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THE NEW FEDERALISM FRONTIER IN MARIJUANA LEGALIZATION AND DECRIMINALIZATION

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Over the past two decades, the movement for marijuana legalization and decriminalization has achieved widespread success on the state level. To date, thirty-six states have legalized marijuana in some form. While once only a budding industry, the cannabis market has grown faster than a weed, with full-fledged medicinal and commercial markets in states nationwide. And now with Democratic control of Congress and the Presidency, federal decriminalization and legalization of marijuana appears more promising than ever. In December 2020, the Democratic-controlled House passed the Marijuana Opportunity Reinvestment and Expungement Act of 2020 (the MORE Act) to decriminalize and legalize marijuana. And most recently in February 2021, Senate Majority Leader Chuck Schumer announced that marijuana reform would be a legislative priority. While marijuana advocates and opponents debate the merits of marijuana use, a novel and pressing constitutional issue will inevitably enter play: depending on its scope and content, federal marijuana legislation may potentially strip states of their power to prohibit and/or criminalize marijuana within their own borders.

Because marijuana has been prohibited at the federal level since 1970, discussions of "marijuana federalism" to date have largely focused on the states' ability to legalize marijuana against the backdrop of federal prohibition. However, in light of recent state trends and new political dynamics, this Article presents an entirely new federalism issue. With federal marijuana reform legislation potentially on the horizon, this Article anticipates the rise of a new federalism issue regarding whether states can prohibit and criminalize marijuana-related activities against the backdrop of federal legalization and/or decriminalization of marijuana. In this new debate, state laws will face constitutional obstacles in the Supremacy Clause and the Dormant Commerce Clause. First, depending on congressional intent, the federal legislation may (or may not) preempt state marijuana laws. And second, these state laws

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may (or may not) be struck down for unduly burdening interstate commerce. Any potential uncertainties, however, can be avoided by close congressional attention. Congress undoubtedly has the ability to avoid federal preemption of state laws, and unequivocally maintains the authority to grant the states explicit powers to regulate and criminalize marijuana-related activities within their borders. Therefore, Congress can—and should—explicitly address this new question of marijuana federalism in any forthcoming legislation that decriminalizes and/or legalizes marijuana.

However, the most prominent and politically successful federal marijuana legislation to date—the MORE Act—lacks these vital provisions. Accordingly, the power of the states to regulate and criminalize marijuana will be at the mercy of judicial interpretation, potentially leaving the states powerless in the marijuana regulatory space. To keep regulatory power with the states, this Article argues that if federal marijuana legislation is introduced, Congress must include explicit provisions that avoid preemption of state marijuana laws and grants power to the states to regulate and criminalize marijuana-related activities if states so choose.

I. INTRODUCTION

The topic of marijuana legalization has been addressed extensively in legal academia, specifically in the context of federalism. To date, legal scholars have comprehensively evaluated the constitutionality of states decriminalizing and legalizing marijuana against the backdrop of federal prohibition under the Controlled Substance Act.[1] Academics have labeled this

1. *See, e.g.*, Brannon P. Denning, *State Legalization of Marijuana as a "Diagonal Federalism" Problem*, 11 FIU L. REV. 349, 349–50 (2016); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 74 (2015); Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 DENVER U. L. REV. 997, 997 (2012); Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 CASE W. RES. L. REV. 769, 772–73 (2015).

constitutional tension the "federalism conflict,"[2] which Dean Erwin Chemerinsky et al. have called "one of the most important federalism conflicts in a generation."[3] Because over thirty-six states have at least partially legalized marijuana,[4] this conflict is ripe for review.

Since California first voted to permit medical marijuana use in 1996, thirty-six other states have joined in passing similar measures.[5] As of March 2021, fifteen states have approved measures to allow for adult recreational marijuana use,[6] and twenty-six states have decriminalized marijuana either fully or partially.[7] In light of these state-level movements, today's political climate, and the changing public opinion favoring marijuana,[8] the prospect of federal legalization and decriminalization appears more likely than ever before.[9] In 2019, then-Senator Kamala Harris and Representative Jerry Nadler introduced identical bills in the Senate and House, respectively, aiming to decriminalize marijuana.[10] Before Representative Nadler's bill was introduced in the House, Randal Meyer of the Global Alliance for Cannabis Commerce remarked: "A floor vote on the bill would be the greatest federal cannabis reform accomplishment in over 50 years."[11] Cementing this accomplishment, the bill ultimately passed in the House, but no action was

2. Hope M. Babcock, *Illegal Marijuana Cultivation on Public Lands: Our Federalism on a Very Bad Trip the Morality and Legality of Marijuana Is Becoming Secondary to the Environmental Damage*, 43 ECOLOGY L.Q. 723, 753 (2016); David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567 (2013).

3. Chemerinsky et al., *supra* note 1, at 77.

4. *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 1, 2021), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx [https://perma.cc/G2NN-8MSF].

5. *See id.* at tbl.1.

6. *Id.*

7. *Decriminalization*, NORML, https://norml.org/laws/decriminalization/ [https://perma.cc/9F4C-S7VS].

8. Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%*, GALLUP (Nov. 9, 2020), https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx [https://perma.cc/A9QA-D9EK] (reporting that support for marijuana legalization has reached a record high of 68% among U.S. adults).

9. *See* Andrew Smith, *Federal Cannabis Legalization: Policy Issues to Be Addressed,* JDSUPRA, (Jan. 15, 2021), https://www.jdsupra.com/legalnews/federal-cannabis-legalization-policy-7061834/ [https://perma.cc/DY9Q-W2U5] ("[T]he cannabis industry must be ready for federal cannabis legalization to occur within the 117th Congress and signed into law by soon to be President Joe Biden."); *see also* Tim Seymour & Brady Cobb, *Op-ed: Cannabis Investors Are About to Ride a Legislative Tailwind in Washington,* CNBC (Feb. 5, 2021), https://www.cnbc.com/2021/02/05/op-ed-cannabis-investors-are-about-to-ride-a-legislative-tailwind-in-washington.html [https://perma.cc/RS96-K9AM].

10. Amanda Becker, *Harris Introduces Senate Bill to Decriminalize Marijuana, Expunge Convictions*, REUTERS (July 23, 2019), https://www.reuters.com/article/us-usa-election-harris/harris-introduces-senate-bill-to-decriminalize-marijuana-expunge-convictions-idUSKCN1UI13O [https://perma.cc/222M-S5JP].

11. Natalie Fertig, *House Set to Vote on Marijuana Legalization,* POLITICO (Aug. 8, 2020), https://www.politico.com/news/2020/08/28/marijuana-legalization-house-vote-404455 [https://perma.cc/JCL6-HEQ7].

taken in the Republican-controlled Senate.[12] With Democratic control of the House, Senate, and the Presidency, federal legislation legalizing and decriminalizing marijuana is now politically well positioned. Highlighting the issue's importance to his caucus, Senate Majority Leader Chuck Schumer stated in February 2021 that marijuana reform legislation would be a legislative priority in the current congressional session.[13] But while some advocates may herald this federal reform as a necessity for social and economic justice, an important reality cannot be ignored: the fact that nineteen states still criminalize and prohibit marijuana-related activities.[14]

Since states began legalizing and decriminalizing marijuana, numerous reports and studies have documented the adverse societal effects of marijuana, including increased rates of addiction, increased marijuana use, impaired cognitive development, and higher rates of marijuana-related fatalities.[15] Accordingly, many states have decided to maintain laws that prohibit and criminalize marijuana-related activities. Throughout the rise of the state legalization movement, legal experts and commentators have heralded marijuana as a "state issue"[16] and advocated that states are "laboratories of

12. Kendall A. Schnurpel & Kate E. Trinkle, *U.S. House of Representatives Reintroduces the MORE Act: Will 2021 be the Year Federal Cannabis Prohibition Finally Ends?,* LEXOLOGY (Jun. 14, 2021), https://www.lexology.com/library/detail.aspx?g=f9a96fb0-94be-44e5-a187-0f605b5f5f31 [https://perma.cc/6D8N-42Z3]. The MORE Act initially passed the House by a vote of 228–164, with five Republicans voting in favor of the Act. Ryan Bort, *Inside the Weed Legalization Bill the House of Representatives Just Passed*, ROLLING STONE (Dec. 4, 2020), https://www.rollingstone.com/culture/culture-features/more-act-marijuana-legalization-bill-vote-1097723/ [https://perma.cc/Q4KB-BN9J].

13. Kim Lyons, *Sens. Booker, Schumer, and Wyden Will Advance Cannabis Legislation,* THE VERGE (Feb. 1, 2021), https://www.theverge.com/2021/2/1/22260844/cannabis-legislation-congress-democrats-congress [https://perma.cc/73JF-B6WM].

14. *See Decriminalization*, *supra* note 7. Advocacy groups such as Smart Approaches to Marijuana oppose the legalization and commercialization of marijuana for a myriad of scientific and social reasons. *See, e.g.*, *Center for Marijuana Resources,* SMART APPROACHES TO MARIJUANA, https://learnaboutsam.org/resource [https://perma.cc/K63M-LG37].

15. *See, e.g.*, Magdalena Cerdá et al., *Association Between Recreational Marijuana Legalization in the United States and Changes in Marijuana Use and Cannabis Use Disorder from 2008 to 2016*, 77 JAMA PSYCHIATRY 165, 168 (2020); Nora D. Volkow et al., *Adverse Health Effects of Marijuana Use*, 370 NEW ENG. J. MED. 2219, 2221 (2014); Kathleen E. Feeney, *Adverse Effects of Marijuana Use*, 83 LINACRE Q. 174, 175–76 (2016); David G. Evans, *Marijuana Legalization Will Cause Many Problems for Missouri Law Enforcement and Schools*, 116 MO. MED. 164, 165 (2019); SMART APPROACHES TO MARIJUANA, LESSONS LEARNED FROM STATE MARIJUANA LEGALIZATION 7–8 (2020), https://learnaboutsam.org/wp-content/uploads/2020/12/2020-Impact-Report1.pdf. [https://perma.cc/L9HJ-DYAE].

16. David Firestone, Opinion, *Let States Decide on Marijuana*, N.Y. TIMES (July 26, 2014), https://www.nytimes.com/2014/07/27/opinion/sunday/high-time-let-states-decide-on-marijuana.html [https://perma.cc/R4RL-F4AT] ("A decision about what kinds of substances to permit, and under what conditions, belongs in the purview of the states, as alcohol is handled. . . . It's a choice that states should be allowed to make based on their culture and their values."); Rob Natelson, *Who Can Control Marijuana? The Constitution Says It's the States*, THE HILL (Aug. 1, 2017), https://thehill.com/blogs/pundits-blog/state-local-politics/344538-sick-of-marijuana-according-to-the-constitution-power [https://perma.cc/AV2C-R7J8].

democracy"[17] permitted to experiment with marijuana policies. At the time, these experts and commentators advanced these arguments to promote state legalization against the background of federal prohibition. However, this principled justification—that states should decide their own marijuana policies—should still hold firm in the event marijuana is legalized and decriminalized at the federal level. As "laboratories of democracy," states should have the ability to both catalyze new experiments and shut the door on experiments through criminalization and prohibition, if they so choose.

Given this reality, the prospect of federal marijuana reform stands to usher in a new federalism debate of the same import and scope as the current federalism conflict. If marijuana is federally legalized and decriminalized, the question becomes whether state laws criminalizing and prohibiting marijuana-related activities could validly coexist or whether they would be preempted by the federal legislation (via the Supremacy Clause) or invalidated for unduly burdening interstate commerce (via the Dormant Commerce Clause). In effect, the previously evaluated federalism conflict would be flipped, as the new inquiry would put state prohibition and criminalization up against the backdrop of federal legalization and decriminalization.

Ultimately, this Article contends that the viability of state laws restricting marijuana will hinge on congressional intent, either express or implied. The inquiry will be whether federal marijuana legislation intends to preempt contrary state laws or whether it only intends to alter federal provisions without stripping the states of regulatory power. If Congress intends to decriminalize and/or legalize marijuana nationally with no room for state regulation, then conflicting state laws would be preempted under the Supremacy Clause. However, if Congress intends to decriminalize and/or legalize marijuana without eliminating the states' existing marijuana regulatory authority, then state laws would not necessarily be preempted under the Supremacy Clause. Nonetheless, even if state laws avoid federal preemption under the Supremacy Clause, they may still be subject to constitutional invalidation pursuant to the Dormant Commerce Clause for unduly burdening interstate commerce. Based on the Supreme Court's Dormant Commerce Clause precedent, the outcome of a challenge to state marijuana laws on Dormant Commerce Clause grounds is uncertain.

To date, the most popular and politically successful proposal to federally decriminalize and legalize marijuana is the Marijuana Opportunity Reinvestment and Expungement Act of 2020 (the MORE Act).[18] In its current

17. Chemerinsky et al., *supra* note 1, at 77 & n.1 ("The struggle over marijuana regulation is one of the most important federalism conflicts in a generation. Unprecedented public support for legalizing marijuana has emboldened Brandeisian experimentation across the country.").

18. Marijuana Opportunity Reinvestment and Expungement Act of 2020, H.R. 3884, 116th Cong. (2020); *see also* JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10556, THE MORE ACT: HOUSE PLANS HISTORIC VOTE ON FEDERAL MARIJUANA LEGALIZATION (2020).

form, the MORE Act lacks express provisions addressing the states' power to regulate marijuana vis-à-vis the Supremacy Clause and the Commerce Clause, despite some congressional records indicating congressional intent to reserve regulatory power to the states.[19] Based on recent preemption jurisprudence, the Supreme Court has emphasized that the text and structure of congressional acts are paramount in the Court's preemption analysis, rather than "abstract and unenacted legislative desires"[20] such as congressional records. Absent the addition of express statutory provisions to the MORE Act or future marijuana legislation, the fate of the states' power to criminalize and prohibit marijuana within their own borders will be decided by the Article III judiciary. Given the decades-long debate over legalization, differing public opinion across demographics,[21] variations in state approaches to marijuana,[22] and ardent advocacy on both sides of the debate,[23] it would be wholly undemocratic for an unelected judiciary to dictate nationwide marijuana policy.

In light of looming constitutional ambiguity, this Article argues that Congress can and should avoid all uncertainty by explicitly, in its federal legislation, disavowing any intent to preempt state marijuana laws and granting states power to regulate and criminalize marijuana. The Supreme Court has explicitly acknowledged that Congress may allow states to discriminate against interstate commerce, as long as Congress expresses this intent in express, unambiguous terms.[24] Similarly, Congress can include an explicit anti-preemption provision in federal legislation. If both provisions are included, states would retain the power to maintain and enact laws that prohibit and criminalize marijuana-related activities within their own borders. Without these provisions, this difficult federalism question would fall to the judiciary to decide—an outcome that can and should be avoided.

This Article proceeds in five parts. Part II briefly traces the historical background of marijuana regulation and evaluates the existing literature on

19. 166 Cong. Rec. H6819, H6828, H6835, H6837 (daily ed. Dec. 4, 2020) (statements of Rep. Sheila Jackson Lee, Rep. Earl Blumenauer, Rep. Tulsi Gabbard, and Rep. Richard Neal); *see also* LAMPE, *supra* note 18, at 3 (stating that the MORE Act "would not directly alter the status of cannabis under state law" because "states are free to regulate substances that are not subject to the CSA or other federal law provided there is no 'positive conflict . . . such that the [CSA and state law] cannot consistently stand together'").

20. Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1907 (2019).

21. Brenan, *supra* note 8.

22. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 4.

23. *See Decriminalization*, *supra* note 7. *See generally Center for Marijuana Resources,* SMART APPROACHES TO MARIJUANA, https://learnaboutsam.org/resource [https://perma.cc/K63M-LG37].

24. New York v. United States, 505 U.S. 144, *on remand* 978 F.2d 705 ("Congress can easily lift it: Commerce clause's limitation on states' ability to discriminate against interstate commerce may be lifted by expression of unambiguous intent of Congress."); New England Power Co. v. New Hampshire, 455 U.S. 331, 339–40 (1982) ("Congress may use its powers under this clause to confer upon the states an ability to restrict flow of interstate commerce that they would not otherwise enjoy."); *accord* Int'l Shoe Co. v. Wash. Off. of Unemployment Comp. & Placement, 326 U.S. 310, 322 (1945).

marijuana federalism. Part III evaluates the Supremacy Clause's possible application in the context of state marijuana laws co-existing (or not) against the background of federal legalization and/or decriminalization. Part IV evaluates the Dormant Commerce Clause. Part V analyzes the MORE Act. Finally, Part VI concludes with legislative recommendations designed to ensure that states retain power to prohibit and criminalize marijuana, in the event of federal legalization and/or decriminalization.

Importantly, in this Article, I do not take any position on whether marijuana should be legalized and/or decriminalized. This Article's analysis opines solely on the federalism issues involved in federal marijuana reform.

II. OVERVIEW OF MARIJUANA REGULATION

A. Brief Historical Overview of Marijuana Regulation

Marijuana was first criminalized by the states in the 1910s.[25] Thereafter, in 1937, Congress regulated marijuana for the first time through the Marijuana Tax Act, which removed marijuana as a federally approved medicine.[26] Subsequently, in 1970, Congress passed the Controlled Substance Act (CSA), which classified marijuana as a Schedule I drug and is still in effect today.[27] A drug is labeled as Schedule I if it has a "high potential for abuse," has "no currently accepted medical use in treatment in the United States," and "there is a lack of accepted safety for use of the drug . . . under medical supervision."[28] The CSA prohibited and punished the manufacture, distribution, and possession of marijuana in all fifty states.[29] States subsequently passed their own marijuana prohibition laws, and since then, "nearly all marijuana enforcement in the United States has taken place at the state level."[30]

In 1996, California voters approved Proposition 215, which legalized the use of medical marijuana for individuals with a doctor recommendation.[31] Over the following four years, six more states—Alaska, Oregon, Washington,

25. Chemerinsky et al., *supra* note 1, at 81. For a full history of marijuana regulation, see Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010–82 (1970).

26. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (enacted Aug. 2, 1937) (repealed Aug. 10, 1956); Chemerinsky et al., *supra* note 1, at 82.

27. Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 812(c)(Schedule I)(c)(10).

28. *Id.* § 812(b)(1).

29. Chemerinsky et al., *supra* note 1, at 84.

30. *Id.*

31. *Id.* at 85.

Hawaii, Colorado, and Nevada—legalized medical marijuana.[32] By January 2009, thirteen states followed suit, and President Obama's term ushered in a confused expansion of marijuana operations in the states. In the fall of 2009, Deputy Attorney General David Ogden issued a memorandum on federal marijuana enforcement: "As a general matter, pursuit of [federal] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[33] Many states and marijuana industry players viewed the Ogden Memorandum as a declaration of a federal hands-off approach to marijuana, and the number of marijuana dispensaries then ballooned in many states.[34] But in 2010, when California attempted to legalize marijuana for all recreational adult users, Attorney General Eric Holder issued a stern warning that the federal government would not be as lenient with recreational marijuana as it had been with medical marijuana.[35] The California voter proposition to legalize recreational marijuana subsequently failed.[36] In 2011, the Department of Justice issued another memorandum to U.S. Attorneys clarifying the 2009 Ogden Memorandum: "The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law."[37]

Despite this new memorandum, Colorado and Washington passed ballot initiatives in November 2012, replacing state marijuana prohibition laws with a tax and regulation system.[38] A few months after these state initiatives, the federal government advised that it would forgo legal challenges to these state systems.[39] Since then, the number of states permitting the use of medical marijuana and recreational marijuana has increased dramatically. Today, thirty-six states allow the use of medical marijuana,[40] fifteen states allow adult recreational marijuana use,[41] and twenty-six states have decriminalized marijuana either fully or partially. The federal government's approach to

32. *Id.*

33. Memorandum from David W. Odgen, Deputy Att'y Gen., Dep't of Just., to selected U.S. Att'ys (Oct. 19, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf [https://perma.cc/5Q6T-27HV].

