

POLICY, PREEMPTION, AND POT: EXTRATERRITORIAL CITIZEN JURISDICTION

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Abstract: In contemporary America, legislators send messages about values through symbolic legislation and lawsuits. One conflict is between states where marijuana is legal and others that continue to ban it. This Article evaluates what might happen if anti-marijuana states made it illegal for their citizens to purchase or use marijuana, borrowing a page from the playbook of activists opposed to reproductive choice who propose that if *Roe v. Wade* is overturned, individuals could be prohibited from traveling to another state for the purpose of obtaining an abortion. Although such laws would be hard to enforce, they still present important questions of state authority. The Supreme Court has recognized state jurisdiction over citizens and over state territory. If, say, Alabama prohibited gambling in its territory, or by its citizens anywhere in the world, while Nevada's public policy was to allow gambling in its territory, a difficult conflict would be presented. However, the marijuana controversy does not present the same problem. Federal law categorically prohibits possession, use, and distribution of marijuana. In order to hold that state marijuana laws are not preempted by the federal ban, courts have found that the states do not have a public policy in favor of marijuana, they merely decline to prohibit it. As a result, the policies of the anti-marijuana states do not conflict with the interests of other states in the way that states opposed to abortion or gambling might conflict with states affirmatively allowing those activities. Although the law in this area is not particularly developed, making reliable prediction difficult, a state's national ban on marijuana seems much more likely to pass muster than would a ban on activities affirmatively promoted by another state.

INTRODUCTION

Battles over many contemporary social questions have been through enactment of laws symbolically and practically reflecting particular posi-

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* Edward L. Barrett Jr. Chair & Martin Luther King Jr. Professor of Law, UC Davis School of Law. In case it helps the reader evaluate the author's perspective, the author personally believes the war on drugs was racist in origin and effect, has been a costly failure (except as an employment-generating and profit-making enterprise), and should be immediately abandoned in favor of a system designed to minimize the public health effects and other harms of abuse of dangerous drugs. See generally Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253 (2003) (exploring the impact of racial discrimination on the imposition of collateral consequences on those convicted of crime).

tions. In recent decades, states have taken divergent positions on reproductive rights, same-sex marriage, racial segregation, the right of transgender persons to use particular bathrooms, legalized gambling, and firearms regulation. As a result, conduct that is permitted, recognized, or required in one jurisdiction might be treated as a nullity or criminalized in another. For the moment, at least, with regard to same-sex marriage¹ and reproductive rights,² the Supreme Court has stepped in to impose national uniformity as a matter of federal law.³ In other cases, disparate state policies remain in effect.

The regulation of marijuana in the United States is a notable example of conflicting state laws. The federal Controlled Substances Act (“CSA”)⁴ criminalizes the possession and use of marijuana under almost all circumstances, and some states do the same. A majority of states, however, now allow the use of marijuana for medicinal purposes; additionally, Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Washington, and the District of Columbia allow its use for recreational purposes.⁵

In the future, the conflicts between inconsistent marijuana policies might be resolved.⁶ Perhaps the Supreme Court will conclude that the states are entitled under the Constitution to pursue their own marijuana policies.⁷ Alternatively, as some bills have proposed,⁸ Congress could let the laboratories of democracy work and affirmatively authorize state choice subject to clear parameters.⁹ For the moment, however, state policies are in some tension, for example as reflected by *Nebraska v. Colorado*,¹⁰ a proposed original action in the Supreme Court challenging Colorado’s marijuana laws as

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

² *Roe v. Wade*, 410 U.S. 113, 166 (1973).

³ Another example is in the area of firearms. *See, e.g.*, 18 U.S.C.A. § 926B (West 2013) (allowing state and local law enforcement officers to carry firearms nationally, regardless of conflicting state law); *id.* § 926C (applicable to retired law enforcement officers).

⁴ Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–9042012)).

⁵ *State Marijuana Laws in 2017 Map*, GOVERNING (Mar. 23, 2017), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> [<https://perma.cc/B3YW-SYVB>].

⁶ *See generally* Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV. 1301 (2013) (arguing that “the United States should seek to eliminate marijuana prohibition at the international level as it replaces prohibition with regulation in its own drug laws”).

⁷ *See* John Vigorito, Note, *Creating Constitutional Cannabis: An Individual State’s Tenth Amendment Right to Legalize Marijuana*, 46 U. TOL. L. REV. 221, 238–48 (2014).

⁸ CARERS Act of 2015, H.R. 1538, 114th Cong. § 2 (2015) (proposing to add to CSA “the provisions of this title relating to marihuana shall not apply to any person acting in compliance with State law relating to the production, possession, distribution, dispensation, administration, laboratory testing, or delivery of medical marihuana”); Regulate Marijuana Like Alcohol Act, H.R. 1013, 114th Cong. § 102 (2015) (proposing amendment to CSA stating that “this title and title III do not apply to marihuana”).

⁹ *See* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 81 (2015).

¹⁰ 136 S. Ct. 1034, 1034 (2016) (denying motion for leave to file a bill of complaint).

impairing the interests of neighboring states¹¹ and “seek[ing] a declaratory judgment that the CSA pre-empts” Colorado’s marijuana laws.¹²

This Article considers the power of a state prohibiting the use of marijuana to carry out its policy through a particular kind of regulation: Under our federalism and constitutional law, can one state prohibit its citizens from using or buying marijuana elsewhere in the United States or anywhere in the world? The Supreme Court has recognized that states can exercise criminal jurisdiction based on both territory and citizenship. Concretely, under these sources of authority, could Oklahoma or Nebraska, concerned about marijuana use, criminalize conduct by their citizens in California or Colorado where marijuana use is perfectly legal or at least not criminalized?

Questions of this sort are often answered by analyzing the interests of the jurisdictions involved. In some cases, there is no conflict. If Idaho prohibited gambling by its citizens anywhere in the world, and Montana prohibited gambling in its territory, it would not compromise the interests or authority of Montana if a Boise resident were prosecuted for gambling in Billings upon her return home. No transaction that Montana wants to promote has been frustrated, Montana suffers no costs, and Idaho has a greater interest in the fate of an Idaho citizen than does Montana.

Nevertheless, if Nevada promotes gambling as a means of generating employment, tourism, and revenue, it would have an interest in whether a resident of Boise visiting Las Vegas were able to play cards or shoot dice. Note that the problem is not that there is a constitutional right to gamble; if such a right existed, questions of citizenship and territory would be irrelevant. Nor is it that a citizen of Idaho has a right not to be regulated by the state once she leaves its territory; the principle of citizen jurisdiction means that presence on a state’s territory is not the only source of obligation. The problem arises from the interests of states and their part in a national system. Both Nevada and Idaho have an interest in the activities of an Idaho citizen in Las Vegas. Because gambling by an Idaho citizen in Las Vegas may be either punished or not, however, there is a conflict, and the goals of only one state can be realized.

¹¹ The complaint alleged: “Plaintiff States have incurred significant costs associated with the increased level of incarceration of 27 suspected and convicted felons on charges related to Colorado-sourced marijuana include housing, food, health care, transfer to-and-from court, counseling, clothing, and maintenance.” Motion for Leave to File Complaint, Complaint, and Brief in Support at 26–27, *Nebraska & Oklahoma v. Colorado*, 136 S. Ct. 1034 (2016) (No. 2015-144).

