

HIGH FEDERALISM: MARIJUANA LEGALIZATION AND THE LIMITS OF FEDERAL POWER TO REGULATE STATES

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The conflict between state marijuana legalization and the blanket federal marijuana prohibition of the Controlled Substances Act (CSA) has created a federalism crisis in which the duties of state officials to adhere to state or federal law are unclear. Current federalism doctrine cannot even tell us whether or not a local police officer who encounters a person in state-authorized possession of marijuana must arrest the person and seize the marijuana. The two most clearly applicable federalism doctrines—the Tenth Amendment anti-commandeering doctrine and federal preemption of state law under the Supremacy Clause—offer only unsatisfactory answers. Anti-commandeering doctrine is incapable of telling us whether a federally imposed duty to arrest and seize the marijuana possessor is impermissible commandeering, permissible “general applicability,” or permissible preemption, let alone answer the more complex federalism questions posed by state marijuana legalization. Alternatively, a strong preemption approach, while capable of producing consistent results in theory, would entail the virtual abandonment of the anti-commandeering doctrine and of judicial enforcement of federalism more generally, while at the same time violating important premises of the “political safeguards of federalism” theory.

This Article argues that courts should pursue a middle path by applying a rigorous anti-commandeering clear statement rule when considering the obligation of state officials to adhere to federal laws. This approach is faithful to consensus principles of federalism that should command the agreement of judges and academics on both sides of the debate concerning judicial versus political safeguards of federalism. An anti-commandeering clear statement rule, when applied to the CSA, requires that state officials be afforded broad latitude to follow the mandates of their states’ legalization laws and have no compelled

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obligations to enforce federal law beyond a duty to refrain from active obstruction of federal officers. The extent of Congress's power to command state official compliance with the CSA can be considered if and when such an amendment to the CSA is under serious congressional consideration—something that may never occur given the current political trend.

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INTRODUCTION

Marijuana legalization by the states presents the most pressing and complex federalism issue of our time. Congress has undisputed power to regulate individuals within a state, even if it creates rights or duties contrary to that state’s laws. The power of Congress under the Commerce Clause to prohibit the manufacture, distribution, and even simple possession of marijuana, whether or not the offending conduct crosses state lines, is clearly established.¹ In the Controlled Substances Act (CSA)², Congress exercised that regulatory power directly on the people of the states. But since 1996, several states have legalized medical or even “recreational” marijuana. The obligation of those states’ legislatures, executive officials, and courts to cooperate with the federal marijuana prohibition is extremely unclear. Internal state governmental processes have been thrown into confusion by apparent conflicts between their state’s legalization laws and the CSA. State governors have refused to implement duly enacted state laws for fear that their subordinates will be prosecuted by federal authorities.³ County bureaucrats are suing their states for injunctions to block enforcement of state laws that they deem to conflict with federal policy.⁴ State courts are uncertain whether to revoke state law probationers or parolees for

¹ The Supreme Court has affirmed this power twice since the first state medical marijuana legalization laws were enacted. See *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001).

² 21 U.S.C. §§ 801–904 (2012).

³ Ryan Grim and Ryan J. Reilly, *Obama’s Drug War: After Medical Marijuana Mess, Feds Face Big Decision On Pot*, THE HUFFINGTON POST (Jan. 26, 2013, 11:18 AM), http://www.huffingtonpost.com/2013/01/26/obamas-drug-war-medical-marijuana_n_2546178.html (quoting Washington Governor Christine Gregoire as saying “I cannot disregard federal law on the chance that state employees will not be prosecuted”). In response to letters from U.S. Justice Department officials, governors in Delaware and Rhode Island announced they were suspending their state licensing programs indefinitely. *Delaware: Federal Threats Halt Efforts To Implement State’s Medicinal Cannabis Law*, NORML (Feb. 16, 2012), <http://norml.org/news/2012/02/16/delaware-federal-threats-halt-efforts-to-implement-state-s-medicinal-cannabis-law>.

⁴ See, e.g., *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461 (Ct. App. 2008).

engaging in conduct that is affirmatively legal under state law.⁵ Local police officers are concerned that they may be committing federal crimes by returning seized property to individuals who have committed no state law offense—and wonder whether they are obligated by federal law to make arrests for conduct expressly legalized by their state.⁶ Rarely in our history have the obligations of officials of all branches of state government to conform to federal law been more uncertain—and rarely has federal law so sweepingly intruded into state policy choices. It is not an exaggeration to say that state marijuana legalization presents a federalism crisis.⁷

Current federalism doctrine offers three possible resolutions to this crisis, all of them unsatisfactory. To see this, we can boil the marijuana federalism problem down to a single question. Suppose a state or local police officer encounters a person who is in possession of marijuana in conformance with the state's legalization law. Must the officer arrest the person and seize the marijuana, or let the person go and keep the marijuana? This question is the most fundamental and commonplace of all the scenarios presenting conflicting duties of state officials in the marijuana federalism crisis. Any doctrinal solution that cannot answer this basic “arrest and seizure” question in a satisfactory manner—one that is consistent both internally and with the broader fabric of federalism doctrines—necessarily fails to resolve the crisis.

The two federalism doctrines most clearly applicable to the marijuana legalization federalism crisis are the Tenth Amendment anti-commandeering doctrine and federal preemption of state law under the Supremacy Clause. Significantly, these two doctrinal paths generate opposing answers to the arrest-and-seizure question. Partly for that reason, and partly due to internal problems in the two doctrines—problems that are exposed by the marijuana legalization federalism crisis—both fail the basic arrest/seizure test.

The anti-commandeering doctrine holds that federal statutes cannot compel state legislatures or executives “to enact or enforce a

⁵ See *infra* notes 71–73 and accompanying text.

⁶ See *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 681 (Ct. App. 2007) (amici police argue that they “would be in direct violation” of the CSA’s prohibition of the distribution of a controlled substance); *Oregon v. Kama*, 39 P.3d 866 (Or. Ct. App. 2002); see also *State v. Okun*, 296 P.3d 998, 100 (Ariz. 2013) (State cannot return seized marijuana “because it subjects the Sheriff to prosecution as a transferor of marijuana under the federal Controlled Substances Act”); *Cnty. of Butte v. Superior Court*, 96 Cal. Rptr. 3d 421, 430 (Ct. App. 2009) (Morrison, J., dissenting) (arguing that state peace officer’s duty “to uphold the constitution and laws of . . . the United States” supports his destruction of marijuana plants lawfully possessed under state law).

⁷ For an excellent overview of the current federal-state enforcement debacle, see Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147 (2012).

federal regulatory program.”⁸ At first glance, a straightforward application of this doctrine would seem to answer all or most marijuana federalism questions, and certainly the arrest/seizure question. Congress cannot compel a state legislature to criminalize marijuana or command state executive officials to arrest or prosecute violators of the CSA’s “zero tolerance” policy toward marijuana. But on close examination, the anti-commandeering answer is far from clear because that doctrine is an exception to a broader rule under which Congress can regulate the states by subjecting them to “generally applicable laws.”⁹ The CSA is plainly a generally applicable law. Consider, moreover, some very broad expressions of the impact of the Supremacy Clause, which imposes

the duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative acts, are *ipso facto* invalid.¹⁰

That pronouncement comes from the majority opinion in *Printz v. United States*, of all places, the case that extended the anti-commandeering doctrine to state executive officials.¹¹ It is quite natural to conclude that a state police officer “obstructs” the CSA by releasing a clear violator of that law and allowing him to keep his marijuana, rather

⁸ *Printz v. United States*, 521 U.S. 898, 935 (1997); *accord* *New York v. United States*, 505 U.S. 144, 188 (1992). Like most federalism doctrines, anti-commandeering doctrine has generated sharp disagreement among constitutional scholars. The doctrine drew immediate criticism on textual and historical grounds. *See, e.g.*, Evan H. Caminker, *Printz, State Sovereignty and the Limits of Formalism*, 1997 SUP. CT. REV. 199; Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1023 (1995); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180 (1997). Defenders of the anti-commandeering doctrine have argued persuasively that it requires Congress to internalize both the political accountability and financial costs of federal regulation. *See, e.g.*, Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 901–04 (1998); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 35, 127–28 (2004). The strongest criticisms of the anti-commandeering doctrine, in my view, have been those showing that anti-commandeering doctrine can be and has been applied in ways that defeat the underlying federalism values it purports to serve and that the anti-commandeering rule stands in considerable tension with preemption doctrine. *See* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71; Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006). For an extremely nuanced, though in my view ultimately unsuccessful, effort to reconcile anti-commandeering and preemption in the marijuana legalization context, 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 (2009).

⁹ *See* *Reno v. Condon*, 528 U.S. 141, 151 (2000) (internal quotation marks omitted); *see also* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985); *infra* text accompanying notes 175–96.

¹⁰ *Printz*, 521 U.S. at 913.

¹¹ *Id.*

than, at a minimum, turning him over to federal officers. Add to that the typical, very broad view that the Supremacy Clause makes federal law in effect the law of the state,¹² and it is not difficult to craft arguments that state executive officials do indeed have an obligation to arrest and prosecute marijuana crimes pursuant to federal policy. Anti-commandeering doctrine doesn't clearly tell us whether a federally imposed duty to arrest and seize the marijuana possessor is impermissible commandeering, permissible "general applicability," or permissible preemption, let alone answer the many more complex federalism questions posed by state marijuana legalization. This failing reveals a lack of robustness and internal consistency in the anti-commandeering doctrine. That weakness, in turn, gives us reason to wonder whether anti-commandeering doctrine is strong enough to survive the Court's demonstrated willingness to bend its federalism doctrine to accommodate a broad reach for the federal marijuana criminalization policy of the CSA.¹³

Alternatively, the Court can opt for a strong preemption approach by making the zero tolerance policy attributed to the CSA into the dominant consideration that carries all before it. Federal law would be treated as the law governing not only the people of the states but also state institutions and officials as well. This resolution, while capable of producing consistent results in theory, would disrupt the fabric of current precedents. It would entail the virtual abandonment of the anti-commandeering doctrine and of judicial enforcement of federalism more generally, while at the same time violating important premises of the very theory that could provide such an approach with a principled justification: the "political safeguards of federalism." Such an approach would thus be satisfactory to no one who believes that courts should resolve federalism questions according to principles at a higher level of generality than a mere policy preference for keeping marijuana illegal nationwide.

The third alternative is to abandon doctrinal consistency altogether. In essence, the Supreme Court could default to a case-by-case patchwork of decisions in which it and the lower courts apply federal preemption here and anti-commandeering there, together with denials of certiorari and the odd justiciability dismissal. This alternative, whether a conscious choice or merely a default, would tolerate the current confused and disruptive state of affairs, marking time until the political process sorts things out. This approach is also unsatisfactory. Not only would it entail an abdication of the judicial role to coordinate conflicting legal regimes in a lawlike manner, but the resulting chaos

¹² See, e.g., *Testa v. Katt*, 330 U.S. 386, 392 (1947); see *infra* notes 44–46, 116, 131 and accompanying text.

¹³ See *Reno*, 528 U.S. at 141; *infra* text accompanying note 189.

would likely last a long time because Congress is not likely to move quickly to resolve the problem.¹⁴ In the interim, a lot of people may needlessly face the threat—and perhaps the actuality—of federal prison.

I will argue that there is a satisfactory resolution, one adhering to a consistent middle path that reaches an accommodation between the doctrines of preemption and anti-commandeering. The courts should apply a rigorous anti-commandeering clear statement rule when considering the obligation of state officials to adhere to federal laws. This approach is the most faithful to consensus principles of federalism that should command the agreement of judges and academics on both sides of the debate concerning judicial versus political safeguards of federalism. It does not require an immediate rethinking of anti-commandeering doctrine. Whether or not there is a future scope for some version of a categorical anti-commandeering rule, the anti-commandeering clear statement rule recognizes that the principles underlying the categorical anti-commandeering rule have a place in federalism doctrine: that federal laws which commandeer state officials reflect a likely process failure in which the political safeguards cannot be assumed to have operated. On the other hand, recognition of an anti-commandeering clear statement rule would require a restatement of preemption doctrine. Rather than displacing state law for all purposes, including that of defining the obligations of state officials, federal preemption should be understood primarily as a choice of law rule directed at courts.

The anti-commandeering clear statement rule answers the arrest/seizure question clearly, and in the negative: The state police officer has no duty to arrest the marijuana possessor or seize the marijuana because no such obligation is clearly stated in the CSA. Further, I will conclude that the clear statement rule, when applied to the CSA, requires that state officials be afforded broad latitude to

¹⁴ Criminal laws are notorious legislative ratchets: easy to enact and difficult to repeal. Elected officials are generally quite reluctant to expose themselves to campaign rhetoric that they are “soft on crime.” See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 545–47 (2001). Despite increasing popular support for medical or recreational decriminalization of marijuana—reflected in large part in the state laws discussed in this Article—Congress and the official executive branch policy have remained impervious to efforts to amend the CSA’s treatment of marijuana. As Professor Mikos summarizes:

The federal government has steadfastly refused to expand legal access to marijuana. Congress has rejected proposals to reschedule the drug or to suspend enforcement of the CSA against people who may use marijuana under state law. Likewise, the [executive branch] has denied petitions to reschedule the drug administratively. . . . In sum, it appears the categorical federal ban on marijuana is here to stay, at least for the foreseeable future.

Mikos, *supra* note 8, at 1434–35 (footnotes omitted); see *Gonzales v. Raich*, 545 U.S. 1, 15 & n.22 (2005) (detailing failure of political efforts to persuade Attorney General to remove marijuana from Schedule I of the CSA).

enforce their states' legalization laws and have no compelled obligations to enforce federal law beyond a duty to refrain from active obstruction of federal officers. The extent of Congress's power to command state official compliance with the CSA through clear and express statutory language is an important theoretical question, to be sure, but is not one presented by the current CSA—and therefore need not be answered to resolve the immediate federalism crisis. This Article reserves that question, noting that such a step by Congress seems unlikely given present political trends and realities.¹⁵

Part I of this Article lays out the contours of the federalism crisis created by state marijuana legalization. After canvassing the conflicting federal and state regimes in marijuana regulation, I then explore the confusion surrounding state officials' obligations under these conflicting regimes, through a series of actual and hypothetical cases. In Part II, I turn to the anti-commandeering doctrine. After tracing its history and recent doctrinal development, I conclude that the doctrine has weaknesses both internally and in the context of the recognized power of Congress to subject the states to generally applicable laws. These weaknesses undermine the capacity of a categorical anti-commandeering rule to resolve the conflicts created by state marijuana legalization.

In Part III, I turn to the Supremacy Clause and preemption doctrine. I argue that a supremacy/preemption-based solution to the marijuana legalization problem can only be realized by abandoning the anti-commandeering doctrine and adopting an understanding of preemption that is belied by the text, history, and structure of the Supremacy Clause. Finally, in Part IV, I present the argument for the anti-commandeering clear statement rule, showing its pedigree in Tenth Amendment clear statement rules, and demonstrating how it follows

¹⁵ However dim the odds are for congressional action to accommodate state legalization of marijuana, it seems far more unlikely that the CSA would be amended to impose specific enforcement obligations on the states. To begin with, public support nationwide for marijuana legalization is substantial and steadily increasing. An October 2013 Gallup poll showed that 58% of Americans favored marijuana legalization. Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP POLITICS (Oct. 22, 2013), <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>. Second, with twenty states having enacted some form of marijuana legalization, it is easy to imagine the congressional delegations of those states putting together an effective veto of such a law—perhaps with a filibuster-proof Senate minority. Third, doubts about its constitutionality aside, commandeering cuts against constitutional and legislative traditions—hence, the great rarity of its appearance in federal legislation, as noted in *Printz*—and is typically unpopular. Opponents could easily avoid a “soft on crime” label by couching their opposition in federalism terms. Finally, given the overlap between marijuana legalization states and “swing states” in presidential elections, there is even a real likelihood that a president from either party would veto such a measure. See David S. Schwartz, *Presidential Politics as a Safeguard of Federalism*, 62 BUFF. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326688&download=yes.

logically from consensus principles that should appeal to proponents of judicially- and politically-enforced federalism alike. I conclude by showing how a clear statement rule resolves the various conflicting duties facing state officials in marijuana legalization states.

I. THE FEDERALISM CRISIS OVER MARIJUANA LEGALIZATION

This section describes the confusion surrounding state officials' obligations in states where marijuana has been legalized, either to a limited extent for medical use, or more broadly for so-called "recreational" use. In sections A and B, I outline the current status marijuana laws at the state and federal level. Section C very briefly sketches the prevailing understandings of the anti-commandeering and preemption doctrines that are arguably most applicable to a judicial resolution of the state-federal conflict. Section D considers actual and hypothetical cases in which the obligations of state officials and their liability to prosecution are uncertain.

A. *State Marijuana Legalization*

Prior to 1996, the laws of all fifty states made criminal offenses of marijuana possession and distribution, similar to federal law. But starting with California's enactment of its Compassionate Use Act by referendum in 1996, twenty-one states and the District of Columbia have enacted laws that remove criminal penalties for the possession, use, and cultivation of marijuana for medical purposes.¹⁶ Two of these states, Colorado and Washington, have legalized recreational marijuana but impose state controls akin to the more restrictive state laws regulating sale of alcoholic beverages.¹⁷ These laws include both statutes and constitutional provisions and were enacted by state ballot initiatives or through the state's legislative processes.¹⁸

State medical marijuana laws shield patients, doctors, caregivers, and (in some states) even dispensaries from arrest and state criminal drug prosecution under certain authorized conditions.¹⁹ The state laws

¹⁶ *Medical Use*, NORML, <http://norml.org/legal/medical-marijuana-2> (last visited Nov. 11, 2013) [hereinafter *Medical Use*] (follow hyperlinks for "Alaska," "Arizona," "California," "Colorado," "District of Columbia," "Maine," "Massachusetts," "Michigan," "Montana," "Nevada," and "Oregon") (ballot initiatives); *id.* (follow hyperlinks for "Connecticut," "Delaware," "Hawaii," "Illinois," "Maryland," "New Hampshire," "New Jersey," "New Mexico," "Rhode Island," "Vermont," and "Washington") (legislative acts).

¹⁷ *State Info*, NORML, <http://norml.org/states> (last visited Nov. 11, 2013) (follow hyperlinks for "Colorado" and "Washington").

¹⁸ *Id.*

¹⁹ See, e.g., Delaware Medical Marijuana Act, DEL. CODE ANN. tit. 16, § 4903A (2013).

vary in details, such as the amounts that can be lawfully possessed, the health conditions that qualify for medical marijuana use, the required role of physicians, and other matters.²⁰ Other common provisions among state laws include delegating administration of the law to the state health agency,²¹ establishing confidential, state-run patient registries,²² and requiring a written prescription from a physician.²³ Several states have mandated government oversight of medical marijuana dispensaries.²⁴

State marijuana legalization, whether for medical purposes or otherwise, creates a panoply of enforcement and compliance obligations on the part of the state's law enforcement officers and civil administration. State police officers are expected not to arrest individuals for marijuana-related activities that are legal under state law, notwithstanding the state's prior criminal law or the CSA. At least one court has held that marijuana seized by a state police officer from a person entitled to possess it must be returned.²⁵ State prosecutors are expected not to file criminal charges. State administrative officials are expected to engage in the various activities required to implement their state's laws, including maintaining patient registries and issuing zoning permits or licenses to marijuana dispensaries and identification cards to medical marijuana users. State-licensed dispensaries are a more recent phenomenon in medical marijuana laws, and the United States Justice

²⁰ Some state laws require that patients try conventional medical therapy before they can obtain medical marijuana prescriptions. *See, e.g.*, Maine Medical Use of Marijuana Act, ME. REV. STAT. tit. 22, § 2422(2) (2013); Washington State Medical Use of Cannabis Act, WASH. REV. CODE § 69.51A.010(6) (2013). Others simply provide a list of pre-approved conditions for which medical marijuana can be prescribed. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11362.7(h) (West 2013); HAW. REV. STAT. § 329-121 (2013). Some states authorize medical marijuana prescriptions for a large variety of medical conditions, while others exercise tighter control over its acceptable use. *Compare* CAL. HEALTH & SAFETY CODE § 11362.7(h) (broad list plus catchall provision), *with* MONT. CODE ANN. § 50-46-302(7a), (10a) (2013) (limiting conditions to those involving chronic pain); *see also* ALASKA STAT. §§ 17.37.010(a), (d), (e) (2013); ARIZ. REV. STAT. ANN. § 36-2801(5) (2013) (caregiver provisions); *Medical Use, supra* note 16 (follow hyperlinks to "Vermont," "Alaska," "California," "Colorado," "Hawaii," "Maine," "Montana," "Nevada," "New Mexico," and "Oregon") (regulating permissible amounts of marijuana in possession).

²¹ *See, e.g.*, COLO. CONST. art. XVIII, § 14 (2000); ME. REV. STAT. tit. 22, §§ 2421-30; N.J. STAT. ANN. §§ 24:6I-1-16 (West 2013).

²² *See, e.g.*, ALASKA STAT. § 17.37.010; DEL. CODE ANN. tit. 16, §§ 4908A-4912A, 4920A (2013); MONT. CODE ANN. § 50-46-303 (2013).

²³ *See, e.g.*, NEV. REV. STAT. § 453A.170 (2013); R. I. GEN. LAWS § 21-28.6-3(14) (2013); VT. STAT. ANN. tit. 18, § 4473(b)(2) (2013).

