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Symposium Marijuana, Federal Power, and the States: Introduction

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— Symposium —

MARIJUANA, FEDERAL POWER AND
THE STATES

INTRODUCTION

Jonathan H. Adler[†]

In November 2012, Colorado and Washington State withdrew from the battle against marijuana. Voters in each state approved ballot initiatives legalizing possession of marijuana and authorizing state regulation of marijuana production and commercial sale.¹ In 2014, Alaska, Oregon, and the District of Columbia followed suit.² Another twenty states have legalized marijuana possession for medicinal purposes.³ Additional ballot initiatives to decriminalize or legalize marijuana, whether strictly for medical uses or generally, can be expected in the years to come.⁴ At least where marijuana is concerned, states are opting out of the “war on drugs.”⁵

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1. See COLO. CONST. amend. 64; Washington Initiative 502, No. 63-502, Reg. Sess. (Nov. 6, 2012).
2. See John Hudak & Philip A. Wallach, *2014 “Marijuana Midterms” to Establish 2016 as Most Crucial Year for Cannabis in America*, FIXGOV, Oct. 28, 2014, <http://www.brookings.edu/blogs/fixgov/posts/2014/10/28-2014-midterms-marijuana-midterms-oregon-alaska-washington-hudak-wallach>.
3. See Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV. 1301, 1302 (2013); see also NORML, “State Laws,” <http://norml.org/laws>.
4. See, e.g., Niraj Chokshi, *First Marijuana Legalization Ballot Measure Set for 2016, Advocates Say*, WASH. POST (Mar. 14, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/03/14/first-marijuana-legalization-ballot-measure-set-for-2016-advocates-say/> (discussing 2016 ballot initiative in Nevada); Alan Johnson, *Group Aims for 2015 Ballot Issue to Legalize Marijuana*, COLUMBUS DISPATCH (Dec. 19, 2014) http://www.dispatch.com/content/stories/local/2014/12/18/Marijuana_ballot_issue_possible_in_2015.html (discussing potential Ohio ballot initiative).
5. Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory*

The use, possession, cultivation, and sale of marijuana remains illegal under federal law. Marijuana is listed in Schedule I of the Controlled Substances Act (CSA), where it was placed by Congress in 1970.⁶ Cultivation and distribution of marijuana are felonies, and CSA violations may authorize asset seizure.⁷ While the federal government has not prioritized enforcement of marijuana prohibition in states that have decriminalized or sought to legalize marijuana possession, it has not sought to preempt state initiatives either, including those that affirmatively license and regulate a growing marijuana industry. Those who use marijuana or participate in marijuana-related businesses remain in potential legal jeopardy, and the viability of state-level reforms remains unclear.⁸ Banks and financial institutions, in particular, face tremendous legal uncertainty about the extent to which they may provide services to marijuana-related businesses.⁹

The constitutional authority of the federal government to prohibit the possession and distribution marijuana was affirmed by the Supreme Court,¹⁰ but the ability of the federal government to enforce this policy on the ground is largely dependent upon state cooperation.¹¹ State and local law enforcement agencies are responsible for the

Jurisdiction, 65 CASE W. RES. L. REV. 769 (2015) (characterizing state resistance as a modern form of “nullification”).

6. See David Firestone, *Let States Decide on Marijuana*, N.Y. TIMES, July 26, 2014; see also Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–889 (2006)).
7. See, e.g., 21 U.S.C. § 841 (explaining prison terms for marijuana cultivation); § 881(a)(7) (explaining that property “used, or intended to be used, in any manner or part” to violate the CSA may be subject to forfeiture).
8. See Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV. 1301, 1302 (2013) (“Unless reform occurs at the federal level . . . state-level reforms face a myriad of limitations and uncertainties.”).
9. See Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597 (2015).
10. See *Gonzales v. Raich*, 545 U.S. 1 (2005). For a critique of this ruling, see William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513 (2015); see also Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (2005).
11. See Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAPMAN L. REV. 555, 561 (2010) (“Whether or not legalizing or decriminalizing marijuana is a good idea, the federal government simply does not have the power to effect such change.”); Mark A.R. Kleiman, *Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization*, 6 J. DRUG POL’Y ANALYSIS 1, 1 (2013) (“[M]arijuana remains illegal under federal law,

lion's share of marijuana law enforcement. The federal government cannot take their place. There are approximately four times as many state and local law enforcement officers within the states of Washington and Colorado as there are Drug Enforcement Administration agents across the globe.¹² Nor can Congress or the executive branch compel state cooperation.¹³ If state and local governments do not cooperate, the federal government must wage its war on drugs without many foot soldiers.

