

BOOK REVIEW

REFLEXIVE FEDERALISM

MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE.
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PAUL J. LARKIN, JR.*

State and federal law once clearly and uniformly treated marijuana as contraband.¹ The current legal status of that drug nationwide, however, is anything but clear and uniform. The federal government still outlaws cannabis altogether.² Since 1996, however, more than thirty states have decided to permit the regulated sale and use of marijuana for medical and recreational purposes.³ The

* John, Barbara & Victoria Rumpel Senior Legal Research Fellow, The Heritage Foundation; M.P.P., George Washington University, 2010; J.D., Stanford Law School, 1980; B.A., Washington and Lee University, 1977. The views expressed are my own and do not represent any official position of The Heritage Foundation. GianCarlo Canaparo, Bertha K. Madras, John G. Malcolm, and Zack Smith provided helpful comments on an earlier version of this Article. Any mistakes are mine.

In the interest of full disclosure, I was one of the lawyers who represented the United States in a case cited below: *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993).

1. RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 51 (Lindsmith Ctr. 1999) (1974).

2. *See, e.g.*, 21 U.S.C. § 812 (2018).

3. Since 1996, thirty-six states and the District of Columbia have revised their laws to permit medicinal use of cannabis. *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 10, 2020), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/8FTQ-THGR>]; Jeremy Berke, Shayanne Gal & Yeji Jesse Lee, *All the states where marijuana is legal—and 5 more that just voted to legalize it in November*, BUS. INSIDER (Jan. 7, 2021), <https://www.businessinsider.com/legal-mariju->

result is this: Three decades ago, the marijuana laws were clear to everyone and the same everywhere, but to some people they were misguided. Today, those laws are anything but clear to anyone and differ widely, but to some people they are still misguided—albeit to different people for different reasons.

Professor Jonathan Adler's recent book *Marijuana Federalism: Uncle Sam and Mary Jane*⁴ is a valuable and timely addition to the discussion of the two subjects conjoined in its title.⁵ *Marijuana Federalism* is a collection of essays by numerous scholars who approach from different perspectives—legal, policy, and otherwise—the issue of whether cannabis should be regulated by the federal or state governments.⁶ The book discusses the legal and practical problems that the incongruity between federal and state law causes the public

ana-states-2018-1?r=US&IR=T [https://perma.cc/59SY-HST4]. There is considerable regulatory variation among those states; see, e.g., DRUG POLICY AND THE PUBLIC GOOD 245–54 (Thomas Babor et al., ed., 2d ed. 2018); Rosalie Liccardo Pacula et al., *Words Can Be Deceiving: A Review of Variation among Legally Effective Medical Marijuana Laws in the United States*, 7 J. DRUG POL'Y ANALYSIS 1 (2014).

4. MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE (Jonathan H. Adler ed., 2020) [hereinafter ADLER].

5. For some earlier stabs at the subject, see Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015); Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Measures*, 65 CASE W. RES. L. REV. 567 (2015); Brianne J. Gorod, *Marijuana Legalization and Horizontal Federalism*, 50 U.C. DAVIS L. REV. 595 (2016); Todd Grabarsky, *Conflicting Federal and State Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1 (2013); Mark A.R. Kleiman, *Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization*, 6 J. DRUG POL'Y ANALYSIS 1 (2013); Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OR. L. REV. 1029 (2013).

6. Jonathan H. Adler, *Our Federalism on Drugs*, in ADLER, *supra* note 4, at 1–13; Julie Andersen Hill, *Banks and the Marijuana Industry*, in ADLER, *supra* note 4, at 139–54; William Baude, *The Contingent Federal Power to Regulate Marijuana*, in ADLER, *supra* note 4, at 171–84; Angela Dills et al., *The Effect of State Marijuana Legalizations*, in ADLER, *supra* note 4, at 35–84; John Hudak & Christine Stenglein, *Public Opinion and America's Experimentation with Cannabis Reform*, in ADLER, *supra* note 4, at 15–34; Robert A. Mikos, *Murphy's Mistake, and How to Fix It*, in ADLER, *supra* note 4, at 103–22; Zachary S. Price, *Federal Nonenforcement: A Dubious Precedent*, in ADLER, *supra* note 4, at 123–38; Cassandra Burke Robertson, *Legal Advice for Marijuana Business Entities*, in ADLER, *supra* note 4, at 155–70; Ernest A. Young, *The Smoke Next Time: Nullification, Commandeering, and the Future of Marijuana Regulation*, in ADLER, *supra* note 4, at 85–102.

and businesses in the cannabis industry, and it assumes the burden of trying to make sense of the law by encouraging us to rethink it entirely. Its virtue lies, not only in its content (which is excellent), but also in its approach (ditto). *Marijuana Federalism* focuses on the implications of an unusual late twentieth and early twenty-first century phenomenon: namely, the growth of distinct and antagonistic federal and state approaches to the regulation of the drug botanically known as cannabis but popularly called marijuana.

The issues raised by the intersection of those two subjects, along with the excellent treatment given them by the contributing essayists, are the primary contributions of *Marijuana Federalism* to contemporary scholarship. After all, the Framers were well aware of (and persuaded by) the potential benefits of a federalist system,⁷ cannabis has been around for thousands of years,⁸ and the number of studies, books, and articles on marijuana policy or federalism is enormous.⁹ What is novel is the recent and unprecedented decision by a majority of states to abandon the approach that they and the federal government had pursued in common for more than eighty

7. See, e.g., *New York v. United States*, 505 U.S. 144, 155–66 (1992); ALISON L. LA-CROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2011).

8. BRITISH MED. ASS'N, *THERAPEUTIC USES OF CANNABIS* 7 (1997); Sunil K. Aggarwal et al., *Medicinal use of Cannabis in the United States: Historical perspectives, current trends, and future directions*, 5 J. OPIOID MGMT. 153, 157 (2009); LESLIE L. IVERSEN, *THE SCIENCE OF MARIJUANA*, 12–13, 17–18, 21–24, 116–121 (2d ed. 2008); Solomon H. Snyder, *Foreword* to IVERSEN, *supra*.

9. For discussions of marijuana policy, see, for example, WILLIAM J. BENNETT & ROBERT A. WHITE, *GOING TO POT: WHY THE RUSH TO LEGALIZE MARIJUANA IS HARMING AMERICA* (2015); *POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION* (Mitch Earleywine ed., 2006); MARK A. R. KLEIMAN, *MARIJUANA: COSTS OF ABUSE, COSTS OF CONTROL* (1989); ROBIN ROOM ET AL., *CANNABIS POLICY: MOVING BEYOND STALEMATE* (2010); *CONTEMPORARY HEALTH ISSUES ON MARIJUANA* (Kevin A. Sabet & Ken C. Winters eds., 2018); see generally Paul J. Larkin, Jr., *Introduction to a Debate: Marijuana: "Legalize, Decriminalize, or Leave the Status Quo in Place?"*, 23 BERKELEY J. CRIM. L. 73 (2018) (collecting authorities). For discussions of federalism, see, for example, SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (Reprint. Ed. 1998); *KEEPING THE COMPOUND REPUBLIC: ESSAYS ON AMERICAN FEDERALISM* (Martha Derthick ed., 2001); ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* (2001); EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY* (2007); JOSEPH F. ZIMMERMAN, *CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER* (2d ed. 2009).

years about how to regulate cannabis. How that development happened; what significance it has for federalism, drug policy, and the law; and what step forward is best—these questions raise important public policy issues. *Marijuana Federalism* brings together an impressive array of scholars to contribute to the debate over these issues.

The importance of having a free and intelligent debate over subjects like cannabis legalization cannot be said or emphasized enough. Too often today we see efforts made—ones that, lamentably, are sometimes successful—to prevent or shut down free discussion of both sides of a disputed issue. The one discussed in *Marijuana Federalism* deserves—indeed, needs—to be fully aired. For too long now, Congress has refused to address the conflict between federal and state law, preferring instead to hope that “this cup [will] pass from me.”¹⁰ I disagree with several of the arguments made by the contributors to *Marijuana Federalism*, and I believe that the book omits an important part of the federalism debate: namely, whether there are certain scientific or technical subject matters that should be in the hands of the federal government because only it has experts with the education, training, experience, and assets needed to best address a problem of that type. Nonetheless, I applaud the editor’s and essayists’ willingness to participate in the debate. Like *Marijuana Federalism*, this Book Review hopes to move that discussion forward.

The essays focus on different aspects of the issue. Rather than address each one seriatim, this Book Review will discuss them in the course of explaining where we are, the problems that we have, the solutions that *Marijuana Federalism* offers, and a proposal of my own. Accordingly, this Book Review is organized as follows: Part I will summarize the state of the law governing cannabis policy that has resulted from the decisions of a majority of states to go their own way. As Part II explains, the recent but widespread and now entrenched conflict between federal and state approaches to cannabis policy is a problem that only Congress can—and must—resolve.

10. *Matthew 26:39* (King James).

Part III will analyze the solutions that contributors to *Marijuana Federalism* have offered to rationalize the state of the law. Part IV will discuss an alternative approach that could supplement the ones discussed in the book. (Spoiler alert: Part IV will also explain the significance of the title of this review.¹¹)

I. THE CURRENT DISARRAY IN THE LAW

For most of the twentieth century, the federal government and all fifty states treated marijuana as contraband.¹² Beginning in the 1960s, however, our historic policy came under challenge. More and more college-age students experimented with marijuana and found it to be just as much an enjoyable intoxicant and social lubricant as alcohol was to their parents' generation.¹³ Over time, marijuana not only lost its taboo status, but also became a political symbol. On college campuses, openly smoking marijuana, like publicly burning draft cards, came to symbolize a generation rebelling against the Vietnam War, the status quo, and all things square.¹⁴

The appropriate treatment of marijuana was more than a subject of late-night dormitory raillery between buzzed collegians. Considerable public controversy arose regarding how to treat the drug.¹⁵ Some maintained that marijuana should remain outlawed because (among other reasons) it was a "gateway" drug—that is, one that progressively leads to the use of even more dangerous ones, such

11. If you cannot wait, read the last four paragraphs immediately preceding the Conclusion.

12. For a history of the law's treatment of marijuana, see BONNIE & WHITEBREAD, *supra* note 1.

13. See, e.g., Herbert J. Cross & Randall R. Kleinhesselink, *The Impact of the 1960s on Adolescence*, 5 J. EARLY ADOLESCENCE 517 (1985).

14. See DANIELLE DAVENPORT, CANNABIS INC.: THE JOURNEY FROM COMPASSION TO INDUSTRY CONSOLIDATION 52 (2019) ("It wasn't long before these two grassroots movements became indissolubly linked: Marijuana activism was subsumed into the antiwar movement, and the drug was omnipresent at rallies and antiwar protests across the country. If it wasn't already, cannabis had become fiercely political.").

15. For recent accounts of that period and later developments, see JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW (2d ed. 2016); Dills et al., *supra* note 6, at 37–42.

as heroin. Others responded that marijuana should be legalized—that is, altogether removed from the penal code—or at least decriminalized—that is, treated as a minor infraction—on the ground that it was a relatively mild intoxicant and produced far less social harm than alcohol.¹⁶ Respected academics and commentators argued in favor of reconsidering our marijuana policy.¹⁷ Even a commission appointed by President Richard Nixon recommended that the nation reexamine its longstanding treatment of cannabis as a dangerous drug (a recommendation that he immediately rejected).¹⁸ Some states and locales even took a few steps to reduce the seriousness of marijuana crimes, such as treating the possession of small amounts of cannabis as the equivalent of a traffic offense.¹⁹ A policy that the states and federal government had endorsed for decades appeared to have a very uncertain future.

Federal law, however, endured and remained clear. No one could lawfully import, cultivate, sell, or own marijuana, and no physician

16. See Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453, 461 n.30 (2015) (discussing “legalization” versus “decriminalization”).

17. For contemporary accounts of the debate by participants and observers, see U.K. HOME OFF., ADVISORY COMMITTEE ON DRUG DEPENDENCE, WOOTTON REP. (1968); E.R. BLOOMQUIST, MARIJUANA (1968); MARIJUANA (Erich Goode ed., 1969); LESTER GRINSPOON, MARIJUANA RECONSIDERED (1971); JOHN KAPLAN, MARIJUANA: THE NEW PROHIBITION (1970); HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 333 (1968) (“A clearer case of misapplication of the criminal sanction would be difficult to imagine.”); JOHN ROSEVEAR, POT: A HANDBOOK OF MARIJUANA (1967); MICHAEL SCHOFIELD, THE STRANGE CASE OF POT (1971); THE MARIJUANA PAPERS (David Solomon ed., 1968); Geoffrey Richard Wagner Smith, Note, *Possession of Marijuana in San Mateo County: Some Social Costs of Criminalization*, 22 STAN. L. REV. 101, 103 (1969) (“In the same week that the President of the United States declared an all-out war on marijuana smuggling, . . . the Wall Street Journal reported discussion in the business world on the potential profit in legalized marijuana.” (footnote omitted)).

18. See FIRST REP. OF THE NAT’L COMM’N ON MARIJUANA AND DRUG ABUSE, MARIJUANA: A SIGNAL OF MISUNDERSTANDING (1972); JOHN GELUARDI, CANNABIZ: THE EXPLOSIVE RISE OF THE MEDICAL MARIJUANA INDUSTRY 121 (2010) (noting Nixon’s rejection).

19. See JONATHAN P. CAULKINS ET AL., RAND CORP., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 1 (2015) (“[I]n the 1970s, 12 states removed or substantially reduced criminal penalties for possession of small amounts of marijuana.” (footnote omitted)).

could prescribe it to treat any disease.²⁰ The principal federal law governing marijuana, the Controlled Substances Act of 1970, placed marijuana in the same category of drugs as (for example) heroin, ones considered dangerous, addictive, and unnecessary for treatment.²¹ Working separately or in task forces, federal, state, and local vice officers (or, to use the vernacular, “narcs”) investigated cannabis offenses. Successful prosecutions could result in lengthy terms of imprisonment.²² The federal (and state) courts consistently rejected claims that the parallel treatment of marijuana and heroin was arbitrary and unconstitutional.²³ In short, everyone knew that marijuana distribution and possession was verboten. Indeed, it was precisely that knowledge that made publicly smoking cannabis into an unmistakable symbol of political and social protest by members of the Baby Boomer Generation.

20. *See, e.g.*, 21 U.S.C. § 841 (2018). From 1978 to 1992, the FDA established a small-scale “Investigational New Drug Compassionate Access Program” that allowed “patients whose serious medical conditions could be relieved only by marijuana to apply for and receive marijuana from the federal government.” Mark Eddy, Cong. Research Serv., *Medical Marijuana: Review and Analysis of Federal and State Policies*, No. RL33211, at 8 (Apr. 2, 2010), <https://fas.org/sgp/crs/misc/RL33211.pdf> [<https://perma.cc/5F9S-PK9F>]. The program was not a clinical trial of marijuana’s effectiveness with an eye toward ultimate approval, and the government closed the program to new applicants in 1992. *Id.*

21. The CSA assigns drugs to one of five schedules according to their potential benefits and risks. *See* 21 U.S.C. §§ 812, 841 (2018).

22. *See, e.g.*, *Hutto v. Davis*, 454 U.S. 370, 371, 375 (1982) (forty years’ imprisonment for possessing less than nine ounces of marijuana); *Gonzalez v. Texas*, 323 S.W.2d 55, 55 (Tex. Crim. App. 1959) (twenty-five years’ imprisonment for marijuana possession).

23. *See, e.g.*, *United States v. Fogarty*, 692 F.2d 542, 547–48 (8th Cir. 1982); *United States v. Kiffer*, 477 F.2d 349, 352–57 (2d Cir. 1973); *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1221–22 (9th Cir. 1972); *United States v. Scales*, 464 F.2d 371, 373–76 (6th Cir. 1972); *State v. Kells*, 259 N.W.2d 19, 24 (Neb. 1977); *State v. Leins*, 234 N.W.2d 645, 645–48 (Iowa 1975); *State v. Donovan*, 344 A.2d 401, 405–06 (Me. 1975); *Blincoe v. State*, 204 S.E.2d 597, 598–600 (Ga. 1974); *State v. Tabory*, 196 S.E.2d 111, 112–13 (S.C. 1973); *State v. Parker*, 256 A.2d 159, 160 (N.H. 1969); *Commonwealth v. Leis*, 243 N.E. 2d 898, 901–05 (Mass. 1969); *People v. Stark*, 400 P.2d 923, 926–28 (Colo. 1965) (all rejecting various claims that federal or state bans on marijuana distribution or possession are unconstitutional); *cf. Crane v. Campbell*, 245 U.S. 304, 307–08 (1917) (ruling that there is no federal constitutional right to possess or use alcohol).

In 1996, California changed all that. It went from being the first state to prohibit the distribution of cannabis to being the first state to legalize its use. Voters enacted a statewide initiative—Proposition 215, also called the Compassionate Use Act—that became the nation’s first state-law based medical marijuana program.²⁴ The initiative authorized cannabis to be grown, sold, and used to treat various medical problems.²⁵ Since then, more than thirty other states have followed suit with their own programs.²⁶ In fact, eleven states (including California) and the District of Columbia have also modified their criminal codes to allow cannabis use for purely recreational purposes.²⁷ Although federal law still prohibits the medical or recreational use of marijuana, more than seventy percent of the states have gone their separate ways.²⁸

Congress has left the substance of federal law unchanged since 1996, so cannabis distribution can still land someone in federal prison. There are legal restrictions, however, on what the federal government can do to enforce federal law. Since 2014, Congress has regularly passed appropriations bills containing a rider prohibiting the U.S. Department of Justice from halting state efforts to implement medical marijuana programs.²⁹ The riders clearly do not pro-

24. 2 CAL. HEALTH & SAFETY CODE § 11362.5 (West 2019). For a summary of the background to and early implementation of Proposition 215, see GELUARDI, *supra* note 18, at 35–47.

25. Paul J. Larkin, Jr., *Reconsidering Federal Marijuana Regulation*, 18 OHIO ST. J. CRIM. L. 99, 103 n.16 (2020).

26. *Id.* at 106.

27. Wayne Hall & Michael Lynskey, *Assessing the Public Health Impacts of Legalizing Recreational Cannabis Use: The U.S. Experience*, 19 WORLD PSYCH. 179, 179 (2020).

28. Larkin, *supra* note 25, at 106; *supra* note 3.

29. See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014); Continuing Appropriations Act, 2016, Pub. L. No. 114-53, § 104, 129 Stat. 502, 506 (2015); Further Continuing Appropriations Act, 2016, Pub. L. No. 114-96, 129 Stat. 2193 (2015); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015); Continuing Appropriations Act, 2017, Pub. L. No. 114-223, 130 Stat. 857, 908–20 (2016); Further Continuing Appropriations Act, 2017, Pub. L. No. 114-254, § 101, 130 Stat. 1005, 1005–06 (2016); H.J. Res. 99, Pub. L. No. 115-30, 131 Stat. 134 (2017); Consolidated Appropriations Act, 2017, Pub.

hibit all federal enforcement of the CSA's provisions outlawing marijuana distribution. Rather, they forbid the expenditure of appropriated funds only to "prevent" states from "implementing" state medical marijuana programs,³⁰ and, since violation of the riders is a felony, the courts must read their terms strictly.³¹ Nonetheless,

L. No. 115-31, 131 Stat. 135, 228 (2017); Continuing Appropriations Act, 2018, Pub. L. No. 115-56, §§ 103–04, 131 Stat. 1139, 1139–47 (2017); Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, 131 Stat. 1280 (2017); Further Additional Continuing Appropriations Act, 2018, Pub. L. No. 115-96, 131 Stat. 2044 (2017); Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, 132 Stat. 29 (2018); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2018, Pub. L. No. 115-141, § 538, 132 Stat. 351, 444–45 (2018); Continuing Appropriations Act, 2019, Pub. L. No. 115-245, §§ 101–103, 312 Stat. 3123, 3123 (2018); H.J. Res. 143, Pub. L. No. 115-298, 132 Stat. 4382 (2018); Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 101, 113 Stat. 10, 10 (2019); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 91, 138 (2019); Continuing Appropriations Act, 2020, Pub. L. No. 116-59, § 101, 113 Stat. 1093, 1093–94 (2019); Further Continuing Appropriations Act, 2020, Pub. L. No. 116-69, § 101, 133 Stat. 1134 (2019); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2020, Pub. L. No. 116-93, § 531, 133 Stat. 2385, 2433 (2019); Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 113 Stat. 2534 (2019).

30. See Consolidated and Further Continuing Appropriations Act, 2015, *supra* note 29, at § 538.

31. A government official who violates an appropriations law limitation can be criminally prosecuted for his actions under the Antideficiency Act. See 31 U.S.C. § 1341(a)(1)(A) (2018) ("An officer or employee of the United States Government or of the District of Columbia government may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation . . ."); 31 U.S.C. § 1350 (2018) ("An officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both."). The appropriations rider has the effect of a criminal law, which means it cannot be read broadly and any doubt as to its meaning must be resolved by application of the Rule of Lenity, even in a civil case. See, e.g., *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) (holding that "the rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them"); *Leocal v. Ashcroft*, 543 U.S. 1, 11–12 n.8 (2004) (explaining that if a statute has criminal applications, "the rule of lenity applies" to the Court's interpretation of the statute "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context"); *Scheidler v. Nat'l Org.*

whether to avoid breaking the law or for other (largely practical) reasons, the Justice Department officials have not aggressively enforced the CSA provisions prohibiting marijuana distribution since the riders went into effect.³² The result is that CSA's provisions dealing with cannabis are effectively on standby.³³

for Women, Inc., 537 U.S. 393, 408–409 (2003) (applying rule of lenity in civil case asserting claims under Hobbs Act); For a discussion of how far that prohibition reaches, see Paul J. Larkin, Jr., *Marijuana Edibles and “Gummy Bears”*, 66 BUFF. L. REV. 313, 356–65 & n.104 (2018).

32. On January 4, 2018, then-Attorney General Jeff Sessions decided to revisit the Obama Justice Department's CSA marijuana enforcement policy and stated that U.S. Attorneys should make charging decisions based on the seriousness of cannabis trafficking in their respective jurisdictions. See Memorandum from Jeff Sessions, Att'y Gen., U.S. Dep't of Just., on Marijuana Enforcement to All U.S. Att'ys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/W7MW-LMJT>]; Press Release, U.S. Dep't of Just., Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy> [<https://perma.cc/2ZKC-QZVC>]; cf. Charlie Savage & Jack Healy, *Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html> [<https://perma.cc/P7RX-XMPQ>]. Apparently, local U.S. Attorneys have decided to focus their attention elsewhere, perhaps (in part) for the practical reasons discussed *infra* note 33.

