

## High on Federalism: Marijuana's Challenge to Federal-State Relations

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Our discussion of federalism as it relates to the ever-so-tumultuous marijuana issue is rooted in the Commerce Clause and an understanding of *Gonzales v. Raich*, the 2005 case in which the Supreme Court ruled that the federal government can indeed regulate the plants you grow in your own backyard for your own individual use.<sup>1</sup> This decision came through a combination of a tortured reading of the Commerce Clause and, for Justice Antonin Scalia, the Necessary and Proper Clause.<sup>2</sup> Let it be clear from the outset that we have no direct interest in the marijuana debate—neither in terms of personal use nor financial investment. Whether that detracts from or enhances our credibility, we strive to provide an objective perspective on this important and growing area of law, particularly as it relates to the intersection of federal and state law.

This intersection poses fascinating legal concerns: constitutional, criminal, conflicts of law, and beyond. We know that the Supremacy Clause of Article VI provides that when federal and state law are in conflict, federal law prevails.<sup>3</sup> How can it be, then, that nothing has changed in federal law while states have, for more than twenty years, been legalizing and decriminalizing marijuana? As of this writing, thirty-three states, plus the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands have legalized medical marijuana, while ten

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<sup>1</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>2</sup> *Id.* at 35.

<sup>3</sup> U.S. CONST. art. VI, cl. 2.

states, D.C., and the Northern Mariana Islands have decriminalized recreational use.<sup>4</sup> Yet federal law vis-à-vis the legality of marijuana remains almost entirely unchanged. Is marijuana Schrödinger's weed—both legal and illegal at the same time? It breeds an interesting dynamic, to say the least.

### I. BACKGROUND: POLLS AND OTHER STATISTICS

Some background is in order before diving into the legal complexities. Marijuana regulation is an area of public policy in which public opinion has changed more rapidly than in any other policy area in American history, with the exception of gay marriage. A Pew Research poll conducted in September of 2018 found that 62 percent of Americans favored legalization.<sup>5</sup> A contemporaneous Gallup poll set the number at 66 percent.<sup>6</sup> These figures are up from 52 percent in 2013 when, for the first time, a majority of Americans were in favor of legalization.<sup>7</sup> A decade before that, in 2002, just 32 percent were in favor of legalization.<sup>8</sup> Another decade prior, in 1991, just 17 percent were in favor.<sup>9</sup> Over twenty-five years, then, public support for legalization has marched from 17 percent into the Sixties. That is a remarkable progression, with the same general trend lines favoring legalization cutting across all demographics. Whether it be bipartisanship, gender, ethnicity, or age, the trend toward supporting legalization has marched in the

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<sup>4</sup> *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGS. (Mar. 5, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/48CD-GMV4>].

<sup>5</sup> Hannah Hartig & Abigail Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR.: FACT TANK (Oct. 8, 2018), <https://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/> [<https://perma.cc/5MS6-QCVA>].

<sup>6</sup> Justin McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, GALLUP: NEWS (Oct. 22, 2018), <https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx> [<https://perma.cc/TNE5-G6FE>].

<sup>7</sup> *Majority Now Supports Legalizing Marijuana*, PEW RES. CTR.: U.S. POLITICS & POLICY (Apr. 4, 2013), <https://www.people-press.org/2013/04/04/majority-now-supports-legalizing-marijuana/> [<https://perma.cc/Y32F-UPUJ>].

<sup>8</sup> Hartig & Geiger *supra* note 5 (referencing data found in embedded hyperlink: [https://www.pewresearch.org/wp-content/uploads/2018/10/FT\\_18.10.09\\_MarijuanaUpdate\\_topline\\_for\\_release.pdf](https://www.pewresearch.org/wp-content/uploads/2018/10/FT_18.10.09_MarijuanaUpdate_topline_for_release.pdf) [<https://perma.cc/Y32F-UPUJ>]).

<sup>9</sup> *Id.*

same direction.<sup>10</sup> Perhaps not surprisingly, younger generations are more in favor of legalization, with Millennial support at 74 percent, Gen X at 63, Boomers at 54, and the Silent Generation at a relatively reticent (but still significant) 39 percent.<sup>11</sup> Moreover, an August 2018 Quinnipiac poll found that 93 percent of Americans approved of medical marijuana if prescribed by a doctor.<sup>12</sup> That should not be taken lightly: 93 percent is about as unanimous as it gets in public-opinion research.

Why this massive shift? It is likely in part because people are seeing incarceration rates rise, along with the costs associated with prosecuting marijuana offenses. Perhaps people feel states should prioritize other matters, whether it be illegal immigration, terrorism, violent crime, or other issues their individual proclivities might hold more valuable. The crime statistics make this sentiment pretty understandable.

In 2017, approximately 660,000 people were arrested for violating marijuana laws<sup>13</sup>—an increase from previous years, the lowest of which was 2015 (close to 90,000 fewer). That figure is still the lowest since 1996.<sup>14</sup> On this data point, incarceration rates are more or less holding steady. This isn't necessarily a sign of progress, though, since the number of people incarcerated for marijuana year-after-year is roughly the population of Fort Worth, Texas,

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *U.S. Voters Believe Comey More than Trump: Quinnipiac University National Poll Finds; Support for Marijuana Hits New High*, QUINNIPAC U. POLL (Apr. 26, 2018), <https://poll.qu.edu/national/release-detail?ReleaseID=2539> [<https://perma.cc/DDL8-4G3L>].

<sup>13</sup> U.S. DEP'T OF JUST., CRIME IN THE UNITED STATES, 2017, FBI UNIFORM CRIME REP. at 2 (2018), <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/persons-arrested.pdf> [<https://perma.cc/BKP5-PW62>]; U.S. DEP'T OF JUST., ARREST TABLE: ARRESTS FOR DRUG ABUSE VIOLATIONS (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/arrest-table> [<https://perma.cc/W8PP-UB3X>]. This approximation was calculated by combining the percentages of marijuana sales/manufacturing arrests (3.7 percent) and marijuana possession arrests (36.7 percent) found in the Arrests for Drug Abuse Violations table, and then multiplying the total amount of drug abuse violations (1,632,921) by this combined percentage.

