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## A General Theory of Preemption: With Comments on State Decriminalization of Marijuana

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# A GENERAL THEORY OF PREEMPTION: WITH COMMENTS ON STATE DECRIMINALIZATION OF MARIJUANA

LEA BRILMAYER\*

**Abstract:** Marijuana decriminalization is a hotly debated topic, which has nonetheless seen popular support in recent years. Current federal law (the Controlled Substances Act) conflicts with many state decriminalization efforts, raising the obvious question of federal preemption. The Supreme Court has failed to provide a clear answer on how much federal law preempts state marijuana decriminalization laws. This Article identifies the foundational principles of vertical and horizontal preemption, as well as various unanswered questions regarding these doctrines. It then applies these questions to marijuana decriminalization. Ultimately, it argues that there is a weak case for vertical or horizontal preemption in the marijuana decriminalization context.

## INTRODUCTION

Controversy about marijuana laws has moved from political circles into the courts. Nowadays many Americans treat marijuana as casually as their parents treated a martini. But not all; as with same sex marriage, the relaxed acceptance of certain members of our population has only made their socially conservative counterparts more determined to resist.

When a small number of vanguard states jettisoned their criminal prohibitions, the rallying cry of the challengers was “preemption.”<sup>1</sup> To the uniniti-

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<sup>1</sup> According to Robert A. Mikos, courts have assumed that Congress intended to preempt all conflicts with the Controlled Substances Act (“CSA”), such that courts have interpreted state laws to be preempted by the CSA if they make compliance with federal law impossible or if they undermine the fulfillment of Congress’ objectives. See Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 10 (2013) (citing cases that employed broad conflicts preemption analysis).

The case authority includes: *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 523–28 (Or. 2010) (concluding that to the extent the Oregon Medical Marijuana Act affirmatively authorized, rather than merely decriminalizing, the use of medical marijuana, it was preempted by the CSA); *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 651–54 (Ct. App. 2011) (holding that an ordinance establishing a permit scheme for medical marijuana collectives stood as an obstacle to the accomplishment of the CSA and therefore was preempted by the CSA, as the

ated, the argument sounded pretty convincing. Marijuana was still illegal under federal law; how could states make it legal? The Supremacy Clause makes federal law supreme and says that state officials are bound by it.<sup>2</sup> End of story.

But it's becoming increasingly clear that this is not necessarily the direction things are headed.<sup>3</sup> And now the Supreme Court must explain why. In the meantime, we can only speculate about the eventual outcome and what the high Court's rationale will be.

Revisiting the basic principles of horizontal and vertical federalism that the Court is likely to consider provides the perfect vehicle for developing a general theory of preemption. There are plenty of unanswered questions about the subject that would benefit from another look. For example, what are the important similarities and differences between the vertical (federal/state) and horizontal (state/state) versions of preemption? Although the concepts of vertical and horizontal *federalism* are about equally well accepted, the corresponding two doctrines of *preemption* have differed widely in their usage. Why is that? And the debate over decriminalization of marijuana provides first-rate opportunities for examining the concrete applications of that general theory. What should all this theory mean for the practical questions about how much state law the federal marijuana laws displace?

Part I of this Article provides background on the marijuana decriminalization movement and federal preemption issues associated with the Con-

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ordinance not only decriminalized but also *authorized* the operation of these collectives), *appeal docketed sub nom.*, 268 P.3d 1063 (Cal. 2012), *appeal dismissed as moot*, 283 P.3d 1159 (Cal. 2012).

Pointing in the opposite direction are: *Ter Beek v. City of Wyoming*, 823 N.W.2d 864, 867–73 (Mich. Ct. App. 2012) (holding that Michigan's medical marijuana law did not directly conflict with the CSA because the state medical marijuana law permitted but did not mandate use of marijuana, thereby making it possible to comply with both statutes simultaneously); *Qualified Patients Ass'n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 102–10 (Ct. App. 2010) (holding that the decriminalization provisions of the state's medical marijuana laws were not preempted by the CSA); *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 475–83 (Ct. App. 2008), *cert. denied*, 129 S. Ct. 2380 (2008) (holding that the provisions of the Medical Marijuana Program requiring California counties to provide identification cards to people exempt from certain marijuana laws did not positively conflict with the CSA, as the CSA is silent on the ability of states to provide identification cards to their citizens, and the CSA does not compel states to impose criminal penalties for marijuana possession).

<sup>2</sup> The Supremacy Clause states, "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, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, § 2.

<sup>3</sup> See *infra* notes 10–20 and accompanying text (describing the trend toward states' decriminalization of marijuana).

trolled Substance Act (“CSA”).<sup>4</sup> Part II discusses the vertical preemption doctrine and several unanswered questions in the doctrine as applied to a hypothetical marijuana decriminalization scenario.<sup>5</sup> Part III discusses the horizontal preemption doctrine in comparison to the vertical preemption doctrine and applies it to the marijuana decriminalization scenario in order to reframe the debate.<sup>6</sup>

## I. SOME BACKGROUND

Marijuana became a political, social, and medical concern in the general population starting roughly in the 1960’s.<sup>7</sup> As recreational use of marijuana increased, Congress responded by passing the CSA.<sup>8</sup> Marijuana was classified as a Schedule I substance, a drug with a high potential for abuse and dependency and no recognized medical use or purpose.<sup>9</sup>

Despite the wholesale federal ban on the possession, cultivation, and use of marijuana, state decriminalization has seen a steady rise.<sup>10</sup> California became the first state to legalize medical marijuana in 1996,<sup>11</sup> and in 2012 Colorado became the first state to legalize its recreational use.<sup>12</sup> In the aftermath of the November 2016 elections, twenty-eight states and the District of Columbia had resolved to permit marijuana usage for medical reasons,<sup>13</sup> and

<sup>4</sup> See *infra* notes 7–36 and accompanying text.

<sup>5</sup> See *infra* notes 37–75 and accompanying text.

<sup>6</sup> See *infra* notes 76–91 and accompanying text.

<sup>7</sup> Marijuana was, of course, available and used in the United States prior to the 1960s. It was in the 1960s, however, that its use spread to the largely white middle class. *Busted: America’s War on Marijuana: Marijuana Timeline*, PBS FRONTLINE (Apr. 1998), <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> [<https://perma.cc/5GKH-UJTB>] (claiming that in the 1960s, “A changing political and cultural climate was reflected in more lenient attitudes towards marijuana. Use of the drug became widespread in the white upper middle class.”).

<sup>8</sup> Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 812 (2012)).

<sup>9</sup> 21 U.S.C. § 812.

<sup>10</sup> The rise began in the early 1970s. See ANGELA DILLS ET AL., CATO INSTITUTE, DOSE OF REALITY: THE EFFECT OF STATE MARIJUANA LEGALIZATIONS 3 (2016) (discussing the wave of decriminalization in eleven states between 1973 and 1978); see also Nate Silver, *Gallup Poll Is First to Find Plurality Support for Marijuana Legalization*, N.Y. TIMES (Oct. 18, 2011), [http://five.thirtyeight.blogs.nytimes.com/2011/10/18/gallup-poll-is-first-to-find-plurality-support-for-marijuana-legalization/?\\_r=0](http://five.thirtyeight.blogs.nytimes.com/2011/10/18/gallup-poll-is-first-to-find-plurality-support-for-marijuana-legalization/?_r=0) [<https://perma.cc/C4VW-NA2P>] (describing the rising public support for marijuana legalization).

<sup>11</sup> CAL. HEALTH & SAFETY CODE § 11362.5 (1996).

<sup>12</sup> See COLO. CONST., art. XVIII, § 16 (concerning personal use and regulation of marijuana); COLO. REV. STAT. § 18-18-406 (2012) (concerning offenses relating to marijuana and marijuana concentrate); *id.* §§ 12-43.3-301 (2012) (concerning licensing requirements for marijuana establishments).

<sup>13</sup> Rita Rubin, *Many States Have Legalized Medical Marijuana, So Why Does DEA Still Say It Has No Therapeutic Use?*, FORBES (Nov. 16, 2016), <https://www.forbes.com/sites/ritarubin/2016/11/>

eight states allowed it for purely recreational use.<sup>14</sup> As a result, more than half of all Americans can now access medical marijuana,<sup>15</sup> and roughly twenty percent of the U.S. population lives in a state where recreational marijuana is legal.<sup>16</sup>

These legal developments reflected a general change in attitudes. A decade ago, polls indicated that only 32% of those surveyed favored legalization; 60% were opposed.<sup>17</sup> As of September 2016, however, 57% of U.S. adults supported marijuana legalization, but only 37% said that it should remain illegal.<sup>18</sup> According to a 2012 poll, over half of American adults (59%) felt that the question of legalization should be left to state governments.<sup>19</sup>

It is significant that the decriminalization movement has achieved results mainly by working through state, not federal, political processes.<sup>20</sup> The politi-

16/many-states-have-legalized-medical-marijuana-so-why-does-dea-still-say-it-has-no-therapeutic-use/#7bfcf80a7ec2.

<sup>14</sup> Rob Hotakainen, *Will Alabama's Sessions Support States When the Issue Is Marijuana?*, MCCLATCHY DC (Nov. 18, 2016), <http://www.mcclatchydc.com/article115643838.html> [<https://perma.cc/566E-TLM8>].

<sup>15</sup> James Higdon, *Jeff Sessions' Coming War on Legal Marijuana*, POLITICO (Dec. 5, 2016), <http://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501> [<https://perma.cc/LEF8-3UQQ>].

<sup>16</sup> Tom Huddleston, Jr., *These 6 States Voted to Legalize Marijuana*, FORTUNE (Nov. 9, 2016), <http://fortune.com/2016/11/08/election-marijuana-legalization-states/> [<https://perma.cc/EJR5-XAFD>].

