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What Will Federal Marijuana Reform Look Like?

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WHAT WILL FEDERAL MARIJUANA REFORM LOOK LIKE?

Alex Kreit†

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INTRODUCTION

When Californian voters passed the first modern medical marijuana ballot measure in 1996, it was hard to imagine federal law might ever change to accommodate it. At the time, then-drug czar Barry McCaffrey called the law “a cruel hoax that sounds more like something out of a Cheech and Chong show.”¹ The Drug Enforcement Administration (DEA) threatened to go after the controlled substances licenses of doctors who recommended medical marijuana,² and the House of Representatives passed a symbolic “Not Legalizing Marijuana for Medical Use” sense of Congress resolution by a vote of 310 to 93.³

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1. PETER HECHT, *WEEDLAND: INSIDE AMERICA’S MARIJUANA EPICENTER AND HOW POT WENT LEGIT* 67 (2014).
2. Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997) (“[T]he DEA will seek to revoke the DEA registrations of physicians who recommend or prescribe Schedule I controlled substances.”). The Ninth Circuit enjoined the plan on First Amendment grounds. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).
3. See Caroline Herman, *United States v. Oakland Cannabis Buyers’ Cooperative: Whatever Happened to Federalism?*, 93 J. CRIM. L. & CRIMINOLOGY 121, 123–24 n.19 (2002) (discussing the “sense of Congress” vote).

Even as more and more states followed California's lead and passed medical marijuana laws of their own, little changed at the federal level. By one estimate, the federal government spent \$483 million dollars interfering with state medical marijuana laws between 1996 and 2012, conducting at least 528 raids and dozens of prosecutions of people operating in compliance with state medical marijuana laws.⁴

By the time Colorado and Washington took state reforms even further in 2012 with laws legalizing marijuana for recreational use, federal marijuana laws and enforcement policies stood in roughly the same place as they had back in 1996. If anything, the Obama administration's actions on medical marijuana—vigorously raiding and prosecuting state operators despite a 2008 campaign pledge⁵ and a 2009 Department of Justice memo⁶ that indicated he would do just the opposite—made the prospect of change at the federal level seem even bleaker.⁷

Somewhat suddenly, however, the last two years have seen the once-impossible idea of reforming federal marijuana law become seemingly inevitable.⁸ In late 2013, the Department of Justice announced a new round of marijuana enforcement guidelines.⁹ The text of the

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4. PEACE FOR PATIENTS, AMERICANS FOR SAFE ACCESS, WHAT'S THE COST? THE FEDERAL WAR ON PATIENTS 3, 16 (2013), *available at* <http://american-safe-access.s3.amazonaws.com/documents/WhatsTheCost.pdf>.
 5. Tim Dickenson, *Obama's War on Pot*, ROLLING STONE (Mar. 1, 2012), <http://www.rollingstone.com/politics/news/obamas-war-on-pot-2010216> (reporting that as a candidate President Obama said, "I'm not going to be using Justice Department resources to try to circumvent state laws on this issue").
 6. Memorandum from David W. Ogden, Deputy Att'y Gen. for Selected United States Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), *available at* <http://blogs.justice.gov/main/archives/192>.
 7. *See, e.g.*, Dickenson, *supra* note 5 ("[O]ver the past year, the Obama administration has quietly unleashed a multiagency crackdown on medical cannabis that goes far beyond anything undertaken by George W. Bush."); Alex Kreit, *Reflections on State Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 DENV. U. L. REV. 1027, 1036–41 (2012) (discussing the aftermath of the 2009 Department of Justice memo on federal medical marijuana prosecutions).
 8. *See* Eliana Dockterman, *Poll: Three in Four Say Legalized Pot Is Inevitable*, TIME (Apr. 2, 2014), <http://time.com/47007/poll-three-in-four-say-legalized-pot-is-inevitable/>.
 9. Memorandum from James M. Cole, Deputy Att'y Gen., to all United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) [hereinafter Cole Memo], *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

DOJ's 2013 guidance is not all that different from its largely ignored 2009 memorandum. This time, however, federal prosecutors and the DEA have mostly abided by the advice. As a result, stores are selling marijuana in Colorado and Washington as openly as they would any other consumer good. Perhaps even more notable, the 2015 federal budget included an appropriations rider banning the Department of Justice from spending money to block the implementation of state medical marijuana laws.¹⁰ Taken together, these two developments suggest the executive and legislative branches are finally coming around to the conclusion that enforcing federal marijuana prohibition in states that have enacted reform is simply no longer a viable option.

But if uniformly enforced federal marijuana prohibition is no longer sustainable, what should a new policy look like? Perhaps because the prospect of a move away from federal marijuana prohibition has seemed so remote for so long, there has not been much serious dialogue about the pros and cons of the various alternatives. Marijuana legalization advocates have been focused on lobbying for any politically viable short-term workaround to the conflict between state and federal law, not crafting a policy for the long-term. Prohibitionists, meanwhile, have been sticking with a run-out-the-clock strategy, betting on the hope that the medical and recreational marijuana legalization trend will eventually reverse itself and working to keep federal marijuana laws untouched until that day comes.

So much energy has been directed at the debate about *whether* to change federal marijuana laws that the question of *how* to change them has been almost an afterthought. Barring a dramatic political reversal, however, it is no longer a matter of *whether* but *when*, and that makes the *how* of federal marijuana reform increasingly important. Instead of trying to find the best short-term fix to the current state-federal conflict, it is time to start thinking seriously about what federal marijuana policy should look like for the next forty or fifty years. This Article aims to help further the dialogue on this question. My goal is not to advocate for any particular solution or consider any one option in detail, but instead to highlight some of the considerations that might guide the debate and some of the trade-offs different sorts of policies might entail. I argue that the federal

10. Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014) (“None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”).

marijuana reform ideas that have generated the most political interest and momentum so far (appropriations provisos and affirmative defense proposals) suffer from serious flaws that make them unlikely to be attractive long-term options. Instead, more sweeping changes to federal law are likely necessary to harmonize state and federal marijuana law. And, though perhaps counterintuitive, there are reasons legalization opponents may also come to reluctantly accept ideas like federal marijuana regulation or state waiver programs as the best option for addressing some of their biggest concerns as legalization moves forward.

This Article proceeds in three parts. Part I briefly lays out the case for why federal law must change to accommodate state marijuana reforms and why, although perhaps not politically viable today, change is nevertheless inevitable and may come much sooner than many think. Part II considers the types of federal marijuana reform proposals that have generated interest and analyzes which is most likely to effectively end the conflict between state and federal marijuana law. Part III looks at the idea of federal marijuana law from the perspective of marijuana legalization opponents and skeptics. Though people in this category might prefer nationwide marijuana prohibition, if that is not a viable option in the long-term, what federal policy would be most likely to effectively address their central concerns about legalization?

I. WHY FEDERAL MARIJUANA LAW REFORM IS BOTH NECESSARY AND INEVITABLE

Walking around Denver, Colorado, or leafing through the *Wall Street Journal*, it would be easy to forget that federal law still criminalizes the distribution,¹¹ manufacture,¹² and even simple possession of marijuana.¹³ State-legal marijuana stores openly sell millions of dollars' worth of marijuana in Colorado,¹⁴ seemingly unconcerned by the lengthy federal sentences their operators are risking.¹⁵ Meanwhile, angel investors pump money into marijuana ventures like Eaze, a

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11. The Controlled Substances Act, 21 U.S.C. § 841(a)(1) (2012).
 12. *Id.*
 13. *Id.* § 844(a) (“It shall be unlawful for any person knowingly or intentionally to possess a controlled substance.”).
 14. Christopher Ingraham, *Colorado Marijuana Revenues Hit a New High*, WASH. POST WONKBLOG (Oct. 14, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/14/colorado-marijuana-revenues-hit-a-new-high/> (reporting that approximately \$34.1 million worth of recreational marijuana was sold in Colorado in August 2014).
 15. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A)(vii) (providing for a mandatory minimum sentence of ten years for the distribution of 1,000 or more marijuana plants or 1,000 kilograms or more of marijuana).

“high-tech pot-delivery service”¹⁶—or, in the eyes of federal drug laws, a sophisticated conspiracy to illegally distribute a controlled substance.

The disconnect between the letter of federal law and the emerging marijuana industry is, in large part, the result of an August 2013 Department of Justice (DOJ) memo advising federal prosecutors not to interfere with state marijuana legalization laws.¹⁷ The memo cautions that it “is intended solely as a guide to the exercise of investigative and prosecutorial discretion” and does not give state-compliant marijuana operators any legally enforceable rights or protection.¹⁸ But enough marijuana operators have put their confidence in the DOJ’s nonbinding guidance that it has proven to be a relatively effective short-term answer to the state-federal marijuana conflict, at least so far. With marijuana businesses operating openly, it is fair to ask whether the state–federal marijuana conflict has already been solved. Does Congress really need to change federal law, or can federal prohibition and state legalization comfortably coexist through an executive nonenforcement policy?