<sup>14</sup> Christopher Ingraham, *Marijuana Arrests Fall to Lowest Level Since 1996*, WASH. POST (Sep. 26, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/09/26/marijuana-arrests-fall-to-lowest-level-since-1996/?utm\\_term=.b2f756e6214c](https://www.washingtonpost.com/news/wonk/wp/2016/09/26/marijuana-arrests-fall-to-lowest-level-since-1996/?utm_term=.b2f756e6214c) [<https://perma.cc/8996-Z4ZP>] (suggesting that 1996 was the last year arrests for marijuana possession were that low, nearly twenty years prior).

or of the entire state of Alaska. Eleven percent of those arrests were for dealing or distribution; the rest were for possession. As of March 2019, 76,166 people were incarcerated in federal prison for drug offenses.<sup>15</sup> That is nearly 46 percent of the total federal prison population.<sup>16</sup> Just over a quarter of these are for marijuana. In other words, about ten percent of the total federal prison population is there for a marijuana offense. As far as female inmates are concerned, 45 percent are incarcerated for a drug offense.<sup>17</sup> Perhaps in some part due to the legalization wave, drug offenders make up a much lesser part of the populations housed in state and municipal facilities. In state prisons, 15 percent of inmates are incarcerated for drugs.<sup>18</sup> Municipal jail populations include about 25 percent drug offenders.<sup>19</sup>

In 2016, arrests for possession of marijuana outnumbered arrests related to violent crime by nearly 60,000.<sup>20</sup> Even with widespread decriminalization and public perception in favor of legal weed at all-time highs, these numbers have not stopped growing. From 2008 to 2013, the number of federal offenders whose most serious offense was marijuana possession increased by over 800

<sup>15</sup> *Inmate Statistics: Offenses*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) [<https://perma.cc/W6K9-J2XM>].

<sup>16</sup> *Id.*

<sup>17</sup> Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2018*, PRISON POLY INITIATIVE (Nov. 13, 2018), <https://www.prisonpolicy.org/reports/pie2018women.html> [<https://perma.cc/5HYX-F83Y>].

<sup>18</sup> DRUG WAR FACTS, DRUGS AND THE CORRECTIONAL SYSTEM (PRISONS, JAIL, PROBATION AND PAROLE), [https://www.drugwarfacts.org/chapter/drug\\_prison](https://www.drugwarfacts.org/chapter/drug_prison) [<https://perma.cc/4MFZ-7VRZ>] (citing Jennifer Bronson, *Prisoners in 2017*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS (April 2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/VHP3-Z8MT>]).

<sup>19</sup> *Id.* (citing Jennifer C. Karberg & Doris J. James, *Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS (July 2005), <https://www.bjs.gov/content/pub/pdf/sdatji02.pdf> [<https://perma.cc/7PY4-XY5M>]).

<sup>20</sup> Christopher Ingraham, *More People Were Arrested Last Year Over Pot Than for Murder, Rape, Aggravated Assault and Robbery—Combined*, WASH. POST (Sept. 26, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/09/26/more-people-were-arrested-last-year-over-pot-than-for-murder-rape-aggravated-assault-and-robbery-combined/?utm\\_term=.68c117b7b464](https://www.washingtonpost.com/news/wonk/wp/2017/09/26/more-people-were-arrested-last-year-over-pot-than-for-murder-rape-aggravated-assault-and-robbery-combined/?utm_term=.68c117b7b464) [<https://perma.cc/9KC6-8UAW>]; see also *Inmate Statistics: Offenses*, FEDERAL BUREAU OF PRISONS, <https://bit.ly/1VIRkTO> [<https://perma.cc/VKQ8-37S8>].

percent.<sup>21</sup> The sentences have not softened alongside the aforementioned shift in public opinion, either. Federal sentencing statistics show that of 3,487 marijuana offenders sentenced in 2016, 914 carried a mandatory minimum.<sup>22</sup> Of those carrying a mandatory minimum, 761 faced five years and 148 saw ten years or more.<sup>23</sup> Of people whose highest conviction was for simple possession of a particular drug, 94 percent of those convictions were for marijuana.<sup>24</sup>

Finally, despite rates of drug use being relatively consistent among racial groups, black Americans are nearly four times as likely as whites to be arrested for marijuana possession.<sup>25</sup> Nearly 60 percent of people incarcerated in state prison and nearly 80 percent incarcerated in federal prison for drug offenses are either black or Latino.<sup>26</sup> Washington's arrest rate for black Americans is still double the rate for other states, despite having a predominantly white population.<sup>27</sup> Given racial minorities' over-representation among those incarcerated for marijuana compared to usage

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<sup>21</sup> *Inmate Statistics: Offenses*, FEDERAL BUREAU OF PRISONS, <https://bit.ly/1VlRkTO> [<https://perma.cc/F3RD-JW4L>] (This was mostly from arrests at or near the U.S.–Mexico border in Arizona. It is possible that this increase in federal offenders of this type is partly a function of increased collaboration efforts between federal agencies and Sheriff Arpaio in Arizona to crack down on illegal immigration, but even so, the concern is that the arrest level cuts against the decriminalization trend.)

<sup>22</sup> U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 120 (Oct. 2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025\\_Drug-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf) [<https://perma.cc/X33B-V3Z3>].

<sup>23</sup> *Id.* at 121.

<sup>24</sup> U.S. SENTENCING COMM'N, WEIGHING THE CHARGES: SIMPLE POSSESSION OF DRUGS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 3 (Sept. 2016), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609\\_Simple-Possession.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609_Simple-Possession.pdf) [<https://perma.cc/3H85-G3LU>].

<sup>25</sup> AMERICAN CIVIL LIBERTIES UNION [ACLU], THE WAR ON DRUGS IN BLACK AND WHITE 4 (2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white> [<https://perma.cc/2BP4-Z2W6>].

<sup>26</sup> DRUG POLICY ALL., THE DRUG WAR, MASS INCARCERATION AND RACE (2018), [http://www.drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race\\_01\\_18\\_0.pdf](http://www.drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race_01_18_0.pdf) [<https://perma.cc/AS9E-NL5N>].

<sup>27</sup> From Prohibition to Progress: A Status Report on Marijuana Legislation, DRUG POLICY ALLIANCE (Jan. 22, 2018), [http://www.drugpolicy.org/sites/default/files/dpa\\_marijuana\\_legalization\\_report\\_feb14\\_2018\\_0.pdf](http://www.drugpolicy.org/sites/default/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf) [<https://perma.cc/XWP9-DGYS>].

rates, there is clearly a racial dimension to incarceration, be it systemic or institutional. To many Americans, this might seem unjust and unreasoned. Liberalization of drug policy may be a cure to these systemic problems, at least in part. Vanderbilt Law Professor Robert Mikos, for example, has said that by allowing the use of medical marijuana, states have “fostered tolerant attitudes, making it seem more compassionate and softening societal reproach.”<sup>28</sup>

This shift in public opinion toward legalization likely has at least something to do with increased public acceptance of marijuana use based on cultural changes: people see how states have legalized marijuana for both medical and, at least in the last few years, recreational purposes, without a subsequent falling of the sky. In the past, the public thought marijuana use was morally reprehensible. This was in no small part due to the controversial propaganda campaigns launched in the mid-twentieth century, but these things have a tendency to take hold. Even so, in 2013, just 32 percent of Americans surveyed thought using marijuana was morally wrong.<sup>29</sup> People are clearly aware of prohibition’s inherent costs, as well. Seventy-two percent of Americans polled by Pew in 2013 believed that efforts to enforce marijuana laws cost more than they are worth, even in a time when only 52 percent favored legalization.<sup>30</sup> It is also becoming clear that concerns about increased youth consumption of marijuana in decriminalized states have proven to be overblown, with Washington data showing no change in youth consumption after legalization.<sup>31</sup> No matter the cause, attitudes are changing.