<sup>17</sup> Abigail Geiger, *Support for Marijuana Legalization Continues to Rise*, PEW RES. CTR. (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/> [<https://perma.cc/WCX9-RCEB>].

<sup>18</sup> *Id.* The Pew Research Center survey, conducted from August 23 to September 2, 2016, shows that young adults have largely driven the increase in support for marijuana legalization and shows that partisan and ideological divides persist on the issue. *Id.*

<sup>19</sup> See Fred Backus & Stephanie Condon, *Poll: Nearly Half Support Legalization of Marijuana*, CBS NEWS (Dec. 28, 2012), <http://www.cbsnews.com/news/poll-nearly-half-support-legalization-of-marijuana/> [<https://perma.cc/R2PZ-XDCM>]; see also Micah Cohen, *Marijuana Legalization and States Rights*, FIVETHIRTYEIGHT (Dec. 8, 2012), <http://fivethirtyeight.blogs.nytimes.com/2012/12/08/marijuana-legalization-and-states-rights/> [<https://perma.cc/RQ2Q-DZPY>] (discussing the tension between a subset of American adults who oppose marijuana legalization and yet support states' rights).

<sup>20</sup> See *supra* notes 10–16 and accompanying text (describing the rise of state decriminalization of marijuana). This is not to say that no changes at all have taken place at the federal level. As states have pursued decriminalization efforts, the federal government, or at least the executive branch, has increasingly evinced a policy of non-interference. In August 2013, the Assistant Attorney General James M. Cole issued a memorandum (the “Cole Memo”) to all U.S. attorneys, stating that the Department of Justice would not prioritize enforcement of federal marijuana laws in states that have enacted laws authorizing marijuana-related conduct if the states possess “strong and effective regulatory and enforcement systems” that address public health, safety, or law enforcement threats posed by state marijuana laws. U.S. DEP’T OF JUSTICE, OFFICE OF DEPUTY ATTORNEY GEN., MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT 3 (2013). Therefore, to date, the Justice Department has not sued any state that has enacted decriminalization laws. The memorandum made clear, however, that the federal government has reserved the right to revise its stance on enforcement in the future. See *id.*

cally realistic could see that reform at the federal level was going nowhere.<sup>21</sup> Given the split in public opinion between the more conservative and more liberal regions of the country, a more practical approach to achieving widespread change would be to establish footholds of reform and encourage permissive ideas to gradually spread.<sup>22</sup> This “beachhead” model of reform had been employed by the pro-life movement with some success; reformers just had to be satisfied for the moment with only partial results.<sup>23</sup>

The general appreciation of this method’s benefits has coincided with a resurgence of states’ rights rhetoric and growing resistance toward a perceived aggrandizement of federal power.<sup>24</sup> The mid-1990s elections, when the Republican Party gained control of Congress, heralded a time when party leaders sought to shift power from Washington to the states. The composition of the Supreme Court, with such figures as William Rehnquist, Sandra Day O’Connor, and Clarence Thomas, was also more amenable to the states’ rights movement. During this period, Supreme Court cases such as *New York*

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With the changes in Washington currently underway, shifts to the right should be expected. See Higdon, *supra* note 15.

<sup>21</sup> Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 556 (2010) (arguing that the focus on debates over legalization at the federal level is misplaced because of the lack of power of the federal government to unilaterally legalize any controlled substance); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1426, 1434–35 (2009) [hereinafter Mikos, *On the Limits*] (arguing that the categorical federal ban on marijuana appears to be here to stay and that state exemption may have more impact on private behavior than federal bans because of the lack of federal enforcement and influence over human behavior).

<sup>22</sup> See Mikos, *On the Limits*, *supra* note 21, at 1424–26 (explaining why permissive state laws foster or enable changing federal behavior and social opinions toward marijuana); Geiger, *supra* note 17 (describing the partisan divide in public opinion on marijuana legalization).

<sup>23</sup> Glen A. Halva-Neubauer & Sara L. Zeigler, *Promoting Fetal Personhood: The Rhetorical and Legislative Strategies of the Pro-Life Movement After Planned Parenthood v. Casey*, 22 FEMINIST FORMATIONS 101, 102 (2010) (describing the rhetorical and legal strategies utilized by the pro-life movement to create public opposition to abortion after *Planned Parenthood v. Casey*); J.K. Hammack, *Imagining a Brave New World: Towards a Nuanced Discourse of Fetal Personhood*, 35 WOMEN’S RTS. L. REP. 357, 362–63 (2014) (describing the Court’s reasoning in *Roe v. Wade*, which opened the door for states to regulate pregnancy by recognizing the government’s interest in protecting the fetus).

<sup>24</sup> See Kirk Johnson, *States’ Rights Is Rallying Cry for Lawmakers*, N.Y. TIMES (Mar. 16, 2010), <http://www.nytimes.com/2010/03/17/us/17states.html> [https://perma.cc/2T43-RXBQ] (recounting that Michael Boldin, the founder of the Tenth Amendment Center “thought states that had bucked federal authority over the last decade by legalizing medical marijuana . . . had set the template in some ways for the [states’ rights] effort now” by demonstrating the efficacy of nullification, or the argument that states can invalidate or disregard any federal laws that they deem to be unconstitutional).

v. *United States* in 1992<sup>25</sup> and *Printz v. United States* in 1997,<sup>26</sup> breathed new life into the Tenth Amendment.<sup>27</sup>

But the central weakness of the beachhead model is the continued looming presence of a uniform federal standard and the entrenchment of that federal standard in the non-foothold states. Where the value in question is one that both sides agree should be decided at the federal level and then imposed uniformly onto the country as a whole, neither side is likely to be tolerant for long of such geographically defined compromise. As Thomas Jefferson wisely prophesied when faced with the Missouri Compromise, “A geographical line, coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper.”<sup>28</sup> A country divided by profound social differences, one side clutching its deeply held values as the other tightens its siege and bides its time, is not exactly the happy federalism that the Founding Fathers had in mind. This is true whether the values in question are of the left or of the right.

Fortunately, the stakes are not what they were in slavery days. But even as new state marijuana laws proliferate, significant questions remain regarding whether, or to what extent, Section 903 of the CSA preempts state efforts at decriminalization. Neither the United States Supreme Court, nor any federal appellate court, has faced the issue squarely.<sup>29</sup>

In 2005, in *Gonzales v. Raich*, the Court recognized the federal government’s ability to enforce the CSA with respect to intrastate manufacturing and possession of medical marijuana in compliance with state law when such activity is rationally related to regulation of interstate commerce in marijuana.<sup>30</sup>

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<sup>25</sup> *New York v. United States*, 505 U.S. 144, 162 (1992) (explaining that “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions”).

<sup>26</sup> *Printz v. United States*, 521 U.S. 898, 935 (1996) (holding that “[t]he 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”).

<sup>27</sup> Although usually raised by the right on the political spectrum, in the marijuana context the banner of “states’ rights” has been applied to marijuana decriminalization by those to the left. For example, under the Obama administration, the White House expressed strong opposition to Congressional attempts at interfering with marijuana decriminalization in the District of Columbia, stating quite clearly that decriminalization efforts were a states’ rights issue. See U.S. DEP’T OF JUSTICE, *supra* note 20, at 2.

<sup>28</sup> Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), available at <http://teachingamericanhistory.org/library/document/letter-to-john-holmes/> [<https://perma.cc/QD8Z-YFVY>].

<sup>29</sup> See Mikos, *supra* note 1, at 7.

<sup>30</sup> See *Gonzales v. Raich*, 545 U.S. 1, 22 (2004) (holding that the CSA can still be applied to intrastate manufacturing and possession of medical marijuana, even if it is in compliance with state law).

Nonetheless, it did not directly address the question of whether the CSA preempts state marijuana laws.<sup>31</sup> There are state court decisions that abrogate state laws protecting medical marijuana users from employment discrimination<sup>32</sup> and laws licensing marijuana distributors; but these, also, do not confront the central issue.<sup>33</sup> Other state court cases have rejected the preemption arguments of local government officials, but the U.S. Supreme Court has denied certiorari in all of these.<sup>34</sup> Meanwhile, some state marijuana reform laws have met a better fate when faced with preemption challenges.<sup>35</sup>

It is difficult to discern with any confidence a trend line. The ongoing gyrations and vacillations, particularly in state court jurisprudence, mean that all bets are off. There is also no consensus on these issues in the academic

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<sup>31</sup> See Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1490 (2006) (“[Raich] neither declared California’s law invalid on preemption or any other grounds nor gave any indication that California officials must assist in the enforcement of the CSA.”).

<sup>32</sup> See, e.g., *Emerald Steel Fabricators*, 230 P.3d at 523–28 (refusing to extend state employment discrimination law to include employees using medical marijuana, as the use of medical marijuana is not authorized under the CSA); *Washburn v. Columbia Forest Prods., Inc.*, 134 P.3d 161, 166 (Or. 2006) (Kistler, J., concurring) (“Federal law preempts state employment discrimination law to the extent that it requires employers to accommodate medical marijuana use.”); see Mikos, *supra* note 1, at 14.

<sup>33</sup> See *Haumant v. Griffin*, 699 N.W.2d 774, 781 (Minn. Ct. App. 2005) (indicating that if a proposed charter directing the Minneapolis City Council to “authorize, license, and regulate a reasonable number of medical marijuana distribution centers in the City of Minneapolis” were to pass, it would be, at least for now, in conflict with current federal law and would thus be ‘without effect’) (internal citations omitted); Mikos, *supra* note 1, at 14 (citing *Pack*, 132 Cal. Rptr. 3d at 638–42 (holding a medical marijuana permit scheme to be preempted by the CSA)).