Though the DOJ’s marijuana nonenforcement policy could continue indefinitely in theory, it is not a long-term solution for several reasons. First, prosecutorial guidance is just that—guidance. A new Attorney General could decide to change the policy.¹⁹ If that happens, the people investing in marijuana delivery startups today could be facing federal drug charges tomorrow. Because their actions violate existing federal law, there would be no *ex post facto* bar to prosecuting marijuana business operators for conduct they undertook while the nonenforcement prosecutorial guidance was in effect. As a result, every Colorado marijuana business owner who employs an

16. Timothy Hay, “Uber for Pot” Eaze Raises \$1.5 Million to Deliver Medical Marijuana, WALL ST. J. (Nov. 5, 2014, 8:00 AM), <http://blogs.wsj.com/venturecapital/2014/11/05/uber-for-pot-eaze-raises-1-5-million-to-deliver-medical-marijuana/>.

17. Cole Memo, *supra* note 9.

18. *Id.* at 4.

19. See, e.g., Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 90 (2015) (observing that making a federal nonenforcement policy permanent “cannot be done by executive action alone because enforcement decisions made by one presidential administration could easily be overturned by the next”); Vikas Bajaj, Op-Ed., *Will the Next Attorney General Crack Down on Marijuana?*, N.Y. TIMES TAKE NOTE BLOG (Jan. 29, 2015), <http://mobile.nytimes.com/blogs/takingnote/2015/01/29/will-the-next-attorney-general-crack-down-on-marijuana/> (reporting on the confirmation for Loretta Lynch, President Obama’s nominee to replace Eric Holder as Attorney General, and observing that “Lynch’s statements serve as a reminder that the Obama administration’s policy on marijuana could easily be reversed”).

armed security guard could wind up serving an effective life sentence in federal prison²⁰ when a new President is sworn into office in January 2017, even if they closed their doors in November 2016. Indeed, even while the policy is in place, a disobedient federal prosecutor could simply ignore it.²¹ Because the policy is only advisory, it does not give state-legal marijuana operators who rely on it a defense in federal court.²²

Second, even if the DOJ's nonenforcement policy could reliably shield marijuana businesses from federal criminal prosecution, it does not solve the conflict between federal prohibition and state legalization entirely. As Erwin Chemerinsky, Jolene Foran, Allen Hopper, and Sam Kamin explain in their recent article *Cooperative Federalism and Marijuana Regulation*, there are a number of "substantial obstacles to businesses and adults seeking to implement and avail themselves of new state laws authorizing marijuana distribution and use" that cannot be solved by prosecutorial discretion alone.²³ These obstacles include access to banks, which are far less likely to be persuaded by advisory guidance²⁴; access to attorneys, who may face ethics charges for facilitating federally illegal drug operations²⁵; a "crippling" federal tax penalty for marijuana businesses²⁶; and risks to

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20. 18 U.S.C. § 924(c) (2012) provides for stiff mandatory minimum sentences for the use of a gun in furtherance of a drug trafficking crime. *See, e.g.*, *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (imposing a fifty-five-year mandatory minimum sentence under 18 U.S.C. § 924(c) for a defendant who carried a handgun to two marijuana sales and possessed guns in his home), *aff'd* 433 F.3d 738 (10th Cir. 2006).
 21. *See, e.g.*, Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 643–45 (2011) (explaining that "the DOJ is [a] fragmented agency, one in which several autonomous decision makers help share enforcement policy" and that not all U.S. Attorneys support the guidance issued by the DOJ in Washington).
 22. *See, e.g.*, *United States v. Stacy*, 696 F. Supp. 2d 1141, 1145 (S.D. Cal. 2010).
 23. Chemerinsky et al., *supra* note 19, at 90–91.
 24. Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597 (2015) (arguing that banking will continue to present "urgent" problems to the marijuana industry because banks do not want to risk noncompliance with federal law).
 25. Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869 (2013) (discussing how attorneys who represent state-legal marijuana businesses might risk running afoul of ethics laws because all lawyers have a duty to not "knowingly assist criminal conduct").
 26. Chemerinsky et al., *supra* note 19, at 94; *see also, e.g.*, Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523 (2014)

users in the form of potential adverse employment, probation and parole, and family law consequences.²⁷ Federal prohibition also leaves marijuana businesses with a great deal of uncertainty when it comes to intellectual property rights,²⁸ the availability of insurance, and even the enforceability of standard business contracts.²⁹ While it is possible some of these hurdles can be overcome in whole or in part without legislative action, others are almost certain to remain.

Third, the continuing nonenforcement of federal drug laws would raise serious concerns about the limits of executive power. In his recent article *Enforcement Discretion and Executive Duty*, Zachary Price considers the federal government's response to state marijuana legalization laws.³⁰ Price argues that while "[s]ome degree of top-down direction regarding" Justice Department resources may be appropriate, "a more definite nonenforcement policy . . . would exceed the Executive's proper role by effectively suspending a federal statute and thus usurping Congress's constitutional responsibility to set national policy."³¹ The longer the federal government goes without prosecuting or otherwise interfering with³² marijuana businesses, the more definite its nonenforcement policy effectively becomes. To be sure, as a matter of legal doctrine on executive discretion, it is quite likely that the DOJ's marijuana nonenforcement policy could continue

(discussing Internal Revenue Code § 280E, which requires sellers of federally illegal drugs to pay taxes on their gross revenue instead of their net income).

27. See generally Chemerinsky et al., *supra* note 19, at 90–100 (surveying impediments faced by states seeking to regulate marijuana “due to marijuana’s continuing illegality under federal law”).
28. Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223, 257 (2010) (“The federal Lanham Act bars the registration of a trademark used on any product proscribed by federal law, including marijuana.”); Kieran G. Doyle, *Trademark Strategies for Emerging Marijuana Businesses*, 21 WESTLAW J. INTELL. PROP. 1 (2014) (explaining that “the pathway toward legitimate in the eyes of the [United States Patent and Trademark Office] may be a rocky one” for marijuana businesses).
29. Chemerinsky et al., *supra* note 19, at 96–97 (discussing cases in which courts have declined to enforce insurance policies and other contracts for marijuana businesses and concluding that marijuana businesses “cannot rely on the contracts they sign or the insurance they pay for”).
30. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 758–59 (2014).
31. *Id.*
32. Federal law enforcement officials have employed a range of tactics to try to shut down people operating pursuant to state marijuana laws, including asset forfeiture and civil suits. See, e.g., *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001) (involving a civil suit to enjoin the operation of medical marijuana cooperatives).

indefinitely.³³ And even as a matter of policy, the dividing line between acceptable guidance about how to use limited law enforcement resources and a problematic *de facto* suspension of federal law by the Executive is open to debate. But, at the very least, a sustained nonenforcement policy presents difficult questions about executive power and the rule of law.

Fourth, applying federal marijuana laws in some states but not others might also be objectionable on the grounds that it is inconsistent with the principle of equal application of the law. Federal drug laws are meant to apply uniformly across the country, at least as they are currently written. Under the DOJ's nonenforcement policy, however, a person openly selling marijuana in Wyoming continues to risk a lengthy stay in federal prison while a person engaging in the same conduct in Colorado can make millions. This state of affairs has already led at least one federal judge to deviate from the penalties recommended by the federal sentencing guidelines for marijuana. The judge reasoned that "changes in state law and federal enforcement policy regarding marijuana"³⁴ warranted a reduced sentence, at least for a distribution scheme that "bears some similarity to those marijuana distribution operations in Colorado and Washington that will not be subject to federal prosecution."³⁵

For these reasons, although the DOJ's nonenforcement policy may work as a temporary fix, legislators should not view it as a long-term solution. Of course, it is also possible for the executive to change marijuana's status under federal law even without congressional action by administratively reclassifying marijuana under the Controlled Substances Act (CSA). Under the CSA, drugs are divided into five "schedules" based on their potential for abuse, medicinal value,

33. As a recent Congressional Research Service report explained, "courts have been reluctant to withdraw the executive's discretion to decide whether to initiate a prosecution" in the absence of "clear and unambiguous evidence of Congress's intent to withdraw traditional prosecutorial discretion." TODD GARVEY, CONG. RESEARCH SERV., R43708, *THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW 14* (2014). The Controlled Substances Act does not contain the sort of express congressional directive that would be likely to constrain prosecutorial discretion under current doctrine. Controlled Substances Act, 21 U.S.C. §§ 801–971 (2012).

34. *United States v. Dayi*, 980 F. Supp. 2d 682, 683 (D. Md. 2013).

