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## Our Federalism on Drugs

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## **Our Federalism on Drugs**

Jonathan H. Adler

*Forthcoming in* MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE

(Jonathan H. Adler ed., Brookings Institution Press, 2020)

### *Abstract*

Over the past decade, voters and legislatures have moved to legalize the possession of marijuana under state law. Some have limited these reforms to the medicinal use of marijuana, while others have not. Despite these reforms marijuana remains illegal under federal law. Although the Justice Department has not sought to preempt or displace state-level reforms, the federal prohibition casts a long shadow across state-level legalization efforts. This federal-state conflict presents multiple important and challenging policy questions that often get overlooked in policy debates over whether to legalize marijuana for medical or recreational purposes. Yet in a “compound republic” like the United States, this federal-state conflict is particularly important if one wishes to understand marijuana law and policy today. This brief essay is the introductory chapter to *Marijuana Federalism: Uncle Sam and Mary Jane* (Jonathan H. Adler ed., Brookings Institution Press, 2020), an edited volume that explores the legal and policy issues presented by the federal-state conflict in marijuana law. It provides an overview of the relevant issues and a survey of the remaining chapters in the volume.

## **Our Federalism on Drugs**

Jonathan H. Adler

*Forthcoming in MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE*  
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Just twenty-five years ago, marijuana was illegal throughout the United States. Beginning in the 1990s, several states, led by California, began to allow the cultivation, possession, and use of cannabis for medicinal purposes, but they remained the exception. In the past decade, however, the legal landscape for marijuana has been radically transformed as an increasing number of states have rejected marijuana prohibition.

Colorado and Washington were the first states to withdraw fully from the federal war against marijuana. In 2012, voters in both states approved ballot initiatives legalizing possession of marijuana for recreational use and authorizing state regulation of marijuana production and commercial sale.<sup>1</sup> Over the next six years, eight more states and the District of Columbia followed suit.<sup>2</sup> Meanwhile, the possession and use of medical marijuana for medicinal purposes, with a doctor's recommendation, became legal in a majority of states,<sup>3</sup> while another dozen states largely decriminalized personal possession of small amounts of marijuana. By 2019, only a handful of states had failed to loosen legal restrictions on marijuana in some way.

These rapid changes in state marijuana policy both exploit and challenge American federalism. While many states have rejected marijuana prohibition, the use, possession, cultivation, and sale of marijuana remain illegal under federal law.<sup>4</sup> Marijuana is listed in Schedule I of the Controlled Substances Act (CSA), where it was placed by Congress in 1970.<sup>5</sup> Cultivation and distribution of marijuana are felonies, and CSA violations may authorize asset

seizure.<sup>6</sup> Those who use marijuana, even for medicinal purposes, may lose their ability to purchase firearms<sup>7</sup> or dwell in public housing,<sup>8</sup> without regard for whether their use of marijuana is sanctioned under state law. Marijuana-related businesses may not deduct the costs of running their businesses for federal income taxes<sup>9</sup> and may be vulnerable to civil RICO suits.<sup>10</sup> Banks and financial institutions, in particular, face tremendous legal uncertainty about the extent to which they may provide services to marijuana-related businesses without exposing themselves to legal jeopardy,<sup>11</sup> and it is unclear whether lawyers may counsel clients engaged in marijuana-related business ventures without running afoul of state rules of professional responsibility.<sup>12</sup> Some also fear the legalization of marijuana sales in some jurisdictions could feed the black market in other states.

The constitutional authority of the federal government to prohibit the possession and distribution of marijuana was affirmed by the Supreme Court,<sup>13</sup> but the ability of the federal government to enforce this policy on the ground is largely dependent on state cooperation. The federal government is not responsible for the local cop on the beat, and federal law enforcement agencies have neither the resources nor the inclination to try to enforce the federal marijuana prohibition nationwide.