<sup>34</sup> See Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 101 (2015) (describing the lack of a federal court opinion about the broad argument that any initiatives that “tax and regulate” marijuana create a direct conflict with federal law); see also *Ter Beek*, 846 N.W.2d at 544 (holding that the Michigan Medical Marijuana Act was not preempted by the CSA); *San Diego NORML*, 81 Cal. Rptr. 3d at 481–83 (holding that provisions allowing patients to obtain medical marijuana identification cards did not positively conflict with the CSA, as simultaneous compliance with both sets of laws was not impossible, and that the identification card provisions did not pose a significant obstacle to the CSA’s objectives); *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 669 (2007), *cert. denied*, 129 S. Ct. 623 (2008) (holding that a medical marijuana user was qualified to invoke the protections of California’s medical marijuana law, was entitled under state law to the return of the seized marijuana, and the return of the marijuana was not precluded by federal preemption because the possession of the drug was legally sanctioned under state law).

<sup>35</sup> See *White Mountain Health Ctr., Inc. v. Maricopa County*, 386 P.3d 416, 419 (Ariz. Ct. App. 2016) (holding that the CSA does not preempt the Arizona Medical Marijuana Act); *Kirby v. County of Fresno*, 195 Cal. Rptr. 3d 815, 831–32 (Ct. App. 2015) (holding, in part, that the CSA did not preempt California’s statutory limitation on marijuana arrests under the Compassionate Use Act and Medical Marijuana Program Act (“MMPA”)); *Qualified Patients Ass’n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 92 (Ct. App. 2010) (holding that California’s decriminalization of specific medical marijuana activities under the MMPA was not preempted by the CSA).



literature, and until the Supreme Court steps in, the uncertainty is destined to continue.<sup>36</sup>

## II. VERTICAL PREEMPTION

Why is there so much disagreement about state decriminalization of marijuana? The law of vertical preemption—preemption of state law by inconsistent federal law under the Supremacy Clause—is fairly well established, and it seems safe to assume that the marijuana issue is not going to trigger a major doctrinal revolt. “Well established,” however, does not mean “well understood” or even “well articulated.” At the root of the problem are important matters that current preemption doctrine leaves obscure; some of the confusion about marijuana decriminalization is a consequence of these gaps in understanding.

Part II begins by identifying some of the premises that are responsible, premises that are foundational for preemption generally and not only marijuana decriminalization. Several unresolved but important issues are in this way brought into focus. These include:

- First, can a challenge based on the Supremacy Clause draw strength from a pattern of popular hostility to the central government, if that establishes a motive for adopting the challenged law? If not, then what is the relevance (if any) of a general political climate of hostility to federal law?
- Second, is the challenged state law supposed to be evaluated relative to the preexisting law of that state, to having no law at all on the subject, or to something else (such as the federal law itself)?
- Third, how intelligible generally are the assignments of orders of magnitude to the state’s undercutting of federal law?

### *A. Vertical Preemption Generally*

Some of the basic principles of preemption law are fairly obvious. Preemption is an issue only where there is overlapping governmental authority.<sup>37</sup> Where, for jurisdictional or other reasons, there is only one source of law that might apply, the result of a dispute is dictated by what that one unargua-

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<sup>36</sup> See Mikos, *supra* note 1, at 7 (comparing *Pack*, 132 Cal. Rptr. 3d at 646, which found that federal law preempted a local marijuana dispensary permit program, with *City of Lake Forest v. Evergreen Holistic Collective*, 138 Cal. Rptr. 3d 332, 361 n.12 (Ct. App. 2012), *review granted and opinion superseded by*, 275 P.3d 1266 (Cal. 2012), which found that federal law did not preempt the local permit program).

<sup>37</sup> See U.S. CONST. art. VI, § 2; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 82 (1824) (establishing the supremacy of the federal government in a conflict between state and federal powers).

bly applicable law provides.<sup>38</sup> Such cases can be resolved without any reference to preemption. Indeed, mention of preemption would be nothing but a diversion. This is a point to which to which this Article will return.<sup>39</sup>

In the case of marijuana regulation, both federal and state laws apply to the conduct giving rise to the prosecution—that is, to the possession, cultivation, or sale of marijuana.<sup>40</sup> Where the state still criminalizes that conduct, it will be illegal under both federal law and the law of a state. Where the state has decriminalized marijuana, possession and sale will still be governed by two laws; it is just that one makes the conduct criminal and the other does not.

In such cases, the Supremacy Clause affirms that federal law is superior to state law and overrides “anything in the Constitution or laws of any state to the contrary notwithstanding.”<sup>41</sup> A central question is therefore whether the challenged state law is something “to the contrary.” If the state law requires the individual to do something that federal law prohibits (or vice versa) the case for preemption is easily made. It has long been clear, and there continues to be no dispute, that the states cannot do that.<sup>42</sup>

But most cases are not so clear; mostly it is possible for the individual to comply with both. Although it might at first seem obvious that state decriminalization law is “to the contrary”—decriminalization policy is “pro-

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<sup>38</sup> Jurisdiction may be lacking for reasons of Due Process or because the federal Constitution does not supply a basis for a particular federal law in its enumerated powers. *See infra* note 88 and accompanying text (describing the federal enumerated powers and suggesting that others may be left to the states). Such reasons for challenging applicability of a statute are not relevant here; this Article will consider only cases in which state and federal jurisdiction to apply their drug laws undeniably exists. Where only one authority has jurisdiction, it is not necessary to consider preemption challenges and the decision can be made on purely jurisdictional grounds.

<sup>39</sup> *See infra* Part III.A (describing that preemption is an issue only when there is more than one law that might apply).

<sup>40</sup> The result is concurrent jurisdiction to prosecute violation of the drug laws (should the prosecutor choose to do so) and the discretion to impose two successive sentences. The Double Jeopardy clause does not prohibit successive prosecutions by the state and federal government, nor by different states. The theory of “dual sovereignty” results in every one being a different crime if it was an offense against a different state. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985) (holding that separate prosecutions for the same conduct by two states were not barred by the Double Jeopardy clause); *United States v. Lanza*, 260 U.S. 377, 382 (1922) (holding that separate prosecutions for the same conduct by a state and the federal government was not barred by the Fifth Amendment’s Double Jeopardy clause).

<sup>41</sup> U.S. CONST. art. VI, § 2.

<sup>42</sup> *See Pennsylvania v. Nelson*, 350 U.S. 497, 509 (1956) (holding that state acts conflict with a federal plan and the dominant interest of the Federal government precludes state interest); *People v. Giese*, 408 N.Y.S.2d 693, 696 (N.Y. Sup. Ct. 1978) (holding that the promulgated state safety standards was not in conflict with the administration of the Federal program, so the Federal program did not preempt the state standards).

marijuana” and federal policy is “anti-marijuana”—this is not necessarily the way to conceptualize the problem. Three points are relevant here.

First, it can be argued, all that the state law says is that possession of pot is not against the law of Colorado. Federal law says that pot is, nonetheless, against the law of the United States, this “federal criminality” is not “contrary” to its lawfulness under the law of Colorado. There are plenty of things that are unlawful under federal law but not state law or vice versa.<sup>43</sup> And an even better analogy (so the argument might go) is to unlawful activities taking place in two different states, for example, a conspiracy, entered into in one state (Alpha) in order to commit a crime in taking effect in another state (Beta). Obviously, the conspiratorial conduct and its consequences might be illegal under the laws of one but not the other. The Supreme Court has defended this “dual sovereignty” rationale in both the federal/state and state/state contexts, holding that successive federal and state, or different state prosecutions, do not violate the Double Jeopardy Clause.<sup>44</sup>

Second, the conflict of laws context has a long tradition of not expecting one sovereign to enforce the criminal law of another. This “penal law exception” apparently continues to be good law.<sup>45</sup> Given the high probability that each state actually *prefers* to enforce its own penal law, the minor digression from standard Full Faith and Credit practice seems justified. As party to every criminal case, the state would naturally want control over how a criminal case proceeds. At issue are matters such as prosecutorial discretion whether to bring a case, the decision whether to plea bargain, and allocating sufficient

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<sup>43</sup> For example, immigration law has long been seen as under the federal power. *See Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (holding that the federal government has significant power to regulate immigration and an Arizona law (S.B. 1070) to regulate illegal immigration undermined federal law and was thus preempted). Additionally, many states prohibit employment discrimination based on sexual orientation and gender identity, but no federal statute currently does so. *See* Elizabeth K. Ehret, Note, *Legal Loophold: How LGBT Nondiscrimination Laws Leave Out the Partners of Transgender People*, 67 RUTGERS U. L. REV. 469, 480–81 (2015) (describing various state employment protections based on sexual orientation and gender identity, as well as proposed federal statutes).

<sup>44</sup> *See supra* note 40 and accompanying text (describing the dual sovereignty which allows concurrent federal and state enforcement of marijuana laws to exist without violating the Double Jeopardy clause).

