State Marijuana Regulation Laws Are Not Preempted By Federal Law

While marijuana possession and distribution are federal crimes under the Controlled Substances Act (CSA) and the Supremacy Clause of the United States Constitution provides that federal law is the "supreme Law of the Land,"[1] that is not the entire story: The U.S. system of government is one of dual sovereignty. States can and do serve as "laboratories of democracy."

Congress never intended to preempt state drug laws, and the 10th Amendment prevents Congress from forcing states to mirror or enforce federal policies.

While federal law creates challenges and injustices — including those related to access to capital, banking, and for immigrants — it does not stand in the way of states' legalization for adults' or medical use. States' actions have dramatically reduced the number of people arrested for cannabis; allowed millions of Americans safe, regulated access to cannabis; and provided a far safer alternative to opiates. And states' actions have already relaxed federal policies.

Congress Did Not Intend to Preempt State Cannabis Laws

The question of federal preemption is first and foremost a question of Congressional intent. The CSA makes it clear it only preempts state laws under very limited circumstances. 21 U.S.C. 903 says it is not intended to preempt the field of drug laws if "there is a positive conflict" between state and federal law "so that the two cannot consistently stand together." Courts have generally held that a state law is only preempted by the CSA if it is "physically impossible" to comply with both state and federal law or if the state law stands as an obstacle to the CSA. Neither is the case with carefully crafted state medical marijuana programs.

A state law — or a portion of it — would be preempted under impossibility preemption if it required someone to violate federal law. For this reason, effective cannabis laws do not require state workers to grow or dispense marijuana in violation of federal law; they just regulate private individuals who choose to do so. Requiring someone to break federal law is quite different from allowing and regulating conduct under state law.

The Tenth Amendment Protects State Cannabis Regulation Laws

The Tenth Amendment limits what state laws can be federally preempted. While the federal government is free to enforce its own marijuana laws, requiring state agents to enforce federal laws is unconstitutional commandeering of a state's resources.

In 2018, the U.S. Supreme Court overturned a federal law, PASPA, that sought to prohibit states from authorizing sports gambling, noting PASPA "violates the anticommandeering rule" that flows from the 10th Amendment.[2] The court explained, "It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."

While the ruling was not about cannabis regulation, the same principle would invalidate a federal attempt to prohibit states from legalizing cannabis. In Arizona, a state court had previously rejected a preemption challenge based on the same constitutional principle, noting:

It is of considerable consequence that it is Arizona's attempt at partial decriminalization with strict regulation that makes the AMMA vulnerable … This view, if successful, highjacks Arizona drug laws and obligates Arizonans to enforce federal prescriptions that categorically prohibit the use of all marijuana. The Tenth Amendment's "anti-commandeering rule" prohibits Congress from charting that course.[3]

The federal government has never alleged in court that federal laws preempt state medical marijuana or legalization and regulation laws. In fact, the Department of Justice (DOJ) argued in favor of dismissing a lawsuit claiming Arizona's medical marijuana law was preempted. That suit was dismissed.[4]

States Are Leading the Way

Federal law has not stopped states from charting their own paths. At least 41 states have legalized possession, manufacture, and sale of at least some cannabis products that are federally illegal. Yet, the Department of Justice has not targeted state-legal marijuana providers in over a decade.

This policy of non-interference unless a specific federal interest is implicated was formalized in the Department of Justice's 2013 Cole Memo.[5] While the memo was rescinded by then-U.S. Attorney General Jeff Sessions in 2018, in practice, the non-enforcement practice continued for the remainder of Trump's term and under the Biden Administration. Reversing the course would be incredibly unpopular. Polls show more than 70 percent of Americans believe the federal government should not use its limited resources to interfere with state-legal marijuana businesses.

Even prior to the federal non-enforcement policy, 99% of all marijuana arrests were at the state and local levels. It is mostly states' continued prohibition policies that are resulting in hundreds of thousands of annual cannabis arrests, tearing families apart and driving sales to the unregulated underground market. State lawmakers can and should change those dated laws.

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[1] U.S. Constitution Article VI, cl. 2.
[2] Murphy v. NCAA, 138 S. Ct. 1461 (2018).
[3] White Mountain Health Center, Inc. v. Maricopa County, CV 2012-053585 (Arizona Superior Court, Maricopa County, 2012
[4] Arizona v. United States, No. CV 11-1072-PHX-SRB, slip op. at 2 (D. Ariz. Jan. 1, 2012).
[5] https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf