
Marijuana Legalization and Horizontal Federalism

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Marijuana legalization efforts over the last few years have scored remarkable and rapid successes, but those successes have also produced legal questions — and, in particular, questions touching on federalism. Much of the discussion of the federalism implications of marijuana legalization has thus far focused on issues of vertical federalism, i.e., the relationship between the federal government and the states, with much less attention paid to issues of horizontal federalism, i.e., the relationship between the states. This Essay focuses on the latter topic and, in particular, one of the manifestations of the inter-state friction that marijuana legalization has produced: a lawsuit Nebraska and Oklahoma filed against Colorado in the United States Supreme Court. Although the Court ultimately decided not to hear the case, it nonetheless highlights important questions about how states mediate policy disputes and the role of the courts, including the Supreme Court, in resolving those disputes. Just as policy debates about marijuana legalization will surely continue, so too will legal debates. Attention to the horizontal federalism issues raised by marijuana legalization can meaningfully contribute to an already vibrant conversation about horizontal federalism and how to resolve inter-state policy disputes and tensions.

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INTRODUCTION

Efforts to legalize marijuana over the last few years have scored remarkable and rapid successes. The first statewide medical marijuana law went into effect roughly two decades ago.¹ Since then, over twenty-five states and the District of Columbia have legalized marijuana for at least some purposes.²

The legal questions raised by these rapid changes — in particular, the questions touching on federalism — have already produced a considerable amount of discussion and debate. For example, there has been significant discussion about the relationship and interaction between the federal prohibition on marijuana and state legalization efforts, as commentators have explored whether federal law preempts state legalization efforts and to what extent the federal government will enforce federal law in states that have legalized marijuana.³ But one topic that has been the subject of much less discussion, though it is no less important, is the relationship between state governments that take different positions on marijuana legalization.

In this short Essay, I provide some broader context before focusing in on one of the manifestations of the inter-state friction that marijuana legalization has produced: a lawsuit filed by Nebraska and Oklahoma against Colorado.⁴ Although the Supreme Court has declined to hear that case,⁵ it nonetheless raises interesting questions about how states should resolve these sorts of policy disputes and what role the Supreme Court should play in resolving them. Indeed, one of the most interesting aspects of marijuana legalization is the extent to which it draws into sharp relief issues of both vertical

¹ CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (2016); see Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 6 (2013) (discussing California's medical marijuana laws).

² *State Marijuana Laws in 2016 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last visited Nov. 29, 2016); see Brannon P. Denning, *Marijuana, Federal Power, and the States: Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567, 568 (2015).

³ See *infra* Part I.B.

⁴ See John Ingold, *Nebraska and Oklahoma Sue Colorado over Marijuana Legalization*, DENV. POST (Dec. 18, 2014, 6:12 AM), <http://www.denverpost.com/2014/12/18/nebraska-and-oklahoma-sue-colorado-over-marijuana-legalization/> (“In the most serious legal challenge to date against Colorado’s legalization of marijuana, two neighboring states have asked the U.S. Supreme Court to strike down the history-making law.”).

⁵ See *Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016).

federalism, the relationship between the federal government and the states, and horizontal federalism, the relationship between the states.

I. BACKGROUND ON MARIJUANA AND FEDERALISM

A. *Horizontal Federalism and Vertical Federalism*

Federalism is often perceived to be one of the defining and essential features of our constitutional system,⁶ one that “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society” and allows for “more innovation and experimentation in government.”⁷ Regardless of what one thinks about the merits of federalism,⁸ its impact on our law and our system of governance is unquestionably significant.

Although discussions about federalism most often focus on the relationship between the federal government and the states,⁹

⁶ See *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (recognizing the “fundamental principle” that “our Constitution establishes a system of dual sovereignty between the States and the Federal Government”); *Texas v. White*, 74 U.S. 700, 725 (1868) (“[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.”), *overruled in part* by *Morgan v. United States*, 113 U.S. 476 (1885); see also Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3 (1988) (describing federalism as the “practical” compromise that resulted because “[i]t was unthinkable to most eighteenth century citizens that the Constitution should abolish state governments,” but “[a]t the same time, the difficulties experienced under the Articles of Confederation demonstrated the need for a strong central power”).

⁷ *Gregory*, 501 U.S. at 458; see *Bond v. United States*, 564 U.S. 211, 221 (2011) (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” (internal quotation marks omitted) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992))).

⁸ There is, of course, a rich literature on federalism — its benefits, its costs, and how to make it work most effectively. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1284-95 (2009) (providing a preliminary assessment of “the costs and benefits of uncooperative federalism”); Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1984-2020 (2008) (arguing that there are circumstances in which “federal agency action is consistent with, rather than at odds with, federalism values”); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 102-34 (2011) (“[C]arefully crafted federalism bargaining can also be a principled means of allocating state and federal authority in realms of concurrent regulatory interest.”); Ernest A. Young, *A Symposium on the Legacy of the Rehnquist Court: The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 875 (2006) (providing “a rigorously conservative case for federalism”).