¹² *Nebraska v. Colorado*, 136 S. Ct. at 1036 (Thomas, J., dissenting). For an article arguing states have a right to invoke the U.S. Supreme Court’s jurisdiction to challenge neighboring states’ marijuana legalization, see generally Chad DeVeaux & Anne Mostad-Jensen, *Fear and Loathing in Colorado: Invoking the Supreme Court’s State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment*, 56 B.C. L. REV. 1829 (2015).

This Article proposes that this conflict between state interests would not arise with a nationwide ban by a state on its citizens use of marijuana. Federal law continues to prohibit the possession, use, and distribution of marijuana in almost all cases. In order to avoid preemption, states authorizing marijuana use have carefully explained that they are not encouraging or promoting it—as a way to avoid having their laws declared invalid. Instead, the states are simply declining to criminalize marijuana. To the extent, then, that a state has the power to prohibit its citizens from using marijuana, it is pursuing a legitimate interest. By contrast, states “legalizing” marijuana are simply not taking a position. Accordingly, it is much more likely that the interests of the anti-marijuana state would be recognized as superior because they do not conflict with the interests and public policies of the states where marijuana is legal. By solving one inter-jurisdictional conflict—that between permissive state laws and federal marijuana prohibitions—decriminalizing states undermined their position with respect to anti-marijuana states.

Part I briefly discusses principles of criminal jurisdiction, including the rule that sovereigns may legislate with respect to their citizens extraterritorially.¹³ To be sure, this sort of jurisdiction is exercised relatively infrequently; therefore, there are a limited number of cases. The cases suggest, however, that extraterritorial jurisdiction may not be recognized if it would interfere with the authority of the state where the conduct occurs.

Part II examines one aspect of the conflicts created by inconsistent marijuana legislation.¹⁴ In a range of contexts, public and private actors have claimed that state medical marijuana laws were invalid because they were preempted by the federal marijuana ban in the CSA. Many state appellate courts rejected these claims, upholding the state laws, finding them consistent with federal law because they do not authorize violations of federal law through encouraging, promoting, or requiring the use of marijuana. Rather, they merely withhold *state* criminal arrest, charge or punishment in particular circumstances, leaving the federal laws unimpaired.

The success in avoiding preemption of state marijuana laws rests on the idea that the legalizing state has no position on marijuana; it is neutral. Nevertheless, if the state, say Colorado, is neutral on marijuana, then it is in no position to claim a public policy interests against another state, say Nebraska, who is attempting to enforce a national prohibition of its citizens’ use of marijuana. This jurisprudential solution of the vertical federalism (federal to state) problem has created problems for the solution of the horizontal federalism (state to state) problem.

¹³ See *infra* notes 15–42 and accompanying text.

¹⁴ See *infra* notes 43–86 and accompanying text.

States have yet to enact laws prohibiting and punishing their citizens' extraterritorial use of marijuana. Should they choose to do so, the absence of conflict with the policy of other states makes it much more likely that such laws would be upheld.

I. CRIMINAL JURISDICTION

The usual basis for state criminal jurisdiction is territorial.¹⁵ States may criminalize and prosecute acts taking place within the boundaries of the state, but the territorial principle is not limited to situations where all, or even any, of the elements of the offense actually occur within the state.¹⁶ In addition, states can legislate when crimes have consequences within the state.¹⁷

The Pennsylvania Consolidated Statutes, which are reasonably representative, provide that "a person may be convicted under the law of this Commonwealth" if (1) "conduct which is an element of the offense or the result which is such an element occurs within" Pennsylvania;¹⁸ (2) out-of-state conduct constitutes an attempt to commit a crime in Pennsylvania;¹⁹ (3) out-of-state conduct constitutes a conspiracy to commit a crime in Pennsylvania, and an overt act occurs in the state;²⁰ (4) conduct in Pennsylvania constitutes an attempt, solicitation, or conspiracy to commit an offense out-of-state, and the conduct is an offense in both jurisdictions;²¹ (5) out-of-state conduct consists of an omission to perform a legal duty in Pennsylvania;²² and (6) the statute expressly applies out-of-state and "the conduct bears a reasonable relation to a legitimate interest of this Commonwealth and the actor knows or should know that his conduct is likely to affect that

¹⁵ See *In re Vasquez*, 705 N.E.2d 606, 610 (Mass. 1999) ("The general rule, accepted as 'axiomatic' by the courts in this country, is that a State may not prosecute an individual for a crime committed outside its boundaries."). See generally 1 SUBST. CRIM. L. § 4.4 (2d ed.), Westlaw (database updated Oct. 2016) ("State Jurisdiction"); 4 CRIM. PROC. § 16.4(c) (4th ed.), Westlaw (database updated Dec. 2016) ("State Jurisdiction"); Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763 (1960) (discussing the "extent to which the criminal legislation of [a state] may be applied in the courts [outside of that state] to certain conduct, harm, or, perhaps, other factors occurring without the state").

¹⁶ See *People v. Betts*, 103 P.3d 883, 887 (Cal. 2005) ("For example, a state may exercise jurisdiction over criminal acts that take place outside of the state if the results of the crime are intended to, and do, cause harm within the state.").

¹⁷ See *In re Vasquez*, 705 N.E.2d at 610-11 ("The 'effects' doctrine provides that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect." (quoting *Strassheim v. Daily*, 221 U.S. 280, 285 (1911)).

¹⁸ 18 PA. CONS. STAT. § 102(a)(1) (1997).

¹⁹ *Id.* § 102(a)(2).

²⁰ *Id.* § 102(a)(3).

²¹ *Id.* § 102(a)(4).

²² *Id.* § 102(a)(5).

interest.”²³ The U.S. Supreme Court has generally approved exercise of jurisdiction of this sort, recognizing that “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect.”²⁴

In addition to regulating conduct in or affecting its territory, there are other grounds for state exercise of jurisdiction.²⁵ One important basis is the nationality or citizenship of the actor. The U.S. Supreme Court recognized this basis of jurisdiction in 1941 in *Skiriotes v. Florida*.²⁶ Skiriotes was convicted of a marine violation off the shore of Florida, but contended that, based on federal law and international treaties, the conduct undisputedly occurred beyond Florida’s territorial waters and therefore out of its territorial jurisdiction.²⁷ The Supreme Court held that because Skiriotes was a citizen and resident of Florida, the statute could be applied extraterritorially.²⁸ The Court noted that “the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.”²⁹ Because the states had authority similar to the United States,

Even if it were assumed that the locus of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the described divers’ equipment at that place. No question as to the authority of the United States over these waters . . . is here involved. No right of a citizen of any other State is here asserted. The question is solely between appellant and his own State.³⁰

²³ *Id.* § 102(a)(6).

²⁴ *Strassheim v. Daily*, 221 U.S. 280, 285 (1911). This is commonly known as the “effects” doctrine. See *In re Vasquez*, 705 N.E.2d at 610–11. The effects doctrine is “not dependent upon the existence of a jurisdictional statute explicitly providing for it.” *Id.* at 611; see, e.g., *State v. Stepanyk*, 761 So. 2d 1027, 1037 (Fla. 2000) (upholding jurisdiction on sexual assault and burglary on a ship which had departed from a Florida port; “individual states have been accorded wide latitude, by the United States Constitution, the Supreme Court and pertinent federal legislation, to assert concurrent jurisdiction over maritime criminal matters extending beyond the State’s territorial limits”); see also *State v. Jack*, 125 P.3d 311, 321 (Alaska 2005).