<sup>45</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 74–75 (1825) (establishing this principle in a conflict with foreign nations). The “penal law exception” is the principle that one nation or sovereign will not enforce the criminal laws of another nation or sovereign. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 274–75 (1935) (“[T]o this rule taxing statutes constitute an exception, analogous to that relating to penal laws, because the courts of one state should not be called upon to scrutinize the relations of a foreign state with its own citizens . . . .”); *Antelope*, 23 U.S. (10 Wheat.) at 74–75; *Universal Adjustment Corp. v. Midland Bank, Ltd., of London, Eng.*, 184 N.E. 152, 159 (Mass. 1933) (“The cause of action must be not founded upon a penal statute of a foreign State, nor contrary to the policy of our law.”).

resources to put on its best case. Control can best be maintained in the state's own courts, using its own trial judges, prosecutors, defense attorneys, juries, and provisions for appellate review.<sup>46</sup>

Third, the phrase "to the contrary" does not mean simply that a challenged state law is *different* from federal law; the existence of a difference can pretty much be taken for granted. If that was all that should be required, existing decisional law on preemption has all rather widely missed its mark. All of the existing cases could have been much more easily decided on the grounds that the two laws were different; but the Court has not taken up that rather simplistic approach. Instead, existing precedents all in one way or another assess whether the objectives of the federal law are in some way undermined by the state legislation.<sup>47</sup> Does the state's adoption of the challenged law make it somehow more difficult, expensive, or otherwise impractical, for the federal government to accomplish its objectives?

The central challenge in preemption jurisprudence is to define what this means. To establish preemption, in what way and to what degree would the challenged authority have to be making the federal government's job more difficult? Preemption challenges are, at the most fundamental level, about states doing things that are either more or less helpful to the projects undertaken by the federal government. In the marijuana context, the federal government has set out to deter drug use by penalizing possession, cultivation, or sale of certain controlled substances. If a state decides to criminalize the same drug (so the argument goes) this will have additional deterrent effect and assist the federal government in accomplishing its objectives. If it repeals its criminal law on the subject, the argument continues, this undercuts the federal objective and the state repeal must be invalidated.

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<sup>46</sup> It might be relevant to point out here that federal courts have been given exclusive jurisdiction over federal crimes. 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.").

<sup>47</sup> See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (stating that preemption exists when "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (alterations in original)); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956) ("We examine these Acts only to determine the congressional plan. Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law."); *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) ("When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.").

The Supreme Court has periodically attempted to formulate a standard for determining how obstructionist the state law would have to be.<sup>48</sup> None of its proposals have made the task much easier for the lower court judges who, unlike academics, do not revel in doctrinal obscurities. There may be reasons why, reasons which are illustrated by the interaction of federal and state marijuana law. The following considers three unanswered questions that, if more were known about them, might shine some light on the preemption doctrine.

### 1. The Relevance of Motive

The first of these is whether the question of preemption can really be considered out of context, that is, without any consideration of the general wave of hostility that some portions of the American public purport to feel towards the federal government.<sup>49</sup> The claim that a particular reform proposal violates the Supremacy Clause is arguably bolstered by the motivation of its sponsors: a very un-supremacy-clause-like desire to protect states' rights and to reduce "unwarranted intrusion" by the central government into the lives of the state's citizens.

The claim would go as follows. What makes a state law supportive or unsupportive of federal law is only in part a precise comparison of the state's law's terms to the federal's. It would be foolish to divorce the marijuana reform bills from their social and political context and consider them in a vacuum. The context, it could be argued, includes the general atmosphere of hostility to Washington that is felt in some quarters, often the states where libertarian sentiment has supported decriminalization. How can it be denied that an "anti-supremacy-clause" mood is in the air, and how can this be ignored? It should count against the constitutionality of that law.

The fact that some of these reforms were adopted through the referendum process may matter because it increases the likelihood that the decision was based in part on hostility to the central government rather than informed

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<sup>48</sup> See *Crosby*, 530 U.S. at 373 (stating that preemption exists when "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (alterations in original)); *N.W. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989) (preemption exists when "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law"). For a recent treatment of these formulations, see *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) (combining the standards from *Crosby v. National Foreign Trade Council* and *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*).

<sup>49</sup> The question of motive is, for reasons explained below, of interest in the marijuana context because of the salience of the issue politically. See *infra* notes 50–66 and accompanying text (describing the issue of legislative motive and how it has been utilized in the constitutional analysis by the Court). It may not be an issue of concern in all preemption contexts.

political choice. Legislators supposedly base their votes on reasoned deliberation about facts put into a public record by themselves and their colleagues. Whatever one thinks of this premise, it seems more plausible than the analogous argument about individual voters, who are not required to display any particular qualification other than their right to vote in general elections. Campaign rhetoric, in fact, often displays hostility to the federal government openly, as a selling point. This would seem to be exactly the sort of danger that the Supremacy Clause was adopted to guard against.

It seems likely that some of the preemption challengers who find it obvious that decriminalization violates the Supremacy Clause are influenced by the current atmosphere of distrust for Washington. It is an appealingly commonsensical position. Given that such anti-Washington sentiment does exist, and is capable of swaying elections in at least some cases, it is worth asking whether, even in theory, an atmosphere of hostility should be taken into account in preemption challenges where it can be shown. Should courts admit and consider evidence on this issue; should trial judges make findings of fact to this effect? They mostly haven't, at least not so far.

The most frequently heard version of the reasons why they do not concern illicit motivation. When a statute's constitutionality is challenged, one is told that evidence of legislators' illicit motivation is generally not welcome. Note that evidence of motivation of the executive, where the issue is validity of an executive order, may be treated differently. So-called legislative motive is a fiction, because a collective body does not have a motivation the way that a single individual does. But it is not a fiction to ask the motivation of the executive, even the motive of a small group of individuals in the office of the executive, because those individuals' wills are all subordinate to the wishes of the executive. In contrast, legislators are all entitled to their own different opinions and to speak of a collective motive is typically not possible.

This includes motivation of many different sorts. Legislation may arguably have been motivated by discrimination against racial or ethnic groups; by a desire to undercut the opposing political party's electoral position; or by irrational and unscientific popular beliefs about climate change, the causes of autism, or evolution. To the extent that it is political animosity, or hostility to science or religious bigotry that accounts for such laws, as opposed to merely mistaken science, such motivations do not as a rule count in the constitutional calculus. The Supreme Court has made this clear.

The Court traces its position back almost to the earliest days of the Republic.<sup>50</sup> So long as legislation serves a facially legitimate purpose, it is said,

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<sup>50</sup> *Village of Arlington Heights v. Metro. House Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) ("This Court has recognized, ever since *Fletcher v. Peck*, [10 U.S.] (6 Cranch) 87, 130–31 (1810)

it is not to be challenged by questioning the legislators' motives. In part, this is for practical reasons, for as the Court has noted, "It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators. . . . [T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters."<sup>51</sup> Chief Justice Warren, writing for the Court in *United States v. O'Brien* in 1968, reiterated these concerns while adding another.<sup>52</sup> A statute invalidated on one occasion might have to be upheld after a second enactment, when legislators were more cautious about public expression of their unsavory opinions.<sup>53</sup>

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. . . , that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)); see also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–48, 55 (1986) (referencing *United States v. O'Brien*, 391 U.S. 367, 382–86 (1968), and holding that a zoning ordinance, which prohibited adult motion picture theaters from locating within 1000 feet of any residential zone, single or multiple-family dwelling, church, park, or school, was a valid governmental response to the "admittedly serious problems" created by adult theaters and did not violate the First Amendment).

<sup>51</sup> *Palmer v. Thompson*, 403 U.S. 217, 225 (1971); see also *O'Brien*, 391 U.S. at 383 ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); *McCray v. United States*, 195 U.S. 27, 56 (1904) ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."). This principle also applies to actions against individual legislators that were involved in the enactment of challenged legislation. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (reiterating *Fletcher v. Peck* that the motives of legislators are irrelevant to a determination of the privilege applied to individual legislators); see also LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 823 (2d ed. 1988) ("Among the most telling objections to judicial review of legislative motive is the difficulty of ferreting out the real purpose of a collective lawmaking body, particularly if it must be inferred from the articulated remarks of a few legislators.").

<sup>52</sup> *O'Brien*, 391 U.S. at 383.

<sup>53</sup> Chief Justice Warren wrote,

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is an entirely different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

*Id.* at 383–84; see also *Palmer*, 403 U.S. at 225 ("If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."); TRIBE, *supra* note 51, at 823.

There are what appear to be exceptions to this general rule, which vary by substantive context. One concerns facial discrimination on the basis of race.<sup>54</sup> In 1977, in *Village of Arlington Heights v Metropolitan Housing Development Corp.*, an Equal Protection case, the Supreme Court first recognized that as a general matter legislative motivation was customarily not relevant: “[B]ecause legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.”<sup>55</sup> But Equal Protection challenges required a different approach. Because “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause[,] . . . [w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.”<sup>56</sup>

A steady string of gerrymandering cases confirms, similarly, that political motivations are not subjected to strict scrutiny, but that strict scrutiny can apply when race is found to be the “the predominant factor” motivating the drawing of district lines.<sup>57</sup> In First Amendment cases a balance must be

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<sup>54</sup> After generally rejecting the relevance of motivation to constitutional questions, the Court in *United States v. O'Brien* noted in a footnote that in a “very limited and well-defined class of cases” motivation “may” be cognizable because “the very nature of the constitutional question requires an inquiry into legislative purpose,” such as those cases in which statutes have been challenged as bills of attainder or cases determining whether a statute was punitive in nature. See *O'Brien*, 391 U.S. at 383–84 n.30 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169–84 (1963); *Trop v. Dulles*, 356 U.S. 86, 95–97 (1958); *United States v. Lovett*, 328 U.S. 303 (1946)). *Washington v. Davis* elaborated in a footnote:

To the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases—as indicated in the text—are to the contrary; and very shortly after *Palmer*, all Members of the Court majority in that case joined the Court’s opinion in *Lemon v. Kurtzman*, 403 U.S. 602 . . . (1971), which dealt with the issue of public financing for private schools and which announced, as the Court had several times before, that the validity of public aid to church-related schools includes close inquiry into the purpose of the challenged statute.