⁹ See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494 (2008)

federalism also implicates relationships between the states themselves.¹⁰ Thus, for example, whether federal law preempts state law,¹¹ or whether federal law unconstitutionally commandeers state officials,¹² are classic examples of vertical federalism problems that require negotiating the relationship and authority of the federal government vis-à-vis the states. By contrast, whether a state law unfairly discriminates against out-of-state residents,¹³ or whether the actions of one state have negative impacts on neighboring states,¹⁴ are examples of horizontal federalism problems that require determining how two independent sovereigns resolve the frictions and tensions that may arise between them. While “a complete analytical separation [between these two types of federalism] is impossible,”¹⁵ it is nonetheless a helpful taxonomy insofar as the issues raised by vertical

(“[M]ost scholarship about constitutional ‘federalism’ focuses on vertical federal-state interactions while neglecting horizontal state-state interactions.”); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 *DENV. U. L. REV.* 289, 290 (2003) (“Vertical federalism has been a major concern of the Rehnquist Court. . . . The Rehnquist Court has not been similarly concerned with horizontal federalism. . . .”); Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 *MICH. L. REV.* 57, 59 (2014) (“[W]hile the vertical dimensions of federalism have generated countless paens, courts and scholars have neglected federalism’s horizontal dimensions.”).

¹⁰ See Erbsen, *supra* note 9, at 494 (“The Constitution allocates sovereign power between governments along two dimensions: a vertical plane that establishes a hierarchy and boundaries between federal and state authority, and a horizontal plane that attempts to coordinate fifty coequal states that must peaceably coexist. Both vertical and horizontal federalism are fundamental elements of U.S. government.”); *id.* at 501-02 (“This taxonomy of vertical and horizontal federalism does not exist in Supreme Court decisions, and has only recently started to appear prominently in legal scholarship.” (footnote call number omitted)).

¹¹ See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008) (holding that the Medical Device Amendments of 1976 preempted state common law claims).

¹² See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress cannot conscript a State’s officer to enforce a federal regulatory program).

¹³ See, e.g., *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 70 (1988) (holding that a state “may not discriminate against nonresidents unless it shows that such discrimination bears a close relation to the achievement of substantial state objectives”).

¹⁴ See, e.g., *New Jersey v. City of N.Y.*, 283 U.S. 473 (1931) (resolving a dispute between New Jersey and the City of New York about the dumping of garbage into the ocean); see also Gerken & Holtzblatt, *supra* note 9, at 61 (“[W]hen lax gun-ownership enforcement in Virginia increases the number of firearms in New York, we worry. When Massachusetts marries same-sex couples from states that don’t recognize those marriages, we worry. When California’s emissions standards trump the emissions standards of other states, we worry.”).

¹⁵ Erbsen, *supra* note 9, at 504.

and horizontal federalism are often different and the constitutional provisions governing vertical and horizontal conflicts are, to some degree, different as well.

Moreover, distinguishing between these two distinct, albeit related, strands of federalism also helps ensure that both strands receive adequate attention. Although a full survey of the academic literature on horizontal federalism is beyond the scope of this short Essay, suffice it to say that “[h]orizontal federalism . . . is coming into view as a subject for the legal academy.”¹⁶ For example, by writing at length on this topic, Allan Erbsen has given “horizontal federalism the systemic scrutiny typically reserved for vertical federalism.”¹⁷ Among other things, he engages in a thorough analysis of the Constitution and determines that it “addresses potential interstate friction” in five different ways involving an even greater number of constitutional provisions.¹⁸ Gillian Metzger has written on Article IV of the Constitution, a provision that she describes as “central to our horizontal federalism framework.”¹⁹ According to Metzger, the Constitution gives Congress broad authority to address interactions between the states.²⁰ Others have also written on the topic, offering critiques of existing doctrines and offering new approaches.²¹

The debates about marijuana legalization mirror, in some ways, these broader debates about federalism. While they have focused significant attention on vertical federalism questions, they have given relatively less attention to the equally important horizontal federalism questions marijuana legalization raises.²²

¹⁶ Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 44 (2007).

¹⁷ Erbsen, *supra* note 9, at 495.

¹⁸ *Id.* at 531.

¹⁹ Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1471 (2007).

²⁰ *Id.* at 1475.

²¹ See Fruehwald, *supra* note 9, at 293; Daniel E. Andersen, Note, *Straddling the Federal-State Divide: Federal Court Review of Interstate Agency Actions*, 101 IOWA L. REV. 1601, 1620 (2016) (discussing “interstate administrative law and the agencies it creates”). See generally Gerken & Holtzblatt, *supra* note 9; Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005).

²² For one good treatment of some of the horizontal federalism questions raised by marijuana legalization, see Denning, *supra* note 2, at 587-93.

B. Vertical Federalism: Federal Preemption

When it comes to marijuana legalization, the focus on questions of vertical federalism is not surprising; after all, even as some states have begun to legalize marijuana possession and sale,²³ federal law continues to prohibit it. Indeed, the federal Controlled Substances Act (CSA) lists marijuana in its most restrictive class of narcotics as one that “has 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.”²⁴ Because marijuana possession and use remains illegal under federal law, there has been significant discussion about whether federal law preempts state legalization efforts and to what extent the federal government will enforce federal law in states that have legalized marijuana.

Although “the conventional wisdom was that states were simply unable to liberalize their laws” in light of federal law,²⁵ courts and commentators alike have more recently suggested otherwise.²⁶ While this argument may seem counterintuitive in light of the Supremacy Clause, which generally privileges federal law over state law,²⁷ it

²³ *State Marijuana Laws in 2016 Map*, *supra* note 2 (“Twenty-six states and the District of Columbia currently have laws legalizing marijuana in some form. Three other states will soon join them after recently passing measures permitting use of medical marijuana.”). For a map showing the current legal status of marijuana in each state, see *id.*

²⁴ 21 U.S.C. § 812(b) (2012); see Schedules of Controlled Substances, 21 C.F.R. § 1308 (2016) (setting out the narcotics schedules).

