiscating drugs from his or her child, a teacher finding drugs in his or her classroom, a daughter picking up a prescription for her bedridden parent, a homeowner finding medicine left behind by a guest, all could be, deemed illegal possessors under strictly construed possession statutes. Moreover, if the teacher transferred the drugs to his or her principal, or the homeowner gave the drugs to the guest’s spouse who came by to pick them up, the teacher and homeowner could be deemed guilty of trafficking as well. We are confident that the General Assembly did not intend to criminalize the possession or transfer of controlled substances in circumstances such as these.<sup>158</sup>

No federal court has yet explicitly recognized or rejected the defense for purposes of the federal CSA, but the reasons for doing so are just as strong as they are for its state law analogs.<sup>159</sup> It seems implausible Congress would have wanted to criminalize the innocent actions highlighted above, e.g., a parent confiscating

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to state’s medical marijuana law); *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 664 (Cal. Ct. App. 2007) (same); *State v. Kama*, 39 P.3d 866, 868 (Or. Ct. App. 2002) (same).

154. See, e.g., *United States v. Rosenthal*, 266 F. Supp. 2d 1068, 1078 (N.D. Cal. 2003) (suggesting that Section 885(d) does not confer immunity for enforcing laws that conflict with the CSA), *rev’d on other grounds*, 454 F.3d 943 (9th Cir. 2006).

155. See Mikos, *supra* note 16, at 1458–59. In any event, even if Section 885(d) bars a court from holding a state officer criminally liable, it might not block the court from enjoining the officer from performing her job. In other words, Section 885(d) might not eliminate the direct conflict but instead might simply limit the application of criminal sanctions.

156. *Commonwealth v. Adkins*, 331 S.W.3d 260, 264 (Ky. 2011); see also *State v. Miller*, 193 P.3d 92, 97 (Utah 2008) (holding that the “innocent possession” defense applies if the drug was obtained innocently and if the individual’s possession of the drug was limited by scope and time).

157. See *Adkins*, 331 S.W.3d at 263–64 (discussing the reasons for the “innocent possession” defense).

158. *Id.* at 264.

159. The federal courts have the power to recognize un-enumerated defenses to federal crimes. See NORMAN ABRAMS ET AL., *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 415 (5th ed. 2010) (“Where there is no statute [explicitly recognizing a defense], the federal courts must both decide whether such a defense exists, and then describe the contours of the defense and allocate the burden of proof.”).

drugs from a child, but the CSA would do just that unless courts recognize an innocent possession and distribution defense.<sup>160</sup> Recognizing such a defense would seemingly allow state police to return medical marijuana to private citizens from whom it was seized.<sup>161</sup>

### *B. Laws that Restrict Marijuana-Related Activities*

The second type of state law restricts the manufacture, distribution, and possession of marijuana. One body of law regulates the supply of marijuana. This body includes regulations that require suppliers to obtain a license from the state, laws that dictate how suppliers operate (e.g., zoning), laws that tax the sale of marijuana, and so on. Colorado, for example, has adopted a very comprehensive set of regulations governing medical marijuana dispensaries.<sup>162</sup> Inter alia, the Colorado regulations require a license to distribute marijuana,<sup>163</sup> restrict who may obtain such a license,<sup>164</sup> require licensees to submit to 24/7 web-based video monitoring of premises,<sup>165</sup> bars suppliers from employing minors,<sup>166</sup> and requires suppliers to take steps to verify buyer eligibility for every purchase.<sup>167</sup>

A second body of law likewise regulates the consumption of marijuana. This body includes laws that stipulate the steps patients must take to establish eligibility for the medical marijuana defense and laws that limit the consumption behavior of marijuana users. For example, New Mexico requires all prospective medical marijuana patients to first register with the state's health agency, a process that entails submitting detailed medical information from a board licensed physician.<sup>168</sup> The state also limits each registered patient to consuming no more than two ounces in any thirty-day period,<sup>169</sup> and it prohibits patients from consuming marijuana in public places.<sup>170</sup>

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160. See *Adkins*, 331 S.W.3d at 264 (suggesting that a legislative body would not intend to punish possession of marijuana that is truly innocent).

161. It would depend, of course, on how the federal courts would define the defense. See, e.g., *id.* (allowing the defense if possession is "incidental" and the length of possession is reasonable); *State v. Miller*, 193 P.3d 92, 97 (Utah 2008) (holding that the innocent possession defense applies if the drug is obtained "innocently" and possession was "transitory"). See also ALEX KREIT, CONTROLLED SUBSTANCES: CRIME REGULATION, AND POLICY 139–54 (2013) (discussing the "possession for disposal" doctrine).

