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Bringing the Green to Green: Would the Legalization of Marijuana in California Prevent the Environmental Destruction Caused by Illegal Farms?

Dana Kelly

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I. Introduction

Support for the complete legalization of marijuana is higher than it has ever been.¹ Nationally, fifteen states and Washington D.C. currently allow

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marijuana for medical purposes. In California, marijuana has been decriminalized for medical purposes since 1996. In the 2010 mid-term elections, 46.5 percent of Californians voted to legalize marijuana under Proposition 19. Many Californian counties have made the enforcement of marijuana laws the lowest priority of local police. Since 2010, people who possess less than one ounce of marijuana cannot be arrested but instead are subject to a $100 fine.

Much of the dialogue for legalization has focused on the criminal and moral aspects of the marijuana prohibition. This note will focus on the environmental problems caused by illegal marijuana farms. It will examine whether legalization would effectively regulate the cultivation of marijuana to prevent destruction to habitat. First, it will explore whether farmers could legally use water to grow marijuana under California water law. It will then examine whether legalization would be struck down as unconstitutional under the Supremacy Clause. Finally, this note will determine whether the Federal government can require California to continue enforcing marijuana prohibition laws under the Tenth Amendment.

II. Environmental Damage

In early 2008, a family in Covelo, Mendocino, called the Department of Fish and Game to complain that their tap water had an odd taste. A warden drove out to their home to investigate. While he was hiking along the banks of the Eel River to collect water samples, he stumbled across a secret, underground greenhouse full of marijuana plants. This illegal farm was the source of the problem.

9. Id.
10. Id.
11. Id.
The growers had buried room-sized storage crates in the forest floor and set up two diesel-powered generators to run lamps.\textsuperscript{12} The illegal farm supported over five thousand plants, which, assuming an average growth rate, would have generated a total of $20 million tax-free dollars a year, in marketable marijuana.\textsuperscript{13} For months the growers had disposed the used oil from their generators in a patch of redwood trees, one hundred yards away from the river which was the source of drinking water for Covelo.\textsuperscript{14} As if this weren’t bad enough, the generators were in poor repair and had been leaking raw diesel directly into the ground.\textsuperscript{15} As Sheriff Tom Allman said on the day of the raid, “This was the most grotesque environmental damage I’ve ever seen.”\textsuperscript{16} The cleanup took weeks but much of the damage was irreversible.\textsuperscript{17}

Marijuana is a hugely profitable commodity. The estimated value of the marijuana grown in Mendocino alone ranges from $1.5 billion to $10.5 billion.\textsuperscript{18} In comparison, the statewide value of California’s grapes in 2006 was a mere $75.3 million.\textsuperscript{19} However, since marijuana is illegal, Mendocino County cannot tax it.\textsuperscript{20} In 2010, the District Attorney’s budget was cut by five percent and the sheriff’s was cut by four percent, despite an increase in marijuana seizures.\textsuperscript{21} With resources stretched thin, the County cannot effectively police these illegal farms (called “grows”) and prevent the environmental destruction they cause.\textsuperscript{22}

Mendocino County has suffered some of the worst environmental consequences of marijuana cultivation. A combination of permissive local laws, rich soil, compatible temperature, and huge forests used for camouflage has made Mendocino, in the words of District Attorney Katherine Houston, “the marijuana capital of the world.”\textsuperscript{23} It is unknown exactly how much marijuana is grown in the county since the farms are hidden underground, in forests, or in abandoned farm houses, but it is

\textsuperscript{12} Id.
\textsuperscript{13} Id. at 2.
\textsuperscript{14} Id. at 4.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{19} Nathan, supra note 1, at 2.
\textsuperscript{20} Id. at 5.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 2.
\textsuperscript{23} Id.
estimated that the police find only between five to ten percent of what is
grown. In 2009, the police seized nearly 540,000 plants.  
The sites that are most appealing for illegal farms are wooded areas, far from any town or road. Horribly, these tend to be areas preserved for habitat restoration and conservation. Indeed, seventy percent of the plants confiscated by police in 2009 were grown on public or protected land. The growers cut down trees and terrace the hills, planting between fifty to a hundred marijuana plants in a clearing. Sometimes, there are five or six of these clearings in a square mile. The growers lay black tubing down on the forest floor to redirect the natural mountain streams to their farms. These tubes are very hard to see but their effects are very visible. The streams that would normally feed the rivers never make it down the mountain, causing serious problems for wildlife. For example, in 1996 the Coho Salmon was listed as threatened. By 2005, it was listed as endangered. 