33. There are a host of practical considerations at work too. Congress cannot compel state legislators to revise their own laws or order state and local police officers to enforce federal law. See *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) (ruling that Congress cannot order a state to pass a state criminal law); *Printz v. United States*, 521 U.S. 898 (1997) (ruling that Congress cannot require state law enforcement officers to enforce a federal criminal law); *New York v. United States*, 505 U.S. 414 (1992) (ruling that Congress cannot order a state to adopt a federal regulatory regime as a matter of state law). Federal law enforcement agencies are on their own when it comes to enforcing the CSA. There is an insufficient number of federal agents in the principal federal agency devoted to the investigation of federal drug crimes—the Drug Enforcement Administration—for them to go it alone nationwide. See DRUG ENFORCEMENT ADMIN., STAFFING AND BUDGET (last accessed Mar. 18, 2020) (noting that, in 2019, the DEA had 10,169 total personnel, of whom 4,924 were federal law enforcement officers), <https://www.dea.gov/staffing-and-budget> [<https://perma.cc/S99B-26YS>]; Young, *supra* note 6, at 88 (noting the state and local law enforcement officers outnumber federal agents by a ratio of 10:1). The President or Attorney General could try to make up for the shortfall by reassigning other federal law enforcement officers to investigate federal

It is difficult to believe that anyone who voted for the CSA—let alone anyone who voted for the Constitution at the Convention of 1787 or in the Ratification Debates—believed that they were creating a system in which, as a practical matter, the states could hand out licenses to commit federal crimes. Yet, that is the law today. To call it odd does not adequately express the bizarre status of our cannabis policy. A “potential train wreck” is not too strong a description.³⁴

The states that liberalized their laws are not the only ones to blame for that discord; the federal government is guilty too. Professor Zachary Price makes that point well in his chapter in *Marijuana Federalism* entitled *Marijuana Nonenforcement: A Dubious Precedent*.³⁵ It turns out that the burgeoning cannabis industry we see today was not the product of California’s 1996 decision to legalize medical marijuana use. No, the widespread commercialization of marijuana did not occur for more than a decade afterwards. What triggered that phenomenon was a series of decisions by the Obama Justice

marijuana law violations. Yet, that would divert them from their everyday assignments, leaving other federal laws underenforced or unenforced entirely. See Paul J. Larkin, Jr., Essay, *A New Law Enforcement Agenda for a New Attorney General*, 17 GEO. J.L. & PUB. POL’Y 231, 239–41 (2019) (discussing the provenance and responsibilities of several different federal law enforcement agencies). That would harm the public because there are numerous offenses that the federal government is far better at investigating than state or local police—such as crimes that have an international or interstate aspect—and some that, practically speaking, only the federal government can investigate at all—such as crimes involving the corruption of state or local public officials. *Id.* at 236–38. Finally, law enforcement agencies measure their success or failure by metrics documenting the number of cases opened, arrests made, convictions obtained, and length of the sentences imposed. *Id.* at 242–45. The uncertainty as to whether a particular lead can bring measurable positive results doubtless discouraged the federal government from opening as many domestic marijuana investigations in 2020 as it did earlier. See Young, *supra* note 6, at 89 (“Colorado and likeminded states . . . are simply betting that, without state and local cooperation, federal authorities will be unwilling to deploy sufficient resources to enforce national marijuana laws on their own. So far, it has been a good bet.”).

34. See STUART TAYLOR, JR., MARIJUANA POLICY AND PRESIDENTIAL LEADERSHIP: HOW TO AVOID A FEDERAL-STATE TRAIN WRECK, GOVERNANCE STUDIES AT BROOKINGS 3 (Apr. 2013), https://www.brookings.edu/wp-content/uploads/2016/06/Marijuana-Policy-and-Presidential-Leadership_v27.pdf [<https://perma.cc/GY8A-8W3B>].

35. Price, *supra* note 6, at 123–38.

Department beginning in 2009 to publicly issue charging policy memoranda stating that the federal government would not prosecute the growth, distribution, or possession of cannabis done in compliance with state law.³⁶ The memoranda effectively told the states and marijuana industry that the legal status of marijuana, as well as the vigor with which the criminal law should and would be enforced, was in their hands. Each state was free to decide how to treat marijuana within its own jurisdiction. Put differently, each one could clean its own room or leave it a mess. As long as each state did not foul up a sibling's room, all was fine with Daddy.

To be sure, unlike a statute or regulation, those memoranda did not have the force of law.³⁷ They merely expressed the Justice Department's then-current enforcement policy, which President Obama or Attorney General Eric Holder (and any of their successors) could revise or abandon at any time.³⁸ Nonetheless, since the department essentially turned a blind eye to seeing precisely how compliant cannabis businesses were with state law, the memoranda had the effect of serving as "Get Out Of Jail, Free" cards for any enterprise that did not embarrass the administration by flaunting its illegal conduct.³⁹ As the result, Professor Price concludes, "the Obama Justice Department effectively opened the door to state-

36. *See id.* at 134–35 n.1 (citing Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Attorneys regarding Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., for United States Attorneys regarding Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 1 (June 29, 2011); Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., for United States Attorneys regarding Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013); Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., for United States Attorneys regarding Guidance Regarding Marijuana Related Financial Crimes 2 (Feb. 14, 2014)).

37. *See, e.g.,* *Service v. Dulles*, 354 U.S. 363, 386 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265–68 (1954) (both ruling that an agency must comply with its own regulations).

38. Albeit not without litigation challenging any such change in policy. *See infra* note 72.

39. *See* Larkin, *supra* note 25, at 107–08 & n.35.

level experimentation with marijuana legalization."⁴⁰ Entrepreneurs immediately leapt through it. The result: "a multi-billion dollar marijuana industry now operates openly in many states, apparently undeterred by its blatant criminality under federal law."⁴¹

The Obama Justice Department's policy technically is no longer in effect, although its legacy remains with us. In January 2018, Trump Administration Attorney General Jeff Sessions revoked the Obama Justice Department memoranda, giving notice to the cannabis industry that it was once again in potential federal legal jeopardy.⁴² Sessions, however, did not direct the department's lawyers to ramp up enforcement efforts.⁴³ He left that decision to the judgment of U.S. Attorneys, who could decide whether to enforce the CSA against businesses selling marijuana in their jurisdictions based on their superior knowledge of that particular locale.⁴⁴ For whatever reason, the U.S. Attorneys did not take that opportunity to aggressively enforce federal law,⁴⁵ and they are unlikely to start now. In January 2019, Sessions' successor, Attorney General Bill Barr, told Congress that he was troubled by upsetting the expectations that had grown up since 1996 and that Congress must resolve this matter.⁴⁶ Perhaps that helps explain why Barr did not direct the Justice Department to aggressively pursue marijuana prosecutions. Of course, members of Congress have generally avoided the issue like the plague, praying for deliverance from voting on an issue that will make enemies however they vote, so Congress is not likely to take up this cross anytime soon. Thus, we were effectively in the

40. Price, *supra* note 6, at 123.

41. *Id.*

42. Memorandum from Jeff Sessions, Att'y Gen., U.S. Dep't of Just., for All United States Attorneys regarding Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/W7MW-LMJT>].

43. *Id.*

44. *See supra* note 33.

45. *See id.*

46. Young, *supra* note 6, at 93; Sarah N. Lynch, *U.S. Attorney General Nominee Will Not Target Law-Abiding Marijuana Businesses*, REUTERS (Jan. 15, 2019, 3:30 PM), <https://www.reuters.com/article/us-usa-trump-barr-marijuana/us-attorney-general-nominee-will-not-target-law-abiding-marijuana-businesses-idUSKCN1P92JO> [<https://perma.cc/WQU7-MXDR>].

same position under President Donald Trump that we were under President Obama. The more things change⁴⁷

That is unfortunate because only Congress can decide whether the federal government or the states should set cannabis policy. The states can exempt medical or recreational use programs from their own criminal laws, but those exemptions cannot immunize someone from federal prosecution.⁴⁸ By contrast, Congress may outlaw all interstate or intrastate sales of marijuana,⁴⁹ or exempt from the CSA states with medical or recreational cannabis programs.⁵⁰ But those are decisions for Congress, not the Attorney General or even the President. Congress may make or revise the law; the other two must implement whatever laws Congress passes.⁵¹

47. See Larkin, *supra* note 25, at 108. A related issue is the effect of this legal confusion on banks. Julie Anderson Hill offers an excellent summary of the problems that the CSA creates for banks. See Hill, *supra* note 6, at 139–54. At bottom, banks cannot offer cannabis businesses their financial services because doing so would make them co-conspirators to marijuana distribution, in violation of the CSA, as well as constitute money laundering, in violation of the federal banking laws. *Id.* Professor Price notes that the House has sought to create a carve-out for banks. See Price, *supra* note 6, at 127. In 2019, the House passed a bill—the Secure and Fair Enforcement (SAFE) Banking Act of 2019, H.R. 1595, 116th Cong. (2019)—that would grant financial institutions a safe harbor from a federal money laundering prosecution or adverse administrative action for providing financial services to cannabis-related business. Price, *supra* note 6, at 127, 136 n.15; see H.R. Rep. No. 116-104 pt. 1, at 9–13, 116th Cong. (2019). The opportunity to satisfy marijuana liberalization’s supporters and banks in one bill—a two-fer—must have seemed too big an opportunity to pass up. Deciding to go big or go home, late in 2020 (*after* the November election) the House voted to remove cannabis from the CSA entirely. Marijuana Opportunity Reinvestment and Expungement (MORE) Act, H.R. 3884, 116th Cong. (2020). The Senate did not vote on either bill in the 116th Congress.

48. See *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483, 494–95 (2001) (rejecting a medical necessity defense to federal prosecution in a state with a medical marijuana program).

49. See *Gonzalez v. Raich*, 545 U.S. 1 (2005) (Congress can prohibit individuals from growing marijuana for their own medical use).

50. See *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993) (Congress may allow lottery-related advertising only in states authorizing lotteries).

51. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad”).

Rather than urge Congress to make that choice, three of our four presidents in office since 1996—Bill Clinton, George W. Bush, and Donald Trump—decided to become bystanders. Why? Perhaps they wanted to see how the state law developments played out. Perhaps they were hoping for some major political event to move the issue to the head of the public policy queue.⁵² Perhaps they sympathized with the plight of the disabled and dying who sought relief from misery and suffering. Perhaps they agreed with the reformers' goals. Perhaps they were preoccupied with other issues. Or perhaps they just didn't care one way or the other. Whatever the explanation might be, none of them used his political capital or bully pulpit to place the issue on the public agenda and demand that voters pressure Congress to resolve it.⁵³

52. A common way for policies to become law. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 2010); Paul J. Larkin, Jr., *John Kingdon's "Three Streams" Theory and the Antiterrorism and Effective Death Penalty Act of 1996*, 28 J.L. & POL. 25, 29–30 (2012).

53. President Obama was less a bystander than a cheerleader. He stands out from the others because his Justice Department effectively encouraged the private sector to take advantage of the opportunities that liberalization offered—even though doing so was a crime. Those memoranda told the cannabis industry precisely how to avoid prosecution for conduct that was clearly a federal offense. That was quite remarkable. Aside from the fact that the Justice Department does not ordinarily act as in-house counsel for an organized criminal enterprise, the entire undertaking was at least facially inconsistent with President Obama's Article II obligation to enforce the law faithfully. In *Marijuana Federalism*, Professor Price seems to agree. See Price, *supra* note 6, at 127 ("The federal Constitution presumes an executive branch that executes acts of Congress, not one that picks and chooses which laws to give effect. After all, the Constitution not only allows Congress to enact statutes over a presidential veto, but also expressly obligates the president to 'take care that the Laws be faithfully executed.'" (footnote omitted)); *id.* at 126–27, 136 n.11. That conduct came perilously close to the type of "dispensation" or "nullification" of lawful acts of the legislature that has been prohibited under Anglo-American law since the English Bill of Rights of 1688, see Bill of Rights 1688, 1 W. & M. sess. 2 c. 2 ("That the pretended Power of Suspending of Laws or the Execution of Laws by Regal Authority without Consent of Parliament is illegal. That the pretended Power of Dispensing with Laws or the Execution of Laws by Regal Authority as it hath been assumed and exercised of late is illegal." (seventeenth-century English modernized)), and that is utterly inconsistent with the President's sworn obligation to enforce the law. See, e.g., U.S. CONST. art. II, § 3 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will

Professor Price is correct that we should not want the President to use a nonenforcement policy in lieu of seeking legislative reform for an act of Congress he finds unwise.⁵⁴ Refusing to enforce laws simply because the current administration disfavors them produces a host of undesirable side effects. A President's decision to forego prosecution rather than seek a change in the law, in Professor Price's words, leaves "a tangle of further questions in its wake."⁵⁵

faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (ruling that the Take Care Clause denied the President "a dispensing power" authorizing him to act *contra legem*); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1848–51 (2016); Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2141–78 (2019); cf. SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 92–93 (2015) (agreeing that the President cannot suspend the law).

Nonetheless, Professor Price argues in *Marijuana Federalism* that the Obama Administration's actions were "dubious but defensible." Price, *supra* note 6, at 128. Why?—because the nonenforcement policy "made no guarantees," it "gave no prospective license for legal violations," and it did not "provide categorical assurance that those outside the stated priorities were safe from enforcement." *Id.* As a result, "[t]hose relying on the policy had clear notice that they were taking their chances." *Id.* (footnote omitted). Yes, and those present at Julius Caesar's funeral heard Marc Antony quite literally say that he came "to bury Caesar, not to praise him." WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 2, l. 83. Yet, we know that his intent was to the contrary. After all, the Obama Justice Department cared little whether marijuana businesses actually complied with state-law requirements that, under the Justice Department's policy, were a precondition for the Justice Department to skip federal enforcement. See GOV'T ACCOUNTABILITY OFF., *STATE MARIJUANA LEGALIZATION: DOJ SHOULD DOCUMENT ITS APPROACH TO MONITORING THE EFFECTS OF STATE MARIJUANA LEGALIZATION* 8–9 (Dec. 2015). Professor Price is right, though, that there was no judicial remedy available if the Obama Administration had acted unlawfully. Prosecutorial decisions *not* to bring charges are generally not subject to judicial review, see *Heckler v. Chaney*, 470 U.S. 821, 835 (1985)—which is almost certainly why the Justice Department phrased its policy as an exercise of its prosecutorial discretion. The remedy would have been for Congress to impeach and remove Deputy Attorney General David Ogden, who signed the first memorandum, Deputy Attorney General James Cole, who signed the later ones, Attorney General Eric Holder, or President Obama himself.

54. Price, *supra* note 6, at 129.

55. *Id.*

President Obama gave the cannabis industry the equivalent of a Papal blessing by almost guaranteeing its members immunity from federal prosecution if they complied with state law⁵⁶—and then studiously ignored whether they were in fact complying. By choosing nonenforcement in lieu of persuading Congress to revise the CSA, President Obama might have reached a short-term accommodation between what some think is an outdated law and contemporary social values. In Professor Price's words, President Obama might have helped to "unstick a frozen issue" that Congress has proved unwilling to resolve itself.⁵⁷ Maybe President Obama thought that he could force Congress to act by making a hash of our cannabis policy. If he did, he was wrong. Strike One. If he thought his actions would energize the public into demanding congressional reform, he was wrong again. Strike Two. If, however, he thought that allowing a massive number of crimes to go unprosecuted on his watch would enable the rise of a billion dollar industry that no successor would dare seek to eliminate (that's my guess), he might have been right about that. If that was his plan, perhaps he succeeded. Yet encouraging people to become scofflaws—pardon me, *rich* scofflaws—is hardly a legitimate law enforcement strategy. Strike Three.

There are multiple adverse long-term consequences whenever a President takes the law into his own hands. Start with the fact that the President corrodes respect for the rule of law,⁵⁸ which is necessary for the public's belief in its legitimacy, as well as individuals' willingness to comply and cooperate with its enforcement.⁵⁹ Excus-

56. See *supra* text accompanying note 36.

57. Price, *supra* note 6, at 126.

58. See JOHN PHILLIP REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* (2004).

59. See TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (arguing that people are more likely to follow the law if they respect it than if they just fear its penalties); PETER YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 9 (1991) ("As criminologists have long known, where laws lack legitimacy, violation rates are likely to be relatively high, other factors held constant.").

ing the President for willful ostrich-like behavior despite his responsibility to enforce the law⁶⁰ fosters the belief that we are a government of men, not laws, a proposition that the Supreme Court's most famous (and important) decision, *Marbury v. Madison*, expressly disavowed⁶¹ and the Court reaffirmed not long ago.⁶² Selective nonenforcement also creates an undesirable precedent for future chief executives. Future Presidents might use President Obama's nonenforcement policy to justify inaction in response to other types of "unwise" legislation. After all, it would always be easier to refrain from enforcing a statute (for example, the federal estate tax) or some feature of one (for example, a corporate income tax above a certain rate) than it would be to convince Congress to repeal or revise the law. Repetition of his policy would make a bad precedent even worse. Prosecutorial charging decisions would become a function, not of the strength of the proof of guilt, but of whether someone has the "right" policy views on a disputed social issue. Excusing the President from carrying out his law enforcement oversight duty also makes it look like he is above the law,⁶³ because the government does not allow private parties to get away with remaining willfully blind of criminal wrongdoing they are responsible for stopping.⁶⁴ Finally, by temporarily shutting off enforcement of the criminal law without guaranteeing that it won't

60. See U.S. CONST. art. II, § 3 (directing the President to "take Care that the Laws be faithfully executed").

61. 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

62. In *United States v. Stevens*, 559 U.S. 460 (2010), the Court declined the federal government's invitation to uphold the constitutionality of a facially overbroad criminal law on the ground that the government would prosecute only truly "bad guys." As Chief Justice Roberts put it, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.* at 480. The Chief did not cite *Marbury*, but he was surely channeling Chief Justice John Marshall.

63. Cf. *United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law.").

64. See, e.g., *Spurr v. United States*, 174 U.S. 728, 735 (1899) (ruling that a bank officer would violate a law making it a crime to willfully permit an overdraft "if the [bank]

later come back on, the President undermines the predictability of the legal rules that companies and the people they employ need to make long-term investment and life decisions.⁶⁵ Presidential non-enforcement is no long-term substitute for the traditional lawmaking process.

But it's even worse than all that. Remember that the unenforced law—the CSA—is a criminal statute. An elementary rule of criminal and constitutional law is that the government must adequately notify the public what conduct is a crime.⁶⁶ The disagreement between cannabis' status under the federal and state codes already confuses the public whether a criminal law—one with some rather unpleasant terms of imprisonment—is in effect. (If you haven't yet seen someone make that mistake when traveling interstate, just wait; you will.⁶⁷) That confusion even makes life difficult for banks, as Julie Anderson Hill explains in her *Marijuana Federalism* article.⁶⁸ Banks cannot offer financial services to cannabis business for fear of becoming co-conspirators to violations of both the CSA and the federal money laundering statutes. Yet, the burden of confusion is not evenly distributed across the public. Banks and other large businesses have in-house counsel units and can obtain expensive legal advice from large white-shoe law firms.⁶⁹ The average person

officer purposely keeps himself in ignorance of whether the drawer has money in the bank"); see generally *Global Tech Appliances v. SEB S.A.*, 563 U.S. 754, 766–68 (2011) (collecting cases defining "willful blindness").

65. See Ibrahim F.I. Shahata, *The Role of Law in Business Development*, 20 *FORDHAM INT'L L.J.* 1577, 1578–79 (1996).

66. See, e.g., *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

67. See Scott McCartney, *The Baffling Legal Gray Zone of Marijuana at the Airport*, *WALL ST. J.* (Sept. 4, 2019, 5:30 AM), https://www.wsj.com/articles/the-baffling-legal-gray-zone-of-marijuana-at-the-airport-11567589405?mod=article_inline [<https://perma.cc/H76W-ZN6S>].

68. Hill, *supra* note 6, at 139–54.

69. Of course, I might be assuming too much by saying that large companies can obtain legal advice on how to avoid breaking the law. Cassandra Burke Robertson's article *Legal Advice for Marijuana Business Entities* describes the minefield that lawyers must traverse when advising someone how to comply with state programs permitting activities that the federal government still treats as a crime. See generally Robertson, *supra* note 6, at 155–69.

doesn't and can't.⁷⁰ That is a problem. The criminal law must be sufficiently clear that "a person of ordinary intelligence" can readily understand where the line falls between what is and is not a crime without consulting an attorney.⁷¹ Ordinarily, any blame for that problem rests with a legislature. If the text of a federal criminal law is vague, that is Congress's fault. By contrast, if the public is confused whether an old federal criminal law is still in effect—especially when the formerly identical state law is not—because of a President's too clever exercise of prosecutorial discretion, that is his fault. President Obama's non-enforcement policy helps Presidents slough off blame that is rightfully theirs.⁷²

* * *

The bottom line is this: We need to stop using prosecutorial discretion as a form of presidential lawmaking, while also eliminating the chaotic state of today's cannabis policy. Disarray in the law

70. See Price, *supra* note 6, at 129–30 ("While lawyers and sophisticated large-scale operators, perhaps, can be expected to understand the difference between enforcement policy and statutory law, it seems doubtful that every participant in the burgeoning, openly tolerated marijuana marketplace fully appreciates the degree of risk they are assuming."). Professor Price is right to be concerned about the effect on small businesses of the need to pay lawyers to know whether they run the risk of arrest. See Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 792 (2014) ("The CEO for DuPont has a white-shoe law firm on speed dial; the owner of a neighborhood dry cleaner does not.").

71. See *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); see also Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335, 342 (2018) ("[The] constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his [or her] contemplated conduct is forbidden by the statute." (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954))); *id.* at 342 ("A 'person of ordinary intelligence,' a 'person of common intelligence,' 'the common world'—those are the phrases that the Supreme Court has used to describe how to decide whether a statute is understandable.").