34. Chemerinsky et al., *supra* note 1, at 86–87.

35. *Id.* at 87.

36. *Id.*

37. Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Just., to U.S. Att'ys (June 29, 2011), www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf [https://perma.cc/X9N5-M88V].

38. Chemerinsky et al., *supra* note 1, at 88–89 ("[T]hey immediately repealed criminal penalties for possession of small amounts of marijuana and instructed their legislatures to implement a regulatory scheme for the taxation and regulation of recreational marijuana production and sale.").

39. *Id.* at 89–90.

40. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 4.

41. *Id.* at tbl.1.

states legalizing marijuana has been regarded as a policy of "tolerance,"[42] partially due to a lack of federal resources to enforce federal laws in these legalizing states.[43]

Notwithstanding the CSA's federal criminalization and prohibition of marijuana, states have permitted recreational marijuana use by simply removing state-level criminal and civil penalties.[44] In upholding these state marijuana laws, many courts have determined that these laws are "consistent with federal law because they do not authorize violations of federal law through encouraging, promoting, or requiring the use of marijuana."[45] Accordingly, federal preemption is "avoided," and these state laws have been upheld.

B. An Overview of Proposed Marijuana Regulatory Systems

This subsection traces existing proposals for marijuana regulation. Given the political environment in past decades, the majority of these proposals were premised on the idea that descheduling marijuana from the CSA was politically unattainable; consequently, these proposals raised alternative methods for legalization and decriminalization of marijuana.[46] Contrary to this premise, this Article is grounded in the notion that marijuana legalization and decriminalization will come through federal legislation that deschedules marijuana from the CSA, which is the same path pursued by the MORE Act.[47] This Article operates under this "new" assumption because today's political environment is far more favorable to federal marijuana legislation. Additionally, many legal experts and industry players have recognized that securing federal legislative action is the ultimate goal of marijuana reform.[48]

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42. Babcock, *supra* note 2, at 754.

43. *Id.*

44. For a more in-depth overview of the "collapse" of marijuana prohibitions at the state level, see Richard J. Bonnie, *The Surprising Collapse of Marijuana Prohibition: What Now?*, 50 U.C. DAVIS L. REV. 573, 587–90 (2016).

45. Gabriel J. Chin, *Policy, Preemption, and Pot: Extraterritorial Citizen Jurisdiction*, 58 B.C. L. REV. 929, 932 (2017).

46. Susan F. Mandiberg, *A Hybrid Approach to Marijuana Federalism*, 23 LEWIS & CLARK L. REV. 823, 823 (2019) ("There has been significant academic discussion about possible regulatory frameworks to address this issue.").

47. LAMPE, *supra* note 18, at 1 ("[T]he MORE Act would remove marijuana from the schedules of controlled substances under the Controlled Substances Act (CSA), legalizing many marijuana-related activities at the federal level.").

48. *See, e.g.*, Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV. 1301, 1307 (2013). Currently, the federal government does not enforce federal marijuana laws to the fullest extent, but Chemerinsky et al. have acknowledged that, even without federal enforcement, adverse consequences still flow from merely maintaining these federal laws on the books. Chemerinsky et al., *supra* note 1, at 79. For example, banking institutions, insurance companies, investors, and lawyers—concerned about violations of federal drug policies—"are reluctant to provide

For example, Professor Steven Duke has stated, "Unless reform occurs at the federal level, though, state-level reforms face a myriad of limitations and uncertainties."[49] Notably, this Article does not take a stance on the "best" regulatory structure for marijuana; rather, it contemplates a reality in which marijuana will be legalized and decriminalized through federal legislation. From this premise, this Article evaluates the constitutional issues that Congress must address to ensure that states retain the power to prohibit and criminalize marijuana if states so choose.

Within that framework, the federal government could choose to fully legalize and decriminalize marijuana, partially legalize and decriminalize marijuana, fully decriminalize and partially legalize marijuana, and so on. Regardless of the degrees and permutations of federal legislation, Congress will need to address the constitutional obstacles contemplated in this Article.[50] But before addressing these constitutional obstacles in subsequent sections, this subsection presents the reader with an overview of alternative regulatory proposals—many of which fall short of comprehensive federal legislation—to provide the reader with a broader background on marijuana regulation.

Prior to 2020, comprehensive federal marijuana reform was virtually unattainable, due to varying stints of Republican leadership and other political obstacles.[51] Accordingly, over the past decade, legal experts and academics have focused on proposing alternative solutions. In summarizing these proposed regulatory regimes, Professor Hope Babcock has identified three general categories of reform proposals: (1) nullification of the CSA's application to the states,[52] (2) state opt outs and waivers from the CSA,[53] and (3) cooperative or shared federalism approaches allocating responsibilities

investment capital, legal advice, or other basic professional services necessary for marijuana businesses to function." *Id.* Furthermore, disclosure of marijuana use can jeopardize an individual's ability to hold a job, maintain parental rights, and receive government benefits. *Id.*

49. Duke, *supra* note 48, at 1302. For example, "[s]ome professional ethics panels are of the opinion that a lawyer may not give legal advice to an active distributor of medical marijuana, even if the operation is entirely consistent with the state's laws because such advice would be assisting the client to commit a federal crime." *Id.* at 1306 n.29.

50. All these legislative permutations must consider the effects of the Dormant Commerce Clause and the federal preemption doctrines on the states' ability to criminalize and prohibit marijuana-related activities because, as the federal government alters its criminal and prohibitory marijuana framework, questions will arise as to whether those alterations have a preemptive effect on state frameworks and powers.

51. *See* Babcock, *supra* note 2, at 725–26 (observing "it is highly unlikely that Congress will delist marijuana from Schedule I of the Controlled Substances Act (CSA) or that an Administration will decriminalize it, and that more states will authorize its use"); Chemerinsky et al., *supra* note 1, at 122 ("Short of a decision by Congress to drop marijuana from the CSA entirely—an unlikely political outcome even given the majority of Americans who might favor it—a more modest federal legislative solution is needed.").

52. Babcock, *supra* note 2, at 726.

53. *Id.; see also* Chemerinsky et al., *supra* note 1, at 115.

between the federal government and states.[54] Prior to delving into the details of these proposals, it is important to emphasize two important qualifications. First, all of these regimes were proposed under the assumption that major federal legislation was unattainable, and thus, they propose solutions "short of delisting the drug" from Schedule I of the CSA.[55] Second, according to Babcock, "[e]ach of the approaches . . . suffers from constitutional uncertainty or the need for enabling legislative authority."[56] Building off of the three general approaches, Professor Susan F. Mandiberg also proposed a fourth "hybrid approach" in which the federal and state governments' regulatory jurisdictions differ based on marijuana-related expertise.[57] Unlike the other three approaches, Mandiberg specifically contemplated a post-legalization and post-criminalization federal environment, which is the same reality contemplated in this Article. However, Mandiberg did not evaluate the constitutional issues and path for achieving that result. Beginning with the three approaches recited by Babcock, this section will now provide a brief summary of the proposed regulatory regimes for marijuana.

Proponents of the nullification approach essentially argue that states can "take over marijuana regulation, as is their right[,]" because "the fact that state officials do not work for federal authorities affords the states important opportunities to influence—and sometimes defy—the enforcement of federal law."[58] Under this theory, states could simply nullify federal marijuana laws and pursue their own regulatory systems. But according to Babcock, this approach is "a shaky constitutional foundation for any resolution of the existing federalism conflict[]" due to its theoretical reasoning and a lack of constitutional precedent on contemporary nullification.[59]

The opt-out-and-waiver approach calls for a regulatory structure in which states can opt out of, or secure a waiver excluding them from, the federal CSA marijuana prohibition.[60] To this end, Professor Sam Kamin has argued that Congress should amend the CSA to allow opt outs and empower the U.S. Attorney General "to certify that a state is regulating marijuana in a manner consistent with federal priorities."[61] If a state does not satisfy the federal

54. Babcock, *supra* note 2, at 726; s*ee also* Chemerinsky et al., *supra* note 1, at 80.

55. Babcock, *supra* note 2, at 725–26.

56. *Id.* at 761.

57. Mandiberg, *supra* note 46, at 826.

58. Babcock, *supra* note 2, at 755 (citing Young, *supra* note 1, at 770) ("[S]tate officials derive the power to defy federal policy from the fact that they are not servants, but rather officers of a different government with an independent base of legitimacy and accountability.").

59. Babcock, *supra* note 2, at 756.

60. *Id.*

61. Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1120; *see also* Babcock, *supra* note 2, at 756 n.239 ("A variation of waiver is to allow states to 'nullify the application of the CSA in their jurisdictions'"); Young, *supra* note 1, at 772 (suggesting that, unlike South Carolina's approach to nullification in the 1800s, contemporary nullification may be a "winning strategy").

guidelines, the state would remain under an "essentially unenforceable federal prohibition" rather than a federal regulatory structure.[62] Chemerinsky et al. referred to this approach as "permissive federalism."[63] And according to Babcock, because this approach does not require the repeal of the CSA, "it may offer a more appealing political resolution of the federalism conflict."[64] This approach would still require congressional legislation, however, to authorize the waiver process in the first instance.[65]

In one of the most widely cited articles on marijuana federalism and regulation,[66] Erwin Chemerinsky, Jolene Forman, Allen Hopper, and Sam Kamin presented the idea of cooperative and shared regulatory approaches to marijuana. Notably, their contributions came in an environment in which "Congress d[id] not yet appear inclined to completely end or even to significantly curtail the federal prohibition of marijuana."[67] Absent comprehensive federal legalization, they proposed a cooperative federalism structure "that allow[ed] states meeting specified federal criteria—criteria along lines that the DOJ has already set forth—to opt out of the CSA provisions relating to marijuana."[68] After meeting federal guidelines, state laws "would exclusively govern marijuana activities within those states opting out of the CSA but nothing would change in those states content with the CSA's terms."[69]

Another example of an existing cooperative and shared federalism regulatory model is the alcohol model, in which both the states and federal government retain power to regulate alcohol in different capacities. According to Professor Steven Duke, this alcohol regulatory model can serve as an example for marijuana regulation:

> Under a regulatory model similar to that for alcohol, the federal government would repeal its prohibition of the possession and distribution of marijuana, but it might retain some restrictions against interstate commerce in drugs that are unlicensed, mislabeled, inadequately identified, or lacking appropriate disclosures and

62. Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE W. RES. L. REV. 689, 708 (2015). *See* Chemerinsky et al., *supra* note 1, at 80.

63. Chemerinsky et al., *supra* note 1, at 115.

64. Babcock, *supra* note 2, at 757.

65. *Id.* at 758.

66. Chemerinsky et al., *supra* note 1.

67. *Id.* at 114. The authors further state that "short of a decision by Congress to drop marijuana from the CSA entirely—an unlikely political outcome even given the majority of Americans who might favor it—a more modest federal legislative solution is needed." *Id.* at 122.

68. *Id.*

69. *Id.* ("This proposed approach embodies the best of cooperative federalism; those states that prefer the status quo may keep it while those states that embrace marijuana law reform will be allowed to experiment with alternative models of marijuana regulation.")

> warnings. The federal government would share with the states the power to tax the manufacture and distribution of the product. As with alcohol, most regulation would be left to the individual states. Some states might confine the distribution of the drug to state-owned institutions; other states would license production and distribution to private persons or organizations.[70]

In this alcohol-like regulatory regime, Duke proposed a repeal of the federal prohibition of marijuana through a constitutional amendment.[71] Similarly, Professor Brannon Denning has suggested that a constitutional amendment for marijuana could deliver the same federalism balance established for alcohol by the Twenty-first Amendment.[72] Today, there is no serious consideration for a constitutional amendment, and federal legislation is the main proposed path for comprehensive marijuana reform. Given the heightened requirement for passing a constitutional amendment,[73] it is highly unlikely that an amendment would be the method for marijuana reform.

An expert in the history of alcohol prohibition, Professor Sean Beienburg has observed that the Twenty-first Amendment's statutory predecessor—the Webb-Kenyon Act—could be instructive in formulating interim federal marijuana legislation that remedies the federalism conflict:

> Rather than endorsing a full federal repeal, legalization advocates could consider, as an interim measure, a Webb-Kenyon for marijuana offering robust federal assistance interdicting importation into nonmarijuana states only. This would allow antimarijuana members of Congress to justify a flip, or, at least, nonobstruction, on both federalist grounds and the grounds of the protection of their own

70. Duke, *supra* note 48, at 1308; *see also* Babcock, *supra* note 2, at 758–59 ("The cooperative, or shared, federalism approach is reflected in current alcohol policy. Alcohol regulation may be a good template for marijuana policy because of the obvious parallels between the two histories.").

71. *See* Duke, *supra* note 48, at 1318.

72. Babcock, *supra* note 2, at 759 (citing Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts,* 65 CASE W. RES. L. REV. 567, 594 (2015) (arguing that, absent a constitutional amendment, the "second-best outcome for state experimentation would be legislation that (1) clarified the legal status of state decriminalization or compassionate use laws under the CSA and (2) permitted states to regulate marijuana free from the strictures of the DCCD").

73. Brenda Erickson, *[LegisBrief] Amending the U.S. Constitution*, NAT'L CONF. OF STATE LEGISLATURES (August 2017), https://www.ncsl.org/research/about-state-legislatures/amending-the-u-s-constitution.aspx [https://perma.cc/LB49-EJS8].

policy preferences within their state—resurrecting the "model federalism" of the original Webb-Kenyon Act.[74]

In contrast with these proposals, Professor Richard Bonnie has explicitly admonished: "[t]he right starting point is not the alcohol model. It is a *noncommercialized 'containment' model*."[75] According to Bonnie, the question of marijuana regulation is perplexing and dates back to 1972 when the National Commission on Marihuana and Drug Abuse did not "know enough about regulatory models" to permit widespread recreational marijuana use.[76] The Commission acknowledged that "the only available models—those being used for tobacco and alcohol—are failures from a public health point of view."[77] Emphasizing the need for federal regulatory oversight, Bonnie concluded that "Congress should reschedule marijuana . . . under the [CSA]" and establish federal criteria for states seeking to permit medical and recreational marijuana use.[78] But acknowledging that federal legalization was unlikely due to the "paralysis in Congress" at the time, Bonnie argued that, at a minimum, the federal government should establish "uniform measures for monitoring the effects of policy innovations" to help guide state experimentation in the field of marijuana.[79]

In contrast with these regulatory proposals, other academics, such as Professor Alex Kreit and Professor Mandiberg, have expressed greater optimism for federal legislative action on legalization and decriminalization. Kreit and Mandiberg have evaluated possible regulatory regimes in the hypothetical environment of federal legalization and decriminalization. Specifically, Kreit has observed that Congress "could conceivably decide to leave federal prohibition in place in states that want it and directly regulate marijuana in states that have legalized."[80] Or alternatively, Congress could eliminate federal prohibition and permit states to ban marijuana if they so choose.[81]

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74. SEAN BEIENBURG, PROHIBITION, THE CONSTITUTION, AND STATES' RIGHTS 249 (2019); *see also* Evan W. Saunders, Note, *It's 1919 Somewhere: What* Tennessee Wine & Spirits Retailers Association v. Thomas *Means for the National Hangover of the Twenty-First Amendment, the Dormant Commerce Clause, and Federal Legalization of Intoxicating Substances*, 86 BROOK. L. REV. 261, 288 (2020).

75. Bonnie, *supra* note 44, at 592 & n.41 ("Although there are important differences between marijuana and tobacco, the emerging model of tobacco control may offer a useful lesson for regulation of marijuana."). *See generally* INST. OF MED., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION (Richard J. Bonnie et al. eds., 2007) (setting forth a two-pronged strategy to substantially reduce smoking, so that it is no longer a significant public health problem).

76. Bonnie, *supra* note 44, at 590.

77. *Id.*

78. *Id.* at 592.

79. *Id.*

80. Kreit, *supra* note 62, at 709.

81. *Id.*

While Kreit did not address the underlying constitutionality for reaching these results, he acknowledged that, at the time in 2015, "[t]he only comprehensive proposal of this sort" was Representative Jared Polis's 2013 bill: the Ending Federal Marijuana Prohibition Act.[82] The stated purpose of the bill was "[t]o decriminalize marijuana at the Federal level, to leave to the States a power to regulate marijuana that is similar to the power they have to regulate alcohol, and for other purposes."[83] This bill exempted marijuana from Schedule I of the CSA, placed the Bureau of Alcohol, Tobacco, Marijuana, Firearms, and Explosives in charge of marijuana enforcement, and included marijuana in the Wilson Act and the Webb-Kenyon Act, which are the federal statutes controlling alcohol regulation.[84] The bill also allowed the states to handle the licensing and regulation of marijuana commerce; however, the federal government would still maintain control of business permits and could impose limitations to "combat commercialization."[85] The bill was introduced in the House in 2013, but a vote was never taken.[86] Although Beienburg—who observed that the Webb-Kenyon Act could be an interim marijuana reform measure—does not reference Representative Polis's 2013 bill, Beienburg's proposal closely mirrors Representative Polis's approach of incorporating marijuana into the Webb-Kenyon Act.[87]

Similar to Kreit, Professor Mandiberg also contemplated a marijuana regulatory regime in a post-legalization and post-decriminalization federal environment. Mandiberg started by posing the question: If marijuana is decriminalized federally, "how should the states and the federal government divide regulatory responsibilities?"[88] Based on evaluations of administrative efficiency and effectiveness, Mandiberg concluded that the best model for marijuana regulation is a "hybrid approach" in which the federal government and states shared regulatory control over different aspects of marijuana-related activities.[89] Before presenting this "hybrid" approach, Mandiberg acknowledged that her proposal hinged on four premises: (1) marijuana-related activities are federally decriminalized, "although an individual state would be free to retain or create criminal sanctions,"[90] (2) "the federal

82. *Id.*; Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013).
83. H.R. 499.
84. Kreit, *supra* note 62, at 709–10.
85. *Id.* at 710.
86. H.R. 499.
87. Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013). BEIENBURG, *supra* note 74, at 249.
88. Mandiberg, *supra* note 46, at 823.
89. *Id.* at 850 ("A hybrid approach, in which different models apply to different scales of activities, may be best suited to maximize both state and federal interests in regulation."). Mandiberg clarifies that "[i]n a hybrid approach, whether federal and state laws overlap or exist in separate spheres should depend upon what was most effective for the type of activity being regulated." *Id.* at 843.
90. *Id.* at 843.

government should not be assumed to have a significant interest in regulating marijuana based merely on the fact that it currently does so,"[91] (3) the federal government's regulatory involvement with marijuana should be "relatively limited,"[92] and (4) "states have a more legitimate interest in, and are better able to regulate, most marijuana-related activities, similar to the way states currently regulate alcohol retail operations."[93]

According to Mandiberg, the federal government would have exclusive control over the international importation and exportation of marijuana products, the intrastate movement of marijuana, and packaging and labeling. Simultaneously, the states would enjoy "[e]xclusive state regulation of marijuana activities within the state," specifically activities that are "individual" and "small-scale" in nature.[94] Mandiberg analogized this state-based regulatory approach to that of alcohol, in which alcoholic beverages brought into a state are subsequently "subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State."[95]

However, given her primary focus on regulatory administrability and effectiveness, Mandiberg did not fully evaluate and scrutinize the constitutional foundations and obstacles to achieving this regulatory result. Mandiberg briefly stated that "[t]he search [for a marijuana regulatory model] does not question whether the federal government is constitutionally empowered to regulate marijuana and preempt conflicting state laws: it surely has those powers."[96] While Mandiberg's statement is correct, it oversimplifies the debate. While Congress undoubtedly has the authority to preempt state laws, there are vital nuances on this topic that warrant detailed evaluation, including questions of which laws would be preempted (civil, criminal, both, some, or none) and how Congress expresses this intent in its legalizing and decriminalizing legislation (express or implied).[97] In its legislation, Congress has the power to define the scope of its federal preemption of state laws.[98] Given that Mandiberg's "hybrid" system allows individual states to retain and create criminal sanctions for marijuana, it would be vital for the viability of her proposal that any federal legislation ensures that states retain the power to criminalize marijuana offenses. Further, with respect to the alcohol analogy,

91. *Id.*

92. *Id.* ("Such involvement should only exist where the nature of the activities makes it worthwhile for the federal government to expend significant administrative and enforcement resources, such as marijuana activities that have a strong effect on interstate commerce.")