35. *Id.* at 689. *Cf.* *United States v. Irlmeier*, 750 F.3d 759, 766–67 (8th Cir. 2014) (Bright, J., dissenting) ("In today's world where several states in this country have legalized marijuana use for medical purposes and two states have even legalized its recreational use, a hard look should apply to marijuana prosecutions carrying mandatory minimum sentences as in this case.").

and addictiveness.³⁶ The DEA has the power to add a new substance to the schedules, move a substance between schedules, or remove a currently scheduled substance entirely.³⁷ Ever since the CSA was passed in 1970, marijuana advocates have argued that the drug is improperly categorized in Schedule I, the strictest category, reserved for drugs with a high abuse potential and no currently accepted medical use.³⁸ In 2011, the governors of Rhode Island and Washington called for rescheduling and even suggested that the move could harmonize state and federal marijuana laws.³⁹

Whatever the merits of rescheduling, it would not fix the state–federal conflict over marijuana. As an initial matter, so long as marijuana is scheduled, it would be illegal to sell the drug for recreational use—even Schedule V substances can only be sold for medicinal use.⁴⁰ Though the CSA does permit the de-scheduling of drugs, marijuana is exceedingly unlikely to ever qualify for complete removal under the scheduling criteria.⁴¹ Even if it could, the CSA requires scheduling decisions to meet U.S. treaty obligations, regardless of the criteria.⁴² As a result, the DEA could not remove marijuana from the CSA without a change in the international drug treaties and, very likely, could not move it any lower than Schedule II.⁴³ Rescheduling marijuana might help begin to address the conflict between

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36. 21 U.S.C. § 812(b) (2012). For an overview of the Controlled Substances Act’s classification scheme, *see, e.g.*, GERALD F. UELMEN & ALEX KREIT, *DRUG ABUSE AND THE LAW SOURCEBOOK* §§ 1:1-1:16 (2014–2015 ed.), *available at* Westlaw.
 37. The CSA grants rescheduling power to the Attorney General, but the Attorney General has delegated this authority to the head of the Drug Enforcement Administration. *See* Alex Kreit, *Controlled Substances, Uncontrolled Law*, 6 ALB. GOV’T L. REV. 332, 336 (2013).
 38. 21 U.S.C. § 812(b)(1) (providing the criteria for placing a substance in Schedule I).
 39. *See e.g.*, Jonathan Martin, *Gregoire to DEA: Make Marijuana a Legal Drug*, SEATTLE TIMES, Dec. 1, 2011, <http://twww.seattletimes.com/seattle-nevvs/gregoire-to-dea-make-marijuana-a-legal-drug/>.
 40. 21 U.S.C. § 829(c) (2012) (“No controlled substance in schedule V which is a drug may be distributed or dispensed other than for medical purposes.”).
 41. For this reason, alcohol and tobacco are both statutorily exempt from regulation under the Controlled Substances Act. 21 U.S.C. § 802(6) (2012).
 42. *Id.* § 812(b).
 43. Nat’l Org. for the Reform of Marijuana Laws v. Drug Enforcement Admin., 559 F.2d 735, 742 (D.C. Cir. 1977) (reporting that the DEA concluded United States treaty commitments would permit marijuana to be moved to Schedule II but not lower). *See also* Uelmen & Kreit, *supra* note 36, at § 1:15.

federal and state *medical* marijuana laws. But even for state medical marijuana laws, federal rescheduling would raise as many questions as answers. This is because state medical marijuana regimes are far more expansive than federal oversight for Schedule II and III drugs. Indeed, because marijuana does not have FDA approval, it is unclear that marijuana could actually be marketed as a medicine at all even if it were rescheduled.⁴⁴

Of course, not everyone would like to see the federal government accommodate state marijuana reforms. Those who favor marijuana prohibition might be inclined to leave the federal prohibition of marijuana in place (though polling indicates substantial support for deferring to states, even among legalization opponents).⁴⁵ If federal marijuana prohibition had been successful at blocking state medical and recreational marijuana laws, federal marijuana prohibition might be a viable long-term option. The trouble for would-be supporters of the status quo is that federal marijuana prohibition has proven itself incapable of stopping state legalization laws.⁴⁶

Between 1996 and 2008, the federal government unambiguously opposed state medical marijuana laws and fought hard to block their implementation.⁴⁷ Even as recently as late 2012, a state-legal Montana medical marijuana provider was convicted of federal charges carrying eight decades of mandatory federal prison time.⁴⁸ Despite their best efforts, however, federal drug enforcement officials were not able to stop states from passing and implementing medical marijuana laws.

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44. See Kevin A. Sabet, *Much Ado About Nothing: Why Rescheduling Won't Solve Advocates' Medical Marijuana Problem*, 58 WAYNE L. REV. 81, 82–83 (2012).
45. Jacob Sullum, *Poll Finds Most Americans Support Treating Marijuana Like Alcohol; Even More Think the Feds Should Let States Do So*, REASON (Jan. 31, 2013, 12:41 PM), <http://reason.com/blog/2013/01/31/poll-finds-most-americans-support-treati> (reporting on poll results in which only about half of respondents supported marijuana legalization but 68% said the federal government should not arrest marijuana growers who are in compliance with state law).
46. See, e.g., Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009).
47. Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 566–70 (2010) (providing an overview of federal enforcement efforts against medical marijuana providers from 1996 and 2008).
48. The defendant, Chris Williams, ultimately received a five-year sentence after prosecutors took the extraordinary step of reducing the charges after trial. Gwen Florio, *Montana Medical Marijuana Grower Gets 5 Years in Federal Prison*, MISSOULIAN, Feb. 1, 2013, http://missoulian.com/news/local/montana-medical-marijuana-grower-gets-years-in-federal-prison/article_89211f90-6ca5-11e2-aa17-001a4bcf887a.html.

To be sure, vigorously enforced federal marijuana prohibition made life more difficult for state-legal marijuana operators, with an unlucky few now serving federal prison sentences. But because the federal government depends almost entirely on state law enforcement resources to enforce drug prohibition laws, it did not have the resources to deter medical marijuana businesses from openly operating.⁴⁹ As a result, federal marijuana prohibition enforcement efforts served mostly to make state medical marijuana laws less well controlled than they otherwise might have been.⁵⁰ Though the Supremacy Clause might give a glimmer of hope to federal marijuana prohibition, so far courts have largely rejected the argument that federal law preempts state marijuana laws.⁵¹ Unless that changes, whatever one thinks about the merits of state legalization, federal law is powerless to stop it. Nearly two decades of experience point to the almost inescapable conclusion that so long as states continue to pass marijuana legalization laws, nationwide federal prohibition is not a realistic policy option. Perhaps more than anything else, this fact is what makes federal marijuana reform inevitable.

II. PROPOSALS TO SOLVE THE CONFLICT BETWEEN STATE AND FEDERAL MARIJUANA LAWS

Though it is becoming clearer that today's federal marijuana laws are not sustainable—at least not without a dramatic reversal of course at the state level—the dialogue about how to reform them should be done is still in its infancy. To date, most proposals to change federal marijuana law have come from state marijuana legalization supporters and have focused mostly on minimizing or resolving the current state-federal conflict. They fall into roughly four categories: (1) preventing the Department of Justice from spending money to interfere with state marijuana laws; (2) providing an affirmative defense based on compliance with state marijuana laws; (3) letting states opt out of

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49. Mikos, *supra* note 46, at 1463–67 (arguing that the federal government's limited law enforcement resources mean that it cannot arrest and prosecute more than a small fraction of marijuana offenders).
50. Kreit, *supra* note 47, at 569–75 (arguing that federal enforcement made it more difficult for states to effectively regulate and control medical marijuana).
51. *See, e.g.,* *Beek v. City of Wyo.*, 495 Mich. 1 (2014) (finding that Michigan's medical marijuana was not preempted by federal law); Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 37 (2013) (“[T]he CSA, properly understood, preempts only a handful of the [marijuana] laws now being promulgated throughout the states.”).

federal marijuana prohibition; and (4) ending the federal ban on marijuana and replacing it with some sort of federal regulatory structure.⁵²

To begin to make sense of the different alternatives for federal marijuana law reform, this section considers the benefits and pitfalls of each type of reform based on the goal of minimizing the conflict between state and federal marijuana laws. Though this is a pressing concern, it is hardly the only goal lawmakers might want to pursue in crafting marijuana policy. In the next section, I will consider how legalization opponents might view different options for reform and take up the question of what type of legal structure would give the federal government the most control in shaping and limiting state marijuana laws.