²⁵ See *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003) (summarizing “five bases on which a State may exercise criminal jurisdiction over a citizen or non-citizen for acts committed outside of the prosecuting State”).

²⁶ 313 U.S. 69, 76–77 (1941).

²⁷ *Id.* at 70, 75–76.

²⁸ *Id.* at 72–73.

²⁹ *Id.* at 73.

³⁰ *Id.* at 76; *Blackmer v. United States*, 284 U.S. 421, 436 (1932) (“While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and con-

Because there was no conflicting federal law, the statute impaired no rights of a non-Floridian, and Florida had a legitimate interest in the matter regulated, Skiriotes could be subject to Florida's law even if not in Florida.³¹

On the other hand, states cannot regulate without regard to the authority of other states. In *Nielsen v. Oregon*, the U.S. Supreme Court invalidated a state law to the extent that another state had a conflicting interest.³² Federal law granted Oregon and Washington concurrent jurisdiction over the Columbia River.³³ Washington issued its resident Christ Nielsen a license to fish using a purse net in the Columbia, but Oregon law prohibited the use of purse nets and prosecuted Nielsen.³⁴ The Supreme Court framed the case as presenting the question:

Can the state of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that state had specially authorized him to do? We are of opinion that it cannot.³⁵

Oregon had territorial jurisdiction, yet, that jurisdiction could not be exercised because Nielsen and Washington had interests that also had to be considered.³⁶ If Nielsen had been a citizen of Oregon, or if Washington had not enacted a conflicting law, perhaps the case would have come out differently.

The *Restatement (Third) of the Foreign Relations Law of the United States* similarly recognizes that a state may regulate “the activities, interests,

tinued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country.”)

³¹ *Skiriotes*, 313 U.S. at 78–79. *But see* *United States v. Bollinger*, 798 F.3d 201, 216 (4th Cir. 2015) (“Requiring a showing of demonstrable effect, of course, still requires that the effect be more than merely imaginable or hypothetical. A prohibition on littering in Istanbul, for instance, may not pass constitutional muster.”); *State v. Sterling*, 448 A.2d 785, 787 (R.I. 1982) (“Rhode Island’s interest in preventing the depletion of the nearby yellowtail flounder population is sufficiently strong to justify extraterritorial enforcement of a regulation Upon examining the history of federal fishing legislation and the regulations promulgated thereunder, we find, however, that the Rhode Island regulation conflicts with federal policies governing yellowtail flounder and is therefore invalid.”).

³² 212 U.S. 315, 321 (1909).

³³ *Id.* at 319.

³⁴ *Id.* at 316.

³⁵ *Id.* at 321.

³⁶ Nevertheless, when there was no conflict with Washington law, Oregon could prosecute purse net fishing in the area of concurrent jurisdiction. *State v. Catholic*, 147 P. 372, 378 (Or. 1915) (“Thus it appears that the act charged is condemned alike by the laws of Oregon and of Washington. There is no grant of authority for it by the latter state. Our sister commonwealth having promulgated a rule on the subject which measurably conforms to our own, the defendant cannot claim immunity through any lack of legislation on either side of the boundary.”).

status, or relations of its nationals outside as well as within its territory.”³⁷ The *Restatement*, however, precludes extraterritorial regulation when it is “unreasonable,” and factors considered in evaluating reasonableness include “the extent to which another state may have an interest in regulating the activity” and “the likelihood of conflict with regulation by another state.”³⁸ As in *Nielsen*, it may be that jurisdiction in a particular case may not be exercised if another state has a superior interest in application of some different rule. Based on these principles, courts considering whether U.S. law applies to foreign conduct often evaluate whether the command of U.S. law will conflict with a foreign rule.³⁹ One common context is § 2423(c), prohibiting U.S. nationals and permanent residents from engaging in certain sexual conduct with minors overseas.⁴⁰ Cases upholding prosecutions often note that the conduct is prohibited in the place of prosecution as well as by

³⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(2) (AM. LAW INST. 1987). There are eight factors in total:

- (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

Id. § 403(2); see also *United States v. Flath*, No. 11-CR-69, 2011 WL 6299941, at *10 (E.D. Wis. Sept. 14, 2011), *report and recommendation adopted in part*, 845 F. Supp. 2d 951 (E.D. Wis. 2012).

³⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(g)–(h) (AM. LAW INST. 1987); see also Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Role for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 119 (2010) (proposing a “dual-illegality rule [which] would require that U.S. courts decline to interpret geoambiguous laws to penalize or regulate conduct that occurs in the territory of another state unless the same conduct is also illegal or similarly regulated by the law of the foreign territorial state”).

³⁹ The U.S. Supreme Court upheld application of U.S. intellectual property laws to misconduct occurring in Mexico, noting that “Mexico’s courts have nullified the Mexican registration of ‘Bulova’; there is thus no conflict which might afford petitioner a pretext that such relief would impugn foreign law.” *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952).

⁴⁰ 18 U.S.C.A. § 2423(c) (West 2015) (“Any United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.”).

U.S. law.⁴¹ Similarly, an important international parental kidnapping precedent upheld a prosecution in an opinion noting that “there is no showing that Iranian law specifically authorizes defendant’s conduct in this case, that is to say that Iranian law ignores custody orders of another country and specifically authorizes the kidnapping that took place.”⁴² Accordingly, in evaluating whether an extraterritorial statute applicable to citizens is permissible, an important consideration is whether it conflicts with the law of the jurisdiction where the conduct occurs, by requiring conduct which is prohibited or prohibiting conduct which is required or permitted. Put another way, when one jurisdiction has territorial jurisdiction over an individual, and another has citizen jurisdiction, when the laws are inconsistent, the laws of only one jurisdiction can prevail and the law weighs the interests of both.

II. CITIZEN JURISDICTION WHEN STATE LAWS CONFLICT

Scholars rather than courts have elaborately explored the extent of jurisdiction based on citizenship in the context of reproductive rights. A number of authors have addressed the consequences of overruling or limiting *Roe v. Wade*.⁴³ Some states would likely still recognize reproductive rights by statute, whereas others would likely impose sharp limitations or absolute

⁴¹ *United States v. Clark*, 435 F.3d 1100, 1107 (9th Cir. 2006) (“[N]othing suggests that Cambodia objected in any way to Clark’s extradition and trial under U.S. law.”); *United States v. Martinez*, 599 F. Supp. 2d 784, 802 (W.D. Tex. 2009) (“This crime is also illegal in Mexico, both under Mexican federal law, and the laws of the state of Chihuahua. Defendant has therefore failed to demonstrate any likelihood of conflict with Mexico that would exist if the United States regulates this activity.” (citations omitted)); *United States v. Frank*, 486 F. Supp. 2d 1353, 1359–60 (S.D. Fla. 2007) (“Mr. Frank argues that § 2423(c) is unconstitutional because it fails to recognize the domestic law of Cambodia, which provides that the age of consent is 15 As an initial matter, § 2423(c) does not regulate the conduct of Cambodian nationals In addition, . . . Cambodia, notwithstanding its own domestic laws on consent, and because of a concern over the impact of child sex tourism, decided as a nation that it would sign an international agreement requiring countries to enact legislation to forbid commercial sex with those under the age of 18 by their own nationals. If Cambodia does not believe that the Optional Protocol infringes on its sovereignty—and it obviously does not—it will not be offended by laws enacted by the United States to implement the Optional Protocol, which regulate the conduct of American citizens abroad.”); *see also* *United States v. Clarke*, 159 F. App’x 128, 130 (11th Cir. 2005) (“[E]ven if Clarke were correct that the Government was required to show the prostitution in question is illegal in Costa Rica, both Agent Patterson and Detective Love testified it is illegal to engage in prostitution with a minor in Costa Rica.”).