93. *Id.*

94. *Id.* at 845–46.

95. *Id.* at 845 (citing 27 U.S.C. § 121 (2018)).

96. *Id.* at 838–39.

97. *Id*.

98. *Id*.

Mandiberg did not address the Twenty-first Amendment's effect on establishing the alcohol regulatory regime, which is a constitutional obstacle for attaining a similar regulatory regime for marijuana.

And finally, in light of potential federal legalization, Andrew Smith of Foley Hoag LLP recently wrote that the cannabis industry must focus on three policy matters: interstate commerce, state regulatory structures, and federal regulatory structures.[99] Most importantly, Smith acknowledged that interstate commerce will be "at [the] forefront of any federal policy to legalize cannabis."[100] Smith recognized that "[m]any legal experts have indicated that unless Congress explicitly states for such a prohibition, states would not be able to prevent the free flow of interstate commerce."[101] According to Smith, "Some industry players have suggested a 'phased' approach to interstate commerce by delaying it for a few years after legalization occurs to allow the state based markets to settle in a new legalized environment."[102] Thereafter, the state-based economic protectionism would be phased out.[103] On the other hand, some industry players have advocated for the immediate "free flow" of marijuana products across state lines with no room for state-based economic protectionism.[104]

Smith also highlighted that states currently have "robust" and "thriving" medical and adult use marijuana markets under state regulatory structures.[105] He asserted, "Any attempt by the Federal Government to reverse that would cripple a growing industry."[106] Consequently, Smith recommended that the "cannabis industry must consider the preservation of the states' ability to license, create their own regulatory structures for cannabis, and avoid a federally mandated regulatory structure for industry."[107] He also advised that the "three-tier system akin to how alcohol is regulated at the federal level" should be avoided.[108] Nonetheless, Smith recognized that the federal government should have an oversight and regulatory function, specifically in the area of "labeling, packaging, ingredient listing and other aspects to ensure product safety and consistency."[109]

99. Smith, *supra* note 9.
100. *Id.*
101. *Id*.
102. *Id.*
103. *See id.*
104. *Id*.
105. *Id*.
106. *Id*.
107. *Id*.
108. *Id.; see also* Saunders, *supra* note 74, at 282 ("Generally, under the three-tiered distribution system, a state's alcohol market is divided among 'producers, wholesalers, and retailers.' Each level of the distribution system receives a different license from the state, and each level, listed above in descending order, can only sell alcohol to the level below it.").
109. Smith, *supra* note 9.

In light of the movement to decriminalize and legalize marijuana, legal academics, legislators, and cannabis industry players have all recognized the importance of establishing an efficient and effective regulatory model for marijuana. While academics have dedicated extensive efforts to devising "alternative" regulatory structures short of descheduling marijuana, the contemporary movement for legalization and decriminalization is now focused on securing comprehensive federal legislation. As Kreit observed in 2015, "Legalization supporters will be less likely to settle for half-measures when it comes to federal marijuana reform as their political strength continues to rise."[110] With marijuana legalized in some form in thirty-six states today, the federal marijuana reform movement is stronger than ever before and is focused on comprehensive federal legislative action—as evidenced by the MORE Act.[111]

Despite the significant potential for federal legislation, legal literature to date has failed to fully analyze the underlying constitutionality of the states' power to regulate and criminalize marijuana-related activities vis-à-vis comprehensive federal legislation. In other words, there has not yet been an inquiry into how the states can retain their power to regulate and criminalize marijuana in the event of federal legalization and/or decriminalization of marijuana. Thus, this Article embarks on this novel constitutional inquiry and argues that both express anti-preemption provisions and express congressional grants of power to the states are required to prevent state marijuana laws from being invalidated under the Supremacy Clause's preemption doctrine and the Dormant Commerce Clause. In fact, the lack of constitutional inquiry to date is reflected in the MORE Act itself, which omits both of these provisions.[112] Absent the inclusion of these express statutory provisions in federal marijuana legislation, the power of the states to prohibit and criminalize marijuana will be shrouded in ambiguity and likely fall to the judiciary to discern based on uncertain precedent.

III. FEDERAL PREEMPTION UNDER THE SUPREMACY CLAUSE

The federal preemption doctrine has been addressed extensively in the context of marijuana legalization, but only in one inquisitorial direction: whether the federal CSA prohibiting marijuana preempts state laws decriminalizing and legalizing marijuana (the "traditional marijuana federalism question"). However, in a world of federal marijuana legalization and/or decriminalization, the preemption question will be flipped, resulting in

110. Kreit, *supra* note 62, at 718.

111. Marijuana Opportunity Reinvestment and Expungement Act of 2020, H.R. 3884, 116th Cong. (2020).

112. *Id.*

the inquiry whether federal legislation legalizing and/or decriminalizing marijuana preempts state laws doing the opposite (the "new marijuana federalism question").[113] In addressing this question, this subsection first presents the federal preemption doctrine. Second, this subsection reviews the Supreme Court's application of the federal preemption doctrine in prior cases and places the new marijuana federalism question in the context of the Court's precedents. Notably, this subsection does not reach a definitive conclusion on whether federal marijuana legislation would preempt state marijuana laws. That conclusion hinges on the (currently unknown) text of the federal marijuana legislation and—if it reaches the courts—on a body of uncertain preemption jurisprudence. Third, this subsection concludes that absent express congressional intent, the answer to this new marijuana federalism question will fall to the judiciary, where past precedent portends an uncertain outcome. And finally, this subsection analyzes federal preemption in the traditional marijuana federalism context to demonstrate the major differences, and minor similarities, with the new marijuana federalism question.

A. The Federal Preemption Doctrine

Grounded in Article VI, Clause Two of the U.S. Constitution, 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; . . ."[114] Under the Supremacy Clause, a federal law trumps state law when both laws are in conflict.[115] This principle serves as the basis for the federal preemption doctrine. As established by the Supreme Court, a preemption analysis necessarily starts "with a presumption that the state statute is valid."[116] To demonstrate preemption, the party challenging the state law must "shoulder[] the burden of overcoming that presumption."[117] In carrying out this analysis, courts rely on two guiding principles: first, the fundamental determination for every preemption analysis turns on congressional intent,[118] and second, the judiciary should assume that "the

113. *See* LAMPE, *supra* note 18, at 3.

114. U.S. CONST. art. VI, cl. 2.

115. Notably, the Supreme Court has consistently held that federal regulations can preempt state laws as well. *See, e.g.*, Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153–54 (1982) ("Federal regulations have no less preemptive effect than federal statutes."); s*ee also* United States v. Shimer, 367 U.S. 374, 381 (1961).

116. Chemerinsky et al., *supra* note 1, at 104.

117. *Id.*

118. *Id.*; *see also* Wyeth v. Levine, 555 U.S. 555, 565 (2009) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

historic police powers of the States" are not preempted by federal law "unless that was the clear and manifest purpose of Congress."[119]

The two general types of federal preemption are express preemption and implied preemption.[120] To establish express preemption, Congress can expressly state, in a statute, its intent to preempt state laws.[121] In the case of express preemption, the courts rely on the plain language of the legislative text to determine Congress's intent to preempt state laws.[122] Alternatively, if Congress does not provide an express preemption provision, Congress's intent to preempt is often "*impliedly*" discerned from the federal statute's purpose and structure.[123] Under the category of implied preemption, courts and academics have used different labels to describe the types of implied preemption—sometimes inconsistently.[124] While the Supreme Court has acknowledged that these categories "are not rigidly distinct,"[125] courts and academics have identified two general types of implied preemption: field preemption and conflict preemption.[126] Field preemption occurs when federal

119. Chemerinsky et al., *supra* note 1, at 104 (quoting *Lohr*, 518 U.S. at 485); Arizona v. United States, 567 U.S 387, 400 (citing Rice v. Santa Fe Elevator Corp., 311 U.S 218, 230 (1947)). However, other legal commentators have observed that, even if Congress is entering a field traditionally occupied by the states, ultimately "Congress's chosen level of deference to state interests will be reflected in the language that Congress enacts." Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 302 (2000).

120. JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 2 (2019).

121. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

122. S*ee, e.g.*, Chamber of Com. v. Whiting, 563 U.S. 582, 594 (2011) ("When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress'[s] preemptive intent.'" (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) ("When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision *explicitly addressing* that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." (emphasis added) (first quoting Malone v. White Motor Corp., 435 U.S. 497, 505 (1978); and then quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 282 (1987))).

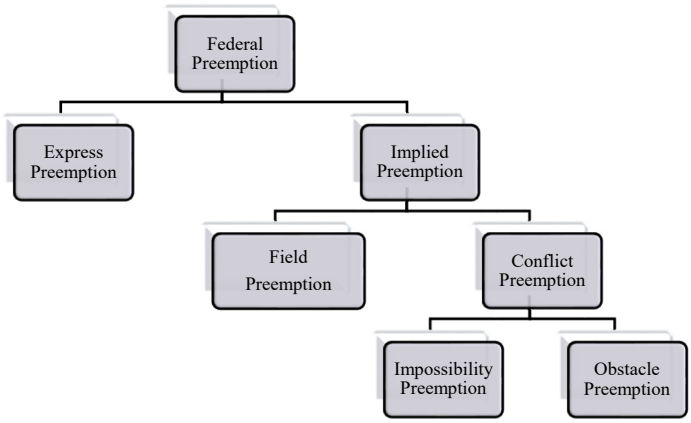
123. SYKES & VANATKO, *supra* note 120, at 2 (emphasis added).

124. In *Virginia Uranium, Inc. v. Warren*, the Supreme Court stated "[t]his Court has sometimes used different labels to describe the different ways in which federal statutes may displace state laws—speaking, for example, of express, field, and conflict preemption." 139 S. Ct. 1894, 1901 (2019). In their widely cited article on marijuana federalism, Chemerinsky et al. stated that "[c]ourts have 'identified four ways in which Congress may preempt state [or local] law:' express, field, conflict, and obstacle preemption." Chereminsky, *supra* note 1, at 104. And more recently, in a 2019 publication on federal preemption, the Congressional Research Service (CRS) stated that express and implied preemption are the two general types of federal preemption. SYKES & VANATKO, *supra* note 120, at 2. According to the CRS, implied preemption has two subcategories: field preemption and conflict preemption. *Id*. Conflict preemption has its own *sub*-sub-categories of impossibility preemption and obstacle preemption. *Id*.

125. *Va. Uranium, Inc.*, 139 S. Ct. 1894, 1901 (2019).

126. SYKES & VANATKO, *supra* note 120, at 2.

law creates a "pervasive scheme of federal regulation"[127] or when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[128] In the case of field preemption, "Congress intends federal law to 'occupy the field[]'"[129] leaving "no room" for additional state legislation.[130] Conflict preemption manifests in two different scenarios, essentially creating two subcategories of conflict preemption: impossibility[131] and obstacle preemption.[132] Impossibility preemption arises when "compliance with both federal and state regulations is a physical impossibility."[133] And obstacle preemption is evident when a state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[134] Given the complex taxonomy of the federal preemption doctrine, the following graphic assists in visualizing and understanding the federal preemption categories:[135]



In evaluating federal preemption, courts and academics have previously asserted that "[e]very preemption case starts 'with a presumption that the state statute is valid.'"[136] But while this principle controlled in the 1980s and

127. *Id*.
128. *Id*. at 17–18.
129. *Id.* at 17 (quoting *Crosby*, 530 U.S. at 372).
130. *Id.* at 3 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
131. *Id.* at 2 (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).
132. *Id.* (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
133. *Id*. at 105–06 (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–143 (1963)).
134. *Id*. at 2 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
135. This graph has been modified from a Congressional Research Service report. *Id.*
136. Chemerinsky et al., *supra* note 1, at 104. Chemerinsky et al. further stated, "In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the

1990s,[137] the "presumption against preemption" has been weakened and inconsistently applied over the past two decades.[138] In 2016, the Supreme Court derogated from past precedent[139] and determined that express preemption cases no longer begin with a "presumption against preemption."[140] According to the Congressional Research Service ("CRS"), the rising popularity of textualism explains the Court's jettison of this presumption in express preemption cases.[141] Generally, textualists are skeptical of "substantive" canons of statutory construction—like the "presumption against preemption"—because such canons artificially tip the scales for a particular outcome, which may not be reflected in the actual statutory text.[142] Accordingly, prominent textualists, including then-professor and now-Supreme Court Justice Amy Coney Barrett, have stated that substantive canons are inconsistent with textualist principles.[143] In judicial practice, these textualist criticisms maintain that a federal statute's express preemption provision, in itself, suffices to establish congressional intent to preempt; and therefore, courts should not import a judicially constructed "presumption against preemption" canon.[144]

Furthermore, the Supreme Court has limited the application of the "presumption against preemption" in other preemption contexts as well.[145] For example, the Court has not applied the presumption in "areas in which the federal government has traditionally had a 'significant' regulatory presence."[146] Demonstrating this point in *United States v. Locke*, the Supreme Court determined that a federal maritime safety statute preempted state laws concerning maritime navigation procedures.[147] The Court reached this conclusion because the state laws regulated maritime commerce—a policy area with a "history of significant federal presence."[148] According to the Court, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers" in policy areas of this nature.[149]

States have traditionally occupied,' [courts] 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*

137. SYKES & VANATKO, *supra* note 120, at 3 & n.21.

138. *Id*. at 3 & n.22.

139. *Id.* at 4 & n.22.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 4–5 & n.28.

144. *Id*. at 5 & n.30.

145. *Id*. ("Specifically, the Court has declined to apply the presumption in cases involving (1) subjects which the states have not traditionally regulated, and (2) areas in which the federal government has traditionally had a "significant" regulatory presence.")

146. *Id.*

147. 529 U.S. 89, 108 (2000).

148. *Id.*

149. *Id.*

But in *Wyeth v. Levine*, the Supreme Court seemingly retreated from this position when it decided to apply the "presumption against preemption."[150] In *Wyeth*, the Court determined that state law claims involving drug labels were not preempted by federal law.[151] The Court recognized the federal government's century-long role in regulating drug labeling but nonetheless applied the presumption and justified its application even in areas where the federal government had regulated extensively.[152] As observed by the Congressional Research Service, the Court's holding and rationale in *Wyeth* "stands in some tension" with the Court's holding in *Locke*.[153] In future judicial proceedings, the application of the presumption in this context is unclear.[154] Given the "history of significant federal presence" in marijuana regulation and criminalization,[155] the question will arise as to whether the Court applies the presumption in the event that state marijuana laws are challenged based on federal preemption. If the Court were to follow the *Locke* approach—which may be more likely given the more textualist composition of the Supreme Court today—then state marijuana laws would not enjoy the "presumption against preemption."

B. The Supreme Court's Interpretation of the Federal Preemption Doctrine and the Application of the Federal Preemption Doctrine

1. Express Preemption and Anti-Preemption

The Supreme Court has repeatedly observed that an express preemption clause "necessarily contains the best evidence of Congress'[s] pre-emptive intent,"[156] and Congress undoubtedly has the power to "enact[] a statute containing an express preemption provision."[157] Congress can expressly determine whether to preempt, the scope of preemption, and the legislative areas that it preempts.[158] To avoid or restrict preemption, Congress can include "savings clauses" in federal statutes that clearly express Congress's

150. 555 U.S. 555, 565 n.3 (2009).

151. *Id.*

152. *Id.*

153. SYKES & VANATKO, *supra* note 120, at 6.

154. *Id.*

155. Marijuana has been regulated by Congress since 1937, and Congress has prohibited and criminalized marijuana, through the Controlled Substances Act, since 1970. Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236; Chemerinsky et al., *supra* note 1, at 82.

156. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993).

157. Arizona v. United States, 567 U.S. 387, 399 (2012).

158. *See* Nelson, *supra* note 119, at 301. *See, e.g.*, Kansas v. Garcia, 140 S. Ct. 791, 802 (2020) (observing that the Immigration Reform and Control Act of 1986's express preemption provision did not apply to certain Kansas statutes because the provision "does not mention state or local laws that impose criminal or civil sanctions on employees or applicants for employment").

intent to *not* preempt certain areas of state laws.[159] Savings clauses represent Congress's intent to allow states to "fill regulatory void[s]" or "enhance protection for affected communities" through additional legislation.[160] Although the caselaw surrounding savings clauses is scarce,[161] three general types of savings clauses have been evaluated by the courts: "(1) 'anti-preemption provisions,' (2) 'compliance savings clauses,' and (3) 'remedies savings clauses.'"[162] Unlike remedies savings clauses,[163] anti-preemption provisions and compliance savings clauses are germane to this Article and will be evaluated at greater length.