Growing marijuana outdoors is, in many ways, just like growing any other crop. Bugs and rodents cause problems and the soil needs to be rich. But since most of the growers are trespassing, they have no interest in maintaining the long-term quality of the land. They sprinkle rat poison at the base of their crop. When it rains, the poison washes off the marijuana and down into the streams, killing fish and polluting water supplies. Some of these outdoor farms have been using carbofuran, an extremely toxic pesticide that has been linked with poisoned lions in Kenya. It is used to protect crops from soil-dwelling pests such as weevils, aphids, and root flies. The granular form of carbofuran has been banned since 1994 after the EPA determined that it had killed more than a million

24. Id. at 2, 5.
25. Id. at 2.
26. Id.
27. Id. at 1.
28. Id. at 2.
29. Id.
30. Id.
31. Id.
32. Id. at 4.
33. Id.
34. Id.
35. Id. at 5.
36. Id. at 4.
37. Id.
38. Id.
birds each year. In 2009, the EPA declared that the “dietary, worker, and ecological risks are unacceptable for all uses of carbofuran” and banned all forms of carbofuran in the United States. There have been reports that some illegal farms in Mendocino still use the granular form of carbofuran, obtained illegally. Cynthia LeDoux-Bloom, of the Department of Fish and Game Department in Mendocino County, stated that, “These growers are worse than the clear-cutters of the 1950’s, and we will likely see the effects of their toxic chemicals in our soil and water for decades.

III. The Regulate, Control and Tax Cannabis Act of 2010

In the California midterm elections of 2010, the Regulate, Control and Tax Cannabis Act was put onto the ballot as Proposition 19. If passed, Proposition 19 would have legalized the possession, consumption, and cultivation of marijuana for people twenty-one and older. Anyone in California could legally grow marijuana on his own property for his own consumption, provided that the garden was smaller than twenty-five square feet. If a local government chose to commercialize marijuana, it could create a regulatory system for its cultivation and distribution. The local government could then collect sales tax on an industry that has been thriving for years. Presumably, Marijuana would then be grown under existing environmental regulations. If a local government decided not to commercialize marijuana, individuals within that jurisdiction would still have the right to grow, possess, and consume for their own use.

Proponents argued that Proposition 19 would raise billions of dollars in sales taxes, save millions of dollars for police and prisons to focus on more dangerous crimes, and make the cultivation of marijuana cleaner and greener. However, despite early favorable polls, Proposition 19 did not pass, with 53.5 percent of California voters voting against it and 46.5 percent

40. Id.
41. Id.
42. Nathan, supra note 1, at 4.
43. Id.
45. Id. at 93-94.
46. Id. at 93.
47. Id.
48. Id.
49. Id.
voting in favor. But proponents of Proposition 19 are gearing up for another ballot measure in 2012, anticipating that the youth vote will be stronger in a presidential election year.

Opponents of Proposition 19 decided early not to use the “gateway drug” argument. In fact, their arguments focused very little on the health effects of smoking marijuana. Instead they argued that Proposition 19 did not set a standard for intoxicated driving, that it would create unsafe work environments because people could legally possess and smoke marijuana at work, and that the K-12 public schools would lose $9.4 billion in Federal funding. (The argument that public schools could lose $9.4 billion in federal funding appears to be an unsubstantiated rumor.)

Most significantly, opponents focused on the fact that Proposition 19 would allow a “hodgepodge” of varying local rules for the cultivation and distribution of marijuana. Beyond the minimum requirement that individuals may only grow marijuana on up to twenty-five square feet of land, which would apply statewide, local governments could enact completely different regulatory schemes. Furthermore, the enforcement of the local rules would fall entirely on the local government’s shoulders. Counties like Mendocino are already unable to curb the rampant, destructive illegal farming of marijuana. It is not clear that Proposition 19 would have alleviated this burden.

This is the crux of the issue. Would Proposition 19, or similar legalization laws, prevent the environmental destruction caused by illegal marijuana farms? If local governments have the discretion to commercialize marijuana, then the burden of regulation and control would fall disproportionately, albeit voluntarily, on the localities that choose to commercialize. Furthermore, marijuana cultivation would have to fit into the existing land use laws and water laws. But the most significant legal obstacles would be the continuing enforcement of federal law and the constitutionality of legalization under the Supremacy Clause.

52. Fagan, supra note 49 at C1.
53. Id.
57. Id.
IV. Legalization and California Water Law

Under Article X, Section 2 of the California Constitution, property interests in water are limited to what can be reasonably used for a beneficial purpose.\textsuperscript{59} If a farm uses water wastefully, then it only has a property interest up to the amount of water that was not wastefully used.\textsuperscript{60} Reasonable use is not an exact, scientific measure.\textsuperscript{61} Instead, courts look to community standards to determine whether a use of water is reasonable.\textsuperscript{62}

Marijuana needs a lot of water. A large plant may require as much as a gallon of water per day.\textsuperscript{63} In comparison, during the peak of its growing season, a grapevine will need three to five gallons of water per week.\textsuperscript{64} However, reasonable use looks to the method used to deliver water to the crops, not to the amount of water consumed by the crop.\textsuperscript{65} So long as cultivators are using ordinary methods, like open irrigation ditches or sprinklers, their use would be reasonable under the law.\textsuperscript{66}

But would growing marijuana be considered a beneficial purpose? Proposition 19 conceived two ways marijuana could be grown. First, any individual could plant marijuana in his or her backyard, provided that the area where the marijuana would be grown does not exceed twenty-five square feet, that the crop be for their own personal use, and that they be legal occupants of the land.\textsuperscript{67} Second, organizations could grow marijuana on a much larger scale in participating counties.\textsuperscript{68} These two types of growing operations could be regulated differently under California water law.