²⁵ Denning, *supra* note 2, at 573; see, e.g., *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010) (en banc) (“[T]o the extent that ORS 475.306(1) affirmatively authorizes the use of medical marijuana, the Controlled Substances Act preempts that subsection . . .”).

²⁶ See, e.g., Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1453 (2009) (arguing that “laws that exempt the possession, cultivation, and distribution of marijuana for medical purposes from state-imposed legal sanctions . . . merely restore the state of nature that existed until the early 1900s when marijuana bans were first adopted” and “cannot be preempted” because “[a] congressional statute purporting [to] do so” would constitute unconstitutional commandeering”); see also *Qualified Patients Ass’n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 107 (Ct. App. 2010) (“[A] city’s compliance with state law in the exercise of its regulatory, licensing, zoning, or other power with respect to the operation of medical marijuana dispensaries that meet state law requirements would not violate conflicting federal law.”).

²⁷ See, e.g., Mikos, *supra* note 26, at 1422 (“When Congress legalizes a private activity that has been banned by the states, the application of the Supremacy Clause is relatively straightforward: barring contrary congressional intent, such state laws are unenforceable . . .”).

makes sense in light of another well-established principle of federalism: anti-commandeering. Under the anti-commandeering principle, the federal government cannot enlist states and their officials in the enforcement of federal law.²⁸ As one commentator has explained, “to say that Congress may thereby preempt state inaction (which is what legalization amounts to, after all) would, in effect, permit Congress to command the states to take some action — namely, to proscribe marijuana. The Court’s anti-commandeering rule, however, clearly prohibits Congress from doing this.”²⁹

Others, however, suggest that this argument proves too much. They note that “the Court has recognized that unless it has a limiting principle, the anti-commandeering doctrine could read the Supremacy Clause out of the Constitution.”³⁰ One commentator argues, for example, that “[i]t is difficult to characterize [liberal state regimes] as other than posing an obstacle to the accomplishment of a congressional objective. It seems axiomatic that the Supremacy Clause and preemption doctrine prohibit states authorizing conduct that federal law prohibits.”³¹ Moreover, while he acknowledges that “the [anti-commandeering] principle places limits on the ability to conscript state officials in enforcing the CSA,” he speculates that a court order enjoining a state’s regulation of the marijuana market might prompt that state to recriminalize marijuana or “trigger federal intervention.”³² My point here is not to argue for one side or the other

²⁸ See *Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”). For some discussion of anti-commandeering principles in the literature, see Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 6-9 (2015); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1642-43 (2006).

²⁹ Mikos, *supra* note 26, at 1424; see also Grabarsky, *supra* note 1, at 11 (“Congress would not be able to compel California to subvert its own medical marijuana legislation by requiring the state to expend its own funds to carry out the federal ban. The so-called ‘anti-commandeering’ doctrine prevents the federal government from requiring states to pay for a federal policy. Nor would the federal government be able to commandeer state officials to enforce or administer the CSA because of the same principle.”).

³⁰ Denning, *supra* note 2, at 581.

³¹ *Id.* at 579. But see Grabarsky, *supra* note 1, at 12 (arguing that courts have concluded that there is not preemption because, among other things, “California drug laws do not positively encourage or require the use of medical marijuana (which may result in a direct conflict with the CSA)”).

³² Denning, *supra* note 2, at 582-83.

of that debate, but simply to highlight one of the ongoing vertical federalism debates raised by state marijuana legalization.³³

Another ongoing issue of vertical federalism raised by marijuana legalization concerns the extent to which the federal government will continue to enforce the Controlled Substances Act in states that have legalized marijuana. After all, regardless of whether or not state law is preempted, the federal government can, without question, continue to enforce federal law in legalization states if it so chooses.³⁴

Although the federal government's position on this topic has shifted over time,³⁵ the Department of Justice's most recent statement on the subject suggests that it will not focus its limited enforcement resources on states that have legalized marijuana. As the Department explained,

[t]he Department of Justice is committed to enforcement of the CSA consistent with [Congress's determinations that marijuana is a dangerous drug and that its illegal distribution is a serious crime]. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent and rational way.³⁶

Toward that end, the Department announced a number of enforcement priorities, and explained that “[o]utside of these enforcement priorities, the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”³⁷ The

³³ For an article arguing for a “middle path that reaches an accommodation between the doctrines of preemption and anti-commandeering,” see David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 573 (2013).

³⁴ Grabarsky, *supra* note 1, at 14 (“[T]he federal government still has another means at its disposal to subvert the state drug laws: enforcing the CSA itself. No constitutional barrier would likely confront this option . . .”).

³⁵ See, e.g., Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 979-82 (2016) (discussing three different positions on CSA enforcement taken by the Department of Justice between 2009 and 2012); Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 DENV. U. L. REV. 1027, 1033-41 (2012) (describing how Deputy Attorney General James M. Cole's memorandum in 2011 “directly contradicted” Deputy Attorney General David Ogden's memorandum in 2009).