72. Even though the CSA has prohibited marijuana trafficking since 1996 and still does today, there certainly would be litigation over the revitalization of Justice Department efforts to prosecute marijuana traffickers. Cf. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905–15 (2020) (ruling that the Trump Administration's decision to rescind the Obama Administration's Deferred Action for Childhood Arrival immigration program was reviewable and also arbitrary and capricious). That litigation does not benefit the public and should be avoided.

gives legislators the same opportunity for reform that a social catastrophe affords them.⁷³ Congress can reaffirm the vitality of the CSA or it can decentralize the nation's approach to marijuana regulation. It can't, and shouldn't, do both.⁷⁴

II. USELESS DISARRAY OR FERTILE OPPORTUNITY?

However anomalous (if not downright bizarre) the current state of affairs might be, it gives us an opportunity to reconsider the allocation of authority between the states and federal government. *Marijuana Federalism* does not take on the quixotic challenge of persuading the Supreme Court to abandon decades of precedent expanding Congress's economic regulatory authority and to return its Commerce Clause power to a pre-New Deal era status,⁷⁵ particularly at a time (unforeseen, of course, by the book's contributors)

73. Cf. Editorial Board, *The Pelosi-Schumer Coronavirus Contagion*, WALL ST. J. (Mar. 23, 2020, 7:34 PM), <https://www.wsj.com/articles/the-pelosi-schumer-contagion-11585006077> [<https://perma.cc/PC6G-Z8AS>] ("House Majority Whip James Clyburn was heard last week advising Democrats to view the crisis as a 'tremendous opportunity to restructure things to fit our vision.'"); Jack Rosenthal, *A Terrible Thing to Waste*, N.Y. TIMES (July 31, 2009), <https://www.nytimes.com/2009/08/02/magazine/02FOB-on-language-t.html> [<https://perma.cc/WC7E-FEWE>] (quoting White House Chief of Staff Rahm Emanuel: "You never want a serious crisis to go to waste.").

74. It could be argued that the cannabis industry is perfectly content with de facto legality and de jure criminality. If so, Congress's inaction has the scent of nefarious collaboration with a multi-billion dollar marijuana industry operating openly in many states despite its blatant criminality under federal law. That is obviously problematic. On the other hand, if the marijuana industry is unsatisfied with the status quo, then congressional inaction truly becomes a worst of all possible worlds scenario. It is a dereliction of duty for Congress to leave the American public to the consequences of de facto legalization without their elected representatives' consent while also leaving a sword hanging over the head of the industry. Congress's abdication won't make for a new chapter in a revised edition of *Profiles in Courage*. JOHN F. KENNEDY, *PROFILES IN COURAGE* (1956).

75. The classic example of the breadth of Congress's New Deal-era Commerce Clause authority is *Wickard v. Filburn*, 317 U.S. 111 (1942). The Court held that Congress can regulate the amount of wheat that an individual farmer grows for his family's own consumption because of the potential effect on interstate commerce of every American farmer's parallel decision to reserve all of his crop for his or her personal use. *Id.* at 132–33.

when the nation has been looking to Congress to return our economy to its pre-COVID-19 heights.⁷⁶ Instead, what the book does (and does well) is suggest how greater reliance on principles of federalism can improve the current confused state of the law.

Professor Adler and the contributors to *Marijuana Federalism* analyze the federalism implications of our current situation from several different directions. As editor, Professor Adler sets the stage for the other contributors. In his cleverly entitled introduction “*Our Federalism on Drugs*,”⁷⁷ Professor Adler argues that the transition we have witnessed since California took the law into its own hands in 1996 gives us the opportunity to decide whether to use cannabis as an occasion for a practical experiment in the benefits of federalism.⁷⁸ Often described by the Supreme Court as a system of “dual sovereignty,”⁷⁹ our federalist system of governance might produce a variety of approaches to the treatment of marijuana. Some states might continue to deem it contraband, the status that marijuana has under federal law. Or they might allow their residents to use cannabis for whatever medical or recreational purposes their distinct electorates from Alabama to Wyoming see fit.⁸⁰ For the last fifty years, however, the CSA has prevented any experimentation with different regulatory approaches by banning marijuana for any purpose whatever. Uniformity has reigned.

76. See, e.g., Siobhan Hughes & Natalie Andrews, *Trump Signs \$2 Trillion Coronavirus Stimulus Bill After Swift Passage by House*, WALL ST. J. (Mar. 27, 2020, 8:00 PM), <https://www.wsj.com/articles/house-lawmakers-race-to-washington-to-ensure-coronavirus-stimulus-passes-11585318472> [https://perma.cc/MG4P-XABF]; Eric Morath & Sarah Chaney, *U.S. Employers Cut 701,000 Jobs in March*, WALL ST. J. (Apr. 3, 2020, 2:32 PM), https://www.wsj.com/articles/u-s-jobs-report-likely-to-show-start-of-record-labor-market-collapse-11585906617?mod=hp_lead_pos1 [https://perma.cc/FZ2L-DTME].

77. The introduction draws on 1980s-era anti-drug use television commercials sponsored by the Partnership for a Drug-Free America. See, e.g., Partnership for a Drug-Free America, *This Is Your Brain . . . This Is Your Brain On Drugs—80s Partnership For A Drug Free America*, YOUTUBE (Mar. 21, 2010), <https://www.youtube.com/watch?v=GOEN-VyIxPI> [https://perma.cc/K9C2-UNSA].

78. See generally Adler, *supra* note 6, at 1–13.

79. See, e.g., Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

80. Adler, *supra* note 6, at 5.

We now have a chance, Professor Adler argues, to reconsider whether we want a uniform, top-down, Washington, D.C.-centric approach to marijuana regulation. If we choose instead to respect the Framers' belief in the value of dual sovereignty, we could generate "a system of competitive federalism in which states are under pressure to innovate in public policy" by "providing different bundles of policies and services."⁸¹ That innovation, in turn, could produce the two classic benefits that are the hallmark of a federalist system. One is the increased likelihood that "more people will live in jurisdictions with policies that match their preferences."⁸² The other is an enhanced prospect that the nation will discover the best answer to a policy dilemma by allowing each state, in Justice Brandeis's famous words, to "serve as a laboratory" and "try novel social and economic experiments without risk to the rest of the country."⁸³ Freed from the "dampening" effect of a uniform, nationwide ban preventing perhaps fifty different approaches to cannabis regulation, federalism could generate "a framework for interjurisdictional competition and discovery."⁸⁴ The current disarray in the law gives us the opportunity to reconsider the federal monopoly over marijuana control. States could try out a host of different approaches to every aspect of the production, distribution, regulation, taxation, marketing, and use of cannabis.⁸⁵

Contributors John Hudak and Christine Stenglein find the present to be an opportune time for the nation to have that debate. In their article *Public Opinion and America's Experimentation with Cannabis Reform*, they analyzed polling data measuring the public's attitudes regarding the state-level revolution that we have witnessed since 1996.⁸⁶ Their opinion is that "Americans' support for cannabis

81. *Id.*

82. *Id.* (footnote omitted).

83. *New State Ice Co. v. Liebermann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also John O. McGinnis, *Federalism as a Discovery Process and a Catalyst for Humility*, 35 HARV. J.L. & PUB. POL'Y 115, 118 (2012); Adler, *supra* note 6, at 6.

84. Adler, *supra* note 6, at 7.

85. See *id.* at 6–7.

86. Hudak & Stenglein, *supra* note 6, at 15–34.

reform has reached an all-time high.”⁸⁷ Americans welcome any new drug that can alleviate pain, inflammation, anxiety, and other disabling side effects of different ailments.⁸⁸ “Medical cannabis has exploded in popularity since California passed the first medical cannabis initiative” in 1996, they argue, and “that support extends across age groups, races and ethnicities, partisanship, ideology, and gender.”⁸⁹ Polls have consistently shown that a very large percentage of Americans, ranging from eighty-four to ninety-four percent, believe that physicians should be able to prescribe cannabis for their patients, “making it one of the most popular policy proposals in the United States.”⁹⁰ Even some groups ordinarily regarded as conservative in their political outlook, such as Veterans of Foreign Wars, have supported liberalizing the cannabis laws.⁹¹ Public support is at its peak for medical use of cannabis, and most Americans believe that cannabis is safer than other drugs and that its use will not inevitably serve as a “gateway” to consumption of more dangerous drugs, such as heroin.⁹² Although the intensity of most Americans’ attitudes toward cannabis legalization remains low, “a majority of Americans across age groups, and across all regions, support legalization.”⁹³

87. *Id.* at 31. I’m sure that the pun was intended.

88. *See id.* at 21 (authors indicate that “Americans embrace the idea that cannabis can be used for medical purposes—to relieve pain”).

89. *Id.* at 21.

90. *Id.* at 21–23 (footnote omitted). An almost equally large percentage—seventy-two percent in one nationwide poll—responded that possession of small amounts of marijuana should not lead to incarceration. *Id.* at 28.

91. *Id.* at 23–24. It is quite possible, perhaps even more likely than not, that this support comes principally from veterans who fought in the Vietnam War and the ones since then. Hudak and Stenglein do not address that issue.

92. Hudak & Stenglein, *supra* note 6, at 27, 31.

93. *Id.* at 31. Hudak and Stenglein also do not mention an additional benefit from re-examining the CSA. Opponents of the nation’s marijuana laws often argue that the states and federal government passed them early in the twentieth century in part due to a racist fear of crimes committed by Mexicans who had recently entered the United States and used that drug. *See* DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 218–20 (3d ed. 1999); Dills et al., *supra* note 6, at 37. Because there

To be sure, Hudak and Stenglein acknowledge that various shortcomings in polling processes or results could weaken their conclusions or even point in another direction. Polls can confuse “decriminalization” — that is, treating possession and use of small quantities as akin to a traffic ticket — with “legalization” — removing cannabis from the criminal code altogether.⁹⁴ That ambiguity could lead people to register support for changing the law to avoid what respondents believe are unduly severe terms of imprisonment for possession of a doobie or two, rather than to allow greater legal use of cannabis. National polling results might not reflect the views of each state’s residents, which might affect the likelihood that Congress will revise the CSA.⁹⁵ Particular states and districts elect individual members,⁹⁶ and the voters in Alabama might have very different opinions than the residents in California. Voting results might not represent the majority’s views because the people who vote might not hold the same attitudes as the bulk of residents.⁹⁷ And so forth. Poll respondents also might not realize that physicians could *not* prescribe marijuana tomorrow even if Congress repealed the CSA today. For those reasons, data is more valuable than the potentially uneducated answers made by self-selecting respondents to possibly ambiguous polling questions.

Three contributors to *Marijuana Federalism* try to fill that need. Professor Angela Dills, Sietse Goffard, and Jeffrey Miron analyzed data available as of 2016 from various states with medical or recreational legalization programs to learn whether the upbeat forecasts offered by liberalization’s supporters or the gloomy ones made by

are legitimate bases for not legalizing cannabis use, reconsidering the status of marijuana today could moot that criticism. *Compare* *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding a facially neutral state constitutional provision barring felons from voting unconstitutional on the ground that the original enactment was motivated by racial discrimination, in violation of the Equal Protection Clause), *with* *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc) (ruling that re-enacted state law ban on federal voting eliminated any taint on the original state constitutional provision).

94. Hudak & Stenglein, *supra* note 6, at 18.

95. *Id.* at 15.

96. U.S. CONST. art. I, § 2, cl. 1; *id.* § 3, cl. 1; *id.* amend. XVII.

97. Hudak & Stenglein, *supra* note 6, at 20–21.

opponents were closer to the mark.⁹⁸ To gauge the positive, negative, or neutral effects of cannabis initiatives, they analyzed the evidence concerning several post-liberalization factors: the amount of marijuana use by adults⁹⁹ and teenagers,¹⁰⁰ its price (a surrogate for its supply),¹⁰¹ the rate of violent crime¹⁰² and traffic crashes,¹⁰³

98. Dills et al., *supra* note 6, at 35–83.

99. *Id.* at 44 (regarding Colorado: “The data do not show dramatic changes in use rates corresponding either to the expansion of medical marijuana or legalization.”). What Professor Dills, Goffard, and Miron fail to ask, however, is whether there was a great increase in the number of people (and amount of marijuana used) after Colorado adopted a medical marijuana program in 2001, and liberalized that program in 2009—which occurred three years *before* the state adopted a recreational cannabis program in 2012. *Id.* at 40–41. Some people reasonably believe think the market was already saturated by 2012 because the state’s medical marijuana program was a sham. See Gerard Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 MCGEORGE L. REV. 127, 130 (2012) (As comedian Jon Stewart noted, by 2011 “Colorado seemed to have changed almost overnight from ‘the healthiest state in the country’ to ‘one of the sickest.’”). The 2012 recreational legalization law therefore just honestly did what the 2001 and 2009 laws accomplished in a *sub rosa* fashion.

100. Dills et al., *supra* note 6, at 50. The data from California, Colorado, and Massachusetts “clearly reveal that the downward trend of suspensions and expulsions remains unchanged in the wake of marijuana legalization.” *Id.* The criticism mentioned above regarding adult use could also apply here as well.

101. *Id.* at 45–46 (regarding Colorado, Oregon, and Washington State: “One hypothesis before legalization was that use might soar because prices would plunge. . . . Overall, these data suggest no major drop in marijuana prices after legalization and, consequently, less likelihood of soaring use because of cheaper marijuana.”).

102. *Id.* at 47 (“Opponents think these substances cause crime through psychopharmacological and other mechanisms, and they note that such substances have long been associated with crime, social deviancy, and other undesirable aspects of society. . . . [M]onthly crime rates from Denver, Colorado, for all reported violent and property crimes . . . remain essentially constant after 2012 and 2014; we do not observe substantial deviations from the illustrated cyclical crime pattern.”).

103. *Id.* at 49 (“No spike in fatal traffic accidents or fatalities [per 100,000 residents] followed the liberalization of medical marijuana in 2009. Although fatality rates have reached slightly higher peaks in recent summers, no obvious jump occurs after either legalization in 2012 or the opening of stores in 2014. Likewise, neither marijuana milestone in Washington appears to have substantially affected the fatal crash rate or fatality rate Although few post-legalization data were available [for Oregon] at the time of publication, we observe no signs of deviations in trend after the opening of medical marijuana dispensaries in 2013. . . . [A]nnual data on crash fatalities in Alaska, Nevada, Maine, and Massachusetts . . . show no discernible increase after legalization.” (footnotes omitted)).

statewide economic effects,¹⁰⁴ and tax receipts.¹⁰⁵ Professor Dills, Goffard, and Miron concluded that the states with liberalized schemes have seen only relatively minimal effects. With one potential short-term exception—state tax revenue—a comparison of the pre- and post-liberalization evidence revealed only minor differences. None of the factors they considered proved that the states with liberalized marijuana laws were decidedly better or worse for having revised their codes. “Our conclusion is that state-level marijuana legalizations to date have been associated with, at most, modest changes in marijuana use and related outcomes.”¹⁰⁶ Put differently, the Age of Aquarius has not dawned, but the sky hasn’t fallen either. That should comfort policymakers who fear that further reform would lead to catastrophic outcomes.

Yet, there is reason to be cautious when deciding whether to accept their conclusions. Some rest on an incomplete scientific record. For example, Professor Dills, Goffard, and Miron suggest that “the pain-relieving element of medical marijuana may help patients avoid more harmful prescription painkillers and tranquilizers.”¹⁰⁷ While it is true that numerous individuals have long argued (and some government reports and private studies have even concluded) that the psychoactive ingredient in cannabis has an analgesic effect for some types of pain,¹⁰⁸ so too does the ethanol in Wild

104. *Id.* at 51 (“Advocates also argue that legalization boosts economic activity by creating jobs in the marijuana sector, including ‘marijuana tourism’ and other support industries, thereby boosting economic output. . . . The impact of legalization [in Colorado], however, was still small relative to the entire economy. . . . Data from the Bureau of Economic Analysis show little evidence of significant gross domestic product (GDP) increases after legalization in any state.” (footnotes omitted)).

105. *Id.* at 51–52 (stating that “[o]ne area where legal marijuana has reaped unexpectedly large benefits is state tax revenue,” but also noting that “tax revenues in these states may moderate as legalizations continue.”).

106. *Id.* at 36; *see id.* at 52.

107. *Id.* at 46 (footnote omitted).

108. *See, e.g.*, NAT’L ACAD. OF SCIS., ENG’G, & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS 54 Tbl. 2-2, 128 Box 4-1 (2017) (listing conditions for which marijuana is a treatment, with varying degrees of scientific support); Gemayel Lee et al., *Medical Cannabis for Neuropathic Pain*, 22 CURRENT PAIN & HEADACHE REPS. 8 (2018)

Turkey, which we do not classify as a medicine.¹⁰⁹ Professor Dills, Goffard, and Miron cited little support for their hope,¹¹⁰ and later studies reveal that it has gone unfulfilled.¹¹¹ Finally, the nation's

("Nearly 20 years of clinical data supports the short-term use of cannabis for the treatment of neuropathic pain."); Barth Wisley et al., *Low Dose Vaporized Cannabis Significantly Improves Neuropathic Pain*, 14 J. PAIN 136 (2013).

109. Dr. Peter Bach, a physician and Director of the Center for Health Policy and Outcomes at the Memorial Sloan Kettering Cancer Center, certainly would not classify either one as a medicine. Peter B. Bach, *If Weed Is Medicine, So Is Budweiser*, WALL ST. J. (Jan. 17, 2019, 7:23 PM), <https://www.wsj.com/articles/if-weed-is-medicine-so-is-budweiser-11547770981> [<https://perma.cc/9HDG-JR8E>]. In his words, "Claims that marijuana relieves pain may be true. But the clinical studies that have been done compare it with a placebo, not even a pain reliever like ibuprofen. That's not the type of rigorous evaluation we pursue for medications." *Id.* Moreover, "every intoxicant would pass that sort of test because you don't experience pain as acutely when you are high. If weed is a pain reliever, so is Budweiser." *Id.*

110. As support, Professor Dills, Goffard, and Miron cite an article by drug policy experts and economists. Dills et al., *supra* note 6, at 46, 78 n.48 (citing David Powell et al., *Do Medical Marijuana Laws Reduce Addictions and Deaths Related to Pain Killers?*, 58 J. HEALTH ECON. 29 (2018)). The Powell article, however, is limited in several respects. It considers only the effect of *medical* marijuana laws, not *recreational* ones. Granted, often the only difference between the two is that the latter are honest about their purposes. *See* Larkin, *supra* note 16, at 509–12. Moreover, the Powell article does not find that medical marijuana programs per se reduce opioid overdose fatalities, only that state laws protecting medical marijuana dispensaries have some effect by offering people an alternative to the *illegal* purchase of opioids, not their use under a lawful prescription, *id.* at 30, which is what Professor Dills, Goffard, and Miron claim in their article, *see supra* text accompanying note 108. Finally, the Powell article does not consider earlier and more recent analyses showing that cannabis is not an adequate substitute for opioids and creates additional problems for people already suffering from opioid use disorder. *See, e.g.*, Fiona A. Campbell et al., *Are Cannabinoids an Effective and Safe Treatment in the Management of Pain? A Qualitative Systematic Review*, 323 BRIT. MED. J. 1, 16 (2001) ("We found insufficient evidence to support the introduction of cannabinoids into widespread clinical practice for pain management—although the absence of evidence of effect is not the same as the evidence of absence of effect. . . . Cannabis is clearly unlikely to usurp existing effective treatments for postoperative pain."); *infra* notes 111–18.

111. A 2017 paper published in the peer-reviewed journal *Lancet Public Health*, based on a four-year longitudinal cohort study, concluded that cannabis does not provide long-term relief from chronic non-cancer pain. Gabrielle Campbell et al., *Effect of Cannabis Used in People with Chronic Non-Cancer Pain Prescribed Opioids: Findings from a 4-year Prospective Cohort Study*, 3 LANCET PUB. HEALTH e341 (2018). In fact, a 2019 study

opioid overdose epidemic has metastasized into its third stage. What began as overreliance on prescription opioids transitioned into the use of illegal narcotics, like heroin, and finally became a resort to illegal drugs cut with extraordinarily more powerful painkillers, like fentanyl.¹¹² Liberalized marijuana laws, even if they might have been helpful years ago, are not a reasonable response to today's opioid problem.

That should come as no surprise. Cannabis is an insufficiently potent analgesic to mollify the severe acute pain caused by surgery, gunshot wounds, late-stage cancer, motor vehicle crashes, and similar illnesses and events.¹¹³ Neither cannabis nor any other drug can

published by the National Academy of Sciences concluded that states with liberal cannabis laws witnessed an *increase* in opioid deaths. Chelsea L. Shover et al., *Association Between Medical Cannabis Laws and Opioid Overdose Mortality Has Reversed Over Time*, 116 PROCEEDINGS NAT'L ACAD. SCI. 12624 (2019). *See also, e.g.*, DEVAN KANSAGARA ET AL., U.S. DEP'T OF VETERANS AFFS., BENEFITS AND HARMS OF CANNABIS IN CHRONIC PAIN OR POST-TRAUMATIC STRESS DISORDER: A SYSTEMATIC REVIEW (2017); Campbell et al., *supra*; Deborah S. Hasin et al., *U.S. Adults With Pain, A Group Increasingly Vulnerable to Nonmedical Cannabis Use and Cannabis Use Disorder: 2001–2002 and 2012–2013*, AM. J. PSYCH., Jan. 22, 2020, <https://ajp.psychiatryonline.org/doi/10.1176/appi.ajp.2019.19030284> [<https://perma.cc/E622-8V6A?type=image>]; Keith Humphreys & Richard Saitz, *Should Physicians Recommend Replacing Opioids with Cannabis?*, 321 JAMA 639, 639 (2019) (“There are no randomized clinical trials of substituting cannabinoids for opioids in patients taking or misusing opioids for treatment of pain, or in patients with opioid addiction treated with methadone or buprenorphine. . . . Many factors other than cannabis may affect opioid overdose deaths, such as prescribing guidelines, opioid rescheduling, Good Samaritan laws, incarceration practices, and availability of evidence-based opioid use disorder treatment and naloxone.”); Suzanne Nielsen et al., *Opioid-Sparing Effect of Cannabinoids: A Systematic Review and Meta-Analysis*, 42 NEUROPSYCHOPHARMACOLOGY 1752 (2017); Mark Olsson et al., *Medical Marijuana and the Opioid Epidemic: Response to Theriault and Schlesinger*, 175 AM. J. PSYCH. 284 (2018); Gabriel Rada, EPISTEMONIKOS FOUND., <https://isof.epistemontos.org/#/finding/593584b2e3089d0fec24dc01> [<https://perma.cc/BP55-CAWD>]; *see generally* Paul J. Larkin, Jr. & Bertha K. Madras, *Opioids, Overdoses, and Cannabis: Is Marijuana an Effective Therapeutic Response to the Opioid Abuse Epidemic?*, 17 GEO. J.L. & PUB. POL'Y 555, 571–95 (2019) (collecting studies).

112. *See* Larkin & Madras, *supra* note 111, at 588–89; R. Vincent Pohl, *Time Trends Matter: The Case of Medical Cannabis Laws and Opioid Overdose Mortality 3–4* (June 22, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192703 [<https://perma.cc/4AVA-ZQ4D>].