Under the Water Code, the statutory definition of beneficial use includes domestic use.\textsuperscript{69} Domestic use means "the use of water in homes," which includes the "irrigation of not to exceed one-half acre in lawn, ornamental shrubbery, or gardens at any single establishment."\textsuperscript{70} Under these sections, the backyard cultivation of marijuana would be just as beneficial a use of water as growing tomatoes. Cultivators wouldn't even be

\textsuperscript{59} Cal. Const. Art. 10 Sect. 2.
\textsuperscript{60} Gin Chow v. City of Santa Barbara, 22 P.2d 5, 15-18 (1933).
\textsuperscript{61} Erickson v. Queen Valley Ranch Co., 99 Cal.Rptr. 446, 449-450 (1971).
\textsuperscript{63} GREG GREEN, THE CANNABIS GROW BIBLE 238 (2d ed. 2010).
\textsuperscript{64} Nathan, supra note 8, at 4.
\textsuperscript{65} Town of Antioch v. Williams Irr. Dist., 205 P. 688, 695-96 (1922).
\textsuperscript{66} Id.
\textsuperscript{67} Ballot Pamph., supra note 43, at 93.
\textsuperscript{68} Id.
\textsuperscript{69} CAL. WATER CODE § 13050(f) (2010).
\textsuperscript{70} CAL. CODE REGS. tit. 23, § 660 (2011).
required to apply for a water permit. As the law currently stands, individuals would be able to use water in their backyards to grow marijuana.

Large scale commercial cultivators, however, would face a slight risk that they would not qualify for water permits. Under the Water Code, the use of water for agriculture is a beneficial purpose, and there is no distinction between the types of crops that are grown. For example, water can be reasonably used for the beneficial purpose of growing rice and cotton in areas that are naturally deserts, a practice that is questionable as both reasonable and beneficial. Rice and cotton production usually involves flooding fields with water, which is, arguably, extremely wasteful. The legislature has made no moves to parse the definition of agriculture to exclude certain crops as beneficial uses, although such an amendment in response to the legalization of marijuana would be easy to imagine.

Even if the legislature does not act, a court could decide on public policy grounds that the cultivation of marijuana is not a beneficial purpose. After all, marijuana would not be an ordinary crop because it would remain illegal under federal law, which could weigh heavily into a court’s analysis. However, there is strong precedent that courts will not use public policy to determine property rights under water law since “public policy is at best a vague and uncertain guide” and “neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them.” Courts are far more likely to declare a use unreasonable and wasteful than they are to declare that a purpose is not beneficial. The few cases that have found unbeneficial uses of water have been limited to drowning rodents by flooding fields and watering duck ponds in a draught.

The courts would be unlikely to declare that marijuana cultivation is not a beneficial purpose for the use of water under the California Constitution in the face of a successful ballot initiative. They are more likely to defer to the State legislature and the local regulating authorities who chose to commercialize marijuana. However, given the continued enforcement of federal criminal law, the clean, large scale cultivation of marijuana may never happen out of fear of arrest.

73. Antioch, 205 P. at 695-96.
74. Id.
75. Gin S. Chow v. City of Santa Barbara, 22 P.2d 5, 15 (1933).
76. Id.
V. The Conflict Between Federal and State Law

In 1970, Congress passed the Controlled Substance Act ("CSA") with the purpose of "combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances." The CSA classifies controlled substances into one of five schedules based on their capacity for abuse, their current acceptance for medicinal use, and whether abuse of the substance leads to physical or psychological dependence. The schedules are updated by the Attorney General every two years, subject to findings made by the Secretary of Health and Human Services. Marijuana has been listed as a Schedule I drug since the CSA was first passed in 1970.

Substances listed under Schedule I are found to have high capacity for abuse, no accepted medicinal use, and no accepted safe use whatsoever.

The CSA anticipates and invites concurrent drug regulation by the States. California State law mirrors Federal marijuana regulation in many ways, but there are several major differences. The California Health and Safety Code lists marijuana as a Schedule I drug, which imposes a complete prohibition of its use and possession. However, in 1996, California passed the Compassionate Use Act, which created a medical use exception to the general State prohibition on marijuana. Under the Compassionate Use Act, a patient with a doctor's prescription for the use of medical marijuana may legally possess and cultivate marijuana for medical use. However, the Compassionate Use Act did not prevent patients from being arrested under State law for the possession of marijuana even though their doctor's prescription provided a complete defense during trial. To correct this technicality, California enacted the Medical Marijuana Program in 2003. Under this program, patients with prescriptions for medicinal marijuana could obtain an identification card which would protect them from arrest. Participation in the Medical Marijuana Program is completely voluntary.

