Chapter 2

Elements of Federal Conflict with State Marijuana Legislation

§ 2:1 Contrasts of Federal and State Legislation

Marijuana has been debated as an issue of political controversy for years. States could punish, prosecute, regulate, or control, but the states were unable to totally block marijuana users from their desire or need for the effects of tetrahydrocannabinol (THC). The demand has been present for decades, if not centuries on an international basis, and so the adoption of a criminal law proscription by the federal government did not dissuade the more dedicated users.[1]

Scholars cannot accurately define how much of current marijuana use comes from new users and how much from former users of illegal sources of cannabis products, but sales figures show rapid growth in the newly legitimate market.[2] The reader will recognize that some of the sales on the lawful marketplace came from new users, but it

1. P. Vincent, *Effects of Perceived Quality on Behavioral Economic Demand for Marijuana*, 170 J. Drug & Alcohol Dependence 174 (2017).
2. *Id*.

is much more likely that the economic demand for the product has largely come from the purchasers' abandonment of former illegal pathways which they had used to obtain the desired THC benefit.[3]

As of spring 2018, there are twenty-nine states and three territories which have enacted some form of medical marijuana statute.[4] Each state's marijuana legislation has contained different terms of scope and exemptions, reflecting that state's particular debates and compromises before adoption of the statute. For example, in 2017, New York made compromises among alternative terms and conditions for medical treatment uses of marijuana, as it became the twenty-eighth state to legalize medical marijuana for use by patients with post-traumatic stress disorder.[5]

In most states which adopted marijuana legislation, a conditional permission for medical patients' medicinal use with heavy restrictions served as a first step toward eventual legalization for general recreational use. Medicinal needs, physician oversight, and beneficial patient uses were emphasized by advocates for the legalization of marijuana. Legal sales of marijuana began, and have grown larger, as the medicinal justifications for marijuana use have gained acceptance.[6]

Of course, no accurate data on the size of the illegal market is possible to compile. It will be useful for researchers to look back after a dozen years and seek to determine how much of the medicinal marijuana sale growth arose from new users, contrasted to users who had long-time experience making untaxed, illegal purchases from informal marijuana suppliers. Because of the criminal penalties, it may be impossible to find accurate data, even after the statutory limitation period for prosecution had passed. A survey asking about one's past criminal acts deters voluntary participation, and a forced mandate to disclose one's criminal act violates Fifth Amendment rights to avoid self-incrimination, so the potential prior-use survey is unlikely to be a statistically valid indicator of accurate data points.

The terms of medicinal use which appear in the statutory text probably relate more to political compromises made in state legislative negotiations, than they do to a rationale based upon any uniform

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3. B. Fairman, *Trends in Registered Medical Marijuana Participation Across 13 US States and District of Columbia*, 159 J. Drug & Alcohol Dependence 72 (2016).
4. K. Zezima, *VA Says It Won't Study Medical Marijuana's Effect on Veterans*, Wash. Post (Jan. 16, 2018). See Appendix A for state-by-state details.
5. J. McMahon, *New York Becomes 28th State to Legalize Medical Marijuana for PTSD*, Modern Healthcare (Nov. 14, 2017).
6. H. Wen, *The Effect of Medical Marijuana Laws on Adolescent and Adult Use of Marijuana, Alcohol and Other Substances*, 42 J. Health Econ. 64 (2015).

standard textual content.[7] By contrast, the federal coverage of the Controlled Substances Act (CSA)[8] is rigidly uniform for the entire nation.[9]

Congress has the constitutional authority to ban the in-state use of marijuana as well as banning its interstate marketing.[10] Under the CSA, marijuana is a Schedule I "controlled substance,"[11] and its federal controls are applied uniformly across the states and territories of the United States, subject to penalties under the U.S. Code and the U.S. Sentencing Commission Federal Sentencing Manual.[12] Federal and state conflicts are the central challenge for scholars who study the future of marijuana regulation.[13]

On January 10, 2018, Attorney General Jeff Sessions told the ninety-three U.S. Attorneys in the ninety-three federal court districts that each one could now determine whether to enforce the CSA against activities which the state laws permitted.[14] This displaced the Obama administration's more state-law-friendly 2013 "Cole Memorandum" which is discussed in chapter 7.