⁴² *United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 731 (E.D. Va. 2003).

⁴³ *See, e.g.,* Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 873 (1993) (“The question then arises whether one state can apply its law to abortions that have connections with other states. In particular, a state that outlaws abortions might attempt to prohibit its residents from traveling to states where abortions are legal and terminating their pregnancies there.”).

prohibitions.⁴⁴ Important examples include a set of papers written by Seth F. Kreimer arguing that “the text, history, structure, and practice of American federalism . . . weigh heavily against the extraterritorial assertion of moralism to punish actions that take place on the soil of and with the permission of sister states.”⁴⁵ Mark Rosen has offered thoughtful rejoinders arguing that states could regulate their citizens’ ability to obtain abortions out of state.⁴⁶

A key disputed text is the U.S. Supreme Court’s decision in *Bigelow v. Virginia*,⁴⁷ which concluded that Virginia could not prohibit the advertisement, in Virginia media outlets, of abortion services available in New York. After noting that Virginia could not directly regulate abortion or abortion providers in New York, the Court stated:

Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded, prosecute them for going there. Virginia possessed no authority to regulate the services provided in New York—the skills and credentials of the New York physicians and of the New York professionals who assisted them, the standards of the New York hospitals and clinics to which patients were referred, or the practices and charges of the New York referral services. A State does not acquire power or supervision over the internal affairs of another State merely be-

⁴⁴ See Anthony J. Bellia, Jr., *Federalism Doctrines and Abortion Cases: A Response to Professor Fallon*, 51 ST. LOUIS U. L.J. 767, 768 (2007) (assessing how the “Court might resolve constitutional questions of federal-state authority”); C. Steven Bradford, *What Happens if Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 91 (1993) (examining whether a “state [could] prohibit its residents from leaving the state to obtain a legal abortion elsewhere”); Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 BYU L. REV. 1651, 1654–55 (concluding that “states can apply their laws to their citizens when they travel out of the state in an effort to avoid abortion restrictions”); Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 611 (2007) (examining the legal and policy considerations at the state and federal level if *Roe v. Wade* were overturned).

⁴⁵ Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 1017 (2002); see also Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 451 (1992).

⁴⁶ See Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 945 (2002) [hereinafter Rosen, *Extraterritoriality and Political Heterogeneity*]; Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1155 (2010) (“And so long as Congress does not act, federal courts and even the states themselves can take the initiative in determining the scope of states’ extraterritorial powers.”); see also Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1912–13 (1987) (arguing that states could regulate extraterritorial abortions by their citizens).

⁴⁷ 421 U.S. 809, 811, 829 (1975).

cause the welfare and health of its own citizens may be affected when they travel to that State . . . [I]t may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.⁴⁸

Bigelow cited *Doe v. Bolton*, which contains this passage:

Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply their trade, so must it protect persons who enter Georgia seeking the medical services that are available there. A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.⁴⁹

On one reading, because what was at issue was a constitutional right to terminate a pregnancy, these cases do nothing more than limit the right of states to restrict constitutionally protected activities.⁵⁰ If that view is correct, overruling *Roe* would mean these cases would say nothing about whether Virginia could “prevent its residents from travelling to New York to obtain those services.”⁵¹ Alternatively, perhaps *Bigelow* forbids “extraterritorial regulation of conduct legal where it occurs,”⁵² and therefore overruling *Roe* would be irrelevant—citizens of any state could still travel to New York for legal abortions notwithstanding the law of their state.

Supportive of the latter reading is that the Court’s Dormant Commerce Clause precedents, which suggest that states have no authority to directly regulate commercial transactions in other states: the “Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”⁵³ One reason for this is respect for “the legitimate regulatory regimes of other States Generally speaking, the Commerce

⁴⁸ *Id.* at 822–25 (citations omitted).

⁴⁹ *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (citations omitted).

⁵⁰ Rosen, *Extraterritoriality and Political Heterogeneity*, *supra* note 46, at 895–96 (“Any such limitation on extraterritoriality is immaterial to the regulations that are the subject of this Article, namely, laws that regulate activities that are not constitutionally protected . . .”).

⁵¹ *Bigelow*, 421 U.S. at 824.

⁵² Seth F. Kreimer, “*But Whoever Treasures Freedom . . .*”: *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 938 n.67 (1993).

⁵³ *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336–37 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)); *see also* *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1326 (9th Cir. 2015) (en banc) (invalidating state law applicable to out of state transactions, even as applied to citizens of enacting state); *Nat’l Solid Wastes Mgmt. Ass’n v. Meyer*, 63 F.3d 652, 658 (7th Cir. 1995) (“*Healy* is consistent with a long line of cases that considered whether state laws violated the Commerce Clause by regulating or controlling commerce occurring wholly outside the legislating state.”).

Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”⁵⁴

The more compelling argument is that States have very limited power to regulate conduct authorized in other states, even by their own citizens. There is a danger of inconsistent regulation. The Supreme Court has recognized that the states have broad “police powers,”⁵⁵ and, pursuant to them, may promote health and morals “of the people.”⁵⁶ Accordingly, to take the example of the *Bigelow* case, New York had an interest in allowing a visitor to its territory to obtain medical services, regardless of whether those services are available or lawful elsewhere. The immediate economic and personal consequences of prohibition or permission occur in New York—New York, and a person physically present in New York, are prevented from pursuing a desired transaction. In addition, a temporary visitor who is a citizen of Virginia may become a permanent resident of New York. Also, if the concern warranting regulation is the moral effect in Virginia of a returned traveler who did something contrary to its public policy, there is also at least an equal and arguably greater moral effect in New York of people being denied the right to pursue their preferences that are legal under state law. Under the police power, New York has a right to instantiate in law the idea that human beings are entitled to self-determination. The immediate and certain impairment of the interests of the jurisdiction where the conduct occurs trumps the contingent, uncertain impairment of the interests of some other place. For these reasons, *Bigelow* means precisely what it says, and, in general, the public policy of the territory where the transaction occurs (or does not) will normally prevail over the public policy of another state even if it has a legitimate interest and a basis to claim jurisdiction.

If that is correct, however, the question of regulation of marijuana sale and use is not answered. To avoid federal preemption, the states allowing marijuana use have insisted that they are not pro-marijuana; they simply do not regulate the area. They are neutral.

⁵⁴ *Healy*, 491 U.S. at 336–37; see also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (“[I]t is clear that no single State could . . . impose its own policy choice on neighboring States.”).

⁵⁵ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 560–61 (1991) (“The States’ traditional police power is defined as the authority to provide for the public health, safety, and morals, and such a basis for legislation has been upheld.”).

⁵⁶ See *Barbier v. Connolly*, 113 U.S. 27, 31 (1884) (recognizing “the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity”).