A. *Reform Through Appropriations Provisos*

The only successful federal marijuana reform proposal to date was focused on spending. In spring 2014, the House of Representatives narrowly passed an appropriations amendment to prevent the Department of Justice from spending any money to block states from implementing their medical marijuana laws. (The amendment does not apply to the legalization laws in Alaska, Colorado, Oregon, and Washington.) The Senate never voted on the provision directly, and, for much of 2014, it seemed unlikely ever to become law. Ultimately, however, it made its way into the final budget for 2015.⁵³

From a political perspective, the development was groundbreaking. It marked the first congressional vote in support of easing federal marijuana law and suggested that Congress and the President are both now (very tentatively) inclined to permit state medical marijuana laws to go forward in some way. It also signaled just how quickly marijuana politics is changing: the last time the amendment came up for a vote, in 2007, it failed, garnering only 165 votes at a time when the Democrats had a majority in the House.⁵⁴

It is not hard to guess at why addressing the state–federal marijuana conflict through a spending proposal may be more politically appealing than other options. Although polls indicate supporting

52. See, e.g., Chemerinsky et al., *supra* note 19, at 113–14 (summarizing marijuana reform bills that have been introduced in Congress).

53. Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014). The appropriations act also limits the use of funds to block industrial hemp research programs. *Id.* § 539.

54. *Congress Votes to End War on Medical Marijuana Patients and Providers*, MARIJUANA POLICY PROJECT, <http://www.mpp.org/media/press-releases/congress-votes-to-end-war-on.html> (last visited Mar. 20, 2015).

marijuana reform is good politics,⁵⁵ many politicians still do not see it that way.⁵⁶ And, for elected officials who came up in the drug war era of the 1980s or 1990s, an appropriations measure almost certainly carries the least risk of giving an opponent fodder for a “soft on crime” type of attack ad. A spending proviso is temporary. It does not change federal law, and it can be easily omitted from the next year’s budget. In addition, it can be framed as a question of allocating federal resources, not necessarily a position on the merits of state marijuana laws. Couching marijuana reform in spending terms may also be more likely to appeal to Republican legislators, particularly those closely aligned with the “tea party” brand. After all, cutting federal spending is at the core of the tea party’s political identity.⁵⁷ Last but not least, an appropriations amendment is much easier to get onto the floor of the House than, say, a bill to remove marijuana from the Controlled Substances Act, which would typically proceed through the usual committee process.

Unfortunately, the politics is not particularly well aligned with policy in this instance. Of all the legislative options for addressing the conflict between state marijuana reforms and federal prohibition, spending restrictions are almost certain to be the least effective.

As an initial matter, the spending restriction in the 2015 budget is not a model of clarity. The provision blocks the Department of Justice from using funds “to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”⁵⁸ It is far from clear that this spending limitation applies to the investigation or prosecution of private parties at all. If the Department of Justice were to use funds to sue a state over its medical marijuana law or to prosecute a state official for issuing a medical marijuana permit, that would surely qualify as preventing the state from “implementing” its law.⁵⁹ But does prose-

55. Lydia Saad, *Majority Continues to Support Pot Legalization in U.S.*, GALLUP (Nov. 6, 2014), <http://www.gallup.com/poll/179195/majority-continues-support-pot-legalization.aspx>.

56. See Nick Wing, *Here Are All the U.S. Senators and Governors Who Support Legalizing Marijuana*, THE HUFFINGTON POST (Oct. 27, 2014, 10:59 AM), <http://m.huffpost.com/us/entry/5107508> (reporting that only one sitting United States Senator or Governor has “announced support for full legalization” of marijuana).

57. Zachary A. Goldfarb, *For Tea Party, Sequestration Is a Moment of Truth*, WASH. POST, Feb. 26, 2013 at A4 (describing federal spending cuts as “the centerpiece” of the tea party’s economic message).

58. Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014).

59. To date, the DOJ has not prosecuted any state or local officials for issuing marijuana permits or sued to block a state’s marijuana law on a

cutting a dispensary operator in San Diego mean that California has been prevented from “implementing” its laws?⁶⁰ The brief debate of the amendment on the House floor leaves little doubt that the provision’s backers meant to stop federal prosecutors from going after dispensary owners.⁶¹ And there is a strong argument that the text itself prevents the Department of Justice from prosecuting *any* state-licensed patient or provider, whether or not the person is in compliance with state law.⁶² After all, a medical marijuana dispensary operator whose state-law violation would result in a civil penalty or relatively minor criminal penalty could face years behind bars if prosecuted federally. The state has an interest in implementing its own laws by imposing its own penalties for noncompliance, not just in protecting compliant operators. Still, the scope of the provision is far from certain. Already, a handful of medical marijuana defendants have unsuccessfully argued the provision prevents the federal government from going forward against them.⁶³ Only time will tell how the

preemption theory, so if this is all the provision restricts, it is not particularly far reaching.

60. There is something of a parallel between this scenario and the federal preemption question. State marijuana reforms do not pose an obstacle to implementing federal prohibition because the federal government can continue to enforce its laws criminalizing marijuana—they just have to do it without the help of state and local officials. Similarly, one might argue that prosecuting a private party would never prevent the implementation of a state law. The state could still put its own law into effect by issuing permits, regulations, and so forth, even if private parties operating pursuant to the law risk federal prosecution.
61. *E.g.*, 160 CONG. REC. H4984 (daily ed. May 29, 2014) (statement of Rep. Titus) (explaining that under the appropriations amendment, “[p]hysicians in [medical marijuana] States will not be prosecuted for prescribing the substance, and local businesses will not be shut down for dispensing the same”).
62. See Alex Kreit, *The 2015 Federal Budget’s Medical Marijuana Provision: An “End to the Federal Ban on Marijuana” or Something Less Than That?*, 35 N. ILL. U. L. REV. (forthcoming 2015).
63. See, *e.g.*, Jacob Sullum, *Jurors Can’t Know Pot Growers Are Patients*, REASON (Feb. 2, 2015), <http://reason.com/archives/2015/02/02/jurors-cant-know-pot-growers-are-patient> (reporting on motions based on the appropriations restriction that were filed in a Washington state federal medical marijuana case); Douglas A. Berman, *Defense Moves to Postpone Federal Marijuana Sentencing Based on New Law Ordering DOJ Not to Prevent States From Implementing Medical Marijuana Laws*, SENT. L. & POL’Y BLOG (Dec. 16, 2014, 6:13 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2014/12/defense-moves-to-postpone-federal-marijuana-sentencing-based-new-law-ordering-doj-not-to-prevent-33.html (reporting on a federal marijuana prosecution in California where the defendant argues the federal appropriations restriction prevents the Department of Justice from continuing with the case).

courts interpret and apply the provision and, perhaps more importantly, whether it is renewed in next year's budget.

Of course, a drafting problem with the 2015 spending amendment does not necessarily mean the idea of updating federal marijuana law through a spending amendment is flawed. But even the most carefully written appropriations amendment would not be a particularly effective solution to the state–federal disconnect.

First, preventing the Department of Justice from spending money to prosecute state-legal marijuana operators would not provide any sort of lasting immunity from prosecution. Congress could decide to lift the spending restriction next year or the year after that. Indeed, in the absence of “futurity” language, an appropriation proviso applies only to the covered fiscal year and must be passed by Congress annually to remain in effect.⁶⁴ If and when the appropriations restriction were ever lifted, the Department of Justice could presumably prosecute marijuana distributors for acts they committed *during* the restricted period. Though defense attorneys might litigate the issue, it is hard to imagine courts finding an *ex post facto* bar to prosecuting people for conduct they engaged in while an appropriation limit was in place. If Congress had intended to make it legal for state-regulated actors to distribute marijuana, it could have amended or repealed the Controlled Substances Act.⁶⁵ A spending restriction, by contrast, speaks only to Congress's budget priorities. Congress might decide to temporarily stop the Department of Justice from spending money to investigate a class of cases when money is tight with the hope that prosecutions will resume as soon as resources permit. For this reason, a spending ban does not provide any more long-term protection than the Department of Justice's own advisory marijuana enforcement memo.

Second, blocking federal law enforcement officials from spending money to pursue state-compliant marijuana cases presents a difficult logistical puzzle. At what point in a particular case does the spending restriction kick in? If the DEA believed a state marijuana licensee was using her permit as a cover for other illegal activity, confirming or disconfirming that suspicion would require it to spend money on an investigation. As a result, it is hard to imagine Congress would stop the Department of Justice from spending money at the investigation

64. *See Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 146 (2d Cir. 2002) (discussing the “presumption that a provision contained in an appropriation act applies only in the applicable fiscal year”).