426 U.S. 229, 244 n.12 (1976).

<sup>55</sup> See *Village of Arlington Heights*, 429 U.S. at 265.

<sup>56</sup> See *id.* at 265–66.

<sup>57</sup> See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (requiring, for a finding of “discriminatory purpose,” evidence of a district’s shape and demographics or direct evidence going to legislative purpose is necessary). As stated by the Court in *Bush v. Vera* in 1996, “Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones. We have not subjected political gerrymandering to strict scrutiny.” See 517 U.S. 952, 964 (1996) (citing *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (White, J., plurality opinion) (“[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”)); *Bandemer*, 478 U.S. at 147 (O’Connor, J., concurring in judgment) (“[P]urely political gerrymandering claims” are not justiciable.). As reaffirmed by the Court in *Vieth v. Jubelirer* in 2004, “[S]etting out to segregate



struck, because “governmental action must be scrutinized more carefully to ensure that communication has not been prohibited ‘merely because public officials disapprove [sic] the speakers’ views.’”<sup>58</sup> The Court has recognized the inevitability of being influenced by legislative motive but has attempted to conduct the examination in a “deferential and limited” manner.<sup>59</sup> And a number of cases suggest that an inquiry into legislative purpose should consider only *objective* evidence of intent.<sup>60</sup>

To summarize, the most substantial reasons for reluctance to take political atmosphere into account are these: empirical uncertainty about the true motivations of most of the decisionmakers; the particular difficulties with making the necessary empirical determinations in decriminalization by referendum; judicial deference to the government’s elected branches; and the likelihood that this basis for decision would require an opposite result in successive cases where a more careful legislative history had been built.

There are good reasons to discount constitutionally a general atmosphere of political animosity towards a distant bureaucracy, even where it might be argued that such hostility was the very reason that the Supremacy Clause was necessary.<sup>61</sup> Should decriminalization of marijuana be unconstitutional because it was motivated in part by resentment, cultural alienation, or, most importantly, belief in an out-of-control federal government having overstepped

gate voters by race is unlawful and hence rare, and setting out to segregate them by political affiliation is (so long as one doesn’t go too far) lawful and hence ordinary.” 541 U.S. 267, 293 (2004).

<sup>58</sup> Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530, 536 (1980) (citing *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)); see also *Goldberg v. Whitman*, 743 F. Supp. 943, 951 (D. Conn. 1990) (quoting *O’Brien*, 391 U.S. at 384) (“[T]o base a constitutional decision on what a legislature really meant is necessarily ‘a hazardous matter.’”).

<sup>59</sup> See *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O’Connor, J., concurring) (recognizing the caution necessary in assessing the proper public purpose of a statute); see also *id.* (“[A] court has no license to psychoanalyze the legislators.”).

<sup>60</sup> *Wallace*, 472 U.S. at 76 (O’Connor, J., concurring) (“The relevant issue is whether an objective observer, acquainted with the test, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in the schools.”); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 n.24 (1979) (citing *Village of Arlington Heights*, 429 U.S. at 266; *Cramer v. United States*, 325 U.S. 1, 32–33 (1945)) (noting that “[p]roof of discriminatory intent must necessarily usually rely on *objective* factors . . . . What a legislature or any official entity is ‘up to’ may be plain from the results its actions achieve, or the results they avoid.”); *Goldberg*, 743 F. Supp. at 952 (describing the cases laying out this limitation on the inquiry into legislative purpose).

<sup>61</sup> The wording of the Clause does not lend itself to any particular interpretation that would support an exception for evidence of hostility to the federal government. It states, “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, anything in the Constitution or laws of any State to the contrary notwithstanding.” U.S. CONST. art. VI, § 2.

its narrow, enumerated, powers? It does not seem that this situation warrants another exception to the general disregard for legislative motivation.

But something that looks somewhat like motive may be more important to the preemption decision. Long settled authority holds that Congressional intent to preempt state law (or not to preempt it) will be honored.<sup>62</sup> Congressional silence on the desire to preempt is something that might be informative, in particular in a period of great public interest and debate.<sup>63</sup> This is not because of the preferences and objectives that it reveals in individual legislators; that would be motive.<sup>64</sup> The better reason would be, instead, that general public hostility or support for decriminalization is somehow an indication of what we generally refer to as “Congressional intent.” Because Congress has the power to decide the issue, its failure to do so has substantive implications for interpretation of the matter.<sup>65</sup> This Article will return to this point, because in this respect vertical and horizontal preemption are different.<sup>66</sup>

## 2. The Problem of Baselines

The second of these reasons relates to *baselines*, namely, the standard of comparison against which the state’s challenged law must be judged.

What does it mean to characterize a state law as being “helpful” to federal policy; or conversely, for the state law to “undermine” or “undercut” federal objectives? One source of uncertainty may be empirical. There are serious factual questions any time that there is disagreement over the utility of a particular state legislative act on some federal objective. Does an increase in the minimum wage result in more unemployment? Does capital punishment deter serious crimes? Do marijuana smokers end up addicted to opiates? The

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<sup>62</sup> *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (“If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.”).

<sup>63</sup> See John David Ohlendorf, *Against Coherence in Statutory Interpretation*, 90 NOTRE DAME L. REV. 735, 750–57 (interpreting Congress’ silence on certain preemption matters); Carlos Manuel Vazquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1270 (2001) (describing the Supreme Court’s reliance on congressional silence in determining the displacement of state law in the area of foreign affairs); see also *Crosby*, 530 U.S. at 388 (striking down the Massachusetts Burma law on the question of preemption in the face of congressional silence); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (upholding a sole executive agreement suspending private claims against Iran because Congress had failed to object to it).

<sup>64</sup> See *supra* notes 49–53 and accompanying text (describing the general rule that inquiries into legislators’ individual motives are not welcome in determining the constitutionality of a statute).

<sup>65</sup> See Ohlendorf, *supra* note 63, at 750–57 (discussing how to interpret Congressional silence).

<sup>66</sup> See *infra* Part III.A.2 (comparing vertical and horizontal preemption).

uncertainties are endless. These are not the only concerns. Questions would continue to exist even if all the empirical answers were undisputed.

The most straightforward way to evaluate the utility of state law to federal policy is to compare it to its alternatives. In most cases, an assertion of helpfulness or unhelpfulness is at ground level a comparative assessment, a relative statement about whether some proposed alternative is better or worse than something else. Thus if Congress decides that Obamacare is a bad idea this boils down to a claim that no legislation at all would be preferable to having the Affordable Care Act (“ACA”) in effect. There is no absolute scale from which some abstract measure of utility can be meaningfully assigned.

The “something else” is usually the status quo. If trying to decide whether to adopt some proposal, one usually has as an alternative simply leaving things as they are. One would only adopt a proposal if it compared favorably to what one has now. But there are also situations where a different comparison must be made. For example, Congress might be considering replacing the ACA with one of several different approaches to health insurance: totally free market, allowing health insurance to be sold in interstate commerce, or tax sheltered health care accounts. Each of the pairs of proposals (status quo versus total free market; health accounts versus interstate insurance, etc.) would have to be assessed and the relative costs and benefits assessed.<sup>67</sup>

Where one comes out on the policy recommendations depends on how each alternative is analyzed on its own terms, but also on how the possible alternatives compare. The free market alternative might be more desirable than the ACA (according to majorities in the House and Senate) but less desirable than health care accounts. The same is true when one asks whether some state statute should be preempted by federal legislation. The question “is this state statute going to undercut federal law” has a relative element to it. The following illustrates an example.

Assume that it is 1950 and Alpha is about to adopt legislation criminalizing various drugs, including marijuana. The federal government already does so. The state adopts a rule that provides penalties for possession and sale, but these are not as draconian as the federal penalties. For purposes of simplification, assume that this means that the federal penalty is five years and the state penalty only three. Naturally, ranking the state and federal authorities by a comparison of penalties is a simplification. Other factors that would have to be taken into account would include: the availability of legal

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<sup>67</sup> Note that this Article does not address any possible complications resulting from Arrow’s Impossibility Theorem. See generally Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950) (arguing that any method of aggregating individual preferences is either irrational or has otherwise undesirable properties).

defenses to prosecution; the amount of drugs sold that would be necessary to prove the offense; etc. But this simplification is enough to illustrate the point at issue here, which is the changing nature of the relative assessment over time.

In 1965 the legislature of Alpha reduces the severity of its law, dropping the penalty for simple possession to six months. Then in 1980 the penalty named in the statute is again increased, this time to eight years, and in 1995 the statute is repealed altogether. As of the end of the story, Alpha has no law criminalizing possession or sale of marijuana. The question now arises, is Alpha law, or any part of it, preempted by the consistent federal standard of a five-year prison term? The question has several parts.

*a. Is the Pre-1950 Version of Alpha Law Preempted?*

The pre-1950 version of Alpha law should not be invalidated as preempted. If it were invalid, then every time that the federal government adopted a statute that was new or different from the law of particular states, those states would have to adopt a copy of it. The Supreme Court has consistently held that state governments could not be “commandeered” into taking action in support of federal policies.<sup>68</sup> Preempting the pre-1950 version of Alpha law would violate this principle.

*b. Is the 1950 Version of Alpha Law Preempted?*

It is also hard to argue that the 1950 version of the statute is preempted. Without it, Alpha would have no marijuana law at all. If, as is sometimes asserted, the federal government depends on state enforcement to achieve its drug-deterrent policies, it is better off with the 1950 version than the status quo ante—that is, with nothing. From the federal point of view, it is still less desirable than copying the federal drug law standard would be. No reported cases are known in which preemption was held to invalidate a state law comparable to Alpha’s, where the new law brought it closer to the federal law than it had been before.