As an increasing number of states have reformed their marijuana laws, the federal government has largely stood by, neither seeking to obstruct or encourage these efforts. In a series of memoranda, the Department of Justice has sought to clarify federal enforcement priorities in states that have legalized some or all marijuana possession. In 2009, Deputy Attorney General David Ogden issued a memorandum indicating that the Justice Department would focus its enforcement efforts on the production and distribution of marijuana, in an effort to curb trafficking, but would not devote significant resources to pursue those who used or possessed marijuana in compliance with state laws allowing the use and possession of marijuana for medicinal purposes.¹⁴ A follow-up memorandum issued by Ogden's successor, James Cole, reaffirmed that while the Justice Department was clarifying its enforcement priorities, the possession, cultivation, and distribution of marijuana remained illegal under federal law.¹⁵

After Colorado and Washington voters passed their respective marijuana legalization initiatives, the Justice Department maintained this position. In August 2013, Deputy AG Cole announced that the Department would make no effort to block the implementation of either initiative, nor was it the federal government's position that state-

but the federal government lacks the capacity to fully enforce that law without state and local cooperation.”).

12. See Mark Kleiman, *How Not to Make a Hash Out of Cannabis Legalization*, WASH. MONTHLY (Apr./May 2014).
13. See *Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government may not “commandeer” state and local governments to implement or enforce federal law); *New York v. United States*, 505 U.S. 144 (1992) (holding that the federal government may not force a state to legislate in accordance with federal policy).
14. See Memorandum from David W. Ogden, Deputy Att’y Gen., to U.S. Att’y (Oct. 19, 2009), <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.
15. Memorandum from James M. Cole, Deputy Attorney General, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, June 29, 2011, <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>.

level regulations of marijuana were preempted by the CSA.¹⁶ According to this memorandum, it was the Justice Department's view that the cultivation, distribution, sale, and possession of marijuana in compliance with state laws was "less likely to threaten" federal priorities, such as curbing interstate trafficking and preventing youth access. So long as this assumption holds, the second Cole memorandum explained, "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity."¹⁷

It is not often that states affirmatively seek to legalize conduct prohibited by federal law. Rarer still do states seek to expressly authorize and affirmatively regulate commercial activities that remain subject to federal prohibition.¹⁸ Yet that is precisely what is occurring with marijuana. Indeed, what the federal government seeks to prohibit, many states hope to tax.¹⁹

The insistence of multiple states on experimenting with various levels of marijuana decriminalization or legalization raises a host of important and difficult legal questions.²⁰ To explore these questions, and the emerging landscape of marijuana law and policy, the Center for Business Law & Regulation at the Case Western Reserve University School of Law hosted an interdisciplinary conference on "Marijuana, Federal Power & the States" in September 2014. The papers from this conference are contained in this issue and address a range of constitutional, regulatory, and policy issues raised by the conflict between federal marijuana prohibition and recent state-level marijuana reforms. The focus of these papers is not whether marijuana should or should not be legal, whether for medical or recreational purposes. Rather, these papers focus on the legal and

16. See Memorandum for All U.S. Attorneys from James M. Cole, Dep. Att'y Gen., Guidance Regarding Marijuana Enforcement, Aug. 29, 2013, <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

17. *Id.*

18. In this regard, marijuana may be "unique." See Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1105 (2014) ("Marijuana is the only substance, and its possession is the only activity, that is prohibited at the federal level while it is being taxed and regulated in the states. This legal status is unique not just at this moment, but also historically.").

19. See Kleiman, *supra* note 11, at 2.

20. See Kreit, *supra* note 11, at 555–56 ("[W]hen it comes to federal drug law, traditional debates about prohibition, legalization, or decriminalization turn out to be surprisingly unimportant. Instead, as states begin to enact new policies the key question facing federal lawmakers and administration officials will be how to harmonize federal law with state reforms.").

policy questions raised by the fact that federal and state marijuana laws conflict.

Questions about the proper balance between the federal and state government have endured since the nation's founding. Marijuana policy is just the latest battleground in this longstanding conflict. It is also an issue that could cut across traditional right-left political lines.

Drug policy reform is often seen as a "liberal" issue. Conservatives are expected to be "tough on crime, and voters who support marijuana legalization are more likely to support Democratic political candidates. Yet many Democrats continue to oppose changes to marijuana laws,²¹ and it is those on the political right who are more likely to call for allowing states to deviate from one-size-fits-all federal policies and serve as "laboratories of democracy."²² On everything from environmental regulation to education policy, Republican officeholders argue that individual states should be able to adopt their own policy priorities, free from federal interference.