65. It is unlikely that the inclusion of “futurity” language would change the equation on this point. *See Atl. Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 225 (1st Cir. 2003) (“We caution, however, that even the presence of [futurity] words will not establish permanence if that construction would render other statutory language meaningless or lead to an absurd result.”).

stage. Even a spending limit that tried to address this issue by, say, allowing for investigations where there was reasonable suspicion that the target was out of compliance with state marijuana laws would tie the Justice Department's hands in many cases.⁶⁶

On the other hand, an appropriations restriction that allowed the DEA to investigate marijuana providers in reform states would raise a tricky problem of its own: how would a federal prosecutor's claim that someone was operating on the wrong side of state law be resolved? The most plausible answer—at a federal criminal trial—would have to overcome the fact that compliance with state marijuana laws is not a defense under the CSA. Ever since the DOJ released its enforcement memo in 2009, federal medical marijuana defendants have argued they should be allowed to introduce evidence of compliance with state law as a defense. But federal courts have uniformly excluded the defense.⁶⁷ As a result, there has been no avenue to test DOJ claims of noncompliance with state law, even in cases where the evidence of compliance seems to be pretty strong.⁶⁸ The addition of a spending provision would certainly strengthen the argument that the issue of a federal defendant's state-law compliance should go to the jury. But without an affirmative defense in the CSA itself, this would still be an awkward solution at best. Ultimately, a federal spending restriction would seem to require choosing between a number of unsatisfactory options: engrafting a limited “state compliance” defense onto the federal law, blocking all prosecutions where a defendant merely claimed state compliance, or taking the federal government's word and leaving federal

66. If the DEA received an anonymous tip that a state marijuana licensee was selling to children or a front for distributing other drugs, for example, it would not have reasonable suspicion and could not spend any money to follow up on the tip. *See Florida v. J.L.*, 529 U.S. 266, 274 (2000) (finding that an anonymous tip standing alone did not give rise to reasonable suspicion). The risk that a pretrial spending restriction would deter legitimate investigations is heightened by the Anti-Deficiency Act, which can result in criminal liability for an official who makes an expenditure that has not been authorized by Congress. 31 U.S.C. § 1341 (2012). *See also* J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1234 (1989) (discussing the Anti-Deficiency Act, “which prohibits any officer or employee of the United States from making expenditures or incurring obligations either in excess of available appropriations or in advance of appropriations, unless he has legal authorization for making them”).

67. *See, e.g., United States v. Stacy*, 696 F. Supp. 2d 1141, 1145 (S.D. Cal. 2010).

68. For example, federal medical marijuana defendant Charlie Lynch was unable to raise compliance with state law as a defense. At sentencing, however, the judge “talked at length about what he said were Mr. Lynch's many efforts to follow California's laws on marijuana dispensaries.” Solomon Moore, *Prison Term for a Seller of Medical Marijuana*, N.Y. TIMES, June 12, 2009, at A18.

marijuana defendants who claimed to be complying with state law defenseless.

To be sure, Congress could go further and stop the Department of Justice from spending any money on marijuana cases in states with medical marijuana laws. Short of that, however, it might not be possible to completely get around the chicken-and-the-egg problem of preventing federal agents and prosecutors from spending money on some, but not all, medical marijuana investigations.

B. An Affirmative Defense Based on Compliance with State Law

A second group of federal reform proposals would carve out exemptions for state-legal marijuana activity from federal prosecution. The Truth in Trials Act, for example, would create “an affirmative defense to a prosecution or proceeding under any federal law for marijuana-related activities” for a defendant who could establish by a preponderance of the evidence that his “activities comply with State law regarding the medical use of marijuana.”⁶⁹ Other variants do not use affirmative defense language, instead stating that federal marijuana laws simply do not apply to state-compliant activity, potentially requiring the government to prove noncompliance with state law in its case-in-chief. The Respect State Marijuana Laws Act provides that federal marijuana laws “shall not apply to any person acting in compliance with State laws relating to the production, possession, distribution, dispensation, administration, or delivery of marijuana.”⁷⁰ A provision of the States’ Medical Marijuana Patient Protection Act would shield those “authorized by a State or local government, in a State in which the possession and use of marijuana for medical purposes is legal from producing, processing or distributing marijuana for such purposes.”⁷¹

Unlike an appropriations restriction, these proposals would give marijuana users and providers more than just temporary protection. By amending federal drug laws, these bills would unquestionably apply to any conduct that takes place while they are in place, even if they were later repealed. They would also avoid the cart-before-the-horse problem that comes with spending provisos since there would be a legislatively established process for determining state compliance.

By making federal immunity contingent on compliance with state law, however, these proposals present their own set of challenges. First, they would inevitably spawn difficult litigation over what con-

69. H.R. 710, 113th Cong. (1st Sess. 2013).

70. H.R. 1523, 113th Cong. (1st Sess. 2013).

71. H.R. 689, 113th Cong. (1st Sess. 2013) (exempting from the Controlled Substances Act people who were “obtaining, manufacturing, possessing, or transporting within their State marijuana for medical purposes, provided the activities are authorized under State law”).

stitutes “compliance” with state law (or engaging in activities “authorized” by state law). In the case of users, this may be easy enough to answer. But, in most medical marijuana states, marijuana manufacturers and sellers are subject to a laundry list of state and local regulations.⁷² A seller who failed to abide by packaging requirements or who sold marijuana to an underage customer on a single occasion would be out of compliance with state law, at least with respect to the affected sales. Would errors like this leave the seller open to federal prosecution, or would substantial compliance with state law suffice? Would noncompliance infect the legitimacy of a defendant’s entire operation or would the defense apply on a per-transaction basis?

Second, wherever the compliance line was drawn, the federal prosecution of noncompliant state licensees would often be at cross-purposes with state regulations. The risk of severe federal criminal penalties (enacted to enforce marijuana prohibition) would, inevitably, undermine the state’s penalty system (enacted to regulate a legal marketplace).⁷³ Marijuana operators would have to account for the fact that a misstep could result in a lengthy federal drug sentence. This would interfere with state regulatory efforts by keeping prices artificially high and, more important, making state-level enforcement more difficult. A marijuana business owner who might otherwise be inclined to self-report a regulatory violation if the penalty were a small fine would have a strong incentive to do everything in her power to hide it if there were a chance the penalty would be a federal prison sentence.

C. Letting States Opt Out of Federal Marijuana Laws

The third category of proposals would let states that met certain requirements opt out of federal marijuana prohibition laws through a waiver system. Opt-out proposals have not yet gained momentum in Congress, but a handful of prominent commentators have recently offered the idea as a politically viable middle ground between complete federal legalization and more limited measures like appropriations limits.⁷⁴ Mark Kleiman and, separately, Erwin Chemerinsky,

72. See, e.g., 1 COLO. CODE REGS. § 212-2 (2014).

73. See, e.g., Paul J. Larkin Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 746 (2014) (arguing against the use of criminal law to enforce a regulatory regime because “[t]he function of the criminal law . . . is to enforce [a] moral code” while “the function of the regulatory system is to efficiently manage components of the . . . economy”).

74. See, e.g., Chemerinsky et al., *supra* note 19, at 114 (proposing a waiver program as “a more incremental” step “[s]ince Congress does not yet appear inclined to completely end or even to significantly curtail the federal prohibition of marijuana”); see also, e.g., Stuart Taylor Jr.,

Jolene Faran, Allen Hopper, and Sam Kamin, have proposed variations on the idea of letting states opt out of a federal marijuana law. Chemerinsky's group recommends that the federal government adopt "either a permissive or cooperative federalism approach" that would allow "states meeting specified federal criteria to opt out of the CSA provisions relating to marijuana."⁷⁵ The permissive federalism version would entail granting states "temporary, revocable waivers" from federal marijuana laws.⁷⁶ A cooperative federalism scheme would go beyond revocable waivers by letting "state law govern[] marijuana enforcement within opt-out states so long as the states comply with federal guidelines."⁷⁷ Kleiman, who was a consultant to Washington State on implementing its legalization law,⁷⁸ suggests that existing federal law might already allow the Attorney General to enter into contracts that would require "the state and its localities to vigorous[ly] enforce[] against [marijuana] exports in return for federal acquiescence in intra-state sales regulated and taxed under state law."⁷⁹ He argues, however, that amending federal law to permit state "cannabis policy waivers would be far cleaner conceptually" than contractual agreements that "would leave the activity in state-regulated markets illegal under federal laws, albeit with some assurance that those laws would not be enforced."⁸⁰

Marijuana Policy and Presidential Leadership: How to Avoid a Federal-State Train Wreck, GOVERNANCE STUDIES AT BROOKINGS (Apr. 2013) (proposing a waiver policy).

75. Chemerinsky et al., *supra* note 19, at 114.

76. *Id.* at 115.

77. *Id.* at 116.

78. Patrick Radden Keefe, *Buzzkill*, NEW YORKER (Nov. 18, 2013), <http://www.newyorker.com/magazine/2013/11/18/buzzkill> (reporting on Kleiman's work advising Washington's implementation of marijuana legalization laws).

