
Legal Cannabis in the U.S.: Not Whether but How?

Sam Kamin*

TABLE OF CONTENTS

INTRODUCTION	617
I. BACKGROUND	619
A. <i>Electoral Victories</i>	620
B. <i>The Legal Impact of Marijuana Law Reform in the States</i> ..	624
C. <i>Ancillary Consequences</i>	630
D. <i>A Silver Lining: (Relatively) Slow Growth</i>	634
II. POLICY ALTERNATIVES.....	640
A. <i>Enforced Prohibition</i>	641
B. <i>Unenforced Prohibition — Maintaining the Status Quo</i>	643
C. <i>Cooperative Federalism</i>	644
D. <i>Rescheduling of Marijuana</i>	646
E. <i>Descheduling of Marijuana</i>	649
F. <i>Final Thoughts on Options for Marijuana Reform</i>	650
III. SO WHICH OPTION TO CHOOSE?	651
A. <i>Free-Market Capitalism</i>	651
B. <i>Harm Reduction</i>	653
C. <i>Revenue Generation</i>	654
D. <i>Libertarianism/Minimal Government</i>	656
E. <i>Finding the Right Mix</i>	658
CONCLUSION.....	658

INTRODUCTION

There is every reason to believe that 2016 will be a turning point in the history of marijuana regulation in this country. Although the federal prohibition on all marijuana conduct remains in place, as of this fall's election twenty-eight states plus the District of Columbia now authorize

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the medical use of marijuana¹ and eight states plus D.C. have legalized marijuana use by all adults.² When Donald Trump is sworn in as the forty-fifth president, therefore, a majority of US states will have legalized marijuana for some purposes and a super-majority of Americans will live in states where some form of legal marijuana is available to them. With marijuana law reform having crossed these tipping points, it is hard to see how the federal government's forty-five year-old prohibition of marijuana can continue in its current form. With popular support for legalization at all-time highs³ and with states from coast to coast and in all regions of the country continuing to examine alternatives to prohibition,⁴ the underpinnings of the federal prohibition are likely to crumble. It is for this reason that many are looking at 2017 as the year the federal prohibition of marijuana begins to end.⁵

However, it is important to remember that federal drug policy — like the state-level drug reform that has preceded it — is not an all-or-nothing choice. Federal lawmakers will not choose between the current system under which marijuana is prohibited in all circumstances, and for all purposes, and a world in which there are no limits placed on how marijuana is produced, distributed, and consumed. Rather, federal marijuana policy is likely to move from prohibition to some form of regulation. Federal law-makers will realize what those in the states already know: that the decision to

¹ 28 *Legal Medical Marijuana States and DC*, PROCON.ORG (Nov. 9, 2016, 11:49:11 AM PST), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (summarizing laws, procedural requirements, and possession limits in states where medical marijuana has been legalized).

² See *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) (“Seven states and the District of Columbia have legalized marijuana for recreational use. . . . Another recent ballot measure legalizing the recreational use of marijuana in Maine narrowly passed, but opponents are expected to request a recount.”).

³ The percentage of Americans answering the questions, “Do you think the use of marijuana should be made legal, or not?” has increased from 12% in the affirmative to 58% since 1969. Jeffrey M. Jones, *In U.S., 58% Back Legal Marijuana Use*, GALLUP (Oct. 21, 2015), <http://www.gallup.com/poll/186260/back-legal-marijuana.aspx>.

⁴ What began as a political movement in the western United States that worked primarily through the initiative process has become a national movement that works in Congress and the state legislatures as well as through direct democracy. For example, all of New England now permits medical marijuana and legislation to further liberalize marijuana laws is under consideration in an increasing number of state legislatures as well. See *State Marijuana Laws Map*, supra note 2.

⁵ Of course, as discussed more fully below, the election of Donald Trump could also lead to an unraveling of marijuana law reform in the states. See, Part II.A. *infra*.

move away from marijuana prohibition is simply the first of many decisions on the road to meaningful marijuana law reform.

This article looks to 2017 and beyond. My goal is to describe the current, tenuous status of marijuana under state and federal law and then to investigate the various alternatives to prohibition available to federal lawmakers seeking to reform the nation's marijuana laws. I situate these alternatives on a continuum between the current federal prohibition and a relatively free market model, similar to that in place in a state like Colorado.