While the federal government has not prioritized enforcement of marijuana prohibition in states that have adopted more permissive marijuana policies, it has not sought to preempt state initiatives either, including those that affirmatively license and regulate a growing marijuana industry. Congress, for its part, has made clear that it does not want federal law enforcement efforts to interfere with state-level medical marijuana programs. While failing to enact legislation to authorize or decriminalize medical marijuana where permissible under state law, Congress has repeatedly prohibited federal law enforcement agencies from taking actions that could prevent

states from “implementing” their own medical marijuana programs. As interpreted by federal courts, these “appropriations riders” bar the federal prosecution of individuals for conduct that is expressly permitted by state medical marijuana laws.<sup>14</sup> This is not a permanent condition, however, as appropriations riders must be reenacted each year to remain effective.

Even before Congress limited federal enforcement efforts, state and local law enforcement agencies were responsible for the overwhelming majority of marijuana law enforcement. Whatever course federal policy takes, this is unlikely to change. There are approximately four times as many state and local law enforcement officers within just two states—Washington and Colorado—as there are Drug Enforcement Administration (DEA) agents across the globe.<sup>15</sup> Nor can Congress or the executive branch compel state cooperation.<sup>16</sup> If state and local governments do not cooperate, the federal government must wage its war on drugs without many foot soldiers.

For the most part, federal agencies have not shown much interest in interfering with state-level reforms. In a series of memoranda issued during the Obama administration, the Department of Justice (DOJ) sought to clarify federal enforcement priorities, deemphasizing federal enforcement in states where marijuana possession is legal for some or all purposes. 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.<sup>17</sup> 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.<sup>18</sup>

After Colorado and Washington voters passed their respective marijuana legalization initiatives, the Justice Department maintained this position. In August 2013, Deputy Attorney General 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-level regulations of marijuana were preempted by the CSA.<sup>19</sup> 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.”<sup>20</sup> Meanwhile, the DEA denied multiple petitions to reschedule marijuana under the CSA and ease its treatment under federal law.<sup>21</sup>

Attorney General Jeff Sessions rescinded the Cole memoranda in January 2018, but it is unclear how much this changed things on the ground. While issuing a new memorandum announcing “a return to the rule of law,” Attorney General Sessions disavowed any intention to depart from traditional enforcement priorities. Federal prosecutors “haven’t been working small marijuana cases before, they are not going to be working them now,” Sessions explained in a 2018 speech at the Georgetown University Law Center.<sup>22</sup> As he acknowledged, the Justice Department could not take over routine enforcement of the federal marijuana prohibition even if it so desired.

In early 2019, Sessions' successor, Attorney General William Barr, reaffirmed that the Justice Department has little interest in trying to enforce marijuana prohibition in jurisdictions that have chosen to legalize or decriminalize marijuana in some way. While personally opposed to marijuana legalization, Barr told Congress that he did not wish to “upset settled expectations and the reliance interest” that arose in the wake of the Cole memo.<sup>23</sup> At the same time, Barr noted the status quo was “untenable,” and suggested federal legislation was necessary to smooth out potential conflicts between state and federal law.

The insistence of multiple states on experimenting with various levels of marijuana decriminalization or legalization raises a host of important and difficult legal questions, not the least of which is how states can adopt marijuana policies preferred by local residents without running afoul of federal law.<sup>24</sup> As a theoretical matter, the federalist structure of American government would enable different jurisdictions to adopt laws in line with local conditions and local preferences. As a practical matter, however, things have been more complicated.

### **Dual Sovereignty and Competitive Federalism**

The constitutional structure of the United States is often referred to as one of “dual sovereignty”<sup>25</sup>—a system in which there are two distinct levels of government. The U.S. Constitution creates a federal government of limited and enumerated powers. All other powers, including the so-called “police power” to protect public health, safety, and the general welfare, are left in the hands of state governments.<sup>26</sup> Federal law is supreme, but the scope of federal power is limited.

This federalist structure leaves states with substantial latitude to enact laws and regulations that conform with the needs and preferences of their citizens, thereby

accounting for the diversity of views and preferences across the country.<sup>27</sup> California, Texas, Vermont, and Alabama differ in many respects. Each of these states has a different climate, different geography, and different demographics and populations with different policy preferences. It should be no surprise that each of these jurisdictions has adopted a different set of policies with regard to the use and distribution of marijuana.