The federal CSA prohibits all medical and recreational uses of marijuana.⁵⁷ It also expressly allows state regulation of controlled substances, so long as that regulation is not fatally inconsistent with federal law. The provision addressing preemption, § 903, states:

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.⁵⁸

Section 903 would not prohibit a nationwide prohibition on citizen use of marijuana, because there would be no positive conflict with federal law. The section does not, however, purport to authorize state regulation beyond that “which would otherwise be within the authority of the state.”⁵⁹ Although production and use of marijuana is commerce subject to federal regulation,⁶⁰ a Commerce Clause objection to national jurisdiction over citizens of a state is diminished or entirely eliminated because of marijuana’s contraband nature under federal law. The Supreme Court of the State of Hawaii, recently observed, “Where legitimate commerce is not burdened by a state law, the doctrine of the dormant commerce clause is inapplicable.”⁶¹ From

⁵⁷ Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–906(2012)).

In the case of the Controlled Substances Act, the statute reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, see 21 U.S.C. § 829, the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has “no currently accepted medical use” at all.

United States v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483, 491 (2001).

⁵⁸ 21 U.S.C. § 903. See generally Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 9–16 (2013) (giving general background on preemption law under the CSA).

⁵⁹ 21 U.S.C. § 903.

⁶⁰ *Gonzalez v. Raich*, 545 U.S. 1, 17–18 (2005).

⁶¹ *State v. Alangcas*, 345 P.3d 181, 202 (Haw. 2015) (citing *People v. Foley*, 731 N.E.2d 123, 133 (N.Y. 2000)); see also *Predka v. Iowa*, 186 F.3d 1082, 1084 (8th Cir. 1999) (“*Predka*’s Commerce Clause argument must fail because the marijuana was contraband, that is, property that is unlawful to possess, and as such not an object of interstate trade protected by the Commerce Clause.” (citing *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 139 (1939) and *Crutcher v. Kentucky*, 141 U.S. 47, 60 (1891))); *People v. Boles*, 280 P.3d 55, 62–63 (Colo. App. 2011) (finding no violation of dormant commerce clause because no “legitimate commerce” at issue); *Cashatt v. State*, 873 So. 2d 430, 436 (Fla. Dist. Ct. App. 2004) (same); *State v. Backlund*, 672 N.W.2d 431, 438 (N.D. 2003) (same).

the federal perspective, marijuana production and sales are not legitimate commerce even if licensed by a state. Therefore, the dormant Commerce Clause would not restrict a state from regulating its citizens' extraterritorial possession and use of marijuana.

There still remains the question, however, of balancing the territorial interests of the decriminalizing states against the interests of a state imposing a national ban on marijuana use by its citizens.⁶² What is the nature of the interest and what is the public policy sought to be advanced by a decriminalizing state? On the one hand, the states cannot be required to criminalize marijuana; because of the anti-commandeering principle of *Printz v. United States*,⁶³ Congress could not force the states to lend their officers or courts to the anti-marijuana project.

On the other hand, states cannot overrule valid federal laws. For better or worse, the Supreme Court has upheld a broad congressional authority to prohibit marijuana in the entire United States. If a state were to enact a law providing, in effect, "[n]otwithstanding the federal Controlled Substances Act, marijuana is legal, and may be possessed, transported, cultivated and distributed by adults in this state without state or federal penalty," undoubtedly it would be preempted by § 903 because there would be "a positive conflict" so profound that "the two cannot consistently stand together."⁶⁴

For example, in a 2010 decision, the Oregon Supreme Court, in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, held that federal law preempted a state law allowing the distribution and use of medical ma-

⁶² The police power has been held sufficient to warrant marijuana prohibition. *State v. Dee*, 39 A.3d 42, 43 (Me. 2012) ("There is a rational explanation for the Legislature's decision to proscribe the possession of marijuana."); *Seeley v. State*, 940 P.2d 604, 622 (Wash. 1997) ("Thus, art. I, § 32 was not meant to provide a substantive right to use marijuana for medical treatment free from the lawful exercise of government police power."). Professor Regan used regulation of intoxicants as an example of a situation where extraterritorial regulation might be desirable. Although objecting to restrictions on interstate access to abortion services, he stated:

We ought to observe, however, that it is possible to imagine considerably more sympathetic uses of a state power to legislate extraterritorially for its own citizens than any we have yet discussed. For example, suppose that Illinois tried to preserve its drinking age of twenty-one by forbidding underage Illinoisans from drinking in Wisconsin. Aside from difficulties of enforcement, such a law would have much to recommend it, both as an attempt to minimize drunk driving in Illinois by Illinois teenagers returning from out-of-state adventures, and as part of an attempt by the state to oversee its young citizens' developing relationship with a powerful, and omnipresent, drug.

Regan, *supra* note 46, at 1912–13.

⁶³ See 521 U.S. 898, 902 (1997) (holding that the federal government cannot commandeer "state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks").

⁶⁴ See 21 U.S.C. § 903 (2012).

rijuana.⁶⁵ An employee with a medical marijuana card was fired by an employer for his use of marijuana outside of work.⁶⁶ The employee sued based on the Oregon Medical Marijuana Act and state employment discrimination law, insisting that he had a disability and was using a drug that was lawful under Oregon law.⁶⁷ The majority held that the employee was properly discharged:

Affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act. To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so. But the state law at issue in *Michigan Canners* [and *Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461 (1984)] did not prevent the federal government from seeking injunctive and other relief to enforce the federal prohibition in that case. Rather, state law stood as an obstacle to the enforcement of federal law in *Michigan Canners* because state law affirmatively authorized the very conduct that federal law prohibited, as it does in this case. To the extent that ORS 475.306(1) affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it “without effect.”⁶⁸

Perhaps recognizing the force of the argument that affirmative action by a state on marijuana would be preempted by the CSA, numerous appellate cases have concluded that the state regulation or action was a mere withholding of criminalization or prosecution, rather than affirmative encouragement, promotion, authorization or permission. In several contexts, described below, state courts have explained their interest in marijuana as neutral non-regulation.

Probation Conditions. Probation conditions typically require a probationer to obey all laws, state and federal. Yet, at least California⁶⁹ and Ari-

⁶⁵ 230 P.3d 518, 529 (Or. 2010).

⁶⁶ *Id.* at 520–21.

⁶⁷ *Id.* at 521.

⁶⁸ *Id.* at 529 (citations omitted) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)); see also *Washburn v. Columbia Forest Prod., Inc.*, 134 P.3d 161, 167 (Or. 2006) (Kistler, J., concurring) (“The difficulty with plaintiff’s argument, in my view, is that federal law preempts the state employment discrimination statute to the extent that it requires defendant to accommodate plaintiff’s medical marijuana use.”).

⁶⁹ See *People v. Tilehkooh*, 7 Cal. Rptr. 3d 226, 235–36 (Ct. App. 2003) (“Since the state does not punish a violation of the federal law “as such,” it can only reach conduct subject to the federal criminal law by incorporating the conduct into the state law. The People do not claim they

zona have declined to make marijuana use in violation of federal law but in compliance with state law a ground for a probation violation. The Arizona Supreme Court explained why this was not preempted:

By not including a prohibition against AMMA-compliant marijuana use, or in this case by removing the condition upon [the probationer's] request, the trial court would not be authorizing or sanctioning a violation of federal law, but rather would be recognizing that the court's authority to impose probation conditions is limited by statute.⁷⁰

Arizona is not authorizing a crime, it has simply abandoned the regulatory arena.