²⁴ *See Delaware: Federal Threats Halt Efforts to Implement State's Medicinal Cannabis Law*, NORML (Feb. 16, 2013), <http://norml.org/news/2012/02/16/delaware-federal-threats-halt-efforts-to-implement-state-s-medicinal-cannabis-law>. Programs are currently operating in Colorado, Maine, and New Mexico.

²⁵ *Oregon v. Kama*, 39 P.3d 866 (Or. Ct. App. 2002); *see also* *Cnty. of Butte v. Superior Court*, 96 Cal. Rptr. 3d 421, 430 (Ct. App. 2009) (Morrison, J., dissenting) (arguing that the state peace officer's duty "to uphold the constitution and laws of . . . the United States" supports his destruction of marijuana plants lawfully possessed under state law).

Department has responded to the trend by warning states that monitoring large-scale production and distribution of marijuana—in violation of the CSA—could trigger legal liability for state employees.²⁶

B. *Federal Marijuana Criminalization*

Federal law criminalizes marijuana under the Controlled Substances Act (CSA),²⁷ enacted in 1970 pursuant to the Nixon Administration's declared national "war on drugs."²⁸ The CSA is Title II of the broader Comprehensive Drug Abuse Prevention and Control Act of 1970,²⁹ comprising the latter's criminal enforcement provisions. The purpose of the CSA was to combat drug abuse, prevent the diversion of drugs from legitimate to illicit channels, and eliminate "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances."³⁰ To accomplish these purposes, "Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA."³¹ The CSA categorizes drugs, including both pharmaceuticals and "street drugs," into five "schedules" with increasingly restrictive controls, reflecting judgments about each substance's accepted medical uses, the potential for abuse, and their health effects.³² Substances listed on "Schedule I," the most restrictive schedule, are deemed to have "no currently accepted medical use," cannot be prescribed by physicians, and are illegal for all purposes except federally authorized experimental studies.³³ Marijuana is listed as a Schedule I drug.³⁴

The CSA provides that "it 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" except as permitted by the Act.³⁵ Since federally authorized studies are the only permissible exception for Schedule I drugs, it is a federal crime to manufacture, distribute, or dispense marijuana, or

²⁶ See *supra* note 3.

²⁷ 21 U.S.C. §§ 801–904 (2012).

²⁸ See *Gonzales v. Raich*, 545 U.S. 1, 10 (2005).

²⁹ Pub. L. No. 91-513, 84 Stat. 1236 (1970); see *Raich*, 545 U.S. at 11.

³⁰ 21 U.S.C. § 801(1)–(6); see *Raich*, 545 U.S. at 11–12.

³¹ *Raich*, 545 U.S. at 13.

³² 21 U.S.C. §§ 811, 812.

³³ *Id.* § 812(b). The CSA authorizes the Attorney General, after consulting with the Secretary of Health and Human Services, to add substances to, remove them from, or transfer them between the various schedules. *Id.* § 811. But "[d]espite considerable efforts to reschedule marijuana, it remains a Schedule I drug." *Raich*, 545 U.S. at 15.

³⁴ 21 U.S.C. § 812(c).

³⁵ *Id.* § 841(a)(1).

possess marijuana with intent to manufacture, distribute, or dispense it. These marijuana offenses are felonies.³⁶ In addition, “simple possession”—i.e., of a small quantity, without the intent to manufacture or distribute—is a misdemeanor, if it is a first offense.³⁷

These offenses are augmented, in ways that are relevant to this Article, by federal statutes codifying the general criminal law principles of “aiding and abetting” and “accessory after the fact.” Title 18 U.S.C. § 2 provides that “[w]hoever . . . aids, abets, counsels, commands, induces or procures” a federal crime, or “causes” a federal criminal act to be done, “is punishable as a principal.”³⁸ Similarly, “[w]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.”³⁹ Generally speaking, aiding and abetting requires an overt act that assisted the commission of a crime with specific intent that the crime be committed.⁴⁰ The federal government has argued that aiding/abetting liability might attach to doctors who “recommend” medical marijuana to their patients.⁴¹ An argument could certainly be made that issuing a medical marijuana identification card or dispensary license aids or abets a violation of the CSA. A police officer who lets a card-carrying medical marijuana possessor go on his way might in theory be charged as an accessory after the fact.

C. *The Anti-Commandeering/Preemption Conflict*

The Supreme Court developed the anti-commandeering doctrine in *New York v. United States*, holding that Congress cannot compel a state legislature to enact a law to enforce a federal legislative mandate.⁴² Five years later, in *Printz v. United States*, the Court extended this doctrine to prohibit congressional commandeering of state executive officials—in that particular case, state police officers.⁴³ As the *Printz*

³⁶ *Id.* § 841(b)(1)(B), (D).

³⁷ *Id.* § 844(a). Simple possession is restricted to small amounts by the fact that intent to distribute may be inferred from possession of larger amounts. *See, e.g., United States v. Campos*, 306 F.3d 577, 580 (8th Cir. 2002).

³⁸ 18 U.S.C. § 2(a), (b) (2012).

³⁹ *Id.* § 3; *see, e.g., United States v. Triplett*, 922 F.2d 1174 (5th Cir. 1991).

⁴⁰ *See, e.g., Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002).

⁴¹ *Id.*; *see also United States v. Cady*, No. 92-6312, 1993 U.S. App. LEXIS 17217 (6th Cir. June 30, 1993) (lessor of trailer home from which marijuana was sold convicted of aiding and abetting possession with intent to distribute); *United States v. Burroughs*, 12 M.J. 380 (C.M.A. 1982) (defendant convicted of wrongful sale of marijuana under an aiding and abetting theory for verbally encouraging his roommate to complete the sale and making change to facilitate the sale).

⁴² *New York v. United States*, 505 U.S. 144 (1992).

⁴³ *Printz v. United States*, 521 U.S. 898 (1997).

Court summed up:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.⁴⁴

Does the anti-commandeering doctrine allow states to opt out of the marijuana criminalization regime imposed at the federal level by the CSA? On the surface, the answer is yes. Focusing on *New York* and *Printz*, the following postulates would seem clear:

1. Congress cannot compel a state legislature to criminalize marijuana; conversely, a state is free to enact whatever marijuana laws it sees fit.
2. Congress cannot compel state executive officials, such as police and prosecutors, to arrest and prosecute violators of the CSA.
3. From 1 and 2 it follows that state law determines the obligations of the state's own police and prosecutors in dealing with people within its jurisdiction who possess, distribute, or manufacture marijuana.

But this answer becomes much less clear if one considers the Supremacy Clause and preemption doctrine. To begin with, as the Court made clear in *Reno v. Condon*, the *New York/Printz* anti-commandeering rule does not override the principle that Congress can subject the states to regulation by "generally applicable laws."⁴⁵

Moreover, the dominant understanding of preemption doctrine is expressed in terms that imply significant state official obligations to enforce federal law: obligations that threaten to undermine anti-commandeering doctrine. First, courts and commentators frequently speak of preemption as though it straightforwardly replaces state law with federal law, making federal law "as much the policy of [the state] as if the act had emanated from its own legislature."⁴⁶ Preempted state laws are said to be "nullified," rendered "void," "invalidated," or even "prohibited."⁴⁷ The Supreme Court has recently reaffirmed that "[t]here

⁴⁴ *Printz*, 521 U.S. at 935.

⁴⁵ *Reno v. Condon*, 528 U.S. 141, 151 (2000).

⁴⁶ *Testa v. Katt*, 330 U.S. 386, 392 (1947) (quoting *Mondou v. New York, N. H. & H. R. Co.*, 223 U.S. 1 (1912)); accord *Printz*, 521 U.S. at 944 (quoting *Claffin v. Houseman*, 93 U.S. 130, 136–37 (1876)); *Tafflin v. Levitt*, 493 U.S. 455, 469–70 (1990) (Scalia, J., concurring) (same); see, e.g., Caminker, *State Sovereignty and Subordinacy*, *supra* note 8, at 1023 ("[I]n-state law is comprised of both state and federal law, with the latter dominating the former.").

⁴⁷ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012) ("The question before the Court is whether federal law preempts and renders invalid four separate provisions of the state law."); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("[S]tate law is

is no doubt that Congress may *withdraw specified powers from the States* by enacting a statute containing an express preemption provision.”⁴⁸

The Court’s anti-commandeering cases fail to come to grips with the prospect that preemption doctrine might result in the commandeering of state officials. Yet the above extremely broad, and typical, descriptions of the nature of preemption should give pause to anyone who believes *Printz* was correctly decided. State legislatures, after all, define the powers and duties of the state’s executive officials. If preemption means that federal law becomes the law of the state as if it “had emanated from [the state’s] own legislature,” then such federal law would seem capable of issuing commands to state executives. While state legislatures are not exactly “commandeered,” in the sense that they are not directly ordered to pass laws, they are simply bypassed, to the same practical effect: commandeering the state’s executive. The understanding that preemption makes federal law into “in-state law” for all purposes is incompatible with the anti-commandeering doctrine; indeed, this very understanding of preemption was advanced as an argument *against* anti-commandeering doctrine by some commentators.⁴⁹

Second, the strand of preemption doctrine known as “obstacle” preemption creates a serious tension with anti-commandeering doctrine. Federal law preempts any state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁵⁰ The *Printz* Court seems to have derived from this concept an affirmative duty requiring both state legislative and executive officials “not to obstruct the operation of federal law.”⁵¹ The unanswered and decisive question raised by obstacle preemption is whether the duty not to obstruct “the accomplishment and execution of the full purposes

nullified to the extent that it actually conflicts with federal law.”); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 290 (1981) (preemption prohibits state regulation); *Sw. Bell Wireless, Inc. v. Johnson Cnty. Bd. of Comm’rs*, 199 F.3d 1185, 1193 (10th Cir. 1999) (county zoning regulations “are void as preempted” by federal law); Adler & Kreimer, *supra* note 8, at 90, 95 (defining preemption as a federal requirement prohibiting state legislatures and executives from acting). Garrick Pursley summarizes the point nicely:

In *Lorillard Tobacco Co. v. Reilly*, for example, the Supreme Court made clear that the preemptive effect of the Federal Cigarette Labeling and Advertising Act (FCLAA) was to nullify Massachusetts tobacco advertising regulations. The Court said, variously, that preemption “bar[s] state action,” “supersede[s]” state authority, “precludes States or localities from imposing” legal requirements, “prohibit[s]” state action, “prevent[s]” state law-making, “forbid[s]” state mandates, “foreclose[s]” state regulation, and, indeed, “nullif[ies]” state law.

Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 527 (2010) (alterations in original) (footnotes omitted).

⁴⁸ *Arizona*, 132 S. Ct. at 2500–01 (emphasis added).

⁴⁹ Caminker, *supra* note 8, at 1028–29.

⁵⁰ See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁵¹ *Printz*, 521 U.S. at 913.

and objectives of Congress” requires active cooperation on the part of state officials.⁵²

D. *State Officials’ Ambiguous Obligations to Enforce Federal Drug Laws*

The tensions between the anti-commandeering and Supremacy Clause doctrines create an impressive array of uncertainties concerning both the obligation of state officials to adhere to the CSA and their liability to criminal sanctions for carrying out state policies.

1. State Executive Officials

a. Police

Consider the following scenarios. A state police officer makes a routine traffic stop and detects marijuana in the car. The motorist’s possession of marijuana is in compliance with the applicable state law—whether a medical marijuana or general legalization law. The officer thus has direct personal knowledge of a federal misdemeanor and evidence of a possible felony. The scenario could unfold in various ways: the officer might simply let the motorist go or might make an initial arrest; the officer might grab and inspect the marijuana, or might even impound it and bring it back to the police station. The question is this: Can a state police officer simply let a federal criminal suspect go? Can he send the suspect on his way with the marijuana?

Consider a second scenario: The state police have knowledge of a marijuana dispensary operating in conformity with state medical marijuana law. But they also know that the very existence of such a business violates federal law. Must they raid the dispensary, shut it down, and arrest the operators?⁵³

⁵² *Hines*, 312 U.S. at 67.

⁵³ To be sure, the doctrine of executive discretion affords police and prosecutors virtually unreviewable authority to make resource allocation decisions that, in an important sense, would relieve even federal agents and prosecutors from a strict duty to proceed against any particular dispensary. Thus, on a practical level, even under a broad preemption theory in which the CSA binds state officials, they would still presumably retain their executive discretion to refrain from raiding the dispensary. Thus, in theory at least, state police and prosecutors could honor a state’s legalization law notwithstanding a perceived contrary federal obligation under the CSA by hiding behind a cloak of prosecutorial or police discretion. While the result may be the same, there is nevertheless more than a formal distinction between saying that state executive officials are constitutionally protected from federal commandeering and saying that they can protect themselves from commandeering by using executive discretion as a form of *sub rosa* resistance or self-help. The justification for inaction given to the state’s citizens would look very different, for one thing. For another, a private nuisance action against the dispensary

Now consider a third scenario: A zealous state law enforcement official disapproves of his state's marijuana legalization law and wishes to volunteer to assist federal authorities in the enforcement of the CSA. *May* the official raid the dispensary, shut it down, and arrest the operators?⁵⁴

There are two seemingly straightforward answers to these questions that conflict with each other. The anti-commandeering doctrine suggests that the state police are under no obligation to enforce the CSA—and therefore should neither arrest the motorist or the dispensary operators, nor seize the marijuana. Yet it seems strange simply to let go of suspects observed to have violated federal law or of federal contraband. Is there really no obligation, even to hand over the suspect and the marijuana to the federal authorities?

The supremacy of federal law and preemption doctrine (as articulated by some courts and commentators) seem to suggest that there is some such obligation. As broadly stated, these doctrines tell us—don't they?—that federal law “trumps” and “nullifies” conflicting state law, that federal law is the law in every state, and that the supremacy of federal law requires state officials to refrain from interfering with the federal law's operation. Isn't it interfering with the CSA to let a known federal offender walk away? If one looks at this “catch and release” scenario not as a question of commandeering, but as one of knowingly letting federal criminals go free, the anti-commandeering principle comes under a bit of stress.

State-federal cooperation in the criminal law field is less governed by hard rules than one might think. To begin with, the authority of state police to make arrests for any crime, state or federal, would appear to be a question of state constitutions and statutes. The power of a state to create a criminal enforcement process and empower officers to arrest persons within the state's territorial jurisdiction is a fundamental

would stand in a stronger position where executive officials could be said to be ignoring a federally-imposed duty to shut it down.

⁵⁴ The concern is not far-fetched. Federal cooperative spending programs relating specifically to marijuana eradication create powerful incentives to state and local executive officials to cooperate with federal drug laws. See Bradley M. Steinman, High Federalism: An Analysis of the Constitutional and Statutory Authority for States to Legalize Cannabis Under National Prohibition (June 2013) (unpublished manuscript) (on file with author) (detailing use of civil forfeiture proceeds to underwrite federal-state anti-drug task forces). Even without a monetary incentive, local law enforcement officials might consider themselves duty bound to apply federal law. For example, in *County of Butte v. Superior Court*, 96 Cal. Rptr. 3d 421 (Ct. App. 2009), a county sheriff ordered destruction of marijuana plants lawfully possessed under state law by a medical marijuana user, presumably to comply with federal law. The court upheld the marijuana user's subsequent damages claim against the sheriff, though a dissenting judge argued that the sheriff's actions were justified by his duty “to uphold the constitution and laws of . . . the United States.” *Id.* at 430 (Morrison, J., dissenting).

constitutional question, and a central attribute of sovereignty.⁵⁵ State statutes authorize their police, expressly or impliedly, to make arrests for federal crimes.⁵⁶ At the same time, a *federal* statute *requiring* state police to make arrests for federal crimes would appear to be unconstitutional under *Printz*,⁵⁷ and no such statute exists. Instead, a general federal statute *permits* state officials to make arrests for federal crimes.⁵⁸ In sum, the constitutional status of a state police power to arrest for federal crimes is not a matter of federal command, but rather a state decision to accept the federal invitation to authorize its officers to arrest for federal crimes. This is one of the kinds of voluntary cooperation identified in *Printz* as the only clearly ascertainable precedent for state enforcement of federal law.⁵⁹

The legal framework for states' handling of federal offenders already in custody likewise seems to rely on voluntary cooperation. The Constitution expressly provides for mandatory *interstate* extradition, and Congress has enacted legislation to enforce that provision.⁶⁰ But

⁵⁵ This point is perhaps so basic that one cannot find a Supreme Court case directly on point. One must soften one's focus and infer it from cases dealing with related questions. *See, e.g., Printz*, 521 U.S. at 917 (state police cannot be "commandeer[ed]" to enforce a federal statute); *Miller v. United States*, 357 U.S. 301, 305 (1958) (holding that the validity of an arrest by state officers for a federal offense is determined in relation to local or state law); *United States v. Di Re*, 332 U.S. 581, 588–89 (1948) (stating the principle that absent an express federal statute defining who is allowed to execute federal arrest warrants, the validity of the arrest should be determined by the law of the state where the arrest took place, and finding that New York's statute authorized its law enforcement officials to make arrests for federal offenses).

⁵⁶ *See, e.g., CAL. PENAL CODE* § 830.1 (West 2013) (law enforcement officials have the authority to arrest individuals for "any public offense" within their jurisdiction); *CONN. GEN. STAT.* § 53a-24 (2013) (Connecticut defines "offense" as "any crime or violation which constitutes a breach of any law of this state or any other state, [or] federal law"); *725 ILL. COMP. STAT.* 5/107-2 (2013) (Under Illinois law, a "peace officer may arrest a person when . . . [h]e has reasonable grounds to believe that the person is committing or has committed an offense."); *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983) ("We infer that Illinois officers have implicit authority to make federal arrests."); 1992-1993 Ky. Op. Att'y Gen. 2-168, 1992 WL 541024 ("Kentucky peace officers may enforce federal laws when permitted by the Federal Government").

⁵⁷ *See infra* Part III.A.2.

⁵⁸ 18 U.S.C. § 3041 (2012) provides:

For any offense against the United States, the offender may, by any . . . chancellor, judge of a supreme or superior court, chief or first judge of the common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond determining . . . whether to detain or conditionally release the prisoner prior to trial or to discharge him from arrest.

⁵⁹ *See Printz*, 521 U.S. at 911, 913, 917.

⁶⁰ The Extradition Clause provides:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive

there is no parallel constitutional provision mandating that states transfer persons from state into federal custody. In practice, there is a great deal of cooperation in this area, but it results from a combination of permissive federal statutes and informal operating agreements.⁶¹

Further indications of the state of the law in this area come from the behavior of the relevant actors themselves. Federal authorities charged with enforcing the CSA appear to be operating under the assumption that there is no basis for the federal government to force state executive officials to enforce the criminal provisions of the CSA. Through two presidential administrations of both parties, the federal government has refrained from asserting that state police were violating the CSA in some fashion by declining to make marijuana arrests or seizures. While state administrators have been threatened with federal injunctions against implementing certain aspects of state marijuana laws, and even possibly with federal criminal prosecution, no such threats have been issued toward state police. Indeed, the Obama administration has sought state-federal cooperation in targeting marijuana manufacturers or distributors who violate *state* (and *a fortiori* federal) drug laws, while reducing enforcement against individuals acting in compliance with state marijuana laws.⁶²

Nevertheless, anxiety and uncertainty remain. Some state police officials have feared that returning seized marijuana to someone legally entitled to possess it under state law violates the “distribut[ing]” prohibition of the CSA.⁶³ And it remains a possibility that federal

Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2, cl. 2; *see also* 18 U.S.C. § 3182.

⁶¹ For example, the Federal Interstate Agreement on Detainers Act, 18 U.S.C. §§ 2–9 (2012), establishes a cooperative, non-mandatory arrangement among signatory states and the federal government to facilitate transfer of suspects from between states or from state to federal custody. A “sending state” may, under certain circumstances, refuse the federal government’s transfer request. 18 U.S.C. § 2 art. IV(a). State participation requires legislation by the states. *See, e.g.*, WIS. STAT. § 976.05 (2013).

⁶² *See* Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, on Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013), *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (In states with marijuana legalization laws combined with “strong and effective regulatory and enforcement systems[,] . . . conduct in compliance with those laws and regulations is less likely to threaten the federal priorities.”); Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1–2 (Oct. 19, 2009), *available at* <http://www.justice.gov/opa/documents/medical-marijuana.pdf> (Federal law enforcement efforts “should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”).

⁶³ 21 U.S.C. § 841(a)(1) (2012) (making it “unlawful . . . to . . . distribute . . . a controlled substance”); *see, e.g.*, *State v. Kama*, 39 P.3d 866 (Or. Ct. App. 2002) (defendant City of Portland argued that returning seized marijuana to state-authorized medical user would violate distribution prohibition of CSA).

authorities could change their position and assert that the CSA compels state cooperation—particularly if court decisions pave the way for such an argument.

Such an argument would be based on preemption. Recall the Supreme Court’s caution in *Printz*, that the anti-commandeering rule does not eliminate the duty of state officials “to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law.”⁶⁴ It could be argued that some or all of the non-enforcement scenarios outlined above amount to obstruction of the operation of the CSA. An argument could also be made by analogy to *Testa v. Katt*, which held that a state court cannot discriminate against federal claims by refusing to hear them when it has jurisdiction that is adequate to hear analogous state law claims.⁶⁵ It might be argued that once a state authorizes its police to make arrests for federal crimes, it may not “discriminate” among federal laws by picking and choosing those it will enforce.⁶⁶

A broad application of obstacle preemption could be construed as requiring the imposition of federal policy as though it were “the policy of the state.” Both federal and state courts could, in effect, rely on preemption doctrine to place state executive officials into a kind of receivership when it comes to the CSA. Courts might consider themselves justified in restructuring the relations of state officials with one another and with their citizens, due to the purported judicial obligation to implement the “full purposes” of Congress, if courts construe those purposes to mean the total elimination of the marijuana black market. The Supreme Court has already announced that this policy extends to purported state legalization efforts, including wholly intrastate medical marijuana.⁶⁷ Courts might therefore issue injunctive relief that should raise eyebrows under *Printz* by requiring state officials to act or refrain from acting in ways that obstruct a zero-tolerance drug policy. Initial steps in this direction have already been taken by some courts.⁶⁸

⁶⁴ *Printz*, 521 U.S. at 913.