## II. DUELING SOVEREIGNS

There are two important limitations to the Supremacy Clause. First, the federal action or law must be constitutional in

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<sup>28</sup> Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crimes*, 62 VAND. L. REV. 1421, 1424 (2009).

<sup>29</sup> PEW RES. CTR, *supra* note 7.

<sup>30</sup> *Id.*

<sup>31</sup> WASH. STATE DEP’T OF HEALTH, 2016 WASH. STATE HEALTH YOUTH SURVEY DATA BRIEF: MARIJUANA (2016), <https://www.askhys.net/Docs/DB%20SU%20Overview%202017-03-08.pdf> [https://perma.cc/NC3B-F7ZX].

the first place. In *Gonzales v. Raich*, the Supreme Court upheld the constitutionality of the Controlled Substances Act as applied to marijuana cultivated in-state for personal use.<sup>32</sup> If the Court had held the opposite—as we think it should have—then the federal government could not have reached the growth, possession, or transfer of marijuana on a local level or within a state. But the Court did what it did, despite the apparent paradox wherein nationwide alcohol prohibition required a constitutional amendment. Thus, the dueling sovereigns of the federal and state governments have developed a much more complicated relationship.

Generally speaking, in those rare cases of overlapping jurisdiction, when Congress legalizes private activity, state laws to the contrary are preempted. But when Congress bans activity the states have legalized, the legal status of the regulated activity and the practical import of federal law is less obvious. This is largely because even in those areas where federal authorities may enact law, they are barred from using the state as an instrument of enforcement of those federal laws.<sup>33</sup> This issue comes up in a host of policy areas, including immigration, guns, and—most recently—even sports gambling.<sup>34</sup> Sure, state and local law enforcement can make agreements with the federal government—often in exchange for federal funding—to cooperate on criminal investigations or for other purposes. This is common practice, but the important consideration is that the state's hand is never forced.<sup>35</sup> This means that regardless of whether it is the state attorney general or a cop on the beat in your hometown, there is no binding obligation to enforce federal law. This creates a fascinating grey area: state officials cannot interfere with federal agents in their enforcement of the Controlled Substances Act—or, for that matter, immigration

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<sup>32</sup> *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

<sup>33</sup> *See, e.g.*, *New York v. United States*, 505 U.S. 142, 165–66 (1992); *Printz v. United States*, 521 U.S. 898, 923–25 (1997) (establishing the anti-commandeering principle).

<sup>34</sup> Last year's Supreme Court decision in *Murphy v. NCAA* confirmed that the federal government cannot dictate what a state legislature might and might not do. 138 S. Ct. 1461, 1478 (2018) (striking down federal law directing states not to legalize sports betting).

<sup>35</sup> *See* WASH. STATE DEP'T OF HEALTH, *supra*, note 31.

law—but state and local agents are under no obligation to assist the feds.

How this tension between federal law enforcement efforts and disinterested state authorities works out has its clearest example in the various breeds of “sanctuary jurisdiction” litigation that has made headlines in recent years. For example, California’s prohibition against employers giving certain information to immigration enforcement may have run afoul of the Supremacy Clause where the law could be interpreted to directly interfere with federal law enforcement.<sup>36</sup> In other words, state officials cannot actively interfere with or obstruct a lawful federal investigation. That said, marijuana has been federally prohibited since 1970, without even any allowances for medical use. But the Supreme Court’s affirmance of this categorical prohibition in *Raich* did nothing to slow state legalization campaigns. By the time *Raich* was decided, fifteen states had already legalized medical marijuana, California being the first in 1996. Since then, twenty-three more have done so while sixteen have decriminalized. Now, ten states plus the District of Columbia have legalized marijuana outright.<sup>37</sup> Vermont, thus far, has become the only state to legalize through an act of its state legislature.<sup>38</sup> All the rest were accomplished via referendum, which is in itself something of a curiosity.

As far as federal enforcement is concerned, Congress has forbidden the U.S. Department of Justice (DOJ) from prosecuting individuals who participate in a state medical marijuana program.<sup>39</sup> That compromise is accomplished by way of an appropriations rider that has been in place for a number of years. The U.S. Court of Appeals for the Ninth Circuit upheld the program, not

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<sup>36</sup> CAL. GOV’T CODE § 7285.1 (West 2018); *United States v. California*, 314 F. Supp. 3d 1077, 1112 (E.D. Cal. 2018) (granting the government’s request for a preliminary injunction as to certain components of California’s law insofar as they direct individuals not to cooperate with federal law enforcement).

<sup>37</sup> *State Medical Marijuana Laws*, *supra* note 4.

<sup>38</sup> Alicia Wallace, *Vermont Gov. Phil Scott Signs Marijuana Legalization Bill “With Mixed Emotions,”* THE CANNABIST (Jan. 22, 2018), <https://www.thecannabist.co/2018/01/22/vermont-marijuana-legalization-scott-signs/97283/> [https://perma.cc/7ZL3-5C2P].

<sup>39</sup> *State Medical Marijuana Laws*, *supra* note 4.

with what one might consider to be that court's typical jurisprudential deviations, but in a fairly straightforward manner with Republican-appointed judges in the majority.<sup>40</sup> In effect, in states that have medical marijuana laws, Congress has denied the executive branch the money to enforce those laws. There has been debate in Congress about extending the same appropriations treatment to states that have legalized marijuana for recreational use, but without success thus far.<sup>41</sup>

The most recent attempt to extend that kind of protection was the First Step Act<sup>42</sup> (the recently enacted criminal-justice reform legislation), with a failed amendment that would have added in the STATES Act (Strengthening the Tenth Amendment Through Entrusting States), which we discuss below. But as it currently stands, the federal government is still authorized and has funding to enforce federal marijuana laws against recreational users, even in states that have legalized it. There is certainly a practical dimension to all of this in that only about one percent of the roughly 800,000 marijuana cases generated every year are handled by the federal government. There simply are not enough federal law enforcement agents, from a practical perspective, to find and pursue marijuana offenders in states that have legalized it. Understandably, the federal government prioritizes organized crime, terrorism, large criminal investigations, and marijuana crime in states that have not legalized—thereby availing themselves of cooperation from local law enforcement.

Under federal law, there are only two exceptions to the categorical marijuana ban. One is a compassionate-use program—somewhat akin to state medical marijuana—that was approved under President Jimmy Carter. It was quickly shuttered thereafter, but the existing patients were grandfathered in. Today, seven people remain on the grandfathered list, making the compassionate use program more of a trivia question than an actual solution.<sup>43</sup>

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<sup>40</sup> *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016).

<sup>41</sup> Dean M. Nickles, *Federalism and State Marijuana Legislation*, 91 NOTRE DAME L. REV. 1253, 1261 (2016).

<sup>42</sup> H.R. 5682, 115th Cong. (2018).