Issuance of Identification or Licenses; Taxation. In 2008, the California Court of Appeal rejected a claim by San Diego County that a state law requiring it to issue medical marijuana identification cards was preempted by the CSA.⁷¹ The court concluded:

The identification laws obligate a county only to process applications for, maintain records of, and issue cards to, those individuals entitled to claim the exemption. The CSA is entirely silent on the ability of states to provide identification cards to their citizenry, and an entity that issues identification cards does not engage in conduct banned by the CSA.

Counties appear to argue there is a positive conflict between the identification laws and the CSA because the card issued by a county confirms that its bearer may violate or is immunized from federal laws. However, the applications for the card expressly state the card will not insulate the bearer from federal laws, and the card itself does not imply the holder is immune from prosecution for federal offenses; instead, the card merely identifies those persons California has elected to exempt from California's sanctions. (Cf. *U.S. v. Cannabis Cultivators Club* (N.D.Cal.1998) 5 F.Supp.2d 1086, 1100 [California's CUA "does not conflict with

are enforcing a federal criminal sanction attached to the federal marijuana law. Rather, they seek to enforce the state sanction of probation revocation which is solely a creature of state law. (§ 1203.2.) The state cannot do indirectly what it cannot do directly. That is what it seeks to do in revoking probation when it cannot punish the defendant under the criminal law California courts do not enforce the federal marijuana possession laws when defendants prosecuted for marijuana possession have a qualified immunity under section 11362.5. Similarly, California courts should not enforce federal marijuana law for probationers who qualify for the immunity provided by section 11362.5.”)

⁷⁰ Reed-Kalisher v. Hoggatt, 347 P.3d 136, 141 (Ariz. 2015).

⁷¹ Cty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 481 (Ct. App. 2008).

federal law because on its face it does not purport to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from the California drug laws”].) Because the CSA law does not compel the states to impose criminal penalties for marijuana possession, the requirement that counties issue cards identifying those against whom California has opted not to impose criminal penalties does not positively conflict with the CSA.⁷²

California courts have also rejected claims that laws providing for government participation in marijuana regulation are preempted.⁷³

On similar reasoning, the Washington Court of Appeals rejected a claim that taxation of marijuana enterprises was preempted:

DOR’s tax assessments on collective gardens indicate that it is aware of the medical marijuana market, but that is not the same as promoting or condoning the market. It is well-established that states have authority to tax illegal activities. DOR’s tax assessments did not cause Nickerson to grow, possess, and distribute

⁷² *Id.*; see also *id.* at 482 (“Congress does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws.”).

⁷³ In *City of Palm Springs v. Luna Crest Inc.*, a marijuana dispensary claimed that a city’s regulations were federally preempted:

Luna articulates no persuasive reason why the City’s regulatory program for medical marijuana should be considered to stand as an obstacle to the purposes and objectives of Congress. “Congress enacted the [Controlled Substances Act] to combat recreational drug abuse and curb drug trafficking.” (*City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 383, 68 Cal.Rptr.3d 656.) Nothing about the City’s regulatory program for medical marijuana stands in the way of those purposes. (See [*Qualified Patients Ass’n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 107 (Ct. App. 2010)] [rejecting argument that state medical marijuana laws are preempted under obstacle preemption].) To the contrary, common sense suggests that a strong local regulatory regime governing medical marijuana related conduct would tend to prevent the transformation of purported nonprofit medical marijuana dispensaries into “profiteering enterprises” that contribute to recreational drug abuse and drug trafficking.

200 Cal. Rptr. 3d 128, 132–33 (Ct. App. 2016) (first and third alterations in original); see also *Qualified Patients Ass’n*, 115 Cal. Rptr. 3d at 106–07 (“The city does not explain how any of the state law decriminalization provisions of the CUA or the MMPA create a positive conflict with federal law, so that it is impossible to comply with both federal and state laws. A claim of positive conflict might gain more traction if the state required, instead of merely exempting from state criminal prosecution, individuals to possess, cultivate, transport, possess for sale, or sell medical marijuana in a manner that violated federal law. But because neither the CUA or the MMPA require such conduct, there is no ‘positive conflict’ with federal law, as contemplated for preemption under the CSA. (21 U.S.C. § 903.)”); cf. *Mont. Cannabis Indus. Ass’n v. State*, 368 P.3d 1131, 1138 (Mont. 2016) (evaluating and largely upholding medical marijuana statute, noting “no challenge is brought to the Act on the ground that it is preempted by federal law, U.S. Const. art. VI, cl. 2, and the State expressly disclaimed such a challenge during oral argument”).

medical marijuana. Rather, DOR imposed taxes on Nickerson *because* he had distributed medical marijuana in exchange for other items of value. The taxes came after the fact.

In addition, the CSA is concerned with the supply and demand of classified drugs and therefore seeks to control the “distribution, dispensing, and possession” of classified drugs. It is hard to see how the DOR’s tax assessments would disturb the CSA’s ability to regulate the distribution, dispensing, or possession of marijuana. Further, DOR’s tax assessments do not impede federal prosecution for CSA violations. Federal authorities are free to enforce the CSA in an effort to effectuate the purposes and objectives of the law—to control drug trafficking and the supply and demand for classified drugs.

Accordingly, we hold that DOR’s application of retail sales and B & O taxes to collective gardens’ “sales” of medical marijuana does not create an obstacle to the execution of the full purposes and objectives of the CSA.⁷⁴

The brief for the United States in *Nebraska v. Colorado* likewise reasoned that state regulation is more likely to control undesirable dissemination of marijuana than naked decriminalization.⁷⁵

Invalidating Anti-marijuana Local Zoning. It may be that prohibiting anti-marijuana probation conditions or government participation in marijuana regulation or taxation do not promote marijuana cultivation or use. Some court decisions seem to immunize conduct that is closer to direct encouragement or violation of federal law. The Michigan Supreme Court found that a local zoning ordinance prohibiting land use in violation of federal law was preempted by the Michigan Medical Marijuana Act (“MMMA”), which prohibited penalties on use of marijuana permitted by state law.⁷⁶ The court held that the MMMA was also not preempted by federal law.

Section 4(a) [of the MMMA] simply provides that, under state law, certain individuals may engage in certain medical marijuana

⁷⁴ Nickerson v. Wash. State Dep’t of Revenue, No. 48702-1-II, 2016 WL 6599651, at *5–6 (Wash. Ct. App. Nov. 8, 2016) (citations omitted).

⁷⁵ The brief noted that the states “do not allege that Colorado has directed or authorized any individual to transport marijuana into their territories in violation of their laws,” or that “the CSA requires Colorado to prohibit the sale or possession of marijuana.” Brief for the United States as Amicus Curiae at 14, 17, *Nebraska and Oklahoma v. Colorado*, 136 S. Ct. 1034 (2016) (No. 2015-144). “If plaintiffs were to prevail, therefore, the result might be that Colorado’s regulatory regime would be enjoined but the sale and possession of marijuana would still be lawful under Colorado’s laws.” *Id.* at 17.

⁷⁶ *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 537–38, 541 (Mich. 2014).

use without risk of penalty. As previously discussed, while such use is prohibited under federal law, § 4(a) does not deny the federal government the ability to enforce that prohibition, nor does it purport to require, authorize, or excuse its violation. Granting Ter Beek his requested relief does not limit his potential exposure to federal enforcement of the CSA against him, but only recognizes that he is immune under state law for MMMA-compliant conduct, as provided in § 4(a) [T]he state law here does not frustrate or impede the federal mandate.⁷⁷

With all due respect to a unanimous court, striking down a local prohibition, so that acts in violation of federal law can occur, arguably does impede the federal mandate.

Return of Seized Marijuana. Appellate courts in several states have held that local police officers are required to return seized marijuana to the owner if it was possessed in accordance with state law. In an opinion citing similar cases from California and Oregon, the Arizona Court of Appeals noted that police officers had no risk of federal prosecution, because

[F]ederal law immunizes a law enforcement official from liability under circumstances such as these. Title 21, section 885(d) of the United States Code is titled “Immunity of Federal, State, local and other officials” and provides that, with exceptions not relevant here, “no civil or criminal liability shall be imposed by virtue of this subchapter . . . upon any duly authorized officer of any State, territory, political subdivision thereof . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.” 21 U.S.C. § 885(d). This provision immunizes law enforcement officers such as the Sheriff from any would-be federal prosecution for complying with a court order to return [the claimant’s] marijuana to her.⁷⁸

The Colorado Supreme Court, 4-3, recently disagreed.⁷⁹

Issue Pistol Permit. Federal law prohibits a person who “is an unlawful user of or addicted to any controlled substance,” from receiving or possessing a firearm, and prohibits licensed dealers from selling to such a per-

⁷⁷ *Id.* at 540.

⁷⁸ *State v. Okun*, 296 P.3d 998, 1001–02 (Ariz. Ct. App. 2013) (citing *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 681 (Ct. App. 2007)); *State v. Kama*, 39 P.3d 866, 868 (Or. Ct. App. 2002)). *But see* *State v. Ehrensing*, 296 P.3d 1279, 1284 (Or. Ct. App. 2013) (refusing to order return of marijuana under circumstances).

⁷⁹ *People v. Crouse*, 2017 CO 5, ¶¶ 18–19 (388 P.3d 39) (Colo. 2017).

son.⁸⁰ The Ninth Circuit recently upheld an administrative ruling that a medical marijuana card-holder could not purchase a firearm from a federal firearms licensee.⁸¹ Conversely, the Oregon Supreme Court, unanimously, just a year after its decision in *Emerald Steel Fabricators, Inc.*, rejected a suit by Oregon sheriffs seeking to avoid issuance to Concealed Handgun Licenses to applicants who admitted to having Oregon medical marijuana cards.⁸² Though recognizing that federal law prohibited marijuana users from possessing firearms, the court concluded that issuance of permits would not frustrate the federal purpose:

Does ORS 166.291, which requires county sheriffs to issue CHLs to qualified applicants even if they use marijuana in violation of federal law, stand as an obstacle to the full accomplishment and exercise of the federal firearms statute's purpose? The sheriffs contend that it does, because it allows marijuana users—persons who are deemed *by Congress* to be unqualified to possess firearms—to obtain licenses that effectively *authorize* their possession of firearms. But . . . that contention does not accurately reflect the actual terms of the CHL statute. Putting aside the question of whether the CHL statute affirmatively “authorizes” *anything*, the fact remains that the statute is not directly concerned with the *possession* of firearms, but with the *concealment* of firearms in specified locations—on one's person or in one's car Neither is the statute an obstacle to Congress's purposes in the sense that it interferes with the ability of the federal government to enforce the policy that the Gun Control Act expresses. A marijuana user's possession of a CHL may exempt him or her from prosecution or arrest under ORS 166.250(1)(a) and (b), but it does not in any way preclude full enforcement of the federal law by federal law enforcement officials.⁸³

Again, the court insisted that the permit was an exemption from prosecution, not an affirmative authorization for conduct prohibited by federal law.

⁸⁰ 18 U.S.C. § 922(d)(3), (g)(3) (2012). Although the prohibitions apply only to receipt or possession “in or affecting commerce,” “the interstate commerce nexus requirement of the possession offense [is] satisfied by proof that the firearm petitioner possessed had previously traveled in interstate commerce.” *Scarborough v. United States*, 431 U.S. 563, 566 (1977). Normally, this is shown by demonstrating that the firearm at any point crossed a state or national border. *United States v. Bass*, 325 F.3d 847, 849 (7th Cir. 2003) (affirming where “the gun had been manufactured in California and shipped to Illinois”); *United States v. Polanco*, 93 F.3d 555, 564 (9th Cir. 1996) (affirming where, although firearm was manufactured and found in California, it had been temporarily stored in a “Nevada gun warehouse, then shipped to a California gun dealer”).

⁸¹ *Wilson v. Lynch*, 835 F.3d 1083, 1094–95 (9th Cir. 2016), *petition for cert. filed*, *Wilson v. Lynch* (Jan. 27, 2017) (No. 16-951).

⁸² *Willis v. Winters*, 253 P.3d 1058, 1065–66 (Or. 2011).

⁸³ *Id.*

“The state’s decision not to use its gun licensing mechanism [to enforce] federal law does not pose an obstacle to the enforcement of that law. Federal officials can effectively enforce the federal prohibition on gun possession by marijuana users by arresting . . . those who violate it.”⁸⁴

State lawyers and state courts had no choice but to minimize the state interests behind these laws. These state actions on their face seem to facilitate the use and distribution of marijuana, at least in particular circumstances, in violation of the CSA. One might assume that they in fact rest on a public policy judgment that medical marijuana has legitimate uses, and in such cases, use should be encouraged, that availability of marijuana promotes the welfare and morals of the people, and raises revenue for the state. In the face of a flat federal prohibition, however, arguing that the laws promoted marijuana use would have been fatal, almost certainly resulting in preemption. Accordingly, the statutes from preemption under the CSA by insisting that all the laws were doing, their sole function, is withholding penalties in particular circumstances. As the Supreme Court of California explained, “No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users. Instead of attempting the impossible . . . California’s voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes.”⁸⁵

As a result, recreational and medical marijuana states, or visitors to them, would be in a weak position to challenge a prohibition on using marijuana promulgated by another state with respect to its citizens. In *Oregon v. Nielsen*, Washington affirmatively authorized certain conduct that it has a right to promote, and that permission overrode contrary law of Oregon, applied in an Oregon court;⁸⁶ both states had jurisdiction, but Washington had a superior interest. Marijuana use is more like conduct occurring on the high seas because there is no other state with jurisdiction that has an affirmative state policy to permit, encourage, or facilitate marijuana use to balance against the policy interests of the prohibiting state.

CONCLUSION

As it happens, states of the United States generally do not regulate the conduct of their citizens on a nationwide or international basis.⁸⁷ In particu-

⁸⁴ *Id.* at 1066.

⁸⁵ *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 204 (Cal. 2008) (citations omitted).

⁸⁶ 212 U.S. 315, 321 (1909).

⁸⁷ Oregon is a partial exception. It provides for juvenile court jurisdiction based on “an act that is a violation, or that if done by an adult would constitute a violation, of a law or ordinance of the United States or a state, county or city.” OR. REV. STAT. § 419C.005(1) (2015); *see State ex*

lar, research reveals no state expressly prohibiting citizens from using marijuana in another state. A number of considerations explain why states have not more vigorously regulated their citizens extraterritorially. One is respect for the interests of other states in a federal system. Another is that states may be persuaded that criminal problems at home are more important and can be more readily and efficiently addressed. States may reason that extraterritorial regulation is likely to be arbitrary and ineffective, given that, for example, Oklahoma and Nebraska do not have large detachments of police investigators stationed in Denver.