113. *See, e.g.*, Abhiram R. Bhashyam et al., *Self-Reported Marijuana Use Is Associated*

match the acute pain-killing effectiveness of opioids.¹¹⁴ Marijuana also is not a proven therapeutic substitute for, or complement to, opioids (or other drugs) in the treatment of chronic pain, for several reasons.¹¹⁵ In fact, people who use both drugs do not reduce their intake of opioids,¹¹⁶ and the combination of the two makes it more

with Increased Use of Prescription Opioids Following Traumatic Musculoskeletal Injury, 100 J. BONE & JOINT SURGERY 2095, 2096 (2018) (“Prior research provided moderate evidence supporting marijuana use for chronic pain. However, the current literature is inadequate to draw meaningful conclusions as to the effectiveness of marijuana as an acute pain reliever.”); Campbell et al., *supra* note 111 (“We found insufficient evidence to support the introduction of cannabinoids into widespread clinical practice for pain management—although the absence of evidence of effect is not the same as the evidence of absence of effect. . . . Cannabis is clearly unlikely to usurp existing effective treatments for postoperative pain.”); David Raft et al., *Effects of Intravenous Tetrahydrocannabinol on Experimental and Surgical Pain*, 21 CLINICAL PHARMACOLOGY & THERAPEUTICS 26 (1976).

114. JERROLD S. MEYER & LINDA F. QUENZER, *PSYCHOPHARMACOLOGY: DRUGS, THE BRAIN, AND BEHAVIOR* 305–06 (2d ed. 2018) (“As a class, [opioids] are the very best painkillers known to man.”).

115. *See generally* Larkin & Madras, *supra* note 111, at 579 (“There are four reasons to doubt claims that permitting marijuana use for chronic pain can alleviate the opioid crisis. First, there is insufficient evidence to support the claim that marijuana is a safe and effective analgesic for chronic pain. Second, states with liberal marijuana laws should have seen a decline in opioid overdose deaths, but that has not been the case. Third, individuals using marijuana for pain relief should have shown a reduction of or stoppage in opioid use, but evidence indicates that they have continued to use or even increased opioid use. And fourth, the concomitant use of marijuana and opioids conceivably interferes with treatment for opioid use disorder.”).

116. *See, e.g.*, Ziva Cooper et al., *Impact of Co-Administration of Oxycodone and Smoked Cannabis on Analgesia and Abuse Liability*, 43 NEUROPSYCHOPHARMACOLOGY 2046, 2050–51 (2018) (“Overall, these findings demonstrate opioid-sparing effects of cannabis for analgesia that is accompanied by increases in some measures of abuse liability.”); Louisa Degenhardt et al., *Experience of Adjunctive Cannabis Use for Chronic Non-Cancer Pain: Findings from the Pain and Opioids IN Treatment (POINT) Study*, 147 DRUG & ALCOHOL DEPENDENCE 144, 146 (2015) (“Those who had used cannabis for pain reported higher pain severity, greater interference from and poorer coping with pain, and more days out of role in the past year, compared to those who had not used [marijuana].”); Shannon M. Nugent et al., *Patterns and Correlates of Medical Cannabis Use for Pain among Patients Prescribed Long-Term Opioid Therapy*, 50 GEN. HOSP. PSYCH. 104, 108 (2018) (“[P]atients prescribed LTOT [long-term opioid therapy] who endorsed the use of medical cannabis for pain were at greater risk for prescription opioid misuse.”); Mark Olfson et al., *Cannabis Use and Risk of Prescription Opioid Use Disorder in the United States*,

difficult for patients to terminate opioid use through drug treatment.¹¹⁷ In sum, marijuana is not a substitute for opioids. Using the two in combination only harms people already suffering from opioid use disorder, and marijuana can harm users in other ways.¹¹⁸

175 AM. J. PSYCH. 47, 49–50 (2018); Marian Wilson et al., *Cannabis Use Moderates the Relationship Between Pain and Negative Affect in Adults with Opioid Use Disorder*, 77 ADDICTIVE BEHAVIORS 225, 230–31 (2018) (concluding that cannabis use strengthens, rather than weakens, the relationship between pain and depression or anxiety).

117. See Alexandra M. Franklyn et al., *The Impact of Cannabis Use on Patients Enrolled in Opioid Agonist Therapy in Ontario, Canada*, PLOS ONE (Nov. 8, 2017), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0187633> [<https://perma.cc/B44Q-58ZW>]; Mohammadali Mojarrad et al., *Marijuana Use and Achievement of Abstinence from Alcohol and Other Drugs Among People with Substance Dependence: A Prospective Cohort Study*, 42 DRUG & ALCOHOL DEPENDENCE 91, 95–97 (2014).

118. See, e.g., Anees Bahji et al., *Prevalence of Cannabis Withdrawal Symptoms Among People with Regular or Dependent Use of Cannabinoids: A Systematic Review and Meta-analysis*, JAMA NETWORK OPEN (Apr. 9, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2764234?resultClick=1> [<https://perma.cc/F2BV-JQPT>]; Magdalena Cerda et al., *Association Between Recreational Marijuana Legalization in the United States and Changes in Marijuana Use and Cannabis Use Disorder from 2008 to 2016*, 77 JAMA PSYCH. 165, 165–67 (2020), <https://jamanetwork.com/journals/jamapsychiatry/article-abstract/2755276?widget=personalizedcontent&previousarticle=2755275> [<https://perma.cc/P6W7-45ED>]; Lauren R. Gorfinkel et al., *Association of Depression with Past-Month Cannabis Use Among US Adults Aged 20 to 59 Years, 2005 to 2016*, JAMA NETWORK OPEN (Aug. 18, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2769386?resultClick=1> [<https://perma.cc/66B8-MQQQ>]; Deborah S. Hasin et al., *Prevalence of Marijuana Use Disorders in the United States Between 2001–2002 and 2012–2013*, 72 JAMA PSYCH. 1235, 1236 (2015); Lindsey A. Hines et al., *Use of High-Potency Cannabis Use with Mental Health and Substance Use in Adolescents*, 77 JAMA PSYCH. 1044, 1045–46 (2020), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2765973?resultClick=1> [<https://perma.cc/K2SV-9BA9>]; Robin M. Murray & Wayne Hall, *Will Legalization and Commercialization of Cannabis Use Increase the Incidence and Prevalence of Psychosis?*, 77 JAMA PSYCH. 777, 777–78 (2020), <https://jamanetwork.com/journals/jamapsychiatry/article-abstract/2763798> [<https://perma.cc/4GXD-674H>]; Chelsea L. Shover et al., *Association of State Policies Allowing medical Cannabis for Opioid Use Disorder with Dispensary Marketing for this Indication*, JAMA NETWORK OPEN (July 14, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2768239> [<https://perma.cc/V54S-B3CW>] (“[A] large proportion of [cannabis] dispensaries make unsupported claims regarding the effectiveness of cannabis as a treatment for OUD [Opioid Use Disorder], including that cannabis should replace FDA-approved MOUDs [Medications for Opioid Use Disorders].”); Zara Latif & Nadish Garg, *The Impact of Marijuana on the Cardiovascular System: A Review of the Most Common Cardiovascular Events Associated with Marijuana Use*, 9 J.

The conclusion that Professor Dills, Goffard, and Miron reached with regard to roadway crashes is also open to question. Because most of us have been driving since we were (at least) seventeen years old, we tend to forget that it is “a complex activity requiring alertness, divided-yet-wide-ranging attention, concentration, eye-hand-foot coordination, and the ability to process visual, auditory, and kinesthetic information quickly.”¹¹⁹ The changing roadway environment requires a driver to respond immediately to unforeseen and repeated dangers.¹²⁰ Like the ethanol in liquor, the THC in cannabis slows our ability to quickly and effectively process information, make decisions, and implement or revise them when behind the wheel.¹²¹ The impairing effect of THC can last even after a

CLINICAL MED. 1925, 1936 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7355963/> [<https://perma.cc/VAA4-AA6R>] (“Although it is widely viewed as a safe drug, marijuana has been strongly linked to various cardiovascular adverse events over the years. Many cases have linked marijuana to myocardial infarction, especially in young healthy men with no other risk factors. Marijuana has also been associated with a worse mortality rate post MI [(myocardial infarction, or heart attack)]. Cases of marijuana precipitating arrhythmias, stress cardiomyopathy, and arteritis have all been described. With the rise in cannabis use among older patients, who are the most vulnerable to cardiovascular events, it is expected that these reports will increase in the next few years.”); Pramod Theetha Kariyanna et al., *Marijuana and Microcirculation—A Review*, 8 AM. J. MED. CASE REP. 284, 286 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7410519/pdf/nihms-1612767.pdf> [<https://perma.cc/8B7W-JW7Z>] (“Evidence suggests that marijuana increases the risk of acute myocardial infarction and ischemic stroke, even in young and otherwise healthy users, in the acute setting.”).

119. Larkin, *supra* note 16, at 454; *see also* ROBERT L. DUPONT, *THE SELFISH BRAIN: LEARNING FROM ADDICTION* 135 (rev. ed., 2000); Gary M. Reisfield et al., *The Mirage of Impairing Drug Concentration Thresholds: A Rationale for Zero Tolerance Per Se Driving Under the Influence of Drugs Laws*, 36 J. ANALYTICAL TOXICOLOGY 353, 353 (2012).

120. *See* Larkin, *supra* note 16, at 454.

121. *See* BRIT. MED. ASS'N, *supra* note 8, at 66 (“Impairment of psychomotor and cognitive performance, especially in complex tasks, has been shown in normal subjects in many tests. Impairments include slowed reaction time, short term memory deficits, impaired attention, time and space distortion, [and] impaired coordination. These effects combine with the sedative effects to cause deleterious effects on driving ability or operation of machinery.” (citations omitted)); *id.* at 19–20 (listing marijuana's pharmacological actions in people); *see also* NAT'L INST. ON DRUG ABUSE, *MARIJUANA* 10, 12–13 (2017); NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *MARIJUANA, ALCOHOL, AND ACTUAL*

DRIVING PERFORMANCE, 39–40 (1999); NEW ZEALAND TRANSP. AGENCY, RISKS OF DRIVING WHEN AFFECTED BY CANNABIS, MDMA (ECSTASY) AND METHAMPHETAMINE AND THE DETERRENCE OF SUCH BEHAVIOUR: A LITERATURE REVIEW 6 (2020) [hereinafter NZ CANNABIS DRIVING RISKS], <https://www.nzta.govt.nz/resources/research/reports/664> [<https://perma.cc/48YL-DB7L>] (“[T]he relative crash risk of cannabis for a sober driver is around 1.5 for lower doses of cannabis and around 2 for higher doses of cannabis.”); *id.* (noting the following effects of cannabis use on driving in a simulator: “[i]ncreased reckless driving”; “[s]lower driving, larger headways”; “[m]ore signaling errors”; “[i]mpaired control of speed, headway and lateral position”; “[d]eceased car control as task demand increases”; “[d]eceased performance on road tracking tasks”; “[d]eceased psychomotor skills, reaction time, visual functions, attention and encoding”); *id.* at 7 (“[C]annabis users may try to mitigate their impairment by not overtaking, slowing down and focusing their attention in anticipating an expected event for which a known response is required. Of course, this cannot happen when an event is unexpected.”); MINISTRY OF TRANSP. (NEW ZEALAND), ENHANCED DRUG IMPAIRED DRIVER TESTING 6 (May 2019) (finding that 27 percent of the drivers killed in crashes had used cannabis and that 59 percent of the drivers “stopped by Police and determined to be impaired by drugs” had used cannabis); *id.* at 7 (“The negative effects of high doses of cannabis on driving performance are well documented and cannabis use is associated with increased risk of being killed or injured.” (footnote omitted)); NAT’L ACAD. OF SCI., ENG’G, & MED., *supra* note 108, at 85–99, 230; IVERSEN, *supra* note 8, at 27–65, 189 (2d ed. 2008); Robert L. DuPont et al., *Marijuana-Impaired Driving: A Path Through the Controversies*, in CONTEMPORARY HEALTH ISSUES ON MARIJUANA 183, 186 (Kevin A. Sabet & Ken. C. Winters eds., 2018) (“Today there is a wealth of evidence that marijuana is an impairing substance that affects skills necessary for safe driving.”); Mark Asbridge et al., *Acute Cannabis Consumption and Motor Vehicle Collision Risk: Systematic Review of Observational Studies and Meta-Analysis*, 9 *BMJ* 344, 344–45 (2012); Robert M. Chow et al., *Driving Under the Influence of Cannabis: A Framework for Future Policy*, 128 *ANESTHESIA & ANALGESIA* 1300, 1301 (2019) (“Several studies have found acute marijuana use to be associated with a ≥ 2 -fold higher risk of crashing while driving a motor vehicle when compared to driving unimpaired. In some cases, drivers under the influence of cannabis were more aware of their deficits and attempted to compensate by driving slower and taking less risks. However, these behaviors do not equate to a reduced risk of accidents. The deleterious cognitive and psychomotor effects of marijuana that increase with multitasking or task complexity cannot be ignored. Studies evaluating the effects of cannabinoids on driving ability have found that participants perform worse on divided attention tasks, during situations with decision-making dilemmas, and during long monotonous drives followed by sudden changes requiring a quick reaction.” (footnotes omitted)); Rebecca L. Hartman & Marilyn A. Huestis, *Cannabis Effects on Driving Skills*, 59 *CLINICAL CHEM.* 478, 478–79 (2013); Eduardo Romano et al., *Cannabis and Crash Responsibility While Driving Below the Alcohol Per Se Legal Limit*, 108 *ACCIDENT ANALYSIS & PREVENTION* 37, 37–38, 41–42 (2017). There is less of an adverse effect in simulators and when drivers perform simple on-road maneuvers, but “if speed increases, as it does on a highway, then reaction time can’t keep up,” and “if a driver

considerable period of abstinence.¹²² Yet, ironically and alarmingly, THC's potentially enduring effect might not matter a great deal because studies show that a good number of people drive shortly after

faces multiple tasks . . . performance goes to hell pretty quickly." DAVID CASARETT, *STONED: A DOCTOR'S CASE FOR MEDICAL MARIJUANA* 160 (2015); see generally Larkin, *supra* note 16, at 473–78.

122. See M. Kathryn Dahlgren et al., *Recreational Cannabis Use Impairs Driving Performance in the Absence of Acute Intoxication*, 208 *DRUG & ALCOHOL DEPENDENCE*, no. 107771, 2020, at 8 ("The current study demonstrates residual driving impairment in nonintoxicated cannabis users, which appears specific to those with early onset cannabis use."), <https://reader.elsevier.com/reader/sd/pii/S0376871619305484?token=77B6250A44A47439AD0E665BF9C48268BDE0223B5726398A1D2FBB9DD375A0745DDAEFC75C7E2411636DFF6FD2A47338> [<https://perma.cc/9538-TB2E>]; DuPont et al., *supra* note 121, at 187 ("A study of chronic, daily marijuana users assessed over a three-week period of abstinence showed prolonged impairment of psychomotor function on critical tracking and divided attention tasks necessary for driving safely.").

consuming marijuana.¹²³ What is worse is that people also commonly use marijuana *and* alcohol.¹²⁴ That combination further impairs someone's ability to handle a motor vehicle safely, because

123. The percentages vary considerably, but all of them are worrisome. See Alejandro Azofeifa et al., *Driving Under the Influence of Marijuana and Illicit Drugs Among Persons Aged ≥ 16 Years—United States, 2018*, 68 MORBIDITY & MORTALITY WKLY. REP. 1153, 1153 (2019) (“During 2018, 12 million (4.7%) U.S. residents reported driving under the influence of marijuana in the past 12 months; 2.3 million (0.9%) reported driving under the influence of illicit drugs other than marijuana. Driving under the influence was more prevalent among males and among persons aged 16–34 years.”); NAT’L HIGHWAY TRAFFIC SAFETY ADM’N, RESULTS OF THE 2013–2014 NATIONAL ROADSIDE SURVEY OF ALCOHOL AND DRUG USE BY DRIVERS 1–2 (2015) (stating that almost 20 percent of drivers tested positive for potentially impairing legal and illegal drugs other than alcohol); NZ CANNABIS DRIVING RISKS, *supra* note 121, at 10 (“Of the 11% who had used cannabis in the previous 12 months, 36% of those who drove during that time reported driving under the influence of cannabis.”); Scott MacDonald et al., *Driving Behavior Under the Influence of Cannabis or Cocaine*, 9 TRAFFIC INJURY PREVENTION 190, 191 (2008) (stating that 22% of marijuana users in Ontario, Canada have driven while under its influence, and 90% of users surveyed said that they were willing to drive after consuming a typical dose); Thomas R. Arkell et al., *Driving-Related Behaviours, Attitudes and Perceptions among Australian Medical Cannabis Users: Results from the CAMS 18–19 Survey*, 148 ACCIDENT ANALYSIS & PREVENTION, no 105784, 2020, <https://pubmed.ncbi.nlm.nih.gov/33017729/> [<https://perma.cc/F9N7-DCY7>] (“A key finding of the current study is that a substantial proportion of medical cannabis users are driving shortly after using cannabis, with some driving during the time of peak effects when impairment tends to be greatest. More than 19.0% of users reporting driving within one hour of consuming cannabis and 34.6% of all users within 3 hours of use . . . The finding that 71.9% of respondents felt that their medical cannabis use does not impair their driving is consistent with previous reports showing that cannabis users tend to perceive DUIC [Driving Under the Influence of Cannabis] as relatively low risk, especially when compared with alcohol.” (citations omitted)). *But see id.* (“In a recent review, Ceilius et al. found that most patients with multiple sclerosis-related spasticity who were being treated with nabiximols actually showed an improvement in driving ability, most likely due to a reduction in spasticity and/or improved cognitive function.” (citation omitted)).

124. See, e.g., AZOFEIFA ET AL., *supra* note 123, at 1154 (“In a study of injured drivers aged 16–20 years evaluated at level 1 trauma centers in Arizona during 2008–2014, 10% of tested drivers were simultaneously positive for both alcohol and [THC].” (footnote omitted)); BECKY BUI & JACK K. REED, COLO. DEP’T OF PUB. SAFETY, DRIVING UNDER THE INFLUENCE OF DRUGS AND ALCOHOL: A REPORT PURSUANT TO HOUSE BILL 17-1315, at 7 (July 2018) (noting that in 2016 alcohol and THC are the most common drug combination in cases with test results); DARRIN T. GRONDELL ET AL., WASH. TRAFFIC SAFETY COMM’N, MARIJUANA USE, ALCOHOL USE, AND DRIVING IN WASHINGTON STATE 1–2

each drug enhances the incapacitating effect of the other.¹²⁵ Consuming marijuana alone might not put someone “one token over the line,”¹²⁶ but a “marijuana-alcohol cocktail” likely would do so.¹²⁷

(Apr. 2018) (“Poly-drug drivers (combinations of alcohol and drugs or multiple drugs) is now the most common type of impairment among drivers in fatal crashes.”); 5 ROCKY MTN. HIGH-INTENSITY DRUG TRAFFICKING AREA STRATEGIC INTEL. UNIT, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT—UPDATED 10 (2019) (depicting that 43 percent of the drivers who tested positive for marijuana also had used alcohol); EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, DRIVING UNDER THE INFLUENCE OF DRUGS, ALCOHOL AND MEDICINES IN EUROPE—FINDINGS FROM THE DRUID PROJECT 17 (2012) (“[I]n the majority of cases [involving drivers “seriously injured or killed”], illicit drugs were found in combination with other psychoactive substances, mainly alcohol. THC (and/or THC-COOH) seemed to be one of the most prevalent illicit drugs”); CAULKINS ET AL., *supra* note 19, at 44 (“Marijuana users are much more likely than are nonusers to drink and to abuse alcohol. For example, current marijuana users are five times as likely as nonusers to meet DSM-IV criteria for alcohol abuse or dependence (26 percent versus 5 percent); that is, one in four current marijuana users is a problem drinker (calculated using 2012 NSDUH data using the SAMHSA online tool). Indeed, simultaneous use is common. The national household survey asks people what, if any, other substances they used the last time they drank alcohol. Among the 15.4 million people who used both alcohol and marijuana at some time in the past 30 days, 54 percent reported using marijuana along with alcohol the last time they drank, a proportion that rises to 83 percent among daily or near-daily marijuana users.” (footnote omitted)); ROBERT L. DUPONT, INST. FOR BEHAV. & HEALTH, IMPLEMENT EFFECTIVE MARIJUANA DUID LAWS TO IMPROVE HIGHWAY SAFETY 1 (Oct. 12, 2016); Johannes E. Ramaekers, *Driving Under the Influence of Cannabis: An Increasing Public Health Concern*, 319 JAMA 1433 (2018). See generally Larkin, *supra* note 16, at 478–79 & nn.104–07.

125. See, e.g., BRIT. MED. ASS’N, *supra* note 8, at 71 (noting the “additive effect” when marijuana and alcohol are combined); IVERSEN, *supra* note 8, at 96 (“It may be that the greatest risk of marijuana in this context is to amplify the impairments caused by alcohol when, as often happens, both drugs are taken together”); Percy Bondallaz et al., *Cannabis and Its Effects on Driving Skills*, 268 FORENSIC SCI. INT’L 92 (2016); R. Andrew Sewell et al., *The Effect of Cannabis Compared with Alcohol on Driving*, 18 AM. J. ADDICTION 185 (2009); see generally Larkin, *supra* note 16, at 478–80 & nn.105–08 (collecting authorities).