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<sup>68</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that “[t]he 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”); *New York v. United States*, 505 U.S. 144, 162 (1992) (explaining that “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions”).

*c. Is the 1965 Version of Alpha Law Preempted?*

The case for preemption here is somewhat stronger. If one compares the new version of the law to the previous (1950) version, it seems that the state legislature has done something that undercuts the federal drug-deterrence objective. But the state is still apparently contributing to the federal effort to some degree. No cases resemble the 1965 pattern in which the state statute was invalidated on preemption grounds.

*d. Is the 1980 Version of Alpha Law Preempted?*

The state law here also seems unlikely to succumb to preemption challenge. It not only raises the level of contribution that the state makes to the federal drug deterrence project, it even exceeds what the federal government is doing. This Article will return to this question later; it can be argued that Alpha is undercutting federal policy by adopting law that is so much more stringent than the federal rule.<sup>69</sup> But it is doubtful that the state statute in question would be invalidated on preemption grounds.

*e. Is the 1995 Version of Alpha Law Preempted?*

This is the case most nearly resembling the current situation; in 1995 Alpha repeals its laws altogether. Some people argue that this should be preempted, because by repealing its statute, Alpha undercuts federal policy. The end result of the repeal, however, is to leave Alpha in exactly the same position it was in just prior to the 1950 adoption of the original state drug law. Moreover, if preemption is established simply because the state reduced its level of support for the federal policy, then it would be necessary to invalidate the law revisions of 1965, as well. Most peculiar of all, it seems that Alpha's law will be invalidated simply because it at one point raised its drug deterrence efforts closer to the federal level. If it had simply never adopted any drug laws at all, it would indisputably escape a preemption challenge.

### 3. The Magnitude of the State's Failure to Cooperate

To make comparisons between different state laws that show disregard or disrespect for federal projects, one has to be able to somehow measure magnitude, at least as a relative matter. Otherwise it is impossible to describe unsupportiveness on federal projects as "minimal," for example, or "substantial." Case law does not generally address the methodological meaningfulness

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<sup>69</sup> See *infra* Part II.A.3 (describing problems with assessing the magnitude of the state's interference with federal law in preemption cases).

of such assessments, but it is clear enough that the magnitude of the state interference with federal objectives should somehow be taken into account.<sup>70</sup> To allow any impingement at all to suffice for preemption would be untenable; as the following suggests, it would have the effect of invalidating almost everything.

But the prospect of assessing the magnitude of a state law's interference raises questions. First, one usually thinks of the policy underlying marijuana prohibition as deterring marijuana use. That is only one side of the equation. The federal government did not set out to deter marijuana use *at any price*. It could probably deter drug use effectively by immediately executing all individuals found with drugs in their possession, without regard for the amount of illegal drugs involved or any other mitigating factors.<sup>71</sup> After a certain point, however, the cost is too high and the benefits too low. One should take the policies supporting *limits* on the severity of federal criminalization into account, as well as policies supporting the criminalization in the first place.<sup>72</sup>

So, for example, if the state is considering adopting a law that would provide criminal penalties for marijuana distribution, it is more closely in line with the federal policy (and should be less likely to be held preempted) if the state provides penalties that are neither too high or too low (in terms of their comparison to the federal penalties). An absurdly low penalty might be held preempted (as might a total repeal of a state criminal law) but if it is, then so should a disproportionately *high* penalty. Here, "disproportionately" means, in relation to the federal penalty for the same offense.

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<sup>70</sup> *Compare Crosby*, 530 U.S. at 373 ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . ."), with *Free v. Bland*, 369 U.S. 663, 666 (1962) ("Any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.").

<sup>71</sup> A similar approach has been advocated by President Rodrigo Duterte of the Philippines. Jason Gutierrez, *Body Count Rises as Philippine President Wages War on Drugs*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/world/asia/philippines-duterte-drug-killing.html> [<https://perma.cc/WG9E-C4JM>].

<sup>72</sup> Although some state courts have looked into the question of whether a lenient state law preempts a lenient municipal law, there are few examples of a lenient federal law preempting a strict state law. See *Kirby v. County of Fresno*, 195 Cal. Rptr. 3d 815, 820 (Ct. App. 2015), *review denied* (Feb. 17, 2016) (holding that a lenient state act does not preempt a county from banning marijuana cultivation as a public nuisance); *Maral v. City of Live Oak*, 164 Cal. Rptr. 3d 804, 806 (Ct. App. 2013) (holding that lenient California state statutes did not preempt a city ordinance banning all cultivation of marijuana). More commonly, a strict federal law has been found to conflict with lenient state laws. See *Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus.*, 230 P.3d 518, 536 (Or. 2010) (holding a lenient state marijuana statute was preempted by the CSA).

It is important to keep in mind that federal criminal laws often provide sanctions in terms of an upper and lower bound.<sup>73</sup> Presumably, the upper limit is crafted as carefully as the lower limit, and with just as much seriousness.<sup>74</sup> If the federal penalty is six months to two years, wouldn't a state mandatory penalty of fifteen years seem excessive?<sup>75</sup> Congress, after all, rejected certain penalties as too high.

And it will sometimes happen that the state sanction is within the interval specified by federal statute, but the total sanction occasioned by applying *both* of the laws is greater than the upper limit. For example, assume that the federal law provides two years to ten with the likely penalty for a particular defendant in a particular case being eight. If the state law provides nine years, then imposing both sets of sanctions results in a penalty that of seventeen years, which is out of the range contemplated by Congress. For the state sanction to stand, in such cases, can hardly be said to be consistent with the terms of the federal statute.

As a more general matter, it is not clear whether the magnitudes of the different state laws are even commensurable. Statutes are not one-dimensional; there are likely to be a variety of considerations that go into determining whether a state law has departed sufficiently from its federal counterpart to be preempted. But how are such differences to be determined; how are they to be compared? If one state's marijuana law has great similarity to the federal law in terms of the lower end of permissible sanctions, but is wildly off base with the federal law in terms of the upper end of the scale, is it more or is it less "preemption worthy" than a law with a wildly overblown sanction and modestly different lower bound?

All of these open questions can present problems for other types of preemption cases outside the marijuana context. Indeed, they apply to a greater or lesser degree to phenomena from outside the federalism context. For example, repeal of an earlier law by a later law fits the general pattern of

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<sup>73</sup> See 28 U.S.C. §§ 991, 994(b)(1) (2012) (establishing that the U.S. Sentencing Commission must create a "sentencing range" for "each category of offense").

<sup>74</sup> See *id.* §§ 991, 994(p), (r), (w)(3) (showing that Congress retained the right to control the U.S. Sentencing Commission's policies and created its own guidelines).

<sup>75</sup> This does occasionally happen, or at any rate, something somewhat like this. In 1989, in *Luna v. Harris*, the Second Circuit examined a case in which New York conditioned take-home methadone privileges on the patient's employment, where the federal statute imposed no such condition. *Luna v. Harris*, 888 F.2d 949, 950 (2d Cir. 1989). It found the state statute wasn't preempted. *Id.* at 954. In 1993, in *People v. Villacrusis*, the Ninth Circuit held that a Guam statute prohibiting importation of methamphetamine was not preempted by the Federal Comprehensive Drug Prevention and Control Act. *People v. Villacrusis*, 992 F.2d 886, 887 (9th Cir. 1993). Perhaps most on point, an Arizona court held that the Comprehensive Drug Control Act did not preempt Arizona from enacting a statute with *more severe* penalties for narcotics importers than the federal penalty. *State v. Dunn*, 803 P.2d 917, 922 (Ariz. Ct. App. 1990).

preemption. Marijuana decriminalization is therefore a vehicle for asking some fairly broad questions. The marijuana example may be distinctive in this regard, but it would not be unique.

### III. HORIZONTAL PREEMPTION

As one would expect from two sets of principles that share a label—“preemption”—vertical and horizontal preemption have much in common; these similarities are important. Of equal interest, though, is what makes them different. Horizontal federalism deals with the relations between the fifty states, co-equal entities that are geographically defined. Vertical federalism deals with relations between the states and a unique central government. These entities are defined by subject matter and the relationship is hierarchical.

Preemption is a process of resolving the overlap of authority between two different sovereign entities. Preemption means that one of the actors dominates; the choice is between federal and state (in vertical preemption) or between Alpha and Beta (in horizontal preemption). Certain criteria must be met for preemption to occur; if they are not met, then neither sovereign preempts the other. Then, the eventual application of one law or the other depends on happenstance, such as which forum ends up resolving the dispute.

The word “preemption” is more frequently used in the vertical federalism context than the horizontal federalism context. The reason is that vertical and horizontal federalism are different in the percentage of overlap cases to which the concept properly applies. Almost all federal/state conflicts can be resolved through preemption but that is true of only a small number of state/state disputes. This is especially true today, when a long tradition of search for uniform and predictable answers, defined by unique geographical occurrences, has largely been abandoned.

#### *A. Horizontal and Vertical Configurations: A Comparison*

The states of the United States are not just separate administrative regions of a single nation; to a certain degree, they enjoy separate sovereignty. Administrative regions can have different rules of substantive conduct and procedural decision making, but these are subject to the will of a single centralized authority that tolerates these differences only so long as they reflect the centralized authority’s own priorities. The Ninth Circuit and the Second Circuit follow different interpretations of federal law, but only until the Supreme Court weighs in on which result is correct. But the law of California is what the courts and legislature of California say it is, by definition. The law



of New York is, by definition, what the New York courts and legislature want it to be.<sup>76</sup>

At the outset of the discussion of vertical preemption, it was noted that preemption takes place within areas of overlapping jurisdiction.<sup>77</sup> If there is no overlapping jurisdiction to start, then the necessary two authorities are lacking; one to preempt, the other to be preempted. If overlap exists, there may or may not be a shared solution to which state's priorities ultimately prevail—which state's laws *preempts* the other's. If there is no shared decision which one preempts and which one is preempted, there is no preemption.