In a large, heterogeneous republic in which different groups of people have different priorities and preferences with regard to how the law should treat marijuana, setting a single national policy increases the number of people who live under laws with which they disagree.<sup>28</sup> As Alexis de Tocqueville observed, “In large centralized nations the lawgiver is bound to give the laws a uniform character which does not fit the diversity of places and of mores.”<sup>29</sup> On the other hand, allowing each jurisdiction to adopt policies in line with the preferences of its citizens makes it more likely that more people will live in jurisdictions with policies that match their preferences.<sup>30</sup>

Alabama made precisely this point when California sought to defend the viability of its medical marijuana laws in federal court. In *Gonzales v. Raich*, the state of Alabama filed briefs urging the Supreme Court to hold that the federal government could not prohibit the possession of marijuana for medicinal purposes where authorized by state law.<sup>31</sup> While pointedly refusing to endorse the substance of California’s law allowing medical marijuana use, Alabama urged the Court to allow different states to adopt different marijuana policies. Although Alabama maintained some of the most punitive marijuana possession laws in the country, it supported the ability of California to make a different policy choice.<sup>32</sup>



Where allowed to operate, dual sovereignty creates a system of competitive federalism in which states are under pressure to innovate in public policy. This may encourage innovation, as states experiment with providing different bundles of policies and services. At the same time, competitive federalism provides a means to discipline states that overreach.<sup>33</sup> Those states that are more successful in providing a mix of laws and amenities that are appealing to different groups of people will attract residents (who are also taxpayers) and investment from other jurisdictions. States that impose policies that are too costly or too restrictive will lose population and investment to other jurisdictions on the margin as well.<sup>34</sup>

These competitive pressures provide a potentially powerful discovery mechanism to reveal the relative benefits and costs of different policy measures. In Justice Louis Brandeis’s famous formulation, allowing states to enact competing policy measures frees them to serve as “laboratories of democracy” in which policymakers may attempt “novel social and economic experiments without risk to the rest of the country.”<sup>35</sup> Allowing private possession and consumption of marijuana for medicinal or recreational purposes may enhance individual welfare, or it may not. Such policies may expand human freedom in meaningful ways without jeopardizing other public concerns, or it may not. Reasonable people may disagree on these points. Allowing states to adopt different policies can generate the empirical evidence necessary to inform, if not also resolve, such disputes.

This discovery process may inform policymakers about the costs and benefits of legalizing or decriminalizing marijuana. Legislators considering changing the marijuana laws in their state can base their decision, in part, on the consequences of similar

measures adopted in other jurisdictions. Perhaps more important, the practical experiences of competing jurisdictions can reveal the relative costs and benefits of adopting different approaches to marijuana law reform. The contours of a legal regime and its implementation can be just as important as the underlying legal rule, and the consequences of different rules, on the margin, can be particularly difficult to predict without first putting them into practice.

While much of the policy debate centers on the binary choice between legalizing use and maintaining prohibition, there are multiple margins along which existing laws and policies may be reformed. How a given jurisdiction chooses to legalize or decriminalize marijuana may be as important as whether a state chooses to move in this direction. Not only do jurisdictions face choices about whether to legalize marijuana, and for what uses, they also face choices about whether marijuana production and distribution is to be a private commercial enterprise; whether the state will license retailers or producers and, if so, under what conditions; how it is or is not to be regulated or taxed; how potential risks to children or vulnerable populations will be addressed; how the consequences of reform will be measured and assessed; and so on. Allowing different jurisdictions to experiment with different combinations of reforms generates information about the benefits and costs of different measures, thereby allowing marijuana policy discussions to proceed on a more informed basis. Whatever the end result of this process will be, marijuana policy will be better the more we allow this federalism-based discovery process to operate.

While federalism, in principle, should create a framework for interjurisdictional competition and discovery, federal law often gets in the way. The expansion of federal law, and

federal criminal law in particular, has constrained the choices left to state policymakers and foreclosed meaningful experimentation in many policy areas, dampening the discovery mechanism competitive federalism can provide.<sup>36</sup> Insofar as federal law prohibits particular conduct, states have less ability to experiment with different legal regimes and are less able to discover whether alternative rules or restrictions would produce policy results more in line with local preferences.

### **Striking a Balance**

Questions about the proper balance between 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,<sup>37</sup> 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. On everything from environmental regulation to education policy, Republican officeholders often argue that individual states should be free from federal interference to adopt their own policy priorities.