⁶⁵ *Testa v. Katt*, 330 U.S. 386 (1947).

⁶⁶ While the *Printz* Court rejected the government’s argument that *Testa* recognized a federal commandeering power, *Printz*, 521 U.S. at 928, the Court did not consider an antidiscrimination argument for binding states to enforce federal laws. To be sure, most acts that violate federal criminal laws probably violate an analogous or related state law as well. The situation here, where that conduct made a federal crime is expressly recognized as legal under state law, is unusual.

⁶⁷ See *Gonzales v. Raich*, 545 U.S. 1, 12–13, 19 (2005).

⁶⁸ See, e.g., *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633 (Ct. App. 2011), *superseded by grant of review*, 268 P.3d 1063 (Cal. 2012) (enjoining county officials from issuing marijuana dispensary licenses); see also *Cnty. of Butte v. Superior Court*, 96 Cal. Rptr. 3d 421, 430 (Ct. App. 2009) (Morrison, J., dissenting) (arguing that state peace officer’s duty “to uphold the constitution and laws of . . . the United States” supports his destruction of marijuana plants lawfully possessed under state law).

An additional theory might be used to impose obligations on state police via the CSA. It might be argued that state legalization laws are nullified or rendered “*ipso facto* invalid” by the CSA, and that such nullification of state legalization has the effect of restoring the previous state regime of full marijuana criminalization. Conceivably, a state court could enjoin the implementation of legalization laws and issue declaratory or injunctive orders directing police and prosecutors to enforce the prior laws, making marijuana criminal to similar extents as the CSA. The net effect would be to neutralize state legalization laws and, in practice, bind state officials to enforce the federal policy implicit in the CSA—if not by enforcing it directly, then at least by enforcing repealed or amended state laws in a manner consistent with the federal mandate.

b. Prosecutors

The position of state prosecutors appears at first blush to be more straightforward than that of police. If marijuana-related conduct is legal under state law, then a prosecutor has no authority to bring charges for the conduct under state law or federal law; federal prosecutors have exclusive jurisdiction to bring federal criminal charges.⁶⁹ But this simple picture is complicated by variations in how we understand federal preemption of conflicting state law.

Bear in mind that marijuana was criminalized in all fifty states prior to the recent round of legalization laws.⁷⁰ As will be discussed further below, many courts and commentators assume that federal preemption renders conflicting state law “null and void.” Suppose an overzealous state prosecutor takes the position that the state’s legalization laws are void and should therefore be treated as though they had never been enacted. He then brings charges against putatively lawful medical marijuana users under the prior state law, which recognized no exception for medical marijuana. (Indeed, a similar line of argument could be adopted by state police to support arrests and seizures under pre-legalization state laws.)

The defendant in this scenario could, of course, argue that federal preemption of a state legalization law does not restore the state’s pre-legalization criminal law. I will develop this argument further below. But the argument is far from a slam dunk, at least based on common articulations of preemption doctrine. At this point, it would be up to a

⁶⁹ Compare 28 U.S.C. § 516 (2012) (delegating exclusive authority for the litigation of the United States to attorney general), with 18 U.S.C. § 3041 (2012) (authorizing state police judicial officers to make arrests for violations of federal criminal laws).

⁷⁰ See *Seeley v. State of Washington*, 940 P.2d 604, 611 (Wash. 1997) (As of 1988, all fifty states had adopted “in some form” parallel legislation to the CSA (a.k.a. the Uniform Controlled Substances Act), and listed marijuana on Schedule 1.).

state court to determine whether federal law preempts state law in the sense in which the state prosecutor argues. The obligation of state courts in such a situation is considered below.

c. Bureaucratic and Regulatory Agents

Any state law that places limits or conditions on the legal possession, use, distribution, or manufacture of marijuana requires an administrative enforcement apparatus. As we have seen, these might include the issuance of identification cards or other affirmative permissions by zoning boards, licensing authorities, taxing authorities, and even perhaps the creation of state-run dispensaries. If one sees an important legal distinction between “passive” and “active” involvement in a marijuana legalization regime, the actions required of such state bureaucratic officials may be viewed as more “active” than the merely “passive” decision of a police officer to decline to make an arrest or seizure.

The most significant amount of litigation activity has occurred around the legality of bureaucratic implementation of state marijuana legalization. The array of parties and their motivations have been various. In some instances, local or county officials—either out of concern about federal criminal exposure or perhaps more personal opposition to marijuana legalization—have sought injunctions against various aspects of state legalization laws.⁷¹ In other cases, county authorities appear to have been motivated by concerns about neighborhood effects of marijuana dispensaries.⁷² Several state courts have issued injunctions against state laws on federal preemption grounds.⁷³

The only thing that is clear from this regulatory picture is that the obligations of state and local officials are exceedingly unclear. The result is a somewhat unseemly spate of intrastate litigation in which federal law is the occasion for state bureaucratic officials to sue their states to clarify their job obligations.

Bureaucratic administrators are not the only state enforcement agencies involved. States are responsible for maintaining the practice standards of two professions that are potentially intimately involved with marijuana legalization: doctors and lawyers. Must state authorities take disciplinary measures against doctors who recommend or prescribe medical marijuana or lawyers who provide transactional counseling to

⁷¹ See, e.g., *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461 (Ct. App. 2008).

⁷² See, e.g., *Cnty. of L.A. v. Alt. Medicinal Cannabis Collective*, 143 Cal. Rptr. 3d 716 (Ct. App. 2012), *superseded by grant of review*, *City of Gilroy v. Kuburovich*, No. H035876, 2011, Cal. App. Unpub. LEXIS 8071 (Ct. App. Oct. 25, 2011).

⁷³ See, e.g., *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633 (Ct. App. 2011), *superseded by grant of review*, 268 P.3d 1063 (Cal. 2012).

assist medical marijuana dispensaries—negotiating or reviewing contracts, drafting incorporation documents, and the like? Some state bar authorities have taken the position that the CSA requires them to undertake such disciplinary steps.⁷⁴

2. State Legislative Processes

New York v. United States holds that state legislatures cannot be compelled to enact laws to carry out federal policies and programs.⁷⁵ The plainest application of this principle tells us that Congress could not directly require states to pass laws criminalizing marijuana or to repeal laws legalizing it. But do state legislatures, or the citizens of a state who can enact laws through a referendum process, have some sort of obligation to refrain from enacting laws that “obstruct” the CSA? One would think not: As discussed further below, federal preemption of state law operates as a post-enactment judicial decision rather than as a pre-enactment veto over state legislation.⁷⁶ Even the *Printz* dissenters described legislative power as “a [state] discretion not subject to [federal] command.”⁷⁷ To be sure, the *Printz* majority reminded us of “the duty owed to the National Government, on the part of *all* state officials, to *enact* . . . state law in such fashion as not to obstruct the operation of federal law.”⁷⁸ But this duty would be realized in “the attendant reality that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid.”⁷⁹ It appears that states remain free to enact laws that conflict with federal law, but those laws will be “invalid.”

And yet, this picture is not so simple either. If CSA preemption imposes affirmative obligations on state executive officials, then the CSA can make considerable inroads into core state legislative prerogatives to define the powers of their own executive officials—to arrest and prosecute and to carry out state legislative commands. In an important sense, legislative commandeering and executive commandeering are two sides of the same coin, and thus preemption doctrine threatens to

⁷⁴ See, e.g., Conn. Bar Ass’n Prof’l Ethics Comm., Informal Op. 2013-2 (2013) (concluding that attorneys may advise clients on licensing and regulatory requirements of state medical marijuana law, but may not provide legal assistance “in aid of functioning marijuana enterprises”); Randy Robinson, *Ethical Issues, Medical Marijuana & the Practice of Law Panel*, DENV. U. L. REV. ONLINE (Jan. 27, 2012, 10:43 AM), <http://www.denverlawreview.org/marijuana-at-the-crossroads/2012/2/8/ethical-issues-medical-marijuana-the-practice-of-law-panel.html>.

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

⁷⁶ See *infra* text accompanying notes 117–31.

⁷⁷ *Printz v. United States*, 521 U.S. 898, 975 (1997) (Souter, J., dissenting).

⁷⁸ *Id.* at 913 (majority opinion) (second emphasis added).

⁷⁹ *Id.*

commandeer legislatures as well as courts. The question of ex post criminal liability for legislative acts is a further potential source of commandeering, and is discussed below.

3. State Courts

While holding that state executive officials, like state legislatures, are protected by the Tenth Amendment from federal commandeering, *Printz* reaffirmed that state courts are different: “they applied the law of other sovereigns all the time.”⁸⁰ It is the nature of the judicial function to base decisions on whatever law is applicable, from whatever sovereign source, including sister states, foreign countries, and the law of nations. From a state court’s vantage point, federal law emanates from another sovereign, but state courts are bound to scrap their usual choice of law rubrics and apply federal law, under the Supremacy Clause.

In the case of CSA preemption of state marijuana legalization laws, however, the picture is exceedingly complicated from the get-go. There is only one circumstance where CSA preemption is unproblematic: Any assertion of state legality as a defense to a federal CSA prosecution is preempted. Put another way, state legalization laws cannot bar or hinder a federal prosecution under the CSA. But state courts are not called upon to make this straightforward application of federal CSA preemption for the simple reason that federal courts have had exclusive jurisdiction over federal criminal prosecutions since the Judiciary Act of 1789.⁸¹ Instead, state court involvement with the CSA arises only in murky applications of preemption doctrine.

To begin with, each one of the previously discussed questions involving the obligations of other state officials could be presented to a state court. Under the Supremacy Clause, state courts would be “bound” to apply federal law, albeit only to the same extent as a federal court. In other words, the Supremacy Clause begs the question of whether, when, and in what circumstances, the CSA applies and preempts state law. State courts and federal courts alike are in the position of having to reconcile the tensions between CSA preemption and the anti-commandeering doctrine.

Perhaps even more difficult are preemption questions involving the rights and duties of private parties toward one another. Crime—

⁸⁰ *Id.* at 907.

⁸¹ See Judiciary Act of 1789, § 9, 1 Stat. 73 (1789) (codified at 18 U.S.C. § 3231 (2012)) (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”). In constitutional theory, Congress could authorize or even compel state courts to hear federal criminal matters, since state courts are competent to try comparable state criminal cases. See *Testa v. Katt*, 330 U.S. 386, 392 (1947) (state court cannot refuse to hear federal “penal” laws).

especially drug crime—raises a host of collateral consequences that permeate private social relationships. Many residential and commercial rental agreements contain provisions requiring the renter to obey federal and state drug laws—and make violation a ground for eviction. Private employment agreements may have similar terms, with illegal drug use a ground for employment termination.⁸² Use of illegal drugs may be the basis for nuisance or other tort suits brought by residential or commercial neighbors against a medical marijuana dispensary or user. The question arises whether these contract terms can and should be enforceable in court and whether the nuisance action will lie.⁸³

Difficult issues also face courts considering probation and parole revocation. Some version of “obey all federal and state drug laws” is fairly common as a condition of probation or parole.⁸⁴ A parolee or probationer who uses medical marijuana in compliance with state law may find himself facing revocation. A court must decide whether state legalization law is preempted for purposes of the state sentence.⁸⁵

The preemption cases involving private litigants and probation or parole revocation share a common element: None of them involve the direct application of a federal criminal prohibition to an accused

⁸² See, e.g., *Casias v. Wal-Mart Stores*, 695 F.3d 428 (6th Cir. 2012) (Michigan’s medical marijuana law did not prohibit termination of employee for marijuana use.); *Benoir v. Indus. Claim Appeals Office*, 262 P.3d 970 (Colo. Ct. App. 2011) (employee entitled to use medical marijuana precluded from unemployment benefits after being terminated under employer’s zero-tolerance drug policy).

⁸³ California’s medical marijuana law, for example, exempts lawful caregivers and users from nuisance abatement proceedings. See *City of Lake Forest v. Evergreen Holistic Collective*, 138 Cal. Rptr. 3d 332, 337 (Ct. App. 2012), *superseded by grant of review on other grounds*, 275 P.3d 1266 (Cal. 2012). Nevertheless, state courts have shown some uncertainty about whether that aspect of the law is preempted by the CSA. See *City of Corona v. Naulls*, 83 Cal. Rptr. 3d 1, 5 (Ct. App. 2008) (City argued on its successful motion for preliminary injunction that Naulls was operating business in violation of the Controlled Substances Act and provisions of zoning regulations and “thus constituted a nuisance per se”); see also *City of Claremont v. Kruse*, 100 Cal. Rptr. 3d 1, 7–8 (Ct. App. 2009) (city adopted moratorium on medical marijuana dispensaries in part because “there was uncertainty between federal laws and California laws”); *Ter Beek v. City of Wy.*, 823 N.W.2d 864, 869 (Mich. Ct. App. 2012) (zoning ordinance void and unenforceable “because the ordinance expressly prohibits uses contrary to federal law and, therefore, provides for punishment of qualified and registered medical-marijuana users . . . that the [Michigan Medical Marijuana Act] expressly prohibits”).

⁸⁴ See, e.g., *Colorado v. Watkins*, 282 P.3d 500 (Colo. 2012).

⁸⁵ See *California v. Bianco*, 113 Cal. Rptr. 2d 392 (Ct. App. 2002) (trial court properly imposed probation condition to, in effect, comply with the Controlled Substances Act, despite defendant’s use of medical marijuana); *Watkins*, 282 P.3d at 500 (vacating trial court’s approval of defendant’s use of marijuana while on probation based on statute that conditions probation on not committing offenses, including federal offenses); *But see* *People v. Tilehkooh*, 7 Cal. Rptr. 3d 226, 229 (Ct. App. 2003) (government may not evade statute that provides medical marijuana defense “on the ground defendant violated a probation condition that he obey the federal criminal marijuana law”); *State v. Nelson*, 2008 MT 359, ¶ 37, 195 P.3d 826, 833–34 (trial court exceeded authority to impose deferred-sentence condition requiring defendant to obey all federal laws; “it must allow an exception with respect to those federal laws which would criminalize the use of medical marijuana”).

offender of the CSA. Rather, they all entail cases in which the CSA is an element of a state claim or charge. As will be seen below, to apply CSA preemption in such cases presupposes a very broad and problematic application of “obstacle preemption.”

4. Potential Criminal Exposure of State Officials

CSA preemption is potentially more intrusive on state sovereignty than is the case with other laws because it is a criminal statute with stiff penalties. We have already seen that state police who return seized marijuana to a state-authorized medical user or state officials administering a state-run dispensary could easily fall within the CSA’s definition of “distribution.” With “aiding and abetting” liability in the picture, the scope of potential criminal prosecution of state officials broadens considerably.

Consider the scope of criminal exposure if aiding and abetting were interpreted to include everyone who “specifically intended to facilitate” and actually “assisted” in the commission of a violation of the CSA. Assistance and facilitation are malleable enough terms that state executive officials would have some justification to worry that implementing a state marijuana regulation program would make administrators of the program into aiders and abettors. What about state judges who decide not to revoke probation of a medical marijuana user or who decide that the CSA does not preempt state legalization regulatory machinery? Can a state judge order a state police officer to return seized marijuana to a medical user or dispenser without distributing, or aiding and abetting the distribution of marijuana? What about a state judge who dismisses a nuisance or eviction case against a state-lawful dispensary, understanding that the decision will result in the dispensary’s continued operation in violation of federal law?

Finally, consider the legislators or even the referendum voters who vote in favor of state legalization. It would not be extremely difficult to prove that such individuals “specifically intended” to “facilitate” the use of marijuana in their states, and that they knew, or should have known, that the enactment of the law would encourage many people previously deterred by state illegality, to possess or distribute marijuana in violation of the CSA.

The CSA itself does not resolve these difficulties. Section 885(d) of the CSA provides that:

[N]o civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State, territory, political

subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.⁸⁶

One arguable interpretation of this ambiguous provision may take care of the problem. A court could construe this language as creating immunity for state officials who are following the dictates of state law.⁸⁷ Or not. A court could also construe the provision as applying only to undercover narcotics officers who participate in drug crimes as part of enforcement operations.⁸⁸ Plainly, the immunity provided to federal officers under this section is aimed at activities enforcing the CSA, and the immunity extended to state officers appears to parallel this. Further, the term “officer” does not with absolute clarity extend to state judges, legislators, or referendum voters.⁸⁹ Though in my view incorrect, it would be supportable for a court to determine that federally-preempted state legalization laws are not “lawful” authorizations exempted by § 885(d).⁹⁰

As explained below, there is no general doctrine of state official immunity from federal prosecution for official acts, even for legislators.⁹¹ Perhaps referendum voters have First Amendment protection for their votes, but that conclusion—while sound—may only be reachable after an uncomfortably close analysis of the *Brandenburg* incitement test.⁹²

If the idea of the federal government prosecuting state police, prosecutors, administrators, judges, legislators, or referendum voters seems farfetched, it nonetheless bears considering why. The political backlash against a presidential administration that took such action is easily imagined. But if that’s the answer, then we have to admit that we’re placing heavy reliance on political safeguards rather than on a judicially-enforced constitutional doctrine to protect federalism in this context.

⁸⁶ 21 U.S.C. § 885(d) (2012).

⁸⁷ See *Oregon v. Kama*, 39 P.3d 866 (Or. Ct. App. 2002) (holding that police officer was required to follow state statutory requirement to return seized marijuana to state-authorized medical user, because doing so was immunized from criminal liability under 21 U.S.C. § 885(d)).

⁸⁸ See Mikos, *supra* note 8, at 1458.

⁸⁹ See, e.g., *Willingham v. Morgan*, 395 U.S. 402, 403–06 (1969) (treating the term “officer” as synonymous with executive or law enforcement official); cf. *Gregory v. Ashcroft*, 501 U.S. 452, 465–67 (1991) (statutory exemption for “appointee[s] at the policymaking level” does not unambiguously cover state judges) (internal quotation marks omitted).

⁹⁰ Professor Mikos offers this interpretation as reflecting the section’s “readily apparent” purpose. Mikos, *supra* note 8, at 1458.

⁹¹ See *infra* text accompanying notes 104–06.

⁹² See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (The First Amendment protects advocacy speech unless that speech is specifically directed to inciting imminent lawless action and is likely to produce such action.).

II. THE INADEQUACY OF SUPREMACY/PREEMPTION SOLUTIONS TO STATE MARIJUANA LEGALIZATION

The Supremacy Clause states that “This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”⁹³ “Preemption” is the doctrine, stemming from the Supremacy Clause, under which federal law supersedes state or local laws that conflict with it.⁹⁴ The concepts of “supremacy” and “preemption” are intertwined, but distinct.⁹⁵

“Supremacy” is best understood as the principle that federal law “trumps” state law. This means two things. First, federal supremacy tells us that when states and the federal government share legislative jurisdiction, federal law will define the obligations of the people where state law is in conflict. Hence, as far as you or I are concerned, marijuana is illegal nationwide, notwithstanding state legalization laws. Second, supremacy is a power of the national government to regulate states, at least to some degree. The Supremacy Clause might allow Congress to regulate states directly in order to effectuate a national policy to make marijuana illegal for all purposes and to command state compliance (though the anti-commandeering doctrine makes this point somewhat uncertain). That approach is not currently on the table, however, because nothing in the CSA purports to regulate the states in this manner—that is, expressly. The significance of that omission will be considered further in Part IV. For present purposes, supremacy is worth discussing to illustrate important qualifications and tensions with the anti-commandeering doctrine.

“Preemption” is not the same thing as “supremacy,” but rather is the mechanism for *judicial implementation* of federal supremacy. Preemption doctrine tells courts how to resolve purported conflicts between federal and state laws. On the surface, preemption offers a strong nationalist solution to the marijuana legalization federalism crisis by seemingly imposing duties on state officials to comply with the CSA. However, on closer inspection, this solution depends either on a false understanding of the nature of preemption as rewriting the organic law of a state, or on a maximally broad interpretation of obstacle preemption. Either way, the preemption solution would destroy the anti-commandeering doctrine while enrolling the courts in actively undermining the political safeguards of federalism.

⁹³ U.S. CONST. art. VI, cl. 2.

⁹⁴ See, e.g., *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 108 (1992).

⁹⁵ Several commentators have identified such a distinction but have drawn it in various ways, some closer to my definitions than others. See, e.g., Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2091 (2000); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994).

A. Supremacy

The status of federal law as “the supreme law of the land” is unquestioned. The people are bound by federal law even in states whose laws permit or require something different. For example, notwithstanding state legal regimes permitting race discrimination by private employers or privately-owned places of public accommodation, such conduct was made illegal by the Civil Rights Act of 1964.⁹⁶

But such laws bind the states as well: For example, Title VII of the Civil Rights Act of 1964 (as amended in 1972), expressly prohibits race discrimination in state employment.⁹⁷ But even before this amendment, the statute would have created some federal power to command state officials: For example, a court would undoubtedly have issued injunctive relief to enforce the command of federal law against state executive officials attempting to enforce segregation in privately-owned workplaces, shops or restaurants.⁹⁸ Nor is the power of Congress to regulate states limited to “generally applicable laws.” Various federal statutes regulate states or state officials exclusively or primarily. 42 U.S.C. § 1983, for example, authorizes the issuance of injunctive relief against state officials who violate federal rights “under color of [state] law.”⁹⁹ Section 1983 requires state action, and thus manifestly does not apply to private parties.¹⁰⁰ Whether via § 1983 or otherwise, states can be ordered to undertake affirmative acts to comply with federal statutes.¹⁰¹

The seemingly categorical *Printz* rule thus needs significant qualification, as *Reno v. Condon* may have implicitly acknowledged.¹⁰² State executive officials cannot be commanded to enforce a federal

⁹⁶ Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. ch. 21 (2012)).