81. 21 U.S.C. § 812(c)(10).
82. 21 U.S.C. § 812(b)(1).
88. City of Garden Grove v. The Superior Court of Orange County, 68 Cal. Rptr. 3d 656, 666 (2007).
90. City of Garden Grove, 68 Cal. Rptr. 3d at 666.
An identification card is not required to raise the medical defense in State courts.\textsuperscript{91}

In the 2010 mid-term election, Proposition 19 proposed to change State law to “(1) legalize the possession and cultivation of limited amounts of marijuana for personal use by individuals age twenty-one or older, and (2) authorize various commercial, marijuana-related activities under certain conditions.”\textsuperscript{92} As discussed above, Proposition 19 would have allowed any person over the age of twenty-one to grow marijuana on their property for their personal use so long as their garden was smaller than twenty-five square feet.\textsuperscript{93} Proposition 19 would also have given local governments the option to legalize the commercialization of marijuana and to pass local ordinances regulating its cultivation, taxation, and sale.\textsuperscript{94}

There are significant contradictions between the federal law under the CSA and current California law under the Compassionate Use Act and the Medical Marijuana Program. The legalization of marijuana in California would have significantly added to those contradictions. Indeed, Proposition 19 warned that “these marijuana-related activities would continue to be prohibited under Federal law” and that the “Federal prohibitions could still be enforced by Federal agencies.”\textsuperscript{95} This conflict of laws taps into the murky balance of power between the federal and state government.

\section*{VI. The Supremacy Clause and the Doctrine of Preemption}

The Supremacy Clause of the Constitution states that “this Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”\textsuperscript{96} This clause sets forth two requirements that must be met before a state law can be preempted by a federal law. First, the federal law must be Constitutional. Second, the state law must conflict with the federal law.

The first of these elements has already been addressed by the Supreme Court. In \textit{Gonzales v. Raich}, the Court held that Congress has the power to regulate any consumption, cultivation, or commercialization of marijuana under the Commerce Clause.\textsuperscript{97} This power extends even to

\begin{itemize}
  \item \textsuperscript{91} \textit{Id.}
  \item \textsuperscript{92} \textsuperscript{Ballot Pamp., supra note 44 at 12.}
  \item \textsuperscript{93} \textsuperscript{Ballot Pamp., supra note 44 at 93.}
  \item \textsuperscript{94} \textit{Id.}
  \item \textsuperscript{95} \textit{Id.}
  \item \textsuperscript{96} \textit{U.S. Const. art. VI, § 2.}
  \item \textsuperscript{97} \textit{Gonzales v. Raich}, 545 U.S. 1, 22 (2005).
\end{itemize}
intrastate activities that are in accordance with state law.\textsuperscript{98} However, Raich did not resolve the issue of preemption between California’s medicinal use defense and federal law.\textsuperscript{99} Because no State has legalized marijuana, the issue of whether or not legalization by a State conflicts with the CSA has yet to be addressed.

A federal law can invalidate a state law under the preemption doctrine by express preemption, field preemption, conflict preemption, or obstacle preemption.\textsuperscript{100} To find express preemption, Congress must explicitly define the extent to which its legislation preempts state law.\textsuperscript{101} Under field preemption, Congress must intend to preempt all state laws in a particular area, which would make any supplementary state regulation invalid.\textsuperscript{102} Conflict preemption arises when simultaneous compliance with both state and federal law is physically impossible.\textsuperscript{103} Finally, obstacle preemption applies when, under the facts of a specific case, the state law stands as an obstacle to the execution of the full purposes and objectives of the federal law.\textsuperscript{104} This note necessarily discusses the constitutionality of the medicinal marijuana laws as part of the preemption analysis for the complete legalization of marijuana.

\textbf{A. Field and Express Preemption Do Not Apply under CSA Section 903}

For field preemption to apply under the CSA, Congress must intend to preempt all state laws in a particular area of law.\textsuperscript{105} Analysis under the Supremacy Clause begins with “the basic assumption that Congress did not intend to displace State law.”\textsuperscript{106} When Congress legislates in a field that has been traditionally occupied by the states, this presumption is at its strongest.\textsuperscript{107} Under their historic police powers, the states are primarily responsible for “protecting the health and safety of their citizens.”\textsuperscript{108} Because the CSA is a federal law that regulates in an area traditionally

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{98} Id. at 29.
\item \textsuperscript{99} Id. at 15.
\item \textsuperscript{100} County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 475-76 (2008).
\item \textsuperscript{101} Id.
\item \textsuperscript{102} Id.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id.
\end{enumerate}
\end{footnotesize}
occupied by the States, a court will not find that the CSA preempts state law "unless that was the clear and manifest purpose of Congress." 109

Section 903 of the CSA specifically addresses Congress's intent regarding preemption:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, 'including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.' 108

Section 903 explicitly disclaims any intent to preempt the field of drug enforcement. 110 Field preemption can be implied if a federal regulation is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary State regulation." 112 However, field preemption will not be implied if there is language disclaiming intent to preempt the field because "the purpose of Congress is the ultimate touchstone" in a preemption analysis. 113 Therefore, field preemption does not apply to this analysis.