“Legal” marijuana was a more than \$5 billion business in the United States in 2015,⁶ even though marijuana businesses were hampered by scatter-shot, state-by-state regulation and the continuing challenges posed by federal prohibition. As the federal government begins to consider alternatives to prohibition, it is important to remember that, for all its faults, prohibition works — people use less of a substance when it is prohibited by law than when it is permitted.⁷ Thus, we can expect that marijuana use to increase when the federal prohibition disappears. Managing how and to what extent marijuana behaviors change as an alternative to prohibition emerges will require careful planning and thoughtful regulation; the time for the making of these decisions is coming sooner than many realize.

I. BACKGROUND

Marijuana is currently classified as a Schedule I substance under the Controlled Substances Act (“CSA”) — the most serious category of drug under federal law.⁸ As such, its production, distribution, and possession are all serious felonies; the large marijuana cultivation facilities that flourish in states with regulated marijuana industries

⁶ Heesun Wee, *Legal US Pot Sales Soar to \$5.4B in 2015: Report*, CNBC (Feb. 1, 2016, 1:17 PM), <http://www.cnbc.com/2016/02/01/legal-us-pot-sales-soar-in-2015.html> (“Legal U.S. pot sales soared to \$5.4 billion for 2015, up 17.4 percent from \$4.6 billion in 2014. . .”).

⁷ See, e.g., Mark H. Moore, Opinion, *Actually, Prohibition Was a Success*, N.Y. TIMES (Oct. 16, 1989), <http://www.nytimes.com/1989/10/16/opinion/actually-prohibition-was-a-success.html> (“Prohibition did not end alcohol use. What is remarkable, however, is that a relatively narrow political movement, relying on a relatively weak set of statutes, succeeded in reducing, by one-third, the consumption of a drug that had wide historical and popular sanction. This is not to say that society was wrong to repeal Prohibition. A democratic society may decide that recreational drinking is worth the price in traffic fatalities and other consequences. But the common claim that laws backed by morally motivated political movements cannot reduce drug use is wrong.”).

⁸ 21 U.S.C. § 812 (2016).

typically contain enough marijuana to earn their proprietors decades in a federal prison.⁹ In addition, anyone conspiring with or aiding and abetting those violating federal law are equally liable for a violation of federal law.¹⁰ This includes, at least in principle, anyone leasing space to marijuana businesses, working for or contracting with them, or providing basic services such as accounting, banking, financial, and legal services.¹¹ Furthermore, the CSA provides for the forfeiture of any assets used in the violation of its provisions; any property used in violation of federal drug laws can be forfeited to the federal government on the relatively simple showing that it was more probable than not that the property was used in furtherance of the drug violation.¹² Taken together, the provisions of the CSA provide a powerful arsenal to the federal government — they allow the Justice Department to make life very unpleasant for those engaged in marijuana production and sale as well as for anyone who facilitates such conduct. Although, as we shall see, the federal government has chosen not to make use of this arsenal to the full extent of its authority, the possibility of civil and criminal enforcement of the CSA hangs like a sword of Damocles above marijuana law reform.

A. Electoral Victories

Although marijuana law reform and the fight for marriage equality are often compared as examples of successful grassroots social movements,¹³ there is at least one fundamental difference between the

⁹ See *id.* § 841(b)(1)(A)(vii) (2016) (stating that in a case involving more than 1,000 marijuana plants a defendant “shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life”).

¹⁰ 18 U.S.C. § 2(a) (2016) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”); *id.* § 846 (2016) (“Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”).

¹¹ See Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 871 (2013) (“Even in those states decriminalizing marijuana, every sale of marijuana, every plant that is grown, is a serious violation of federal law. Thus, an attorney engaged by a marijuana practitioner to do the work that lawyers traditionally do for businesses necessarily puts herself at risk. Because all lawyers have an obligation not to knowingly assist criminal conduct, attorneys who take on marijuana clients face the possibility of significant ethical and criminal consequences for their actions.”).

¹² 18 U.S.C. § 981 (2016).