Horizontal and vertical preemption are not merely two variations on the same general theme. They are defined in profoundly different ways. The types of considerations which define a geographical entity are different from the types that define an entity with subject matter jurisdiction. Because jurisdiction at the outset is defined differently, the areas of overlap are defined differently as well. The resolution of the overlap must also, then, be defined differently.

### 1. Jurisdiction and Jurisdictional Overlap: the Interstate System

The authority of the states in regard to one another is delineated by reference to geographical boundaries. There is debate within the choice of law field, today, over whether geographical boundaries are something of an anachronism. The modernists contend that jurisdiction should be defined by reference to people, and the interests of a state in taking care of its people by imposing compensatory or protective laws on appropriate interstate cases.<sup>78</sup> But this definition still relies on geographical boundaries, although at a derivative level. For the people that matter, even to the modernists, are *the people of the state*, meaning in essence the people who live in the state. The central importance of geography is unmistakable.

In any event, the various constitutional limitations on extraterritoriality make clear that so far as states are concerned, territorial limits are not a thing

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<sup>76</sup> This is, of course, subject to substantive constitutional limits, such as the Bill of Rights.

<sup>77</sup> See *supra* note 37 and accompanying text (describing the origins of the preemption doctrine).

<sup>78</sup> For some of the most influential arguments in this debate, see generally Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963) (analyzing the problem of the disinterested third state in conflict-of-laws theory); Herma Hill Kaye, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1982) (examining the reported choice of law cases decided since the mid-1950s from the perspective of the court); Robert A. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack,"* 46 OHIO ST. L.J. 483 (1985) (arguing that interest analysis is the preferred approach to choice of law).

of the past.<sup>79</sup> Those who say that state lines are irrelevant for choosing the applicable law are kidding themselves, as are those who accept, equally, its corollary that state interests are defined by the desire to help state residents. As to these, John Hart Ely once put it, “This claim is so plainly the result of wishful thinking that it does not merit extended rejoinder.”<sup>80</sup> Or, in the context of this Symposium, “what *are* they smoking?”

This is not the place to develop a theory of what geographical connections make the state’s exercise of authority over an individual legitimate.<sup>81</sup> That, of course, is a topic much debated by scholars of choice of law, personal jurisdiction, and international law (not to mention by a number of philosophers).<sup>82</sup> That question can, for present purposes, be treated as undecided.

But the one thing known is that the states of the United States are all equal, constituted politically by identical normative structures. And there is reason to think that at the state level, the bases for legitimacy are geographical. So one can say that a state has jurisdiction where the appropriate geographical tests are met, whether the tests depend on presence in the state, undertaking actions having an impact in the state, residing in the state, residence of the complaining party in the state, or something similar.

The areas of overlap include disputes that satisfy the criteria of more than one state. If the basis for legitimacy is an act occurring within the state, then the area of overlap between two states, Alpha and Beta, includes all disputes that have at least one occurrence in each of those states. If there is jurisdiction over any dispute where one or the other of the parties is a resident,

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<sup>79</sup> This is particularly true in the area of due process limitations on state court jurisdiction as to which the U.S. Supreme Court has said that territorial limits are the most important consideration. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (describing the limitations on state jurisdiction as a result of territorial limitations). But it is also the case in due process limits on choice of law, the Commerce Clause, and on extraterritoriality of federal statutes internationally.

<sup>80</sup> John Hart Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 180 (1981).

<sup>81</sup> Some of the author’s previous work has considered these questions. *See generally, e.g.,* LEA BRILMAYER, *AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE-SUPERPOWER WORLD* (1994) (arguing that American hegemony is a form of international governance whose legitimacy must be evaluated through liberal political morality); LEA BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (1989) (highlighting the distinction between the horizontal approach to international law, in which states are coequal actors, and the vertical approach, which is dependent upon the relationship between the state and the individual, raising the question of legitimacy); Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989) (arguing that a political rights-based approach provides suitable constraints on a policy analysis of choice of law and establishing basic features of the choice of law regime which could arise from such a theory of political rights).

<sup>82</sup> *See* JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 68 (Thomas P. Peardon ed., Bobbs-Merrill Educational Publishing 1952) (1690). *See generally* Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 11 (1989) (citing Locke).

then the areas of overlap include all cases where the parties are from the two different states.

The symmetry of the arrangement is what gives it its simplicity. But it also creates problems. Because of this symmetry, there is no obvious way to select between the various authorities that have jurisdiction in a particular case. How can you resolve the overlap? This problem has been noticed in the choice of law context. Under early choice of law theories, it had been assumed that only one state could have jurisdiction over a particular case.<sup>83</sup> But eventually, the Court found explicitly that there are cases over which more than one state has jurisdiction consistent with the U.S. Constitution.<sup>84</sup> It then noted that the Full Faith and Credit Clause could not be read to compel one state to apply the law of the other. If the Full Faith and Credit Clause requires Alpha to apply the law of Beta, then it also requires Beta to apply the law of Alpha. The result would be ridiculous. Because of the symmetry of the situation, it would be impossible to find a way to resolve disputes in the area of overlap.

To resolve such disputes, there must either be some categorical hierarchy or there must be a case-by-case method of allocating disputes in the overlap area to one state or the other. The most obvious way of doing so would be to recognize that some connections are more important than others. If Alpha is connected to the dispute by the residence of the plaintiff, and Beta is connected to the dispute because it is the place where the objectionable conduct occurred, then this dispute probably falls under the area of overlap defined by the Due Process Clause limits on jurisdiction. The Due Process Clause does not single out one state over the other. What would single out one state would be a reason for prioritizing territorial connecting factors over one's based on residence (or vice versa).

To the extent that the states have agreed to do this, expressly or by implication, the area of overlap is resolved. When the area of overlap is resolved, it is possible to talk about preemption. Both states have agreed that

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<sup>83</sup> LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 11–41 (2d ed. 1991) (describing the history and modern theories of choice of law).

<sup>84</sup> *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939) (“While the purpose of that provision was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 540–41 (1935) (“[W]here the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligation, and its sanctions are subject, in some measure, to the legislative control of the state. The fact that the contract is to be performed elsewhere does not of itself put these incidents beyond reach of the power which a state may constitutionally exercise.”).

the law of the state where the activity occurred preempts the law of the state where the plaintiff resides. Thus, where there is agreement of this sort, one might say that territory preempts residence. The Supreme Court has in fact elevated territory to hierarchically superior status under the Commerce Clause, in cases concerning voting rights in corporations and pricing of liquor.<sup>85</sup>

Such an inference can be particularly plausible when important rights are involved. Some rights are such that a state has an affirmative desire to protect the exercise of the right within its territory. If this is a reasonable inference, as it seems to be given the constitutional structure of rights of this sort, preemption is justified. The conclusion follows from the hierarchically superior status of territorial factors over personal connections, together with the compelling need to have a single solution for both states to recognize.<sup>86</sup>

Choosing a single connecting factor to resolve disputes between states can be an ideal solution to the problem of overlap. The selection of one factor results in a selection of one state, because if the geographical factor establishes a connection between Alpha and the dispute it necessarily fails to establish a connection between Beta and the dispute. The same would not be true in the Federal State system, where both the state and Federal government may have a connection of a territorial sort with the dispute.<sup>87</sup> In this respect, as in many others, the vertical arrangements made for our federal system are different from the horizontal ones.

## 2. Jurisdiction and Jurisdictional Overlap: the Federal/State System Compared

Federal authority in regard to the states is of course not defined geographically (although in regard to foreign nations the division is primarily geographic). In the context of federal/state relations, federal government jurisdiction exists when an issue area falls within one of the national government's enumerated powers, as defined by the Constitution. These powers in-

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<sup>85</sup> *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337 (1989) (holding that Connecticut's beer-price affirmation statute created competing local economic regulation that the Commerce Clause was meant to preclude); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93–94 (1987) (holding that an Indiana state law regarding controlling corporate shares was not pre-empted by the federal Williams Act governing hostile corporate stock tender offers because the purposes of the state law were consistent with the federal law).

<sup>86</sup> See generally Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993) (evaluating whether states can regulate their local residents' reproductive rights when they are temporarily in other states).

<sup>87</sup> See *supra* note **Error! Bookmark not defined.** and accompany text (establishing the importance of territoriality in jurisdictional issues).

clude the familiar regulation of interstate commerce, foreign affairs, immigration and naturalization, coinage of money, and so forth.

Overlap is defined by two conditions. This is because to belong in the overlap a dispute must be subject to jurisdiction by both competing authorities. With the horizontal state-to-state relations, both conditions relate to geography; they are symmetric. A dispute must satisfy the same criteria for each state. With the vertical federal/state relations, the authority of the federal government depends on subject matter; the issue must fall within the federal government's enumerated powers. The authority of the state extends to all subject matter questions other than those reserved exclusively to the federal government by the U.S. Constitution.<sup>88</sup>

The states and federal government are not identical in the way that the state governments are and neither is the method of resolving overlapping jurisdiction the same as with state governments. The federal government is hierarchically superior, when in the area of overlap. The reason, of course, is the Supremacy Clause. Within the enumerated powers, Congress can assert federal power or not as it chooses. If it does not exercise power this is because it does not want to. If it does not want to, then the state is free to act. In the vertical system, the absence of a federal substantive law means Congress is content to remain with the decisions reached by the states. This is something of a compromise, giving authority to both the states and to the federal government. But it is hardly a compromise from positions of equality. It guarantees the federal government what it wants and leaves the rest to the states.