In response, the federal prosecutor in Oregon asked its governor and law enforcement officials to determine "how much excess marijuana is being produced and how much is being smuggled out to other states where weed remains illegal" and stated that "the surplus attracts criminal networks and generates money laundering, drug violence and environmental contamination from pesticides and draws down water supplies in rural communities."[15] In April 2018, President Trump told a U.S. Senator from Colorado that his administration did not intend to challenge marijuana businesses that were acting legitimately under state marijuana laws.[16]

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7. *See, e.g.*, Ohio Rev. Code ch. 3796 (2016).
8. 21 U.S.C. § 801.
9. V. Haddox, Drug Abuse & the Law Sourcebook ch. 1 (2017).
10. Gonzales v. Raich, 545 U.S. 1 (2005).
11. 21 C.F.R. § 812.
12. *See* www.ussc.gov.
13. *See, e.g.*, Rosalie Winn, *Hazy future: the impact of federal and state legal dissonance on marijuana businesses*, 53 Am. Crim. L. Rev. (2016).
14. Press Release, DOJ, Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018).
15. G. Flaccus, *"We're going to do something about it": Oregon's federal prosecutor holds summit on black market marijuana*, Associated Press (Feb. 2, 2018).
16. Burgess Everett, *Colo. Senator: Trump easing up on pot crackdown*, Politico (Apr. 13, 2018).

§ 2:2 What Is Federal Preemption?

The doctrine of preemption details how federal government decisions will override contrary state or local legislation or regulations.[17] In brief summary, a federal court will override a state or local entity's legislative enactment or regulation, if its effect would be contrary to a congressional enactment, or would interfere with the federal agency rules adopted under that federal statute.

The 1792 decision to establish a single Constitution for the nation was reached after difficult compromises were achieved among the delegates from the thirteen former colonies. The language in Article VI clause 2, which made federal law "the supreme law of the land," has an impact known as "federal preemption" of state laws, diminishing the power of a state to legislate or regulate in a divergent direction from the central decisions made by Congress. Many other sources have covered myriad appellate decisions which interpret and create preemption principles.[18]

Preemption is not automatic. Its active application in a state or local matter must be determined by a federal court's analysis of the conflict between the specific state and federal provisions. These conflicts have often been at issue in medical marijuana cases.[19]

§ 2:3 How Could Congress Change the Status of Marijuana?

The U.S. Constitution's "Supremacy Clause"[20] in Article VI clause 2 directs that federal statutes are controlling or "preemptive" of conflicting state law. For instance, classic prescription pharmaceuticals are regulated under the Food Drug & Cosmetic Act[21] and states cannot allow sales of banned pharmaceutical products.

Federal courts routinely handle criminal cases of interstate movement of quantities of marijuana through their growing, production, and transportation. The federal Controlled Substances Act (CSA)[22] could, in theory, be revised at any time to change the existing federal controls on marijuana. Notice to the World Health Organization must be made under the 1971 Convention on Psychotropic Substances, as discussed *supra* in section 1:5.[23] Making such a statutory change would

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17. *See* J. O'REILLY, FEDERAL PREEMPTION OF STATE & LOCAL LAWS (ABA Press 2006).
18. *Id*.
19. United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711 (2001); United States v. Marin All., 139 F. Supp. 3d 1039 (N.D. Cal. 2015); Pearson v. McCaffrey, 139 F. Supp. 2d 113 (D.D.C. 2001).
20. U.S. CONST. art. VI cl. 2.
21. 21 U.S.C. § 321 *et seq*.
22. 21 U.S.C. § 801 *et seq*.
23. United Nations, Convention on Psychotropic Substances (1971).

require both houses of Congress to pass the law, and the President to sign the final bill. This is the standard school lesson in Civics 101.

If Congress does not alter the CSA provision, then a roadblock to federal legalization exists. In theory, as discussed *supra* in section 1:6, the Drug Enforcement Administration could propose an amended Schedule I coverage, could review comments,[24] and then could reach a conclusion on amendments to change the Schedule I status. This optimistic theory diverges from several practical barriers. The 1971 Convention on Psychotropic Substances is a treaty which continues in force to bind the signatory nations including the United States. The United States would be required to clear the change with the Treaty partners, and then the DEA could adopt a final rule changing the Schedule I status of marijuana. This discussion is hypothetical, as it is a commentary on how the process could work, rather than as a prediction of the likelihood of actual changes.[25]

§ 2:3.1 Political Challenges

Any observer of the current American news media will recognize that dysfunctional conflicts and legislative problems in our Congress make such a controversial statutory change, toward a law that allows marijuana use, virtually impossible for the near term.