Anti-preemption provisions commonly recite the following: (1) "nothing in" the applicable federal law "may be construed to preempt or supersede" specific types of state laws, or (2) the applicable federal law "does not annul, alter, or affect" any state laws "except to the extent that those laws are inconsistent" with the federal law.[164] Some federal statutes with the latter language provide that state laws are not "inconsistent" with the applicable federal statute as long as the state laws are more consumer-protectionist than the federal statute.[165] Many federal courts have recognized the power of anti-preemption provisions to prevent federal preemption of state laws.[166]

Compliance savings clauses stipulate that compliance with federal law does not immunize a person from liability resulting from state law violations.[167] In practice, the Supreme Court has held that compliance savings clauses can limit the preemptive effect of federal laws. In *Geier v. American Honda Motor Co., Inc.*, the Supreme Court addressed whether the National Traffic and Motor Vehicle Safety Act (NTMVSA) preempted state common law claims against car manufacturers.[168] The NTMVSA included both an express preemption provision and a compliance savings clause. The express preemption provision prevented states from implementing motor vehicle safety standards that were different from those prescribed by federal law.[169] And the compliance savings clause stated that full compliance with federal motor vehicle safety standards does not "exempt any person from any liability under common law."[170] The Court acknowledged that the NTMVSA's

159. SYKES & VANATKO, *supra* note 120, at 13.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* Remedies savings clauses dictate that "nothing in" an applicable federal law "shall in any way abridge or alter the remedies now existing at common law or by statute." *Id.* at 15.
164. *Id.* at 13 & n.120.
165. *Id.* at 14 & n.121.
166. *Id.*
167. *Id.*
168. *Id*. at 15 (citing 529 U.S. 861, 868 (2000)).
169. *Id.* (citing 15 U.S.C. § 1392(d)).
170. *Id.* (citing 15 U.S.C. § 1397(k)).

preemption provision, in isolation, could possibly be read to impliedly preempt state common law claims; but holistically, such a reading would render the compliance savings clause ineffective.[171] Relying on the compliance savings clause, the Court concluded "that the NTMVSA did not expressly preempt" state common law claims.[172] Similarly, in *Sprietsma v. Mercury Marine*, the Court reasoned that a nearly identical savings clause in another federal statute "buttresse[d]" the conclusion that state common law claims did not qualify as "law[s] or regulation[s]" within the meaning of the federal statute's preemption clause.[173] Although the Supreme Court has not yet pronounced a widely applicable rule on interpreting compliance savings clauses, the Court has relied on compliance saving clauses to inform the interpretation of, and restrict the reach of, express preemption provisions.[174]

Despite the available statutory mechanisms to expressly enshrine its legislative intent, Congress frequently fails to include express preemption clauses, leaving the issue of discerning preemptive intent to the courts. This has created pervasive problems over the past few decades because the Supreme Court has historically struggled to determine "the appropriate scope of conflict preemption based on frustration of federal objectives."[175] More broadly, courts have been widely criticized for "reading preemption clauses into statutes that did not really imply them."[176] In a widely cited article on federal preemption, Professor Caleb Nelson observed that, "in the absence of a clear-statement rule, . . . laws may be more likely to have preemptive effects that some or all members of Congress did not anticipate."[177] Nelson acknowledged that these issues arise when "Congress vote[s] for bills without fully understanding what they mean."[178] These issues can also arise deliberately "[w]hen members of Congress focus on a particular issue but fail to reach a collective decision about how to resolve it, [so] they sometimes compromise by enacting intentionally ambiguous language that transfers the issue to the courts."[179] Regardless of the motive for omitting these provisions, it is clear that express preemption provisions are the strongest indicators of congressional intent; absent express provisions, courts have struggled to discern congressional intent.

171. *Id.* (citing 529 U.S. 861, 868 (2000)).

172. *Id.* (citing 529 U.S. 861, 868 (2000).

173. *Id*. (citing Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2002)).

174. *Id*.

175. Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U. CAL. DAVIS L. REV. 1, 19 (2001). *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 67 n.20 (1941); Geier v. Am. Honda Motor Co., 529 U.S. 861, 881 (2000).

176. Nelson, *supra* note 119, at 303 (noting that the courts have long struggled to pinpoint a consensus approach on interpreting implied preemption).

177. *Id.* at 302.

178. *Id.*

179. *Id.* at 302 n.235.

As just one example of this phenomenon, many states implemented laws in the 2010s protecting drug manufacturers from products liability suits.[180] Some of these states also passed "fraud-on-the-FDA" provisions, "which removed statutory protections afforded to drug manufacturers . . . if plaintiffs can provide evidence that the drug manufacturer made misrepresentations to the United States Food and Drug Administration ('FDA') during the process of obtaining marketing approval for the drug."[181] A question soon arose as to whether these "fraud-on-the-FDA" provisions were federally preempted by the Federal Drug and Cosmetic Act (FDCA).[182] Because the FDCA lacked an express preemption provision,[183] the federal circuits struggled to discern implied congressional intent, resulting in the Fifth and Sixth Circuits holding in favor of federal preemption and the Second Circuit ruling against federal preemption.[184] The Supreme Court granted *certiorari* to review the Second Circuit's decision and subsequently split evenly without an opinion.[185] As a result, the Second Circuit precedent stayed intact but lacked precedential worth.[186] Legal uncertainty continued to plague state legislatures, citizens, and manufacturers in this field.[187]

In sum, Congress can and should include an express anti-preemption provision and a compliance savings clause in its federal marijuana legislation to ensure that the federal legislation does not preempt state marijuana laws.[188] These provisions would serve as the best evidence of Congress's intent to *not* preempt state marijuana laws. As evidenced in *Geier v. American Honda Motor Co.*, Congress's failure to include an express anti-preemption provision leaves state laws vulnerable to invalidation through implied preemption.

2. Implied Preemption

With respect to implied federal preemption, it has been observed that "[t]he willingness of the Supreme Court to find conflict between state and federal regulations has varied dramatically over time."[189] In fact, the Supreme Court itself has acknowledged that its past preemption cases "are not precise

180. Gaddis, *supra* note 120, at 113.
181. *Id.*
182. *Id.*
183. *Id.* at 117; *see also* Wyeth v. Levine, 555 U.S. 555, 574 (2009).
184. Gaddis, *supra* note 120, at 113.
185. *Id.*
186. *Id.*
187. *Id.* at 113–14.
188. Based on Supreme Court precedent, the anti-preemption provision is likely more effective and valuable than the compliance savings clause, given the fact that the *Geier* Court reasoned "that the savings clause did not create any sort of 'special burden' disfavoring implied preemption."" *Id*. at 15 & n.130 (citing *Geier*, 529 U.S. at 870–71).
189. 3 WILLIAM J. RICH, *Implied preemption resulting from conflict with federal statute, rule, or policy*, *in* MODERN CONSTITUTIONAL LAW § 34:20, 44 (3RD ED. 2020).

guidelines . . . for each case turns on the peculiarities and special features of the federal regulatory scheme in question."[190] The Supreme Court's applications of its own implied preemption categories—conflict, obstacle, and field preemption—often overlap, further clouding the analysis.[191] Nonetheless, a review of precedent over the past few decades will provide some insight into how the Supreme Court *may* address the preemption question presented in this Article: whether federal marijuana legislation preempts state laws that prohibit and/or criminalize marijuana-related activities. Given that the final text of the federal marijuana legislation is currently unknown, this subsection does not arrive at a definitive answer to this question. Rather, it seeks to demonstrate that the Supreme Court's preemption jurisprudence portends an uncertain outcome if Congress fails to include an express preemption provision and leaves the courts to wrestle with an implied preemption analysis.

As a brief review, implied preemption has been broken into two general categories: field and conflict preemption. Conflict preemption then branches into obstacle and impossibility preemption.

a. Field Preemption

When federal legislation contains a "sweeping effect" or national goal of uniformity, the Supreme Court frequently determines that the federal legislation preempts state laws based on field preemption.[192] A field preemption analysis first focuses on defining the exact policy field that Congress has purportedly occupied.[193] In this analysis, "[c]ontext makes an enormous difference."[194] But generally, if a state law regulates in a traditional state policy space and does not significantly interfere with national interests, the courts will typically uphold the state law unless Congress expresses clear intent otherwise.[195] On the other hand, if a state law enters a field traditionally regulated by Congress or where national uniformity is vital, the courts will more readily invalidate the state law.[196] Legal commentators have observed that "[i]f it is desirable for the subject area of the legislation to have national uniformity, preemption can be inferred directly from the subject matter even

190. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973).

191. *See* Pennsylvania v. Nelson, 350 U.S. 497, 501–02 (1956).

192. Bianca I. Truitt, *Injured Consumers and the FDA*, 15 J. LEGAL MED. 155, 167 (1994).

193. *See* 3 WILLIAM J. RICH, *Exclusive federal regulation of a field of activity*, *in* MODERN CONSTITUTIONAL LAW § 34:21, 50 (3RD ED. 2020).

194. *Id*.; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230–31 (1947)) ("It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.").

195. *Id.*

196. *Id.*

if Congress is silent with respect to such a desire."[197] These determinations ultimately come down to congressional intent.

For example, in *International Longshoremen's Ass'n, Local 1416*,[198] the state of Florida asserted jurisdiction to penalize and enjoin peaceful protesting related to interstate labor disputes.[199] However, the Supreme Court determined that, pursuant to the National Labor Relations Act (NLRA), the federal government maintained exclusive jurisdiction over the protesting activities of labor groups engaged in interstate commerce given the national interest of resolving labor disputes.[200] Although the NLRA itself was silent on whether states could concurrently penalize and enjoin peaceful protesting, the Supreme Court still determined that the NLRA preempted state laws and jurisdiction over this activity.[201]

Additionally, the Supreme Court has acknowledged that the creation of a federal regulatory scheme can lead to the inference that states and localities have no room to concurrently regulate.[202] In *City of Burbank v. Lockheed Air Terminal Inc.*, the Supreme Court ruled that the federal Noise Control Act of 1972 preempted a city ordinance seeking to mitigate noise by prohibiting late-night aircraft takeoffs.[203] Despite recognizing that "[c]ontrol of noise is of course deep-seated in the police power of the States"[204] and that the Act lacked an express preemption provision, the Supreme Court nonetheless held that the "the pervasive nature of the scheme of federal regulation of aircraft noise . . . leads us to conclude that there is pre-emption."[205] In making this determination, the Court acknowledged that local ordinances of this nature would impede the Federal Aviation Agency's ability and flexibility to determine national flight takeoffs and landings.[206] Similarly, in *Campbell v. Hussey*, the Supreme Court struck down a Georgia law requiring special markings on in-state tobacco products.[207] While Congress did not expressly preempt state laws in this area, the Court held that the federal Tobacco Inspection Act impliedly preempted the Georgia law because the Act established federal tobacco standards as the "official standards of the United States," and the legislative history reflected the goal of national uniformity.[208]

197. Truitt, *supra* note 192, at 161.

198. International Longshoremen's Association, Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970).

199. *Id.* at 196.

200. *See id.* at 200–01.

201. *Id.; see also* United Steelworkers v. NLRB, 376 U.S. 492, 498–99 (1964); Local 20, Teamsters Union v. Morton, 377 U.S. 252, 259 (1964).

202. SYKES & VANATKO, *supra* note 120, at 17–18.

203. 411 U.S. 624, 625–26 (1973).

204. *Id.* at 638.

205. *Id.* at 633.

206. *Id.* at 639.

207. Truitt, *supra* note 192, at 167 (citing Campbell v. Hussey 368 U.S. 297 (1961)).

208. *Id.*

As a result, the Supreme Court concluded that congressional intent to establish national uniformity "preempted the field and left no room for any supplementary state regulation concerning" tobacco classification.[209]

Likewise, in *Perez v. Campbell*, the Supreme Court decided that an Arizona statute was preempted by federal bankruptcy laws.[210] The Arizona statute provided that a person's driver's license would be suspended if he failed to pay judgments related to automobile accidents, "even if the debt had been discharged in bankruptcy."[211] The Supreme Court determined that federal bankruptcy laws preempted this state law because "one of the objectives of federal bankruptcy law was to provide uniform national standards for determining when a debt was discharged."[212] As exemplified by these cases, and as observed by legal practitioners, "[t]he line for protecting traditional state responsibility may be difficult to discern and may give way to expressed concerns for national uniformity."[213]

Based on these cases, the Supreme Court could reasonably infer that a federal act legalizing and/or decriminalizing marijuana through a federal regulatory scheme effectively preempts state laws regulating in that same policy space. In *International Longshoremen's Ass'n*, *City of Burbank*, *Campbell v. Hussey,* and *Perez v. Campbell*, all of the federal acts lacked express congressional intent to preempt state and local laws in the same policy space. Yet, the Supreme Court still invalidated those state and local laws on the basis of implied preemption, citing the importance of national uniformity, standards, and objectives. Conceivably, federal legislation could establish a federal regulatory system comprised of federal marijuana licenses, federal labeling and packaging requirements, uniform pricing, expungement programs, and more. Accordingly, even without express preemptive intent, this federal marijuana legislation could impliedly preempt state laws seeking to criminalize and regulate marijuana-related activities. And while it may be argued that the criminalization of conduct is a police power, the Supreme Court has demonstrated in *City of Burbank* that even local legislation "deep-seated in the police power of the States"[214] can still be preempted when national uniformity and objectives are at issue.

The Supreme Court has also held "[t]hat no State may completely exclude federally licensed commerce."[215] In *Castle v. Hayes Freight Lines*, the state of Illinois prohibited certain interstate motor carriers from using state roads if

209. *Campbell*, 368 U.S. at 301.

210. 402 U.S. 637, 1714–15 (1971); Scordato, *supra* note 175, at 14.

211. Scordato, *supra* note 175, at 14.

212. *Id.*

213. 3 WILLIAM J. RICH, *Express preemption*, *in* MODERN CONSTITUTIONAL LAW § 34:19, 42 (3RD ED. 2020).

214. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973).

215. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

the carriers committed multiple state highway infractions.[216] But previously under the Motor Carrier Act, Congress created a comprehensive interstate plan for the regulation of goods transported by motor trucks.[217] Under this plan, the federal government issued federal certificates, licenses, and permits to motor carriers permitting them to use state roads.[218] The Supreme Court held that the Illinois state law conflicted with the Motor Carrier Act, and thus struck down the state law.[219] Notably, this case seemingly blurred the line between field preemption and Dormant Commerce Clause jurisprudence. The Court did not reference the Dormant Commerce Clause or preemption by name. But alluding to field preemption, the Court stated that under Congress's regulatory scheme, "*[n]o power at all was left in states* to determine what carriers could or could not operate in interstate commerce."[220]

Similarly, in *Douglas v. Seacoast Products, Inc.*, the Supreme Court held that a federal regulatory scheme granting fishing licenses preempted a Virginia state law prohibiting nonresidents from fishing in Virginia waters.[221] Sounding in Dormant Commerce Clause jurisprudence, the Court acknowledged that Virginia's disparate treatment between residents and nonresidents played a significant role in its decision.[222] But the Court focused its holding on federal preemption jurisprudence: "[A]s these state laws subject federally licensed vessels owned by nonresidents or aliens to restrictions different from those applicable to Virginia residents and American citizens, *they must fall under the Supremacy Clause*."[223] This case also blurred the line between Dormant Commerce Clause and preemption jurisprudence. But nonetheless, it further supports the proposition "[t]hat no State may completely exclude federally licensed commerce" pursuant to the Supremacy Clause.[224]

On the other hand, in *Pacific Gas*, the Supreme Court addressed whether the federal Atomic Energy Act of 1954 preempted a California state law conditionally precluding the construction of nuclear power plants.[225] Under the Atomic Energy Act of 1954, the federal government held exclusive control over the "transfer, delivery, receipt, acquisition, possession and use of nuclear materials."[226] But California sought to prevent nuclear power plant

216. 348 U.S. 61, 62 (1954).
217. *Id.* at 63.
218. *Id*.
219. *Id.* at 65.
220. *Id.* at 63 (emphasis added).
221. 431 U.S. 265, 283 (1977).
222. *Id.*
223. *Id.* at 286–87 (emphasis added).
224. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).
225. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 206–07 (1983).
226. *Id.* at 207.

construction until the state made certain findings regarding proper storage and removal of nuclear waste.[227] After reviewing the federal Act's legislative history, the Supreme Court determined that although "the safety of nuclear technology was the exclusive business of the federal government, state power over the production of electricity was not otherwise displaced."[228] The Court emphasized California's economic purposes for enacting its law and concluded that it did not conflict with the federal Act's goals of promoting nuclear power and safety.[229] According to the Court, "Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons."[230] Thus, the California law was not preempted.[231]

Based on these cases, state marijuana laws could possibly be preempted by any federal marijuana legislation that creates a federally licensed commercial marijuana system. Federal marijuana legislation could conceivably legalize marijuana and establish a federal system in which citizens and businesses acquire federal licenses to engage in marijuana-related commerce. With marijuana considered federally licensed commerce, state laws seeking to exclude marijuana would be subject to invalidation based on *Gibbons v. Ogden*, *Castle v. Hayes Freight Lines,* and *Douglas v. Seacoast Products, Inc.* precedent. On the other hand, based on the holding in *Pacific Gas*, a state may contend that its marijuana laws are saved by some provision in the federal marijuana legislation that reflects a legislative purpose not inconsistent with the state law. Without express preemption provisions in the federal marijuana legislation, a state's ability to prohibit marijuana would face an uncertain resolution in the courts.

The Supreme Court has also identified some policy fields that are *de facto* exclusively occupied by the federal government.[232] Generally, this includes immigration and foreign affairs.[233] In *Arizona v. United States*, the Supreme Court invalidated multiple sections of an Arizona law under the federal preemption doctrine.[234] The Arizona law aimed to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[235] Section 3 of this Act created a new state misdemeanor offense for any individual that failed to fulfill federal alien-

227. *See id.* at 209.

228. *Id.* at 208.

229. *Id.* at 221 ("The Act itself states that it is a program 'to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public.'").

230. *Id.* at 223.

231. *Id.* at 203.

232. *See* SYKES & VANATKO, *supra* note 120, at 18–19.

233. *Id.*

234. Arizona v. United States, 567 U.S. 387, 400–10 (2012).

235. *Id.* at 393.

registration requirements.[236] And Section 5 created a new state misdemeanor offense when unauthorized aliens pursued work or worked in Arizona.[237] On review, the Supreme Court determined that Section 3 of the Act interfered with Congress's "occupied field" of immigration regulation.[238] The Court previously held in *Hines v. Davidowitz* that a state alien-registration program was preempted because Congress intended its own federal alien-registration program to be a "single integrated and all-embracing system."[239] As such, the *Hines* Court ruled that states could not "curtail or complement" the federal program or "enforce additional or auxiliary regulations."[240] Applying this same principle, the *Arizona* Court determined that Section 3 of the Act was preempted because Congress occupied the field with its federal registration program.[241] Notably, the Court emphasized that "federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance."[242] The Court also highlighted that when Congress occupies a policy field, "even complementary state regulation is impermissible."[243] On this basis alone, Section 3 was preempted.