In December 2014, Nebraska and Oklahoma both filed suit seeking to force the preemption of Colorado’s Amendment 64. Both 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 to suppress 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.<sup>38</sup> Colorado's experience to date, however, suggests that state governments are capable of effectively regulating intrastate marijuana markets.<sup>39</sup>

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 non-prohibition 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 by state law does not eliminate the federal prohibition.<sup>40</sup> Legalizing the possession and use of marijuana by adults poses the risk that marijuana will become more accessible to juveniles.<sup>41</sup> 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.<sup>42</sup>

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, particularly interstate drug trafficking. 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 between.<sup>43</sup> 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.<sup>44</sup>

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.

### **Uncle Sam and Mary Jane**

The aim of this book is to help inform the emerging debate over marijuana federalism by identifying and clarifying many of the legal and policy issues that are at stake as these issues work their way through our federal system.

The marijuana policy debate is rapidly evolving. As John Hudak and Christine Stenglein detail, public opinion on marijuana has changed quite dramatically in a relatively short period of time, driven in part by a widespread perception that marijuana is less dangerous than other illicit substances.<sup>45</sup> As they note, public opinion may change as more people experience the consequences of legalization – or it may not. According to Angela Dills, Sietse Goffard and Jeffrey Miron, the effects of marijuana legalization in legalizing states, thus far, have been less significant than both supporters and opponents predicted.<sup>46</sup>

The fact that marijuana can be legal in some states while prohibited under federal law may seem odd, but this is a key aspect of how our federalist system operates. As Ernest Young

and Robert Mikos each explain, the federal government lacks the power to “commandeer” state governments or police forces to implement federal law or policy priorities.<sup>47</sup> The Supreme Court has repeatedly reaffirmed this principle, which is why so much of marijuana policy “on the ground” reflects state and local choices, and state resistance to federal priorities can be quite profound. One might think that federal officeholders are obligated to make greater efforts to enforce federal prohibition, but as Zachary Price explains, the Executive Branch retains ample flexibility about how to deploy law enforcement resources—and this flexibility that has been utilized by both the Obama and Trump Administrations.<sup>48</sup>

Even if the federal government is not actively enforcing the federal prohibition on the possession, distribution and sale of marijuana, the mere existence of the federal prohibition has effects on businesses and professionals with their own obligations to comply with federal law. As Julie Hill explains, federal marijuana prohibition has made it more difficult for banks to provide banking services to marijuana-related businesses due to the demands of compliance with banking laws.<sup>49</sup> And as Cassandra Robertson explains, the persistence of a federal prohibition has forced attorneys, and those who evaluate and enforce rules of professional responsibility for lawyers, to consider whether attorneys may provide legal services to marijuana-related businesses without running afoul of their ethical obligations.<sup>50</sup>

As noted above, much of the legal and policy tension between the federal and state governments is a consequence of current constitutional doctrine, under which the scope of federal power is determined independent of the actions taken by states. But need this be so? A congressionally enacted statute could reorient the federal-state balance concerning marijuana, but so could a shift in Supreme Court doctrine. As William Baude suggests, perhaps existing

constitutional doctrine should be more solicitous of state actions and recognize limits on federal power where states have productively occupied the field.

Whatever approach the federal government takes in the years ahead – and whether legal reforms come from Congress or the courts – the marijuana policy debate today extends well beyond whether to legalize cannabis for some or all purposes. Unless the federal government takes action to remove legal obstacles to state-level reforms, various interjurisdictional conflicts and legal quandaries will continue to arise. Administrative action, however popular with recent presidents, is unlikely to be sufficient to resolve these conflicts. Legislative action of some sort will be required eventually. Until then, this is our federalism on drugs, and it is going to be an interesting trip.

## Endnotes

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<sup>1</sup> Colorado Constitution, Amendment 64; Washington Initiative 502, No. 63-502, Reg. Sess. (November 6, 2012).

<sup>2</sup> National Conference of State Legislatures, “Marijuana Overview,” December 14, 2018 ([www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx](http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx)). This site is updated regularly as state laws change.