³⁶ Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to all U.S. Attorneys, on guidance regarding marijuana enforcement 1 (Aug. 29, 2013) [hereinafter Cole Memo], <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

³⁷ *Id.* at 2 (“[T]he Department of Justice has not historically devoted resources to

Department did make clear, however, that its guidance “rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.”³⁸ Thus, some clarity on the federal government’s position exists for now, but of course, that position could change again under the Trump Administration.³⁹

Moreover, an additional wrinkle to this vertical federalism issue was added in late 2014, when Congress passed the Consolidated and Further Continuing Appropriations Act. That Act provided that “[n]one of the funds made available in this Act to the Department of Justice may be used, with respect to [listed states], to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”⁴⁰ Although the federal government has argued that that language does not prohibit it from bringing enforcement actions under the Controlled Substances Act, a district court strongly disagreed, concluding that the government’s “reading [of the statute] so tortures the plain meaning of the statute that it must be quoted to ensure credible articulation.”⁴¹ Congress could, however, change its position,

prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property.”). Jessica Bulman-Pozen argues that this is an example of “executive federalism . . . transform[ing] national drug policy. States have taken the initiative by adopting new state laws and establishing novel regulatory apparatuses, but negotiations between state and federal officials over the enforcement of state and federal law have ultimately determined the contours of today’s drug law.” Bulman-Pozen, *supra* note 35, at 982.

³⁸ Cole Memo, *supra* note 36, at 2. For an interesting argument that “[i]f a state legalizes and regulates a drug in a way that minimizes the risk of spillovers into the interstate black market, the federal drug laws should be forbidden to apply within that state,” see William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513, 514 (2015).

³⁹ For discussion of the 2016 presidential candidates’ positions on marijuana legalization, see *2016 Presidential Candidates*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/2016-presidential-candidates/> (last visited Oct. 11, 2016).

⁴⁰ Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2216 (2014). The same language was included in the next year’s appropriations act. Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015).

⁴¹ *United States v. Marin All. for Med. Marijuana*, 139 F. Supp. 3d 1039, 1044 (N.D. Cal. 2015). For discussion of this legislation, see Dean M. Nickles, Note, *Federalism and State Marijuana Legislation*, 91 NOTRE DAME L. REV. 1253, 1259-61 (2016).

which means that this part of the vertical federalism story also remains subject to change.

C. *Horizontal Federalism: Interstate Conflict*

In contrast to the obvious vertical federalism issues posed by marijuana legalization, the horizontal federalism issues are less obvious, but are no less significant. Indeed, marijuana legalization has not just pitted the federal government against state governments, it has also pitted state governments against each other, as some states have argued that marijuana legalization in other states has had negative effects in their states.⁴²

Marijuana legalization thus presents an opportunity to think about how states mediate their own policy differences — through the courts and other means. This is an important topic because these sorts of inter-state disputes can arise in many different contexts. For example, issues of horizontal federalism arise when activity in one state causes pollution to travel across the border into a neighboring state or when one state argues that a neighboring state with lax gun regulations causes more guns to travel into its state.⁴³ And paradoxically state efforts to limit the spillover effects of their policies can even raise their own horizontal federalism issues if they result in in-state and out-of-state residents being treated differently.⁴⁴

There are a number of ways in which these sorts of policy disputes can, in theory, be mediated. For example, the federal government plays a role by enacting and enforcing legislation designed to address spillover effects. Indeed, Metzger has argued that “the Constitution grants Congress expansive authority to structure interstate relationships.”⁴⁵ States can also play a role in encouraging Congress

⁴² See *infra* Part II.

⁴³ See, e.g., *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1584 (2014) (concerning the “cost-effective allocation of emission reductions among upwind states to improve air quality in polluted downwind [states]”); Brief for Hawaii et al. as Amici Curiae Supporting Respondent at 7, *Abramski v. United States*, 134 S. Ct. 2259 (Dec. 30, 2013) (No. 12-1493), 2013 WL 6907723 (arguing that “gun traffic from states with weaker gun laws is a major law enforcement challenge for states seeking to enforce stricter gun laws”); see also Galle & Seidenfeld, *supra* note 8, at 1987 (noting that “[l]ax regulations in one state — be they on handguns, fireworks, or abortions — can make restrictions in nearby states largely fruitless” and that “[u]pwind pollution makes East Coast clean-air efforts prohibitively expensive” (footnote call number omitted)).

⁴⁴ See Denning, *supra* note 2, at 587-92.

⁴⁵ Metzger, *supra* note 19, at 1475; *id.* at 1476-77 (“Several central features of the interstate relations context — the need for a federal umpire, the Constitution’s

and federal agencies to enact legislation or promulgate regulations that will help resolve horizontal federalism disputes, although there is debate about how effective they are in that regard.⁴⁶ Sometimes, the courts can play a role in mediating these disputes, often by interpreting the laws the federal government has enacted.⁴⁷ In addition, the states, with Congress's consent, can negotiate directly by forming compacts that set out ground rules for resolving some disputes.⁴⁸ Moreover, as Gerken and Holtzblatt argue, "Congress, administrative agencies, political parties, networked interest groups, and NGOs can and do mediate interstate tussles."⁴⁹ Indeed, they argue that "[g]iven the democratic benefits associated with spillovers, it will often be better to resolve spillover fights through political rather than judicial institutions."⁵⁰ Of course, how often political resolution of these disputes will be possible is very much an open question, especially in light of increasing political polarization.⁵¹

One of the most striking examples of the inter-state friction caused by marijuana legalization is a lawsuit Nebraska and Oklahoma filed

emphasis on congressional supervision in a variety of interstate relations contexts, and the benefits of flexibility and political accountability in mediating interstate disputes — support recognizing such expansive congressional authority.”).

⁴⁶ There is, more generally, a rich literature on the influence — or not — that states can have on Congress. See, e.g., David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL'Y 267, 324 (2015) (“States can and do lobby agencies; but because agencies are not politically beholden to states, agencies can more easily turn a deaf ear.”); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1357 (2001) (“Modern ‘political safeguards’ theorists . . . have, of course, long focused on the representation of the states in Congress as the critical, even exclusive, constitutional protection for federalism. Many judges and scholars have been properly skeptical of these claims.” (footnote call number omitted)); *id.* at 1358 (“[Members of the national Congress] may see state politicians and state governmental institutions as political competitors.”). See generally Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 955 (2014) (describing how “state involvement in federal regulation has been operationalized”).