⁹⁷ 42 U.S.C. § 2000e (2012).

⁹⁸ See, e.g., *Green v. Mansour*, 474 U.S. 64, 68 (1985) (Injunctive “[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.”); see also *Printz v. United States*, 521 U.S. 898, 913 (1997) (recognizing that state acts obstructing federal law are invalid notwithstanding the anti-commandeering principle).

⁹⁹ While the right of individual plaintiffs to obtain damage remedies against states for violation of some of these generally applicable laws (those promulgated under Congress’s Article I powers) has been restricted by the Court’s Eleventh Amendment decisions, they retain the right to seek injunctive relief; and Eleventh Amendment immunity does not bar enforcement actions, even for retrospective relief, by the federal government.

¹⁰⁰ See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929, 937 (1982) (The § 1983 “under color of law” requirement is identical to the Fourteenth Amendment “state action” requirement; a private party may be liable only if his conduct is “chargeable to the state.”).

¹⁰¹ See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 695 (1979) (state agency may be ordered to prepare rules to implement court order to comply with federal statutory mandate); *Rosado v. Wyman*, 397 U.S. 397 (1970) (federal claim available to secure state compliance with Social Security Act).

¹⁰² *Reno v. Condon*, 528 U.S. 141 (2000).

policy or program—except when the state is made subject to generally applicable laws, or is regulated directly under the congressional enforcement provisions of the Civil War amendments, and there may be other exceptions as well. In the overall scheme of things, it may be more accurate to characterize the anti-commandeering rule as an exception to a general power of Congress to regulate states.

Where federal laws regulate states directly, rather than regulating the people, one might categorize that situation as one involving supremacy rather than preemption. If the federal law is valid, it should be obligatory on the affected state officials regardless of whether there is a conflicting state law to be preempted. In cases involving federal regulation of states, the Court does not necessarily even mention preemption. In *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁰³ for example, the Fair Labor Standards Act (FLSA) preempted conflicting state wage and hour law less protective of employees than the federal law. But the language of preemption does not appear in that case.¹⁰⁴

The supremacy principle underlies constitutional doctrine that permits abrogation of state sovereign immunity, not only under the Civil War amendments, but in other contexts. For instance, while the Court now holds that Congress cannot rely on its commerce power to abrogate state sovereign immunity from damages suits by private parties,¹⁰⁵ states enjoy no sovereign immunity from such suits by the federal government.¹⁰⁶ The Court has repeatedly indicated that a general waiver of any pre-existing sovereign immunity against suits by the federal government “is inherent in the constitutional plan.”¹⁰⁷ Pursuant to this principle, the Court has declined to recognize any hard immunity rule for states or their officials from federal criminal prosecution.¹⁰⁸

¹⁰³ 469 U.S. 528 (1985).

¹⁰⁴ The word “preemption” appears but once in any form in *Garcia*, and it is used in a different sense than preemption doctrine, referring generically to the state’s role in the federal system rather than to judicial resolution of a conflict between federal and state laws. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 (1985) (“[T]he States have a major role that cannot be pre-empted by the National Government.”). Similarly, in *Gregory v. Ashcroft*, the question could have been framed as whether the federal Age Discrimination in Employment Act (ADEA) preempted a state mandatory retirement law, but the Court deemed preemption to be an analogous, rather than a controlling, legal category. *See Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (presumption against preemption analogous to the clear statement rule adopted in *Gregory*).

¹⁰⁵ *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

¹⁰⁶ *See, e.g., United States v. Mississippi*, 380 U.S. 128, 140 (1965) (“[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State’s being sued by the United States.”).

¹⁰⁷ *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934) (citing cases) (There is “jurisdiction of this Court of a suit by the United States against a State, albeit without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan.”).

¹⁰⁸ *Id.*

B. Preemption

“[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”¹⁰⁹ When Congress acts within its enumerated powers, its power to displace state law is plenary.¹¹⁰ The question for courts becomes whether and to what extent state and federal laws conflict.¹¹¹

1. Current Doctrine

Preemption doctrine has recognized three types of conflict at one time or another. “Impossibility of compliance” preemption involves instances where it is logically impossible to comply with both federal and state law. Where a state law *requires* conduct that violates federal law (or vice versa), the regulated party cannot comply with one law without violating the other, and the state law is preempted: For example, a state law that “no entry-level fast food worker shall be paid in excess of \$5.00 per hour” would be preempted by a federal law that “the minimum wage for any employee shall be \$7.50 per hour” under “impossibility” preemption. This situation is rare. A second form of preemption, has been referred to as “repugnance” or “positive conflict” preemption by commentators, past courts, and lawmakers.¹¹² It exists

¹⁰⁹ *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (citations omitted) (internal quotation marks omitted).

¹¹⁰ *See, e.g., Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 290 (1981) (“A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law. Moreover, it is clear that the Commerce Clause empowers Congress to prohibit all—and not just inconsistent—state regulation of such activities.” (citations omitted)).

¹¹¹ Preemption doctrine has been organized, somewhat confusingly, into questions of “express” and “implied” preemption, separating those federal laws with, from those without, an express provision dealing with preemption. The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1191 (2012) contains an express preemption clause, providing that the statute “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” *Id.* § 1144(a). Implied preemption cases involve statutes with no such preemptive language and try to determine the preemptive intent of Congress in other provisions of the statute or its legislative history. The express/implied doctrinal distinction is unhelpful because the same analytical questions are presented whether there is an express preemption clause or not: Specifically, did Congress intend to reserve exclusive legislative authority, and, if not, do the state and federal laws conflict and to what extent did Congress intend to tolerate state law departures from federal policy. Nevertheless, the Court has chosen to locate the categories of “field” preemption (an intention of Congress to impose exclusive federal regulation) and “conflict” preemption as subcategories of implied preemption. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012).

¹¹² The term “repugnant” was famously employed by Chief Justice Marshall in the first conflict preemption case, *Gibbons v. Ogden*, 22 U.S. 1, 186 (1824).

where it is logically possible for a regulated party to *comply* with both laws but logically impossible for courts to *apply* both laws to the same case.¹¹³ A state medical marijuana law positively conflicts with the federal Controlled Substances Act, which prohibits the individual use of marijuana for any purpose.¹¹⁴ A person could comply with both laws at once by refraining from using marijuana. However, if a person possesses marijuana in a manner compliant with state law, a court could not logically apply both the state law and the CSA. Put another way, a positive conflict occurs where a state law *permits* a violation of federal law (or vice versa).

A third type of conflict will be found if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹¹⁵ Federal courts have used this doctrine to preempt state laws not only in clear-cut positive conflicts, but also where the “purpose” of Congress was defined in much broader, fuzzier terms. For example, in *Geier v. American Honda*,¹¹⁶ the Court held that a state tort rule that would allow a jury to find an auto manufacturer liable for failing to install airbags in a 1984-model-year car was preempted by a federal regulation permitting auto manufacturers to phase airbags into all car models by 1987. The Court determined that the policy of the federal regulation was to promote gradualism, while the state tort rule penalized manufacturers for failing to move at a pace faster than required by the federal policy.¹¹⁷ Significantly, there was no positive conflict between the two laws: Had the federal regulation been construed as setting a regulatory floor rather than a ceiling, the state policy of prodding faster adoption of airbags would not have been an obstacle to the federal policy. Nor did the federal regulation purport to deal with products liability in any explicit way.

Contemporary preemption doctrine no longer recognizes a separate strand of “positive conflict” or “repugnance” preemption. Instead, that concept seems to have been subsumed into obstacle preemption.¹¹⁸ To be sure, repugnance preemption can be seen as a lesser included category within obstacle preemption, since enforcement of a repugnant state law undoubtedly “stands as an obstacle” to the accomplishment of the purposes of the federal law. But obstacle

¹¹³ “When two statutes were ‘repugnant’ within the meaning of the rule, it would have been logically impossible for courts to follow both; courts that gave effect to one would not be giving effect to the other.” Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 236 (2000).

¹¹⁴ See *supra* text accompanying notes 29–35.

¹¹⁵ See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹¹⁶ 529 U.S. 861 (2000).

¹¹⁷ *Id.*

¹¹⁸ See, e.g., *Geier*, 529 U.S. at 873; *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 648 (Ct. App. 2011), *superseded by grant of review*, 268 P.3d 1063 (Cal. 2012). Thus, under current doctrine, “conflict preemption” is deemed to consist of two types, “impossibility of compliance” and “obstacle” preemption.

preemption cuts a much broader swath through state law than positive conflict preemption. In the medical marijuana context, for example, a positive conflict occurs only insofar as a state legalization law purports to immunize a medical marijuana possessor from *federal* criminal liability. The state law would be preempted and afford no defense in a federal prosecution under the CSA under positive conflict preemption principles (though a court would now call it obstacle preemption). The state law requiring the state's health department to issue a medical marijuana identification card to that person creates no positive conflict, since nothing in the CSA addresses the situation. It might, however, conflict with the *policy* of the CSA and thereby become subject to an obstacle preemption argument.

2. Does Preemption Imply a Federal Power to Make State Law?

One basis for imposing the CSA as obligatory on state officials is to treat it as the law of the state. As discussed above, courts and commentators tend to discuss preemption doctrine as though it were in effect a plenary authority of Congress to rewrite state laws: as if federal laws can “nullify” or “repeal” state laws and substitute federal policy, which becomes “the policy of the state.”¹¹⁹ The conflict between this position and the anti-commandeering doctrine is obvious: If federal law becomes state law for all purposes, state executive officials would be obliged to follow it, and state legislatures' power to determine the obligations of their executive officials would be supplanted wherever federal law so provided. Despite the frequency with which sophisticated commentators, and courts, speak of preemption in these terms, it is a mistaken view of the nature of preemption. This overbroad view of preemption is belied by the text and history of the Supremacy Clause and by the structural and functional premises underlying the federalist design.

The reason why preemption is described in such overbroad terms is undoubtedly that the preemption cases and academic commentary virtually always focus on federal laws regulating the people rather than laws regulating the states. The question of whether preemptive federal law imposes duties on state officials is simply not raised in garden-variety preemption cases. In those usual settings, courts are asked to make a choice-of-law decision about whether federal or state law supplies the rule of decision regulating private parties in a specific case. If federal law preempts state law, the latter is indeed effectively nullified

¹¹⁹ *Testa v. Katt*, 330 U.S. 386, 392 (1947); *accord* *Clafin v. Housman*, 93 U.S. 130, 136–37 (1876); *see supra* notes 44–47 and accompanying text.

or repealed, albeit only for purposes of that specific category of cases. Consider *Geier v. American Honda*, which held that a federal safety standard intended to promote the gradual introduction of airbags preempted a state products liability rule holding a car manufacturer liable for failing to install airbags.¹²⁰ For purposes of automakers' liability to their consumers, the federal airbag law nullified the state tort regulation of airbags. No state *officials'* obligations were altered by this garden-variety preemption decision—other than that of state judges, who would have to apply federal law thenceforth. But this is unproblematic, since state judges are excepted from the anti-commandeering doctrine.

Despite the breadth of descriptions of preemption, including the non-obstruction obligation described in *Printz*, there are reasons to doubt that the preemptive effect of a federal law regulating the people should be construed to impose obligations on state non-judicial officials—legislators and executive officers. The Supremacy Clause, Article VI, Clause 2, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹²¹

It is not absurd to read the Supremacy Clause as authorizing Congress by statute to impose federal obligations directly on state legislatures and executives.¹²² But this reading was rejected by the Court in *New York* and *Printz*, and there is reason to think those decisions got it right. To begin with, the “oath of office” clause which immediately follows the Supremacy Clause, sets out some critically contrasting language:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.¹²³

In express terms, then, Article VI states that “the Judges in every state shall be bound” by “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof.” In contrast, “the Members of the several State Legislatures, and all executive and judicial

¹²⁰ *Geier*, 529 U.S. at 873–74.

¹²¹ U.S. CONST. art. VI, cl. 2.

¹²² See, e.g., Caminker, *supra* note 8, at 1022–30.

¹²³ U.S. CONST. art. VI, cl. 3.

Officers . . . of the several States” are bound “to support this Constitution.” State legislatures and executives are strikingly omitted from the Supremacy Clause; and federal statutes, expressly included in the Supremacy Clause, are strikingly omitted from the “oath of office” clause. A natural reading of this language is that state judges are bound by federal statutes (and treaties) in a way that state legislatures and executives are not.¹²⁴

The distinction was explained by the Court in *Printz*, though the majority did not discuss the “oath” clause. State judges are bound to apply federal law as a rule of decision in cases before it; this is not improper commandeering, since courts “applied the law of other sovereigns all the time.”¹²⁵ Thus, as Alexander Hamilton explained in *The Federalist*, state courts will necessarily have “a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited,” precisely because “[t]he judiciary power of every government” includes the power to apply the substantive law of any sovereign that may be applicable to a dispute before it.¹²⁶ Given the power of Congress to “regulate the people directly” on subjects that would often overlap with the presumptive legislative jurisdiction of the states, it was of course foreseeable that there would be cases in which both federal and state law would apply *prima facie*. The Supremacy Clause instructs judges that federal law will control in such cases. It is, in effect, a constitutionally mandated choice-of-law rule for state courts.¹²⁷

The drafting history of the Supremacy Clause lends support to the theory that the Clause is a choice of law rule and not a binding command on non-judicial officials of the states. The background of the Supremacy Clause has been well and frequently told by historians and legal scholars. The Constitutional Convention defeated James Madison’s proposal for a power of Congress or, alternatively, a national law revision commission, to “negative” or veto state laws. The Supremacy Clause was adopted explicitly as a substitute, one that would be less onerous on states than the federal legislative veto but that would still

¹²⁴ The general understanding of the Supremacy Clause is that its preference for federal over conflicting state law applies in federal court too. Federal judges were not expressly mentioned because, to the framers, it went without saying that a court must apply the law of its own sovereign and that federal judges would be naturally inclined to prefer federal law anyway. The President is not mentioned in the Supremacy Clause, but is bound by federal law under the Take Care Clause in Article II. If the framers had intended to bind state executive and legislative officials to federal statutes, the motivation to name them in the Supremacy Clause should have been even stronger than that of naming state judges because the idea of applying the law of other sovereigns would have been less familiar to them than to state judges.

¹²⁵ *Printz v. United States*, 521 U.S. 898, 907 (1997).

¹²⁶ THE FEDERALIST NO. 82, at 492 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

¹²⁷ This understanding is implicit in *Printz*. Several commentators have expressed a similar understanding. See Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 91 (2003) (“The Supremacy Clause establishes a rule of decision for courts”); Dinh, *supra* note 95, at 2088, 2103.

maintain the primacy of national laws over conflicting state laws.¹²⁸ The clause assumes that supremacy would be enforced by a judicial act in which state laws would be “set aside”¹²⁹ in court cases where conflicting federal law was applicable.

The framers deemed it less onerous on state autonomy to implement federal supremacy through the courts rather than Congress.¹³⁰ Judicial review under the Supremacy Clause is less intrusive on sovereign state lawmaking processes than a legislative negative. The congressional negative would have been part of the state lawmaking process, as the President’s veto is part of the federal legislative process: Interposed before the law’s formal enactment, its effect would have been to prevent a state bill from ever becoming a law. Judicial review, in contrast, takes place after a state law has been enacted, and—a point that is less well understood—it does *not* reduce the state law to the same status as if it had never been enacted.¹³¹

To see this, consider choice of law questions generally. Choosing one law as the controlling rule of decision in a case where a choice of law question arises entails “setting aside” the law not chosen. But the law set aside is not rendered a nullity for all purposes. Suppose Wisconsin has a comparative negligence regime and Illinois a contributory negligence regime, and suppose further that Wisconsin choice of law rules dictate that its courts will apply the Wisconsin comparative negligence rule to a car accident between Wisconsin drivers on an Illinois highway. Illinois law is “set aside” by that choice of law, but it is most certainly not “negativized”—the Illinois contributory negligence rule may continue to govern cases involving *Illinois* drivers in Wisconsin courts, or perhaps all out-of-state drivers on Illinois highways in cases before the Illinois courts.

What makes the Supremacy Clause different from an ordinary choice-of-law rule is that it must be applied by all courts in all cases throughout the United States. Where sovereigns are co-equal, the

¹²⁸ See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 171–77 (1996); Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1425–31 (2008); William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1030–39 (2001); James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 705–59 (1998).

¹²⁹ According to New York delegate Gouverneur Morris, who supported the Supremacy Clause over Madison’s legislative negative, “A law that ought to be negativized will be set aside in the Judiciary department . . .” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 28 (Max Farrand ed. 1986).

¹³⁰ Clark, *supra* note 127, at 109–11.

¹³¹ Thus, for example, it is widely assumed that were *Roe v. Wade* overruled, state abortion laws that had previously been invalidated by judicial review would become enforceable again. See GUTTMACHER INST., STATE POLICIES IN BRIEF: ABORTION POLICY IN THE ABSENCE OF *ROE* (2012), available at http://www.guttmacher.org/statecenter/spibs/spib_APAR.pdf.

choice-of-law rules are likely to be somewhat malleable or variable: States have some discretion to fashion choice-of-law rules to determine when another state's law will be favored over the state's own law. The Supremacy Clause imposes a strict choice-of-law rule that favors federal law whenever it applies.

What purposes might a law serve other than to regulate private parties in a litigated case? An obvious purpose is to establish powers and duties of non-judicial state officials. A state law legalizing marijuana for medical purposes may be preempted and "set aside" in a federal prosecution for marijuana possession under the CSA. But unless the CSA reduces the state legalization law to a complete nullity, as if the legalization law did not exist, then the state legalization law continues to define the duties of state police and prosecutors toward the state's citizens and the relationships of state governmental officials to one another outside the context of the preemption case.

If the text and history of the Supremacy Clause were not enough, its key structural and functional underpinnings also belie the idea that preemption can transform federal law into state law. For starters, no one seriously argues that the Supremacy Clause allows Congress to create state law on a blank slate, when preemption is not at issue; it thus makes no sense to attribute such a power to Congress simply because a state happens to have a law conflicting with a federal statute. Indeed, such an understanding would give Congress a power far greater than the legislative "negative" over state law that the Supremacy Clause withheld.

At the same time, the argument for construing preemption as a federal power to make state law is extremely thin. It appears to rest entirely on overbroad language from a small handful of Supreme Court cases holding that state courts must apply federal law. For example, the breadth of the oft-quoted assertion by the Supreme Court in *Testa v. Katt*, that preemptive federal law is "as much the policy of [the state] as if the act had emanated from its own legislature,"¹³² was belied by the precise issue in the case—whether state courts could decline to entertain a federal claim within its general jurisdiction.¹³³ But such cases tell us nothing more or less than that federal law operates on the citizens of the state and must be applied to them by state courts to the same extent as the laws of that state (and with the added feature that it supersedes in-state law in the event of a conflict). The cases do not hold that federal law is "in-state law" in the sense of binding on executive and legislative officials in their official capacities.¹³⁴

¹³² *Testa v. Katt*, 330 U.S. 386, 392 (1947) (quoting *Mondou v. New York*, 223 U.S. 1, 57 (1912)).

¹³³ *Id.* at 388.

¹³⁴ The same point applies to the overbroad language from the other cases. *Testa* quoted directly from *Mondou*, which held that state courts were obligated to hear cases under the

The Madisonian Compromise supports the idea that the language of the Supremacy Clause is directed to courts. The framers' intention to substitute a judicial override in place of a national legislative negative meant enforcing supremacy through post-enactment court decisions in litigated cases rather than direct pre-enactment intervention into state legislative processes. This suggests that the Supremacy Clause was not intended as a mechanism for the national government to restructure internal state constitutional relations—the reciprocal obligations among state officials and between them and their citizens. This in turn implies that the choice of federal law by a court as a rule of decision does not rewrite the state's law on matters outside the contours of the case. Garden-variety preemption should not be understood as imposing a duty on state executives to execute federal laws or on state legislatures to enact federal policies or adopt federal laws as their own.

In sum, the Supremacy Clause reflects the federal power to make federal law binding on the people in the states, and binding to some degree on state officials. But it is not a source of a federal power to make state law. To this extent, preemption doctrine is harmonious with the anti-commandeering doctrine of *New York* and *Printz*.

3. Obstacle Preemption as a Power to Commandeer

Despite an absence of commandeering authority under the Supremacy Clause, obstacle preemption applied in its broadest form might easily be turned into a de facto power to commandeer. Even if preemption is properly understood as a choice-of-law rule directed to courts, broad statements of obstacle preemption seem to impose a duty

Federal Employers' Liability Act. See *Mondou*, 223 U.S. at 57. The source of this strain of language seems to be *Clafin v. Houseman*, 93 U.S. 130 (1876), in which the Court said:

The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitute the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other

Id. at 136–37. Like *Testa* and *Mondou*, the issue in *Clafin* was the duty of a state court to apply federal law—specifically, to recognize a federal bankruptcy court's assignment of state law claims to a bankruptcy assignee. But it is clear from context, that “citizens” are private citizens on whom federal regulation operates directly, not state government officials, and that this principle is addressed to state courts, not executives and legislatures.