Voters are easily scared by "drug user" and "drug advocate" claims when made against election candidates by partisan opposing forces. When political parties are already divided on issues like public responses to drug use, repeal is unlikely. Congressional primary and general elections would see a wave of anti-drug advertising, intended to frighten away most of those candidates who would seek nomination, through the strident and intense opposition of their party's hard-core supporters for a "drug-free" society.

What risk of consequences holds back a majority of congressional members from a vote for de-criminalizing marijuana? Fear of attack by political opponents is the most likely reason. Your author has run for office and recognizes the vulnerability which such a platform on controversial issues offers to opponents. A policy decision to speak in favor of, or to have actually voted for, liberalizing any drug access might be touted as a fatal flaw in an elected official's vulnerability to challengers.

Change of marijuana's status in the federal legislative field depends on our electoral system, and regulatory change is unlikely to occur until the future time when cultural change, favoring marijuana, is so profound that campaign television spots and highway billboards will

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24. 5 U.S.C. § 552; *see also* James O'Reilly, Administrative Rulemaking (3d ed. 2017).
25. V. Haddox, Drug Abuse & the Law Sourcebook (2017).

no longer feature anti-drug "attack ad" messaging with slurs such as: "Vote Against Jones—He Supports Drug Abusers." Until then, the task of finding sponsors for such a federal statutory revision favoring marijuana will be a profound political challenge.

Since textual change to marijuana's CSA schedule status is unlikely for political reasons, and the Trump administration's DEA is not likely to make a rule change, some form of a short-term exception is needed to allow states to regulate or de-regulate marijuana distribution within their state.

§ 2:3.2 Use of the Appropriations "Rider" System

The Controlled Substances Act is not self-executing, but needs federal agents and employees to administer its ban on marijuana.[26] A form of limited nullification of some of that federal statute's effects can be achieved by a legislative adoption of an appropriations bill "rider," which would be a clause added to a federal appropriations bill which funds the Drug Enforcement Administration. In some recent federal marijuana cases, the shield of congressional "riders" has been used to shield a state permissive statute from DEA enforcement.

The concept of a rider is like "nullification by conscious inactivity."[27] Operationally, this means that the prohibitory clause in that statute remains in place, while the agency is forbidden to spend money to enforce its provisions.[28] The Rohrabacher-Blumenauer amendment on federal marijuana enforcement has been in place within federal appropriations legislation since 2014.[29] The rider maintains that federal funds cannot be used to prevent states from "implementing their own state laws that authorize the use, distribution, possession or cultivation of medical marijuana."[30] Congress passed essentially the same rider in 2015; it became commonly known as "§ 542."[31] Oregon was a pioneer in marijuana legislation at the state level, so veteran Oregon Congressman Earl Blumenauer was a champion of the rider along with Dana Rohrabacher of California. In 2018, when the Attorney General revoked the Obama administration's prior Justice Department guidance document, the Cole Memorandum, the rider's co-sponsor was quoted: "Without [the Cole Memo] being in place anymore, there's going to be something else that's pushing the US attorneys in the wrong

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26. *See, e.g.*, dea.gov.
27. I. Scharf, *The Problem of Appropriations Riders*, 42 Mitchell Hamline L.J. 791 (2016).
28. Principles of Federal Appropriations Law: Fourth Edition, ch. 2, www.gao.gov/products/GAO-16-464SP (2016).
29. Pub. L. No. 113-235, 128 Stat. 2130 (2014).
30. Pub. L. No. 113-235, 128 Stat. 2130, § 538 (2014).
31. Pub. L. No. 114-113 § 542, 129 Stat. 2242, 2332–33 (2015).

direction," Rohrabacher said on the call. "We're talking about asset forfeiture here."[32]

For each fiscal year, the federal agencies receive appropriations of funds from Congress, either in a specific legislative act or in the omnibus federal spending bill. To do its job, the agency first justifies the plans for funding of certain projects as part of the overall Executive Branch proposed budget submission; then the agency defends its request in appropriations committee hearings in Congress, and then later allocates the incoming money to the programs within the agency which are the administration's selected priorities.

Tailoring an appropriations "rider" to create an exception, an act like installing a limited hole in the uniform statutory prohibition "wall," is a subtle art form, which the most seasoned lobbyists can play. The effect of the typical rider is to require a federal agency to perform task A, in order for the agency to qualify to receive annual budget amount B. Or a negative rider attaches to the federal agency appropriations bill, with a conditional clause that would proscribe the agency from spending to do X or to enforce a term in an existing federal statute: "No funds appropriated by this Act may be spent on the enforcement of the Controlled Substances Act related to marijuana within a state which has authorized the distribution and sale of marijuana in such state."