126. MIKE BREWER & TOM SHIPLEY, ONE TOKE OVER THE LINE (Kama Sutra Records 1971).

127. See, e.g., Nat’l Highway Traffic Safety Admin., *Marijuana and Alcohol Combined Severely Impede Driving Performance*, 35 ANNALS OF EMERGENCY MED. 398, 398 (2000); Stanford Chihuri et al., *Interaction of Marijuana and Alcohol on Fatal Motor Vehicle Crash Risk: A Case-Control Study*, 4 INJURY EPIDEMIOLOGY, no. 8, 2017, at 6; Guohua Li et al., *Role of Alcohol and Marijuana Use in the Initiation of Fatal Two-Vehicle Crashes*, 27 ANNALS

The recent numbers bear out that concern. Data from 2018 and 2019 in Colorado and Washington show a considerable increase in the number of drivers who tested positive for THC in crashes resulting in fatalities.¹²⁸ The Colorado data, in fact, represents roughly one person killed every three days.¹²⁹ Those facts make it easy to understand why the federal agencies responsible for improving roadway safety—such as the National Highway Traffic Safety Administration and the National Transportation Safety Board,¹³⁰ along

OF EPIDEMIOLOGY 342, 346 (2017); Adi Ronen et al., *The Effect of Alcohol, THC and Their Combination on Perceived Effects, Willingness to Drive and Performance of Driving and Non-Driving Tasks*, 42 ACCIDENT ANALYSIS & PREVENTION 1855, 1862 (2010); Mark R. Rosekind et al., *Reducing Impaired Driving Fatalities: Date Need to Drive Testing, Enforcement and Policy*, 180 JAMA INTERNAL MED. 1068, 1068 (2020) (“[E]very year more than 10 000 individuals die on US roads as a result of crashes in which a driver had a blood alcohol concentration of greater than 0.08 g/dL, accounting for about one-third of motor vehicle crash deaths annually. As this significant alcohol-impaired driving problem continues, public health and safety professionals are justifiably concerned by the introduction of an additional legal intoxicant into our communities and onto our roads.” (footnote omitted)); Julian Santaella-Tenorio et al., *Association of Recreational Cannabis Laws in Colorado and Washington State with Changes in Traffic Fatalities, 2005-2017*, 180 JAMA INTERNAL MED. 1061, 1064 (2020) (finding an increase in marijuana-related traffic fatalities in Colorado but not Washington State); L.R. Sutton, *The Effects of Alcohol, Marihuana and Their Combination on Driving Ability*, 44 J. STUD. ALCOHOL 438, 442 (1983). *But see* Julian Santaella-Tenorio et al., *US Traffic Fatalities, 1985-2014, and Their Relationship to Medical Marijuana Laws*, 107 AM. J. PUB. HEALTH 336, 338 (2017) (finding a decrease in traffic fatalities in states with medical marijuana programs); *see generally* Larkin, *supra* note 16, at 478–80 & nn.104–09 (collecting authorities).

128. *See, e.g.*, ROCKY MTN. HIGH-INTENSITY DRUG TRAFFICKING AREA STRATEGIC INTEL. UNIT, *supra* note 124, at 5–17; COLO. DEP’T OF PUBLIC SAFETY, DIV. OF CRIM. JUST., OFF. OF RES. & STAT., *IMPACTS OF MARIJUANA LEGALIZATION IN COLORADO: A REPORT PURSUANT TO SENATE BILL 13-283 51* (Oct. 2018).

129. ROCKY MTN. HIGH-INTENSITY DRUG TRAFFICKING AREA STRATEGIC INTEL. UNIT, *supra* note 124, at 5.

130. *See, e.g.*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., *DRUG-IMPAIRED DRIVING*, <https://www.nhtsa.gov/risky-driving/drug-impaired-driving> [<https://perma.cc/83EL-TEP7>] (last accessed Aug. 23, 2020); NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., *MARIJUANA, ALCOHOL AND ACTUAL DRIVING PERFORMANCE 4–15* (1999); Heidi King, Deputy Dir., Nat’l Highway Safety Admin., *DUID: A Vision for the Future* (Feb. 27, 2018), <https://www.nhtsa.gov/speeches-presentations/duid-vision-future> [<https://perma.cc/83EL-TEP7>]; *Planes, Trains, and Automobiles: Operating While Stoned: Hearing Before the Subcomm. on Operations of the H. Comm.*

with the White House Office of National Drug Control Policy¹³¹—are troubled by the risks posed by DUI-D: that is, Driving Under the Influence of Drugs. We would be foolish to discount their concerns in any debate over the future of our marijuana policy. The bottom line is that Professor Dills, Goffard, and Miron are too quick to dismiss the potential harm of marijuana-impaired driving.¹³²

* * *

Where does that leave us? If polls are to be believed, our historically negative attitude toward cannabis has withered away, and people in the mainstream of political discourse disagree over how to treat the drug. A majority of states have passed medical or recreational marijuana programs despite the obvious fact that they are

on Oversight and Government Reform, 113th Cong. 9–23 (2014) (statement of Hon. Christopher Hart, Acting Chairman, Nat'l Transp. Safety Bd.); *id.* at 24–25 (statement of Jeffrey P. Michael, Assoc. Adm'r of Rsch. & Program Dev., Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp.); *id.* at 42 (statement of Patrice M. Kelly, Acting Dir., Off. of Drug & Alcohol Pol. and Compliance, U.S. Dep't of Transp.); *id.* at 44 (statement of Ronald Flegel, Dir., Div. of Workplace Programs, Ctr. for Substance Abuse Prevention, Substance Abuse & Mental Health Serv. Admin., U.S. Dep't of Health & Human Servs.).

131. In 2010, ONDCP concluded that drugged driving poses as great a threat to roadway safety as alcohol-impaired driving and demands an “equivalent” response from the government and society. *See* OFF. OF NAT'L DRUG CONTROL, NATIONAL DRUG CONTROL STRATEGY 2010, at 23 (2010).

132. For a recent validation of that proposition, see Russell S. Kamer et al., *Change in Traffic Fatality Rates in the First 4 States to Legalize Recreational Marijuana*, 180 JAMA INTERNAL MED. 1119, 1119–20 (June 22, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2767643> [https://perma.cc/NPY5-YS9F] (“[L]egalization of recreational marijuana is associated with increased traffic fatality rates. Applying these results to national driving statistics, nationwide legalization would be associated with 6800 (95% CI, 4200-9700) excess roadway deaths each year.”); *see also* Jaeyoung Lee et al., *Investigation of Associations between Marijuana Law Changes and Marijuana-Involved Fatal Traffic Crashes: A State-Level Analysis*, 10 J. TRANSP. & HEALTH 194, 201 (2018) (“We found that simply legalizing medical marijuana has no association with the number of drivers who are under the influence of marijuana in fatal crashes. On the other hand, all other types of changes in marijuana policy: decriminalization, additional medical legalization (in states that already decriminalized marijuana), and recreational legalization significantly increased the number of drivers involved in fatal crashes who were impaired by marijuana because all adults can more easily access marijuana.”).

encouraging state residents to violate federal law. The federal government has not torpedoed those programs, and for a while even gave them its blessing.¹³³ Former U.S. Attorney General Bill Barr told Congress that only a legislative resolution is now appropriate. For those reasons (and some others too), it is time to re-examine the status of marijuana under federal law.¹³⁴

III. THE OPPORTUNITY TO RECONSIDER OUR APPROACH FROM SCRATCH

So far, Congress has largely decided to “pay no attention to that man behind the curtain”¹³⁵—that is, to the thirty-plus states acting as if the CSA were advice, not law, but who are really pulling the strings of contemporary cannabis policy. The Members hope that this problem will go away without having to vote on potential reform of federal law, because any vote will anger some voters whichever button they push. A new Congress might think and act differently, but there is no certainty of that happening. As a result, because the states cannot exempt themselves from the CSA,¹³⁶ the only option left to rationalize federal and state law, some people might say, is to persuade the Supreme Court to find a basis in the Constitution to do Congress’s job.

Their likelihood of being successful, however, is not high. The system was not designed to work that way; the Court’s role is to

133. Emily Kopp, *States Turn to Unenforced Federal Law to Slow Medical Marijuana Legalization*, ROLL CALL (Mar. 4, 2020, 5:30 AM), <https://www.roll-call.com/2020/03/04/states-turn-to-unenforced-federal-law-to-slow-medical-marijuana-legalization/> [<https://perma.cc/2MZA-9UTR>].

134. See generally Peter Bensinger, *Weighing the Consequences of Legalization*, WALL ST. J. (Jan. 2, 2020), <https://www.wsj.com/articles/the-america-that-legal-marijuana-has-wrought-11577984718> [<https://perma.cc/GR3J-Y4>]. The House of Representatives recently passed the Marijuana Opportunity Reinvestment and Expungement (MORE) Act, H.R. 3884, 116th Cong. (2020), which would remove cannabis from the schedules of controlled substances in the Controlled Substances Act of 1970.

135. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

136. See *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483, 494–95 (2001) (ruling that medical necessity is not a defense to cannabis distribution even in a state with a medical marijuana program).

keep Congress from going off the rails, not to tell Congress where it must or should go. The Court is reticent to assume a legislative role for a host of institutional and political reasons, even when Congress refuses to do its job. Even if the Court were inclined to do so, it is not likely that the Court would find that eliminating the incoherence plaguing this subject is sufficiently important to justify wearing a legislative hat.

Professors Robert Mikos, Ernest Young, and William Baude take a different, more traditional approach. Each one is a well-recognized scholar in the field of cannabis regulation or constitutional law, and each one believes that the Supreme Court has gone too far in letting Congress override the states' authority to permit marijuana to be grown, sold, and used within their borders.¹³⁷ Rather than ask the Supreme Court to legislate a solution to this problem, they urge the Court to revisit its precedents to recognize that the state should have greater room to regulate entirely in-state conduct free from congressional oversight.¹³⁸ If anyone could persuade the Supreme Court to adopt a reasonable, constitutionally justified, and federalism-friendly alternative to today's messy state of the law, one or more of them can.¹³⁹

137. See generally Robert A. Mikos, *Marijuana Localism*, 65 CASE WES. RES. L. REV. 715 (2015); Ernest A. Young, *Federalism as a Check on Executive Authority*, 22 TEX. REV. L. & POL. 305 (2017–2018); William Baude, *The Contingent Power to Regulate Marijuana*, at 171–84.

138. *Id.*

139. Professors Mikos and Young have written extensively about one subject or the other in the book's title. For a sampling of Professor Mikos' scholarship on cannabis policy, see ROBERT A. MIKOS, *MARIJUANA LAW, POLICY, AND AUTHORITY* (2017); Robert A. Mikos, *Marijuana Localism*, 65 CASE WES. RES. L. REV. 715 (2015); Robert A. Mikos, *Preemption under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5 (2013); Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 DENVER U. L. REV. 997 (2012); Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633 (2011); 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). For a sampling of Professor Young's scholarship on federalism, see Ernest A. Young, *Federalism as a Check on Executive Authority*, 22 TEX. REV. L. & POL. 305 (2018); Ernest A. Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057 (2015); Ernest A. Young, *The Puzzling Persistence of Dual*

Professor Mikos addresses the marijuana federalism issue from a preemption perspective.¹⁴⁰ His concern is with the argument that the CSA preempts state legalization provisions.¹⁴¹ Invoking implicit preemption principles, opponents of legalization have argued that the CSA preempts state cannabis legalization laws because they frustrate the policy underlying the CSA of deterring the sale or consumption of marijuana.¹⁴² In response, Professor Mikos both relies

Federalism, 55 NOMOS 34 (2014); Ernest A. Young, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39 (2013); Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874 (2006). For an article of Professor Young's spanning the divide between both subjects, see Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after Gonzales v. Raich*, 2005 SUP. CT. REV. 1 (2005). Professor Baude's oeuvre focuses (but not exclusively) on constitutional theory. For a sampling of his scholarship, see William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019); William Baude, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809 (2019); William Baude et al., *A Call for Developing a Field of Positive Legal Methodology*, 84 U. CHI. L. REV. 1 (2017); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

140. Mikos, *supra* note 6, at 103. Professor Young does as well, see Young, *supra* note 6, at 89–92, but Professor Mikos focuses on the issue. For convenience, I will refer only to Professor Mikos's argument.

141. Mikos, *supra* note 6, at 114.

142. For some time the Supreme Court has stated that federal law implicitly preempts state law when the latter imposes an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also, e.g., *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1912 (2019) (Ginsburg, J., concurring in the judgment); *Wyeth v. Levine*, 555 U. S. 555, 563–64 (2009). The *Virginia Uranium* case, however, calls that principle into question. Writing the lead opinion for the Court, Justice Gorsuch, joined by Justices Thomas and Kavanaugh, concluded that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law." *Virginia Uranium*, 139 S. Ct. at 1901 (lead opinion) (citation and internal punctuation omitted); see also *id.* at 1905 ("Start with the fact that this Court has generally treated field preemption inquiries like this one as depending on *what* the State did, not *why* it did it."). As Justice Gorsuch elaborated, "A sound preemption analysis cannot be as simplistic as that. No more than in field preemption can the Supremacy Clause be deployed here to elevate abstract and unenacted legislative desires above state law; only federal laws 'made in pursuance of' the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect. Art. VI, cl. 2 So any '[e]vidence of pre-emptive

on and quarrels with the Supreme Court's 2018 decision in *Murphy v. National Collegiate Athletic Association*,¹⁴³ the third of three decisions addressing what has come to be known as the "Anticommandeering Doctrine."¹⁴⁴ He relies on *Murphy* for the rule that Congress cannot issue diktats to state legislatures telling them what must be a crime. Professor Mikos quarrels with the Court's reasoning, however, because it did not go far enough to protect state decisions to liberalize their criminal laws, particularly the ones dealing with marijuana.¹⁴⁵

Murphy involved a Tenth Amendment challenge to the constitutionality of a federal law, the Professional and Amateur Sports Protection Act (PASPA).¹⁴⁶ The PASPA ostensibly sought "to safeguard the integrity of sports"¹⁴⁷ by telling the states that they could not "authorize" sports gambling.¹⁴⁸ New Jersey decided to cash in on

purpose,' whether express or implied, must therefore be 'sought in the text and structure of the statute at issue.'" *Id.* at 1907 (citation omitted). Those three justices would not allow for preemption based on a "frustration of the purposes" rationale. *Id.* at 1900. If two additional justices joined those three, there would be no good argument that the CSA preempts the state legalization measures. In any event, there is no need to invoke the "anticommandeering doctrine" to fend off a preemption challenge, as explained below. See *infra* note 177.

143. 138 S. Ct. 1461 (2018).

144. Mikos, *supra* note 6, at 103–122; *Murphy*, 138 S. Ct. at 1472.

145. Mikos, *supra* note 6, at 111–114.

146. 28 U.S.C. §§ 3701–3704 (2018).

147. *Murphy*, 138 S. Ct. at 1470. I say "ostensibly," because the PASPA grandfathered the state laws then in effect—think: Nevada—or any such law that New Jersey passed within a year after the PASPA became law. *Id.* at 1471 & nn.25–27. It is difficult to believe that the millions of dollars annually bet on sports gambling in those states does not risk "the integrity of sports."

148. 28 U.S.C. § 3702 (2018) ("It shall be unlawful for—(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games."); see S. Rep. No. 102-248 at 9 (1991) (Senate Report accompanying the Professional and Amateur Sports Protection Act (PASPA)).

that enterprise,¹⁴⁹ and its legislature, in a meandering way, eventually did just that.¹⁵⁰ The Supreme Court read the PASPA as forbidding New Jersey from repealing a state criminal law banning sports gambling and held that, in so doing, the PASPA violated the Court's Anticommandeering Doctrine.¹⁵¹ That doctrine denies Congress the power to treat states as if they were federal agencies whom Congress can boss around.¹⁵² Just as Congress cannot order a state to pass a state law,¹⁵³ so too Congress cannot direct a state to leave one unmodified.¹⁵⁴ The Court also rejected the argument that the PASPA was an ordinary exercise of Congress's Supremacy Clause power to regulate interstate gambling and, in the process, preempt contrary state law.¹⁵⁵ That defense failed, the Court concluded, because "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States."¹⁵⁶ By contrast, the PASPA spoke only to the states without also prohibiting private sports gambling.¹⁵⁷

149. I know; that's a horrible pun. But I couldn't help myself.

150. *Murphy*, 138 S. Ct. at 1469–72.

151. *See id.* at 1474–75.

152. *Id.* at 1475 ("The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States.").

153. That was the holding of the "pioneering case," *id.* at 1476, in the Anticommandeering Doctrine, *New York v. United States*, 505 U.S. 144 (1992). *New York* held that Congress cannot order a state to assume "title" to radioactive waste or regulate it as Congress directs. *Id.* at 176–78.

154. *Murphy*, 138 S. Ct. at 1478–79.

155. *Id.* at 1479.

156. *Id.* at 1481.

157. *Id.* ("Once this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors. It certainly does not confer any federal rights on private actors interested in conducting sports gambling operations. (It does not give them a federal right to engage in sports gambling.) Nor does it impose any federal restrictions on private actors. If a private citizen or company started a sports gambling operation, either with or without state authorization, [28 U.S.C.] § 3702(1) would not be violated and would not provide any ground for a civil action by the Attorney General or any other party. Thus, there is

Professor Mikos's criticism of *Murphy* is not that the Supreme Court mistakenly held the PASPA unconstitutional, but that the Court's ruling did not go far enough to protect state sovereignty.¹⁵⁸ The holding is underinclusive, he argues, because it does not keep Congress from adopting a simple workaround.¹⁵⁹ Congress could easily nullify the Court's holding by passing a statute that adds to the PASPA's text a provision forbidding any private party from engaging in sports gambling.¹⁶⁰ The Court likely did not intend to create that loophole, as they note, but it is there for all to see, and other commentators have spotted it too.¹⁶¹

Professor Mikos is not concerned with the potential resurrection of the PASPA.¹⁶² What troubles him is the risk that *Murphy* would not be an answer to the argument that the CSA preempts state cannabis legalization programs.¹⁶³ As discussed above, the inconsistency between federal and state law is plain for all to see.¹⁶⁴ Accordingly, the preemption argument would be that, by regulating rather than prohibiting the sale of marijuana, the state liberalization statutes conflict with a fundamental purpose of the CSA—namely, to stop the distribution of cannabis. Because the CSA clearly applies

simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.”).

158. Mikos, *supra* note 6, at 112–113.

159. *Id.*

160. Professor Mikos even kindly drafts the text Congress could use. *Id.* at 112–13 (“It is unlawful for any private actor to sponsor, operate, advertise, or promote sports gambling.”).

161. Young, *supra* note 6, at 91; Mikos, *supra* note 6, at 113, 120 n.25. It is unlikely that Congress will use that loophole to salvage the PASPA. The statute did not make sports gambling a federal offense, and it exempted sports gambling in Nevada casinos from its terms. *Murphy*, 138 S. Ct. at 1470–71; *supra* note 148. Given the centrality of gambling to Nevada's economy, that compromise likely was necessary to secure the PASPA's passage. The political muscle necessary to demand that exemption is likely to stop Congress from making sports gambling a federal offense. Congress's theoretical ability to plug the hole necessary for preemption to be effective and save the PASPA is likely to remain just that, theoretical.

162. Mikos, *supra* note 6, at 118.

163. *Id.* at 115–16.

164. *See supra* Part I.

to private conduct, the argument would go, it does not violate the Anticommandeering Doctrine, and it preempts all state marijuana liberalization laws.

To defend against that argument, Professor Mikos urges the Supreme Court to refine the Anticommandeering Doctrine.¹⁶⁵ He maintains that to decide whether Congress has merely regulated private conduct or has trespassed on state sovereignty, a court should look to the substance of state, not federal, law and discern whether the state has regulated or deregulated private conduct.¹⁶⁶ Why? “Congress may preempt state law only to the extent the *state* law imposes restrictions or confers rights—that is, only to the extent *state* law regulates private actors.”¹⁶⁷ By contrast, “Congress may not preempt state law if it, instead, removes such restrictions on rights—that is if the state law deregulates private actors.”¹⁶⁸

I doubt that the Supreme Court will want to adopt a rule resembling Wesley Newcomb Hohfeld’s analysis of legal rights as the difference between forbidden commandeering and lawful preemption.¹⁶⁹ One of the two biggest selling points of the Anticommandeering Doctrine is its simplicity (the other is its apparent facial plausibility). Article I identifies the process that Congress must follow to legislate, as well as the subjects its legislation may govern.¹⁷⁰

165. Mikos, *supra* note 6, at 116–18.

166. *See id.*

167. *Id.* at 116.

168. *Id.* Professor Young suggests that perhaps the Supreme Court will reconsider its ruling in *Gonzalez v. Raich*, 545 U.S. 1 (2005), if “the *de facto* patchwork of contemporary law fails to cause chaos in the states where prohibitions are still enforced.” Young, *supra* note 6, at 97. That suggestion is similar to Professor Baude’s argument (both offer essentially the same suggestion, just from different directions), which I discuss below. *See infra* text accompanying notes 187–90.

169. *See, e.g.*, WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cooke ed., 2010) (1964); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913); *see generally* Heidi M. Hurd & Michael S. Moore, *The Hohfeldian Analysis of Rights*, 63 *AM. J. JURIS.* 295 (2018).

170. U.S. CONST. art. I, §§ 7–9.

It does not permit Congress to sidestep those limitations by conscripting a state into acting, in Justice Scalia's felicitous phrase, as a "junior-varsity Congress."¹⁷¹ As *Murphy* put it, "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States."¹⁷² What could be simpler? Why complicate matters?¹⁷³

Besides, that complication is unnecessary. The Constitution does not require a state to have a criminal code. Article I identifies two examples of criminal legislation that states *cannot* enact—an ex post facto law and a bill of attainder¹⁷⁴—but it does not specify any laws that a state *must* pass. *Murphy* ruled that Article I does not vest in Congress the authority to issue commands to states, and the Article VI Supremacy Clause does not change that conclusion.¹⁷⁵ The Supremacy Clause merely establishes "a rule of decision" protecting Congress's legislative authority by making it superior to state law when acting within a delegated power.¹⁷⁶ Because Congress has no Article I power to command that states outlaw cannabis as contraband, states can repeal whatever drug laws they choose.¹⁷⁷

171. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

172. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018).

173. Yes, in the context of addressing the PASPA as a lawful exercise of the right to regulate gambling the Court in *Murphy* looked to see whether the PASPA granted private parties a right to engage in sports gambling, and found that it did not. *Id.* at 1481. The Court pursued that inquiry, however, only to discern whether there was some non-obvious feature of the PASPA that could save it by regulating private conduct. *Id.* There is no doubt that the CSA regulates private conduct, so there would be no need for that inquiry.

174. See U.S. CONST. art. I, § 10, cl. 1.

175. *Murphy*, 138 S. Ct. at 1478–79.

176. See Larkin, *supra* note 25, at 109–11.

177. *Id.* Atop that, the Supreme Court's Anticommandeering Doctrine is misconceived. The doctrine (assuming that only three decisions can constitute a "doctrine") is a good example of a phenomenon that occasionally bewitches the Supreme Court. From time to time, the Court becomes so captured by one of its own doctrines that it fails to see that the doctrine obscures rather than illuminates legal analysis. (The Supreme Court's capital sentencing precedents are another example.) Indeed, *Murphy* is an example of what happens when judges become hypnotized by a word—here, "commandeering."

The doctrine stems from the Supreme Court's 1992 and 1997 decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). The *New York* case held unconstitutional a provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (codified as amended at 42 U.S.C. § 2021b et seq. (2018)), requiring the states, by legislation, to adopt as state law federally mandated regulations of that subject or else treat as state property their low-level radioactive waste. *New York*, 505 U.S. at 175, 188. *Printz* held the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended at 19 U.S.C. § 922 (2018)), unconstitutional insofar as it directed state law enforcement officers to conduct federal firearms background checks required by federal law. 521 U.S. at 933–34. *Murphy* relied on *New York* and *Printz* to hold unconstitutional an act of Congress, the PASPA, directing state legislatures not to make gambling lawful under state law. *Murphy*, 138 S. Ct. at 1477–78. The doctrine likely gained its moniker because Justice Scalia, the author of *Printz*, used the term “commandeer” to describe what Congress had done by ordering state officials to carry out the responsibilities that federal law had unconstitutionally imposed on them. 521 U.S. at 914 n.7, 917, 929. Justice Stevens also used that term in his dissent. *Id.* at 952, 963 (Stevens, J., dissenting).