Does conservative support for a greater policy decentralization mean conservatives may support state marijuana policy initiatives? Perhaps. Republican support for legislation that would give states greater leeway to pursue their own marijuana policies appears to be growing, even if most of the support for such measures (and legalization generally) comes from the Democratic side of the aisle. In May 2014, the House of Representatives passed a measure barring the Department of Justice or Drug Enforcement Administration from spending federal monies on efforts to prevent states from implementing state laws that allow for medical marijuana.²³ The measure was sponsored by Representative Dana Rohrbacher, (R-CA) and supported by another forty-eight Republicans. The prior time such a measure had been proposed, not even thirty House Republicans would support it.

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21. Democratic National Committee Chair Debbie Wasserman Shultz, for instance, opposed Florida's medical marijuana initiative. See Marc Caputo, *Behind Wasserman Schultz's Marijuana Feud*, POLITICO, Feb. 24, 2015, <http://www.politico.com/story/2015/02/behind-wasserman-schultzs-marijuana-feud-115442.html>.
 22. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system, that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").
 23. Contrary to some news reports, this measure did not prevent the enforcement of federal laws against marijuana possession in such states. Rather, it only barred federal efforts to preempt or obstruct state measures. See Willam E. Moschella, *Clearing the Haze: Rohrbacher Amendment Does Not Change Federal Policy Regarding Medical Marijuana*, WWW.JDSUPRA.COM, June 5, 2014, <http://www.jdsupra.com/legalnews/clearing-the-haze-rohrbacher-amendment-73362/>.

As Republicans gear up for the 2016 presidential election, several potential candidates have voiced support for state prerogative. Senator Ted Cruz (R-TX) and former Texas Governor Rick Perry—two prominent conservatives—have both stated that states should be able to set their own marijuana policies even though each has also said that he personally opposes legalization.²⁴ Speaking of the Colorado ballot initiative to the Conservative Political Action Conference in 2015, Senator Cruz explained, “If the citizens of Colorado decide they want to go down that road, that’s their prerogative. I personally don’t agree with it, but that’s their right.”²⁵

Other prominent Republicans, such as former Florida Governor Jeb Bush, have also expressed a willingness to consider letting each state go its own way, particularly so long as activities in one state are not allowed to have significant effects upon its neighbors.²⁶ While running for Vice President in 2012, Representative Paul Ryan (R-Wis.) also expressed support for letting states decide whether to legalize medical marijuana—at least temporarily. He told a Colorado television station that he believed Washington should “let the states decide what they want to do with these things.”²⁷ Within days, however, the campaign claimed that Ryan supported Mitt Romney’s position and opposed any legalization of marijuana.²⁸

The Romney campaign’s hostility to any discussion of marijuana policy reform is understandable given the longstanding conservative hostility to drug policy reform.²⁹ In some cases, conservative commentators have suggested that state-level reform efforts could be chal-

24. See Will Weissert, *Perry Defends States’ Right to Legalize Marijuana*, ASSOCIATED PRESS, Jan. 23, 2014, available at WestLaw, 1/23/14 AP St. News 22:15:10; Matt Ferner, *Ted Cruz Voices Support for States’ Right to Legalize Marijuana*, HUFFINGTON POST (Feb. 26, 2015), http://www.huffingtonpost.com/2015/02/26/ted-cruz-marijuana_n_6764430.html.

25. Ferner, *supra* note 24.

26. Marc Caputo, *Jeb Bush Conflicted over Feds Role in Medical-Marijuana Enforcement*, MIAMI HERALD (Aug. 15, 2014), available at 770 2014 WLNR 22490198.

27. *Paul Ryan on Medical Marijuana Legalization: “Let the States Decide”*, HUFFINGTON POST (Sept. 7, 2012), http://www.huffingtonpost.com/2012/09/07/paul-ryan-marijuana-legalization_n_1866180.html.

28. Stephen C. Webster, *Paul Ryan’s Campaign Immediately Retracts Candidate’s Support for Medical Marijuana*, THE RAW STORY (Sept. 10, 2012), <http://www.rawstory.com/rs/2012/09/paul-ryan-immediately-retracts-support-for-medical-marijuana/>.