Section 5 of the Act created a new state misdemeanor offense penalizing unauthorized aliens that pursued work or worked in Arizona.[244] Specifically, this Section "enact[ed] a state criminal prohibition where no federal counterpart exist[ed]."[245] Because this Act created a new criminal offense with no comparable federal immigration law, the Court ruled that this Section was an obstacle to the federal government's "comprehensive framework for 'combating the employment of illegal aliens'"[246] under the Immigration Reform and Control Act of 1986 ("IRCA").[247] The IRCA already "ma[de] it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers"[248] and "require[d] every employer to verify the employment authorization status of prospective employees."[249] For violations of these provisions, the federal framework provided both civil and criminal penalties for employers, but only civil penalties for aliens.[250] The Supreme Court highlighted that the IRCA's legislative background indicated "that

236. *Id.*
237. *Id.* at 393–94.
238. *Id.* at 401.
239. Hines v. Davidowitz, 312 U.S. 52, 74 (1941).
240. *Id.* at 66–67.
241. *Arizona*, 567 U.S. at 401.
242. *Id.*
243. *Id.*
244. *Id.* at 403.
245. *Id.*
246. *Id.* at 404 (quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002)).
247. *Id.* at 403.
248. *Id.* at 404.
249. *Id.*
250. *Id.*

Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment."[251] However, Arizona established a criminal penalty for this very action in Section 5.[252] While the Supreme Court acknowledged that IRCA's express preemption provision was "silent about whether additional penalties may be imposed against the employees themselves,"[253] the Court still ruled that Section 5 served "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" because "Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment."[254] Accordingly, the Court concluded that Section 5 was preempted.[255]

The case of *Arizona v. United States* addressed a comprehensive federal regulatory framework in which states were precluded from regulating in that same policy domain. When a state attempted to establish a new criminal offense (Section 3) in the absence of a compatible federal criminal offense, the Supreme Court struck down the state law under the preemption doctrine because the state offense served as an obstacle to the federal immigration framework. On its face, this case may foreshadow a bleak future for states seeking to criminalize marijuana-related activities within a federal regulatory framework of decriminalized and/or legalized marijuana. If a state attempts to enact (or perhaps keep on the books) a criminal marijuana law, this criminal law could foreseeably be framed as an obstacle to a federal marijuana regulatory framework. The purpose and objectives of a federal regulatory framework of decriminalized and/or legalized marijuana would conceivably be to promote interstate marijuana commerce. Any contrary state laws serving as an obstacle could possibly be invalidated under the preemption doctrine.

On the other hand, *Arizona v. United States* is possibly distinguishable from the marijuana federalism context because *Arizona* transpires in the immigration policy space. As the Supreme Court observed in *Arizona*, the federal government maintains "broad, undoubted power over the subject of immigration and the status of aliens" due to Congress's constitutional power to "establish [a] uniform Rule of Naturalization" and "its inherent power as sovereign to control and conduct relations with foreign nations."[256] Along with multiple in-depth analyses of immigration policy, the Court concluded with an emphasis on the importance of immigration policy in shaping the nation's foreign policy.[257] Unlike with national immigration policy, states

251. *Id.* at 405.
252. *Id.*
253. *Id.* at 406.
254. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
255. *Id.* at 407.
256. *Id.* at 394–95.
257. *Id.* at 408–10.

have long maintained a role in both establishing and enforcing marijuana policies, which distinguishes the marijuana issue from the immigration and foreign policy issues in *Arizona.*

If the federal government were to decriminalize and/or legalize marijuana, it would be fully aware that some states still have criminal and prohibitory marijuana laws on the books. This would cut in favor of the validity of these state laws and against the claim that Congress occupies the field. The opposite situation manifested in *Arizona,* where federal immigration policy was established first, and then the state of Arizona passed state immigration laws. As such, Congress occupied the field first with its "comprehensive" federal immigration program, and the state of Arizona was subsequently not permitted to interfere in that policy space. While *Arizona* resulted in federal preemption, the facts regarding temporal proximity of state and federal legislation in the marijuana federalism context would likely oppose preemption.

On a broader level, the constitutional grounding and foreign policy implications of immigration policy also seemingly subject state immigration laws to an unstated higher level of scrutiny, as exemplified in *Arizona*. Because marijuana does not have any analogous constitutional grounding or major foreign policy pertinence,[258] state marijuana laws may be wholly distinguished from the laws in *Arizona* or, at least, afforded stronger presumptive validity. In sum, there are many factual similarities and differences between *Arizona* and the marijuana federalism question. It is unclear which approach the Supreme Court would take in the context of the new marijuana federalism question.

Most recently, in *Virginia Uranium, Inc. v. Warren*, the Supreme Court ruled that a Virginia state law prohibiting in-state uranium mining was not preempted by the federal Atomic Energy Act ("AEA").[259] Under the AEA, the National Regulatory Commission ("NRC") holds the authority to "regulate[] milling and tailing storage activities nationwide";[260] pursuant to this authority, the NRC issued numerous regulatory rules regarding uranium mining.[261] A Virginia-based uranium mining company challenged the Virginia state law under the Supremacy Clause, asserting that the NRC was the only permissible regulator based on field and conflict preemption.[262] On

258. It does have some foreign pertinence, as recognized in several international treaties, but not to the extent of immigration. There are also other logical incompatibilities between the *Arizona* laws and this hypothetical marijuana issue. For example, in *Arizona*, Section 3 of the Act attempted to "add[] a state-law penalty for conduct proscribed by federal law." *Id.* at 400. Hypothetically, a state marijuana law would attempt to penalize—or keep penalties on the books for—conduct that is *permitted* by federal law.

259. *See* Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1903–04 (2019).

260. *Id.* at 1900–01.

261. *See id.* at 1901.

262. *Id.*

review, the Supreme Court first noted that the AEA lacks an express preemption provision and that the AEA gives the NRC the power to regulate activities only "*after* [uranium's] removal from its place of deposit in nature."[263] In other words, the Supreme Court held that the NRC did not have regulatory authority over the mining of uranium.[264] Furthermore, the AEA contained an entire section detailing the regulatory "Cooperation with States"[265] and a provision that "might be described as a *non-preemption* clause"[266] in Section 2021(k): "Nothing in this section [that is, § 2021] shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."[267] The Supreme Court interpreted this provision to mean "Subsection (k) does not displace traditional state regulation over mining or otherwise extend the NRC's grasp to matters previously beyond its control."[268]

These statutory provisions further supported a non-preemptive reading of the AEA. The Virginia mining company attempted to analogize this case to *Pacific Gas*, where the Supreme Court "seemed to accept California's argument that its law addressed *whether* new power plants may be built."[269] However, the Supreme Court refused to regard *Pacific Gas* as controlling because that case involved the construction of nuclear power plants rather than uranium mining.[270] The construction of nuclear power plants was clearly within the federal government's regulatory purview, whereas nuclear mining was regulated by both the federal and state governments.[271]

Along with field preemption, the Virginia mining company asserted that the AEA preempted state law pursuant to conflict preemption because the state law interfered with the Act's objectives.[272] The Supreme Court stated that preemptive purpose must be supported by the Act's text and

263. *Id.* at 1902.
264. *See id.*
265. 42 U.S.C § 2021.
266. *Va. Uranium*, 139 S. Ct. at 1902.
267. *Id.*
268. *Id.* at 1903.
269. *Id.* at 1904.
270. *Id.* ("It is one thing to do as *Pacific Gas* did and inquire exactingly into state legislative purposes when state law prohibits a regulated activity like the construction of a nuclear plant, and thus comes close to trenching on core federal powers reserved to the federal government by the AEA. It is another thing to do as *Virginia Uranium* wishes and impose the same exacting scrutiny on state laws prohibiting an activity like mining far removed from the NRC's historic powers. And without some clearer congressional mandate suggesting an inquiry like that would be appropriate, we decline to undertake it on our own authority.") (second emphasis added).
271. *See id*.
272. *Id.* at 1907.

structure[273]—and not by "abstract and unenacted legislative desires."[274] In fact, the Supreme Court dedicated substantial emphasis to this point:

> Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual Members of Congress often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are fully realized in the final product . . . Worse yet, in piling inference upon inference about hidden legislative wishes we risk displacing the legislative compromises actually reflected in the statutory text . . . .[275]

After affirmatively stating that "[t]he only thing a court can be sure of is what can be found in the law itself," the Supreme Court concluded that the AEA's text and structure lacked any evidence of preemptive purpose.[276] Refusing to find an unwritten congressional purpose, the Supreme Court decided that the AEA did not preempt the Virginia state law.[277]

Legal practitioners have observed that *Virginia Uranium, Inc. v. Warren* was decided based on the narrow issue before the Court and thus "did not establish a clear framework for tackling other similar preemption issues."[278] Nonetheless, it provides valuable insight into how the Supreme Court may analyze the new marijuana federalism question. Notably, the AEA's express provision dedicated to "Cooperation with States" and express provision that "might be described as a *non-preemption* clause" both proved significant in the Supreme Court's determination that the Virginia state law was not preempted.[279] The Supreme Court also emphasized that its implied preemption analysis hinges on the text and structure of the congressional act rather than "abstract and unenacted legislative desires."[280] Further, the Court emphasized the importance of analyzing the "final product" and not the express preferences of individual member of Congress.[281]

In sum, this underscores the importance of including express congressional intent in the body of the congressional act, rather than in a congressional or legislative record. Based on the Supreme Court's field preemption precedent, it is unclear whether federal marijuana legislation

273. *See id.* (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).
274. *Id.*
275. *Id.* at 1907–08.
276. *Id.* at 1908.
277. *See id.* at 1907–08.
278. *Preemption*, FED. LITIGATOR (Laws. Coop. Publ'g), Aug. 2019, 34 No. 8 Fed. Litigator NL 4.
279. *Va. Uranium*, 139 S. Ct. at 1902.
280. *See id.* at 1907.
281. *Id*. at 1907–08.

would preempt state marijuana laws. Accordingly, if federal marijuana legislation *implicitly* manifests intent to occupy the entire field of marijuana legislation, then state marijuana laws *may* be preempted entirely. To avoid this result, the Supreme Court has recognized that Congress can limit the preemptive effect of its legislation by including explicit anti-preemption provisions.

b. Conflict Preemption

i. Obstacle Preemption

With respect to obstacle preemption, the Supreme Court invalidates state laws that serve as obstacles to the legislative purposes and objectives of congressional acts.[282] Invalidation of state laws typically hinges on persuading the court that the federal legislation contains policy objectives that are inconsistent with the state law, thus rendering dual compliance impossible. For example, in *Nash*, the Supreme Court determined that, despite the absence of an express federal preemption provision, a Florida law was still impliedly preempted by the National Labor Relations Act ("NLRA").[283] The NLRA encouraged employees to file claims with the National Labor Relations Board if the employees faced unfair labor conditions, while the Florida law provided that employees filing such claims could not receive unemployment benefits.[284] Reasoning that Florida's law was an obstacle to the purpose and objectives of the NLRA, the Supreme Court concluded that the state law was preempted.[285]

Similarly, in *Crosby v. National Foreign Trade Council*, the Supreme Court held that federal laws preempted a Massachusetts state law that "restrict[ed] the authority of its agencies to purchase goods or services from companies doing business with Burma."[286] The state law conflicted with the federal objective of giving the President "flexible and effective authority over economic sanctions against Burma."[287] The state of Massachusetts argued that "the failure of Congress to preempt the state Act demonstrate[d] implicit permission."[288] In support of this contention, the state highlighted that Congress was aware of Massachusetts's law in 1996, but Congress decided not to preempt the state law when it implemented its own legislation on

282. Scordato, *supra* note 175, at 13.
283. *Id*; *see* Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 239–40 (1967).
284. Scordato, *supra* note 175, at 13.
285. *See Nash*, 389 U.S. at 239–40.
286. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000).
287. *Id.* at 374.
288. *Id.* at 386–87.

Burma.[289] Nonetheless, the Court concluded that states are not permitted to enact laws in the same regulatory domain as Congress "simply because the silence of Congress is ambiguous."[290] Relying on implied preemption, the Court invalidated the state law.[291]

Even when a federal policy is permissive rather than mandatory, the federal policy can still preempt conflicting state laws.[292] In *Fidelity Federal Savings & Loan Ass'n*, the Supreme Court ruled that a federal regulation permitting the use of "due on sale" clauses in mortgages preempted a California state law that prohibited the use of these same clauses.[293] California argued that the federal regulation created a permissive directive rather than a compulsory one; and as such, it argued that there was no conflict.[294] However, the Supreme Court stated:

> The conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred. The Board consciously has chosen not to mandate use of due-on-sale clauses "because [it] desires to afford associations the flexibility to accommodate special situations and circumstances."[295]

Thus, even though dual compliance was possible, the state law was still preempted because it interfered with federal policy objectives by "limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry."[296]

And finally, based on the theory of obstacle preemption, the Court has also invalidated state laws that interfere with the exercise of federal rights.[297] In *Felder v. Casey*, the Court determined that 42 U.S.C. § 1983 preempted a state law that added specific procedural requirements before a § 1983 claim could be brought in state court. Section 1983 grants citizens the right to bring suits against state officials on account of federal civil rights infractions.[298] But before a § 1983 claim could be brought in state court, the state law mandated that citizens give 120 days' written notice to the state government defendant, including information about the alleged claim, the value of the claim, and the

289. *Id.* at 387.
290. *Id.* at 388.
291. *Id.*
292. RICH, *supra* note 189, at 49 & n.25.
293. *See* Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 155, 170 (1982).
294. *Id.* at 155.
295. *Id.*
296. *Id.* at 156.
297. *Id*. at 27 (citing Felder v. Casey, 487 U.S. 131, 153 (1988)).
298. *Id*. at 27 (citing Felder v. Casey, 487 U.S. 131, 153 (1988)).

plaintiff's intent to sue.[299] In effect, the state law limited the state's liability by imposing additional procedural hurdles.[300] The Court determined that the state law was preempted because the state law's "purpose" and "effect" conflicted with § 1983's purpose and objectives of delivering relief to injured citizens.[301]

As demonstrated by these cases, a state marijuana law could be invalidated if it serves as an obstacle to the legislative purposes and objectives of federal marijuana legislation. Specifically, if a state marijuana law implements stricter marijuana regulations than federally established standards, interferes with a congressional goal of creating uniform federal regulation, or hinders the exercise of a federal right, then that state marijuana law may be preempted. For example, federal marijuana legislation could seek to achieve nationwide decriminalization of marijuana-related offenses, create a federally licensed marijuana commercial program, establish social services and community reinvestment programs, and fund these initiatives through federal tax mechanisms. In light of these federal purposes and objectives, state marijuana prohibition laws could conceivably be viewed as obstacles because they would continue to criminalize and penalize marijuana, hinder marijuana commerce, and lead to lower marijuana-related tax revenue. Based on the logic in *Nash*, it could also be argued that federal marijuana legislation encourages engagement in federal marijuana commerce and national decriminalization, and thus any state law that penalizes such efforts or actions serves as an obstacle. Alternatively, a state may argue that its laws were on the books and known to Congress before the passage of the federal marijuana legislation, thereby permitting the state laws to evade federal preemption if Congress fails to explicitly preempt them. But as exemplified in *Crosby*, even if Congress is aware of contrary state laws and fails to explicitly preempt them, those state laws can still be impliedly preempted if they serve as obstacles to congressional acts' purposes and objectives.[302]

State marijuana laws could even be impliedly preempted by permissive federal marijuana legislation. In theory, federal marijuana legislation could create a permissive environment for marijuana decriminalization, use, and sale. In other words, federal legislation may permit, but not explicitly mandate, that states legalize and decriminalize marijuana. But as exemplified in *Fidelity Federal Sav. & Loan Association*, even a permissive federal policy can preempt state laws that prohibit the federally permitted activity.[303] If the Supreme Court were to follow any of these aforementioned logical paths, a

299. *Id.* at 27 (citing 487 U.S. 131, 141–42 (1988)).
300. *Id.* at 27 (citing 487 U.S. 131, 138 (1988)).
301. *Id.*
302. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 363 (2000).
303. Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 155 (1982).

state marijuana law could be preempted based on the theory of obstacle preemption. All in all, absent an express provision reflecting congressional intent, it would be unclear whether state marijuana laws serve as obstacles to federal marijuana legislation.

ii. Impossibility Preemption

Under the theory of impossibility preemption, the Supreme Court invalidates a state law when compliance with both the conflicting state law and federal law are physically impossible.[304] In *Florida Lime & Avocado Growers, Inc.*, the Supreme Court addressed tension between a federal regulation dictating when certain avocados became "mature" and a California state law that proscribed the sale of those same avocados due to subpar fat content.[305] Determining that California's avocado criteria did not impede federal policy objectives, the Court ruled that dual compliance was not physically impossible.[306] As such, the state law was not preempted.[307]

However, in two drug labeling cases, *PLIVA v. Mensing* and *Mutual Pharmaceutical Co. v. Bartlett*, the Supreme Court relied on impossibility preemption to invalidate state law claims brought against drug makers because dual compliance with federal law was impossible.[308] The plaintiffs experienced adverse effects after using generic drugs and alleged that the drug labels lacked proper warnings.[309] The defendant drug manufacturers asserted that federal law preempted these state law claims.[310] Pursuant to relevant federal regulations, drug manufacturers can bypass regular FDA approval procedures and receive expedited approval of generic drugs by showing that the generic versions are counterparts of FDA-approved brand name drugs.[311] When drug producers use this expedited route, they are required to keep the same labels as those on the counterpart brand-name drugs.[312] As such, they cannot unilaterally amend their drug labels.[313] However, the state laws at issue required drug manufacturers to make unliteral alterations to their drug labels.[314] According to the Court, drug makers were unable to comply with both laws because the state law required drug label alterations that the federal

304. *Fla. Lime & Avocado Growers*, 373 U.S. at 142–43.

305. *See id.* at 138–39. Notably, however, this case was remanded to the district court for a new trial to determine whether the state law unduly burdened interstate commerce. *Id*. at 158–59.

306. *Id.* at 143.

307. *See id.*

308. SYKES & VANATKO, *supra* note 120, at 24

309. *Id*. (citing *Bartlett*, 570 U.S. at 475; *PLIVA*, 564 U.S. at 610).

310. *Id.* at 25 (citing *Bartlett*, 570 U.S. at 475; *PLIVA*, 564 U.S. at 610). .

311. *Id.* at 25 (citing *Bartlett*, 570 U.S. at 476–77; *PLIVA*, 564 U.S. at 612–13).

312. *Id.*

313. *Id.*

314. *Id*. at 25 (citing *Bartlett*, 570 U.S. at 487; *PLIVA*, 564 U.S. at 610).

law explicitly proscribed.[315] Thus, the federal law preempted the state law claims.[316] Specifically in *Bartlett*, the plaintiffs advanced the argument that drug manufacturers could dually comply by terminating the sale of the drug.[317] However, the Court rejected the plaintiffs' "stop-selling" contention because it would leave the preemption analysis "all but meaningless."[318] The Congressional Research Service observed that the impossibility preemption doctrine "presuppose[s] some affirmative conduct by the regulated party."[319]

As exemplified by these cases, a state marijuana law could be invalidated if it is physically impossible to comply with both the state marijuana law and federal marijuana legislation. Federal marijuana legislation would almost certainly not compel a citizen to consume marijuana and/or engage in marijuana commerce; thus, a person could comply with a state marijuana law's prohibition on marijuana use while still complying with federal law. Relying on *Florida Lime & Avocado Growers*, a state would thus argue that dual compliance is not physically impossible, thereby allowing state laws to evade impossibility preemption. But the holdings in *PLIVA* and *Bartlett* broaden the scope of impossibility preemption. Based on the logic in *Bartlett*, if federal marijuana legislation creates a federal regulatory policy for marijuana commerce, then it is conceivable that no state law may force a marijuana producer or seller to "stop-selling" marijuana completely.[320] In *Bartlett*, federal law established standards that drug manufacturers *could* follow if they wanted to market and sell generic drugs in an expedited fashion.[321] When states attempted to regulate in this same domain, the Court invalidated state laws that forced drug makers to "stop-selling" drugs, based on impossibility preemption.[322] Applying this reasoning to the marijuana context, federal marijuana legislation may create federal standards that marijuana producers and sellers *could* follow if they wanted to engage in marijuana commerce. And like in *Bartlett*, if states attempt to regulate marijuana in a manner that forces producers and sellers to "stop-selling," then these state regulations could be invalidated based on impossibility preemption as well.