Express preemption will apply if Congress explicitly defines the extent to which its legislation preempts State law. 114 Section 903 states that federal law preempts state law only if "there is a positive conflict between [them] so that the two cannot stand together." 115 This language is not strong enough to invoke an express preemption analysis. In Southern Blasting Services, Inc. v. Wilkes County, the Fourth Circuit analyzed similar preemption language in a statute regulating explosives. 116 The statute read:

No provision in this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between

109. Id.
112. San Diego NORML, 81 Cal. Rptr. 3d at 476.
113. San Diego NORML at 475 (quoting Retail Clerks Int'l Ass'n, Local 1625 v. Schermerborn, 375 U.S. 96, 103 (1963)).
114. Id.
116. Id.
such provision and the law of the State so that the two cannot consistently stand together."  

The Fourth Circuit determined that the “direct and positive conflict” language merely restated the principle that “State law is superseded in cases of an actual conflict with Federal law such that compliance with both federal and state regulations is a physical impossibility.” In other words, the “direct and positive conflict” language is the codification of conflict preemption and is not specific enough to be considered express preemption. Therefore, express preemption does not apply here.

B. Conflict Preemption

In order to determine whether the legalization of marijuana would conflict with federal law, the different components of legalization must be teased apart. Proposition 19 would have done two things. First, within certain limitations, it would have revoked the state laws criminalizing marijuana. Second, it would have authorized local governments to set up regulatory schemes to authorize various marijuana-related commercial activities. This note will refer to these provisions as “decriminalization” and “commercialization” respectively. “Legalization” will refer to an entire scheme that both decriminalizes and commercializes marijuana. Furthermore, this note will assume that any future legalization attempts will have both decriminalization and commercialization components. It seems reasonable to make this assumption since legalization would only be appealing to moderate voters if there is some guarantee of tax revenue and State control over the sale and cultivation of marijuana.

1. Decriminalization: California Steps Down as an Enforcer

The “positive conflict” language in section 903 of the CSA has been read to invoke conflict preemption. Conflict preemption applies when “simultaneous compliance with both State and Federal directives is impossible.” This standard is very strict and very literal. If it is possible to simultaneously comply with both Federal and State law, then the State law is valid.

118. S. Blasting Servs. Inc., 288 F.3d at 590.
119. Id.
120. Ballot Pamp., supra note 43 at 93-94.
121. Id.
123. San Diego NORML, 81 Cal. Rptr. 3d at 480-481.
The first case to discuss conflict preemption was *McDermott v. Wisconsin*. In *McDermott*, the Supreme Court ruled that the Federal Food and Drugs Act (FDA) preempted a Wisconsin food label law, even though the preemption was implicit. Wisconsin law required that food sold within the State use Wisconsin labels and no other. This required stores to remove federal labels from food packages and replace them with Wisconsin labels before they were sold. The Court found that it was essential to the purpose of the FDA that the federal labels remain on packaged food so that the Act could be enforced. Since simultaneous compliance with the FDA and the Wisconsin statute was impossible, the Court struck down the State law as "beyond the power of the State."

If California were to decriminalize marijuana, there would be no state requirements regarding marijuana at all. Before a law can be invalidated under conflict preemption, there must be "an actual conflict with Federal law such that 'compliance with both Federal and State regulations is a physical impossibility.'" But the absence of a State law does not create a conflict with federal law: it creates a vacuum where only the federal law applies. There would be no conflict of laws here, because one could comply with both federal and state laws by merely not possessing marijuana. While this may seem semantic, conflict preemption requires literal impossibility.

The decriminalization of marijuana in California, or in any other State, would not be preempted under the Supremacy Clause. However, federal law would still be enforceable. Californians would continue to be criminally liable for the possession and consumption of marijuana under federal law, and nothing in California law could shield them from federal prosecution. But decriminalization in California would substantially reduce the enforcement of the federal prohibition of marijuana because the federal government is almost completely reliant on the States for their concurrent enforcement.

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125. Id. at 137.
126. Id. at 133.
127. Id.
128. Id. at 136.
129. Id. at 134.
130. Under Proposition 19, decriminalization would not have lifted every penalty regarding the use and possession of marijuana: people under the age of twenty-one could not use it, people over twenty-one could use it only in their own homes, and no one could use it in the presence of minors.
enforcement. Indeed, the States make ninety-nine percent of arrests for possession of marijuana.\textsuperscript{134}

2. \textbf{Commercialization: California Steps Up as a Regulator}

As stated above, conflict preemption will be found when “simultaneous compliance with both State and Federal directives is impossible.”\textsuperscript{135} Under Proposition 19, local governments could issue permits to grow and sell marijuana for recreational use.\textsuperscript{136} This appears to be in direct conflict with the CSA, which states that “it shall be unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”\textsuperscript{137} However, Californians have been growing and selling marijuana under the Compassionate Use Act since 1996.\textsuperscript{138} This note will look to the local regulations for the permitting of medicinal marijuana dispensaries as a guide to determine whether commercialization would create a direct conflict with federal law.