<sup>3</sup> National Conference of State Legislatures, “Marijuana Overview,” March 5, 2019 ([www.ncsl.org/research/health/state-medical-marijuana-laws.aspx](http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx)). This site is updated regularly as state laws change.

<sup>4</sup> For an overview of federal and state laws and how they potentially conflict, see Lisa N. Sacco and others, “The Marijuana Policy Gap and the Path Forward,” *Congressional Research Service* 7-5700, March 10, 2017.

<sup>5</sup> 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)). For a brief history, see John Hudak, *Marijuana: A Short History* (Washington, DC: Brookings Institution Press, 2016).

<sup>6</sup> See, for instance, 21 U.S.C. § 841 (prison terms for marijuana cultivation); § 881(a)(7) (property “used, or intended to be used, in any manner or part” to violate the CSA may be subject to forfeiture).

<sup>7</sup> The U.S. Court of Appeals for the Ninth Circuit upheld portions of the federal Gun Control Act and implementing regulations that effectively criminalize the possession of a firearm by the holder of a state marijuana registry card. See *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016).

<sup>8</sup> Because marijuana is listed under Schedule I of the Controlled Substances Act, the Quality Housing and Work Responsibility Act prohibits public housing agencies from allowing current users of marijuana to participate in public housing programs. See 42 U.S.C. §13661.

<sup>9</sup> 28 U.S.C. §280E.

<sup>10</sup> In *Safe Streets Alliance v. Hickenlooper*, the U.S. Court of Appeals for the Tenth Circuit held that neighboring landowners could file a civil claim under the federal Racketeer Influenced and Corrupt Organizations Act (RICO) against a marijuana grower alleging that the cultivation of marijuana contributed to a common law nuisance. 859 F.3d 865 (10th Cir. 2017).

<sup>11</sup> See Chapter 6, this volume.

<sup>12</sup> See Chapter 7, this volume

<sup>13</sup> See *Gonzales v. Raich*, 545 U.S. 1 (2005). For a critique of this ruling, see Jonathan H. Adler, “Is *Morrison* Dead? Assessing a Supreme Drug (Law) Overdose,” *Lewis & Clark Law Review* 9 (2005); Chapter 8, this volume.

<sup>14</sup> See, for example, *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016); *United States v. Marin Alliance for Medical Marijuana*, 139 F. Supp. 3d 1039 (E.D. Cal. 2015).

<sup>15</sup> See Mark Kleiman, “How Not to Make a Hash Out of Cannabis Legalization,” *Washington Monthly*, April/May 2014.

<sup>16</sup> See *Printz v. United States*, 521 U.S. 898 (1997) (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) (the federal government may not force a state to legislate in accord with federal policy).

<sup>17</sup> Memorandum from David W. Ogden, Deputy Attorney General, to U.S. Attorneys, October 19, 2009 ([www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf](http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf)).

<sup>18</sup> 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 ([www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf](http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf)).

<sup>19</sup> Memorandum for All U.S. Attorneys from James M. Cole, Deputy Attorney General, Guidance Regarding Marijuana Enforcement, August 29, 2013 ([www.justice.gov/iso/opa/resources/3052013829132756857467.pdf](http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf)).

<sup>20</sup> *Ibid.*

<sup>21</sup> Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 81 *Federal Register*, 53767-53845, August 12, 2016; Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 81 *Federal Register*, 53687-53766, August 12, 2016; Drug Enforcement Administration, “Denial of Petition to Initiate Proceedings to Reschedule Marijuana,” 76 *Federal Register*, 40552-40589, July 8, 2011.

<sup>22</sup> Quoted in Max Greenwood, “Sessions says despite rules change federal prosecutors will not take ‘small marijuana cases’,” *The Hill*, March 10, 2018.



<sup>23</sup> Dominic Holden, “Bill Barr Says He’s ‘Not Going After’ Marijuana in States Where It’s Legal,” *Buzzfeed News*, Jan. 15, 2019 (<https://www.buzzfeednews.com/article/dominicholden/bill-barr-attorney-general-marijuana-legal-enforcement>).

<sup>24</sup> See Alex Kreit, “Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms,” *Chapman Law Review* 13 (2010), pp. 555–56 (“when 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”).