79. Mark A.R. Kleiman, *Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization*, 6 DRUG POL'Y ANALYSIS 1, 4 (2013). *See also* 21 U.S.C. § 873 (2012) (providing for cooperative enforcement agreements). Though a cooperative enforcement agreement could be drafted to operate to let states opt out of federal enforcement, it could also take a more limited form. For example, the Attorney General could implement a more formalized version of the DOJ's current prosecutorial guidance for marijuana. *See Taylor, supra* note 74, at 16–17 (proposing a contractual agreement the would require federal prosecutors "take no enforcement action against any state-licensed marijuana supplier unless the Attorney General (or a high-level designee) personally finds, in writing, that the supplier has violated state as well as federal law and that state and local authorities are unable or unwilling to correct the problem").

80. Kleiman, *supra* note 79, at 7.

Crafting a waiver policy would entail a number of “administrative complexities”⁸¹ about the sort of requirements states would have to meet to qualify and what the federal government could do to ensure compliance. Consider the Chemerinsky group’s proposal, for example. It would give states the opportunity to opt out of federal marijuana law by receiving certification from the Attorney General. Certification would be contingent on where state regulations and enforcement are “reasonably able to prevent” a number of problems, including the distribution of marijuana to minors, the diversion of marijuana to prohibition states, and violence in the market for marijuana.⁸² Without well-defined measurable targets, however, it would be difficult to effectively cabin the Attorney General’s discretion when determining whether a state has met its obligations. Open-ended goals like limiting the amount of marijuana that finds its way to other states are susceptible to wildly different interpretations.⁸³ But broad goals might be the only available option since it might not be possible to precisely measure—let alone set targets for—things like the leakage of marijuana from one state to the next or the number of sales to minors.

Dealing with noncompliant states would raise an additional challenge for any waiver policy because the federal government’s only obvious remedy for addressing noncompliance would be far from satisfying. Revoking a waiver from federal marijuana prohibition would simply move things back to square one—a state legalization law that is impossible to reconcile with federal prohibition. This distinguishes marijuana from the other regulatory regimes the Chemerinsky group points to as successful examples of a cooperative federalism. Under the Clean Air and Clean Water Acts, when state pollution plans do not live up to federal standards, the federal government puts its own regulations in place.⁸⁴ If a state fails to set up a health care exchange under the Affordable Care Act, the federal government fills the void with its own exchange.⁸⁵ If a state failed in its marijuana waiver obligations, however, the federal government would not substitute its own regulatory scheme. Instead, state failure would mean reverting to an essentially unenforceable federal prohibition. To be sure, if the waiver policy uniformly resulted in state compliance, the federal government’s remedy for failure would be a nonissue. But, in the event that a state did fall short, this would be a serious problem.

81. *Id.*

82. Chemerinsky et al., *supra* note 19, at 120–21 (2015).

83. *Cf.* Kleiman, *supra* note 79, at 7 (observing that “[t]he choice of outcome measures would be especially tricky” in any waiver system).

84. *See* Chemerinsky et al., *supra* note 19, at 117–18 (describing the Clean Air and Clear Water Acts as examples of cooperative federalism).

85. *Id.* at 118 (discussing the cooperative federalism elements of the Affordable Care Act).

Despite these challenges, some form of opt-out policy would create a level of certainty that would not be possible through the use of spending restrictions or affirmative defenses. It would eliminate the problem of trying to reconcile federal prohibition laws with state legalization while giving the federal government at least some measure of control over state marijuana reforms.⁸⁶ Perhaps most important, a waiver program would give state marijuana operators certainty that they would not face federal prosecution for conduct they engaged in while the waiver was in effect. State marijuana operators would not have to fear future prosecution for present state-compliant conduct (as in the case of appropriations provisos) or that a minor violation of state law could lead to a lengthy federal prison sentence (as in the case of an affirmative defense based on compliance with state law).

D. Federal Marijuana Regulation

Last but not least, Congress could rethink federal marijuana prohibition and enact its own set of marijuana regulations. If the goal is to eliminate the conflict between state and federal law entirely, removing marijuana from the Controlled Substances Act would be the most straightforward solution. This type of approach could include significant federal regulation of the legal marijuana market or not much regulation at all. Similarly, Congress could conceivably decide to leave federal prohibition in place in states that want it and directly regulate marijuana in states that have legalized. Or it could get rid of federal marijuana prohibition altogether, leaving states that want to ban the drug to do so on their own.

The only comprehensive proposal of this sort has come from Congressman Jared Polis with his Ending Federal Marijuana Prohibition Act.⁸⁷ Polis's bill would enact a range of changes to federal marijuana laws, chief among them being exempting marijuana from the Controlled Substances Act and then transferring enforcement authority over marijuana from the DEA to a newly renamed Bureau of Alcohol, Tobacco, Marijuana, Firearms, and Explosives.⁸⁸ Polis's bill would also add marijuana to two key federal alcohol statutes, the

86. Kleiman, *supra* note 79, at 8 (“When states exercise their constitutional prerogative to replace their own prohibitions with systems of regulation and taxation (clearly preferable, in terms of the purposes of the CSA and the international treaties, to the outright repeal of all cannabis laws which is the states’ undoubted right), then the federal government would be well advised to cooperate with the inevitable and attempt to manage, rather than trying to squelch, the resulting somewhat paradoxical situation of state-licensed and state-taxed violations of federal law.”).

87. H.R. 499, 113th Cong. § 101 (1st Sess. 2013).

88. *Id.*

Wilson Act and the Webb-Kenyon Act.⁸⁹ Though the federal government would issue permits for people who wanted to operate marijuana businesses under Polis's proposal, there would be a relatively open process for obtaining them.⁹⁰ This would leave most of the details of licensing and regulating marijuana businesses entirely with the states.

This brief overview (which leaves out many elements of Polis's bill) highlights the range of issues that any proposal for federal marijuana regulation would need to consider. Federal marijuana regulation could look a lot like alcohol regulation, as in Polis's bill, or it could be much more restrictive or (less likely) more open. As discussed below, the federal government could use its regulations to try to limit the size of marijuana businesses to combat commercialization or to very strictly police sales to minors itself.⁹¹ For purposes of putting state and federal marijuana laws on the same page, however, most of these details are unlikely to matter much. Even a relatively strict federal regulatory regime is likely to most effectively resolve the conflict between state marijuana reforms and federal law. This is because, regardless of the details, replacing federal prohibition with regulation would leave states free to decide to legalize marijuana without having to obtain a federal waiver or leaving state-legal marijuana businesses at risk of federal prosecution. In this sort of system, state legalization laws would not have to operate with federal prohibition lurking in the background.

89. *Id.* § 202.

90. *Id.* § 302 (describing the permit process).

91. I leave to the side the very difficult question of how medical marijuana laws should be treated in a federal regulatory scheme. This issue presents its own challenges because medicines are regulated under the Food, Drug, and Cosmetic Act—not just the Controlled Substances Act. Legalizing the drug for recreational purposes at the federal level would not necessarily answer how medical-only state laws should be addressed. Likewise, even if marijuana is legal for recreation, the government may want to specifically regulate the marketing of marijuana as a medicine. This might mean special restrictions or regulations on its sale as a medicine. Or it could mean letting some patients who use marijuana as a medicine receive insurance coverage. All of these are likely to be particularly thorny questions at both the state and federal level going forward since there is not a particularly good precedent for regulating a drug that is legally accepted for both medicine and recreation. *See, e.g.,* Kimani Paul-Emile, *Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy*, 19 CORNELL J. L. & PUB. POL'Y 691 (2010) (discussing the regulatory dissonance between drugs that are criminalized entirely, accepted as medicines but not for recreation, and accepted as medicines and for recreation).

III. ADVERTISING, COMMERCIALIZATION, AND FEDERAL MARIJUANA REFORM

While replacing federal marijuana prohibition with regulation might be the most effective way to bring federal law into line with state reforms, many observers believe this type of fundamental change to federal marijuana law is not politically viable as compared to other options.⁹² Nor is resolving the conflict between state and federal marijuana law the only goal policymakers should consider when thinking about federal marijuana law. Lawmakers and advocates who are opposed to or have mixed feelings about marijuana legalization are most obviously going to be concerned with more than just how to get out of the way of states that want to legalize the drug. At first glance, people in this camp might seem likely to most strenuously object to sweeping changes to federal marijuana laws. Between federal prohibition and regulation, an affirmative defense seems like an obvious compromise. But would a narrow approach to federal reform actually be in the best interest of marijuana prohibitionists and legalization agnostics?