More recently, the Court in *Tafflin v. Levitt*, 493 U.S. 455 (1990) cited *Clafin* in support of its holding that state courts presumptively have concurrent jurisdiction with federal courts over civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims. *Id.* at 459. Justice Scalia, in a concurrence, quoted the broad *Clafin* language to drive home the presumption of concurrent state court jurisdiction over federal law claims. *Id.* at 469–70 (Scalia, J., concurring). Only in *Printz* have any justices relied on this *Clafin* language to argue in favor of a federal power to make state law—in the dissent, of course. See *Printz v. United States*, 521 U.S. 898, 944 (Stevens, J., dissenting).

on courts to remove any obstacles to the “accomplishment . . . of the full purposes and objectives of Congress.”¹³⁵ Courts’ remedial power to issue injunctive and even declaratory relief might in theory be used to impose duties on state officials that could look an awful lot like commandeering to further the federal policy. The arrest/seizure example illustrates: Allowing the marijuana possessor to go free and returning his marijuana frustrates the accomplishment of Congress’s “full purposes” under the CSA. Does obstacle preemption doctrine empower a court to order state police officers to make CSA-based arrests and seizures?

Short of the actual growing and selling of marijuana by state officials, or their physically impeding federal agents, there is no state marijuana legalization scenario in which a state official creates more of an obstacle to federal policy than the arrest/seizure case. Direct encounters between state police and marijuana possessors are likely to occur frequently. At least as frequently, state officials (including but not limited to police) are likely to have information that would amount to probable cause for arrests for violations of the CSA. Patrol officers will drive or walk past storefront medical marijuana dispensaries, other dispensaries will have applied for licenses, and medical marijuana users may place their names on state-compiled registries. State officials may or may not have a duty to supply this information to federal authorities;¹³⁶ withholding it in the event of a direct request by federal authorities may also obstruct CSA enforcement. The key point is that all of these, and the other examples, are no *more* obstructive to CSA enforcement than police officers declining to make arrests and seizures across the run of basic encounters. Yet the arrest/seizure case also represents the clearest case of commandeering. Therein lies the problem: Obstacle preemption doctrine itself, with its focus on the state’s obstruction of federal policy, cannot draw a principled line between anti-commandeering and CSA obstacle preemption that puts the arrest/seizure case on the protected anti-commandeering side while putting some or all of the other instances on the preempted, federal obligation side. We will consider in the following section whether anti-commandeering doctrine can supply this distinction.

Critics of preemption doctrine have focused, and rightly so, on the amorphousness of this policy aspect of obstacle preemption—specifically, that it tends to lure courts beyond the terms of the statute into freewheeling judicial policy selection. The underlying policy of a statute might not always be clear or unalloyed; it may not have been the

¹³⁵ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹³⁶ See Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 106–08 (2012) (noting that courts have sustained federal claims for disclosure of confidential information from states, but arguing that such federally compelled disclosure is unconstitutional commandeering).

intent of Congress to have its salient statutory policy “accomplished” to the “fullest” extent. The policy of any statute can be stated narrowly or broadly, without guiding principles to determine which. Moreover, it is often unclear whether the “policy” of the law included an intention to displace state law, the very question which obstacle preemption is employed to answer.¹³⁷

A further problem with policy-based obstacle preemption, one not directly addressed by prior commentators, is that it stretches the concept of judicial *application* of law—of what it means to say that a law “applies” to a case—to its outermost extremity. Generally speaking, a statute identifies parties who are required to act or refrain from acting in a certain way, or who are to receive some right or benefit, or a combination of the two. Statutes do not operate by announcing a broad policy and then authorizing courts to issue appropriate orders to ensure that “no person shall do anything that interferes with this policy.”

By the same token, we generally do not understand a law to “apply” to a given case when neither the parties nor the acts or omissions identified by the statute are present. A statutory rule identifies parties regulated and benefitted, and acts required or prohibited. At its extremity, obstacle preemption takes this rule, abstracts a policy from the rule, and recasts the policy into a new rule. The danger is that the court will apply the statute to cases where the parties, the acts, or both, as identified in the original statute, are missing. That is, the new rule will create new required or prohibited acts, identify new parties, or both. Moreover, obstacle preemption applied in this fashion could involve excessive judicial creativity in coming up with means to enforce the policy that were not identified in the legislation.

Whatever criticisms one might have of the *Geier* decision, it at least started with an alleged incompatibility between two regulations that applied to the parties and the conduct. The federal regulations and state tort liability rule were both aimed at car manufacturers and their decision to install airbags. But suppose American Honda were to challenge a state tax on automobile sales on the theory that it, too, is preempted by the airbag phase-in regulation: The tax makes it more difficult for the auto manufacturer to install airbags because the tax will either reduce sales or force the manufacturer to lower prices to offset the tax, and therefore “stands as an obstacle” to the airbag phase-in.

¹³⁷ See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 587 (2009) (Thomas, J., concurring in the judgment) (criticizing “the vague and ‘potentially boundless’ doctrine of ‘purposes and objectives’ pre-emption”); Nelson, *supra* note 113, at 283–87; Pursley, *supra* note 47, at 525 (arguing that obstacle preemption does not squarely fit within the Supremacy Clause). Nelson critiques the obstacle preemption doctrine and concludes that “[o]ur interpretive conventions simply do not support a general doctrine of obstacle preemption.” Nelson, *supra* note 113, at 287.

Or consider the following marijuana case: A high school gym teacher is fired for employing corporal punishment on some of his students, in violation of state law. The fired teacher is prepared to prove that he is the most vigorous and effective participant of the school district's anti-drug education initiative in the entire district. He argues that the corporal punishment law is preempted by the CSA, at least as applied to him, because his termination is likely to result in increased illegal drug use by students in his school, in conflict with the policy of the CSA to eliminate the use of illegal drugs.

Why are these two examples far-fetched? The reason is not the absence of a policy conflict, nor is it the breadth of the policy attributed to the federal law. Rather, it is the absence of the parties or the conduct specified in the statute. The regulation in *Geier* was construed as striking a compromise between car buyers' demands for safety and car manufacturers' cost concerns; both the conduct of installing airbags and the car buyer as a party were missing from the hypothetical tax case. In the gym teacher's case, both the conduct and the parties regulated by the CSA were absent: possession, distribution, or manufacture of illegal drugs or persons who do those acts. The conduct targeted by the CSA lurks in the background, to be sure, but far in the background.

And while these examples may seem far-fetched, they are not at all far removed from the way certain CSA preemption questions could arise and have arisen. Although the issuance of state medical marijuana identification cards does not involve acts prohibited by the CSA, at least one court has found such a state law preempted on the theory that it tends to promote such acts.¹³⁸ One could easily imagine a court ruling in a nuisance action against a neighbor for using state-authorized medical marijuana that the state law defense of legality is preempted.

Various arguments have been advanced for reigning in obstacle preemption or even eliminating it entirely.¹³⁹ A rebuttable presumption against preemption is supposed to apply where a preemption ruling would override a state law in a "traditional sphere[] of state regulation," but the Court has been notoriously erratic in applying it.¹⁴⁰ All of these disputes involve attempts to use substantive subject matter to strike the appropriate federalism balance—a notoriously elusive project. They also

¹³⁸ See, e.g., *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633 (Ct. App. 2011), *superseded by grant of review*, 268 P.3d 1063 (Cal. 2012).

¹³⁹ "[T]he Court's [obstacle] pre-emption jurisprudence facilitates freewheeling, extratextual, and broad evaluations of the 'purposes and objectives' embodied within federal law. This, in turn, leads to decisions giving improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress . . ." *Wyeth*, 555 U.S. at 604 (Thomas, J., concurring); see, e.g., Nelson, *supra* note 113, at 231 ("[C]onstitutional law has no place for the Court's fuzziest notions of 'obstacle' preemption . . .").

¹⁴⁰ See Ernest A. Young, "The Ordinary Diet Of The Law": *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 258, 307–10.

focus on federal-state conflicts over regulation of the people rather than federal regulation of the states and therefore cannot resolve the marijuana federalism problem addressed here.

Whatever one's position on preemption doctrine in general, it is undeniable that using obstacle preemption to impose affirmative duties on state officials would undermine the anti-commandeering doctrine. I will argue below that proponents of both judicial and political safeguards of federalism should be opposed to such an application of preemption.

III. THE LIMITS OF ANTI-COMMANDEERING SOLUTIONS TO STATE MARIJUANA LEGALIZATION

The hornbook understanding of current Tenth Amendment doctrine is that (1) the anti-commandeering rule precludes Congress from commanding state legislatures and executives “to implement . . . federal regulatory programs,” but that (2) Congress can subject the states to regulation by “generally applicable” laws.¹⁴¹ Unfortunately, these two ideas stand in considerable tension: Generally applicable laws can indeed require states to enforce—and perhaps even enact—a federal policy or program. After *Garcia*, for example, state payroll departments would have had to change some of their wage and hour practices; presumably, they would have promulgated regulations to implement the federally mandated rule, or the state legislature itself might have felt compelled to amend its wage and hour law to bring the state into compliance.

The Court stated the anti-commandeering doctrine in *New York v. United States* and *Printz v. United States* with great firmness, but firmness is not the same as coherence or clarity. Indeed, the anti-commandeering rule is the latest episode in a decades-long search by the Court to craft a workable doctrine to limit federal power to regulate states. As we will see, the Court's most recent case to apply the anti-commandeering doctrine, *Reno v. Condon*, shows that the Court has not yet found one.

¹⁴¹ See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 100–01 (2d ed. 2005).

A. *The Evolution of Anti-Commandeering Doctrine*

1. The Unsteady Path: *Wirtz*, *National League of Cities*, and *Garcia*

Over the last half-century, the Court has repeatedly groped toward some workable doctrine limiting the federal power to regulate states. In holding that the Tenth Amendment encompassed an “anti-commandeering” principle that protects state legislatures from direct federal commands, the *New York* decision marked a third revival of the Tenth Amendment as a substantive limit on the powers of Congress. Under *Lochner*-era doctrine, the Tenth Amendment was held to cordon off wide areas of intrastate economic activity from the reach of the federal commerce power. The most (in)famous expression of this idea, *Hammer v. Dagenhart*,¹⁴² struck down federal child labor regulation in part on such Tenth Amendment grounds. This understanding was overruled, apparently for good, in 1941 in *United States v. Darby*, which observed that the Tenth Amendment “states but a truism that all is retained which has not been surrendered.”¹⁴³

But *Darby* dealt with regulation of the people, not regulation of the states. Although the Supreme Court has adhered to *Darby*'s view that the Tenth Amendment reserves no subject matters for exclusive state control with respect to federal commerce regulation of private parties, it has gone back and forth over whether the Tenth Amendment stands as an independent source of limitations on the commerce power when it comes to regulating the states. In the 1968 case *Maryland v. Wirtz*,¹⁴⁴ the Court rejected a Tenth Amendment challenge to the federal FLSA, which had been recently amended to extend federal wage and hour protections to school, hospital, and similar “institutional” state employees. The Court reasoned that it did not “interfere[] with . . . state functions” to regulate states when they were “engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons.”¹⁴⁵ But just eight years later in *National League of Cities v. Usery*,¹⁴⁶ the Court overruled *Wirtz*. In a 5-4 decision written by then-Justice Rehnquist, the Court held that regulating the people of the states and regulating “the States as States” were constitutionally distinct: Under the Tenth Amendment, “Congress may not abrogate the States’ otherwise plenary authority” to make determinations about “functions essential to [the states’] separate and

¹⁴² 247 U.S. 251 (1918).

¹⁴³ 312 U.S. 100, 124 (1941).

¹⁴⁴ 392 U.S. 183, 193, 197 (1968).

¹⁴⁵ *Id.* at 197.

¹⁴⁶ 426 U.S. 833 (1976).

independent existence.”¹⁴⁷ The Court concluded that wage and hour regulation of state and local government employees under the FLSA fell within this category.¹⁴⁸

National League of Cities was doomed almost from the start to be an unstable precedent. Justice Blackmun, who rendered the deciding fifth vote, was “not untroubled” by the ruling and admittedly sympathetic to the dissenting opinion that had all but promised an interest in overruling the decision.¹⁴⁹ Moreover, Blackmun construed the majority’s principle not as a categorical rule but as a balancing test.¹⁵⁰ Not surprisingly, as soon as the Court was called upon to doctrinalize the majority’s ideas in *National League of Cities*, it began to limit and then erode them. In *Hodel v. Virginia Surface Mining & Reclamation Association*,¹⁵¹ a unanimous Court upheld federal environmental regulations of surface mining activities making clear that *National League of Cities* would not be expanded to revive the Tenth Amendment as a restriction of federal power to regulate private parties, even in regard to “traditional” state law matters such as land use. The Tenth Amendment would be implicated only if “the challenged statute regulates the ‘States as States’” by “address[ing] matters that are indisputably ‘attribute[s] of state sovereignty.’”¹⁵² Moreover, the Court followed Justice Blackmun by changing the *National League of Cities* principle into a balancing test: The Tenth Amendment would only bar a federal law if it were “apparent that the States’ compliance with the federal law would directly impair their ability ‘to structure integral operations in areas of traditional governmental functions.’”¹⁵³ After *Hodel*, a divided Court successively narrowed *National League of Cities* in cases that, unlike *Hodel*, did in fact regulate state governments.¹⁵⁴

¹⁴⁷ *Id.* at 842, 845–46 (internal quotation marks omitted).

¹⁴⁸ *Id.* at 855.

¹⁴⁹ *Id.* at 856 (Blackmun, J., concurring).

¹⁵⁰ *Id.* (“I may misinterpret the Court’s opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.”).

¹⁵¹ 452 U.S. 264 (1981).

¹⁵² *Id.* at 287–88 (second alteration in original) (quoting *Usury*, 426 U.S. at 845, 854 (majority opinion)).

¹⁵³ *Id.* at 288 (quoting *Usury*, 426 U.S. at 852).

¹⁵⁴ See *EEOC v. Wyoming*, 460 U.S. 226, 239 (1983) (application of federal Age Discrimination in Employment Act to state park game warden did not “directly impair[] the State[s] ability to structure [its] integral operations”); *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742 (1982) (upholding federal statute requiring states to “consider” enacting various energy regulation standards and giving federal regulatory agency an ongoing consultative role in state energy rulemaking); *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 686–87 (1982) (stating that operating a railroad was not a traditional governmental function that could provide state immunity from federal Railway Labor Act).

The Court came full circle a few years later, in 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁵⁵ A 5-4 majority expressly overruled *National League of Cities* by holding that the FLSA applied to state and local employees after all. Justice Blackmun, who switched sides to make the difference, framed the issue this way:

Although *National League of Cities* supplied some examples of “traditional governmental functions,” it did not offer a general explanation of how a “traditional” function is to be distinguished from a “nontraditional” one. Since then, federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause. . . .

Our examination of this “function” standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of “traditional governmental function” is not only unworkable but is also inconsistent with established principles of federalism¹⁵⁶

Significantly, the Court purported to embrace the “political safeguards of federalism” theory, as the natural alternative to a judicially-enforced federalism based on “unworkable” definitions and boundary-drawing. “[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.”¹⁵⁷

In hindsight, it seems foolish to have believed that *Garcia* could be the last word—not only because it represented a narrow 5-4 judgment on a Court that was destined to drift further to the right, but also because it failed to get at the kernel of truth in what underlay the *National League of Cities* decision. Throughout the entire line of decisions—including *Wirtz*, which had considered whether the federal law unduly interfered with state functions—the Justices struggled to find some workable distinction between federal laws regulating the people of the states and those regulating the states “as states.” To be sure, the verbal formulas “traditional” or “core” state functions and “regulating the states as states” were failures on a semantic level, but underneath those formulas arguably lay some attribute of state sovereignty or autonomy whose continued existence is important to federalism in practice. What that attribute is, and whether it requires judicial

¹⁵⁵ 469 U.S. 528 (1985).

¹⁵⁶ *Id.* at 530–31.

¹⁵⁷ *Id.* at 556.

protection, are central questions in an ongoing and seemingly unresolvable debate. That the Court keeps returning to this idea in various forms shows a continued judicial interest in playing a role in imposing some kind of limit on the power of the federal government to regulate states.

2. The Anti-Commandeering Doctrine: *New York*, *Printz*, and *Reno*

The Tenth Amendment was revived (again) as an independent limit on the commerce power after only a seven-year slumber in *New York v. United States*.¹⁵⁸ There, the state of New York challenged a federal statute designed to promote interstate coordination of disposal of low-level radioactive waste. The law encouraged states—through a series of deadlines and increasing monetary surcharges—to make provisions for disposal of such waste within their borders, either by creating in-state disposal sites or making compacts with other states having disposal sites. States that failed to make provisions for disposal would be required, as of January 1, 1996, to “take title” to the waste: that is, to transfer legal responsibility for the waste from the private waste-generating industries to themselves.¹⁵⁹ The Court found no constitutional objection to imposing federal surcharges on laggard states.¹⁶⁰ However, the “take title” provision compelled states to choose between adopting two alternatives, neither of which was a direct federal command to state legislatures: to dispose of the waste in a federally-approved site or assume liability for it. The latter, according to the Court, was “no different than a congressionally compelled subsidy from state governments to radioactive waste producers.”¹⁶¹ The choice presented by the law did not allow states to “decline to administer the federal program” and it was therefore unconstitutional.¹⁶² Although “[r]egulation of the . . . interstate market in waste disposal is . . . well

¹⁵⁸ 505 U.S. 144 (1992).

¹⁵⁹ *Id.* at 153. The provision in question stated, in relevant part:

[B]y January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession

42 U.S.C. § 2021e(d)(2)(C) (2012).

¹⁶⁰ Technically, the surcharges were imposed and collected by the states with waste disposal sites that accepted waste shipments from no-site states; a portion of these surcharges was then remitted to the Federal Treasury. See *New York*, 505 U.S. at 171. The Court deemed these a straightforward exercise of Congress’s power to authorize states to burden interstate commerce and for Congress to tax interstate commerce.

¹⁶¹ *Id.* at 175.

¹⁶² *Id.* at 177.

within Congress' authority under the Commerce Clause,"¹⁶³ the Tenth Amendment withholds from Congress the power "simply to direct the States to provide for the disposal of the radioactive waste generated within their borders."¹⁶⁴

In establishing the legislative anti-commandeering rule, the *New York* Court did not purport to reverse itself on the Tenth Amendment yet again. Noting that "[t]he Court's jurisprudence in this area has traveled an unsteady path,"¹⁶⁵ the Court took pains to distinguish *Garcia*. It, like "[m]ost of our recent cases interpreting the Tenth Amendment . . . concerned the authority of Congress to subject state governments to generally applicable laws."¹⁶⁶ In contrast, *New York* "concerns the circumstances under which Congress may use the States as implements of regulation."¹⁶⁷

The Court derived the "anti-commandeering" principle as a structural implication of the Constitutional Convention's rejection of the New Jersey plan and from its supersession of the Articles of Confederation, both of which had Congress directing its legislation to state legislatures for implementation within the states.¹⁶⁸ In adopting the Virginia plan, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."¹⁶⁹ As Madison had famously summed up, "[t]he practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands."¹⁷⁰

The Court further justified the anti-commandeering principle on the grounds that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."¹⁷¹ If federal law overrides a state policy choice,

it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.¹⁷²

¹⁶³ *Id.* at 160.

¹⁶⁴ *Id.* at 188.

¹⁶⁵ *Id.* at 160.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 161.

¹⁶⁸ *Id.* at 164–66.

¹⁶⁹ *Id.* at 166.

¹⁷⁰ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 129, at 9.

¹⁷¹ *New York*, 505 U.S. at 168.

¹⁷² *Id.* at 168–69.

The anti-commandeering principle was extended from legislatures to executive officials in *Printz v. United States*.¹⁷³ There, local law enforcement officials made a Tenth Amendment challenge to the Brady Act, a 1993 amendment to federal gun control laws that required local “chief law enforcement officer[s]” (CLEOs) to participate in background checks on gun purchasers.¹⁷⁴ The participation of local law enforcement was an interim measure, pending the implementation of a federal program.

Because the Court found “no constitutional text speaking to th[e] precise question” of Congress’s power to commandeer state officials, it sought an answer “in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”¹⁷⁵ The 5-4 majority determined that history weighed against the conclusion that Congress could command state officers to enact federal policies. Although the point was extensively debated, it seemed—at least to the majority—as though each historical example relied on by the dissenters and the supporters of the law involved either instances of states voluntarily agreeing to participate in enforcing a federal law or else reliance on state judicial officers. The former category would not be commandeering at all: It is not problematic from a Tenth Amendment perspective for state legislatures to consent to make their executive officials available to carry out a federal mandate. As for judicial officers, while there may have been a few historical examples in which state judges carried out certain federal functions with administrative implications, for the most part, *Printz* reaffirmed, state judges merely applied federal law as rules of decision pursuant to the Supremacy Clause. This was not a precedent for commandeering state executive officials: “It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time.”¹⁷⁶ The historical practice, the Court admitted, “tends to negate the existence of the congressional power asserted here, but is not conclusive.”¹⁷⁷ The Court found stronger support in “essential postulates” of the Constitution’s

¹⁷³ 521 U.S. 898, 935 (1997).

¹⁷⁴ *Id.* at 903 (internal quotation marks omitted). The law required the CLEO of the locality to receive a form from the firearms dealer in each proposed gun purchase and “make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.” *Id.* (internal quotation marks omitted) (quoting 18 U.S.C. § 922(s)(2) (2012)). While the Act did not require the CLEO to take any particular action beyond that, it authorized him to cancel a pending transaction that would be unlawful. *See id.* at 904.