⁴⁷ See Gerken & Holtzblatt, *supra* note 9, at 61 (noting that “most [scholars of horizontal federalism] look to the judiciary to referee state-to-state conflict”).

⁴⁸ See U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any agreement or Compact with another State”); see also Comment, *The Power of the States to Make Compacts*, 31 YALE L.J. 635, 635-39 (1922).

⁴⁹ Gerken & Holtzblatt, *supra* note 9, at 64.

⁵⁰ *Id.*

⁵¹ See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2333 (2006) (discussing the “coherence and polarization of the two [major political] parties”).

against Colorado, arguing that Colorado’s legalization of marijuana has caused negative effects in their states.⁵²

II. *NEBRASKA V. COLORADO*

A. *Background*

In 2012, Colorado, by a statewide vote, passed Amendment 64, which authorized all persons over the age of twenty-one to possess, cultivate, and use specified amounts of marijuana and directed the state to establish a system to license, regulate, and tax retail marijuana businesses.⁵³ Shortly thereafter, the state enacted and promulgated legislation and administrative regulations to implement the Amendment’s provisions. Among other things, Colorado mandated a “seed-to-sale tracking system” for each individual marijuana plant and placed quantitative limits on sales to in-state residents and lower quantitative limits on sales to those who cannot prove in-state residence.⁵⁴

In December 2014, Nebraska and Oklahoma sued Colorado, arguing that drug legalization in Colorado “undermin[es their] own marijuana bans, draining their treasuries, and placing stress on their criminal justice systems.”⁵⁵ They also argued that the federal Controlled Substances Act preempts Colorado’s legalization regime.⁵⁶ Nebraska and Oklahoma did not sue in district court; instead, they sued in the U.S. Supreme Court, asking the Court to hear the case as part of its original jurisdiction.⁵⁷

Although the vast majority of the Supreme Court’s time is spent on its appellate docket, reviewing cases that were previously decided in the lower courts, the Supreme Court does have the authority to act as a trial court in certain cases invoking the Court’s original jurisdiction.⁵⁸ Most often, these original jurisdiction cases involve suits between states as parties, usually over territorial or water rights disputes. For example, in 2015, the Court decided *Kansas v. Nebraska and Colorado*, a dispute over the states’ rights to the waters of the

⁵² See *infra* Part II.B.

⁵³ See COLO. CONST. art. XVIII, § 16.

⁵⁴ COLO. CODE REGS. §§ 212-2.103, .309, .402 (2016).

⁵⁵ Complaint at 3-4, *Nebraska v. Colorado*, 136 S. Ct. 1034 (Dec. 18, 2014) (No. 144), 2014 WL 7474136 [hereinafter *Complaint of Nebraska & Oklahoma*].

⁵⁶ *Id.* at 8.

⁵⁷ See *id.* at 1.

⁵⁸ See U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a) (2012).

Republican River Basin.⁵⁹ But the Court's original jurisdiction is not limited to disputes over water or territory; rather, it reaches "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party"⁶⁰ That language plainly reaches Nebraska and Oklahoma's complaint against Colorado.

B. Nebraska and Oklahoma's Complaint

In their complaint and accompanying brief, Nebraska and Oklahoma argue both that the federal Controlled Substances Act preempts Colorado's laws, and that Colorado's marijuana legalization has caused their states' significant injury which the Court can remedy. With respect to preemption, Nebraska and Oklahoma allege in their complaint that "[i]n our constitutional system, the federal government has preeminent authority to regulate interstate and foreign commerce, including commerce involving legal and illegal trafficking in drugs such as marijuana,"⁶¹ and that "[t]he nation's anti-drug laws reflect a well-established — and carefully considered and constructed — balance of national law enforcement, foreign relations, and societal priorities."⁶² They further argue that "[i]n passing and enforcing Amendment 64, the State of Colorado has created a dangerous gap in the federal drug control system enacted by the United States Congress,"⁶³ and there is a "positive conflict" between the two laws.⁶⁴

Their complaint also argues — this being the real horizontal federalism dispute in the case — that the "State of Colorado's actions have caused and will continue to cause substantial and irreparable harm to the Plaintiff States."⁶⁵ As they explain, "[s]ince the implementation of Amendment 64 in Colorado, Plaintiff States have

⁵⁹ *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015).

⁶⁰ U.S. CONST. art. III, § 2, cl. 2.

⁶¹ Complaint of Nebraska & Oklahoma, *supra* note 55, at 2.

⁶² *Id.*

⁶³ *Id.* at 3; *see id.* at 8 ("Colorado Amendment 64 obstructs a number of the specific goals which Congress sought to achieve with the CSA.").

⁶⁴ *Id.* at 8, 21; *see also* Brief in Support of Motion for Leave to File Complaint at 17-27, *Nebraska v. Colorado*, 136 S. Ct. 1034 (Dec. 18, 2014) (No. 144), 2014 WL 7474136 [hereinafter Brief of Oklahoma & Nebraska]. They also argue that "[i]n addition to violating the CSA, Amendment 64 further violates a number of international treaties to which the United States is a party." Complaint of Nebraska & Oklahoma, *supra* note 55, at 10.