To date, proposals in the appropriations and affirmative defense categories have enjoyed the most political momentum. This may have to do with the fact that a spending proviso or a limited affirmative defense to federal prosecution would do the least damage to federal marijuana laws. In both scenarios, Congress could leave the Controlled Substances Act and marijuana's Schedule I status unchanged by adopting limited exceptions. From a drafting perspective, these would be relatively simple changes. And from a political perspective, they might hold some appeal for tentative legislators—they give some measure of protection to state marijuana reforms without necessarily endorsing the idea of legalization. For similar reasons, most observers also view a waiver or opt-out program as more politically promising than a proposal like Polis's. As Mark Kleiman put it, “[g]ranting the Attorney General the authority to issue conditional and revocable (or renewable) waivers would constitute a far less drastic devolution of power to the states than amending the CSA to give unconditional deference to state marijuana-legalization legislation.”⁹³

In comparison to state waivers, affirmative defenses, and appropriations provisos, a proposal like Polis's would represent the biggest break from federal marijuana prohibition. Granting waivers would allow for a logistically easy return to nationwide federal marijuana prohibition. By contrast, replacing federal prohibition with a regula-

92. *E.g.*, Chemerinsky et al., *supra* note 19, at 114 (“Congress does not yet appear inclined to completely end or even to significantly curtail federal prohibition of marijuana.”).

93. Kleiman, *supra* note 79, at 6.

tory system would incorporate the idea of state marijuana legalization into federal law in a way that would make it hard to turn back. In this sense, federal marijuana regulation would be a concession to the idea that existing state-level medical and recreational marijuana laws are not going anywhere and that state marijuana legalization is a legitimate policy option. It is understandable that many prohibitionists might not yet be ready to make this sort of allowance, especially when most elected officials continue to oppose marijuana legalization.⁹⁴ But holding onto the hope that political winds will shift—that instead of continuing to pass reforms, states will soon begin repealing existing medical and recreational marijuana laws—is not cost free. If legalization opponents do not constructively engage in the dialogue about how to fix federal marijuana laws, they risk ending up on the sidelines. If legalization opponents were to accept that changing federal law to account for state reforms is inevitable, however, they might find that more comprehensive reform could be in their interest as well. Thinking about what drives opposition to marijuana legalization shows why this might be so.

While legalization skeptics have cited a range of concerns, perhaps chief among them is the specter of a large-scale commercial marijuana industry.⁹⁵ Leading marijuana legalization opponent Kevin Sabet, for example, argues that legalization would result in a large commercial marijuana industry that would invest heavily in promoting and advertising marijuana.⁹⁶ Sabet envisions a world in which “Big Marijuana” is dedicated to “creating addicts” and “targeting the young.”⁹⁷ To be sure, legalization opponents worry about more than just the commercialization of marijuana. Legalization in any form would reduce prices and increase youth access.⁹⁸ But commercialization has emerged as the leading argument against legalization. As former Secretary of Health Education and Welfare Joseph A. Califano Jr. put it, “not only would legalized drugs be more openly available . . . but of even greater damage to our children would be the commercial reality that Madison

94. See Wing, *supra* note 56 (“Out of 50 governors and 100 U.S. Senators only one has announced support for full legalization of marijuana.”).

95. See, e.g., Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OR. L. REV. 1029, 1031–32 (2013) (discussing the argument that legalization marijuana would result in a large commercial marijuana industry).

96. Kevin A. Sabet, *A New Direction? Yes. Legalization? No. Drawing on Evidence to Determine Where to Go in Drug Policy*, 91 OR. L. REV. 1153, 1173–74 (2013).

97. Kevin A. Sabet, Op-Ed., *Marijuana Is Now Big Business*, N.Y. TIMES: ROOM FOR DEBATE (Nov. 10, 2014, 1:45 PM), <http://www.nytimes.com/roomfordebate/2014/06/05/did-colorado-go-too-far-with-pot/marijuana-is-now-big-business>.

98. Sabet, *supra* note 96, at 1156–57.

Avenue marketers would be free to glamorize substances like marijuana.⁹⁹ No doubt, legalization opponents would prefer to return to nationwide marijuana prohibition. But if, as I argue above,¹⁰⁰ that is not a realistic option, federal regulations aimed at limiting commercialization to the extent possible might be their second-best alternative.

Though perhaps counterintuitive, the options for reforming federal marijuana law that seem to be the most prohibition friendly (spending provisos and affirmative defenses) are actually likely to give the federal government *less* control over marijuana regulation than would a more dramatic move. Preventing the federal government from spending money to prosecute people who comply with state marijuana laws or granting an affirmative defense based on state compliance would effectively cede the details of legalization entirely to the states. Although anyone who ran afoul of state law would risk tough federal criminal penalties, states would have complete control over how much (or how little) to regulate the marijuana market. A state like California, where medical marijuana dispensaries are legal but entirely unregulated at the state level,¹⁰¹ would enjoy as much freedom as a state with a finely tuned regulatory regime.

By comparison, although a waiver policy would give state legalization laws more legitimacy than an appropriations restriction or affirmative defense law, it would also give the federal government much more control over shaping state law. The federal government could demand state regulations meet certain standards in order to receive a waiver and then make renewals contingent upon satisfactory state-level enforcement. As a result, legalization skeptics would almost certainly find more success in furthering some of their goals through a waiver program than they would if Congress were to adopt yearly hands-off appropriations riders or add a state-law-compliance-based affirmative defense to the federal code.

Federal regulation of the marijuana industry would allow for even more federal control. The federal government could retain federal prohibition in states that want it, while simultaneously granting federal manufacturing and retail licenses in legalization states. Federal licensure would give the federal government a number of possible methods for containing marijuana commercialization. It could limit federal retailers to a single license at a single location so that there is no possibility of a marijuana version of “BevMo.” It could strictly limit

99. JOSEPH A. CALIFANO JR., *HIGH SOCIETY* 128 (2007).

100. *See supra* Part I.

101. *See, e.g.*, Michael Vitiello, *Why the Initiative Process Is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215*, 43 *McGEORGE L. REV.* 63, 69–70 (2012) (discussing the lack of state medical marijuana regulations in California).

the amount of marijuana each licensee could produce annually, in effect resulting in a marijuana market made up exclusively of craft beer-sized manufacturers.¹⁰² On this point, it is worth noting that the CSA already has a quota system for Schedule I and II substances in place.¹⁰³ The existing quota structure is designed to limit drug production to an amount commensurate with the “medical, scientific, research, and industrial needs of the United States.”¹⁰⁴ But quotas could also be used to limit the size of commercial entities that sell marijuana. And, in contrast to a waiver regime, directly regulating the market would give the federal government enforcement power over licensees. In sum, if “Big Marijuana” is one’s biggest concern about state marijuana legalization *and* if state legalization cannot be stopped, then federal regulations that would strictly limit the size of commercial marijuana enterprises might hold a lot of appeal.

While federal regulation or a state waiver policy would give the federal government much more control over state legalization schemes than the current unenforceable federal prohibition or a modest affirmative defense statute, advertising is likely to remain a sticking point for marijuana legalization opponents.¹⁰⁵ Federal marijuana prohibition may not be able to block state legalization laws, effectively ceding all regulatory decisions to states that decide to legalize. Federal prohibition does, however, allow for a complete ban on marijuana advertising because there is no First Amendment right to advertise the sale of an illegal good. Indeed, federal law actually makes it a crime to advertise marijuana or any other Schedule I drug.¹⁰⁶ To date, the federal government has not targeted marijuana advertising in its enforcement efforts in legalization states.¹⁰⁷ But so long as marijuana

102. Mark Kleiman described the potential for state quotas to limit the size of marijuana business in a white paper advising Washington State on its state marijuana regulations. See MARK A.R. KLEIMAN, *ALTERNATIVE BASES FOR LIMITING CANNABIS PRODUCTION* 8 (2013).

103. 21 U.S.C. § 826(a) (2012) (requiring the Attorney General to “determine the total quantity and establish production quotas for each basic class of controlled substance in schedules I and II . . . to be manufactured each calendar year to provide for the estimated medical, scientific, research, and industrial needs of the United States”).

104. *Id.*

105. Sabet, *supra* note 96, at 1173 (“In the United States, a country obsessed with commercialization in the name of the First Amendment, legalization is sure to be an even riskier proposition.”).

106. 21 U.S.C. § 843(c) (2012).