¹⁷⁵ *Id.* at 905.

¹⁷⁶ *Id.* at 907.

¹⁷⁷ *Id.* at 918.

structure, buttressed by the *New York* decision, including the latter's "democratic accountability" argument.

Printz made a big splash. Striking down a federal statute on a hot-button issue like gun control was newsworthy, and the case attracted much academic commentary both before and after the decision. Many commentators and courts take *Printz's* categorical statement that Congress cannot force state officials to enforce federal law as the current state of the law.¹⁷⁸

Yet the most recent Supreme Court decision on federal commandeering was issued three years after *Printz*, in 2000. Standing in *Printz's* shadow, the unanimous decision in *Reno v. Condon*¹⁷⁹ raises serious questions about the scope and even the viability of *Printz's* anti-commandeering rule. In *Reno*, the Court rejected a challenge to a federal law regulating the disclosure of personal information collected by state motor vehicle departments. The Drivers' Privacy Protection Act (DPPA),¹⁸⁰ prohibits "[a] State department of motor vehicles, and any officer, employee, or contractor thereof," from releasing "personal information . . . about any individual obtained by the department in connection with a motor vehicle record," unless the disclosure is for any of several expressly permitted purposes under the Act.¹⁸¹ The purpose of the Act was in part to control data mining and in part to prevent stalking.¹⁸² The Act also restricts "[r]esale or redisclosure" of the information by "[a]n authorized recipient" including both state agencies and private parties.¹⁸³

The state of South Carolina and its attorney general challenged the law as unconstitutional under the Tenth Amendment principles of *New York* and *Printz*. The plaintiffs argued that compliance with the DPPA would consume significant time and attention of state employees who would have to learn and apply the Act's substantive restrictions, and conform their actions to them, rather than to the state's law, which was more permissive about the release of driver information.¹⁸⁴ Thus, the state argued, the DPPA unconstitutionally commandeered state officials because it "thrusts upon the States all of the day-to-day responsibility

¹⁷⁸ See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (citing *New York* and *Printz* as categorical and current statements of anti-commandeering doctrine).

¹⁷⁹ 528 U.S. 141 (2000).

¹⁸⁰ 18 U.S.C. § 2721 (2012).

¹⁸¹ 18 U.S.C. § 2721(a). The statute defines "personal information" as any "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information," but not including "information on vehicular accidents, driving violations, and driver's status." *Id.* § 2725(3).

¹⁸² Erwin Chemerinsky, *Right Result, Wrong Reasons: Reno v. Condon*, 25 OKLA. CITY U. L. REV. 823, 834 (2000).

¹⁸³ 18 U.S.C. § 2721(c).

¹⁸⁴ *Reno*, 528 U.S. at 149–50.

for administering its complex provisions,” making “state officials the unwilling implementors of federal policy.”¹⁸⁵

In an opinion by Chief Justice Rehnquist, the unanimous Court rejected these arguments and upheld the DPPA. While reaffirming the anti-commandeering principle of *New York* and *Printz*, the Court distinguished those cases:

[T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.¹⁸⁶

In *Printz* itself, by contrast, “the whole object of the law [was] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty.”¹⁸⁷

The *Reno* Court went on to address the lingering question of the extent, if any, to which *New York* and *Printz* might have overruled or eroded *Garcia*. While *Garcia* was generally understood, before *Printz*, as holding that Congress may regulate states by subjecting them to federal laws “of general applicability,” the *Printz* opinion had hinted that *Garcia* would be reduced to a narrowly-confined balancing test. According to *Printz*, a federal regulation of the states would be permissible only where “the incidental application to the States of a federal law of general applicability [did not] excessively interfere[] with the functioning of state governments.”¹⁸⁸ But the *Reno* Court seemed to restore *Garcia*’s principle to its former place, and then some. South Carolina argued that the DPPA was a law of the latter “excessively interfering” stripe, and not even a law “of general applicability.” The Court disagreed, finding the law “generally applicable” insofar as one of its subsections covered private, as well as public, “resale and rerelease” of driver information.¹⁸⁹ And the Court gave short shrift to any impact on state functions. Thus, general applicability would suffice to make the law constitutional, notwithstanding an impact on the state that may or may not have been merely “incidental.”

But the *Reno* Court seemed to tilt farther toward federal power than *Garcia* had. The Court stated that, because the DPPA was generally

¹⁸⁵ *Id.* (quoting Brief for Respondents at 10–11, *Reno v. Condon*, 528 U.S. 141 (2000) (No. 98-1464), 1999 WL 688428).

¹⁸⁶ *Id.* at 151.

¹⁸⁷ *Printz v. United States*, 521 U.S. 898, 900 (1997) (emphasis omitted).

¹⁸⁸ *Id.* at 932 (emphasis added). This was far from an extended discussion of *Garcia*; the *Printz* opinion seemed to prefer to belittle *Garcia* by largely ignoring it, alluding to *Garcia* just once, in a string cite, as a case having the above-quoted significance.

¹⁸⁹ *Reno*, 528 U.S. at 141.

applicable, “we need not address the question whether general applicability is a constitutional requirement for federal regulation of the States.”¹⁹⁰ *Reno* thus holds open the possibility that Congress can regulate states directly, without relying on a law that also regulates private parties.¹⁹¹

With the Court having no further occasion to apply the anti-commandeering doctrine since *Reno*, and with relatively sparse scholarly commentary on the case, the contours of the anti-commandeering doctrine after *Reno* are unclear. *Printz* gestured toward harmonizing its holding with *Garcia*, by hinting that the “general applicability” principle would need to be restricted by returning to something like the *Hodel* balancing test: Courts could strike down federal laws regulating the states that, notwithstanding their general applicability, “excessively interfered with the functioning of state governments.”¹⁹² But *Reno* impliedly rejected this approach by reaffirming the *Garcia* principle that Congress can regulate states pursuant to its Article I powers by including states within generally applicable laws.

Further, *Reno* and *Printz* sow some confusion about what is meant by generally applicable laws. The Brady Act was generally applicable in the sense that it regulated both private parties and government agents and, indeed, required both to participate in the background check process. It was, if anything, more “generally applicable” than the DPPA. Maybe generally applicable laws are those that regulate activities that have private marketplace analogues, or that entail entry into a marketplace in which private entities do or at least could participate—such as transportation, employment, construction, or, as in *Reno* itself, database ownership. Even under this view, we have to soften our focus on the case facts quite bit to see the DPPA as generally applicable while the Brady Act is not. State driver databases are acquired through government compulsion, as are the criminal databases supposed to have been checked under the Brady Act.

B. *The Anti-Commandeering Rule After Reno: Limits and Loopholes*

The anti-commandeering rule after *Reno* provides less guidance than one might hope for courts to apply the CSA to state marijuana legalization. We can start by asking whether *Reno*’s doctrinal formulas supply an answer. To be sure, a federal law requiring a state police officer to arrest a suspect under the CSA appears to be a “federal

¹⁹⁰ *Id.* at 151.

¹⁹¹ *Id.*

¹⁹² *Printz*, 521 U.S. at 932.

regulation of the state's regulation of private parties." If this is the current definition of what is forbidden by the anti-commandeering doctrine, or even the hard core of a broader concept that is fuzzy around the edges, perhaps the anti-commandeering doctrine does indeed resolve the arrest-seizure hypothetical and other aspects of the marijuana federalism crisis besides.

But the question becomes more complicated when posed in a more pragmatic form. Doctrines come and go, their contours, strength, and existence tested by hard cases. Cases are hard when case-specific considerations of justice or public policy go against the pre-existing doctrine. We need to ask whether the anti-commandeering doctrine is strong enough and clear enough to overcome a strong belief possibly held by key justices that constitutional law must somehow accommodate the imposition of a federal anti-drug policy on the states. Given the 5-4 margin in *Printz* and continuing scholarly criticism, the anti-commandeering doctrine is not exactly entrenched; the vote of just one of the five conservative justices could produce a decision qualifying or limiting the anti-commandeering doctrine, if not entirely scrapping it, in order to make room for *de facto* commandeering of state officials under the CSA.¹⁹³

¹⁹³ The ease with which justices can pick up and put down their federalism principles to suit other policy objectives is suggested, if not demonstrated, by comparing the positions of Justices Kennedy and Scalia in *Gonzales v. Raich*, 545 U.S. 1 (2005) and *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). Both Justices have consistently sided with their conservative colleagues on all of the commerce clause and anti-commandeering cases over the past two decades with the lone exception of *Raich*. Pitting the seemingly conservative penchant for federalism against the conservative penchant for social control, *Raich* tested federalism principles in a way that the other Rehnquist- and Roberts-Court commerce clause cases—where federalism and a conservative preference for deregulation were comfortably aligned—did not. Justices Kennedy and Scalia failed this federalism test. Justice Kennedy signed onto an opinion holding that consuming vegetables was quintessential economic activity that could be regulated by Congress—a position he would ridicule in *NFIB*. Compare *Raich*, 545 U.S. at 25–26 (“consumption of commodities,” including the plant cannabis, is “quintessentially economic” activity), with *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. at 2650 (Kennedy et al., J., dissenting) (using hypothetical broccoli-purchase mandate as *reductio ad absurdum*).

Justice Scalia, for his part, authored a concurring opinion in *Raich* arguing that “where Congress has the authority to enact a regulation of interstate commerce, it possesses every power needed to make that regulation effective.” *Raich*, 545 U.S. at 36 (Scalia, J., concurring) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118–19 (1942)). I see no convincingly principled distinction between that ground for upholding the CSA in *Raich* and his vote to strike down the individual mandate in *NFIB*. Assuming *arguendo* that a distinction between “activity” and “inactivity” is constitutionally meaningful rather than a foolish semantic quibble, there is still an undeniable interstate market in health care; and Justice Scalia (in the joint dissent) gleefully acknowledged that the individual mandate was necessary to the effective regulation of that market (when arguing that the individual mandate was not severable and hence that the entire law should be struck down). The reasoning of his *Raich* concurrence compelled upholding the commerce power to impose the individual mandate: Justice Scalia's point in *Raich* was not that there was something constitutionally momentous in confining regulations to “activities,” but that Congress could reach subjects of local regulation if need be to make an interstate market regulation effective.

So just how strong and clear is the anti-commandeering doctrine? Possible qualifications and loopholes can be found in *Printz* and *Reno*. To begin with, *Printz* characterized its holding as one invalidating a law whose “whole object” was “to direct the functioning of the state executive.”¹⁹⁴ Plainly, that is not the “whole object” of the CSA, most of which is aimed at direct federal regulation of drug users, manufacturers, and distributors. If “whole object” is the test of impermissible commandeering laws, then the CSA—indeed most federal laws—could escape that net. Control over state officials is rarely, if ever, a federal regulatory end in itself. The description is not particularly applicable even to the law at issue in *Printz*: If the Brady Act had any identifiable “whole object,” it was to require background checks of gun purchasers, not to regulate state police.

Reno’s definition of prohibited commandeering—laws that regulate the states’ regulation of private parties—is undoubtedly more robust than the “whole object” formula, yet even that seems less than ironclad on close scrutiny. On the one hand, it makes sense to distinguish *Reno* from *Printz* by saying that the Brady Act conscripted state officials in the regulation of private gun purchasers (by requiring the state CLEOs to participate in background checks), whereas the DPPA in *Reno* regulated the state’s primary conduct in selling drivers’ data. While the DPPA aimed at protecting the privacy rights of private drivers’ licensees, that is not the same thing as regulating them, if “regulation of private parties” in the *Reno* anti-commandeering formula means subjecting private behavior to restrictions—a reasonable definition—rather than providing private parties with protections or benefits.¹⁹⁵ On the other hand, such a view of *Reno* requires that we ignore the would-be *purchasers* of the drivers’ data, who certainly experience their behavior as significantly restricted by rules, since their efforts to purchase data will be limited or denied. Does it make sense to say that the would-be purchasers are “unregulated” or “merely incidentally regulated” by the law? Perhaps. But, at the same time, it would be far from absurd to say that they are regulated by the law. The DPPA’s regulation of the state is merely a means to regulate the sale of drivers’

The apparent willingness of these two justices to let policy and perhaps political judgments predominate over their federalism views offers a cautionary note to anyone who believes that the imperatives of federalism doctrine are necessarily powerful enough to overcome other factors that influence judicial decision-making.

¹⁹⁴ *Printz*, 521 U.S. at 932.

¹⁹⁵ See, e.g., David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 91 (1997) (distinguishing “regulated party” from “protected party” in statute); cf. RESTATEMENT OF CONTRACTS § 302 (1981) (distinguishing promisor from third party beneficiary). Note, however, that a state’s provision of Medicaid benefits was impliedly deemed a regulation of the benefits’ recipients by the Court in *National Federation of Independent Business v. Sebelius*. I am grateful to Andy Coan for this observation.

information to the private data-miners; indeed, the purpose of the DPPA was to crack down on lax state regulation of the sale of private data to *private parties*—by the state and by private data sellers. It is thus quite easy to characterize the DPPA as a regulation of the state’s regulation of private parties.¹⁹⁶ By focusing on the case’s facts rather than the Court’s effort to doctrinalize them, *Reno* can be read to permit some significant federal regulation of states that *Printz* seemed to have taken off the table. “Regulating the states’ regulation of private parties” is a pithy and seemingly clear definition of prohibited commandeering, but it blurs considerably when we try to apply it carefully to the facts of *Reno*.

We can next try to excavate an anti-commandeering rule from the facts of *Reno* by making further qualifications—perhaps by saying that laws like the DPPA are not commandeering if they *primarily* regulate state official behavior and at most *incidentally* regulate private conduct. We might thereby succeed in harmonizing *Reno* as a correctly decided anti-commandeering case, but only at the cost of widening the loophole in the previously clear and straightforward anti-commandeering doctrine.

Significantly for present purposes, however, such a loophole would make it easier to characterize the CSA—even the arrest/seizure hypothetical—as “not commandeering” under *Reno*. Requiring state police officers to make the arrest and seizure, and perhaps to transfer the suspect or the marijuana or both to federal custody, would constitute a regulatory adjustment ultimately designed to regulate would-be consumers of marijuana, just as *Reno* required state compliance with federal regulations controlling would-be consumers of drivers’ data. Put another way, while it is easy to distinguish the CSA from the DPPA, it is also possible to emphasize important similarities. Perhaps even the result deemed impermissible in *Printz*—requiring local law enforcement officers to conduct background checks on gun purchasers—could itself be upheld post-*Reno* if the law were patterned more closely on the DPPA.¹⁹⁷

¹⁹⁶ The DPPA’s regulation of private parties is analogous to a boycott or picket line. The behaviors of potential patrons of the boycotted business are the immediate behavioral target of the picketers. But it would be somewhat inane to characterize the boycott as anything other than an effort to regulate the behavior of the boycotted business. The characterization of the DPPA as a regulation of private data purchasers is even more apparent when one considers that the DPPA allowed disclosure of drivers’ data under certain conditions. Had the DPPA imposed an outright ban, there would have been a slightly stronger, albeit largely rhetorical, argument that we need not consider the regulatory impact on would-be purchasers. But in fact, the state was required to mandate certain compliance efforts on the part of private parties before releasing data to them. See 18 U.S.C. § 2721(b) (2012).

¹⁹⁷ For example, the federal gun control law could make it a crime for either a private gun seller or a chief law enforcement officer (the “CLEO” mentioned in the Brady Act) “to sell, or to permit or suffer to be sold, a gun to a purchaser who has not undergone a background check.”

Reno's treatment of the "general applicability" doctrine further complicates the anti-commandeering rule. A future Court might well decide that *Reno* will jettison the "general applicability" doctrine as the touchstone of permissible federal regulation of states, expanding permissible regulation to extend to anything that does not "regulate the states' regulation of private parties." But the *Reno* Court did not make this move; it assumed *arguendo* that general applicability was a bottom line constitutional requirement and found the DPPA to be generally applicable. That aspect of the ruling is itself noteworthy. In prior general applicability cases, the law in question regulated the state's relationships with its own employees or instrumentalities in a manner analogous to the federal regulation of private relationships—such as employing workers or running a transit company. In *Reno*, however, the DPPA was deemed generally applicable even though it governed the state's interactions with private parties.

The point here is not that the anti-commandeering doctrine is incoherent and theoretically incapable of answering the arrest/seizure problem or other marijuana federalism questions. Rather the question is whether the anti-commandeering doctrine is strong and clear enough to constrain justices from indulging in an anti-marijuana-legalization policy preference by fitting the CSA into easily conceived loopholes in the anti-commandeering doctrine. If there is a coherent core to an anti-commandeering doctrine, then the arrest/seizure hypothetical lies squarely within it. Put another way, if a federal command to state police to make arrests and seizures for CSA violations is not impermissible commandeering, nothing is. I take it as a given that a state's control over the arrest authority of its police is so fundamental that any anti-commandeering rule that allows the federal commandeering of state police to enforce federal criminal law is not worth the trouble. The Court showed a continued commitment to the anti-commandeering rule in *National Federation of Independent Business v. Sebelius*,¹⁹⁸ where seven justices relied on it as a premise for the conclusion that states cannot be coerced under the conditional spending power.¹⁹⁹ But *Reno* muddies the waters by suggesting the existence of significant qualifications or loopholes in the anti-commandeering rule.

While law enforcement officers do not typically sell guns to private purchasers, they could in theory. The crime of "permitting or suffering to be sold" could be defined as failing to intervene to prevent a sale by a person under one's control when one knew or should have known the sale was taking place. "Control" of a person could be defined to include both the authority to supervise or fire (in the case of an employer) and the authority to arrest (in the case of a CLEO) the person. Adler and Kreimer suggest that the Brady Act might have been constitutional if it "had applied to 'entities with easy access to information about criminal records,' rather than 'chief law enforcement officer[s],' thereby including credit bureaus and private investigators." See Adler & Kreimer, *supra* note 8, at 111 (alteration in original) (footnote omitted).

¹⁹⁸ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012).

¹⁹⁹ See *id.* at 2602.

After *Reno*, what does the anti-commandeering rule tell us about commandeering under the CSA? One might try to distinguish impermissible CSA commandeering from permissible federal regulation of state officials in various ways. Two such justifications involve reversion to prior Tenth Amendment doctrine. First, one might limit the anti-commandeering doctrine by subject matter to “core state functions” in general or to the especially core state functions of law enforcement officials in particular. The attempt to draw Tenth Amendment distinctions between core or “traditional” state functions and others has already once been abandoned as “unworkable” in *Garcia*. The *Reno* facts are illustrative. To be sure, the *Reno* opinion sees no objection to regulating states “as owners of databases,” something that private parties can also own. But consider how the states acquired these databases through their motor vehicle departments: Licensing and regulating non-commercial drivers is a core sovereign state function, something that is not done by private parties and typically done at the state rather than the federal level.²⁰⁰

Second, the court could return to the sort of balancing test created in *Hodel* to modify *National League of Cities*, combined with a heightened scrutiny framework borrowed from Fourteenth Amendment doctrine. This approach would balance the degree of intrusion into state institutions caused by commandeering against the federal interest and the degree of fit. The higher the degree of intrusion, the stricter the scrutiny. A mild or “incidental” degree of commandeering—as in *Reno*, for example—would be sustained if it were rationally related to a legitimate federal interest (in promoting privacy). A significant degree of commandeering—requiring state officials to make arrests for violations of a federal law incompatible with state law—would be sustained only if narrowly tailored to serve a compelling federal interest. And so forth. Such a balancing test has serious drawbacks—primarily, that of expanding the doctrinal grounds on which the Court makes itself the judge of the importance of federal policy and the appropriateness of legislative means.²⁰¹

²⁰⁰ See *Delaware v. Prouse*, 440 U.S. 648, 658 (“States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed.”); see also *Kansas v. Hershberger*, 5 P.3d 1004, 1010 (Kan. Ct. App. 2000) (states regulate licensing and registration to protect public interest). The federal government’s involvement in drivers’ licensing focuses on those who drive interstate commercial vehicles and federal government vehicles; see, e.g., 49 U.S.C. § 14501 (2012).

²⁰¹ A potential basis to distinguish *Reno* from *Printz* and reconstruct the anti-commandeering rule would be to allow commandeering in service of federal efforts to protect the rights of individuals *against* the state. Although the Court did not analyze the cases this way, there is a clear difference between the DPPA, upheld in *Reno*, and the Brady Act, struck down in *Printz*, one that is not fully captured in the idea of a constitutional prohibition on regulating states’ regulation of individuals or in the concept of subjecting states to “generally

C. *Anti-Commandeering and Preemption*

The anti-commandeering cases have drawn criticism for their failure to acknowledge the doctrine's tension with preemption.²⁰² Two scholarly works have attempted to reconcile the tension, but neither are entirely convincing.

Professors Adler and Kreimer have argued that “there is a good conceptual, interpretive, and normative case for construing the preemption/commandeering distinction as a distinction between inaction and action.”²⁰³ Drawing on an action/inaction distinction in moral philosophy and other areas of case law, the authors argue that constitutionally impermissible commandeering occurs when federal law requires affirmative activity on the part of state legislators or executives, whereas constitutionally permitted preemption is a requirement to

applicable” federal law. The DPPA was framed as a direct regulation—a partial ban backed by criminal sanctions—on a particular state function: the marketing of drivers’ private information. But its purpose and effect was to protect the privacy rights of individual citizens. The law could have easily been reframed as a civil enforcement scheme in Title 42 of the United States Code rather than a criminal enforcement scheme in Title 18 of the United States Code, providing a cause of action to aggrieved individuals for damages and injunctive relief. In that event, it would no more resemble commandeering of states than Title VII of the 1964 Civil Rights Act. The DPPA, rather than commandeering state executives, can be seen as a mode of protecting individual rights against state encroachment. In short, *Reno* and *Printz* can be harmonized by admitting a federal power to commandeer under circumstances analogous to abrogation of sovereign immunity under the Eleventh Amendment.