⁶⁵ Complaint of Nebraska & Oklahoma, *supra* note 55, at 25; *see* Brief of Oklahoma & Nebraska, *supra* note 64, at 13-14.

dealt with a significant influx of Colorado-sourced marijuana,⁶⁶ and “[t]he detrimental economic impacts of Colorado Amendment 64 on the Plaintiff States, especially in regard to the increased costs for the apprehension, incarceration, and prosecution of suspected and convicted felons, are substantial.”⁶⁷ They argue that “[u]nless restrained by this Court, Colorado-sourced marijuana undoubtedly will continue to flow into and through Plaintiff States in violation of the Controlled Substances Act and thus compromise federal laws and treaty obligations.”⁶⁸

In their brief accompanying the complaint, Nebraska and Oklahoma also explained why they believed it would be appropriate for the Court to exercise its original jurisdiction in the case. According to the states, “[t]his case is of a serious and dignified nature. . . . Colorado’s choice to skirt the comprehensive CSA presents a direct threat to the health and safety of the residents of Plaintiff States, drains Plaintiff States’ treasuries, and stresses Plaintiff States’ criminal justice systems.”⁶⁹ They argued that “[g]iven the direct assault on the health and welfare of Plaintiff States’ citizenry, this is a dispute of such seriousness that it would amount to *casus belli* if the States were fully sovereign,”⁷⁰ and that “[a]n important issue of federalism is at stake”⁷¹ Finally, and significantly, they maintained that because the Court’s jurisdiction over controversies between two or more states is exclusive, “Plaintiff States have no adequate alternative remedies to enforce their rights other than [this action].”⁷²

⁶⁶ Complaint of Nebraska & Oklahoma, *supra* note 55, at 25.

⁶⁷ *Id.* at 26.

⁶⁸ *Id.* at 28.

⁶⁹ Brief of Nebraska & Oklahoma, *supra* note 64, at 11.

⁷⁰ *Id.* at 12 (comparing this case to ones involving “cross-border nuisances” (quoting *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983))).

⁷¹ *Id.* at 15.

⁷² *Id.* at 16; *see id.* at 17 (“[T]he power of Plaintiff States to regulate the flow of illegal drugs at their borders, in the manner normally available to sovereigns, has been surrendered by the states under the Constitution.”). All nine former administrators of Drug Enforcement also filed a brief in support of the motion for leave to file a complaint, arguing that the Court has jurisdiction over the case, and that it presented an important question that the Court should resolve. Brief for All Nine Former Administrators of Drug Enforcement as Amici Curiae in Support of Plaintiff States’ Motion for Leave to File a Bill of Complaint at 7, 20-23, *Nebraska v. Colorado*, 136 S. Ct. 1034 (Feb. 19, 2015) (No. 144), 2015 WL 1262747.

C. Colorado's and the United States' Responses

In response Colorado and the U.S. Solicitor General (who was asked to weigh in by the Court⁷³) made a number of different arguments, three of which I focus on here. First, they argue that Oklahoma and Nebraska's claims rest, in significant part, on factual claims that might be better developed in the lower courts.⁷⁴ The United States, in particular, emphasized this point strongly, noting that "the Court could conclude that whether Colorado's scheme creates a 'positive conflict' with the CSA ultimately turns on, among other factors, the practical efficacy of Colorado's regulatory system in preventing or deterring interstate marijuana trafficking."⁷⁵ It also argued that "[i]t is not obvious, at least without further factual development of a potentially sprawling and uncertain nature, that the class of lawbreakers that Nebraska and Oklahoma have identified . . . cause them to 'suffer great loss or any serious injury' in terms of law enforcement funding or other expenditures."⁷⁶

With respect to this argument, I am unconvinced. It is certainly true that the Supreme Court is, as a general matter, less well-positioned to resolve factual disputes than the district courts. In fact, as I have written elsewhere, there are real problems when the Supreme Court tries to engage in fact-finding when it is acting, as it normally is, as an appellate body.⁷⁷ But the story is a little more complicated here, given that Nebraska and Oklahoma were invoking the Court's original jurisdiction. After all, if the Court is acting as a trial court, then it can engage in fact-finding.⁷⁸ Indeed, in original jurisdiction cases, the

⁷³ See *Nebraska v. Colorado*, 135 S. Ct. 2070 (2015). The states of Washington and Oregon also filed a brief in support of Colorado, arguing that the case did not warrant exercise of the Court's original jurisdiction, that lower federal courts are better situated to address the complaint, and that the plaintiffs lacked standing. See Amicus Brief of the States of Washington & Oregon in Support of Respondent at 4-15, *Nebraska v. Colorado*, 136 S. Ct. 1034 (2015) (No. 22O144), 2015 WL 1478011.

⁷⁴ See Brief of Colorado in Opposition to Motion for Leave to File Complaint at 21, *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016) (No. 144) (Mar. 27, 2015) [hereinafter Brief of Colorado]; Brief for the United States as Amicus Curiae at 22-23, *Nebraska v. Colorado*, 136 S. Ct. 1034 (No. 144) [hereinafter Brief for the United States].

⁷⁵ Brief for the United States, *supra* note 74, at 22.

⁷⁶ *Id.* at 19.

⁷⁷ See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 53-66 (2011).

⁷⁸ See Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 628 (2002) (noting that the Court has both "fact-finding" and "legal decision-making authority" in original jurisdiction cases).