107. *Cf.* Benjamin B. Wagner & Jared C. Dolan, *Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California*, 43 MCGEORGE L. REV. 109, 110 (2012) (“Businesses now openly sell marijuana and advertise their services in the newspaper, on the radio and on television [in California].”).

remains illegal federally, the DOJ could conceivably amend its prosecutorial guidance to advise prosecutors to target marijuana advertising while otherwise permitting state-legal marijuana businesses. Moreover, keeping marijuana illegal at the federal level strengthens the First Amendment case for more rigorously enforced state-level advertising bans where the drug has been legalized,¹⁰⁸ though the issue has not yet been tested in court.¹⁰⁹

If federal law were to formally recognize state legalization via waivers or affirmative regulation, advertising bans would be on very shaky ground. The framework for addressing commercial advertising restrictions dates back to the Supreme Court's 1980 *Central Hudson* decision.¹¹⁰ Under *Central Hudson*, the government can ban advertising that is deceptive or that is "related to illegal activity."¹¹¹ Non-misleading advertisements for legal goods can only be prohibited if the government is able to (1) claim a substantial interest in restricting the speech, (2) demonstrate that its restriction directly and materially advances its interest, and (3) show that the restriction is narrowly tailored to that interest.¹¹² Though early decisions applying *Central Hudson* indicated that restrictions on vice advertisements—for gambling, alcohol, and so on—might be permitted, the Court has since "rejected the idea that the *Central Hudson* analysis is more lenient for government regulation of vice product advertising."¹¹³

Government restrictions on vice advertisements under *Central Hudson* typically fail the requirements that the restriction would

108. Joseph M. Cabosky, *The Advertising Regulation "Green Zone,"* 5 CHARLOTTE L. REV. 1, 33 (2014) (observing that the federal prohibition on marijuana might provide a basis for upholding Denver's ban on outdoor marijuana advertising).

109. A group of publishers sued Colorado over its advertising ban but lacked standing to pursue the claim because there was no indication retail marijuana outlets had sought to buy advertising from them. *Trans-High Corp. v. Colo.*, No. 14-cv-00370—MSK, 2014 WL 585367 (D. Colo. Feb. 14, 2014) (denying a motion for preliminary injunction but granting leave to file an amended complaint because "[t]here is no allegation that any advertiser has been discouraged from seeking to place advertisements with either of the Plaintiffs. Thus, as currently drafted, the Complaint does not contain a colorable showing sufficient for the Plaintiffs to pursue the rights of advertisers.").

110. *Cen. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

111. *Id.* at 563–64.

112. *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 298 (4th Cir. 2013) (describing the *Central Hudson* test).

113. Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL'Y 267, 283 (2003).

actually advance the government's interest and that there aren't narrower, non-speech restrictive alternatives. This can be true even where advertisements appear to target an audience that cannot legally buy the product being advertised. A recent Fourth Circuit decision overturning a Virginia ban on advertising alcohol in college student newspapers is instructive. The ads could not be restricted on the theory that they involve illegal activity because "alcohol advertisements—even those that reach a partially underage audience—concern the lawful activity of alcohol consumption."¹¹⁴ Though the court granted that the government has a substantial interest in combatting underage drinking, it concluded that the ban was not narrowly tailored because "roughly 60% of the Collegiate Times's readership is age 21 or older and the Cavalier Daily reaches approximately 10,000 students, nearly 64% of whom are age 21 or older."¹¹⁵ *Central Hudson* leaves room for some limits on advertisements on legal goods, of course. A ban on alcohol advertisements in high school newspapers would likely withstand a First Amendment challenge.¹¹⁶ But marijuana prohibitionists' concerns that legalization might mean having to allow a great deal of marijuana advertising are not misplaced.

Of course, there might be creative ways to directly limit some marijuana advertising in the absence of federal prohibition. The federal government could attempt to devise a legal hook for advertising limits by enacting a prohibition that it does not intend to enforce—for example, criminalizing the *use* of marijuana while licensing its manufacture and sale and allowing its possession. In theory, this may allow for bans on marijuana advertising that promoted use. Or if the federal government legalized only the intrastate sale of marijuana, it could try banning advertisements that crossed state lines. Unless the Supreme Court were to reassess its view of the commercial speech doctrine, however, it may be impossible to put any significant restrict-

114. *Educ. Media Co. at Va. Tech, Inc.*, 731 F.3d at 299.

115. *Id.* at 301.

116. Though it is worth noting that, in light of a recent Second Circuit case holding that a prosecution for promoting off-label uses of prescription drugs violates the First Amendment, even long-standing commercial speech regulations are on potentially shaky ground. *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012). *See also, e.g.*, Constance E. Bagley et al., *Snake Oil Salesmen or Purveyors of Knowledge: Off-Label Promotions and the Commercial Speech Doctrine*, 23 CORNELL J. L. & PUB. POL'Y 337, 339 (2013) ("The Second Circuit's reasoning has the potential to undermine the constitutionality of numerous areas of federal regulation, including regulation of the offer and sale of securities under the Securities Act of 1933; the solicitation of shareholder proxies and the periodic reporting under the Securities Exchange Act of 1934; mandatory labels on food, tobacco, and pesticides; and a wide range of privacy protections.").

ions on marijuana advertising in the absence of federal marijuana prohibition.

For this reason, First Amendment concerns may lead prohibitionists to view appropriations restrictions as the most acceptable method for reconciling federal and state marijuana laws. Forbidding the executive to spend money interfering with state marijuana reforms would leave federal marijuana prohibition untouched, thereby almost certainly permitting bans on advertising. An affirmative defense based on compliance with state marijuana laws or a state waiver policy might also leave room for advertising bans, though this is less certain. If the federal government continued to ban marijuana sales with an affirmative defense, it is hard to predict whether the activity would still be considered illegal under *Central Hudson*. Even a federal waiver system might allow for an argument for the constitutionality of advertising bans. Imagine a law that let states opt out of most federal marijuana laws but not the federal law forbidding advertisements. The federal government could also make its waivers contingent on a state-level advertising ban. It is *possible* that this sort of scheme would be enough to keep marijuana sales in the “illegal activity” category for First Amendment purposes.

Those concerned by the idea of marijuana advertising should not be too quick to discount federal marijuana regulation, however. Though federal marijuana regulations would make it difficult to directly limit marijuana advertising to adults, they might still give prohibitionists the most effective tools for limiting the sort of commercialization that is likely to result in extensive advertising.¹¹⁷ Indeed, the Supreme Court has cited the availability of “non-speech related” policies similar to the quota options discussed above when striking down advertising restrictions.¹¹⁸ In finding a Food and Drug Administration ban on advertising compounded drugs unconstitutional, for example, the Court observed that the federal government could limit the incentive to advertise by “capping the amount of any particular compounded drug . . . that a pharmacist or pharmacy may make or sell in a given period of time.”¹¹⁹

While marijuana legalization opponents might prefer not to think about how to change marijuana laws, they may soon be forced to. What sort of federal accommodation of state law might best combat marijuana commercialization: a strict federal regulatory scheme or a

117. JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 155 (2012) (“The extent of advertising would depend in part on whether the legal marijuana industry is dominated by a few large corporations with national advertising budgets.”).

118. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 372 (2002).

119. *Id.*

system that would provide for the best chance of constitutionally banning marijuana advertising but leave all other details of marijuana regulation to the states? This is the sort of question prohibitionists should be considering sooner rather than later.

CONCLUSION

With most politicians still wary of marijuana reforms, Congress is unlikely to reconsider federal marijuana prohibition this year or the next. But while a change in federal marijuana law may not be imminent, it is almost certainly inevitable. Almost half of the states allow for the medical use of marijuana, and four states have passed laws to legalize the drug entirely. Due to resource constraints, the federal government has proven itself unable to effectively block these state laws by enforcing its own prohibition. As a result, in states that have legalized the drug, federal marijuana prohibition continues in name only. Unless states suddenly reverse course and begin recriminalizing marijuana or the Supreme Court finds that state legalization laws are preempted by the Controlled Substances Act—both exceedingly unlikely events—federal marijuana prohibition’s days are numbered. This Article compares different avenues for reforming federal marijuana laws, with the goal of highlighting some of the considerations that might drive the debate in the coming years.

To date, efforts to reconcile federal marijuana law with state reforms have focused mostly on relatively narrow proposals, like forbidding the DOJ from spending money to interfere with state marijuana laws or establishing a limited affirmative defense to federal marijuana prosecutions based on compliance with state law. At first glance, these proposals might seem most likely to be palatable to legalization opponents since they would do the least cosmetic damage to existing law. But more far-reaching reforms, like a state waiver system or federal marijuana regulation, could actually give the federal government more control in addressing prohibitionists’ primary concern: marijuana commercialization. Meanwhile, legalization supporters will be less likely to settle for half-measures when it comes to federal marijuana reform as their political strength continues to rise.

While legalization opponents may understandably be hesitant to concede ground on scaling back federal prohibition, if they wait too long, they may find themselves on the sidelines, with the content of federal marijuana reforms left almost entirely in the hands of legalization proponents, much like the state legalization laws themselves.