In 2004, the city of Oakland passed Measure Z, a voter initiative that authorized medicinal marijuana dispensaries to be operated within the city.\textsuperscript{139} It directed that a committee be formed to issue permits and oversee the operations of dispensaries.\textsuperscript{140} Within the year, Oakland enacted Chapter 5.80, the local ordinance for medicinal dispensary permits.\textsuperscript{141} Under Chapter 5.80, a medical cannabis cooperative may consist of no more than three cardholders under the Medical Marijuana Program.\textsuperscript{142} Oakland authorized four dispensaries to be operated within city limits subject to certain requirements, like distance from schools and parks, and restrictions on

\textsuperscript{135} County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 476 (2008) (citing Southern Blasting Services, 288 F.3d at 584).
\textsuperscript{136} Ballot Pamp., supra at note 93-94.
\textsuperscript{137} Id.
\textsuperscript{138} CAL. HEALTH & SAFETY CODE § 11362.5 (2010).
\textsuperscript{142} Id.
advertising and signage. They may "facilitate/assist in the lawful production, acquisition, and provision of medical marijuana to their qualified patients." The dispensaries are authorized to possess up to eight ounces of dried marijuana per qualified customer but the retail of marijuana "for excessive profits are explicitly prohibited." They may only charge for actual costs and "reasonable compensation for services actually rendered." Cannabis cannot be smoked or otherwise consumed on the premises. The cooperatives must pay application fees, annual regulatory fees, and business taxes.

In United States v. Oakland Cannabis Buyers' Cooperative and Jeffery Jones, the Federal government sought an injunction against an Oakland dispensary, arguing that the Cooperative was in violation of the CSA's prohibitions on distributing, manufacturing, and possessing marijuana. The Cooperative argued that their actions were defensible on the grounds that the marijuana was a medical necessity for its members. The United States Supreme Court granted certiorari and held that there was no such defense under the CSA. The CSA divides substances among five schedules, four of which allow medical use but the first, where marijuana is listed, does not. The Supreme Court reasoned that Congress had considered a medical use exception for the substances regulated by the CSA and had explicitly rejected its application to marijuana. It further held that lower courts could not create a defense against the manufacturing and distribution of marijuana for medical reasons. However, the Court did not address any Constitutional issues, including whether or not Oakland's local ordinance authorizing medical dispensaries was preempted by the Supremacy Clause.

In San Diego NORML, several California counties claimed that the Medical Marijuana Program was preempted under federal law because it required state action in direct conflict with the CSA. The Court of Appeals disagreed and held that the ID cards merely identified those against whom

143. Id.
144. Id.
145. Id.
146. Id.
147. Id.
148. Id.
150. Id. at 487.
151. Id. at 494.
152. Id. at 491-492.
153. Id.
154. Id. at 491.
155. San Diego NORML, 81 Cal. Rptr. 3d, at 467.
California has opted not to impose criminal penalties. It analyzed the issue of preemption from a decriminalization standpoint, which was appropriate since the Medical Marijuana Program was enacted to effectuate a decriminalization statute. The court in San Diego NORML also noted that the cards explicitly stated that they did not protect the holder from federal law. The issue of whether or not commercialization was preempted by the CSA was never addressed by San Diego NORML, since preemption was beyond the scope of the facts.

Despite its obviously applicability, the preemption doctrine has never been applied to the commercialization of marijuana. The issue is either never raised or dropped for appeal or explicitly not addressed. With no case directly on point, the standard rules apply to the issue.

Conflict preemption applies when "simultaneous compliance with both State and Federal directives is impossible." In McDermott, the Supreme Court held that the Wisconsin food label law was preempted by the FDA because it was impossible to sell syrup with packaging that was legally labeled under both regulatory schemes. The situation with the commercialization of marijuana is similar. It is impossible to sell marijuana, for any reason, in a way that complies with both California’s Compassionate Use Act and the federal CSA. As seen in Oakland’s 5.80, medical dispensaries are allowed to possess and distribute marijuana. These actions are explicitly forbidden under the CSA and there is no recognized defense or exception in federal law.

Under the decriminalization analysis, it can be argued that a person can be in compliance with both the federal prohibition of marijuana and the State decriminalization of marijuana by simply abiding by the federal prohibition and not engaging in marijuana activities. However, this argument does not apply to commercialization. It is not possible to engage in the commercialization of marijuana without possessing and selling marijuana. The fact that a person could choose not to engage in the commercialization of marijuana would not detract from the direct and positive conflict between state and federal law. In McDermott, the manufacturer of syrup could have simply stopped manufacturing syrup to be in simultaneous compliance with both schemes. However, this would be a truly ridiculous result and would render the preemption doctrine useless.

Therefore, while the decriminalization of marijuana would not be preempted by the CSA, the commercialization of marijuana would be

156. Id. at 481.
157. Id.
158. Id. at 476.
159. McDermott, 228 U.S. at 136-37.
preempted under any regulatory scheme. A State may not authorize the possession and sale of marijuana when federal law prohibits the possession and sale of marijuana.