29. This hostility was exemplified by the Reagan Administration’s “Just Say No” campaign.

lenged on federalism grounds.³⁰ If nothing else, federalism limits on state power may complicate state regulatory efforts.³¹

In December 2014, the states of Nebraska and Oklahoma both filed suit seeking to force the preemption of Colorado's Amendment 64. Both of these states have been active champions of state prerogatives, regularly challenging federal regulatory initiatives in other policy areas. Here, however, the two states sought federal support suppressing Colorado's experiment with marijuana, arguing that Colorado's decision to allow a legal market in marijuana threatened to impose a nuisance on neighboring jurisdictions.³² Colorado's experience to date, however, suggests that state governments are capable of effectively regulating intrastate marijuana markets.³³

Some of the more difficult legal questions confronting state efforts to legalize marijuana involve the intersection between state law and the existing federal prohibition. Even if the federal government decides to scale back marijuana law enforcement in nonprohibition states, federal law remains federal law, and it continues to have an effect. Banks, attorneys, and others are bound to respect federal law even in the absence of conforming state laws, as the legalization of a product at the state level does not eliminate the federal prohibition.³⁴ Legalizing the possession and use of marijuana by adults poses the risk that marijuana will become more accessible to juveniles.³⁵ Just as some states may disagree with federal prohibition, some localities may disagree with their states' marijuana policy decisions, raising the question of whether marijuana federalism should become marijuana localism.³⁶

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30. See David B. Rivkin Jr. & Elizabeth Price Foley, *Federal Antidrug Law Goes Up in Smoke*, WALL ST. J., Dec. 28, 2014, <http://www.wsj.com/articles/david-b-rivkin-jr-and-elizabeth-price-foley-federal-antidrug-law-goes-up-in-smoke-1419810742>.
 31. See Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567 (2015).
 32. See Jonathan H. Adler, *Are Nebraska and Oklahoma Just Fair-Weather Federalists?* THE VOLOKH CONSPIRACY (Dec. 19, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/19/are-nebraska-and-oklahoma-just-fair-weather-federalists/>.
 33. John Hudak, *Colorado's Rollout of Legal Marijuana Is Succeeding: A Report on the State's Implementation of Legalization*, 65 CASE W. RES. L. REV. 649 (2015).
 34. Hill, *supra* note 9.
 35. Steven Davenport, Jonathan P. Caulkins & Mark A.R. Kleiman, *Controlling Underage Access to Legal Cannabis*, 65 CASE W. RES. L. REV. 541 (2015).
 36. Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV. 719 (2015).

The federal government has a legitimate interest in controlling interstate drug trafficking but no particular interest in prosecuting those who seek to provide medical marijuana to local residents pursuant to state law. So it only makes sense for the Justice Department to tell federal prosecutors to focus their efforts on those who are not in compliance with state law, such as those who use medical marijuana distribution as a cover for other illegal activities, interstate drug trafficking in particular. California should be free to set its own marijuana policy, but the federal government retains an interest in preventing California's choice from adversely affecting neighboring states.

One possibility is for the federal government to treat marijuana like alcohol, retaining a federal role in controlling illegal interstate trafficking but leaving each state entirely free to set its own marijuana policy, whether it be prohibition, decriminalization, or somewhere in between.³⁷ Another alternative would be for the federal government to offer states waivers or enter into cooperative agreements with states that seek to adopt alternative approaches to marijuana policy.³⁸

When alcohol prohibition was repealed, states retained the ability to prohibit or regulate alcohol and the federal government focused on supporting state-level preferences by prohibiting interstate shipment of alcohol in violation of applicable state laws. There is no clear reason why a similar approach to marijuana would be less effective, though any such step would require legislative reform.³⁹

Whatever approach the federal government takes in the years ahead, the marijuana policy debate today extends well beyond whether to legalize cannabis for some or all purposes. Several states have taken definitive steps to remove legal prohibitions from marijuana use, cultivation, and sale, and more are likely to follow suit in the years ahead. Unless the federal government were to follow suit, the question today is how to address the inevitable interjurisdictional conflicts and legal quandaries that will arise. The articles in this issue are part of an effort to start this conversation—a conversation that will be necessary if these conflicts are to be resolved in a productive way.

This is our federalism on drugs, and it's going to be an interesting trip.

37. For an argument that this should be the approach to all illicit drugs, see DANIEL K. BENJAMIN & ROGER LEROY MILLER, *UNDOING DRUGS: BEYOND LEGALIZATION* (1993).

38. Alex Kreit, *What Will Federal Marijuana Reform Look Like*, 65 CASE W. RES. L. REV. 689 (2015).

39. See Firestone, *supra* note 6.