162. See COLO. REV. STAT. ANN. §§ 12-43.3-101 to -1001 (West Supp. 2011) (establishing requirements and guidelines for all approved businesses involved in the cultivation, manufacture or sale of medical marijuana). Colorado has proposed similar regulations to govern distributors of recreational marijuana. See generally BROHL & FINLAW, *supra* note 2.

163. COLO. CODE REGS. § 212-1:1.100 (2011).

164. § 12-43.3-307.

165. § 212-1:10.400.

166. § 212-1:5.100.

167. § 212-1:13.100.

168. N.M. CODE R. § 7.34.3.9 (2010).

169. § 7.34.2.7(D).

170. N.M. STAT. ANN. § 26-2B-5(A) (LexisNexis Supp. 2011).

Regulations such as these clearly do not pose a direct conflict with the CSA. It is always possible for someone to comply with the regulations imposed by state law and the prohibition imposed by federal law by not engaging in the federally proscribed activity. Return to the example of marijuana licensing laws. According to the Supreme Court, a license is simply ““a right or permission granted in accordance with law . . . to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful.””<sup>171</sup> No one is required to seek a license in the first instance, and even those who do obtain one are not obliged to actually use it, i.e., to distribute marijuana.<sup>172</sup>

### *C. Laws that Promote Marijuana-Related Activities*

A third category of laws arguably promotes marijuana-related activities. One set of laws within this category aims to protect marijuana users (and perhaps suppliers) from sanctions imposed by other private individuals and firms. A handful of states now prohibit landlords from discriminating against medical marijuana patients based solely on their status as such.<sup>173</sup> For example, Arizona law provides that “No . . . landlord may refuse to . . . lease to and may not otherwise penalize a person solely for his status as a [medical marijuana] cardholder, unless failing to do so would cause the . . . landlord to lose a monetary or licensing related benefit under federal law.”<sup>174</sup>

To the extent that these laws merely protect individuals based on their status as drug users, they do not pose a direct conflict and are not preempted. The CSA does not prohibit anyone from housing drug users. However, if these laws were interpreted to prohibit landlords from evicting individuals for consuming or distributing marijuana *on* rental property, they would clearly pose a direct conflict with the CSA.<sup>175</sup> That is because Section 856 expressly forbids landlords from renting property if they know it is being used to manufacture, distribute, or

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171. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1978 (2011) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1304 (2002)).

172. *See Ter Beek v. City of Wyoming*, 823 N.W.2d 864, 871 (Mich. Ct. App. 2012) (commenting that an individual could comply with a state act allowing for medical marijuana use and the CSA at the same time because the state act does not mandate marijuana use, it only permits its use). Similarly, philatelists commonly acquire marijuana tax stamps from the states with no intention whatsoever of ever selling the drug. *See, e.g., Marijuana Tax Stamps Still On Sale Even Though Law Up In Smoke*, COMMONWEALTH CONVERSATIONS: REVENUE, TAXES CHILD SUPPORT & LOCAL SERVS. INFO. FROM THE DEP'T OF REVENUE (Mar. 30, 2012), <http://revenue.blog.state.ma.us/blog/2012/03/marijuana-tax-stamps-still-on-sale-even-though-law-is-kaput.html> (noting that some stamp collectors sell marijuana tax stamps as collectibles on internet auction sales sites).

173. *See* ARIZ. REV. STAT. ANN. § 36-2813(A) (Supp. 2012); DEL. CODE ANN. tit. 16, § 4905A (Supp. 2011); ME. REV. STAT. ANN. tit. 22, § 2423-E(2) (Supp. 2011); R.I. GEN LAWS § 21-28.6-4 (West Supp. 2011); 2012 Conn. Legis. Serv. 12-55 (West).