<sup>43</sup> See *Federal IND Patients*, MEDICALCANNABIS.COM, <https://www.medicalcannabis.com/patients-care-givers/federal-ind-patients/> [<https://perma.cc/FT6D-5NCY>]. Another

The other exception is for those participating in an FDA-approved research study. The federal government only approved a handful of marijuana research projects from 2000 to 2009, but has ramped up its activity since.<sup>44</sup> At the very least, we know there is some sort of research going on. Nevertheless, the government—under both Republican and Democratic administrations—has refused to expand legal access to marijuana. There is a rubric for classifying both recreational and medicinal pharmaceuticals, which takes into account medicinal value, potential for abuse, psychological and physical effects on the body.<sup>45</sup> The government's contention has always been that this rubric was properly applied to marijuana, thus justifying the ban. In other words, the official position of the U.S. government is that marijuana has no beneficial effects and that is why it was classified as a Schedule I drug.<sup>46</sup>

### III. FROM A CHECKERED PAST TO STATE SOLUTIONS

The categorical federal ban has been on the books since 1970, with rather strict penalties attached thereto.<sup>47</sup> At the state level, several began adopting bans on marijuana in the early twentieth century as part of a wave of racially-tinted, anti-drug campaigns.<sup>48</sup> Marijuana as a mechanism for the influx of Mexican immigrants at the time to seduce white women constituted one central idea propelling the anti-marijuana craze.<sup>49</sup> It is safe to say

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piece of trivia, the federal grow site tasked with providing the marijuana for purposes of the compassionate use program is located at the University of Mississippi. Whether that means the Mississippi senators in the late 1970s were very powerful, or very weak, is uncertain.

<sup>44</sup> See the U.S. National Library of Medicine's website at [ClinicalTrials.gov](https://clinicaltrials.gov) (showing 93 active studies on Cannabinoids as of March 7, 2019) for more current data.

<sup>45</sup> See DRUG ENFORCEMENT ADMIN. [DEA], DRUG SCHEDULING, <https://www.dea.gov/drug-scheduling> [<https://perma.cc/4QW4-GTHR>].

<sup>46</sup> David Downs, *The Science Behind the DEA's Long War on Marijuana*, SCIENTIFIC AM. (Apr. 19, 2016), <https://www.scientificamerican.com/article/the-science-behind-the-dea-s-long-war-on-marijuana/> [<https://perma.cc/LQ9W-GFT8>]; see also DRUG SCHEDULING, *supra* note 45 (explaining that marijuana is a Schedule I drug).

<sup>47</sup> Controlled Substances Act, 21 U.S.C. § 801 (1970); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

<sup>48</sup> Alyssa Pagano, *The Racist Origins of Marijuana Prohibition*, BUS. INSIDER (Mar. 2, 2018, 10:57 AM), <https://read.bi/2EGB2jt> [<https://perma.cc/X7MP-BU59>].

<sup>49</sup> *Id.*

that, at least on the state level, there might have been some motivations for drug prohibition aside from public-health concerns, but given the dubious past of these laws, it is interesting that states ultimately pushed the needle in the other direction.

California started the latest wave of legalization in 1996 by establishing a template for future medicinal marijuana statutes, all of which apply a common framework.<sup>50</sup> A prospective user must have some sort of debilitating medical condition, attested to in the course of a bona fide medical exam by a physician. Many of the raids on dispensaries in Oakland, California, for example, occur when authorities find evidence that the doctors do not actually perform real examinations, but are simply churning out prescriptions.<sup>51</sup>

The doctor must recommend marijuana for the benefit of the patient, who then registers with the state and is given a license. Typically, patients have to re-register or renew their licenses periodically. Medical marijuana laws also typically provide legal protection of various kinds, some of which the federal government cannot preempt because of the anti-commandeering principle, and some of which it could seek to overturn as facilitating the violation of federal law. The most obvious protection that state laws give is immunity from arrest and prosecution for possessing, growing, or using marijuana. Registration and licensing programs sort who is exempt from those sanctions, and the federal government probably cannot interfere so long as the registration licensing program does not encourage use.

Some states bar landlords, employers, and schools from discriminating against medical marijuana patients, and we now see some of these protections being transferred to recreational users.<sup>52</sup>

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<sup>50</sup> California Proposition 215, also known as the Compassionate Use Act, was on the November 5, 1996 general election ballot in California as an initiated state statute, where it was approved. CAL. HEALTH CODE § 11362.5 (West 1996).

<sup>51</sup> THE ASSOC. PRESS, *Federal Officials Raid Medical Marijuana School in Oakland*, N.Y. TIMES (Apr. 2, 2012), <https://www.nytimes.com/2012/04/03/us/medical-marijuana-training-school-in-oakland-is-raided.html> [<https://perma.cc/HC4R-82N2>].

<sup>52</sup> Sachi Barreiro, *State Laws on Off-Duty Marijuana Use*, NOLO, <https://www.nolo.com/legal-encyclopedia/state-laws-on-off-duty-marijuana-use.html> [<https://perma.cc/C96C-KBVR>].

Caregivers and physicians typically receive similar protections.<sup>53</sup> If the federal government really wanted to pursue a crackdown, it could seek to have those protections involving landlords, employers, schools, and so forth invalidated on the ground that they present an affirmative change from the state law, thereby facilitating violations of federal law.

Some states give qualified patients and other now-legal users the right to recover any marijuana seized by state law enforcement.<sup>54</sup> This comes into play in situations where there is a criminal investigation and the authorities discover marijuana owned and stored lawfully according to state law. For those situations, some state laws instruct the police to return the seized marijuana, the same way they would return any other property at the end of an investigation. What this means, in theory, is that the state officials are now distributing marijuana in violation of federal law. Similarly, several states supply marijuana directly to qualified patients themselves, analogous to a direct-delivery Alcohol Beverage Control (ABC) store.<sup>55</sup> This means there is direct state involvement in production or distribution, which could almost certainly be preempted if the federal government chose to intervene to stop state distribution.

The political machinations of the DOJ might also transform any incremental shifts in drug policy into matters of posturing (rather than substantive developments) in such a chaotic area of law. While many think of the political left as champions of marijuana legalization, developments in the Trump administration have also trended in the direction of legalization. President Donald Trump first voiced lukewarm support for the STATES Act in 2016, which

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<sup>53</sup> See generally *id.* (Courts often rule in favor of employers).

<sup>54</sup> Cameron Mostaghim, *Roadside Seizures of Medical Marijuana: Public Safety and Public Policy as Limitations upon Transporting and the Return of Lawfully Seized Medical Marijuana*, 44 AM. JUDGES ASS'N COURT REV. 108, 109 (2007), <http://aja.ncsc.dni.us/publications/courtrv/cr44-3/CR44-3Mostaghim.pdf> [<https://perma.cc/662F-9SNX>].