As of 2018, reform of the CSA marijuana provision has not been adopted, but the less sweeping change in the rider was included in the appropriation legislation to which courts have deferred. The federal courts followed the statute, but the reader should know that courts would not go farther than "de-funding enforcement"; they denied injunctive relief to a marijuana user in a state with marijuana statutory provisions.[33] And the state marijuana law rider was applied to protect the defendants in the 2016 *McIntosh* decision in the Ninth Circuit Court of Appeals.[34] In that case, defense arguments for the effectiveness of the rider prevailed over the literal statutory language of the CSA.

One can think of the use of an appropriations rider in federal appropriations as a two-year exception from the power of the prohibitory law. So "follow the money." The Constitution proscribes federal agency spending that had not been appropriated by Congress.[35] If the law forbids X but the rider to the relevant agency's appropriation prevents federal agencies from spending money on enforcement of that

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32. N. Rashidian, Cannabis Wire News (Jan. 10, 2018).
33. United States v. Ragland, No. 2:15-cr-20800, 2017 WL 2728796 (E.D. Mich., June 6, 2017).
34. United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016).
35. U.S. Const. art. 1 sec. 9, cl. 7.

prohibition of X during the two-year budget cycle, then the sponsor of that rider has won a reprieve, and no enforcement agents will be assigned to fight against X … at least until two years have passed. But where the rider would limit federal enforcers, it does not limit enforcement of state laws, or enforcement of federal probation conditions by federal courts.[36]

§ 2:4 State Ballot Initiatives and Federal Preemption

The passage, implementation, and alleged effects of a ballot initiative concerning marijuana have been widely studied. Amendment 64 to the Colorado Constitution[37] had impacts which were disputed in a 2017 state appellate case. "Amendment 64 repealed many of the State's criminal and civil proscriptions on 'recreational marijuana,' and created a regulatory regime designed to ensure that marijuana is unadulterated and taxed, and that those operating marijuana-related enterprises are, from the State's perspective, licensed and qualified to do so."[38] But no change to federal law resulted from these state-level decisions.

The Colorado appellate court recognized that state constitutional change by ballot initiative "did not and could not … amend the United States Constitution or the Controlled Substances Act (CSA),[39] under which manufacturing, distributing, selling, and possessing with intent to distribute marijuana remains illegal in Colorado."[40] This is the federal preemption clause being used against the state enactment.[41]

But until January 2018, the Justice Department's decision for "forbearance," conscious non-action under the 2013 "Cole memorandum" authored by the deputy attorney general in the Obama administration, had left alone the states whose system for permitting marijuana use did not conflict with federal CSA priority objectives.[42]

That policy was eliminated by the Justice Department on Jan. 4, 2018.[43] Attorney General Jeff Sessions left specific prosecution deci-

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36. United States v. Tuyakbayev, No. 15-cr-00086-MEJ-1, 2017 WL 3434089 (N.D. Cal., Aug. 10, 2017).
37. COLO. CONST. art. XVIII, § 16 (2017).
38. Safe Streets All. v. Hickenlooper, 859 F.3d 865 (10th Cir. 2017).
39. 21 U.S.C. §§ 801–904.
40. *Hickenlooper*, *supra* note 38, *citing* U.S. CONST. art. VI, cl. 2.
41. For a history of the clause's impact, see JAMES O'REILLY, FEDERAL PREEMPTION OF STATE & LOCAL LAWS (2006).
42. Deputy Att'y Gen. James Cole, Memorandum to United States Attorneys, 2013, withdrawn (Jan. 4, 2018).
43. Statement by Att'y Gen. Jeff Sessions (Jan. 4, 2018); *see also* J. Gerstein, *Sessions Announces End to Policy That Allowed Legal Pot to Flourish: DOJ Leaders Said the Obama-era Policies Made Marijuana Industry Players Too Comfortable*, POLITICO.COM (Jan. 4, 2018), https://www.politico.com/

sions up to the ninety-three local U.S. Attorney offices. In areas with heavy local support for marijuana, this policy shift caused considerable anxiety about potential forfeiture and prosecution risks.[44] Trump administration guidance uses a more ad hoc method of policy-making on cannabis.[45]

story/2018/01/04/jeff-sessions-marijuana-policy-us-attorney-enforcement-324020.

44. S. Ward, *New US attorney issues apparent warning as Massachusetts prepares for legalized marijuana*, Bos. Globe (Jan. 9, 2018).

45. *See* Everett, *supra* note 16.