174. ARIZ. REV. STAT. ANN. at § 36-2813(A).

175. Most laws do not reach so far, and indeed, some states expressly provide that a landlord is not required to lease property when doing so would violate federal law or cause the landlord to lose federal funding. *See, e.g., ME. REV. STAT. ANN. tit. 22, § 2423-E(2)* (Supp. 2011).

consume illegal drugs.<sup>176</sup> It would be impossible for a landlord to obey this prohibition without incurring liability under the hypothetical state non-discrimination law.<sup>177</sup>

A recent eviction case in California appears to have created just such a direct conflict with the CSA. In the case, a landlord filed an unlawful detainer lawsuit in state court seeking to evict a prominent medical marijuana dispensary (Harborside Health Center) because the dispensary was distributing marijuana on the premises.<sup>178</sup> The court, however, denied the eviction, finding that the tenant's right to use the rental property to distribute marijuana was protected by state law.<sup>179</sup> The ruling literally makes it impossible for the landlord to comply with Section 856 (i.e., to remove the tenant) because, under California law,

[t]he landlord must use [the unlawful detainer process] to evict the tenant; the landlord cannot use self-help measures to force the tenant to move. For example, the landlord cannot physically remove or lock out the tenant, cut off utilities such as water or electricity, remove outside windows or doors, or seize (take) the tenant's belongings in order to carry out the eviction. The landlord must use the court procedures.<sup>180</sup>

The court plainly erred. It seems beyond question that Congress would want to stop states from compelling residents to violate federal law.

Some states likewise prohibit employers from discriminating against medical marijuana patients. For example, Delaware law provides that

an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon . . . [his/her] status as a [medical marijuana] cardholder . . . or [his/her] . . . positive drug test for marijuana . . . unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.<sup>181</sup>

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176. 21 U.S.C. § 856(a)(1) (2011).

177. *Id.* An aggrieved tenant would presumably be authorized to seek damages from the landlord for violating state anti-discrimination law. *See, e.g.*, CAL. DEP'T OF CONSUMER AFFAIRS, THE EVICTION PROCESS, <http://www.dca.ca.gov/publications/landlordbook/evictions.shtml> (noting that under California eviction law, "[i]f the landlord uses unlawful methods to evict a tenant, the landlord may be subject to liability for the tenant's damages, as well as penalties of up to \$100 per day for the time that the landlord used the unlawful methods").

178. Paul T. Rosynsky, *Landlord Can't Evict Oakland's Largest Medical Marijuana Dispensary*, OAKLAND TRIB. (Dec. 4, 2012, 6:33 AM).

179. *Id.*

180. CAL. DEP'T OF CONSUMER AFFAIRS, *supra* note 177 (describing California eviction law).

181. DEL. CODE ANN. tit. 16, § 4905A (Supp. 2011); *see also* ARIZ. REV. STAT. ANN. § 36-2813(A) (Supp. 2012) (prohibiting an employer from penalizing a person for their status as a cardholder).

Employment laws such as this do not pose a direct conflict with the CSA because the CSA does not prohibit (most) firms from employing drug users. That is, an employer can keep a known drug user on the payroll per state law without violating any provision of the CSA.<sup>182</sup>

A second set of laws that promotes marijuana involves state participation in the marijuana market. Most of the laws falling into this category remain purely hypothetical, as few proposals have actually been enacted. For example, a few states have considered creating state-owned and operated marijuana dispensaries that would provide marijuana directly to qualified patients, replacing private vendors who now control the market.<sup>183</sup> There is much to be said for direct state involvement in the dispensation of marijuana. It would give the states unprecedented control over the medical marijuana market, assuaging some concerns over diversion of the drug into recreational uses<sup>184</sup> as well as concerns over the safety of marijuana now being provided to patients by under-regulated private dispensaries.<sup>185</sup> Indeed, states employed a similar strategy to ease their way out of alcohol prohibition, giving state liquor stores a monopoly over the retail distribution of alcoholic beverages.<sup>186</sup> As it stands, however, no state has yet passed legislation that would establish a state-owned/operated marijuana dispensary system.<sup>187</sup>

State cultivation and distribution of marijuana would clearly pose a direct conflict with the CSA. The state itself would be violating Section 841's prohibition on the cultivation/distribution of marijuana, no less than private dispensaries do

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182. See *supra* Part II.A.3.

183. See Travis Koch, *Oregon Ballot Measures: Some Get Support Others Slip Away*, NBC 5 (Nov. 8, 2012, 11:25 AM), <http://www.kobi5.com/news/local-news/item/oregon-measures-get-support-other-faulter.html> (describing, and noting the failure of, Oregon's 2012 Ballot Measure 80, which would have created a state commission to buy and sell marijuana); John M. Glionna, *San Francisco to Consider Growing Pot After Prop. S Passes*, L.A. TIMES (Nov. 7, 2002), <http://articles.latimes.com/2002/nov/07/local/me-calwrap7> (discussing how passage of Proposition S in California prompted San Francisco city officials to consider creating a program to grow and distribute marijuana for medical use).