This is not to say that *Reno* should be read to create an exception to the anti-commandeering rule based strictly on Fourteenth Amendment abrogation. Commandeering to protect individual rights should arguably include regulation of states under Article I powers as well—how else to explain *Garcia*? Properly understood, the anti-commandeering doctrine itself may well be an exception to a broad rule of federal supremacy in which states have waived sovereign immunity against the federal government; if such a power is part of the constitutional plan, it need not rely on the Civil War amendments for its exercise. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (federal power to sue states derives from “essential postulate[s]” of the constitutional plan). To be sure, there is no parallel limitation on the legislative anti-commandeering doctrine. A generally applicable law, such as the Fair Labor Standards Act, might require a state paymaster to pay federal minimum wage to its employees, but it is not understood to require state legislatures to enact a state minimum wage law. Legislative sovereignty is “a discretion not subject to command,” *Printz v. United States*, 521 U.S. 898, 975 (Souter, J., dissenting), whereas executive power is largely, if not entirely, subject to legislative command that limits discretion. Indeed, the *Printz* dissenters attempted on this basis to distinguish away *New York* and argue that there was no anti-commandeering principle at all as to executive officials. Even if the majority was right in rejecting this argument, the dissent was correct in seeing a difference. Harmonizing the *New York-Printz-Reno* line might require recognizing a spectrum of “commandeeringability,” with state courts being bound to apply federal law, state executives less so, and state legislatures least of all.

²⁰² See, e.g., Adler & Kreimer, *supra* note 8, at 83 (*New York* and *Printz* “barely recognize” the need to draw a boundary line between anti-commandeering and preemption).

²⁰³ *Id.* at 95. In fairness to the authors, it must be noted that their ultimate conclusion is critical of the doctrine for its failure to promote the federalism values that purportedly justify it. See *id.* Here, I take issue specifically, and only, with their conclusion that the preemption/anti-commandeering distinction “is a good conceptual, interpretive” case. *Id.*

refrain from activity. According to the authors, the touchstone of “activity” is physical movement. Thus, legislators are commandeered when required by federal law to move their mouths or pens to vote yea or nay on legislation, and executives are commandeered when they are required to make physical movements—whether applying handcuffs or typing on a computer to check a criminal record—to comply with federal law.²⁰⁴

Adler and Kreimer may well be right in characterizing what the *New York* and *Printz* Courts thought they were doing in carving out an anti-commandeering rule. They may also be right in their implicit suggestion that there is no better means to distinguish commandeering from preemption. But it is less clear that they have come up with a sustainable distinction between commandeering and preemption. To put it simply, the Adler-Kreimer definition of commandeering runs into serious difficulties with the arrest/seizure test. An encounter that raises the arrest/seizure question inevitably arises within a dynamic and continuous sequence of physical movements. (Even seeing marijuana on the passenger seat involves a physical movement of the eyes.) By the time the preemption/commandeering question arises, the officer must make physical movements to take either course. Arrest and seizure obviously involve movements, but so does letting the person go: If the marijuana possessor has not been seized, he has nonetheless been stopped and cannot proceed until the officer by word or gesture indicates that he is free to go. And if the officer does make an arrest, the federalism problem is still not resolved: A decision must still be made whether, again, to release the individual under state law or do something (file a charge, turn him over to federal authorities) under federal law.

Thus, the Adler-Kreimer anti-commandeering rule does not reliably tell us whether or not a state police officer must arrest a person in possession of marijuana.²⁰⁵ Undoubtedly, many judges are comfortable resting constitutional questions on an activity/inactivity distinction, despite the ease with which the same conduct can be

²⁰⁴ *Id.* at 92–95. Adler and Kreimer are careful to distinguish the *Garcia* rule permitting federal laws to command state officials’ activity where the laws are “generally applicable.” Only laws targeted to officials are subject to their activity/inactivity distinction.

²⁰⁵ Further illustrating the problems with the activity/inactivity distinction in this context is Adler and Kreimer’s somewhat mystifying observation that “[a] requirement that state legislators enact a particular statute seems, somehow, to be more of an interference with state autonomy than a requirement that they refrain from enacting a particular statute.” *Id.* at 94. A federal command to a state legislature to refrain from enacting a statute seems a particularly egregious interference with state autonomy and starkly illustrates how the activity/inactivity distinction can fail to protect state autonomy. It is on this basis that Professor Mikos differs with the Adler-Kreimer argument, since he contends that states have an absolute right to repeal their criminal prohibitions, which itself requires a legislative act. See Mikos, *supra* note 8, at 1448.

characterized as either.²⁰⁶ Perhaps, too, a majority of judges would call arresting a suspect “activity,” and would further deem releasing a suspect onto the street to be “inactivity” while releasing a suspect into federal custody would be “activity.” But such a line is not sufficiently clear to constrain judges who wish to find the CSA obligatory on state officials in the arrest hypothetical, and is less clear when applied to other marijuana federalism scenarios.

Professor Mikos has attempted, along lines somewhat analogous to Adler and Kreimer, to reconcile commandeering and preemption in the specific context of marijuana legalization.²⁰⁷ Starting from the premise that “[t]he preemption power is constrained by the Supreme Court’s anti-commandeering rule,”²⁰⁸ Mikos argues that we should identify the anti-commandeering/preemption boundary by reference to the “state of nature,” by which he means the status quo in the absence of any state regulation.²⁰⁹ “Congress may drive states into—or prevent states from departing from—this state of nature (preemption), but Congress may not drive them out of—or prevent them from returning to—the state of nature (commandeering).”²¹⁰ In substance, Mikos advocates a rule under which Congress cannot compel states to adopt a regulatory posture or prevent them from adopting a deregulatory one. Preemption is constitutional (avoids the anti-commandeering problem) only when it imposes a deregulatory regime. In other words, Mikos substitutes a regulatory/deregulatory distinction for an activity/inactivity distinction.

This argument has a compelling logical and intuitive appeal, and on the surface, it seems that Mikos’s proposal would answer the arrest/seizure scenario: A state police officer cannot be compelled to seize marijuana, since leaving it with the individual comports with the deregulatory “state of nature.” Presumably, the same goes for arrest, though Mikos does not say so specifically. But Mikos’s argument unravels when he acknowledges (and accepts) the general applicability exception to an anti-commandeering rule.²¹¹ The problem is that generally applicable laws, too, pose a commandeering threat. Mikos attempts to define away this problem by asserting the black letter doctrine that generally applicable laws are not commandeering. But, as

²⁰⁶ See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587–89 (defining the failure to obtain health insurance as “inactivity” even though it could readily have been deemed “activity” by characterizing it as “free riding” or “market timing”).

²⁰⁷ Mikos, *supra* note 8, at 1445–52.

²⁰⁸ *Id.* at 1446.

²⁰⁹ *Id.* at 1448.

²¹⁰ *Id.* I do not understand Mikos to be arguing that Congress cannot impose stricter regulation on *private parties* than states do. His argument applies only to congressional efforts to regulate states.

²¹¹ *Id.* at 1450 (“Congress may require states to depart from the state of nature and to take positive action if it imposes a similar duty on private citizens—i.e., as long as that duty is generally applicable.”).

we have seen, the CSA is generally applicable, at least as much as the DPPA was in *Reno*. Mikos himself acknowledges this when he recognizes that state officials could in theory be charged with aiding and abetting violations of the CSA.²¹² Thus, Mikos's theory likewise fails the arrest/seizure test once we take general applicability into account. Declining to arrest and seize the marijuana possessor should be within the state's power under the "state of nature" principle, yet that power might be taken away from the state by making the failure to arrest and seize into the federal crime of aiding and abetting. Indeed, many if not all of Mikos's conclusions about state activities that are not preempted require overlooking his own definitional constraint that his "state of nature" solution addresses only laws targeting states and omits generally applicable laws.

Difficulties within the anti-commandeering doctrine, and incompatibilities between the anti-commandeering rule and the related doctrines of preemption and general applicability, remain unsolved. As Adler and Kreimer put it, these doctrines together "lack[] a fabric of constitutional law sufficiently coherent and well-justified to last."²¹³ Moreover:

If they are to be consistent with precedent, the doctrinal boundaries that define this area must map onto the outcomes of prior cases. If they are to be workable, the boundaries must be intelligible and coherent. And if they are to be at all intellectually persuasive, the boundaries cannot be simple result-oriented gerrymanders. Unfortunately, the anticommandeering doctrines seem headed for trouble in all three dimensions.²¹⁴

Given these weaknesses, it is far from clear that a majority of the Supreme Court will redefine anti-commandeering doctrine at the expense of preemption in order to save state marijuana legalization laws.²¹⁵ But these questions need not be answered in order to resolve the marijuana legalization federalism crisis. Adopting a clear statement rule might be all that is required in this instance.

IV. AN ANTI-COMMANDEERING CLEAR STATEMENT RULE AS A RESOLUTION OF THE MARIJUANA LEGALIZATION FEDERALISM CRISIS

In this section, I argue that whenever a decision to impose federal supremacy would likely commandeer state legislatures or executives, the Court must apply a clear statement rule to the federal law. The potential

²¹² *Id.* at 1456–60.

²¹³ Adler & Kreimer, *supra* note 8, at 71.

²¹⁴ *Id.* at 73.

²¹⁵ *See supra* Part III.B.

commandeering that would trigger this presumption should be understood to refer to federal regulation of the states' regulation of private parties, irrespective of whether the law in question is "generally applicable."

The clear statement approach leaves open the question of the extent of federal authority to commandeer state officials; but it rests on principles that can be agreed upon by proponents of judicial and of political safeguards of federalism alike. The anti-commandeering clear statement rule can impose considerable clarity on the current muddle over marijuana legalization without undermining the states' institutional integrity. My proposal thus allows courts to resolve the federalism crisis without having to be hamstrung by more abstract theoretical disagreements over federalism.

A. *An Anti-Commandeering Clear Statement Rule*

Where Congress has undisputed authority to regulate states, whether by means of "generally applicable laws" or under its power to enforce the Civil War amendments against the states, the Court has at times sought to protect state institutional integrity by applying a "clear statement" rule. If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must "mak[e] its intention unmistakably clear in the language of the statute."²¹⁶ The Court has applied this principle in various contexts to determine whether Congress has abrogated a state's Eleventh Amendment immunity and whether Congress has imposed a condition on the grant of federal money under the Spending Power.²¹⁷

The Court applied this rule in a Tenth Amendment context in *Gregory v. Ashcroft*.²¹⁸ There, two state judges sought a declaratory judgment that a state constitutional provision requiring state judges to retire at age seventy violated the Age Discrimination in Employment Act (ADEA).²¹⁹ There was no suggestion of an intention to overrule *Garcia* and make what would have been the third U-turn in fifteen years on whether Congress could subject states to federal employment laws under the commerce clause. Instead, the five-justice majority opinion ruled that the intent of Congress to include state judges within ADEA coverage was somewhat ambiguous: While the ADEA expressly applied

²¹⁶ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); *accord Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

²¹⁷ *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Pennhurst*, 451 U.S. at 16.

²¹⁸ 501 U.S. 452, 460 (1991).

²¹⁹ See *Gregory v. Ashcroft*, No. 88-0221C(3), 1989 U.S. Dist. LEXIS 16872 (E.D. Mo. July 14, 1989), *aff'd*, 898 F.2d 598 (8th Cir. 1990), *aff'd*, 501 U.S. 452 (1991). The Supreme Court opinion neglected to mention the specific relief the plaintiffs were seeking.

to state employers, it excluded from coverage “an appointee on the policymaking level.”²²⁰ The Court acknowledged that such language would be “an odd way for Congress to exclude judges.”²²¹ But the key point was that “in this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*.”²²²

The *Gregory* Court was thus willing to stretch a point of statutory interpretation to protect the federalism values at stake. More than any cases in the *Wirtz-National League of Cities-Garcia* line, *Gregory* involved an integral state function—the qualifications of its own governing officials. “Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.”²²³ Indeed, the Court hinted that there might even be a hard constitutional rule barring federal regulation of state officials’ qualifications under its commerce power, but the Court was able to defer that question by relying on the clear statement rule.²²⁴

The clear statement rule of *Gregory* helps resolve the federalism problems raised by application of preemption or supremacy doctrines to impose obligations on state officials. The power of the people of a state, through their constitutions and legislatures, to enact laws, to create officials to execute those laws, and to define the obligations and duties of those officials to each other and to the people of the state, is precisely how the people of a state structure their government—how the state “defines itself as sovereign” in the words of *Gregory*.²²⁵ A state judge’s qualifications—which *Gregory* hinted may be immune from commerce regulation—are simply a specific instance of the broader set of powers structuring the state government. Under *Gregory*, a clear statement rule should be applied to any federal statute whose preemptive effect would result in commandeering—either by altering state legislative decisions about the obligations of state officials or by commanding state legislatures or executives to enact or enforce federal policies. In other words, whatever power Congress may ultimately have to regulate states and even commandeer state officials, an exercise of that power should not be inferred by courts from silent statutes.

It is important to understand the anti-commandeering clear statement rule as a requirement that an intent to commandeer must be

²²⁰ *Gregory*, 501 U.S. at 465 (quoting 29 U.S.C. § 630(f) (2012)) (internal quotation marks omitted).

²²¹ *Id.* at 467.

²²² *Id.*

²²³ *Id.* at 460.

²²⁴ *Id.* at 464 (“As against Congress’ powers ‘[t]o regulate Commerce’ . . . the authority of the people of the States to determine the qualifications of their government officials may be inviolate.” (first alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 3)).

²²⁵ *Id.* at 460.

“unmistakably clear *in the language of the statute.*”²²⁶ This aspect of the clear statement rule thus differs from the presumption against preemption, which permits courts to infer preemptive congressional intent from other interpretive sources, such as legislative history or statutory purpose.²²⁷ For reasons I will discuss in the next section, it is important to use this stricter version of the clear statement rule before interpreting statutes to commandeer.

Given the arguments I have made so far about the difficulties with the anti-commandeering doctrine, is it paradoxical to rely on the concept of commandeering to trigger a statutory clear statement rule? I think not. What is problematic about the anti-commandeering doctrine is not so much the definition of commandeering itself as it is the tensions between anti-commandeering doctrine and the doctrines of preemption and general applicability. It makes sense to define commandeering, for purposes of the clear statement rule, as a federal command to state executive or legislative officials to implement a federal policy or program—as the *New York* and *Printz* Courts defined it—or as federal regulation of the states’ regulation of private parties, as *Reno* defined it. It is not necessary to craft a sharp distinction between impermissible commandeering and permissible preemption because applying the clear statement rule by itself accommodates the blurriness of the distinction between those two concepts. The rule guides courts to interpret the statute as not intending to commandeer.

As for the general applicability doctrine, that should have no bearing on application of the anti-commandeering clear statement rule. Before *Reno*, laws that were considered validly binding on states

²²⁶ *Id.* at 464 (emphasis added) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (internal quotation marks omitted)).

²²⁷ See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (presumption against preemption often deemed rebuttable by “statutory language, legislative history, and overall purpose”); Young, *supra* note 140, at 271 (“[T]he distinction between presumptions and clear statement rules is helpful in pinning down the sources to which a court may look when it evaluates Congress’s preemptive intent.”). Professor Young observes that courts and commentators have frequently “lump[ed] . . . together” clear statement rules and statutory interpretation presumptions, such as the presumption against preemption. *Id.* But, while the two categories may overlap somewhat, the distinction is worth clearly maintaining, at least in some contexts:

An interpretive presumption like the *Rice* canon generally “serves as a kind of burden allocator or tie-breaker . . . but allows the court to look to all relevant information and, if appropriate, to find an answer implicit in the statute despite the absence of express language.” On the other hand, “[c]lear-statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them”; “such rules foreclose inquiry into extrinsic guides to interpretation and even compel courts to select less plausible candidates from within the range of permissible constructions.”

Id. (alterations in original) (footnote omitted).

through general applicability regulated the states' internal operations rather than their regulation of private parties. *Garcia*, for example, upheld the application of the FLSA to the wage rates of state employees, and did not require states to change their laws regulating wages in the private sector. Confusion over the impact of general applicability to the question of state obligations under the CSA arises from the facts of *Reno*, which seemed to extend that concept to a law that arguably did regulate state regulation of private parties—*Reno*'s protestations to the contrary notwithstanding. That confusion is eliminated simply by applying the anti-commandeering clear statement rule to construe even a generally applicable statute as not regulating the state's regulation of private citizens. Note that the anti-commandeering clear statement rule is otherwise consistent with *Reno*, since the statute in question expressly regulated the states: The DPPA satisfied the clear statement rule, making the use of statutory interpretation presumptions inapplicable.

B. *A Consensus Case for the Anti-Commandeering Clear Statement Rule*

Federalism arguments are so difficult to resolve because federalism questions typically mask highly contested policy questions that the Constitution does not answer. Federalism itself represents a compromise between the virtues of rendering policy at the national and state governmental levels. The Constitution encodes both state autonomy and national supremacy values without telling us how to harmonize them.

The federalism crisis created by state marijuana legalization can be played out along three lines of argument. First, proponents and opponents of marijuana legalization will argue about drug policy, health, morals, social control, or crime.

A second argument might be conducted between proponents of nationalism and of state sovereignty. This latter dispute is also a policy dispute, but one occurring at a higher level of generality than the first. It might be more accurate to characterize the first argument as one over short term policy and the second as one over long term policy: whether nationally-centered policymaking produces better results over the long run than state-centered policymaking. A principled nationalist today is likely to believe that government intervention in the economy and the dismantling of slavery and racial oppression are the most important long-term elements of United States policy and are best promoted by national policies. A principled state sovereigntist today is likely to believe that resisting government intervention in the economy is the key to a prosperous and successful American society and that limits on national authority promote such deregulation. Advocates of both

positions are willing to construct theories of federalism that they think tend to sustain such overarching views of long-term societal welfare even at the expense of their short term policy preferences.

A third argument pits advocates of judicial safeguards and of political safeguards of federalism against one another. This too is a long-term policy argument. It maps roughly, but imperfectly onto the nationalist/state sovereigntist argument. Since its focus is on the role of judicial review, the disputants may have other intellectual commitments beyond the federal-state balance.

Acknowledging all this, it can be useful to reframe the debate by separating out the persuadables from the unpersuadables. My argument has nothing to say either to staunch opponents of marijuana legalization or staunch nationalists. The former would presumably use whatever doctrinal tools are at their disposal to impose the CSA on the states, subordinating views they might otherwise hold on more abstract federalism questions to the short-term policy preference. The latter would be expected to subordinate their qualms, if any, about federal marijuana policy to the larger project of promoting national regulatory supremacy. Instead, I address the persuadables: those who believe in some sort of balance between federal and state regulatory authority and all those participants in the judicial-versus-political safeguards debate except adherents of the most extreme version of “political safeguards” theory who would treat federalism questions as non-justiciable.²²⁸ I think it is not overly optimistic to say that the majority of constitutional law scholars and judges are in the persuadable category.²²⁹

The anti-commandeering clear statement rule should have appeal to most persuadables because it derives from a combination of consensus principles and acceptable compromises. Those who lean toward state autonomy should have little trouble accepting a “soft-rule” version of the anti-commandeering doctrine: It advances the same federalism values as the hard or categorical anti-commandeering rule and doesn’t require that the latter be abandoned, only postponed in its deployment to the marijuana legalization setting. Those who lean toward nationalism might be persuaded to see the anti-commandeering clear statement rule as a preferable alternative to deployment of the anti-commandeering rule now, leaving the door open to recognition of additional federal powers to regulate the states.

²²⁸ See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 175 (1980) (“[T]he constitutional issue of whether federal action is beyond the authority of the central government and thus violates ‘states’ rights’ should be treated as nonjusticiable . . .”). Those whose dominant concerns favor either marijuana legalization or state autonomy may find my argument congenial or useful, but not necessarily persuasive, since I advocate a moderate version of their pre-existing preference.

²²⁹ See Young, *supra* note 8, at 40.

Most constitutional scholars who have written about federalism in the past twenty years have acknowledged at least some extent of agreement about the now well-developed catalogue of “values of federalism.”²³⁰ It might be said that these command something of a consensus. In his monumental synthesis of disparate federalism doctrines and diverging views, Professor Young argued that these consensus values

are predicated on active state governments with important responsibilities. . . . [W]hether states adopt rigorous regulatory policies or laissez faire ones, the important point is that the policy questions they confront must be meaningful ones, and that their regulatory jurisdiction must cover a broad range of issues important to their citizens.²³¹

The maintenance of states’ regulatory autonomy, Young argues, was a crucial element in Madison’s federalist design, in which states would primarily protect themselves through the political process by “compet[ing] for the People’s loyalty.”²³² This they could only do by enacting and enforcing policies at the state level that their citizens approved of on issues they cared about. Among other things, Young argues that doctrines that address malfunctions in the political process safeguarding federalism should be employed by courts as checks on excessive expansion of federal at the expense of state regulatory autonomy. These doctrines include clear statement rules, the presumption against preemption, and the anti-commandeering doctrine.