C. Obstacle Preemption

Under obstacle preemption, the federal statute must first be taken into account as a whole to discover its intended purpose and the natural effect of its provisions.\textsuperscript{161} If, "under the circumstances of a particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," then the state law will be preempted under the Supremacy clause.\textsuperscript{162} What constitutes a sufficient obstacle will be a matter of informed judgment, guided by the text of the federal statute.\textsuperscript{163}

1. Obstacle Preemption is Applicable Regardless of Codification

In \textit{San Diego NORML}, the California Court of Appeals determined that obstacle preemption does not apply under the CSA.\textsuperscript{164} It argued that the "positive conflict" language in section 903 showed that Congress intended that state laws could only be preempted by conflict preemption.\textsuperscript{165} Congress has used different language in other statutes to clearly invoke obstacle preemption. For example, under section 416(e) of the Federal Food, Drug, and Cosmetic Act, a state law will be preempted if the law "as applied or enforced is an obstacle to the accomplishing and carrying out this section or a regulation prescribed under this section."\textsuperscript{166} The \textit{San Diego NORML} court reasoned that the lack of language invoking obstacle preemption in the CSA showed a conscious intent that obstacle preemption would not apply, since Congress was capable of showing intent that obstacle preemption would apply.\textsuperscript{167} It thereby held that requiring counties to issue medical marijuana cards under California's Medical Marijuana Program was not preempted by the CSA under obstacle preemption.\textsuperscript{168}

However, the United States Supreme Court disagrees. In \textit{Crosby v. National Foreign Trade Council}, the Court stated, "Even without an express

\begin{itemize}
  \item 161. \textit{San Diego NORML}, 81 Cal. Rptr. 3d. at 476.
  \item 163. \textit{Id.} at 373.
  \item 164. \textit{San Diego NORML}, 81 Cal. Rptr. 3d. at 479-480.
  \item 165. \textit{Id.}
  \item 166. \textit{Id.} at 480; 21 U.S.C. § 350e(e)(1).
  \item 167. \textit{San Diego NORML}, 81 Cal. Rptr. 3d. at 479-480.
  \item 168. \textit{Id.} at 481.
\end{itemize}
provision for preemption, we have found that State law must yield to a Congressional Act... where, under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\(^{169}\) Both obstacle and conflict preemption, being implied theories of preemption, apply regardless of a statutory codification to that effect.\(^{170}\) Only express preemption requires statutory codification to apply.\(^{171}\) Under Crosby, obstacle preemption applies to the CSA.

2. The Intended Purpose of the CSA

First, the CSA must be considered as a whole to discover its intended purpose and the natural effect of its provisions.\(^{172}\) The United States Supreme Court has wrestled with the CSA several times. As a result, the Court has had many opportunities to consider its intended purposes. In Gonzales v. Oregon, the Court found the CSA to be "a statute combating recreational drug abuse."\(^{173}\) In Raich, the court found that the main objectives of the CSA were to, "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances" and to "prevent the diversion of drugs from legitimate to illicit channels."\(^{174}\)

The San Diego NORML court relied on Oregon v. Gonzales to find that the purpose of the CSA was "to combat recreational drug use, not to regulate a State’s medical practices."\(^{175}\) The court reasoned the medical marijuana card program did not create an obstacle to the enforcement of the CSA because it was a state medical practice.\(^{176}\) However, Gonzales v. Oregon discussed a schedule two substance, and not schedule one substance.\(^{177}\) Schedule two substances have recognized medical uses but schedule one substances do not.\(^{178}\) The plain language of the CSA shows that Congress did intend to regulate medical practices for schedule one drugs.

170. Id. at 372.
171. San Diego NORML, 81 Cal. Rptr. 3d at 475.
172. Id. at 476.
174. Gonzales v. Raich, 545 U.S. at 12-13.
175. San Diego NORML, 81 Cal. Rptr. 3d at 482.
176. Id.
3. Commercialization: California Steps Up as a Regulator

The purpose of the CSA is to “prevent the diversion of drugs from legitimate to illicit channels.”179 In Raich the Court wrote, “In effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.”180 The commercialization of marijuana would stand as an obstacle to the CSA if it prevents or impedes these purposes.

Proposition 19 would have allowed local governments to foster the cultivation and sale of marijuana.181 In anticipation of Proposition 19 passing, the Oakland City Council passed a plan to tax medical marijuana sales at five percent and commercial marijuana sales at ten percent.182 The plan would authorize the construction of enormous “pot industrial parks” which could generate an annual income from $47 million to $72 million.183 These industrial parks would lease space to “pot growers, bakeries, labs and processing facilities.”184 They would create entry-level jobs paying $40,000 a year.185 Since Proposition 19 did not pass, Oakland has backed down from issuing any permits to these industrial parks, although as the law stands they may do so for the sale of medicinal marijuana.186 The five percent tax on medical marijuana currently applies within the county.187 These proposed plans provide a guide into what could be authorized under commercialization.

The commercialization of marijuana creates an obstacle to the enforcement of the CSA. Commercialization would make the cultivation and distribution of marijuana a legal business in California. This flies in the face of the CSA’s closed regulatory scheme which is intended to prevent the commercialization of marijuana. Until marijuana is rescheduled by the Federal government, States cannot independently choose to regulate the cultivation and sale of marijuana.