184. See, e.g., Kirk Mitchell & Ryan Parker, *Colorado's Medical Pot Industry Fuels Illegal Trade, Review Shows*, DENVER POST (Aug. 2, 2012, 4:49 PM), [http://www.denverpost.com/breakingnews/ci\\_21221031/colorados-medical-pot-industry-fuels-illegal-trade-review](http://www.denverpost.com/breakingnews/ci_21221031/colorados-medical-pot-industry-fuels-illegal-trade-review) (reporting that marijuana from medical marijuana suppliers in Colorado had been diverted to criminal drug operations in more than seventy instances since 2010).

185. E.g., Joe Monzingo, *The Green Rush: Private Labs are Testing Pot in a Legal Vacuum*, L.A. TIMES, Feb. 12, 2012, at A1 (noting the quality-control and contamination problems that medical marijuana consumers face in an unregulated market).

186. See Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 MILBANK Q., 461, 476 (1991) (describing "the Rockefeller plan," a proposal that would grant states exclusive control of the retail sale of spirits, wine and beer above 3.2% alcohol in an effort to eliminate the profit motives of private businesses that benefit from liquor sales).

187. See Mikos, *supra* note 114, at 1438.



now.<sup>188</sup> It would be physically impossible for the state employees tasked with operating a state dispensary to perform their required duties while also complying with the CSA's prohibition against marijuana trafficking.<sup>189</sup>

A third set of laws that could potentially promote marijuana-related activities involves the provision of public benefits to known marijuana users.<sup>190</sup> The states operate a number of important benefit programs designed to help low-income residents obtain basic needs, such as food, housing, and medical care.<sup>191</sup> Though states have frequently denied drug users access to such benefits,<sup>192</sup> a few are now opening their coffers to qualified medical marijuana patients.<sup>193</sup>

Unlike providing marijuana, providing public benefits to medical marijuana users does not necessarily pose a direct conflict with the CSA. After all, the CSA does not forbid anyone from feeding, housing, or providing medical care to people who use drugs. The CSA does, however, prohibit anyone from aiding and abetting the cultivation, distribution, and possession of marijuana.<sup>194</sup> It is thus possible that a benefit program that is specifically designed to promote a violation of the CSA would pose a direct conflict, for the program would satisfy the elements of aiding and abetting liability.<sup>195</sup> Oregon voters, for example, recently rejected a ballot measure that would have provided state funds specifically to help low-income

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188. 21 U.S.C. § 841(a) (2011) (“[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”).

189. See GARVEY, *supra* note 9, at 15 (providing commentary from one U.S. Attorney noting that state employees who participate in any state-authorized growing, distributing and possession of marijuana are still in violation of federal laws).

190. See, e.g., Jessica Dyer, *Medical Pot User to Keep Subsidy*, ALBUQUERQUE J. (Nov. 25, 2010), <http://www.abqjournal.com/north/25232284943north11-25-10.htm> (reporting how one New Mexico public housing authority decided not to terminate a medical marijuana user's Section 8 housing subsidy); Noelle Crombie, *Marijuana's Medicinal Value Boosted by Oregon's Food Stamp Deduction*, OREGONIAN (July 3, 2012, 7:59 PM), [http://www.oregonlive.com/health/index.ssf/2012/07/marijuanas\\_medicinal\\_value\\_gai.html](http://www.oregonlive.com/health/index.ssf/2012/07/marijuanas_medicinal_value_gai.html) (permitting food stamp applicants who qualify for Social Security Disability Insurance to deduct medical marijuana costs from their income).

191. See generally GOVBENEFITS.GOV: A PROGRESS REPORT TO CITIZENS 2 (2008), available at <http://www.benefits.gov/static/benefits/en/html/progress-report-2008.pdf> (displaying 611 federally funded but state-administered benefit programs including food stamps, public housing, and Medicaid programs).