There was a simple answer to the allegedly complex issue posed by the constitutional challenges to the PASPA. Put aside any discussion of the express or implied limitations that the Constitution places on Congress's power and return to first principles. They offer an easier path to the same result without the need to create a new doctrine. Those principles reveal that all three statutes sought to do what no one at the Philadelphia Convention of 1787 or State Ratifying Conventions imagined that the newly chartered federal government could do: create *state law*.

Murphy, like *New York*, involved a federal statute that directed a state legislature to pass or not a state law of Congress's liking, while *Printz* involved a statute that imposed a new duty on state law enforcement officers. All three cases involved Congress's attempt to impose new duties on state officials whose authority and responsibilities are defined by state law. *See, e.g.,* *McMillan v. Monroe Cty.*, 520 U.S. 781, 786 (1997); VA. CODE ANN. §§ 15.2-1609 & 15.2-1603 (2020). The statutes in *New York*, *Printz*, and *Murphy* certainly did not purport to grant the relevant state legislative and executive officials' *federal* authority, and, even if they had, it would have been to no effect. The reason is that any party who exercises authority under federal law must be appointed consistent with Article II, and none of those statutes contemplated any such appointment, as Justice Scalia noted in *Printz*, 521 U.S. at 922–23. The only alternative is that, in each case, Congress sought to impose new duties on state officials by creating *state law*.

Yet, Congress lacks the “police power” that states enjoy, so it must find authority to legislate in one or more clauses of Section 8 of Article I. *See, e.g.,* *United States v. Lopez*, 514 U.S. 549, 566 (1995); *id.* at 552 (“The Constitution creates a Federal Government of enumerated powers.”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (“The enumeration presupposes something not enumerated . . .”); THE FEDERALIST No. 45 (James Madison) (Clinton Rossiter ed., 2003) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”). When Congress does so, it

To Professors Young and Baude, the real villain is not *Murphy*, but the Supreme Court's earlier decision in *Gonzales v. Raich*.¹⁷⁸ *Raich* was a challenge to the CSA by two individuals who sought to grow and use marijuana for their own personal medical use, rather than for any commercial purpose, whether interstate or intrastate.¹⁷⁹ They maintained that Congress lacked authority under the Commerce Clause to regulate their conduct because it did not take place in, and could have no effect on, interstate commerce.¹⁸⁰ The California medical cannabis law cordoned that activity off from commerce by limiting the exemption to in-state personal use by residents.¹⁸¹ The Court rejected that argument, holding that Congress

creates a "Law," U.S. CONST. art. I, § 7, cl. 2, that is by definition a *federal* law. Indeed, the Supremacy Clause rests on the premise that federal and state law are categorically different from each other. Because federal legislative authority was seen as being narrowly limited to matters of surpassing national importance, the clause creates an ordinal relationship between them, with federal law trumping state law when they conflict. See, e.g., *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2018) (plurality opinion) ("The Supremacy Clause supplies a rule of priority."); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) ("It is apparent that this Clause creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance thereof,' as 'the supreme Law of the Land.'"); Larkin, *supra* note 25, at 109–11. Congress can no more create state law for New York, Arizona, or New Jersey than it can create domestic law for England, Canada, or Australia. To be sure, Congress can incorporate state law into federal law. See, e.g., Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2018) (making the federal government liable in tort "in accordance with the law of the place where the act or omission occurred"). But any state law so incorporated necessarily becomes a federal law in the process of its application. In sum, since Congress has no power to create state law, none of the statutes in *New York, Printz*, or *Murphy* could have imposed any duty on state legislators or executive officers as a matter of their own state doctrine.

What does that mean for purposes of the Anticommandeering Doctrine? The holdings in *New York, Printz*, and *Murphy* were correct, but for a different reason. The correct rationale should have been that Congress cannot give state officials orders or powers under state law because Congress cannot create state law. So viewed, none of those cases supports the argument that the CSA preempts state legalization efforts because the decisions would not involve the Supremacy Clause at all. They represent only an internal limitation on Congress's power to legislate. State cannabis legalization measures would be safe against preemption by the CSA.

178. 545 U.S. 1 (2006); Young, *supra* note 6, at 96–97; Baude, *supra* note 6, at 171.

179. 545 U.S. at 6–7.

180. *Id.* at 15.

181. *Id.* at 30.

may regulate even “purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”¹⁸² The Court also rejected the plaintiffs’ submission that their personal cultivation and use of marijuana could not affect commerce because (as the Court sarcastically described it) “California law ha[d] surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market.”¹⁸³ State law cannot enhance or dilute Congress’s Commerce Clause authority, the Court reasoned, so a state’s efforts to remove a particular local product or activity from the stream of commerce cannot defeat Congress’s power to regulate it to protect interstate commerce or the interests of other states.¹⁸⁴

Pointing to the Supreme Court’s doubt that locally grown marijuana would not find its way across California’s borders, Professor Young suggests that perhaps the Court might be willing to reconsider *Raich* if the states could prove their ability and willingness to quarantine state-grown cannabis within their jurisdictions.¹⁸⁵ Professor Young starts from the premise that the ruling in *Raich* rests on “a hearty dose of skepticism about the efficacy of California’s regulatory regime.”¹⁸⁶ Professor Young surmises that, if state cannabis regulatory programs “prove their efficacy over time” and do not “cause chaos in the states where prohibitions are still enforced,” perhaps the Court would be willing to re-examine that aspect of *Raich*.¹⁸⁷

Professor Baude approaches the decision from a slightly different angle.¹⁸⁸ He argues that Congress’s authority over purely intrastate activity is defensible only insofar as it is necessary to prevent local conduct from affecting people in another state.¹⁸⁹ Accordingly, Con-

182. *Id.* at 17 (quoting *Perez v. United States*, 402 U.S. 146, 151 (1971)).

183. *Id.* at 30.

184. *Id.* at 29–33.

185. Young, *supra* note 6, at 85–102.

186. *Id.* at 97.

187. *Id.*

188. Baude, *supra* note 6, at 171–84.

189. *Id.* at 171–72.

gress's authority should wane as a state minimizes "the risk of spillovers into the interstate black market."¹⁹⁰ To use a different metaphor, the Constitution divides and balances authority over intrastate commerce between the state and federal governments in a manner akin to the operation of a seesaw. The more effort that *State A* makes to prevent its intrastate commerce from spilling over into the jurisdiction of one of its forty-nine neighbors, the less authority Congress enjoys to regulate commerce within that state. That argument, like Professor Young's, is clever, but also ultimately unpersuasive.

Perhaps the Court would be willing to revisit *Raich* if there were proof that no more than a trivial amount of each state's marijuana would end up elsewhere. But I wouldn't bet the ranch on it. The Court wrote in *Raich* that "Congress could have rationally rejected" a system allowing states effectively to opt out of the reach of the CSA by regulating conduct themselves.¹⁹¹ What the Court was politely saying was that the plaintiffs' claim that California's marijuana would never leave home was not credible. The Court just decided to place the blame on Congress for that disbelief instead of taking responsibility itself. In any event, it would be extraordinarily difficult for anyone to prove that marijuana will spend its entire life in its state of birth.

Professors Young and Baude assume that cannabis-legal states are able and willing to prevent homegrown marijuana from crossing their borders headed elsewhere so that the states can escape from the CSA's clutches. That assumption is untenable. There is no reason to presume that what happens in California, stays in California. The evidence certainly doesn't offer much promise in that regard.¹⁹² As for the motivation of law enforcement officers to pre-

190. *Id.* at 172.

191. *Raich*, 545 U.S. at 30.

192. See, e.g., DRUG ENF'T ADMIN., DEA-DCT-DIR-007-20, 2019 NATIONAL DRUG THREAT ASSESSMENT, at 77 (2019) [hereinafter 2019 DEA NATIONAL DRUG THREAT AS-

SESSMENT] (“The popularity of marijuana use, the demand for increasingly potent marijuana and marijuana products, the potential for substantial profit, and the perception of little risk entice diverse traffickers and criminal organizations to cultivate and distribute illegal marijuana throughout the United States.”); *id.* at 80 (“Illicit domestic-produced marijuana is cultivated by various types and sizes of organizations. These range from individuals growing a limited number of plants to organized groups growing large quantities of marijuana intended for distribution across the United States.”); *id.* (“In January 2019, a traffic stop in Texas resulted in the seizure of almost 500 pounds of marijuana from a Colorado resident driving an RV. According to press reports, the driver was the owner and operator of a state-licensed marijuana cultivation facility in Colorado. The marijuana was reportedly en route to Dallas and Newark, New Jersey.”); *id.* at 81 (“[B]lack market marijuana production continues to grow in California, Colorado, Oregon, Washington, and other states that have legalized marijuana, creating an overall decline in prices for illicit marijuana as well. This further incentivizes trafficking organizations operating large-scale grow sites in these states to sell to customers in markets throughout the Midwest and East Coast, where marijuana commands a higher price. Marijuana is also shipped via mail and express consignment shipping services from the United States mainland to the USVI.”); *id.* at 85 (“In May 2019, the Denver FD, along with numerous federal, state, and local partners, arrested 42 people pursuant to a large black market marijuana investigation. During the two-year investigation, over 250 search warrants were executed at large-scale marijuana grow operations and businesses associated with an Asian DTO. Over 65,000 plants and 2,200 pounds of harvested marijuana were also seized. The marijuana produced by this organization was almost entirely destined for drug markets outside of Colorado.”); *id.* (“In March 2019, the New York FD received information regarding multiple suspected drug shipments sent via tractor-trailer from Washington and California to storage facilities in Queens. Follow-up investigation with the New York Police Department (NYPD) and ICE resulted in the identification and arrest of four suspects. Agents seized approximately 425 pounds of marijuana and 8,875 cartridges of THC oil.”); *id.* at 87 (“Marijuana produced in the United States is often trafficked from states where production is legal to or through states where production is not. Domestically produced marijuana is transported in personally owned vehicles (POVs), rented vehicles, semi-trucks, tractor-trailers, vehicle hauler trailers, trains, and buses as well as through personal and commercial planes. The use of commercial parcel services is also common especially for trafficking concentrated forms of marijuana, which are concealed in envelopes, small containers, or flattened parcels.”); Press Release, DEA, Two more plead guilty for roles in interstate marijuana trafficking conspiracy (May 1, 2019), <https://www.dea.gov/press-releases/2019/05/01/two-more-plead-guilty-roles-interstate-marijuana-trafficking-conspiracy> [<https://perma.cc/D7RR-GXXY>]; Press Release, U.S. Att’y’s Off., Dist. of Or., U.S. Dep’t of Just., Houston Man Sentenced to 84 Months in Federal Prison for Leading Interstate Marijuana Trafficking Conspiracy (Jan. 8, 2020), <https://www.justice.gov/usao-or/pr/houston-man-sentenced-84-months-federal-prison-leading-interstate-marijuana-trafficking> [<https://perma.cc/35VR-J9FV>]; CALIFORNIA HIGH INTENSITY DRUG TRAFFICKING AREAS: MARIJUANA’S IMPACT ON CALIFORNIA 46–47 (2018) (noting that marijuana

vent the export of cannabis out of California: Police officers are motivated to make arrests because that is their measure of success.¹⁹³

originating in California was seized in more than 20 other states); OREGON-IDAHO HIGH INTENSITY DRUG TRAFFICKING AREA: AN INITIAL ASSESSMENT OF CANNABIS PRODUCTION, DISTRIBUTION, AND CONSUMPTION IN OREGON 12 (2018) (updated Aug. 6, 2018) (“Between July 2015 and January 2018, 6,602 kg (14,550 lb.) of trafficked Oregon cannabis was seized en route to 37 states—worth more than \$48 million. During that period of time, Oregon cannabis was most frequently illicitly exported to Minnesota, Florida, Wisconsin, Missouri, Virginia, Illinois, Arkansas, Iowa, Maryland, and Texas. . . . Among in-bound monetary seizures, the largest amounts originated from Chicago Illinois, Dallas Fort-Worth Texas, Atlanta Georgia, Phoenix Arizona, and Los Angeles California—over \$718k was seized from Chicago and Dallas alone. As of 2018, Oregon cannabis products were found on multiple public internet markets (Online Classifieds), and clandestine marketplaces online. The most commonly used digital currencies accepted by vendors of Oregon cannabis on clandestine marketplaces were Bitcoin, Bitcoin Cash, Ethereum, Monero, and Litecoin.”); *id.* at 38 (“Because Oregon produces more cannabis than can be consumed by local demand, preventing the exportation of cannabis is a priority and is wholly illegal at both the federal and state level.”) (footnotes omitted); *id.* at 38–40; Trevor Hughes, *Colorado sued by neighboring states over legal pot*, USA TODAY (Dec. 18, 2014), <https://www.usatoday.com/story/news/nation/2014/12/18/colorado-marijuana-lawsuit/20599831/> [<https://perma.cc/H9CF-V5UH>] (“In June, USA TODAY highlighted the flow of marijuana from Colorado into small towns across Nebraska: felony drug arrests in Chappell, Neb., just 7 miles north of the Colorado border have skyrocketed 400% in three years.”); Patrick McGreevy, *As the top pot-producing state in the nation, California could be on thin ice with the federal government*, L.A. TIMES (Oct. 1, 2017), <https://www.latimes.com/politics/la-pol-ca-marijuana-surplus-export-20171001-story.html> [<https://perma.cc/WUU4-GGRK>] (“California produced at least 13.5 million pounds of marijuana last year—five times more than the 2.5 million pounds it consumed. Where did all that extra pot go? The answer, experts say, is that much of it ended up in other states—some, where marijuana is still illegal. . . . The Drug Enforcement Administration already has focused much of its efforts on California. Federal, state and local law enforcement agencies reported seizing 5.3 million marijuana plants throughout the nation last year. Seventy percent were confiscated in California—more than 1 million more plants than were seized in the state a year earlier.”); MARY K. STOHR ET AL., EFFECTS OF MARIJUANA LEGALIZATION ON LAW ENFORCEMENT AND CRIME: FINAL REPORT NO. 255-60 TO THE NAT’L INST. OF JUSTICE, U.S. Dep’t of Justice 6–7 (2020) (noting the belief among law enforcement officers “that there is increased cross border transference of legal marijuana to states that have not legalized,” as well as “the persistence of the complex black market”). Reports indicate that states are not doing a good job of enforcing state regulatory programs. *See, e.g.*, OR. LIQUOR CONTROL COMM’N, OR. HEALTH AUTH., OREGON’S FRAMEWORK FOR REGULATING MARIJUANA SHOULD BE STRENGTHENED TO BETTER MITIGATE DIVERSION RISK AND IMPROVE LABORATORY TESTING (2019).

193. *See* Larkin, *supra* note 33, at 242–44 (discussing law enforcement metrics).

Almost ninety percent of California's law enforcement officers work for local police departments and sheriff's offices.¹⁹⁴ Based on my experience in law enforcement, those officers are more likely to be concerned with the murders, rapes, robberies, and drug trafficking that take place *within* their discrete regional jurisdictions than with crimes that occur *in other states*. Why?—because residents from Nevada to Maine do not vote in California elections, and residents from Sacramento and San Francisco do not vote in Los Angeles or San Diego elections. To be sure, a bust of outbound marijuana is a “stat,” and officers won't pass up a “cheap” stat (an arrest made without much work). Nonetheless, by and large most local officers probably believe that a crime, including the distribution of cannabis, in their assigned district in California is “my” problem, while the illegal distribution of dope in other states is “theirs.” They will save the heavy lifting for local crimes.

Now, put aside the facts and psychology; turn to the law. Once we do that, it does not take long to realize that any attempt to correlate Congress's authority to the effectiveness of a state regulatory program would generate an unworkable rule of constitutional law.

Start with this question: What do we measure? Professor Young appeals to the Supreme Court's willingness to reconsider its precedents by suggesting that the Court might revisit *Raich* if states with liberalized cannabis programs do not cause “chaos” for states with traditional marijuana laws.¹⁹⁵ Professor Baude's submission is that “the constitutionality of federal law under the Necessary and

194. See, e.g., DUREN BANKS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 14–16 App. Tbls. 1–3 (Oct. 4, 2016); BRANDON MARTIN & MAGNUS LOFSTROM, PUB. POL'Y INST. OF CALIF., LAW ENFORCEMENT STAFFING IN CALIFORNIA 1 (2018), <https://www.ppic.org/wp-content/uploads/jtf-law-enforcement-staffing-in-california.pdf> [<https://perma.cc/8GYU-ASPP>] (“In 2017 there were more than 119,500 full-time law enforcement employees in California; roughly 78,500 were sworn law enforcement officers (with full arrest powers) and 41,000 were civilian staff. Of all sworn officers, about 48% were municipal police officers, 39% were county sheriff officers, and almost 10% were with the California Highway Patrol (CHP). About 3% were employed by other agencies, such as university, port, and transportation districts and the State Department of Parks and Recreation.”).

195. Young, *supra* note 6, at 95.

Proper Clause must be judged under the circumstances,” and those circumstances should include a state’s “success” at preventing the interstate spillover of state-grown cannabis.”¹⁹⁶ Professor Baude even proposes two ways of gauging a state’s success: (1) whether the state’s regulatory scheme is reasonably likely to prevent spillovers, or (2) whether the state’s program in fact prevents spillovers.¹⁹⁷ Sounds easy to evaluate, right? Guess again.

Start by asking whether *State A* has a reasonable cannabis regulatory program, one that engenders trust in the state’s ability to make it work. That might allay any doubts that the state is making a good faith effort to prevent any spillover. Would that approach be sufficient? That is, perhaps we can avoid measuring the effectiveness of a state’s program if we can establish its bona fides.

What must a state regulatory program contain to establish its bona fides? Must there be a licensing requirement to sell marijuana? If so, for how long may a license extend? One year? Two? Five? How much should a license cost? Who can obtain one—in particular are people with felony records (particularly for drug crimes) disqualified? Must growing, processing, and distribution facilities be inspected? If so, how, how often, and by whom?

Rules without penalties for their violation are merely advice, not laws, so there must be a penalty scheme. Must there be criminal

196. Baude, *supra* note 6, at 176.

197. *Id.* at 179 (“There are, no doubt, many ways courts could admit the relevance of state law. One way is to ask the following two questions: First, does the state have a regime that seems likely, on its face, to eliminate whatever spillover problem Congress would otherwise have the power to address? For instance, does the state limit the purchase of marijuana to residents, limit the purchase quantities in a way that makes straw buyers infeasible, and also regulate production and sale in a way that makes diversion unlikely? Second, if the regime seems likely to work on its face, is there also evidence that it works in practice? For example, does the state allocate significant resources to enforcement at the border or other relevant nexus? Do studies or reports demonstrate a large amount of diversion? States that have any interest in the preservation of their regulatory authority could themselves be the ones to amass some of this evidence and provide it to the court, whether as litigants or intervenors or amici.” (footnotes omitted)). Professor Baude also suggests that a court could demand only a “rational basis” for believing that a state’s program would be successful. *Id.* at 180. If that is the standard, however, then there is an equally persuasive “rational basis” for Congress to believe that the state programs won’t work.

liability or are civil and administrative penalties sufficient? If criminal enforcement is necessary, must imprisonment be an available option? If so, for what length? Who will be responsible for enforcement? Must enforcement be done by government officials or can that task be contracted out to the private sector? If the government must be responsible for enforcement for the state's scheme to be credible, who will have that assignment? Must investigators be "rough-and-ready" law enforcement officers (like EPA Special Agent Jack Taggart¹⁹⁸) or may they be ordinary "pencil neck" bureaucrats (like Walter Peck¹⁹⁹)?

May a court examine the intent of the legislators, regulators, inspectors, or enforcement personnel to determine whether they are serious about business compliance?²⁰⁰ If a state the size of Alaska has only one inspector, does that by itself prove that the entire state regulatory program is a sham? If not, how many inspectors must there be? And so forth.

There might be additional questions that need an answer, but you get the point. Courts would be forced into making the type of judgments that we ordinarily leave to Congress during the budgetary and appropriations processes, not because that branch is good at it, but because the courts are worse. If the courts simply make the same type of judgments that Congress would make, we haven't improved the scientific accuracy or political legitimacy of the decision-making process. We've just given it whatever veneer of respectability comes with a judge making a decision rather than an elected official, as well as taking it out of the hands of the public. Governance by Article III judges rather than Article I legislators is not an improvement as far as federalism is concerned.

198. FIRE DOWN BELOW (Warner Bros. Pictures 1997).

199. GHOSTBUSTERS (Columbia Pictures 1984), <https://www.youtube.com/watch?v=j3Uy9wsfkok> [<https://perma.cc/C3NX-RNK3>].

200. The difficulties in doing so are legion. *See, e.g.*, *Edwards v. Aguilar*, 482 U.S. 578, 636–39 (1987) (Scalia, J., dissenting); *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . ."). *See generally* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (3d ed. 2012) (developing modern social choice theory).

Now turn to the issue of a state's effectiveness at preventing a spillover. Unfortunately, that approach does not fare much better. It does not eliminate questions that need answering; it just poses different ones. Plus, the problems it would pose, if anything, are even greater.