Court will often appoint a Special Master to assist it in that responsibility.⁷⁹ At least historically, the Court has often directed Special Masters to receive evidence, and it has given them the authority to summon witnesses and issue subpoenas in order to gather that evidence.⁸⁰ While there is certainly room to debate from a transparency and rule of law perspective whether we might still be *better off* with district courts doing this work, the imbalance is simply not as great as the United States and Colorado suggested.

Second, the United States argued that it would be unusual for the Court to exercise its original jurisdiction in this case because Nebraska and Oklahoma's real complaint is not with Colorado as much as it is with third-parties who might buy marijuana in Colorado and bring it across the border.⁸¹ Thus, according to the United States, this case is very different from a case involving a direct dispute between two states over, for example, which state has rights to property or a certain body of water.⁸² This case is also different from one in which, as the United States put it, one state has "directed or affirmatively authorized the generation of pollution that by operation of natural forces enters and causes injury in the complaining State's territory that it is powerless to prohibit."⁸³

This is certainly right as a descriptive matter, but I think it is less obvious that it makes sense as a normative matter. To determine whether original jurisdiction is appropriate in any given case requires thinking through the reasons why it might make sense for a case to start at the Supreme Court, rather than end there — perhaps the possibility that resolution of the case will be quicker or that the Supreme Court forum will more appropriately respect the gravamen and seriousness of inter-state disputes. Given those (and other possible) rationales, one can imagine cases other than those identified by the United States where original jurisdiction might be appropriate — for example, where one state's failure to regulate leads to pollution in another state. My point here is not to take any definitive stance on this question, but simply to recognize that the United States' argument that this case would be unusual simply raises the question of whether it *should* be.

Third, both Colorado and the United States argue that there is a classic standing problem here because the Court cannot redress

⁷⁹ *Id.* at 627-28.

⁸⁰ *Id.* at 627.

⁸¹ See Brief for the United States, *supra* note 74, at 14.

⁸² See *id.* at 10, 20.

⁸³ *Id.* at 10.

Nebraska and Oklahoma's asserted injury.⁸⁴ Indeed, they argue that the remedy those states seek would actually make their injury worse. Importantly, Nebraska and Oklahoma do not argue that Colorado cannot legalize marijuana. Instead, they argue that the state's regulations governing the sale and distribution of marijuana should be dismantled,⁸⁵ even though such dismantling would actually make it more likely that marijuana would find its way from Colorado into neighboring states and cause the very injuries that Nebraska and Oklahoma assert.

As a legal matter, although I think that standing should be broader than it is under current doctrine,⁸⁶ I think current doctrine, which requires that courts be able to redress the plaintiff's injury,⁸⁷ makes this a strong argument. Moreover, as a practical matter, it certainly makes it seem like this lawsuit is largely about political opposition to what Colorado is doing within its own borders, rather than genuine concern about the out-of-state effects of its in-state activities. That said, it does not answer the question whether it makes sense for the Supreme Court to hear the case *now* and decide the standing question, or rather whether the question should be left to work its way up through the lower courts.⁸⁸

D. Resolution

On March 21, 2016, the Supreme Court declined to hear the case.⁸⁹ Justice Thomas, joined by Justice Alito, dissented. According to Justice Thomas, it is unclear whether the Supreme Court has the discretion to decline to hear cases within its original jurisdiction. Although Justice Thomas acknowledged that there is a long history of the Court exercising such discretion, doing so is, in Thomas's view, at odds with the Constitution's text, as well as the statutory language conferring on the Court "original and exclusive jurisdiction of all controversies between two or more States."⁹⁰ He also noted that the Court's

⁸⁴ See Brief of Colorado, *supra* note 74, at 24-30; Brief for the United States, *supra* note 74, at 17-18.

⁸⁵ See Complaint of Nebraska & Oklahoma, *supra* note 55, at 18, 28-29.

⁸⁶ See Gorod, *supra* note 77, at 69-70.

⁸⁷ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) ("[T]here must be redressability — a likelihood that the requested relief will redress the alleged injury.").

⁸⁸ See Brief of Colorado, *supra* note 74, at 21 (noting that there are cases pending in the district court that present the preemption issue).

⁸⁹ See *Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016).

⁹⁰ *Id.* at 1034-35 (Thomas, J., dissenting) (quoting 28 U.S.C. § 1251(a) (2012)).

rationales for treating its original jurisdiction as discretionary — for example, “its purported lack of ‘special competence in dealing with’ many interstate disputes” and “its modern role ‘as an appellate tribunal’” — are essentially policy rationales.⁹¹ To Thomas, the Court’s policy rationales “are in conflict with the policy choices that Congress made in the statutory text specifying the Court’s original jurisdiction.”⁹² Finally, he noted that Nebraska and Oklahoma have alleged “significant harms to their sovereign interests caused by another State.”⁹³ To Thomas, regardless of whether those allegations were ultimately meritorious, they were sufficiently significant that the Court should have heard the case.⁹⁴

Unfortunately, because (as Justice Thomas somewhat pointedly noted) the Court almost never explains its decision not to hear cases,⁹⁵ it is impossible to know for sure why the Court did not take the case. The answer may be as simple as it is not a case that requires the Court’s intervention (under its long-standing practice of treating its original jurisdiction as discretionary⁹⁶), and given that the legal preemption issue could eventually reach the Court through other means, the Court preferred to see how lower courts handle the question first.⁹⁷ Or the answer may be more complicated: even though the Court’s decision not to hear a case is decidedly not a judgment on the merits, it may still reflect that at least some justices are skeptical of Nebraska and Oklahoma’s arguments on either standing or the merits.

⁹¹ *Id.* at 1035.