315. *Id*. at 25 (citing *PLIVA*, 564 U.S. at 618).
316. *Id*. at 25 (citing *Bartlett*, 570 U.S. at 487; *PLIVA*, 564 U.S. at 610).
317. *Id*. at 25 (citing *Bartlett*, 570 U.S. at 488-89).
318. *Id.*
319. *Id*. at 25.
320. *Id*. at 25 (citing *Bartlett*, 570 U.S. at 488–89).
321. *Bartlett*, 570 U.S. at 476–77.
322. *Bartlett*, 570 U.S. at 488–89.

3. Conclusions on Preemption in the New Marijuana Federalism Context

Despite the many uncertainties surrounding federal marijuana legislation and the Supreme Court's federal preemption analysis, two things are certain. First, an express statutory provision "necessarily contains the best evidence of Congress'[s] pre-emptive intent."[323] And second, Congress can include an express anti-preemption provision and a savings clause in its marijuana legislation to prevent the preemption of state marijuana laws. Without these provisions, state marijuana laws will be subject to possible invalidation through field preemption, obstacle preemption, and impossibility preemption. And based on ambiguous implied preemption precedent, the courts will be left to grapple with this major federalism issue. To avoid this undesired result, Congress must include an express anti-preemption provision and a savings clause in its marijuana legislation. From a more cynical perspective, this would also force members of Congress to squarely address this important issue and be held accountable, rather than using "intentionally ambiguous language that transfers the issue to the courts."[324] Given the importance of this federalism issue, it cannot spend years bouncing around the federal court system. The states need to retain their proper role as policymakers and policers of public health and safety; and citizens, state legislators, and commercial industry players need legal certainty.

4. Federal Preemption in the Context of the CSA Vis-à-Vis State Laws Decriminalizing and/or Legalizing Marijuana

To date, the most important and widely debated preemption analysis in marijuana federalism has involved whether the federal CSA preempts state laws that decriminalize and/or legalize marijuana. Given legal academia's strong focus on this inquiry, there may be a temptation to turn to and rely on this traditional analysis to answer the new marijuana federalism question. However, this traditional analysis is fundamentally different from the new marijuana federalism analysis for a number of reasons. For completeness, this subsection outlines the traditional marijuana federalism analysis and explains why it is not entirely applicable to the new marijuana federalism question.

323. SYKES & VANATKO, *supra* note 120, at 4 & n.24 (citing Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938, 1946 (2016)).

324. Nelson, *supra* note 119, at 302 n.235.

a. The Traditional Marijuana Federalism Analysis

In evaluating whether the federal CSA preempts state law, Chemerinsky et al. framed the question as "whether state laws allowing the sale, cultivation, and use of limited amounts of marijuana create an impermissible 'conflict' . . . with the CSA provisions prohibiting marijuana altogether."[325] In evaluating this question, Chemerinsky et al. acknowledged the interplay between the Supremacy Clause and the Tenth Amendment. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[326] Importantly, the Tenth Amendment has been interpreted by the Supreme Court to prevent federal commandeering of state officials.[327] This anticommandeering doctrine prevents the federal government from forcing state officials to pass certain laws and from enlisting state officials in federal law enforcement tasks.[328] As such, the federal government cannot force states to pass laws or keep laws on their books criminalizing the manufacture, sale, and possession of marijuana.[329] But, at the same time, the Commerce Clause unequivocally grants Congress the power to "prohibit even the intrastate cultivation and possession of marijuana, [and] no state can erect a legal shield protecting its citizens from the reach of the CSA."[330] According to Chemerinsky et al., "Congress had the authority to occupy the field of controlled substances regulation when it enacted the CSA," but Congress "explicitly chose not to do so."[331] Reflecting this reality, Section 903 of the CSA states:

> No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.[332]

325. Chemerinsky et al., *supra* note 1, at 102.
326. U.S. CONST. amend. X.
327. *See generally* Printz v. United States, 521 U.S. 898 (1997).
328. Chemerinsky et al., *supra* note 1, at 102.
329. *Id*. at 102–03.
330. *Id*. at 103.
331. *Id.* at 104.
332. 21 U.S.C. § 903.

Chemerinsky et al. observed that this "antipreemption provision expressly disclaim[s] preemptive intent in all but a narrow set of circumstances."[333] Specifically, the phrase "positive conflict . . . so that the two cannot consistently stand together" only reaches situations in which "'compliance with both federal and state regulations is a physical impossibility.'"[334] Similarly, Justice Scalia has opined that Section 903 reflects Congress's intent "that the CSA preempt only state laws that require someone to engage in an action specifically forbidden by the CSA."[335]

In applying this provision, Chemerinsky et al. concluded that compliance with both the federal CSA and permissive state laws decriminalizing marijuana is not "physically impossible."[336] Chemerinsky et al. explained:

> Only if a state law required a citizen to possess, manufacture, or distribute marijuana in violation of federal law would it be impossible for a citizen to comply with both state and federal law. Similarly, if a state were to make state officers the manufacturers or distributors of marijuana, it might well be impossible for those officials to comply with both state and federal law. No state marijuana law, however, has attempted to require state or local officials to violate the CSA in this manner.[337]

While the authors stated that this analysis may be sufficient alone to resolve the preemption debate, they also analyzed the CSA and state laws under implied preemption because, even with the presence of express anti-preemption provisions, the Supreme Court has suggested that courts sometimes still pursue an implied preemption inquiry.[338] The Supreme Court has admonished that implied preemption only manifests "to the extent [the state law] actually conflicts with federal law"[339] and that "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them."[340]

Chemerinsky et al. acknowledged that the CSA "operate[s] in a field within which states have traditionally regulated" and "specifically left a

333. Chemerinsky et al., *supra* note 1, at 104.

334. *Id.* at 105–06.

335. *Id.* at 106 (citing Gonzales v. Oregon, 546 U.S. 243, 290 (2006)) (Scalia, J., dissenting) ("noting that the CSA 'does not purport to pre-empt state law [regarding assisted suicide] in any way . . . unless . . . some States *require* assisted suicide.'") (alterations in original). *Id.* at 106 n.121.

336. *Id.*

337. *Id.*

338. *Id*.

339. *Id.* at 109 (alterations in original).

340. *Id*. (alterations in original).

significant role for the states in regulating controlled substances like marijuana."[341] The traditional state-regulated fields implicated in the CSA include "public health and medical care, land use, and state and local government's power to criminalize conduct."[342] Since the nation's inception, state and local governments have maintained the power to implement and enforce laws promoting public health and safety, specifically related to drug regulation.[343] Accordingly, the implied preemption analysis of the CSA commences with a strong presumption against preemption.[344] According to Chemerinsky et al., Congress passed the CSA while contemporaneously "well aware" that many state laws existed with varying degrees of punishment for marijuana-related conduct that deviated from the CSA's federal drug policy.[345] Nonetheless, Congress "decided to stand by both concepts and to tolerate whatever tension there [is] between them."[346]

Chemerinsky et al. next entertained the contention that state laws decriminalizing marijuana serve as obstacles to the purposes and objectives of the CSA. The CSA's purpose and objectives are "combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances."[347] This argument hinges on the logic that these state laws eliminate criminal punishments, in turn permitting citizens to engage in federally prohibited conduct.[348] While Chemerinsky et al. acknowledged that the removal of state marijuana laws and state enforcement partners makes CSA enforcement more challenging, permissive state marijuana laws are, nonetheless, not legal "obstacle[s]" under Supremacy Clause precedent.[349] Pursuant to the Tenth Amendment, "the federal government could not require the state either to reenact its repealed marijuana laws or to assist the federal government in enforcing the CSA."[350] Ultimately, Chemerinsky at al. concluded, "[f]or the same reasons that states may repeal any and all state marijuana laws, they may remove some or even all criminal penalties and impose a state system to regulate marijuana activity instead."[351] Even under an implied preemption analysis, according to Chemerinsky et al., the CSA does not preempt state laws legalizing and/or decriminalizing marijuana.[352]

341. *Id*. at 107–08.
342. *Id.* at 108 (footnotes omitted).
343. *Id.*
344. *Id.* at 107.
345. *Id.* at 109.
346. *Id.* (alterations in original).
347. Gonzales v. Oregon, 546 U.S. 243, 250 (2006).
348. Chemerinsky et al., *supra* note 1, at 111.
349. *See id.*
350. *Id.*
351. *Id.* at 113.
352. *Id.* at 100.

5. Comparing and Contrasting the Traditional Marijuana Federalism Question and the New Marijuana Federalism Question

While Chemerinsky et al.'s analysis is not entirely applicable to the new marijuana federalism question, it provides some important confirmations regarding implied preemption in the marijuana federalism context and also underscores some ancillary observations incorporable in this Article's analysis. At the outset, Chemerinsky et al.'s approach cannot cogently resolve this Article's new marijuana federalism question because this Article contemplates a different (future) reality in which (1) the federal government has decriminalized and/or legalized marijuana-related activities, and (2) notwithstanding federal decriminalization and/or legalization, some states will maintain and/or enact laws criminalizing and regulating the manufacture, sale, and possession of marijuana. Under this Article's contemplated reality, the federal preemption inquiry will pit these state laws against whatever federal legislation[353] decriminalizes and/or legalizes marijuana. On the other hand, the federal preemption analysis by Chemerinsky et al. is grounded in two different (and currently existent) premises regarding marijuana federalism: (1) the federal government (via the CSA and attendant criminal statutes) still criminalizes marijuana-related activities, and (2) notwithstanding federal criminalization, some states have decriminalized marijuana and created permissive environments in which citizens can engage in the manufacture, sale, and possession of marijuana.[354] As such, these different premises inevitably render Chemerinsky et al.'s analysis not entirely applicable to this Article's new federalism dilemma. Nonetheless, some portions of Chemerinsky et al.'s analysis provide valuable insight for evaluating the new marijuana federalism question.

First, as observed by Chemerinsky et al., Congress can expressly include an anti-preemption provision, like that in the CSA, to express its intent not to preempt any (or some) state marijuana laws. According to Chemerinsky et al., the CSA contains an "antipreemption provision" in Section 903 that "expressly disclaim[s] preemptive intent in all but a narrow set of circumstances."[355] Conceivably, any federal legislation that legalizes and/or decriminalizes marijuana could contain a similar (or more limiting) anti-preemption provision to explicitly and prophylactically ensure that states retain the power to criminalize and prohibit marijuana-related activities. The inclusion of an anti-preemption provision would help avoid uncertain judicial interpretations if state marijuana laws were challenged in court.

353. This also includes federal regulations.
354. Chemerinsky et al., *supra* note 1, at 111.
355. *Id.* at 104.

Second, Supreme Court precedent and Chemerinsky et al.'s preemption analysis *may* lay the foundation for a strong argument against field preemption of state marijuana laws.[356] As observed by Chemerinsky et al., the Supreme Court has opined that "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them."[357] Currently, there are nineteen states that still criminalize and prohibit marijuana-related activities.[358] If Congress were to pass federal marijuana legislation in the near future, Congress would certainly be aware of these state laws. In fact, multiple members of Congress recognized this fact on the record when discussing the MORE Act in a House Judiciary Committee hearing in 2020.[359] Further, Chemerinsky et al. acknowledged that states have maintained a traditional role in regulating marijuana, public health, public safety, medical care, and the criminalization of conduct.[360] Thus, without an express preemption provision overriding these state laws, there would be a strong starting presumption against federal preemption. But despite these seemingly strong arguments against preemption, the Supreme Court has still found preemption in cases that started with a "particularly weak" presumption of preemption.[361] In *City of Burbank v. Lockheed Air Terminal Inc.,* the Supreme Court determined that federal policy preempted local legislation that was "deep-seated in the police power of the States" because important national uniformity and objectives were at issue.[362] Additionally, the Supreme Court held in *Crosby v. National Foreign Trade Council* that even if Congress is aware of contrary state laws and fails to explicitly preempt them, those state laws can still be preempted if they serve as obstacles to the congressional act's purposes and objectives.[363]

In sum, the traditional marijuana federalism question is fundamentally different from, and falls short of delivering a definitive answer to, the new marijuana federalism question. Nonetheless, Chemerinsky et al.'s analysis of the traditional marijuana federalism question still provides valuable insights into addressing this Article's new federalism question.

356. *See id.* at 107–08.

357. *Id*. at 109. (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166–67 (1989)).

358. *Map of Marijuana Legality by State,* DISA (Sept. 2021), https://disa.com/map-of-marijuana-legality-by-state [https://perma.cc/BY9A-5GB7].

359. 166 CONG. REC. H6828 (daily ed. Dec. 04, 2020), https://www.congress.gov/116/crec/2020/12/04/CREC-2020-12-04-pt1-PgH6819-2.pdf [https://perma.cc/HL6S-HLMD].

360. Chemerinsky et al., *supra* note 1, at 108.

361. *Id.* at 109; Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 498 U.S. 141, 167 (1989).

362. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638–39 (1973).

363. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 363 (2000).

IV. DORMANT COMMERCE CLAUSE ANALYSIS

Even if Congress includes an unassailable anti-preemption provision in its federal marijuana legislation, the power of states to regulate and criminalize marijuana may still be subject to invalidation under the Dormant Commerce Clause. In *Florida Lime & Avocado Growers, Inc.*, the Supreme Court heard challenges to a California state law on the basis that the state law was preempted by the Supremacy Clause and violated the Commerce Clause for unduly burdening interstate commerce.[364] The Court decided that the state law was not federally preempted but still remanded the case to the district court to separately determine whether "the enforcement of [the state law] unreasonably burdens or discriminates against interstate commerce."[365] As exemplified by this case, federal preemption and Commerce Clause review are distinct constitutional inquiries—each with the independent capability of invalidating a state law. Accordingly, if state marijuana laws are to withstand judicial scrutiny in a federally legalized and/or decriminalized marijuana environment, any federal legislation must also include express provisions granting states the power to legislate in this policy space vis-à-vis the Commerce Clause.

A. The Dormant Commerce Clause

The Commerce Clause, grounded in Article I, Section Eight, Clause Three of the U.S. Constitution, states that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[366] While the Commerce Clause expressly grants Congress the authority to regulate commerce between the states, it "also prohibits state laws from unduly restricting interstate commerce."[367] Referred to as the Dormant Commerce Clause, this "'negative' aspect of the Commerce Clause prevents the States from adopting protectionist measures and thus preserves a national market for goods and services."[368] In practice, the Dormant Commerce Clause is invoked when state laws purportedly discriminate against or have an unjustified discriminatory effect on out-of-state citizens.[369] In one of its most recent Dormant Commerce Clause cases, the Supreme Court stated "that the Commerce Clause by its own force

364. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 134–35 (1963).
365. *Id*. at 158–59.
366. U.S. CONST. art. I, § 8, cl. 3.
367. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019).
368. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988).
369. *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 598 (1987).

restricts state protectionism."[370] While this doctrine has been criticized extensively,[371] the Supreme Court recently observed that "it is deeply rooted in our case law" and vital to the constitutional scheme of our nation.[372]

B. Judicial Application of the Dormant Commerce Clause

Based on established judicial precedent, two general principles undergird the Supreme Court's Dormant Commerce Clause analysis. First, "if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to 'advanc[e] a legitimate local purpose.'"[373] And second, the Dormant Commerce Clause prohibits states from "passing facially neutral laws that place[] an impermissible burden on interstate commerce."[374] It has also been firmly established that Congress can grant states the power to legislate in certain commercial fields in ways that would otherwise be impermissible under the Dormant Commerce Clause.[375] But to prove this exception, it must be "unmistakably clear" that Congress intended to exempt state laws from Commerce Clause reach.[376]

If a state law facially discriminates against out-of-state residents, it is considered "virtually per se" invalid[377] and is subjected to strict judicial scrutiny.[378] To rebut a judicial finding of discrimination, the state must show that the law has a valid non-protectionist purpose and that no alternative non-discriminatory legislative solutions exist.[379] Alternatively, if a state law regulates evenhandedly between in-state and out-of-state residents, with just "incidental effects" on interstate commerce, then the state law is subject to a judicial balancing test.[380] The *Pike* balancing test evaluates the state law's burden on interstate commerce, the law's legitimacy with respect to delivering local benefits, and the availability of alternative, non-discriminatory methods for delivering those local benefits.[381] State laws promoting the health and safety of state citizens are permitted to burden interstate commerce more

370. *Tenn. Wine & Spirits*, 139 S. Ct. at 2461.
371. *Id*. at 2460.
372. *Id*.
373. *Id*. at 2461 (citing Dep't of Revenue of Ky. v. Davis, 533 U.S. 328, 338 (2008)).
374. *Id*. at 2464 (citing Granholm v. Heald, 544 U.S. 460, 477 (2005)).
375. *See* Redish & Nugent, *supra* note 369, at 570 n.9.
376. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984).
377. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).
378. *See* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).
379. *See* Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992); Maine v. Taylor, 477 U.S. 131, 138 (1986).
380. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
381. *See id.*

heavily than other categories of laws.[382] When determining the existence of alternative, non-discriminatory options, courts only consider actual alternatives, rather than "abstract possibilities" with "no assurance as to their effectiveness."[383] Under this *Pike* test, a state law is upheld unless the law's burden on interstate commerce is "clearly excessive in relation to the putative local benefits."[384] The resolution of a Dormant Commerce Clause analysis typically hinges on the level of scrutiny applied by the courts. Since facially and effectively discriminatory laws are generally invalidated by strict scrutiny, states prefer the lower review standard embodied in the *Pike* balancing test.[385]

C. The Potential Marijuana Dilemma under the Dormant Commerce Clause

If marijuana is federally legalized and/or decriminalized, state laws prohibiting and criminalizing marijuana may be challenged under the Dormant Commerce Clause. At a broad level, arguments would likely be made that the operative federal legislation is intended to create a national marijuana marketplace and regulatory structure, and thus, states cannot isolate themselves from the national marketplace. For example, the MORE Act calls for the creation of nationwide social services and community reinvestment programs funded by federal tax dollars.[386] A prohibition state would argue that it is prohibiting marijuana based on the justification that marijuana produces adverse health, economic, and societal effects. But while this may be facially justified under the state's police power, a counterargument could be made that, under the Dormant Commerce Clause, states do not have the ability to isolate and protect themselves from economic and societal ills. If the federal legislation establishes nationwide markets and programs—funded by federal tax dollars like in the MORE Act—then state prohibition laws may be invalidated under the Dormant Commerce Clause.