<sup>55</sup> See *Observations on Utah's Proposed State Distribution System*, VAND. UNIV. MARIJUANA LAW, POLICY, AND AUTHORITY (Oct. 15, 2018), <https://bit.ly/2EVTpSZ> [<https://perma.cc/VE83-Q3T7>].

now seems to have solidified.<sup>56</sup> He has made other generally pro-decriminalization statements such as, “if they vote for it, they vote for it. But they’ve got a lot of problems going on right now, in Colorado. Some big problems. But I think medical marijuana, 100 percent.”<sup>57</sup> President Trump also promised that he would not pursue cannabis businesses operating in compliance with state laws, which, at least for now, could make that matter more academic than practical.<sup>58</sup> Still, basing a business’s safety from prosecution entirely on who is in the White House is an unstable situation at best.

States have generally been wary about the process by which patients actually acquire marijuana in the first place, so even where protections exist for users, doctors, landlords, and the like, there are comparatively few protections for growers and suppliers. At the federal level, there is a treacherous gray area for suppliers in terms of banking regulations,<sup>59</sup> gun ownership,<sup>60</sup> and otherwise.<sup>61</sup> These things that might seem, at first blush, like collateral matters are really the fertile battlegrounds where all the action is. Questions of criminal and constitutional law are interesting intellectually, but the real battles are being fought on these ancillary issues, to which we will return anon.

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<sup>56</sup> Andrew Blake, *Sen. Cory Gardner: Trump supports bipartisan marijuana reform bill*, WASH. TIMES (Dec. 19, 2018), <https://bit.ly/2SPbSEo> [<https://perma.cc/3KV9-KT6W>].

<sup>57</sup> Kris Krane, *Why President Trump Is Positioned To Be Marijuana's Greatest Savior & How The Democrats Blew It*, FORBES (Jul. 11, 2018, 6:00 AM), <https://bit.ly/2IYihO2> [<https://perma.cc/EQ2R-WDWC>].

<sup>58</sup> *Id.*

<sup>59</sup> See Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567 (2015).

<sup>60</sup> In November 2017, Hawaiian marijuana cardholders received letters signed by Honolulu Police Chief Susan Ballard, informing them they had thirty days to turn in their firearms. This decision was ultimately reversed due to tremendous public backlash but highlights a salient point about the intersection of state marijuana legalization and federal law. It remains a federal crime for users of marijuana to be transferred a firearm. See Matthew Larosiere, *Hawaii's Weed-and-Gun Blunder Should Be a Wake-up Call to Gun Owners*, GLENN BECK (Jan. 3, 2018), <https://bit.ly/2Hk23MI> [<https://perma.cc/B92F-Y3Z4>]; ATF Form 4473, <https://bit.ly/2xfVwKg> [<https://perma.cc/2EGL-S9ZW>].

<sup>61</sup> For example, banking restrictions have led to many marijuana businesses operating on a cash-only basis. This, combined with the federal government's position that no users of marijuana can be transferred firearms, sets up an interesting Catch-22: one might wind up running a cash business, and be unable to use firearms to deter robbery.

## IV. STATE LEGALIZATION CAMPAIGNS

Colorado and Washington state voters approved recreational marijuana in November 2012, but the two states saw significantly different political campaigns. In Washington, the sheriff of King County—which includes Seattle and is one of the most populous counties in the country—supported the legalization.<sup>62</sup> Meanwhile, the governor, attorney general, and law enforcement establishment in Colorado opposed legalization, but pledged to abide by the will of the voters. Now, Colorado residents over the age of twenty-one may possess an ounce of marijuana for personal use, with further regulations in the area of licenses and security requirements for dispensaries.<sup>63</sup> These regulations and attendant taxes, which attempt to regulate a fledgling market, pose still more federalism concerns.

In 2014, Alaska and Oregon saw concerted resistance from state officials to their ultimately successful legalization efforts. The Anchorage Municipal Assembly and the Alaska Association of Police Chiefs strongly opposed Alaska’s “Ballot Measure 2”, which allowed persons over twenty-one years of age to have an ounce of marijuana or six plants (only three of which “mature”).<sup>64</sup> Nonetheless, the measure passed by a narrow margin. As a result, Alaska collected \$1.7 million in tax revenue from the project in the 2017 financial year and \$11 million in 2018.<sup>65</sup> The Alaska Department of Revenue declined to conduct forecasting of the estimated revenues from legal marijuana sales, but the Marijuana Policy Project

<sup>62</sup> Jonathan Martin, *\$1 million more for marijuana legalization campaign – and support from King County sheriff*, SEATTLE TIMES (Oct. 1, 2012, 7:46 PM), <https://bit.ly/2TvTHIt> [<https://perma.cc/HZB4-2GYU>].

<sup>63</sup> See, e.g., COLORADO OFFICIAL STATE WEB PORTAL, RETAIL MARIJUANA LICENSEES, <https://bit.ly/2H5isFA> [<https://perma.cc/9X5C-F7G3>].

<sup>64</sup> Suzanna Caldwell & Devin Kelly, *Anchorage Assembly votes 9-2 to oppose marijuana ballot measure*, ALASKA DISPATCH NEWS (Sep. 28, 2016), <https://bit.ly/2XKt01V> [<https://perma.cc/9S4N-LMFQ>]; *Police chiefs speak out against Ballot Measure 2*, KTVA (Oct. 9, 2014, 10:39 AM), <https://bit.ly/2ETD0i3> [<https://perma.cc/W7FH-7UQL>].

<sup>65</sup> THE ASSOC. PRESS, *Alaska collects \$11M in tax revenue from marijuana*, N.Y. POST (Aug. 2, 2018, 2:22 AM), <https://nyp.st/2M2P3h4> [<https://perma.cc/ZFW2-QR3D>].

projected \$23.7 million in revenues by 2020.<sup>66</sup> Not a bad deal for a state with a population comparable to the city of Charlotte, North Carolina.

Legalization does not universally reduce criminality. There is the somewhat anomalous case of Washington, D.C., which decriminalized marijuana use in March 2014, but was unable to legalize the sale of marijuana, forcing distribution into a kind of grey market by tying marijuana deliveries to “gifts” attached to a donation or some other purchase obfuscation.<sup>67</sup> Given the somewhat strict limitations on sale and cultivation, arrests for marijuana distribution actually increased in the District post-legalization.<sup>68</sup> D.C., of course, is not a state; any law there can be overruled by Congress. There were attempts to do just that with marijuana, but they did not pass.

## V. THE FEDERAL RESPONSE

After the Colorado and Washington legalization votes, it took the DOJ some time to figure out how to appropriately respond. Nine months later, in August, 2013, the DOJ issued its “Cole memo” (named for then-Deputy Attorney General James Cole), which set out a list of priorities.<sup>69</sup> Under the Cole memo, the federal government would not seek preemption or otherwise try to interfere with state regulatory schemes legalizing recreational marijuana as long as the following law enforcement priorities were not disturbed: criminal enterprises; violence and firearms; exposure to

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<sup>66</sup> Adam Orens et al., *Market Size and Demand for Marijuana in Alaska*, MARIJUANA POLY GROUP 1 (Oct. 27, 2014), <https://mjpolicygroup.com/pubs/Alaska-Demand-and-Taxes.pdf> [<https://perma.cc/NNQ6-C3YR>].