<sup>25</sup> See, for example, *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 751 (2002) (“Dual sovereignty is a defining feature of our Nation’s constitutional blueprint”); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government”).

<sup>26</sup> See *Chicago, B & Q Railway Co., v. People of State of Illinois*, 200 U.S. 561, 592 (1906) (defining the police power to include “regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety”).

<sup>27</sup> Michael W. McConnell, “Federalism: Evaluating The Founders’ Design,” *University of Chicago Law Review* 54 (1987), p. 1493.

<sup>28</sup> F. A. Hayek, “The Economic Conditions of Interstate Federalism,” in *Individualism and Economic Order* (University of Chicago Press, 1948), pp. 264–65.

<sup>29</sup> Alexis de Tocqueville, *Democracy in America* (J. P. Mayer, ed. 1969), p. 161.

<sup>30</sup> McConnell, “Federalism,” p. 1493.

<sup>31</sup> Brief of the States of Alabama, Louisiana, and Mississippi as Amici Curiae in Support of Respondents, *Ashcroft v. Raich*, No. 03-1454, Supreme Court of the United States, October 13, 2004. Note that this case was styled *Ashcroft v. Raich* when Alabama filed the amicus brief, but was *Gonzales v. Raich* when the case was decided.

<sup>32</sup> At the time of the litigation, individuals convicted three times for marijuana possession could be jailed for fifteen years. Ethan Nadelman, “An End To Marijuana Prohibition,” *National Review*, July 12, 2004, p. 28.

<sup>33</sup> Hayek, “Interstate Federalism,” p. 268.

<sup>34</sup> For an extended discussion of the role of mobility in competitive federalism, see Ilya Somin, “Free to Move: Foot Voting, Federalism, and Political Freedom,” in *NOMOS LV: Federalism and Subsidiarity*, James Fleming and Jacob Levy, eds. (NYU Press, 2014), pp. 110–154.

<sup>35</sup> 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”).

<sup>36</sup> As Justice Kennedy noted, federal law often “forecloses the States from experimenting and exercising their own judgment” in areas traditionally left within state hands. *United States v. Lopez*, 514 U.S. 549, 583 (1995).

<sup>37</sup> Democratic National Committee Chair Debbie Wasserman Schultz, for instance, opposed Florida’s medical marijuana initiative. See Marc Caputo, “Behind Wasserman Schultz’s Marijuana Feud,” *Politico*, February 24, 2015 ([www.politico.com/story/2015/02/behind-wasserman-schultzs-marijuana-feud-115442.html](http://www.politico.com/story/2015/02/behind-wasserman-schultzs-marijuana-feud-115442.html)).

<sup>38</sup> See Jonathan H. Adler, “Are Nebraska and Oklahoma Just Fair-Weather Federalists?” *The Volokh Conspiracy*, December 19, 2014 ([www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/19/are-nebraska-and-oklahoma-just-fair-weather-federalists/](http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/19/are-nebraska-and-oklahoma-just-fair-weather-federalists/)).

<sup>39</sup> See Chapter 4 of this volume.

<sup>40</sup> See Chapter 6 of this volume.

<sup>41</sup> See Steven Davenport, Jonathan P. Caulkins, and Mark A. R. Kleiman, “Controlling Underage Access to Legal Cannabis,” *Case Western Reserve Law Review* 65 (2015).

<sup>42</sup> See Robert A. Mikos, “Marijuana Localism,” *Case Western Reserve Law Review* 65 (2015).

<sup>43</sup> For an argument that this should be the approach to all illicit drugs, see Daniel K. Benjamin and Roger Leroy Miller, *Undoing Drugs: Beyond Legalization* (New York: Basic Books, 1993).

<sup>44</sup> See, for example, the proposal outlined in Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, “Cooperative Federalism and Marijuana Regulation” *UCLA Law Review*, 62 (2015).

<sup>45</sup> Chapter 2 of this volume.

<sup>46</sup> Chapter 3 of this volume.

<sup>47</sup> Chapters 4 and 5 of this volume.

<sup>48</sup> Chapter 6 of this volume.

<sup>49</sup> Chapter 7 of this volume.

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<sup>50</sup> Chapter 8 of this volume.