One might take issue with Young’s endorsement of the anti-commandeering doctrine as a logical derivative of the consensus federalism values. Professor Siegel and others have argued that anti-commandeering doctrine in fact undermines these federalism values by prompting the federal government to resort to regulatory alternatives, particularly preemption and conditional spending, that (they argue) may be more intrusive on state autonomy than commandeering.²³³

²³⁰ See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 75–106 (1995); Jenna Bednar & William N. Eskridge, *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1467–68 (1995); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 386–405 (1997); Jackson, *supra* note 8, at 2213–28; Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1503–04 (1988); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); Young, *supra* note 8, at 51–65.

²³¹ Young, *supra* note 8, at 63.

²³² *Id.* at 81.

²³³ Siegel, *supra* note 8, at 1646–58; see also Adler & Kreimer, *supra* note 8, at 95. Siegel offers a persuasive critique of the *New York* decision: “Yet over the long run, it is difficult to see how ‘the states’ were made better off by the decision in *New York*, which likely rendered them less able to make credible commitments to one another in the face of collective action problems” Siegel, *supra* note 8, at 1664.

There are of course counters to these arguments. Conditional spending, which basically buys states compliance, arguably can't be worse for state autonomy than commandeering, which takes it without compensation.²³⁴ And there will not always be a logical preemption alternative to commandeering if preemption must be accomplished at least by regulating private parties along with or instead of state officials. Even if there is a preemption alternative, it will not always be politically viable.²³⁵

Still, to convince proponents of the political safeguards of federalism to overcome their resistance to a categorical anti-commandeering rule may take some work. Young and others have explained the rule as serving state autonomy interests by forcing Congress to internalize the costs—political and fiscal—of federal legislation.²³⁶ The *New York* and *Printz* Courts both made much of the “democratic accountability” problem created by commandeering, which could be used by Congress to make an unpopular policy look like it emanated from the state.²³⁷ This problem can be overblown, of course. Externalizing political costs—making the state the bad guy through commandeering—might be an issue in the case of an obscure, complex regulatory scheme like that involved in *New York*; but it would hardly have been an issue in *Printz*, where it would have been a simple matter for local police chiefs to inform the public that they were reluctantly enforcing a federal law that they strongly opposed, where the law had been well publicized, and where it would be easy for the public to understand the point. A much stronger rationale for anti-commandeering is its tendency to prevent Congress from externalizing the *financial* costs of the law:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes.²³⁸

Given the culture of resistance to taxes and government spending, forcing Congress to internalize the fiscal costs of federal regulation is a significant check, and allowing it to externalize costs is a significant incentive to commandeer.

²³⁴ See Hills, *supra* note 8, at 901–04.

²³⁵ Cf. Mikos, *supra* note 8, at 1481–82 (arguing that the ability of Congress to enact laws that would effectively commandeer state official compliance with CSA may be politically infeasible).

²³⁶ See, e.g., Hills, *supra* note 8, at 901–04; Siegel, *supra* note 8, at 1644–45; Young, *supra* note 8, at 35.

²³⁷ *Printz v. United States*, 521 U.S. 898, 919–20 (1997); *New York v. United States*, 505 U.S. 144, 168–69 (1992).

²³⁸ *Printz*, 521 U.S. at 930.

The marijuana legalization issue provides a salient example. The accountability issue is minimal: Any reasonably well-informed person in a marijuana legalization state knows that it is federal law that imposes the strict prohibition. But the shifting of fiscal costs onto the states through commandeering is potentially enormous. As of 2008, there were approximately 120,000 federal law enforcement agents in the United States, compared to 765,000 at the state level.²³⁹ Professor Mikos reports that “[o]nly 1 percent of the roughly 800,000 marijuana cases generated every year are handled by federal authorities.”²⁴⁰ Thus, commandeering state officials to enforce the CSA could create a massive shift in law enforcement costs onto the states. The idea that the courts might have the power to accomplish this large-scale commandeering through an aggressive CSA-preemption ruling should alarm anyone who believes in political safeguards of federalism. Such a judicial application of preemption doctrine would bypass the significant political obstacles that would likely prevent Congress from taking such a step directly.

Of course, Young’s argument still doesn’t provide a convincing reason why an adherent of the political safeguards of federalism should prefer that the anti-commandeering doctrine be a “hard” and categorical constitutional rule rather than a “softer” clear statement rule. Externalizing regulatory costs may be a bad thing, but if Congress has put such cost externalization clearly on the political agenda, and passed the various legislative “veto gates,” the political safeguard proponent might still be satisfied.

Nevertheless, political safeguards proponents should insist on a clear statement rule against commandeering. As Young argues, clear statement rules have numerous advantages that should appeal to political safeguard proponents.²⁴¹ By throwing the federalism issue back to Congress, they require Congress to engage in dialogue about the proper federal/state policymaking balance. By requiring clarity and explicitness when state autonomy will be curtailed by a federal law, the clear statement requirement forces Congress to give notice to potential opponents of a bill who might not otherwise have coalesced. Thus, they promote the working of the political safeguards and deter political

²³⁹ BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES 2008 1 (2011), available at <http://www.bjs.gov/content/pub/pdf/cslea08.pdf> (“State and local law enforcement agencies employed about 1,133,000 persons on a full-time basis in 2008, including 765,000 sworn personnel.”); BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FEDERAL LAW ENFORCEMENT OFFICERS, 2008 1 (2012), available at <http://www.bjs.gov/content/pub/pdf/fleo08.pdf> (“In September 2008, federal agencies employed approximately 120,000 full-time law enforcement officers who were authorized to make arrests and carry firearms in the United States.”).

²⁴⁰ Mikos, *supra* note 8, at 1424.

²⁴¹ Young, *supra* note 8, at 101, 126.

process failure. Although clear statement rules avoid direct confrontations between the courts and the political branches over the limits of their power, they may be of greater practical significance in protecting state autonomy than splashier, but less frequently applied categorical constitutional rules. The difficulties in enacting legislation and the increased drafting costs in following the clear statement rule may mean that Congress will not ultimately amend the law to make the clear statement.²⁴² As the Court stated in *Gregory*:

[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."²⁴³

The problem addressed by the clear statement rule is not a pedantic or formalistic insistence on clarity, but rather a concern to ensure that the political safeguards have in fact functioned. As the Court has repeatedly observed, applying the clear statement rule to legislation affecting the federalism balance "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."²⁴⁴

All of these advantages of clear statement rules are present in the anti-commandeering clear statement rule. Both sides of the federalism debate should agree on a rigorous clear statement rule. For proponents of judicially enforced federalism, the reason is obvious: Commandeering restructures state governments contrary to the constitution and statutes of the state. But proponents of the political safeguards theory should also prefer the clear statement rule because judicially inferred commandeering-by-preemption represents a serious political process failure.

There is yet a further reason. Given a statute's silence on any intent to commandeer state officials, there is no way for the Court to "defer" to a congressional choice when Congress has not made a choice. Here, the commandeering of state officials would represent a significant *judicial* choice of legislative means. For a court to infer commandeering from a silent statute—based on its purpose or even legislative history—would represent a dramatic judicial intervention in the choice of legislative means. Put another way, the political process failure of commandeering

²⁴² *Id.*

²⁴³ *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (second alteration in original) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 480 (2d ed. 1988)).

²⁴⁴ *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971) (internal quotation marks omitted)); *Gregory*, 501 U. S. at 461.

through silence or ambiguity does not materialize *unless and until a court infers commandeering*.

The CSA illustrates these issues plainly. Commandeering hundreds of thousands of police officers and thousands of state prosecutors to enforce federal law is a major step that Congress may or may not have considered. Its absence from the CSA means that the question did not undergo the rigors of the political process. Given the political checks and vetoes that would face an effort today to amend the CSA to commandeer state officials, a decision by politically-insulated courts to read commandeering into the statute would actively promote a major failure of the political safeguards of federalism.

Too often in discussions of federalism, courts flit in and out of view, sprite-like. But when discussing federalism “doctrine,”—in this Article, the difficulties in reconciling preemption and anti-commandeering doctrine in particular—we are talking about judge-made law, not legal authority external to courts. Here legislation creates a federalism problem, and is thus a continuing focal point, but my argument focuses on a doctrinal, rather than legislative solution. And what we call “doctrine” is at bottom an exercise of judicial power. The anti-commandeering doctrine is a judicial check on federal legislative power; preemption has elements of both an assertion of federal legislative and judicial power. The clarity with which Congress states an intention to preempt state law varies along a spectrum, both in terms of the linguistic clarity of the statute itself and the degree to which specific applications have or have not been contemplated in the statute. The less clear the preemptive intent, the more a court gains latitude to impose its own idea of policy. Congress simply did not take a position in the CSA on whether state officials had to enforce the federal law irrespective of contrary state policies. Imposing a clear statement rule against commandeering thus does not check the power of Congress—because that power wasn’t exercised—so much as it checks the power of the *courts*. There can be, but need not be, a hard constitutional anti-commandeering rule standing behind the clear statement rule; were Congress to expressly commandeer state officials, the presumption would be overcome and only then would the exercise of judicial review power be truly at issue. In the meantime, the anti-commandeering clear statement rule limits the power of courts, by preventing them under the cloak of statutory interpretation, from undertaking a potentially major initiative in federal drug policy.

C. *Application to Marijuana Legalization*

The rule I have advocated—a clear statement rule prohibiting the application of “obstacle” or “policy” preemption to commandeer state

officials—would resolve a great many of the existing uncertainties surrounding state officials’ obligations to conform to the CSA in states with marijuana legalization laws. The criminal provisions of the CSA nowhere refer to states or state officials, but instead regulate the conduct of “any person.”²⁴⁵

The CSA has an express preemption clause, which 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 between that provision of this subchapter and that State law so that the two cannot consistently stand together.²⁴⁶

This clause cannot be read as an express directive to states to criminalize marijuana, or to act in cooperation with federal authorities to enforce the CSA itself. All it tells us is that state law is preempted in a case of positive conflict. This means that a state legalization law cannot be a defense to a federal marijuana prosecution, as the CSA is currently written. That is the only positive conflict, and the net result of this preemption is far from trivial: It means that marijuana is illegal in all states, regardless of state law. A state law by which state officials actively hindered federal agents’ enforcement activities would create a positive conflict, as well as an obstacle to the CSA, and would no doubt be subject to a federal injunction. Beyond that, the proper resolution is to allow state officials to follow the mandates of their state legalization laws.

1. Police and Prosecutors

Police and prosecutors offer the least problematic case for resolution because a federal requirement that these officials execute the CSA or enforce its broad policy objectives would present the clearest case of commandeering. Implicit in the anti-commandeering doctrine and the structure of the federal system is that state officers derive their authority from state constitutions and statutes. State and local police have a general authority to make arrests for violations of federal law. As discussed above, federal law gives these officers permission to do so, but

²⁴⁵ 21 U.S.C. § 841(a)(1) (2012).

²⁴⁶ *Id.* § 903. This clause is not a model of clarity. Its wording suggests an intention to preempt the field in the event of a positive conflict, which does not make sense under the Court’s preemption taxonomy. Positively conflicting state laws are always preempted. The point of “field” preemption is to preempt state laws that do not positively conflict with federal statutory provisions or purposes.

full authorization also requires authorization from the state.²⁴⁷ States generally interpret their arrest authorization statutes to extend to federal laws, but the anti-commandeering principle implies that states can withdraw that authorization. Ultimately, the arrest powers of state officers are determined by state law. The analysis for search and seizure powers is necessarily the same. The anti-commandeering clear statement rule requires courts to construe the CSA so as to leave state police subject to the commands of their own states' laws.

The anti-commandeering clear statement rule likewise precludes an interpretation of the CSA that requires state prosecutors to charge and prosecute violators of the CSA. While in theory states could authorize their prosecutors to prosecute federal crimes, the federal permission extended to state police has been denied to state prosecutors: By statute, federal prosecutors (and courts) have exclusive jurisdiction over the prosecution of federal crimes.²⁴⁸ Only if the CSA acted as a “negative” on state law might an argument arise that marijuana legalization or decriminalization laws were “removed from the books,” and the state of the law would default to a regime in which marijuana possession or distribution was a state law crime. But that is not the correct interpretation of the nature of preemption.

2. State Administrative Officials

The notion, implicit in the dicta from *Printz*, that federal law is binding on state officials who are not identified in the law, is a troubling one for state institutional integrity. On the one hand, it places a potentially enormous burden on state administrators to scour federal law for possible obligations, and then to make difficult and highly debatable legal interpretations about whether and how federal law might apply. On the other hand, it creates a potentially massive opportunity for mischief: Any state bureaucrat can become a “conscientious objector” and refuse to carry out state policies based on a theory of a policy conflict with some federal law or other. The potential for disruption within state administration, and for disobedience of state administrators to state legislatures, should give pause to anyone concerned with federalism. Placing a front-line obligation on state officials to interpret and apply federal laws that don't expressly apply to states—that is, in advance of an authoritative judicial ruling—creates a significant risk of erroneous federal preemption decisions by non-judicial officials. At least some of these decisions could lead to

²⁴⁷ See *supra* text accompanying notes 53–54.

²⁴⁸ See *supra* notes 68, 80 and accompanying text.

unconstitutional “self-commandeering” as state officials enforce federal laws in a good faith but mistaken belief that they are required to do so.

An overbroad view of federal preemption can multiply the opportunities of state and local governmental units to obstruct state legal processes. It should be a cause for concern to see county governments suing their states for declaratory relief based on federal preemption claims. Today the cause of action is based on the CSA. In the future, such claims might be based on broad, amorphous preemptive federal regimes such as the Employment Retirement Income Security Act or the National Bank Act, whose complexity on preemption questions have baffled federal courts for years. Fortunately, some decisions have applied state law standing rules to limit the ability of government officials to challenge their own state’s law on federal preemption grounds.²⁴⁹

Applying the anti-commandeering clear statement rule, the CSA would not apply to state officials at all. Cases like *Pack v. Superior Court*, holding that state licensing procedures are preempted, are incorrectly decided.²⁵⁰ While issuing a medical marijuana identification card to a qualified patient, or issuing a business license to a medical marijuana dispensary, is inconsistent with a zero-tolerance policy toward marijuana that would be fairly attributable to the CSA, such measures stop short of either requiring or otherwise directly causing a violation of the CSA. Nor do they purport to immunize anyone from federal prosecutions.

3. Courts

State courts are obligated to apply federal law in a non-discriminatory fashion as rules of decision, and to choose federal law as the rule of decision over a conflicting state law. If Congress passed an amendment to 18 U.S.C. § 3231 and authorized state courts to hear federal prosecutions under the CSA, then presumably under *Testa v. Katt*, state courts would have to entertain such cases. In such a (hypothetical) federal marijuana prosecution in state court, state law defenses—such as medical marijuana legalization—would be preempted, just as they would be in federal court. However, even in this hypothetical regime, state marijuana legalization laws would continue to govern prosecutions under state law.

Short of that unlikely situation, however, state courts should have little occasion to apply the CSA as a rule of decision. Applying the anti-

²⁴⁹ See, e.g., *Cty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461 (Ct. App. 2008).

²⁵⁰ *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 648 (Ct. App. 2011), *superseded by grant of review*, 268 P.3d 1063 (Cal. 2012).

commandeering clear statement rule, the CSA would not apply to state officials at all. The question becomes whether the CSA is binding on state courts in the more tangential ways it arises in cases otherwise properly before a state court. As discussed above, there are a few patterns this might take. A CSA violation might be offered as an element to a state law cause of action, such as nuisance or ejection. It might arise in a probation or parole revocation proceeding. Or it might be asserted as the basis of some legal disability under state law.

If federal law does not by its own force create a private right of action in nuisance or some other tort, it is hard to see how it can do so when imported into state law. The CSA contains no express provision creating a private right of action. The Supreme Court has been exceedingly reluctant to infer private rights of action from federal criminal statutes.²⁵¹ The few courts to consider whether the CSA creates a private right of action have held (correctly) that it does not.²⁵² To be sure, state law torts may have a federal law element—such as negligence per se for the violation of a federal safety statute, or a nuisance action against a drug dealer living next door. But the effect that a violation of federal law is to be given when embedded in a state law claim seems manifestly a question of state law. For Congress to dictate that its laws must be applied in a particular way as elements of state tort or property law claims would amount to commandeering of state legislatures under *New York*. The anti-commandeering clear statement rule would mean that courts should not impose such an outcome.

The anti-discrimination principle of *Testa v. Katt* has no application to this point. State courts must apply federal law in a non-discriminatory fashion, insofar as they must hear any federal claim, which meets the state court's jurisdictional grant under analogous kinds of state law cases. But this does not mean that a state legislature cannot discriminate among federal policies when deciding how or whether federal policies will ramify in state substantive law. State courts are entitled, and indeed required, to apply state law in determining the state law implications of a federal element.²⁵³ This might be the rule even

²⁵¹ *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 190 (1994).

²⁵² *Peckens v. Rite Aid of W. Va.*, No. 5:11CV70, 2011 U.S. Dist. LEXIS 78578, at *11 (N.D. W. Va. July 19, 2011); *McCallister v. Purdue Pharma*, 164 F. Supp. 2d 783, 793 (S.D. W. Va. 2001); *see also Bonds v. Tandy*, 457 F.3d 409, 415–16 (5th Cir. 2006) (holding there was no private right of action for a pharmacist to challenge denial of pharmacy license under CSA). Generally speaking, the test for a private right of action requires that the statute be designed to protect some “especial” beneficiary class. *See Cort v. Ash*, 422 U.S. 66, 78 (1975). The CSA does not seem to meet this test. *See Gonzales v. Raich*, 545 U.S. 1, 12 n.20 (2005) (CSA intended to promote “the health and general welfare of the American people” (quoting 18 U.S.C. § 801(1) (2012) (internal quotation marks omitted))).

²⁵³ *See, e.g., Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1057–60 (Cal. 1998) (effect to be given a federal safety statute as an element of state common law claim was determined by reference to state law). An instructive analogy might be found in the line of cases analyzing whether federal

without an anti-commandeering clear statement rule, but is certainly the rule with it.

The same principle should apply to the case of state bar prosecutors and state medical licensing authorities. Although these officials might be operating under a general mandate to require members of their supervised professions to adhere to federal criminal laws, that mandate necessarily stems from state, not federal law.²⁵⁴ They would be required to obey a state law providing that, for example, bar discipline could not be imposed against an attorney acting in compliance with state law.²⁵⁵ Even if state law did not expressly address this, a court applying the state's own principles of preemption and statutory interpretation would be correct in holding that the state policy in favor of marijuana legalization would trump a general professional standard impliedly incorporating federal laws including the CSA.²⁵⁶

4. Criminal Consequences

The anti-commandeering clear statement rule should be applied to immunize all state officials, and voters, from criminal liability under the CSA. The CSA only regulates "persons." The Supreme Court has identified an "often-expressed understanding" in interpreting statutes that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it,"²⁵⁷ particularly "where it is claimed that Congress has subjected the States to liability to which they had not been subject before."²⁵⁸ In *Will v. Michigan Department of State Police*, the Court held that sovereign immunity principles dictated applying this presumption against interpreting the word "person" in 42 U.S.C. § 1983 to include states or their officers acting in an official capacity.²⁵⁹ The

jurisdiction is supported by a federal issue "embedded" in a state law claim. The Supreme Court has held that a violation of a federal statute as an element of a state cause of action does not state a claim under federal law, where Congress has not created a "private, federal cause of action for the violation." See *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 817 (1986).

²⁵⁴ See, e.g., *In re Attorney Discipline Sys.*, 967 P.2d 49, 54 (Cal. 1998) (bar discipline falls with state judicial authority).

²⁵⁵ Cf. *Gonzales v. Oregon*, 546 U.S. 243, 270–71 (2006) (structure of federalism counsels against interpreting CSA as imposing federal policy on state medical licensing authorities).

²⁵⁶ What about federal authority over the professions? Federal courts presumably retain inherent power to discipline legal practitioners and to deny practice privileges. To the extent that these are based on state law disciplinary requirements, however, arguably even federal courts should not refuse admittance to attorneys who have counseled clients on activities that conform to state law, but violate federal law.

²⁵⁷ *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (alterations in original) (quoting *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979)) (internal quotation marks omitted).

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 71.

same principle should apply for the CSA to state officials acting in good faith compliance with state laws and to legislators *and voters* enacting them.

CONCLUSION

I have argued that existing federalism doctrines fail to resolve the marijuana legalization federalism crisis. A strong preemption outcome would result in abandoning the anti-commandeering doctrine entirely, and would compel state officials to disregard their state legalization laws and enforce the CSA. The main alternative, the anti-commandeering doctrine, cannot adequately resolve the crisis because of its internal weaknesses and its tensions with the “general applicability” rule and preemption doctrine. Other than these alternatives, we are faced with a case-by-case muddle in which the courts mark time until the political process resolves the issues—perhaps after many years of confusion and even some jail time for undeserving state officials.

Because the CSA does not purport to regulate states or state officials, the problem might well be permanently resolved by the Supreme Court’s adoption of an anti-commandeering clear statement rule. Such a position would impose the functional equivalent of the *New York/Printz* anti-commandeering rule and allow state officials to enforce their own states’ laws short of forcibly interfering with federal agents. This resolution would continue unless and until Congress amended the CSA to regulate states and their officials expressly. Before such an amendment could be enacted into law, the political safeguards of federalism would come strongly into play.

What if Congress enacted such an amendment to the CSA to commandeer states? I have shown that the anti-commandeering rule of *New York* and *Printz* has internal inconsistencies that might make it difficult to sustain against a properly drafted statute that tracks the law upheld in *Reno*. Perhaps a modified version of a judicially enforceable anti-commandeering rule would be employed by the Court to meet that eventuality. But that eventuality may never come.