<sup>67</sup> Sean McCaughan, *In Washington D.C., Marijuana Markets Give You a Gift of Mary Jane for a Song*, POT NETWORK (Jun. 2, 2018), <https://bit.ly/2sHnGhd> [<https://perma.cc/88VR-66TC>].

<sup>68</sup> Steven Nelson, *Pot-Dealing Arrests Back to Pre-Legalization Levels in D.C.*, U.S. NEWS & WORLD REP. (June 22, 2017), <https://bit.ly/2UqItlH> (last visited June 12, 2019).

<sup>69</sup> *Conflicts Between State and Federal Marijuana Laws: Hearing Before the S. Committee on the Judiciary*, 113th Cong. 113-588 (2013); James M. Cole, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement*, U.S. DEP'T OF JUST., Off. of the Deputy Att'y Gen., (Aug. 29, 2013).

minors; impaired driving; use, possession, or distribution on public lands and federal property; and diversion to other states.

This federal approach is an interesting assertion of typical modern federal interests: a concern for interstate transfers and a general catch-all for public health and safety. This was really a way of making explicit what was otherwise implicit: that prosecutors would go after murderers ahead of jaywalkers, but as applied to the marijuana context. In January 2018, former Attorney General Jeff Sessions rescinded the Cole and related memos.<sup>70</sup> This action was not groundbreaking on the criminal side. It is not as if the U.S. Attorney for the District of Colorado, for example, was suddenly going to shift his enforcement priorities. As was explicit before, the focus of limited resources is going to continue to be on criminal enterprise, violence, and human trafficking, rather than students in Boulder sitting in their dorm rooms, smoking their state-allowed quantity of marijuana. The withdrawal of the Cole memo had much more of an impact on producers and distributors than on users, adding uncertainty to the business climate in the marijuana industry.<sup>71</sup> These concerns might seem limited to the business side—and individual voters are far less concerned about suppliers than criminal liability for themselves—but these matters are central to the viability of private markets in marijuana.

#### IV. EARLY ANALYSIS OF LEGALIZATION'S EFFECTS ON SOCIETY

Regardless of which direction the Justice Department takes, early results from Washington and Colorado show a positive-to-neutral impact of legalization on overall rates of drug use, suicides, hospital admissions, crime, etc.<sup>72</sup> The most recent data

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<sup>70</sup> Jefferson B. Sessions, *Memorandum for All United States Attorneys: Marijuana Enforcement*, Office of the Att'y Gen., (Jan. 4, 2018).

<sup>71</sup> Alicia Wallace, *What Now? Experts and politicians weigh in on potential impact of Sessions' rollback of marijuana policy*, THE CANNABIST (Jan. 4, 2018, 2:28 PM), <https://www.thecannabist.co/2018/01/04/sessions-cole-memo-marijuana-legal-impact/95903/> [<https://perma.cc/YS2A-L8YU>].

<sup>72</sup> Jason C. Johnson, *Is marijuana legislation driving increases in violent crime?*, THE HILL (Feb. 19, 2019, 1:30 PM), <https://thehill.com/opinion/criminal-justice/430551-is-marijuana-legalization-driving-increases-in-violent-crime> [<https://perma.cc/H4B7-VZ66>].

suggests that the use of marijuana by minors ages twelve to seventeen is lower in Colorado and Washington than it was prior to legalization.<sup>73</sup> There was a slight usage uptick initially, as one might expect, but usage settled down, presumably as the novelty wore off.<sup>74</sup>

To put things in terms of the opioid epidemic—in response to arguments that marijuana is a gateway drug—in states with medical marijuana, the opioid death rate is 25 percent lower and dependence is 23 percent lower.<sup>75</sup> As far as crime is concerned, obviously marijuana arrests have plummeted where legalized, but the reduction in these arrests exacerbated the racial disparity.<sup>76</sup> It is counterintuitive, but if people accessing the legal market are disproportionately white, that regrettably means that arrests in the gray and black markets that remain—either because taxes are high or because minority neighborhoods lack dispensaries—will have a greater racial disparity.<sup>77</sup> For example, marijuana arrests in Colorado are down by more than 50 percent for whites, but only 33 percent for Hispanics and 25 percent for blacks.<sup>78</sup> As far as other crimes go, Denver saw a 2.2 percent drop in the rate of violent crime in the year following the first legal recreational cannabis

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see also Jayne O'Donnell, et al., *Car crashes, psychosis, suicide: Is the drive to legalize marijuana ignoring major risks?*, USA TODAY (Mar. 7, 2019, 10:43 AM), <https://www.usatoday.com/story/news/health/2019/03/06/marijuana-legalization-risks-critics-downsides-car-crashes-psychosis-schizophrenia-suicide/2915860002/> [https://perma.cc/4WFH-2AXN].

<sup>73</sup> Christopher Ingraham, *Following marijuana legalization, teen drug use is down in Colorado*, WASH. POST (Dec. 11, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/12/11/following-marijuana-legalization-teen-drug-use-is-down-in-colorado/?utm\\_term=.748900b9f9e0](https://www.washingtonpost.com/news/wonk/wp/2017/12/11/following-marijuana-legalization-teen-drug-use-is-down-in-colorado/?utm_term=.748900b9f9e0) [https://perma.cc/R2VJ-2J2Y].

<sup>74</sup> See *id.*

<sup>75</sup> *From Prohibition to Progress: A Status Report on Marijuana Legislation*, *supra* note 27.

<sup>76</sup> German Lopez, *After legalization, black people are still arrested at higher rates for marijuana than white people*, VOX (Jan. 29, 2018, 8:50 AM), <https://www.vox.com/policy-and-politics/2018/1/29/16936908/marijuana-legalization-racial-disparities-arrests> [https://perma.cc/G9YL-6Y8V].

<sup>77</sup> See *id.*

<sup>78</sup> *Id.*

sales and overall property crimes dropped by 8.9 percent; in Washington, violent crime rates dropped by 10 percent.<sup>79</sup>

This is not to suggest that there is a direct causal relationship between marijuana legalization and crime reduction—aside from the obvious eliminated drug crime—but a lot of these attendant factors seem to be moving in a positive direction. Overall DUI arrests are down since legalization in Colorado,<sup>80</sup> which could be due to a sort of a substitution effect.<sup>81</sup> If people are getting high rather than drunk, it could be that they are either less likely to get in the car, or that they are more likely to drive carefully when they do drive. It is difficult to know with the limited data available and there is some complexity in measuring objective levels of impairment.<sup>82</sup> The active chemical in marijuana, tetrahydrocannabinol (THC), does not work like alcohol because it is not directly measurable by blood concentration.<sup>83</sup> To put it simply, THC does not impair someone most when it is at its highest blood concentration, but rather takes effect by penetrating the blood-brain barrier.<sup>84</sup> Moreover, there is a much greater disparity in impairment at any given level of use between novice and experienced marijuana users

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<sup>79</sup> Alan Pyke, *Sessions: Legal pot drives violent crime, statistics be damned*, THINKPROGRESS (Feb. 28, 2017, 3:45 PM), <https://thinkprogress.org/sessions-legal-pot-violent-crime-8640413ca090/> [<https://perma.cc/8Z6B-DKNB>].