192. See PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 3 tbl.1 (2002), available at [http://www.sentencingproject.org/doc/publications/women\\_lifesentences.pdf](http://www.sentencingproject.org/doc/publications/women_lifesentences.pdf) (displaying welfare eligibility limitations state-by-state for individuals convicted of certain drug offenses). Twenty-two states deny benefits entirely to individuals with drug convictions. *Id.*

193. See *supra* note 190 and accompanying text.

194. See 18 U.S.C. § 2(a) (2011) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”).

195. See, e.g., *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991) (stating that aiding and abetting liability requires an establishment that a person had knowledge of the illegal activity, as well as a desire for the illegal activity to be successful).

residents buy medical marijuana from private suppliers.<sup>196</sup> Had it passed, program employees arguably could have been charged with aiding and abetting violations of the CSA—they would, after all, give residents money with the specific intent of helping them to buy marijuana.<sup>197</sup> It seems safe to assume, however, that most public benefit programs do not have the specific purpose of facilitating violations of the CSA and thus do not pose a direct conflict. For example, providing public housing might help residents to obtain marijuana in some indirect way (e.g., by boosting disposal income),<sup>198</sup> but the program is clearly not designed for that purpose.

It is important to note, however, that the states' power to provide federally funded benefits to marijuana users might be further circumscribed by conditions imposed on federal grants. For example, the United States Department of Agriculture (USDA) has barred states from considering resident's medical marijuana expenses in determining their eligibility to receive federally funded food stamps administered by the states.<sup>199</sup> Similarly, the Department of Housing and Urban Development (HUD) has instructed states to deny federally funded public housing assistance to individuals engaged in illegal drug activity.<sup>200</sup>

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In sum, only a few state marijuana reforms pose a direct conflict with the CSA. Laws requiring landlords to rent property for distributing or consuming marijuana clearly pose such a conflict and are preempted. So are proposals that would directly involve the state in the actual distribution of marijuana. Laws requiring police to return marijuana seized from private citizens might be preempted, but there are sound legal arguments suggesting police do not violate the CSA in administering such laws and hence do not create a direct conflict with the law. Apart from these few measures, state marijuana reforms are not preempted.

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196. See Anne Williams, *Drug Debate*, REGISTER-GUARD, Oct. 16, 2010, at A1 (discussing the 2010 Oregon ballot initiative).

197. *Id.* (noting that the proposed ballot initiative would have permitted the health authority to use state revenue to develop a program to assist low-income residents in obtaining medical marijuana).

198. See ECONSULT CORP., ASSESSING THE ECONOMIC BENEFITS OF PUBLIC HOUSING 13 (2007), available at [http://www.myphalinks.com/userfiles/file/final\\_report.pdf](http://www.myphalinks.com/userfiles/file/final_report.pdf) (reporting in one study that housing subsidies increased participants' household disposable income by fifty-seven percent, thereby allowing them to afford other items).

199. Memorandum from Lizbeth Silbermann, Dir., Program Dev. Div., to Regional Dirs., Supplemental Nutrition Assistance Program (July 10, 2012), available at [http://www.fns.usda.gov/snap/government/pdf/Medical\\_Deductions-Illegal\\_Substances.pdf](http://www.fns.usda.gov/snap/government/pdf/Medical_Deductions-Illegal_Substances.pdf).

200. See 24 C.F.R. § 5.854(b) (2012). It is worth noting, however, that HUD allows local housing authorities to evict drug users, but it does not require them to do so. *Id.* at § 5.858.

## IV. CONCLUSION

This Article proposes a new and clearer approach to judging whether a state law is preempted by the federal CSA. Under this approach, called the direct conflict rule, state law is preempted only to the extent it requires someone to violate the CSA. The direct conflict rule has several advantages over the broader conflict preemption rule now in widespread use by courts and commentators. It avoids a nettlesome constitutional problem created by the unthinking application of obstacle preemption principles.<sup>201</sup> It protects congressional interests by preserving state power to impose restrictions on the marijuana market.<sup>202</sup> It also better reflects Congress's express desire to limit the scope of preemption.<sup>203</sup> What is more, the direct conflict rule is simpler to apply and should help alleviate some of the confusion now plaguing state and local marijuana regulations.<sup>204</sup>

The Article demonstrates that the states already have wide latitude to reform their marijuana laws. Even without further congressional amendment, the CSA, properly understood, preempts only a handful of the laws now being promulgated throughout the states. This clarification of the boundaries of state power vis-à-vis the federal government should help resolve one of the thorniest questions now confronting state policymakers. Knowing what they are allowed to do in light of federal law, those state policymakers can now focus more attention on what they should do.

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201. *See supra* Part II.A.1.

202. *See supra* Part II.A.2.

203. *See supra* Part II.A.3.

204. *See supra* Part II.B.