A state law prohibiting and/or criminalizing marijuana likely would not fall under the first prong of the Dormant Commerce Clause analysis because, assuming the law prohibits both in-state and out-of-state marijuana-related activities, it would not discriminate against out-of-staters. More likely, these state laws would be subject to scrutiny under the second prong because they

382. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350 (1977) (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963)).

383. *Maine*, 477 U.S. at 147 (quoting *Hunt*, 432 U.S. at 353).

384. *Pike*, 397 U.S. at 142.

385. *See* PRACTICAL LAW GOV'T PRACTICE AND PRACTICAL LAW LITIG., DEFENDING AGAINST A DORMANT COMMERCE CLAUSE CHALLENGE: OVERVIEW 9.

386. *See* LAMPE *supra* note 18.

would be "facially neutral" laws.[387] As such, a reviewing court would evaluate whether the burden of these state laws is "clearly excessive in relation to the putative local benefits."[388] Again, the argument can be made that state prohibition laws—juxtaposed a national marijuana market and regulatory structure—impermissibly burden interstate commerce by removing an entire state from the marketplace, hindering commercial transportation of marijuana, and removing a source of federal tax revenue. As such, it can be argued that removing a state from the marketplace is "clearly excessive"[389] in relation to the state's purported local health and safety justifications. While this analysis has been purely theoretical up until this point, a historical review of alcohol regulation, which follows below, validates these putative challenges under the Dormant Commerce Clause. Moreover, analyzing the alcohol regulatory model is important because it provides a possible framework for enacting strong state regulatory protections in the event of federal legalization and decriminalization of marijuana.

Comparing the regulation of alcohol to the regulation of marijuana is not a new analogy and presents obvious parallels. Alcohol was once federally prohibited and criminalized, but then the federal government decriminalized and legalized it.[390] Thereafter, some states continued to regulate and prohibit alcohol, seemingly without any major conflict with the federal government.[391] And accordingly, marijuana could follow the same path. While functionally this may be a viable route, the constitutional issues and constraints involved require further analysis and scrutiny. First, the method by which alcohol was federally decriminalized and legalized was the passage of the Twenty-first Amendment, which repealed the federal prohibition of alcohol.[392] Currently, there is no serious consideration of an amendment to repeal the federal prohibition of marijuana; instead, legalization and/or decriminalization would likely come through congressional legislation. As such, it is vital to understand the Twenty-first Amendment, how this Amendment created the alcohol regulatory model, and the differences between regulatory systems created by amendment and congressional legislation.

Section Two of the Twenty-first Amendment specifically reserved to the states the power to regulate and prohibit alcohol within their own borders.[393]

387. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2464 (2019) (quoting Granholm v. Heald, 544 U.S. 460, 477 (2005)).

388. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

389. Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018).

390. *See* Harry G. Levine & Craig Reinarman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 THE MILBANK Q. 461, 463, 466 (1991).

391. *Id.*

392. U.S. CONST. amend. XXI, § 1.

393. U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

In light of this constitutional amendment, the "[Supreme] Court has acknowledged that § 2 [of the Twenty-first Amendment] grants States latitude with respect to the regulation of alcohol" that they would not otherwise have.[394] In 2019, while analyzing a Tennessee law regulating alcohol, the Supreme Court stated:

> But because of § 2 [of the Twenty-first Amendment], we engage in a different inquiry. Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground.[395]

As evidenced by this Supreme Court interpretation, the Twenty-first Amendment affords the states unique powers to enact alcohol prohibition and regulations, which would otherwise face greater scrutiny under the Dormant Commerce Clause.[396] Absent a similar grant of power, states will not have the ability to regulate marijuana in the same way they currently regulate, and (if they wanted to) prohibit, alcohol.

D. An Overview of Alcohol Regulation and Its Possible Application in the Marijuana Context

In the 1800s, many states began enacting laws regulating alcohol use, and these regulations were challenged in the courts.[397] While many state alcohol laws involved licensing and age requirements, some states passed laws completely prohibiting the production and sale of alcohol.[398] Despite these laws, some residents of prohibition states continued to consume alcohol by having it shipped in from other states. In response, these prohibition states passed laws regulating and prohibiting alcohol importation from other states.[399] These laws were challenged under the Dormant Commerce Clause. At that time, the Dormant Commerce Clause precedent followed "two distinct principles": (1) "the Commerce Clause prevented States from discriminating

394. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2470 (2019).
395. *Id.* at 2474.
396. *See id.*
397. *See id.* at 2463.
398. *Id.* ("By 1891, six [s]tates had banned alcohol production and sale completely.").
399. *Id.* at 2464.

against the citizens and products of other States,"[400] and (2) "the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce."[401] Also at that time, the "original-package doctrine" controlled the outcome of many of these cases.[402] This doctrine stated that "goods shipped in interstate commerce were immune from state regulation while in their original package, because at that point they had not yet comingled with the mass of domestic property subject to state jurisdiction."[403]

Pursuant to the original-package doctrine, the Supreme Court invalidated an Iowa statute mandating that alcohol importers secure certifications,[404] and invalidated another Iowa statute that banned liquor importation.[405] Thus, while states could constitutionally prohibit in-state alcohol production and sales, these prohibition efforts "were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package."[406] In essence, the states "had no power to prohibit the sale of intoxicating liquor in the original package in which it was shipped from another state."[407] This resulted in a "practical nullification of state laws," which left prohibition states "in a bind."[408] Reflecting on this period, the Supreme Court wrote, "In effect, the Court's interpretation of the dormant Commerce Clause conferred favored status on out-of-state alcohol, and that hamstrung the dry States' efforts to enforce local prohibition laws."[409]

In an attempt to remedy this situation, Congress enacted two laws. First in 1890, Congress passed the Wilson Act, which left "it up to each State to decide whether to admit alcohol."[410] At its core, the Wilson Act "specified that all alcoholic beverages 'transported into any State or Territory' were subject 'upon arrival' to the same restrictions imposed by the State 'in the exercise of its police powers' over alcohol produced in the State."[411] However, the Wilson Act failed to protect prohibition states, as the "Court read the Act's

400. *Id.* (quoting Walling v. People of the State of Mich., 116 U.S. 446, 460 (1886)). In applying this first rule, the Court "struck down a discriminatory state fee that applied only to those in the business of selling imported alcohol." *Id.* (citing *Walling*, 116 U.S. at 454).

401. *Id*. at 2464.

402. *Id*.

403. *Id.* at 2464–65 (citing *Granholm*, 544 U.S. at 477).

404. *See* Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465, 500 (1888).

405. *See* Leisy v. Hardin, 135 U.S. 100, 104–05 (1890).

406. *Tenn. Wine & Spirits*, 139 S. Ct. at 2465 (quoting *Granholm*, 544 U.S. at 478).

407. *The Present Status of the Webb-Kenyon Act*, 1 ST. LOUIS L. REV. 55, 55 (1915)*; see also Leisy*, 135 U.S. at 124–25 (holding that the state has no power to interfere in the importation and sale of alcohol by a non-resident importer while the alcohol is in its original packaging).

408. *Tenn. Wine & Spirits*, 139 S. Ct. at 2465 (citing Lindsay Rogers, *Interstate Commerce in Intoxicating Liquors before the Webb-Kenyon Act*, 4 VA. L. REV. 174 (1916)).

409. *Id.* at 2465.

410. *Id.*

411. *Id*.

reference to the 'arrival' of alcohol in a State to mean delivery to the consignee, not arrival within the State's borders."[412] As such, residents of prohibition states were still able to import alcohol. In a second attempt to address this issue, Congress passed the Webb-Kenyon Act in 1913, which sought "to give each State a measure of regulatory authority over the importation of alcohol."[413] The Act prohibited the shipment of alcohol into any state for any use "either in the original package or otherwise," "in violation of any law of such State[.]"[414] The Supreme Court recognized that this Act "by regulating commerce, could obviate dormant Commerce Clause problems."[415]

After the Webb-Kenyon Act passed, the period of Prohibition soon followed with the 1919 ratification of the Eighteenth Amendment, which banned the manufacture, sale, and importation of alcohol nationwide.[416] After the failed experiment of Prohibition, the Twenty-first Amendment was ratified in 1933,[417] which repealed the Eighteenth Amendment and federal Prohibition. However, the Twenty-first Amendment still "gave each State the option of banning alcohol if its citizens so chose."[418] The Twenty-first Amendment reads, in relevant part:

> Section 1.
>
> The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2.
>
> *The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.*[419]

In the years immediately following the ratification of the Twenty-first Amendment, the Supreme Court interpreted Section Two with very wide

412. *Id*. at 2466 (citing *Granholm*, 544 U.S. at 480).
413. *Id.*
414. *Id.*
415. *Id.* at 2467.
416. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.
417. Ten states did not approve the ratification of the Twenty-first Amendment. *Tenn. Wine & Spirits*, 139 S. Ct. at 2467.
418. *Id*. at 2467.
419. U.S. CONST. amend. XXI, §§ 1–2 (emphasis added).

latitude[420] and seemingly adopted the view that Section Two could override other constitutional principles.[421] However, in recent decades, the Supreme Court has disavowed these cases and principles[422] and proclaimed that "the thrust of § 2 is to 'constitutionaliz[e]' the basic structure of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment."[423] In other words, Section Two "was meant to have a similar meaning" as the Webb-Kenyon Act.[424]

Based on the history of the Webb-Kenyon Act, Section Two "does not entirely supersede Congress's power to regulate commerce."[425] In *Granholm v. Heald*, the Supreme Court affirmed that the Twenty-first Amendment does not allow states to discriminate against interstate commerce in any manner that violates the Dormant Commerce Clause.[426] Nonetheless, the *Granholm* Court reiterated that states retain the power to completely prohibit alcohol within their own borders if they so choose.[427] Following *Granholm*, debate arose whether the Twenty-first Amendment actually afforded the states any additional regulatory power beyond the ability to completely prohibit alcohol.[428] Providing some clarity on this debate in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, the Supreme Court re-affirmed a narrow reading of the Twenty-first Amendment:

> As for the dormant Commerce Clause, the developments leading to the adoption of the Twenty-first Amendment have convinced us that

420. *Tenn. Wine & Spirits*, 139 S. Ct. at 2468–69 ("In 1936, the Court found that § 2's text was 'clear' and saw no need to consider whether history supported a more modest interpretation, . . . [t]he Court read § 2 as granting each State plenary 'power to forbid all importations which do not comply with the conditions which it prescribes,' . . . [t]he Court went so far as to assume that the Fourteenth Amendment imposed no barrier to state legislation in the field of alcohol regulation.").

421. *Id.* at 2468 ("Although our later cases have recognized that § 2 cannot be given an interpretation that overrides all previously adopted constitutional provisions, the Court's earliest cases interpreting § 2 seemed to feint in that direction.").

422. *See id.* at 2469.

423. *Id.* at 2463 (citing Craig v. Boren, 429 U.S. 190, 206 (1976)).

424. *Id.* at 2467 ("As we have previously noted, the text of § 2 'closely follow[ed]' the operative language of the Webb-Kenyon Act, and this naturally suggests that § 2 was meant to have a similar meaning.").

425. *Id.* at 2469.

426. Saunders, *supra* note 74, at 274 ("In the aftermath of *Granholm*, lower courts struggled to reconcile the protections of the Twenty-First Amendment with the Court's strong repudiation of any interpretation that favored discrimination against interstate commerce.").

427. *Id.* at 275 ("A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective."); *see also* Granholm v. Heald, 544 U.S. 460, 488–89 (2005).

428. Saunders, *supra* note 74, at 274–75; *see also* Jonathan M. Rotter & Joshua S. Stambaugh, *What's Left of the Twenty-First Amendments?*, 6 CARDOZO PUB. L., POL'Y, & ETHICS J. 601, 608 (2008) ("[I]f liquor is subject to all of the constraints of the Dormant Commerce Clause . . . a state can choose either (1) to be dry, and permit no liquor . . . or (2) to allow all alcohol without respect to its geographic origin.").

> the aim of § 2 was not to give States a free hand to restrict the importation of alcohol for purely protectionist purposes.[429]

This decision has been regarded as "an even greater limitation of section 2 [of the Twenty-first Amendment]," [430] leaving states with the limited choice to prohibit alcohol completely or permit alcohol with regulations conditioned on Dormant Commerce Clause compliance.[431]

E. Securing an Explicit Congressional Grant of Power to the States to Regulate and Criminalize Marijuana-Related Activities

To ensure that states retain the power to prohibit and criminalize marijuana-related activities, Congress must include an explicit grant of power to the states to legislate in this area. The statutory and constitutional basis for alcohol regulation can provide many lessons for the legislative path forward for protecting state rights in the context of federal marijuana reform. Absent alcohol-like state protections, states may suffer the same fate as dry states in the period before the Webb-Kenyon Act. Prior to the Webb-Kenyon Act, the Supreme Court held that "in the absence of Congressional permission[, states] had no power to prohibit the sale of intoxicating liquor in the original package in which it was shipped from another state."[432] According to an article published in the *St. Louis Law Review*, residents of dry states could simply "evade the effect of the various state prohibitory liquor laws by the simple expedient of having the liquor shipped in from another state."[433] Without express congressional grants of power to the states, prohibition states may suffer the same fate in an environment of federally decriminalized and legalized marijuana.

But while alcohol and marijuana share many historical and regulatory similarities, the Twenty-first Amendment poses an anomalous situation given that federal marijuana reform would most likely occur through congressional legislation rather than constitutional amendment. Nonetheless, the Supreme Court's modern interpretation of the Twenty-first Amendment seemingly

429. *Tenn. Wine & Spirits*, 139 S. Ct. at 2469 (first citing *Granholm*, 544 U.S. at 486–87; and then citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984)).

430. Saunders, *supra* note 74, at 278–79 ("Taken on its own, this text implies that section 2 still confers some unique authority on the states, namely, the authority to restrict the sale and use of alcohol for the safety of its citizens. However, when considered in the context of the Court's recent Twenty-First Amendment cases, it becomes evident that even when states attempt to regulate alcohol in the interest of public health, the Court still interrogates the effectiveness of the regulation in protecting this public health interest, an inquiry that precisely echoes the narrow tailoring requirement of discriminatory regulation under the DCC.").

431. *Id.* at 285.

432. *The Present Status of the Webb-Kenyon Act*, *supra* note 407, at 55.

433. *Id.*

treats alcohol the same way as any other good vis-à-vis the Dormant Commerce Clause. The Court also explicitly relies on the Webb-Kenyon Act and Wilson Act to inform its understanding of the purpose and effect of the Twentieth-first Amendment.[434] Accordingly, alcohol-like protections—at least the power to completely prohibit marijuana within state borders—can likely be achieved without a constitutional amendment. As historians have observed and as Rep. Polis proposed in his 2013 bill, either incorporating marijuana into the Webb-Kenyon Act and Wilson Act or crafting new marijuana legislation mirroring these acts could deliver similar regulatory results.[435] These protections, coupled with an express anti-preemption provision, would cement states' power to criminalize and/or prohibit marijuana in the event of federal legalization and/or decriminalization.

V. FEDERAL BILLS PROPOSING MARIJUANA DECRIMINALIZATION AND LEGALIZATION

Over the past decade, federal legislators have introduced several bills to legalize and decriminalize marijuana.[436] Chemerinsky et al. have categorized these bills as having eight different objectives.[437] But before December 2020, a bill to remove marijuana from the CSA Schedule I prohibition list had never been voted on in either chamber of Congress.[438] This changed on December 4, 2020, when the House of Representatives voted to pass the MORE Act, which called for the federal decriminalization of marijuana.[439] Labeled the

434. *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2465–67 (2019).

435. Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013).

436. *See* Chemerinsky et al., *supra* note 1, at 113.

437. *Id.* at 113–14 ("(1) remove marijuana from the CSA schedule of drugs and the enforcement and punishment provisions of the federal code; (2) reschedule marijuana to allow marijuana for medical use in the states where medical marijuana has been legalized and to ensure "an adequate supply of marijuana is available for therapeutic and medicinal research"; (3) provide an affirmative defense for medical marijuana-related activities conducted in compliance with state law and mandate the return of property seized by the federal government in connection to marijuana prosecutions; (4) amend the asset forfeiture provisions of the CSA to prohibit the seizure of real property used in activities performed in compliance with state marijuana laws; (5) amend the CSA preemption provision (21 U.S.C. § 903) to specify that the CSA shall not be construed to indicate that Congress intended to occupy the field of marijuana enforcement or preempt state marijuana laws; (6) prohibit the DEA and the DOJ from spending taxpayer money to raid, arrest, or prosecute medical marijuana patients and providers in states where medical marijuana is legal; (7) prohibit any provision of the CSA from being applied to any person acting in compliance with state marijuana laws; and (8) provide legal immunity from criminal prosecution to banks and credit unions providing financial services to marijuana-related businesses acting in compliance with state law.")

438. Paul Armentano, *Four Reasons Why the MORE Act Vote Is a Really Big Deal*, NORML (September 10, 2020), https://norml.org/blog/2020/09/10/four-reasons-why-the-more-act-vote-is-a-really-big-deal/ [https://perma.cc/8UA4-FP8T].

439. Alicia Victoria Lozano, *House Passes Historic Bill to Decriminalize Cannabis*, NBC NEWS (Dec. 4, 2020, 5:29 AM), https://www.nbcnews.com/politics/congress/congress-takes-historic-bill-decriminalize-cannabis-n1249905 [https://perma.cc/Z9PP-KCN3].

"most comprehensive marijuana reform bill ever introduced,"[440] the MORE Act not only removed marijuana from the CSA but also called for the expungement of criminal records for marijuana offenses and for the creation of grant programs for those affected by criminal drug enforcement.[441] Given its popularity and political success in the House, the MORE Act is the focus of this Article's constitutional analysis.

A. Analyzing the Marijuana Opportunity Reinvestment and Expungement Act of 2020 (the MORE Act)

1. An Overview of the MORE Act

In July 2019, Senator Kamala Harris introduced the MORE Act of 2019 in the U.S. Senate.[442] That same day, Representative Jerry Nadler introduced an identical bill in the U.S. House.[443] The Senate version of the bill was read and referred to the Committee on Finance, but no subsequent action was taken by the Senate.[444] The House version ultimately passed in December 2020.[445] The identical bills—together, the MORE Act—sought to decriminalize marijuana by removing it from the CSA and eradicating criminal penalties for the manufacture, possession, and sale of marijuana.[446] The Act's stated purpose was "[t]o decriminalize and deschedule cannabis, to provide for reinvestment in certain persons adversely impacted by the War on Drugs, to provide for expungement of certain cannabis offenses, and for other purposes."[447] To this end, the bill "requires federal courts to expunge prior marijuana-related convictions and arrests and authorizes the assessment of a 5% sales tax on marijuana and marijuana products to create an Opportunity Trust Fund."[448] The Trust Fund would create "grant programs administered by the Department of Justice and the Small Business Administration to

440. *Historic: Judiciary Committee Chairman Introduces Bill To End Federal Marijuana Prohibition*, NORML (July 23, 2019), https://norml.org/blog/2019/07/23/historic-judiciary-committee-chairman-introduces-bill-to-end-federal-marijuana-prohibition/ [https://perma.cc/N79D-PCCQ]; *see also What Is the MORE Act, and How Could It Change Marijuana Policy Forever?*, NORML (Aug. 19, 2019), https://norml.org/blog/2019/08/19/what-is-the-more-act-and-how-could-it-change-marijuana-policy-forever/ [https://perma.cc/G9Z8-4T9T] (describing the MORE Act as "the most revolutionary and socially conscious federal marijuana reform bill introduced to date").