<sup>80</sup> *Colorado Division of Criminal Justice Publishes Report on Impacts of Marijuana Legalization in Colorado*, COLO. DEPT OF PUBLIC SAFETY (Oct. 26, 2018), <https://www.colorado.gov/pacific/publicsafety/news/colorado-division-criminal-justice-publishes-report-impacts-marijuana-legalization-colorado> [<https://perma.cc/JQ3T-TEB4>].

<sup>81</sup> See Alcohol & Drug Abuse Inst., *Learn About Marijuana*, UNIV. OF WASH. (June, 2018), <http://learnaboutmarijuanawa.org/factsheets/alcohol.htm> [<https://perma.cc/G57A-Q8DE>].

<sup>82</sup> See Shefali Luthra, *Too High To Drive: States Grapple With Setting Limits On Weed Use Behind Wheel*, KAISER HEALTH NEWS (Jan. 3, 2019), <https://khn.org/news/too-high-to-drive-states-grapple-with-setting-limits-on-weed-use-behind-wheel/> [<https://perma.cc/C36F-VPGM>].

<sup>83</sup> Christopher Ingraham, *Stoned drivers are a lot safer than drunk ones, new federal data show*, WASH. POST (Feb. 9, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/02/09/stoned-drivers-are-a-lot-safer-than-drunk-ones-new-federal-data-show/?utm\\_term=.6304f4a8a038](https://www.washingtonpost.com/news/wonk/wp/2015/02/09/stoned-drivers-are-a-lot-safer-than-drunk-ones-new-federal-data-show/?utm_term=.6304f4a8a038) [<https://perma.cc/SR4P-DPLC>].

<sup>84</sup> Addam Corre, *How Does THC Enter The Brain?*, CBD TESTERS (Jan. 25, 2018), <https://www.cbdtesters.co/2018/01/25/how-does-thc-enter-the-brain/> [<https://perma.cc/G99X-DCUL>].

than between infrequent drinkers and alcoholics.<sup>85</sup> So levels of impairment for DUIs and the like are still being worked out.

Turning to money, revenue collection and job creation have vastly outstripped expectations.<sup>86</sup> Colorado had tax revenues of almost \$60 million in 2014 and \$113 million in 2015.<sup>87</sup> Washington brought in \$64.9 million in 2015 and \$314.8 million in 2017.<sup>88</sup> Washington actually has the highest marijuana taxes of any state, even higher than California,<sup>89</sup> which also means it has the largest black market, where it is cheaper than in legal dispensaries.<sup>90</sup>

John Hickenlooper, the former governor of Colorado, once said that he would reverse legalization if he had a magic wand—but later rolled that sentiment back when it became clear that legalization was filling the state's coffers.<sup>91</sup>

## VII. RECENT PROGRESS AND THE FUTURE

In 2016, recreational marijuana legalization passed in California, Maine, Massachusetts, and Nevada, but failed in Arizona.<sup>92</sup> In 2018, Oklahoma voted to legalize medical marijuana,

<sup>85</sup> See Ingraham, *supra* note 82.

<sup>86</sup> Joseph Bishop-Henchman & Morgan Scarboro, *Marijuana Legalization and Taxes: Lessons for Other States from Colorado and Washington*, TAX FOUNDATION (May 12, 2016), <https://taxfoundation.org/marijuana-taxes-lessons-colorado-washington/> [https://perma.cc/H6BG-PBYR].

<sup>87</sup> *Id.*

<sup>88</sup> Jake Whittenberg, *Where does Washington's marijuana tax money go?*, KING5 NEWS (Aug. 10, 2018, 8:48 AM), <https://www.king5.com/article/news/local/where-does-washingtons-marijuana-tax-money-go/281-581833195> [https://perma.cc/7VMQ-MKA5].

<sup>89</sup> Katherine Loughhead & Morgan Scarboro, *How High Are Recreational Marijuana Taxes in Your State?*, TAX FOUNDATION (Apr. 26, 2018), <https://taxfoundation.org/state-marijuana-taxes-2018/> [https://perma.cc/7YWV-BAG3].

<sup>90</sup> See Bishop-Henchman & Scarboro, *supra* note 86.

<sup>91</sup> David Kelly, *Governor who called legalization 'reckless' now says Colorado's pot industry is working*, L.A. TIMES (May 17, 2016), <https://www.latimes.com/nation/la-na-hickenlooper-marijuana-20160516-20160516-snap-story.html> [https://perma.cc/7RS3-BJCK].

<sup>92</sup> Mattie Quinn, *Marijuana Legalized for Fun in 4 More States and Medicine in 4 Others*, GOVERNING THE STATES AND LOCALITIES (Nov. 9, 2016, 9:45 PM), <http://www.governing.com/topics/elections/gov-medical-recreational-marijuana-2016-state-ballot-measures.html> [https://perma.cc/W7AF-G66G].

while Michigan approved recreational use.<sup>93</sup> Clearly, there is a trajectory here, and Congress cannot really do much about it. Of course, it could offer state legislators heaps of money not to legalize, but there is no way to so directly bribe voters, who are the ones doing most of the legalizing through initiatives and referenda.

Interestingly, the president could ease some of these federalism tensions simply by reclassifying marijuana to lower than a Schedule I. For example, if marijuana were reclassified as Schedule III or lower, all manner of collateral consequences involving such things as the ability to own firearms and eligibility for public housing or student loans fall away.

As much as one might criticize the trajectory of executive power over the last decade, the Controlled Substances Act does allow the president and attorney general to reschedule this drug, or de-schedule it all together.<sup>94</sup> The question is, why not reschedule? President Barack Obama was criticized for abuses of executive power—including by the authors of this Comment—but he did not do anything with his unquestionable executive authority in this area. If President Trump really sees the benefits of legalization, or at least of allowing states to choose their own policies, he could reschedule marijuana without congressional input.<sup>95</sup> Such a move would not likely cost much political capital, either. A March 2018 poll by Tony Fabrizio found that 77 percent of likely voters in the

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<sup>93</sup> *Oklahoma voters approve medical marijuana despite opposition*, CNBC (June 27, 2018, 4:01 AM), <https://www.cnn.com/2018/06/27/oklahoma-voters-approve-medical-marijuana-despite-opposition.html> [https://perma.cc/LP62-SBDP]; See Maria McFarland Sanchez-Moreno, *Marijuana legalization is working; most Americans are on board: Today's talker*, USA TODAY (Dec. 7, 2018, 12:30 PM), <https://www.usatoday.com/story/opinion/2018/12/06/recreational-marijuana-legal-michigan-what-does-say-talker/2225426002/> [https://perma.cc/DEW6-JLFN].