Both Nebraska and Oklahoma have broad jurisdictional statutes that suggest a test is possible. The Nebraska Supreme Court, considering a conspiracy statute, held in 1975 that “[a] conspiracy in this state to do something in another state which is lawful in that state is not a crime in this state. A conspiracy in Nebraska to gamble in Nevada is a convenient illustration of that principle.”⁸⁸ The court, however, noted that “[t]he problem that is presented by this case is one that can be solved by legislation.”⁸⁹ The Nebraska Legislature seemingly “solved” that problem for gambling when they substantially revised their gambling statute⁹⁰ in 1986 to provide that “[i]t shall be no defense to a prosecution under any provision of this article relating to gambling that the gambling is conducted outside this state and is not in violation of the laws of the jurisdiction in which it is conducted.”⁹¹ Although there are no reported cases interpreting this section, it can plausibly be read as applying, to the extent that it constitutionally can, to extraterritorial conduct of citizens of Nebraska.⁹² If Nebraska believes it is appropriate to regulate gambling in states where it is legal, it might consider regulating drug use extraterritorially as well.

Oklahoma law possibly already permits prosecution for its citizens who use drugs out of state. In cases dealing with alcohol prohibition, older

rel. Juvenile Dep't v. W., 578 P.2d 824, 827 (Or. Ct. App. 1978) (rejecting equal protection challenge to provision).

⁸⁸ *State v. Karsten*, 231 N.W.2d 335, 336 (Neb. 1975); *see also, e.g.*, *People v. Cox*, 486 N.Y.S.2d 143, 145 (Sup. Ct. 1985) (“[A]n agreement contrived in New York to operate a gambling establishment in Nevada, where such conduct is not criminal or even illegal, is not prosecutable as a conspiracy in New York . . .” (citation omitted)).

⁸⁹ NEB. REV. STAT. § 28.1104 (2015) (“(1) A person commits the offense of promoting gambling in the third degree if he or she knowingly participates in unlawful gambling as a player by betting less than five hundred dollars in any one day. (2) Promoting gambling in the third degree is a Class IV misdemeanor.”). *See generally* Roland J. Santoni, *An Introduction to Nebraska Gaming Law*, 29 CREIGHTON L. REV. 1123 (1996) (describing Nebraska state gaming law).

⁹⁰ Nebraska currently prohibits gambling, including being a player. *See Karsten*, 231 N.W.2d at 337.

⁹¹ NEB. REV. STAT. § 28-1110; *see also* 73 Op. Neb. Att’y Gen. (1985), 1985 WL 168575, at *1.

⁹² Maine has a similar statute, which likewise has apparently not been construed by reported cases. ME. STAT. tit. 17-A, § 957 (1975).

Oklahoma cases reflect disfavor of extraterritorial application of law.⁹³ Oklahoma's current jurisdictional statute is drafted more broadly:

The following persons are liable to punishment under the laws of this State:

1. All persons who commit, in whole or in part, any crime within the State.
2. All who commit theft out of this state, and bring, or are found with the property stolen, in this state.
3. All who, being out of this state, abduct or kidnap, by force or fraud, any person contrary to the laws of the place where such act is committed, and bring, send, or convey such person within the limits of this state, and are afterward found therein.
4. And all who, being out of this state, cause or aid, advise or encourage, another person, causing an injury to any person or property within this state by means of any act or neglect which is declared criminal by this code, and who are afterward found within this state.⁹⁴

At least subsection 1 could apply to an Oklahoman who, while in Oklahoma, planned a trip to Colorado or Washington for the purpose of possessing or using marijuana,⁹⁵ because part of the crime was committed within the state. If the trip is planned with more than one person, a conspiracy charge might be available.⁹⁶ Many jurisdictions require that the offense be crimi-

⁹³ *Gulf, C. & S.F. Ry. Co. v. State*, 116 P. 176, 178 (Okla. 1911) (stating that prohibition laws “do not attach until the delivery of the same to the consignee within the state by the interstate carrier. It cannot be successfully maintained that such laws attach to the liquor without the state, and have an extraterritorial effect so as to make it unlawful for the interstate carrier to receive such shipment in another state for delivery in this state. No authority has been cited to that effect, and none can be found. The opposite in law is a truism.”); *State v. Eighteen Casks of Beer*, 104 P. 1093, 1095 (Okla. 1909) (“It might be very convenient and useful in the execution of the policy of prohibition within the state to extend the powers of the state beyond its territorial limits. But such extraterritorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence; for, if they belong to one state, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegations of national power to prevent.”).

⁹⁴ OKLA. STAT. tit. 21, § 151 (2014).

⁹⁵ *State v. Fletcher*, 133 P.3d 339, 341 (Okla. Crim. App. 2006) (“To prove Appellee guilty of attempt the State is required to prove the intent to commit a specified crime, performance of some overt act towards its commission and failure of consummation.” (citing *Weimar v. State*, 556 P.2d 1020, 1024 (Okla. Crim. App. 1976)); *see also* *People v. Betts*, 103 P.3d 883, 893 (Cal. 2005) (“These acts [inside the State of California] were not merely de minimus; they furthered the completion of the charged offenses by removing the girls from the protection of their mother and providing defendant with opportunities to be alone with each of them.”).

⁹⁶ *People v. Morante*, 975 P.2d 1071, 1075 (Cal. 1999) (“California courts have jurisdiction over the criminal prosecution of a defendant for conspiracy to commit an offense where the de-

nalized in the out-of-state jurisdiction.⁹⁷ On the other hand, it is not clear that that is either a universal rule or a constitutional requirement.⁹⁸ Because Colorado and Washington have made clear that they have merely withheld punishment, not affirmatively authorized or encouraged the use of marijuana, it is hard to argue that prosecution of an Oklahoman in Oklahoma would conflict with the interests of those states.

fendant, within the State of California, both entered into an agreement to commit the offense and committed acts in furtherance of the conspiracy, but the offense that is the object of the conspiracy was committed in another jurisdiction.”); *see also* *Mathews v. State*, 198 P. 112, 113 (Okla. Crim. 1921).

⁹⁷ N.Y. CRIM. PROC. LAW § 20.30(1) (McKinney 2017) (“[T]he courts of this state do not have jurisdiction to convict a person of an alleged offense partly committed within this state but consummated in another jurisdiction, [or of solicitation, conspiracy, attempt, or facilitation], unless the conduct . . . constitutes an offense under the laws of such other jurisdiction as well as under the laws of this state.”); *State v. Self*, 706 P.2d 975, 978 (Or. Ct. App. 1985) (“One may be criminally liable in Oregon for soliciting the commission of a crime in another state, so long as that other state’s offense has a counterpoint under Oregon law. Possession of cocaine is illegal in both Oregon and California. It is therefore permissible to charge a person in Oregon with the crime of soliciting possession of cocaine in California.”).

⁹⁸ *See Morante*, 975 P.2d at 1086 (“We reserve for another day the issue whether a conspiracy in state to commit an act criminalized in this state but not in the jurisdiction in which the act is committed, also may be punished under California law.”).