This logic does not apply in the state/state system. Failure to legislate means nothing or is ambiguous. There would be no reason for states to take a position when their position would be irrelevant anyway. But Congress can directly say to the states that certain solutions are outside the bounds of the

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<sup>88</sup> U.S. Constitution Article 1, Section 10 reads:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No state shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controll of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

acceptable, because within the area of overlap it is superior. Congressional silence therefore means something.

Vertical and horizontal federalism are different in the percentage of overlap cases that are resolvable through preemption. Almost all federal/state conflicts can be resolved through preemption because in the case of conflict, the federal priority (as stated by Congress, typically) governs. Congress can express preemption either by stating directly that the states are preempted from issuing laws on the subject or that they are not preempted; or by stating a substantive rule, with the indirect preempted effect that all state laws that are inconsistent are automatically invalid without an express statement to that effect.

But that is true of only a small number of state/state disputes. For most of these, the eventual application of one law or the other is determined by where the dispute is resolved, that is by forum shopping. It is no longer assumed that the results to be had in one state will be the same as the result to be had in all the other states. As a result of the so-called choice of law revolution, a long tradition of search for uniform and predictable answers, defined by unique geographical occurrences, has largely been abandoned.

### *B. Putting the Model Together*

#### 1. Principles of Preemption Summarized

The following premises summarize the similarities and differences between state/state and federal/state preemption:

##### *a. Definition of Preemption:*

Preemption is relevant in situations where more than one authority has a prima facie case of jurisdiction. Preemption allocates authority within the area of overlap; it is governed by principles that are recognized on both sides, so that the two authorities should be able to agree on the result. Something is not a theory of preemption unless it reliably specifies a single law that applies to a particular case, occurrence, or legal issue.

Preemption might be called “quasi-jurisdictional”; it takes place where jurisdiction exists in more than one authority, but for mutually agreed on reasons, only one authority is entitled to exercise it.

##### *b. Definitions of Relevant Authoritative Entities:*

States are geographically defined, with borders that allocate particular pieces of territory to one state and one state alone. The federal government is defined by subject matter jurisdiction, as specified in the powers enumerated in the U.S. Constitution.

*c. Relationships:*

The states are equal to one another and identical in authority and limitations. The federal government, acting within its enumerated powers, is superior to the states and is unique.

*d. Areas of Overlap:*

Where an issue falls within the concurrent jurisdiction of federal and state authorities, the values and priorities of the federal government prevail. This is a compromise of sorts, but not an equal one. Where an issue falls within the concurrent jurisdiction of more than one state authority the allocation of authority should be accomplished either through compromise and/or negotiation or reasonably inference about priorities shared by all states, and if it cannot be resolved this way then neither state preempts the other.

*e. Occurrence of Preemption:*

In federal/state relations, preemption of state law by federal law occurs whenever Congress specifies; Congress may also specify (if it chooses) that it does *not* wish to preempt state law. Where Congress has expressed no view on the preemption issue, it may matter that the state law in question was not in existence when the statute was passed, or that the issue was not politically salient. These may be relevant in interpreting Congressional silence on the issue, because if Congress is silent in the face of a preexisting state statute subject to intense controversy, this may suggest that Congress did not have an intent to preempt. Preemption is a less significant feature of horizontal federalism because it occurs infrequently. Areas of overlap are substantial because it is infrequent for state jurisdiction to be defined in such a way as for only a single state to have authority over a particular case, occurrence, or legal issue. But they are rarely solved by state consensus. More typically, the rule that is applied depends on which authority is able to take control of resolving the dispute, for example, because of forum shopping by one of the parties. The silence of one or both parties on the preemption issue is irrelevant in determining whether preemption should occur, because neither state has authority to determine the question. The two states are equal and it is not for one or the other to decide.

These principles shed some light on the application of preemption theory to the marijuana preemption controversy.

## 2. The Special Problem of Marijuana Decriminalization

The case is weak for federal/state preemption because there is sufficient basis for assuming Congressional tolerance for state inaction. At the time that

the federal statute was originally passed, Congress had no reason to think that states would automatically follow its example by criminalizing marijuana. It follows that Congress would have had no reason to object to states first criminalizing and then decriminalizing the drug. The only difference between today's decriminalization legislation and the original failure to have any statute at all on the subject is that the former takes place against a backdrop of anti-Washington animus while the latter was oblivious to any states' rights political movement. This consideration is simply an indication of motive, which should not be factored into the equation. All in all, it seems that interpretive considerations all point towards federal intent to tolerate different state laws.

The possibility of horizontal preemption seems at least equally unlikely. The issue would arise if the effect in some states (such as Alpha) of decriminalization policies in the other states' (such as Beta) made it impossible to enforce the preexisting drug laws. Perhaps the general availability of the drug in the decriminalizing state (Beta) encouraged people from the non-liberalizing state (Alpha) to drive across the state line to where it was legal, procure it, bring it back home, and bring cause whatever deleterious consequences that the Alpha government and citizens were fearing. Addiction, broken homes, and wasted lives would follow. "Why should other states be able to circumvent our protections for the health and welfare of our people?" exclaims the governor of Alpha. "Horizontal federalism requires that the people of Beta respect the way of life of the law abiding, God fearing, Alphans!"

Alpha can argue that it has a good jurisdictional basis for asserting its authority over vendors and producers living in Beta, near the border. Its basis would be "impact territoriality"; the occurrence in Beta of activity with impact inside Alpha. Impact territoriality is in fact a sufficient basis for jurisdiction over someone acting in Beta, at least when the consequences in Alpha are reasonably foreseeable.<sup>89</sup> And it is possible that Alpha's fact finders might be able to satisfy that standard for vendors of this highly mobile product.

But the question is not whether jurisdiction is available in Alpha, which it is. It is also available in Beta; the dispute is within the area of concurrent Alpha and Beta jurisdiction. The question that Alpha's governor raises is whether Alpha's law preempts Beta's. Does Beta have an obligation to assist Alpha in enforcing its criminal prohibition, subordinating its own law in the process? Probably not, unless (paradoxically) Alpha also has the obligation to

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<sup>89</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1) (AM. LAW INST. 1987); *see also* *World-Wide Volkswagon v. Woodson*, 444 U.S. 286, 297 (1980) ("The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being hailed into court there." (citing *Kulko v. Cal. Superior Court*, 436 U.S. 84, 97-98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)).



assist Beta at the expense of its own policies; in other words, Beta's law also preempts Alpha's. This certainly cannot be the case.

The circularity results from the lack of respect for a general ordering principle of logic, whereby a statement can only refer to another statement of a different, lower, logical order. If A refers to B and B can refer back to A, an endless loop arises. The problem is reminiscent of one version of the famous "liar paradox," and also of the conflict of laws issue known as "renvoi."<sup>90</sup>

*Liar Paradox:* Assume that everyone in the world is either a truth teller who always tells the truth, or a liar who always lies. Jerry says to Donna, "You are a liar; everything you say is a lie." Donna responds, "You are a truth teller; what you say is always true." Who is lying, and who is telling the truth?<sup>91</sup>

*Renvoi:* Suppose a tort case turns on the availability of the contributory negligence defense. Assume that it is being litigated in Alpha, whose choice of law rules refer to the law of Beta (the place where the injury occurred) as dispositive. But Beta choice of law rules in turn require reference back to the law of Alpha because, for example, it treats the issue as procedural law to be governed by the law of the forum.

The problem does not arise with vertical preemption because federal law refers to state law as a lower logical order; state law does not refer back to federal law, which is of a higher, more authoritative, logical order.

In any event, the governor of Alpha has it wrong. She wants there to be two bases for jurisdiction over which Alpha would have preemptive authority: territoriality and impact territoriality. If Alpha has such authority to preempt then so must Beta, for any two states have equal and identical powers. But only one state can have the right to preempt other states on a particular set of facts. If Alpha preempts Beta regarding things actually happening inside Alpha, then Beta must preempt Alpha on things happening in Beta. Beta cannot be preempted by Alpha on things happening inside Beta.

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<sup>90</sup> Jc Beall et al., *Liar Paradox*, § 1.3 *Liar cycles*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2016); *Liar Paradox*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Renvoi*, *id.*

<sup>91</sup> See STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 90.

Consider a very concise (*viz.*, one-sentence-each) dialog between siblings Max and Agnes.

Max: Agnes' claim is true.

Agnes: Max's claim is not true.

What Max said is true if and only if what Agnes said is true. But what Agnes said (*viz.*, 'Max's claim is not true') is true if and only if what Max said is not true. Hence, what Max said is true if and only if what Max said is not true. But, now, if what Max said is true or not true, then it is both true and not true.

*Id.*

The first priority is obviously things occurring within the state's border. No state would want to turn over regulation of such occurrences to other states, allowing them to preempt its authority. In fact, impact territoriality is derivative of the regulation of conduct occurring within the borders of the state. If the state is not concerned first and foremost with what is done in its territory, then there is no reason that it should be concerned with the consequences within its territory of what has been done elsewhere.

#### CONCLUSION

This has, with any luck, been of enough interest to refocus the debate over marijuana decriminalization—to “re-stir the pot” (if that is not too frivolous a note to end on). Hopefully, also, it is enough to reframe the debate on the basic logical principles underlying the comparison between vertical and horizontal preemption. Marijuana may be effective or ineffective for easing symptoms of serious diseases. It may be harmlessly enjoyable or it may be the kiss of death to the individuals who smoke it. But it certainly ought to be both effective and enjoyable as a source of legal disagreement, for the next few years at least.