⁹² *Id.*

⁹³ *Id.* at 1036.

⁹⁴ *See id.*

⁹⁵ *See* William Baude, Foreword, *The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 7 (2015) (“[T]he Court almost never provides explanation for the denial of certiorari. . .”).

⁹⁶ *See* Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court’s Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, 196 (1993) (“The final and most important gatekeeping rule is the Supreme Court’s highly discretionary test — custom-made by it for original jurisdiction cases — that asks whether the attempted suit is an ‘appropriate’ one for the exercise of the Court’s jurisdiction as a court of both first and last instance.”).

⁹⁷ Justices have suggested that they see value in allowing issues to percolate through the lower courts before they grant certiorari. *See, e.g., Maryland v. Balt. Radio Show, Inc.* 338 U.S. 912, 918 (1950) (Frankfurter, J., statement respecting the denial of certiorari) (“It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.”). For an article questioning this view as a general matter, see Todd J. Tiberi, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861 (1993).

It is also worth considering whether Nebraska and Oklahoma could have done anything to make it more likely that the Court would hear their case. For example, as I noted earlier, Colorado and the United States both convincingly argue that Nebraska and Oklahoma cannot establish redressability, given their concession that Colorado cannot be forced to criminalize marijuana. Although I take no position on this question, it is worth considering whether that concession was necessary, or whether Nebraska and Oklahoma could have argued that a state cannot legalize a previously prohibited substance that is prohibited under federal law, notwithstanding the Court's anti-commandeering precedents. It is also worth considering whether Nebraska and Oklahoma could have done more to argue that Supreme Court review is not only permissible, but necessary, because of the need for prompt and final judicial guidance on the important questions posed by this case, questions that will presumably only become more serious as more states continue to legalize marijuana. Finally, it is interesting to note that only one *amicus* brief was filed in support of Nebraska and Oklahoma's motion; perhaps additional *amicus* briefs — particularly, by additional states arguing that this is a serious problem that merits the Court's attention — would have made it more likely that the Court would hear the case. Or perhaps not. Again, because of the Court's silence on this question, there is really no way to know.

III. MOVING FORWARD

The fact that the Court ultimately decided not to hear the Nebraska and Oklahoma case does not mean that we cannot learn from it and the existence of this dispute between the states. First, this case not only highlights the important issue of how states mediate policy differences, it also demonstrates how challenging those problems can be. Notably, horizontal federalism issues are different than vertical federalism issues in the sense that there is no horizontal federalism equivalent to the Supremacy Clause. The Supremacy Clause makes clear that when federal and state policies conflict, federal law trumps.⁹⁸ To be sure, there are provisions of the Constitution that apply in the context of some horizontal federalism disputes, but those provisions, at least as currently interpreted, do not necessarily do that much work in resolving the sorts of policy disputes presented by issues like marijuana legalization.⁹⁹

⁹⁸ See U.S. CONST. art. VI, cl. 2.

⁹⁹ See *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (“[M]odern

Second, because there is no way to give one state priority in these sorts of policy disputes, it may well be that the ideal way for them to be addressed is through a political process in which the states engage in direct negotiation and try to determine whether there is a way for state X to limit the spillover effects of its actions on state Y. If Nebraska and Oklahoma's objections were really about spillover effects (and not just political objections to Colorado's policy choices), one could imagine those states suggesting additional regulations that, at least in theory, might do more to address their concerns. That said, one state cannot force another state to adopt regulations it does not want to. Moreover, as noted earlier, political polarization may make it unlikely in many cases that these issues can be worked out through simple mediation and the political process. Thus, there will inevitably be many cases in which third parties have to intervene, and that still leaves difficult questions about how and when that intervention should happen.

Third, and related, it may be that judicial intervention is less necessary when other branches are actively superintending the problem. In the context of marijuana legalization, the federal government is actively involved in the policy dispute and has already adopted an enforcement policy that encourages states to try to minimize spillover effects.¹⁰⁰ Federal involvement should not always preclude a role for the courts, of course, but it might nevertheless be relevant to a court's decision about how to deal with such a case.

Fourth, and finally, regardless of whether the Court was right to decline to hear Nebraska and Oklahoma's case, those states' efforts to raise this issue in the Supreme Court highlight that there could be cases in which early intervention by the Supreme Court would prove beneficial. At minimum, amidst continuing discussions about how best to resolve inter-state frictions and what roles the various branches of the federal government might be able to play, it is also worth considering how best and most efficiently the Supreme Court can play a role as compared to the lower federal courts. After all, there may be cases in which all parties would benefit from the finality that a Supreme Court decision would provide, and so it might be helpful for the Supreme Court to hear a case as part of its original jurisdiction. Additionally, it would be helpful in that regard if the Supreme Court

law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988)).

¹⁰⁰ See *supra* notes 35–41 and accompanying text.

were to provide more explanation for how it exercises its original jurisdiction discretion; that explanation could help contribute to a more fulsome debate about the proper role for the Court in horizontal federalism disputes.

CONCLUSION

Just as policy debates about marijuana legalization will surely continue, so too will legal debates, and those legal debates will no doubt implicate issues of both vertical and horizontal federalism. Attention to the horizontal federalism issues raised by marijuana legalization can meaningfully contribute to an already vibrant conversation about horizontal federalism and how to resolve inter-state policy disputes and tensions. After all, marijuana legalization is but one of many issues that can give rise to inter-state disputes — countless others have arisen in the past and will continue to arise in the future — and thus what we learn from the marijuana legalization debates may help inform how we deal with these issues more generally.