<sup>94</sup> John Hudak & Grace Wallack, *How to reschedule marijuana, and why it's unlikely anytime soon*, BROOKINGS INST. (Feb. 13, 2015), <https://www.brookings.edu/blog/fixgov/2015/02/13/how-to-reschedule-marijuana-and-why-its-unlikely-anytime-soon/> [https://perma.cc/H3EN-UA53]; see also Will Yakowicz, *Clinton Says She'll Reschedule Marijuana. Here's How She Can, INC.* (Aug. 17, 2016), <https://www.inc.com/will-yakowicz/can-the-next-us-president-reschedule-marijuana.html> [https://perma.cc/7X6Y-LUK6].

<sup>95</sup> See Krane, *supra* note 57.

2018 elections had a favorable opinion of medical marijuana, including 68 percent of Republicans.<sup>96</sup> Opponents of state marijuana reform feared that legalizing in one state necessarily harms others, but if you look back to *Raich*, Alabama filed an amicus brief in which then-solicitor general Kevin Newsom (now a judge on the U.S. Court of Appeals for the Eleventh Circuit) expressed the sentiment that, even though Alabama did not necessarily like California's law, each state should still be able to pursue its preferred policy.<sup>97</sup> With this type of a robust federalist attitude, even in states that would not otherwise want to legalize, there is great opportunity to suss out the best policy—to have the “laboratories of democracy” that are supposed to be a hallmark of our federalist system of government.

The bipartisan nature of the movement for marijuana legalization is not a random coincidence. Plenty of purple and even red states—like Alaska, Montana, and even Texas—have had a modicum of legalization efforts.<sup>98</sup> Senators Cory Booker (D-NJ) and Rand Paul (R-KY) introduced the CARERS Act in 2017, which

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<sup>96</sup> Maggie Severns et al., *The biggest Republican mega-donor you've never heard of*, POLITICO (Mar. 19, 2018, 10:00 AM), <https://www.politico.com/newsletters/morning-score/2018/03/19/the-biggest-republican-mega-donor-youve-never-heard-of-142121> [<https://perma.cc/MA9E-74ST>].

<sup>97</sup> Brief of the States of Ala., La., and Miss. as Amici Curiae in Support of Resp. at 1-3, *Ashcroft v. Raich*, 248 F. Supp. 2d 918 (N.D. Cal.) (No. 03-1454).

<sup>98</sup> See generally Megan Edge & Laurel Andrews, *Timeline: Notable moments in 40 years of Alaska's history with marijuana*, ANCHORAGE DAILY NEWS (Sept. 28, 2016), <https://www.adn.com/cannabis-north/article/alaska-weed-history/2014/04/14/>

[<https://perma.cc/X9TB-U9NM>] (noting the history of marijuana legalization in Alaska); see also Matt Ferner, *Marijuana Is officially legal in Alaska*, HUFF POST (Feb. 24, 2015, 4:02 AM), [https://www.huffpost.com/entry/alaska-marijuana-legal\\_n\\_6738328](https://www.huffpost.com/entry/alaska-marijuana-legal_n_6738328)

[<https://perma.cc/7Z4J-9JGT>] (addressing the legalization of marijuana use in Alaska); Alex Samuels, *As more states legalize marijuana, advocates see signs suggesting Texas may move that way*, THE TEXAS TRIBUNE (July 26, 2018, 12:00 AM), <https://www.texastribune.org/2018/07/26/texas-legalize-marijuana-2019-legislative-session/>

[<https://perma.cc/V32V-CMXB>] (stating that public opinion regarding marijuana is shifting and bills have been filed with the goal of weakening Texas' rigid marijuana laws); Bishop Henchman & Scarboro, *supra* note 86 (stating an initiative to legalize marijuana and impose an excise tax of 20 percent was proposed in Montana).

would protect medical marijuana patients nationwide.<sup>99</sup> Representatives Tom Garrett (R-VA) and Tulsi Gabbard (D-HI) were behind the Ending Federal Marijuana Prohibition Act.<sup>100</sup> There was also an attempt to pass legislation allowing business expenses to be deducted from federal taxes, led by former Rep. Carlos Curbelo (R-FL).<sup>101</sup> These are just three of many bipartisan bills seeking to liberalize the marijuana market, which may now have a better shot at passing after House Rules Committee Chair Pete Sessions (R-TX)—who was known to stymie these proposals—lost his seat to a medical marijuana advocate.<sup>102</sup>

Another issue of particular concern to Kentuckians is industrial hemp—a low-THC variety of marijuana. Hemp has historically been illegal to sell or grow in the U.S., despite being a popular ingredient in everything from cannabinoid (“CBD”) oil to moisturizers, lattes, and dog treats.<sup>103</sup> These industries got a big boost late last year in the farm bill, which legalized the production and sale of hemp products.<sup>104</sup>

## CONCLUSION

Marijuana legalization is just one example of a much broader phenomenon: situations where states push back on federal

<sup>99</sup> DJ Summers, *Congress Set to Revive CARERS Act*, LEAFLY (June 14, 2017), <https://www.leafly.com/news/politics/congress-set-revive-carers-act-thursday> [<https://perma.cc/TT2P-J5YU>].

<sup>100</sup> Chris Goldstein, *Dwight Evans first Pa. congress member to cosponsor Ending Federal Marijuana Prohibition Act*, INQUIRER (Jan. 11, 2018, 6:57 PM), <https://www.philly.com/philly/business/cannabis/dwight-evans-pennsylvania-legal-marijuana-ending-federal-marijuana-prohibition-act-20180111.html> [<https://perma.cc/7XHW-ZL4W>].

<sup>101</sup> Lydia O’Neal, *Legal Pot’s Tax Hit From Drug War Era May Vaporize in New Congress*, BLOOMBERG NEWS (Nov. 28, 2018), <https://www.bna.com/legal-pots-tax-n57982094234/> [<https://perma.cc/7ZC6-GQTQ>].

<sup>102</sup> Patrick Williams, *Two Guys Named Sessions Out of Work in D.C.; Pot Advocates Happy*, DALLAS OBSERVER (Nov. 9, 2018, 4:00 AM), <https://bit.ly/2tUm1FO> [<https://perma.cc/TV9B-ZVEM>].

<sup>103</sup> Chavie Lieber, *Hemp is now legal. That’s huge for the CBD industry*, VOX (Dec. 28, 2018, 3:49 PM), <https://www.vox.com/the-goods/2018/12/13/18139678/cbd-industry-hemp-legalization-farm-bill> [<https://perma.cc/Q96L-9BSL>].

<sup>104</sup> See German Lopez, *Trump and Congress just legalized hemp*, VOX (Dec. 20, 2018, 4:01 PM), <https://www.vox.com/policy-and-politics/2018/12/12/18136408/hemp-marijuana-legalization-trump-congress-farm-bill> [<https://perma.cc/J4K9-3NP4>].

policy, creating various legal and political tensions. This reassertion of dual sovereignty is a healthy development for our constitutional structure. Marijuana isn't the first product to be legal in some states, but not in others. After all, we still have dry counties nearly a century after the fall of prohibition. Just like gin, marijuana use has thrived in the shadow of the federal ban.

In sum, federal supremacy has its limits.