441. *See* LAMPE, *supra* note 18, at 2–3.

442. MORE Act, S. 2227, 116th Cong. (2019).

443. MORE Act, H.R. 3884, 116th Cong. (2019).

444. S. 2227.

445. H.R. 3884.

446. H.R. 3884; S. 2227.

447. H.R. 3884; S. 2227.

448. Natalie Fertig (@natsfert), TWITTER (Aug. 28, 2020, 12:10 PM), https://twitter.com/natsfert/status/1299378927530508288 [https://perma.cc/N5M9-U3SE] (depicting Rep. James Clyburn's "Whip Question" Memorandum on the MORE Act); s*ee also* LAMPE, *supra* note 18, at 2–3.

support individuals who have been adversely affected by the War on Drugs, provide assistance to socially and economically disadvantaged small business owners, and minimize barriers to marijuana licensing and employment."[449]

2. Discerning Congressional Intent and Identifying the Lack of State Protections in the MORE Act

The MORE Act does not contain any express provisions reserving to the states the power to regulate or criminalize marijuana-related activities. And the text, structure, and legislative record of the MORE Act do not support a definitive conclusion on whether states retain the power to regulate or criminalize marijuana-related activities. Without an express anti-preemption provision, the MORE Act jeopardizes the regulatory power of the states and leaves the issue of discerning implied preemptive intent to the judiciary. In tracing the MORE Act's text, structure, and legislative record, this subsection demonstrates the uncertainty surrounding the Act's allocation of power between the states and federal government. Further, this subsection concludes that, absent express provisions protecting the states, the MORE Act—and any federal marijuana legislation—could leave the states powerless to prohibit and criminalize marijuana.

At best, there are some ancillary provisions in the MORE Act and congressional records that *implicitly* suggest Congress's intent to *not* preempt conflicting state marijuana legislation. But, on the other hand, the purposes and objectives of the Act, along with some auxiliary provisions,[450] may lead to the opposite conclusion. Upon judicial review, a court could find that state marijuana laws implicitly conflict with the purposes and objectives of the MORE Act, leading to the preemption of those state laws. For example, Chemerinsky et al. have observed that "nearly all marijuana enforcement in the United States has taken place at the state level."[451] Based on this premise, it may be argued that the Act's goal of marijuana decriminalization likely cannot be achieved if states have the ability to continue criminalizing marijuana-related conduct under state laws.

449. Fertig, *supra* note 448; *see also* LAMPE, *supra* note 18, at 3.

450. While the Act does not acknowledge that states retain the power to prohibit and/or criminalize marijuana-related activities, it does make a distinction between "States" and "eligible States" throughout the Act. *See* H.R. 3884; S. 2227. However, this distinction does not reflect any acknowledged difference between legalized and non-legalized states. Section 6(b) of the Act details the various federal benefits, like access to funding and services, bestowed upon an "eligible State or locality." *Id.* § 6. Section 6(b)(3)(B) defines the term "eligible State or locality" as "a State or locality that has taken steps to—(i) create an automatic process, at no cost to the individual, for the expungement, destruction, or sealing of criminal records for cannabis offenses; and (ii) eliminate violations or other penalties for persons under parole, probation, pre-trial, or other State or local criminal supervision for a cannabis offense." H.R. 3884; S. 2227.

451. Chemerinsky et al., *supra* note 1, at 84.

Furthermore, the MORE Act calls for the creation of expungement and grant programs, which are funded by a 5% tax on marijuana products.[452] If a state decides to criminalize or prohibit marijuana, the purposes and objectives of this Act (to create expungement and grant programs) may be frustrated because these states will not have taxable marijuana products and thus cannot fund these programs. To take this hypothetical a step further, imagine that multiple states decide to criminalize or prohibit marijuana. In this hypothetical scenario, the Act's programs would face funding shortages because limited marijuana products would be available for sale and taxation. This could impede the purpose and objectives of the Act. Of course, it may be argued that these programs will only operate in states that provide adequate marijuana-related tax revenue; however, the Act does not contain any provisions indicating such an approach.[453] And even if this limiting principle were interpreted or included in the Act, the Act's objectives would still be frustrated because citizens of "non-marijuana" states would fall outside the reach of these congressional programs. In turn, this limitation would preclude the Act from attaining its objective of reinvesting in persons "adversely impacted by the War on Drugs."[454]

Additionally, the MORE Act arguably establishes a federal framework for commerce and social services that preempts any state laws attempting to regulate in the same field. Section 6 of the Act states:

> The Director of the Cannabis Justice Office shall establish and carry out a grant program, known as the 'Community Reinvestment Grant Program', to provide eligible entities with funds to administer services for individuals adversely impacted by the War on Drugs.[455]

Also pursuant to Section 6, "The Director . . . shall provide eligible entities with funds to administer substance use disorder services for individuals adversely impacted by the War on Drugs or connect patients with substance use disorder services."[456] The Administrator of the Small Business Administration is charged with establishing and implementing grant and licensing programs throughout states and localities.[457] To finance these initiatives, the MORE Act establishes a new "Opportunity Trust Fund" in the

452. LAMPE, *supra* note 18, at 3.

453. *See* H.R. 3884 (as passed by House, Dec. 4, 2020).

454. LAMPE, *supra* note 18, at 2.

455. H.R. 3884 § 3052 (as passed by House, Dec. 4, 2020).

456. H.R. 3884 § 6 (as passed by House, Dec. 4, 2020); *see also id.* ("Also eligible for such services are individuals who have been arrested for or convicted of the sale, possession, use, manufacture, or cultivation of a controlled substance other than cannabis (except for a conviction involving distribution to a minor).").

457. *Id.*

U.S. Treasury.[458] The Trust Fund receives appropriations from a 5% tax on marijuana products.[459] The funds will then be distributed to the Attorney General and Administrator of the Small Business Administration to carry out the aforementioned functions, among others.[460] In sum, these MORE Act provisions establish a federal system for "reinvestment" in communities affected by the "War on Drugs" using a federal taxation scheme.

Pursuant to the MORE Act, the federal government would also create a grant program that bestows commercial marijuana licenses on eligible entities.[461] Under Supreme Court precedent, the creation of this federal scheme could lead to the inference that Congress left no room for states and localities to concurrently regulate.[462] These provisions also arguably establish federal licensing of marijuana commerce, thus leaving the states without any power to prohibit it within their borders.[463]

On the other hand, some provisions in the MORE Act may implicitly recognize that states retain the power to criminalize and/or prohibit marijuana-related activities. Section 5(a) of the Act proposes amendments to Chapter 98 of the Internal Revenue Code (IRC) to update the IRC in light of federal marijuana reform.[464] One of these amendments states:

> The payment of any tax imposed by this subchapter for carrying on any trade or business shall not be held to—
>
> (1) *exempt any person from any penalty or punishment provided by the laws of any State for carrying on such trade or business within such State*, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law, or . . .[465]

This provision acknowledges that state laws criminalizing and prohibiting marijuana may still exist after the MORE Act and that payment of federal taxes on marijuana-related activities does not immunize a taxpayer from those state laws.[466] Similarly, Section 7(a) of the MORE Act proposes amendments to the Small Business Act (15 U.S.C. § 632) to reconcile the

458. *Id.* § 5.
459. *Id.*
460. *See id.*
461. *Id.* § 6.
462. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
463. *See* Fla. Lime & Avocado Growers, Inc. v. Paul, 313 U.S. 132, 142 (1963) (citing Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 447–48 (1960)).
464. H.R. 3884 § 5 (as passed by House, Dec. 4, 2020).
465. *Id.* (emphasis added).
466. *Id.*

Small Business Act with a federally legalized marijuana environment.[467] In these proposed amendments, Section 7(a) of the MORE Act states:

> The term 'cannabis-related legitimate business' means a manufacturer, producer, or any person or company that is a small business concern and that—
>
> (A) engages in any activity described in subparagraph (B) *pursuant to a law established by a State or a political subdivision of a State*, as determined by such State or political sub-division; and . . . .[468]

This provision arguably recognizes that a cannabis business is only legitimate if it operates validly under a state law that permits marijuana operations.[469] In other words, it acknowledges that some states may continue to prohibit and/or criminalize marijuana-related activities. While this argument may cut against preemption, it appears to be a weaker and more attenuated statutory argument juxtaposed the Act's foundational purpose, objectives, and other statutory provisions that favor preemption.

Turning to extra-statutory sources of intent, one congressional report and multiple media outlets widely declared that states would retain power to criminalize marijuana under the MORE Act. However, this assertion is not reflected anywhere in the statutory text of the MORE Act itself. A report from the Congressional Research Service ("CRS") claimed that the MORE Act "would not directly alter the status of cannabis under state law" because "states are free to regulate substances that are not subject to the CSA or other federal law provided there is no 'positive conflict . . . such that the [CSA and state law] cannot consistently stand together.'"[470] In making this pronouncement, the CRS fails to properly account for the fact that the MORE Act itself would be a federal law that regulates marijuana.[471] In other words, if the MORE Act passed, states would arguably not be "free to regulate" marijuana because the MORE Act itself would create a "positive conflict" since marijuana would be "subject to" the MORE Act, which creates a comprehensive federal framework for decriminalizing and legalizing marijuana-related activities. Even more importantly, the CRS report failed to cite any statutory provisions in the MORE Act supporting its conclusion that states would retain power to criminalize marijuana.

467. *Id.* § 7.
468. *Id.* (emphasis added).
469. *See id.*
470. *See* LAMPE, *supra* note 18, at 3.
471. *Id.*

Like the CRS, media outlets also reported—without any statutory citations—that states would retain the power to criminalize and regulate marijuana under the MORE Act. According to Politico reporter Natalie Fertig, the MORE Act "would not immediately legalize [marijuana] sale in every state," and "some states may not allow sales even if the federal ban was removed."[472] Similarly, CNBC reported that the Act "allows states to enact their own policies and gives them incentives to clear criminal records of people with low-level marijuana offenses."[473] Further, the Political Director of the National Organization for the Reform of Marijuana Laws (NORML) recognized that the MORE Act allows states and cities to "regulate cannabis however they want."[474] However, these reports do not have any statutory grounding in the MORE Act itself. While these media outlets do not cite the sources for their assertions, the assertions are likely derived from the Act's legislative record, in which four congressmembers expressed these sentiments.[475] During a House Judiciary Committee hearing on the MORE Act in 2020, four congressmembers expressed the notion that the states would retain the power to decide whether to legalize marijuana within their own borders. First, Representative Sheila Jackson Lee of Texas stated:

> [The MORE Act] does not mean that marijuana would now be legal in the entire United States, as some have tried to argue. It would simply remove the Federal Government from interfering with State laws and State structures in the business of prosecuting marijuana cases and would leave the question of legality to the individual States.
>
> . . .
>
> and those States that choose to continue to make marijuana illegal can continue to do so as well.[476]

472. Fertig, *supra* note 11.

473. Berkeley Lovelace Jr., *House Committee Approves Landmark Bill Legalizing Marijuana at the Federal Level*, CNBC (Nov. 21, 2019, 6:18 PM), https://www.cnbc.com/2019/11/20/house-committee-approves-bill-decriminalizing-marijuana-on-the-federal-level.html [https://perma.cc/LYZ6-CP8Y].

474. *See What is the MORE Act, and How Could It Change Marijuana Policy Forever?*, *supra* note 440 ("As states and local governments identify what practices work best for their communities, and, collectively, as states and localities learn from each other, slowly but surely there will be a consensus that emerges when it comes to regulatory structures, consumer safety and protections, and the like.").

475. *See* Fertig, *supra* note 11; Lovelace, *supra* note 473; *What is the MORE Act, and How Could It Change Marijuana Policy Forever?*, *supra* note 440.

476. 166 CONG. REC. H6828 (daily ed. Dec. 4, 2020) (statement of Rep. Jackson Lee), https://www.congress.gov/116/crec/2020/12/04/CREC-2020-12-04-pt1-PgH6819-2.pdf [https://perma.cc/HL6S-HLMD].

Likewise, Representative Tulsi Gabbard of Hawaii observed that the MORE Act "frees States to regulate [cannabis] as they choose."[477] Representative Richard Neal of Massachusetts stated that the Act "does not undermine the ability of states to apply their criminal laws as they see fit."[478] And Representative Earl Blumenauer of Oregon acknowledged: "This bill would not force states to make cannabis legal. If a state like Idaho wants to continue arresting people for cannabis, they will have that ability, as much as I may disagree with that decision."[479]

However, other congressmembers expressed contrary sentiments in the congressional record, which directly conflicted with the media reports and CRS report. Representative Steven Palazzo of Mississippi stated, "To legalize marijuana or not is one thing; to pass a bill that has no recourse for States that don't want mass legalization, which totals 35 states, is irresponsible."[480] Representative Greg Murphy of North Carolina opined that the MORE Act "disrespects States' rights."[481] And finally, Representative Andy Biggs of Arizona observed that "ostensibly deregulating cannabis imposes a Federal tax, Federal agencies, Federal oversight. [It is] not de-federalizing marijuana; [it is] just changing the regulatory structure in which you control marijuana."[482]

While members of Congress apparently disagreed on the Act's implications for state marijuana regulatory power, the record *arguably* supports the states' power to regulate and criminalize marijuana— if the CRS report, media interpretations, and Democratic legislator sentiments are afforded greater weight. Nonetheless, the Supreme Court recently observed in *Virginia Uranium* that its implied preemption analysis hinges on the text and structure of the congressional act rather than "abstract and unenacted legislative desires."[483] In fact, the Supreme Court explicitly disavowed judicial reliance on the individually expressed preferences of members of Congress: "Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual Members of Congress often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are fully realized in the final product."[484] Thus, while some members of Congress may genuinely seek to reserve regulatory power to the states,

477. *Id.* at H6837 (statement of Rep. Tulsi Gabbard).
478. *Id.* (statement of Rep. Richard Neal).
479. *Id.* at H6839 (statement of Rep. Earl Blumenauer).
480. *Id.* at H6835 (statement of Rep. Steven Palazzo).
481. *Id.* at H6831 (statement of Rep. Greg Murphy).
482. *Id.* at H6834 (statement of Rep. Andy Biggs).
483. 139 S. Ct. 1894, 1907 (2019) (citing CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).
484. *Id.* at 1907–08.

these desires are virtually irrelevant if they are not manifested in the Act's text and structure.

In sum, the MORE Act's failure to include express anti-preemption provisions and provisions granting regulatory power to the states jeopardizes the states' ability to criminalize and/or prohibit marijuana. As evidenced by the MORE Act's text, structure, and legislative record, it is unclear whether the states would retain power to criminalize and/or prohibit marijuana-related activities. Absent an express anti-preemption provision and provisions explicitly granting regulatory power, the unelected judiciary would be left to grapple with an ambiguous congressional act and uncertain legal precedent to determine one of the most important federalism issues of our lifetime. And given the Supreme Court's history of "reading preemption clauses into statutes that did not really imply them"[485] and the Court's textualist trend away from applying the "presumption against preemption," the fate of the states' marijuana regulatory power would be greatly imperiled in the courts.

VI. CONCLUSION AND RECOMMENDATIONS FOR PROTECTING THE STATES' REGULATORY POWER

If marijuana is federally legalized and/or decriminalized, the Supremacy Clause and Dormant Commerce Clause are both independent constitutional obstacles that could prevent states from criminalizing and prohibiting marijuana-related activities. The MORE Act's lack of express provisions addressing these constitutional issues is proof that Congress is either unaware or unwilling to include these explicit protections for the states.[486] To adequately protect the states' power to regulate and/or criminalize marijuana, both constitutional obstacles must be addressed in the structure and text of any federal marijuana legislation. The best mechanisms for achieving these protections would be including (1) an explicit anti-preemption provision disavowing any congressional intent to preempt state marijuana laws, and (2) an explicit congressional grant of power to the states allowing them to prohibit and/or criminalize marijuana-related conduct within their own borders.

Despite the independent nature of the federal preemption and interstate commerce inquiries, it may be argued that one single statutory provision *could possibly* satisfy both constitutional concerns. That is, a congressional grant of power to the states to prohibit and criminalize marijuana may in itself serve as an anti-preemption provision, at least with respect to the delineated powers

485. Nelson, *supra* note 119, at 303 (noting that the courts have long struggled to pinpoint a consensus approach on interpreting implied preemption).

486. Since multiple members of Congress expressed desires to reserve power to the states yet failed to include provisions to do so, it seems more likely that Congress is unaware of these constitutional obstacles.

granted to the states. Arguably, this singular grant of power could suffice because the congressional grant of power would expressly demonstrate that Congress intended to give the states the power to regulate and did not intend to preempt those state laws. In theory, this contention may be correct, but it would also carry problematic limitations and uncertainties.

For example, if Congress's grant of power to the states is vague or non-comprehensive, then this power-granting provision will fail to safeguard state laws against implied preemption challenges in other areas outside the scope of this commerce provision. This could create a strong inference that, outside of the few permissible congressionally granted areas of regulation, Congress intended to preempt state laws. As illustrated in *Pacific Gas,* the Supreme Court determined that the federal law at issue compelled the determination that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states."[487] A federal anti-preemption clause could prove valuable in these circumstances. As another example, if a state regulates marijuana in a realm outside the scope of congressionally granted power, the state holds that prerogative if the state law can pass Dormant Commerce Clause judicial review (the *Pike* test). But a state law that passes the *Pike* test could still be invalidated if the courts determine that Congress intended to create a nationwide framework for marijuana regulation that implicitly preempts state laws in that field. In this hypothetical scenario, the absence of a federal anti-preemption provision could prove costly and lead to the invalidation of state laws.

To remedy this potential issue, it may be argued that Congress could simply include, in the congressional grant of power to the states, every regulatory power that it would otherwise not preempt in the anti-preemption provision. Put differently, Congress could draft an all-encompassing grant of power to the states that accounts for every regulatory power that the sates would retain under the anti-preemption provision. While this may be theoretically possible, it would be very difficult. A congressional grant of power to the states to regulate commerce is a grant of power typically more limited in scope, detailed in the exact subject matter, and affirmative in nature. On the other hand, federal anti-preemption provisions can be drafted with less specificity and in terms that more comprehensively reserve power to the states to regulate. For example, the anti-preemption provision in the CSA was drafted to "expressly disclaim preemptive intent in all but a narrow set of circumstances."[488] It reads as follows:

487. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983); *see* SYKES & VANATKO, *supra* note 120, at 23.

488. Chemerinsky et al., *supra* note 1, at 104.

> No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.[489]

Consequently, while a single provision addressing both constitutional issues may be theoretically possible, the inclusion of both an anti-preemption provision and an explicit grant of power to the states likely affords the states greater protection. In sum, any future federal legislation seeking to decriminalize and/or legalize marijuana must include these provisions if Congress wants to fully protect the rights of states to prohibit and criminalize marijuana-related activities within their own borders.

489. *Id.* 21 U.S.C. § 903 (1988).