Start this time with the fact that neither Professor Young nor Professor Baude defines what standard is the correct one to determine whether a state's efforts are effective. What, then, does that concept—"chaos" or "success"—mean? Perhaps more importantly, how does a court, which will evaluate the evidence and arguments pro and con, decide whether a state's program "works in practice"?²⁰¹

The dictionary won't help. No one tried to measure the success of the criminal justice system in the eighteenth century, so that term didn't have a commonly accepted meaning in 1787 when the Framers included the Commerce Clause in Article I. Today's dictionaries also don't solve the problem. Success is ordinarily measured by rates, and there is no one success rate for every enterprise in life.²⁰² In baseball, a batter who hits safely once in every three at-bats will wind up in the Hall of Fame, whereas in football, a quarterback who completes only one pass out of three will wind up on the bench, and a surgeon who has only one-third of his patients survive the procedure won't be practicing medicine for long. What, then, is an acceptable success rate here? Professors Young and Baude do not offer a number, a range, or a parameter for determining

201. Baude, *supra* note 6, at 179.

202. Perhaps "chaos" should be measured by new units known as "Portlands," although other cities are also competing for the title. See, e.g., Erin Ailworth & Julie Wernau, *Wisconsin's Governor Declares State of Emergency Amid Protests*, WALL ST. J. (Aug. 25, 2020), https://www.wsj.com/articles/kenosha-wis-sees-second-night-of-violence-as-unrest-spreads-11598362900?mod=hp_lead_pos7 [https://perma.cc/2GM6-R8FR]; Deanna Paul, *Violence Erupts at Protests in Chicago, Portland*, WALL ST. J. (Aug. 16, 2020), <https://www.wsj.com/articles/violence-erupts-at-protests-in-chicago-portland-11597596900?mod=searchresults&page=1&pos=2> [https://perma.cc/4R64-FNR9]; Deanna Paul & Dan Frosch, *Seattle Police Chief Resigns after Budget Cuts*, WALL ST. J. (Aug. 11, 2020), <https://www.wsj.com/articles/seattle-police-chief-resigns-after-budget-cuts-11597166461> [https://perma.cc/LV2T-RYEE].

whether a state has captured a sufficient quantity of marijuana grown within its borders to escape the reach of the CSA, nor do they identify a relevant source to look for the answer. Creating a constitutionally-based exception to a law without explaining when that exception applies lets each of the 860-plus federal judges pick a number that satisfies him- or herself.²⁰³ That surely would lead to success somewhere (with that many judges, one surely will find that the state's efforts are good enough for government work), but the nationwide disparities that likely will result are likely to lead to chaos or something resembling it (albeit not the type that Professor Young had in mind).

Atop that, neither Professor Young nor Professor Baude argues that a district court should hold the CSA *facially* unconstitutional—that is, unconstitutional across the board, regardless of the facts of a particular case. Accordingly, each federal district court judge would decide only the application of the CSA in the specific case before him or her. The Federal Rules of Criminal Procedure do not permit outsiders to intervene in a criminal prosecution.²⁰⁴ To bring an independent civil action, a party would need to prove that he or she would commit the same conduct as a defendant—that is, traffic in cannabis in violation of the CSA—and be subject to the same government action—that is, a criminal prosecution.²⁰⁵ Few defendants will want to prove that they will violate federal law.²⁰⁶ Moreover, a particular district court judge's ruling binds no other judge; in fact,

203. ADMIN. OFF. OF THE U.S. COURTS, AUTHORIZED JUDGESHIPS, <https://www.uscourts.gov/sites/default/files/allauth.pdf> [<https://perma.cc/V2ZY8U3F>].

204. Compare Fed. R. Civ. P. 24 (allowing nonparties to intervene in a civil action) with Fed. R. Crim. P. 7(c)(1) (the indictment must identify “the defendant”); cf. 28 U.S.C. §§ 509, 510 & 516 (2018) (the authority to bring criminal prosecutions rests with the U.S. Attorney General or his designees).

205. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (ruling that, to obtain prospective relief against police use of a chokehold, the plaintiff would have to prove that he would again be subject to the same practice).

206. Having a marijuana industry organization bring suit on behalf of its members is not an escape from the requirement of proving injury-in-fact because the organization would need to prove that one or more of its members will break the law. See, e.g., *Hunt v. Wash. St. Apple Comm'n*, 432 U.S. 333, 342–43 (1977).

it doesn't even bind the judge who issued the ruling.²⁰⁷ Also, different prosecutions could involve different substantive trafficking crimes—not to mention different conspiracies to traffic cannabis—committed at different times involving different quantities of cannabis, presenting very different factual scenarios. Cases involving the assistance of federal law enforcement officers would have to be eliminated from the tally, or discounted, because the inquiry is whether the *state* has stopped exports. Counting cases where the DEA or FBI assisted would be cheating. Finally, California's "success" at preventing marijuana from spilling over into other states could well vary over time. So, we could have multiple judges deciding materially different cases with conflicting rulings that change over time.

It is also far from obvious how we would measure a state's accomplishments. Is it the amount of cannabis legally grown in *State A* that is not illegally transferred into *State B*, either in gross tonnage or as a percentage of all the cannabis grown in *State A* (assuming that the amount can be reliably measured)? That would require us to know how many crimes have *not* been committed, an answer that law enforcement has never known. Or do we use the amount of money that growers or distributors legally earn in *State A* that they later use to cultivate or sell marijuana illegally in a different jurisdiction, *States B, C, D*, and so on? If so, precisely how much money is enough to justify Congress regulating cannabis in *State A* (and do we adjust that number for inflation over time)? Is there a minimum tonnage or dollar amount that traffickers must exceed before Congress can act, or can Congress intervene earlier on to protect the interests of *States B* through *Z*? And where do those numbers come from, given that they don't have a basis in the text of the Commerce Clause? Picking an arbitrary number is what legislatures do, not courts.

Once we have decided what the correct success rate must be to

207. See *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 J. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 134.02[1][d] (3d ed. 2011))).

stave off congressional regulation, we must determine whether *State A* has achieved it. How do we do that? More specifically, whose evidence counts? The Office of National Drug Control Policy? The Drug Enforcement Administration? Or must the source be closer to home? If *State A* is California, do we rely on the findings of the California Bureau of Investigation, a statewide law enforcement agency? How about the Los Angeles County Sheriff's Department, a massive, regional law enforcement agency?²⁰⁸ What about a sheriff's office with only a handful of deputies?²⁰⁹ What do we do with the opinions of the law enforcement agencies in *State B* (and *C, D*, and so forth)? What about the opinions of a university economist or private consultant? Or do we just let the defendant and Justice Department introduce whatever evidence each party wants and task the appropriate decision-maker with sorting it all out? Any one case will then resolve every case for a state.

If so, who is that decision-maker? That is, who gets to decide whether we are below, at, or above the amount defining *State A's* "success" that would be sufficient to keep the exercise of Congress's Commerce Clause power at bay? Does Congress decide? If so, we have just gone in a complete circle for no apparent reason. If not, is it a subject for the judiciary, particularly federal trial judges? There is no one else left. Consider how that process would work.

Take the Central District of California, which is responsible for Los Angeles and six other counties in adjacent areas. As of April 7, 2020, there were twenty-seven sitting federal district court judges and ten vacancies.²¹⁰ If that court were fully staffed and if each

208. The Los Angeles County Sheriff's Department is the world's largest sheriff's department, with approximately 18,000 employees. *About Us*, LOS ANGELES CTY. SHERIFF'S DEP'T, https://www.lasd.org/about_us.html [https://perma.cc/KG97-QHHF].

209. More than half of the nation's 3,012 sheriff's departments have fewer than 25 full-time sworn officers. Connor Brooks, *Sheriffs' Offices, 2016: Personnel*, NCJ252834, BUREAU OF JUST. STAT., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST. 1 (Oct. 2019), <https://www.bjs.gov/content/pub/pdf/so16p.pdf> [https://perma.cc/T9VK-D3MQ].

210. *Chronological History of Authorized Judgeships in U.S. District Courts*, ADMIN. OFF. OF THE U.S. CTS. 9 <https://www.uscourts.gov/sites/default/files/districtchronol19.pdf> [https://perma.cc/J376-7XP4] [hereinafter ADMIN. OFF.]; *Current Judicial Vacancies*, U.S.

judge had to decide whether the CSA might constitutionally be applied to a particular defendant, there could be as many as thirty-seven different rulings. How is that possible? For two reasons. When the crime occurred (and the amount of marijuana involved) might distinguish each case from all other prosecutions. Different judges might evaluate the same evidence differently, let alone evidence that varies like the quadrants in a Jackson Pollack painting. There are also three other districts in California with dozens of additional judges, bringing the total in California to sixty.²¹¹ Do we really want to have sixty different conclusions about Congress's power to regulate intrastate commerce in just *one* state? Even if we don't wind up with sixty different rulings, how many does it take before we admit that this heavily fact-bound approach just won't work?

Moreover, we also need to know how to define the nature of a district court's ruling on this issue. That is, is it a question of *adjudicative* or *historical* fact, like the name of the person on the deed to Blackacre, or is it a question of *legislative* or *constitutional* fact, like the effect of a 2018 Federal Reserve interest rate reduction on the 2019 Gross Domestic Product? Is the ruling a mixed question of law and fact, like the issue of whether there was probable cause to arrest someone for drug trafficking?²¹² Or is it a pure question of law, like the issue whether there is a "dormant" aspect to the commerce clause?²¹³ The proper classification matters because different appellate standards of review apply to different types of district court findings, even in a criminal case.²¹⁴ The result is that, even after the

CTS. (Apr. 7, 2020), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> [<https://perma.cc/M8BG-RXDU>].

211. ADMIN. OFF., *supra* note 210, at 9.

212. *See, e.g., Ornelas v. United States*, 517 U.S. 690 (1996) (ruling that *de novo* review is necessary for the ultimate questions of the presence of reasonable suspicion to stop and probable cause to conduct a warrantless search).

213. *See, e.g., Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019) (noting that "[m]embers of the Court have authored vigorous and thoughtful critiques" of the Court's precedents recognizing a "Dormant Commerce Clause").

214. An appellate court reviews a district court's adjudicative factual findings under

appellate process ends, we could wind up with a batch of different conclusions whether the CSA can lawfully be applied to different defendants.

Professors Young and Baude do not discuss this issue, but their arguments lend themselves to treating “chaos” or “success” as a question of fact. Defining those concepts does not require examination of the text or history of the Commerce Clause, as a question of law would. Nor do those terms ask a court to decide whether a state’s evidence satisfies a constitutional standard, like the issue of “reasonableness,” which appears in the Fourth Amendment²¹⁵ or “probable cause,” which the Supreme Court has defined as a component of reasonableness.²¹⁶ The implication of Professor Young’s and Professor Baude’s arguments is that a court should consider “success” or “chaos” by determining whether, and to what extent, the state has halted the export of cannabis. That certainly appears to be a question of adjudicative or historical fact, one that, in part, asks how many crimes were not committed. That inquiry is one that the criminal law has never been able to answer. Perhaps, however, they would want a judge to decide whether the state’s enforcement efforts promoted the legitimate purposes of the criminal law, such as retribution, deterrence, incapacitation, education, respecting victims, rehabilitation, and so forth. That approach essentially asks a district court to gauge the effectiveness of a criminal law. Good luck with that.²¹⁷

the “clearly erroneous” standard, while circuit courts independently review the application of constitutional law to particular facts. *See, e.g., Ornelas*, 517 U.S. at 695–99 (requiring *de novo* review for the application of the Fourth Amendment to particular facts); *Maine v. Taylor*, 477 U.S. 131, 144–45 (1986) (limiting appellate review to the clearly erroneous standard for historical facts).

215. U.S. CONST. amend. IV.

216. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 230–46 (1983) (defining “probable cause”).

217. *See Gore v. United States*, 357 U.S. 386, 393 (1958) (“Whatever views may be entertained regarding the severity of punishment, whether one believes in its efficacy or futility, these are peculiarly questions of legislative policy.” (citation omitted)); *Graham v. Florida*, 560 U.S. 48, 97 (2010) (Thomas, J., dissenting) (“I am unwilling to assume that we, as Members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that

Yet, deciding that issue still does not end our inquiry. We still need to know how long a district court's findings retain their vitality. Why? A state's "success" might not be permanent. Indeed, one needn't be an inveterate cynic to predict that, once a state has proved itself successful, it might transfer its limited enforcement resources elsewhere. If so, the federal government and defendants will be playing this game into extra innings. Can the government or a defendant relitigate the issue a year later? Two? Five? Who knows? Here, too, there is no principled way to answer those questions, which means the Supreme Court is unlikely to try and unlikely to adopt a rule of law asking other courts to do the impossible.

* * *

At the end of the day, Professor Mikos offers an unnecessarily complex (and needless) inquiry. Professors Young and Baude would force courts to answer a host of questions that have no obvious, objective, or permanent answer. Neither the text, history, nor purposes of the Commerce Clause supply us an objective way to decide whether *State A* has successfully prevented the spillover of marijuana beyond its borders. The only answers seem to come from thin air. The Supreme Court, therefore, is not likely to do Congress's job.

task, and nothing in Article III gives us that authority."); Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and Kahler v. Kansas*, 43 HARV. J.L. & PUB. POL'Y 85, 150 (2020) ("Think of the questions that must be answered to do that job properly. Are all justifications of equal importance or do some—say, deterrence—carry more weight than others—say, retribution? How do you measure a punishment's effectiveness? How effective must a punishment be? How do you trade off short-term versus long-term effectiveness? Are some successes—such as uncovering espionage plots or intercepting terrorist attacks—worth more than others are—such as apprehending mass murderers (or serial killers) or convicting senior members of an organized crime family? There are no easy answers to those questions, let alone objective ones. To evaluate the effectiveness of the decisions that legislators and executive officials make, we use the ballot box, not a courtroom." (footnote omitted)).

IV. AN ADDITIONAL RECOMMENDATION

Professor Adler recognizes that most of the debate over federal cannabis policy has focused on the polar options of Congress's reasserting its authority to impose one regulatory approach on the entire nation or completely decentralizing regulatory authority to each state so that fifty different flowers can bloom. There are numerous positions between those two, he notes, and, with the freedom to experiment with different ones without the risk of federal criminal prosecution, the states might be able to devise regulatory schemes that best serve their residents and the nation.²¹⁸

One option, I would suggest, is to divorce the regulation of medical from recreational marijuana use and treat each one separately.²¹⁹ That is particularly important in connection with the former. Federal and state law serve complementary roles in the use of drugs to treat disease.²²⁰ Federal law regulates what drugs may be distributed in interstate commerce,²²¹ while state law governs the practice of treating individual patients.²²² If Congress were to revisit the CSA, it should make clear that the Commissioner of Food and Drugs is responsible for deciding whether cannabis, in any of its

218. Adler, *supra* note 6, at 6–7 (“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. . . . 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.”).

219. See Larkin, *supra* note 25, at 115–34; Paul J. Larkin, Jr., *States’ Rights and Federal Wrongs: The Misguided Attempt to Label Marijuana Legalization Efforts as a “States’ Rights” Issue*, 16 GEO. J.L. & PUB. POL’Y 495 (2018).

220. See Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L.J. 845, 849 (2017) (noting the consensus that “state jurisdiction is reserved for medical *practice*—the activities of physicians and other health care professionals—while federal jurisdiction covers “medical *products*, including drugs” (footnote omitted)).

221. See Federal Food Drug and Cosmetic Act of 1938, 21 U.S.C. § 301 *et seq.* (2018).

222. See *Dent v. West Virginia*, 129 U.S. 114, 121–24 (1889).

forms and however it is used,²²³ is a safe and effective treatment for disease. Since Congress enacted the Federal Food, Drug, and Cosmetic Act of 1938,²²⁴ the nation has entrusted the Food and Drug Administration with the responsibility for ensuring the safety of drugs used in medical treatment. There is no good reason to exempt marijuana from that rule.²²⁵ Congress ought to reaffirm that principle in any reconsideration of the CSA.

A consequence of the state liberalization efforts is a change in the practice of medicine in states that authorize marijuana use for medical or recreational purposes. Numerous physicians (some routinely) now recommend that patients use marijuana to treat disabling medical conditions and their unpleasant symptoms or side effects.²²⁶ Apparently, it is not difficult to find a physician who is willing to recommend marijuana as a treatment for some disease or other.²²⁷ In some locales, all it takes is “\$40 and 10 minutes.”²²⁸ This

223. There are many forms and delivery mechanisms. *See* Larkin, *supra* note 31, at 318–19 (“Food is rarely used as the delivery system for drugs, including controlled substances. Edibles, however, serve in that role. Those foods come in different forms, such as cookies, candies, cakes, popcorn products, lozenges, chocolates, butter, popsicles, and liquids, as well as the Alice B. Toklas brownies made popular in the 1960s. As one observer noted, “[e]ssentially, a cannabis culinary professional can infuse just about anything you want to eat with THC.” (footnotes omitted)).

224. Pub. L. No. 75-717, 52 Stat. 1040 (1938).

225. *See, e.g.*, BRIAN F. THOMAS & MAHMOUD A. ELSOHLY, *THE ANALYTICAL CHEMISTRY OF CANNABIS* xiv (2016) (arguing that the FDA needs to be more closely involved in marijuana regulation than the Drug Enforcement Administration); Larkin, *supra* note 25, at 115–27; Sean M. O’Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 AM. U. L. REV. 823 (2019) (explaining that descheduling cannabis transfers regulatory authority to the FDA).

226. *See* NAT’L ACAD. OF SCI., ENG’G, & MED., *THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH* 53–54 (2017) (surveying therapeutic effects of marijuana for treating nausea, appetite loss, pain, and anxiety, for which there are varying degrees of support).

227. *See, e.g.*, ED GOGK, *MARIJUANA DEBUNKED* 111 (2015) (“Political campaigns sell marijuana laws to the voting public with ads that feature cancer patients using marijuana for nausea. But it’s a bait and switch. . . . The patients using medical marijuana in real life are disproportionately young and male, and few of them have serious illnesses.”).

228. Chris Roberts, *Anyone Can Get Their Medicine: California has Already Pretty Much*

practice is not a secret. Numerous physicians have published books and articles touting cannabis as a treatment for various ailments and their symptoms.²²⁹

Physicians cannot literally “prescribe” cannabis for treatment. The CSA classifies all “controlled substances” into Schedules I through V according to their perceived risk of addiction and medical utility.²³⁰ Schedule I lists drugs that no physician may prescribe

Legalized Marijuana. And That's Okay, SF WKLY. (Sept. 14, 2014), <http://www.sfweekly.com/sanfrancisco/chem-tales-marijuana-legalization-recreational-use/Content?oid=3154256> [<https://perma.cc/4EQH-CTVV>] (“Anyone Can Get Their Medicine. Not long ago, a friend of mine visited the doctor. Afterward, I asked him for the diagnosis. ‘Good news,’ he said with a grin. ‘I’m still sick.’ A clean bill of health would have been a setback. That would mean no more marijuana. I am often asked how to legally obtain some weed in San Francisco, what ailment is required to get a medical marijuana recommendation. This fascinates people to this day, out-of-towners as well as locals. When I am honest, I say, ‘About \$40 and 10 minutes.’”).

229. See, e.g., DAVID BEARMAN & MARIA PETTINATO, *CANNABIS MEDICINE: A GUIDE TO THE PRACTICE OF CANNABINOID MEDICINE* (2019); CASARETT, *supra* note 121; PATRICIA C. FRYE & DAVID SMITHERMAN, *THE MEDICAL MARIJUANA GUIDE: CANNABIS AND YOUR HEALTH* (2018); BONNI GOLDSTEIN, *CANNABIS REVEALED* (2016); *THE POT BOOK: A COMPLETE GUIDE TO CANNABIS* (Julie Holland ed., 2010); LESTER GRINSPOON & LESTER B. BAKALAR, *MARIJUANA: THE FORBIDDEN MEDICINE* (1997); MICHAEL H. MOSKOWITZ, *MEDICAL CANNABIS* (2017); J. Michael Bostwick, *Clinical Decisions: Medicinal Use of Marijuana—Recommend the Medical Use of Marijuana*, 368 JAMA 866 (2013); Jerome P. Kassirer, *Federal Foolishness and Marijuana*, 336 NEW ENG. J. MED. 366 (1997). Not every physician, however, believes that marijuana is a legitimate medical treatment. See, e.g., ROBERT L. DUPONT, *THE SELFISH BRAIN: LEARNING FROM ADDICTION* 147–54 (Updated ed. 1997); ED GOGK, *MARIJUANA DEBUNKED* (2015); KEVIN P. HILL, *MARIJUANA: THE UNBIASED TRUTH ABOUT THE WORLD’S MOST POPULAR WEED* (2015).

230. A “controlled substance” is “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of [the] subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.” 21 U.S.C. § 802(6) (2018). The CSA incorporates the definition of a “drug” from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g)(1) (2018).

because of their perceived dangerousness.²³¹ Congress placed marijuana in Schedule I in 1970, and it remains there today.²³² Any physician who prescribes cannabis can suffer a suspension or termination of his license to prescribe controlled substances—which covers every drug for which a prescription is necessary—as well as a criminal prosecution for exceeding the boundaries of legitimate medical practice.²³³ Yet, as if to give content to the aphorism “where there’s a will, there’s a way,” the U.S. Court of Appeals for the Ninth Circuit has ruled that a physician may “recommend” that a patient consider using marijuana as a treatment.²³⁴ Of course, the distinction between “prescribing” a medication easily available in any licensed pharmacy and “recommending” use of a drug openly sold in state-legal marijuana dispensaries (or readily available in every other state²³⁵) is about as precise as the difference between “dusk” and “twilight.”

The federal government seems to have acquiesced in that distinction because it has not been eager to prosecute cases in other circuits to persuade the courts of appeals to forbid physicians from recom-

231. 21 U.S.C. § 812(b)(1)(A)–(C) (2018) (noting that drugs placed in Schedule I have “a high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and a lack of accepted safety for use of the drug or other substance under medical supervision”); *id.* § 829 (setting prescription standards for drugs in Schedules II–V); *id.* § 841(a) (defining prohibited acts).

232. *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 937 n.1 (D.C. Cir. 1991). Marijuana, combined with salts, isomers, and synthetic equivalents, is on that list. *See* 21 C.F.R. § 1308.11(d)(31) (2020).

233. *See United States v. Moore*, 423 U.S. 122 (1975) (holding that a physician can be convicted for distributing methadone, a Schedule II controlled substance, outside the boundaries of professional medical practice).

234. *See Conant v. McCaffrey*, 172 F.R.D. 681, 694–95 (N.D. Cal. 1997) (issuing preliminary injunction), 2000 WL 1281174 (N.D. Cal. Sept. 7, 2002) (issuing permanent injunction), *aff’d*, *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (upholding permanent injunction). The courts concluded that the First Amendment Free Speech Clause prohibits the government from adopting a viewpoint-based restriction on the private communications between a physician and a patient of potential medical treatment options. *Conant*, 309 F.3d at 636–39.

235. *See* 2019 DEA NATIONAL DRUG THREAT ASSESSMENT, *supra* note 192, at 77 (“As the most commonly used illicit drug, marijuana is widely available and cultivated in all 50 states.”).

mending marijuana use, or even to clarify where the line falls between permissible and unlawful conduct.²³⁶ That is likely because the advent of state recreational-use marijuana programs renders moot any special restrictions on marijuana distribution or use imposed by state medical marijuana statutes. Why bother to ask the courts to draw a fine distinction between “prescribing” and “recommending” a drug for its potential medical benefits if anyone can buy it simply for its guaranteed euphoric effect?