179. Gonzales v. Raich, 545 U.S. at 12-13.
180. Id. at 13.
182. Id.
183. Id.
184. Id.
185. Id.
186. Id.
187. Id.
4. Decriminalization: California Steps Down as an Enforcer

Under Proposition 19, California would have decriminalized the cultivation, possession, and use of marijuana by people over the age of twenty-one. Given that ninety-nine percent of marijuana crimes are currently enforced by state police, there is a very convincing, common sense argument that the decriminalization of marijuana would stand as an obstacle to the execution of the full purposes and objectives of the CSA. However, this argument has been rejected out of hand. In *New York v. United States*, the Supreme Court wrote:

If State residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a Federally mandated regulatory program.

The lack of a state regulation can never stand as an obstacle to the implementation a federal law because states are under no obligation to enforce or to assist in enforcing federal law. Therefore, the decriminalization of marijuana cannot be preempted either by field, express, conflict, or obstacle preemption. It would be constitutionally permissible for California to step down as an enforcer of criminal sanctions against marijuana use and possession.

VII. The 10th Amendment and the Anti-Commandeering Doctrine

The Federal government does not have the power to force California to participate in the enforcement of the CSA. The division of power between the Federal government and the states is a system of “dual sovereignty.” The United States was originally organized under the Articles of Confederation. Under this system, the Federal government regulated and acted upon the states. In turn, the states regulated and acted upon the

188. Ballot Pamp., *supra* note 43 at 92.
191. Id.
193. Id. at 919.
194. Id.
people. But this system quickly failed and the country was reorganized under the Constitution. Under the Constitution, both the Federal government and the states regulate and act directly upon the people, who are "the only proper objects of government." The Constitution grants specific, enumerated powers to the Federal government. The Tenth Amendment reserves all other powers for the States and the people.

In Printz v. United States, the Brady Act, a federal law, required State police officers to run background checks on people who wanted to purchase guns. This provision was to be only temporary, while the Federal government organized a national database for its law enforcement officers to use. The Court found that the Federal government had overreached by forcing the States to participate in the administration of a federal program. "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."

In New York v. United States, the Low-Level Radioactive Waste Policy Amendments Act, a federal law, required states to either write legislation to deal with the disposal of low-level radioactive waste or to accept the liability created by such waste. The Court found that this requirement encroached on the powers reserved to the states under the Tenth Amendment. While the Federal government does have substantial power to encourage the States to legislate in particular ways, "Congress may not simply 'commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.'" The option under the Act was not actually an option at all because a State could not decline to administer the federal program. The States could not both refuse to accept liability for the waste and refuse to legislate to address the waste.
The federal government would be powerless to stop California from decriminalizing marijuana. Under Printz, the federal government cannot force states to participate in a federal program.\textsuperscript{209} Congress would not have the power to require California to enforce the federal CSA. Under New York \textit{v. United States}, the federal government cannot directly compel the States to promulgate and enforce their own regulations.\textsuperscript{210} The federal government could not require California to keep its laws criminalizing marijuana. The decriminalization of marijuana would, therefore, be Constitutional. After all:

One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."\textsuperscript{211}

\textbf{VIII. Conclusion}

The commercialization of marijuana would fit comfortably within California's existing statutory scheme for the use of water. Marijuana farmers would be just as entitled to obtain water rights as grape farmers; indeed, the profitability of marijuana may even encourage many farmers to switch over. But if commercialization efforts rely solely on counties for enforcement of environmental standards, impacted areas such as Mendocino County will continue to be overrun with destructive grows. To effectively curb the environmental impact, future legalization efforts should provide for statewide funding for the protection of conserved lands.

In the event that commercialization is struck down by the courts as unconstitutional, it is possible that decriminalization alone could prevent some amounts of environmental destruction caused by illegal farms. Given that only one percent of marijuana related arrests are performed by the Federal government, if California were to decriminalize the possession of marijuana, people might feel that it's safer to grow marijuana in backyard gardens than it is now. Conversely, one could imagine that decriminalization would increase demand and encourage more large, illegal farms to spring up in the woods.

However, any legalization legislation would not be in effect for very long. First, the commercialization of marijuana could be struck down as unconstitutional under the Supremacy Clause, leaving only the decriminalization aspect of the law still in effect. If the commercialization

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\textsuperscript{209}. Printz, 521 U.S. at 944-945.
\textsuperscript{210}. New York \textit{v. United States}, 505 U.S. at 176-177.
\textsuperscript{211}. Gonzales \textit{v. Raich}, 545 U.S. at 42 (citing New State Ice Co. \textit{v. Liebmann}, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
\end{flushleft}
aspects of the law are struck down, Californians will be almost certain to repeal decriminalization. A law that allows wide-spread marijuana cultivation and use without the benefit of state control or the generation of tax revenue will also not be very popular amongst conservative or moderate voters. Indeed, almost thirty percent of voters support legalization so marijuana can be taxed.\textsuperscript{212} Until marijuana is rescheduled by the federal government, no State can regulate its cultivation. The secret environmental destruction will continue, hidden in the woods.

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By Chloe Angelis
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