The birth of state recreational cannabis programs beginning in 2012 has shifted the focus of the debate away from cannabis as therapy to cannabis as euphoric. If nothing else, that shift has improved the honesty of the public debate over cannabis policy. If hypocrisy is the tribute that vice pays to virtue, medical marijuana’s supporters have found the post-1996 debate to be an expensive one.²³⁷ The

236. See *supra* Part I.

237. See Bach, *supra* note 109; Laurie D. Berdahl, *Medical Marijuana: A Dangerous Sham*, MED’L ECON. at 70 (July 10, 2012); Jonathan P. Caulkins, *The Real Dangers of Marijuana*, NAT’L AFFS., Winter 2016, 21, 30 (“Unfortunately, there is very little in the way of intellectually honest marijuana-policy analysis.”); *id.* at 21 (“In the 1990s, several states introduced ‘medical marijuana’ programs. Though marijuana use was made legal only for medical purposes, the regulations were often so loose that essentially anyone could get a physician’s ‘recommendation,’ authorizing that person to purchase marijuana. Suppliers were euphemistically called ‘caregivers’ (even though some never met the ‘patients’ they were caring for), and they sold out of brick-and-mortar retail stores known as ‘dispensaries.’ At one point, there were thousands of dispensaries in California alone.”); Mark Kleiman, *Cannabis Has Medical Value; Medical Marijuana Is a Fraud*, AM. ADDICTION CNTRS., <https://www.rehabs.com/pro-talk/cannabis-has-medical-value-but-medical-marijuana-is-a-fraud/> [<https://perma.cc/3QHV-MT7G>]; Mark A.R. Kleiman, *The Public-Health Case for Legalizing Marijuana*, NAT’L AFFS., Spring 2019, 68, 73 (describing the medical marijuana reform campaign as being “largely fraudulent,” but “worked like a charm”); Charles Krauthammer, *Pot as Medicine*, WASH. POST (Feb. 7, 1997), <https://www.washingtonpost.com/archive/opinions/1997/02/07/pot-as-medicine/84704a96-39b8-485e-96e1-08e798569f05/> [<https://perma.cc/E88D-TZYJ>] (“Take any morally dubious proposition—like assisting a suicide—and pretend it is merely help for the terminally ill, and you are well on your way to legitimacy and a large public following. That is how assisted suicide is sold. That is how the legalization of marijuana is sold. Indeed, that is precisely how Proposition 215, legalizing marijuana for medical use, passed last November in California. . . . Marijuana gives them a buzz, all right. But medical effects? Be serious. The medical effects of marijuana for these conditions are nil. They are, as everyone involved in the enterprise knows—and as many

purpose of the first medical use law—California’s Compassionate Use Act of 1996,²³⁸ also known as Proposition 215—illustrates why that was so. The initiative justified legalizing marijuana use as a treatment for horrific maladies such as terminal cancer, AIDS, and multiple sclerosis-induced “spasticity,” but also included a justification allowing marijuana use for “any other illness for which” a physician believes “marijuana provides relief.”²³⁹ That would include a headache, nervousness, or having a “blue day,” ailments that are light-years away from the maladies used to sell the public on medical marijuana initiatives.²⁴⁰ The proponents of Proposition 215 had that goal in mind,²⁴¹ and the evidence bears it out.²⁴²

behind Prop 215 intended—a fig leaf for legalization.”); Larkin, *supra* note 16, at 511–13 & n.283 (collecting data and authorities supporting the conclusion that medical marijuana initiatives are a sham for recreational cannabis use); *see also, e.g.*, Tom Keane, *The Medical Marijuana Sham*, BOS. GLOBE (Aug. 5, 2012), <https://www.bostonglobe.com/opinion/2012/08/04/medical-marijuana-just-backdoor-way-legalizing-weed/3fLD096MPkfzpg8KHatv9I/story.html> [<https://perma.cc/P2KA-FLHU>]. Even some advocates for medical marijuana use agree. *See* CASARETT, *supra* note 121, at 249 (“A joint is hardly a medicine.”).

238. WEST’S ANN. CAL. HEALTH & SAFETY CODE § 11362.5 (2020).

239. *Id.* § 11362.5(b)(1)(A) (2020).

240. *See* Larkin, *supra* note 16, at 509–12.

241. *Id.* at 511 (“Supporters of the California measure did their cause no good by immediately lighting up marijuana cigarettes after it passed last month and proclaiming that a legitimate medicinal use would include smoking a joint to relieve stress. Dennis Peron, originator of the California initiative, said afterward, ‘I believe all marijuana use is medical—except for kids.’ These actions made it obvious that the goal of at least some supporters is to get marijuana legalized outright, a proposition that opinion polls indicate most Americans reject.” (quoting *Marijuana for the Sick*, N.Y. TIMES (Dec. 30, 1996), <http://www.nytimes.com/1996/12/30/opinion/marijuana-for-the-sick.html> [<https://perma.cc/LDE5-TKMP>])). Whether or not most Americans still reject recreational marijuana use, it is highly likely that most of them do not like being taken for chumps.

242. *Id.* at 511–12 (“There is considerable proof that many state medical marijuana programs are simply a sham for the decriminalization of that substance. Consider the following: according to a 2013 study, in Arizona merely seven of 11,186 applications for medical marijuana had been denied. Only 2,000 patients registered for Colorado’s medical marijuana program before the Justice Department announced in 2009 that it would not enforce the federal marijuana laws against individual patients and caregivers. Colorado residents apparently listened because by March 2011, there were more than 127,000 Colorado registrants. In Colorado, fewer than fifteen physicians wrote

In sum, the futility of pursuing reasoned limitations on the therapeutic uses of cannabis in the face of state recreational use laws highlights a problem that has afflicted marijuana policy since the first medical-use law came on stream in 1996: that is, the argument that smoking marijuana is a legitimate medical treatment is a sham—and a dangerous one at that.²⁴³

more than seventy percent of all medical marijuana recommendations, with the reason being severe or chronic pain in ninety-four percent of the reported conditions. Michigan had fifty-five physicians certify approximately 45,000 patients. California does not require patients to register to receive marijuana for medical use, so the number of patients is a matter of speculation. Estimates, however, are that the number increased from 30,000 in 2002 to more than 300,000 in 2009 and 400,000 in 2010. The California statute permits a patient or caregiver to possess six plants, but it allows counties to amend state guidelines. Humboldt County, which lies in the heart of the Northern California marijuana farming, allows resident [sic] to grow up to ninety-nine plants on behalf of a patient. Not surprisingly, there is also considerable evidence that significant quantities of marijuana grown or sold for medical uses have been diverted for recreational use.” (footnotes omitted)).

243. See Mark Kleiman, *Cannabis Has Medical Value; Medical Marijuana Is a Fraud*, AM. ADDICTION CNTRS. (Nov. 4, 2019), <https://www.rehabs.com/pro-talk/cannabis-has-medical-value-but-medical-marijuana-is-a-fraud/> [<https://perma.cc/4MPK-GET2>]. For a trenchant and recent summary of the public health harms that come from allowing mountebanks to deceive the public into believing that smoking marijuana is a legitimate medical treatment, see Keith Humphreys & Chelsea L. Shover, *Recreational Cannabis Legalization Presents an Opportunity to Reduce the Harms of the US Medical Cannabis Industry*, 19 WORLD PSYCH. 191, 191–92 (2020). As I have explained before:

[M]edical marijuana has become a modern day version of what Stanford Law School Professor Lawrence Friedman has termed the “Victorian Compromise.” . . . The law [in the Victorian Era] would nominally prohibit gambling parlors, saloons, and houses of prostitution from conducting business openly, but law enforcement officials were expected to wink at the existence of private clubs where gambling was conducted and alcohol consumed and to turn a blind eye toward “call girls” and other forms of debauchery that transpired behind closed doors. Professor Friedman described that double standard—the difference between what the law strictly prohibited when defining formal public morality and what the law studiously ignored as being acceptable for purely private conduct—as “the Victorian Compromise.”

That compromise has been reborn today in the form of medical marijuana laws. Unlike straightforward proposals to legalize or decriminalize marijuana, medical marijuana initiatives do not frontally assault the longstanding consensus that, like any other drug, marijuana should not be deemed “safe and effective” just because alcohol can be an even more hazardous inebriant.

Medical marijuana proposals do not directly challenge society's decision to forbid marijuana from being used as an intoxicant while simultaneously permitting beer, wine, or spirits to be freely sold in grocery stores. Nor do they implicitly criticize as hypocritical the social acceptance of alcohol and communal rejection of cannabis. Supporters of medical marijuana measures sold them to the public on the ground that cannabis would be limited to the "personal medical purposes of the patient" acting in consultation with his physician. Supporters highlighted fearsome diseases (cancer, AIDS) and sympathetic parties (the terminally or chronically ill) in order to exploit the voters' humanitarian impulses and thereby generate political support for otherwise controversial ballot initiatives that legislatures might shy away from. Medical marijuana advocates also took advantage of the belief that little harm and possibly some good could result from allowing medically-condemned patients to achieve some respite from their tragic predicaments by whatever means they found useful, means that harmed no one else.

Reform supporters persuaded the public. Beginning in 1996 with the California Compassionate Use Act, numerous states enacted laws ostensibly permitting only a limited exception from the state penal code so that marijuana could be used by a restricted number of severely crippled and dying patients in order to alleviate the symptoms of their disease or the side effects of their treatment. In theory, narrow exceptions to the criminal laws governing "medical marijuana" would benefit the innocent victims of horrible maladies without materially disrupting the purposes served by using the criminal law to prohibit marijuana's widespread use and without materially weakening society's resolve that marijuana should continue to be branded as a dangerous drug.

It turns out, however, that the number of registered medical marijuana "patients" is far too large to believe that only the seriously afflicted are taking advantage of these new laws. The number of users gives strong reason to believe that a massive number of medical marijuana patients are not the poor suffering individuals on whom those laws were supposed to focus—people nearing the end of life or suffering from a debilitating disease or chronic pain. Instead, it is not unreasonable to believe that medical marijuana legislation is a sleight of hand to do indirectly what the new recreational marijuana laws do directly—allow individuals to use marijuana without risking state law criminal liability. It is fair to say that the only difference between medical marijuana laws and recreational marijuana laws are that the latter are honest in their goals.

The result is that a large segment of the nation's population justifiably believes that the medical marijuana movement is merely a Trojan Horse for legalization. To them, the sponsors of those initiatives took advantage of the natural sympathy that people have for others in extremis to achieve dishonestly what could not be done openly: legalize marijuana use. Many people quite reasonably believe that medical marijuana initiatives rest on the deceit

But don't take my word for it. The FDA has consistently affirmed that botanical cannabis is not a safe, effective, and pure drug for purposes of the FDCA.²⁴⁴ The allied federal health care agencies—such as the Department of Health and Human Services, the Office of the U.S. Surgeon General, the National Institute on Drug Abuse, and the Substance Abuse and Mental Health Services Administration—have also concluded that smoking marijuana is not a legitimate treatment and, in fact, carries substantial health risks.²⁴⁵ The

that their purpose and effect would be limited to alleviating the suffering of parties desperate for relief from unrelenting pain or a crippling malady, some of whom have no hope for anything other than to limit their suffering before they die. Many people would have favored decriminalizing or legalizing marijuana—for example, people who may have supported Colorado and Washington's decisions to allow marijuana to be consumed for recreational use—but only if it were done openly, with a public debate followed by a vote of the legislature or, more likely, the state's voters. Now, however, they feel lied to and cheated. Worse still, they feel insulted. In their mind, the supporters of medical marijuana initiatives believe that the average person is so dim-witted that he will never realize what is really going on.

Larkin, *supra* note 16, at 509–12 (footnotes omitted).

244. See, e.g., *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, FDA (Oct. 1, 2020), <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd> [https://perma.cc/TF56-2GRQ]; *What You Need to Know (And What We're Working to Find Out) About Products Containing Cannabis or Cannabis-derived Compounds, Including CBD*, FDA (Mar. 5, 2020), <https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis> [https://perma.cc/7HGY-KAZ4]; *FDA and Cannabis: Research and Drug Approval Process*, FDA (Oct. 1, 2020), <https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process> [https://perma.cc/L2QP-YETU].

245. See, e.g., Alex M. Azar II, HHS Sec'y, Remarks on Surgeon General's Marijuana Advisory (Aug. 29, 2019), <https://www.hhs.gov/about/leadership/secretary/speeches/2019-speeches/remarks-on-surgeon-general-marijuana-advisory.html> [https://perma.cc/YBQ8-T4HP]; *U.S. Surgeon General's Advisory: Marijuana Use and the Developing Brain*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. OF THE SURGEON GEN'L (Aug. 29, 2019), <https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html> [https://perma.cc/AR4A-5DA8]; U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. OF THE SURGEON GEN'L, *THE SURGEON GENERAL'S WARNING ON MARIJUANA, MORBIDITY AND MORTALITY WEEKLY REPORT* (Aug. 13, 1982), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00001143.htm> [https://perma.cc/9KLB-FZFU]; SUBSTANCE ABUSE &

federal government experts therefore agree that medical marijuana is a stalking horse for recreational use of the drug.²⁴⁶

Medical marijuana is a sham that we have been selling to minors over the last twenty-five years. It is bad enough for adults to lie to serve their own venal purposes. It is worse for adults to teach their

MENTAL HEALTH SERVS. ADM'N (SAMHSA), MARIJUANA RISKS (Sept. 26, 2019), <https://www.samhsa.gov/marijuana> [<https://perma.cc/DCB3-ZQ7Y>]; NAT'L INST. ON DRUG ABUSE, MARIJUANA RESEARCH REPORT (Rev. July 2020), <https://www.drugabuse.gov/download/1380/marijuana-research-report.pdf?v=d9e67cbd412ae5f340206c1a0d9c2bfd> [<https://perma.cc/U5RU-P2HM>] (“Is marijuana safe and effective as medicine? The potential medicinal properties of marijuana and its components have been the subject of research and heated debate for decades. THC itself has proven medical benefits in particular formulations. The U.S. Food and Drug Administration (FDA) has approved THC-based medications, dronabinol (Marinol®) and nabilone (Cesamet®), prescribed in pill form for the treatment of nausea in patients undergoing cancer chemotherapy and to stimulate appetite in patients with wasting syndrome due to AIDS. . . . Researchers generally consider medications like these, which use purified chemicals derived from or based on those in the marijuana plant, to be more promising therapeutically than use of the whole marijuana plant or its crude extracts. Development of drugs from botanicals such as the marijuana plant poses numerous challenges. Botanicals may contain hundreds of unknown, active chemicals, and it can be difficult to develop a product with accurate and consistent doses of these chemicals. Use of marijuana as medicine also poses other problems such as the adverse health effects of smoking and THC-induced cognitive impairment. Nevertheless, a growing number of states have legalized dispensing of marijuana or its extracts to people with a range of medical conditions. An additional concern with ‘medical marijuana’ is that little is known about the long-term impact of its use by people with health- and/or age-related vulnerabilities—such as older adults or people with cancer, AIDS, cardiovascular disease, multiple sclerosis, or other neurodegenerative diseases. Further research will be needed to determine whether people whose health has been compromised by disease or its treatment (e.g., chemotherapy) are at greater risk for adverse health outcomes from marijuana use.”). The cannabis plant contains valuable cannabinoids (namely, biologically active ingredients), some of which the FDA has approved. The plant itself, however, is not, and could not be, classified as an FDA-approved “medicine.” Larkin, *supra* note 25, at 117–18 n.76.

246. Does that mean anyone who recommends smoking marijuana to someone who is dying, crippled, or in unyielding pain must be a scoundrel or charlatan? No; that person might be acting out of human kindness. But we shouldn't equate sympathy with medicine. Someone who recommends that the ill or disabled smoke marijuana for symptomatic relief confuses human empathy with scientific legitimacy. “Caring without science is well-intentioned kindness, but not medicine.” Gary M. Reisfield & Robert L. DuPont, *Clinical Decisions: Medicinal Use of Marijuana—Recommend against the Medical Use of Marijuana*, 368 NEW ENG. J. MED. 866, 868 (2013) (quoting BERNARD LOWN, *THE LOST ART OF HEALING: PRACTICING COMPASSION IN MEDICINE* (1996)).

children by example that lying is an appropriate way to get what one wants. It is worst of all to incorporate those lies into our law. Yet, that is what we have done throughout the period of state medical marijuana schemes. (Yes, I used the word “scheme” intentionally, with all of the nefarious connotations that it implies). Minors have grown up believing that smoking marijuana is not harmful for two reasons. One explanation is simple: they have parents, relatives, siblings, or friends who smoked marijuana and did not die. Even presidential candidates have used marijuana and not only lived to tell the tale but also won election (and re-election).²⁴⁷ The other reason is more complicated, but unfortunately, more pernicious. Minors know that the states allow it to be sold, that the federal government has two agencies—the FDA and the DEA—whose mission is to protect the public against the use of dangerous drugs, and that the federal government has not shut down state medical marijuana dispensaries on the ground that they are run by unscrupulous charlatans threatening the public health with their product. State legalization efforts have been free riding on the public’s belief that, notwithstanding the oft-repeated statements by numerous federal agencies that the federal government has not approved marijuana for any legitimate therapeutic use,²⁴⁸ the federal government would not stand idly by while millions of people use a drug that could damage their health or well-being. So, minors use marijuana, and some will wind up doing so for a lengthy period, resulting for some in serious damage to their bodies, minds, careers, and lives.²⁴⁹ Dishonesty by adults leads to poor choices by some minors, which leads to poor lives for some soon-to-be adults. That is a serious adverse consequence of empowering the states, under the flag of federalism, to make nationwide scientific decisions about the safety of particular drugs.

247. See Olivia B. Waxman, *Bill Clinton Said He ‘Didn’t Inhale’ 25 Years Ago—But the History of U.S. Presidents and Drugs Is Much Older*, TIME (Mar. 29, 2017), <https://time.com/4711887/bill-clinton-didnt-inhale-marijuana-anniversary/> [<https://perma.cc/GA6G-HLFV>].

248. See *supra* note 244.

249. See, e.g., Larkin, *supra* note 31, at 323–31 & nn. 28–40.

It does not have to end up that way, at least not on a large scale. In 1938, Congress chose a different path, and we have not deviated from it ever since. The FDA is responsible for deciding what substances are “drugs” and which drugs are “safe” and “effective.”²⁵⁰ Why change now? We do not allow states to opt out of the CSA’s classification of heroin, methamphetamine, or cocaine. Why treat marijuana differently? We do not permit companies to distribute drugs like laetrile, viox, or diethylstilbestrol that the FDA has banned. Why place cannabis in a different category? To be sure, questions like those are ones that a democracy should always be free to debate and, if the answers change over time, alter the course of our law. Those questions, however, do not involve disputes over competing social or economic policies, nor do they concern disputed moral controversies whose resolution could change over time. They are scientific issues as to the safety and effectiveness of particular drugs. We might not be able to answer them with the mathematical certainty we would prefer, because risks often extend over a range rather than define themselves as a fixed number, but we do not answer scientific questions by plebiscite; we leave them to scientists. If we want to allow cannabis to be sold for recreational use, do that honestly. State governments should stop ignoring the FDA’s guidance by claiming that marijuana is good for what ails you.

My biggest criticism of *Marijuana Federalism*, therefore, is that none of the contributors discusses the fundamental issue of how we decide precisely what decisions should be left to the states rather than the federal government, whether competence is a legitimate factor for us to consider, and how much weight competence should receive. The Framers made the judgment that our new central government should decide matters that arise in an international or interstate context; the rest they left to the states. The Founders did not separate policy controversies from scientific judgments and assign each one to the federal or state governments based on each polity’s respective skill set. We do that today, however, because science is

250. See, e.g., 21 U.S.C. §§ 321(p) & 352(f)(1) (2018); Larkin, *supra* note 31, at 376–77.

far more advanced than it was in the eighteenth century; because physicians, biochemists, and epidemiologists know far more than the average person does about drugs, medical treatment, and the like; because we are comfortable with allowing experts to make decisions that only someone with their specialized education, training, and experience can make successfully; and because only the federal government has the ability to dedicate the assets required to collect the experts and ensure that they can perform or review the research necessary to maximize the likelihood of reaching the right (or best) result. We did not encourage the states to send an astronaut to the moon and return him safely to Earth; we trusted the federal government to make that possible. The same is true with respect to the safety and efficacy of drugs, even when those drugs come from the cannabis plant. The decision which government—federal or state—should regulate marijuana requires a more nuanced analysis than the contributors to *Marijuana Federalism* acknowledge.

We have largely forgotten those propositions in our debate over the proper allocation of responsibility for making decisions about marijuana. As Professor Adler notes, the debate has generally been a contest between those who want to give all or none of the authority to the federal or state governments. The result is that we have been conducting this debate as if there is no long-term consensus over who is best qualified to decide some of these issues. If federalism is to be our guide, that forgetfulness almost certainly will lead us to reflexively choose the federal government or states based on our views about the pros and cons of federalism writ large. To die-hard Federalists, it is a conceit that only Washington, D.C., can resolve society's problems. For many other people, that attitude might be a conceit, but that doesn't mean the people who hold it are wrong. We would be wise to keep both of those propositions in mind as we debate marijuana policy.

CONCLUSION

Over the last twenty-plus years, a majority of states have concluded that marijuana has legitimate therapeutic and recreational value, and those states allow private parties to cultivate, sell, possess, and use it under a state regulatory régime. Consequently, we have witnessed the development of state cannabis regulatory programs that are inconsistent legally, practically, and theoretically with the approach that our national government has taken for fifty years. How do we resolve that conflict between state and federal law? The Supreme Court has refused to take this issue away from the political branches of the federal government by ruling that it is a matter within the states' bailiwick. The Executive Branch has failed to take a coherent position regarding whether, when, and how it will enforce the existing federal law. And Congress has abdicated its responsibility to clarify what should be federal policy in a field where only Congress can decide. The result is that we have one law for Athens and one for Rome. Not surprisingly, that strategy is not working for anyone other than those members of Congress who wish to avoid casting a vote on the issue.

Marijuana Federalism therefore appears at a most opportune point. The new state cannabis regulatory programs existing from Maine to Hawaii will not disappear any time soon. Some of *Marijuana Federalism's* contributors encourage Congress to "cowboy up" politically and eliminate the disarray in the law, while others try to persuade the Supreme Court to take another whack at the issue. The threads that tie the essays together are the potential benefits we might see from permitting multiple states to devise different regulatory approaches and the affinity for decentralized decision-making built into our Constitution's DNA. All that *Marijuana Federalism* is missing is a treatment of the argument that Congress should leave decisions regarding the recreational use of marijuana to the states, but not whether it has legitimate medical uses. Agree or disagree with the views of one or more of *Marijuana Federalism's* essayists, the book makes an eminently valuable contribution to a much-needed national discussion of an important contemporary public policy issue.