¹³ See, e.g., Barney Frank, *How Gay Marriage Is Like Legalizing Pot*, POLITICO MAG. (Aug. 19, 2015), <http://www.politico.com/magazine/story/2015/08/marijuana-legalization->

two; while the fight for same-sex marriage won important victories through litigation, opponents of continued marijuana prohibition have been almost entirely unsuccessful in court. The Supreme Court has reaffirmed the authority of Congress to regulate (and prohibit) marijuana under the Commerce Clause (even marijuana grown on private property for consumption rather than sale).¹⁴ Moreover, the Supremacy Clause of the federal constitution has been held to mean that U.S. Attorneys around the country have the power to prosecute marijuana cases even in states that have repealed their own marijuana prohibitions; compliance with state law is irrelevant in such a prosecution and may not be argued to a jury.¹⁵ Legal challenges to the classification of marijuana alongside LSD and heroin as a Schedule I drug have also consistently failed.¹⁶

Perhaps because of the perseverance of the federal marijuana prohibition in the face of legal challenges, marijuana law reform activists have focused their attention on change at the ballot box. Following passage of the CSA in 1970, all of the states followed the federal lead criminalized marijuana as well, creating their own counterparts to federal prohibition. However, beginning with California in 1996, and working mainly through the initiative process, marijuana law reform activists gained significant electoral victories in

gay-marriage-121520 (comparing marijuana legalization to the momentum recently gained by same-sex marriage legalization).

¹⁴ See *Gonzales v. Raich*, 545 U.S. 1, 32-33 (2005) (rejecting the claim that “a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim”).

¹⁵ See, e.g., *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 499 (2001) (“[I]n the Controlled Substances Act, the balance already has been struck against a medical necessity exception. Because the statutory prohibitions cover even those who have what could be termed a medical necessity, the Act precludes consideration of this evidence.”). *But see United States v. Marin All. for Med. Marijuana*, 139 F. Supp. 3d 1039, 1040 (N.D. Cal. 2015).

¹⁶ See, e.g., *Ams. for Safe Access v. Drug Enf’t Admin.*, 706 F.3d 438 (D.C. Cir. 2013) (“On the record before us, we hold that the DEA’s denial of the rescheduling petition survives review under the deferential arbitrary and capricious standard. The petition asks the DEA to reclassify marijuana as a Schedule III, IV, or V drug, which, under the terms of the CSA, requires a ‘currently accepted medical use.’ The DEA’s regulations . . . define ‘currently accepted medical use’ to require, *inter alia*, ‘adequate and well-controlled studies proving efficacy.’ We defer to the agency’s interpretation of these regulations and find that substantial evidence supports its determination that such studies do not exist.”); *see also Craker v. Drug Enf’t Admin.*, 714 F.3d 17, 26-29 (1st Cir. 2013) (rejecting a doctor’s challenge to the Agency’s decision to reject his application to cultivate marijuana for medical research).

state after state. Initially, marijuana law reform focused on the purported medicinal properties of the drug. After the 2016 elections, twenty-eight states¹⁷ had passed medical marijuana bills which generally created an exception to state marijuana prohibition for those who can demonstrate a medical need for marijuana and for those helping to satisfy that medical need.¹⁸ Although some critics questioned the efficacy and sincerity of the marijuana as medicine,¹⁹ it proved a powerful force with voters — tales of patients with wasting diseases or seizure disorders who were unable to obtain relief from conventional medicines proved difficult for prohibitionists to counter.

It is undeniable, however, that medical marijuana was the camel's nose under prohibition's tent. As an increasing number of states liberalized their laws to permit marijuana to be used as medicine, reform advocates noted that doomsday predictions regarding increased teen drug usage, impaired driving, and diversion to the black market did not materialize in those states. What is more, states like Colorado, which created regulatory regimes to govern medical marijuana

¹⁷ This list includes only those states that permit the use of psychotropic THC for medical purposes. Other states have permitted only the use of non-psychotropic CBD. Most of these states have not created a legal means for their citizens to obtain these cannabis-based products and these laws amount to little more than the decriminalization of some products. As a result I, and most others, do not include them when cataloguing states permitting medical marijuana. See, e.g., *State Info*, NORML, <http://norml.org/states> (last visited Oct. 17, 2016) (distinguishing states with medical marijuana laws from those merely authorizing the possession of CBD oils).

¹⁸ Given the fact that marijuana remains a Schedule I drug, however, any doctor prescribing it risks losing her power to prescribe other controlled substances. Thus, state medical marijuana provisions generally provide a defense to those who have received a doctor's *recommendation* of marijuana. The language is carefully chosen; while a doctor can lose her license for prescribing a Schedule I narcotic, First Amendment case law generally prohibits imposing limits on what a doctor may discuss with her patient. See *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002) (“An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients. That need has been recognized by the courts through the application of the common law doctor-patient privilege.”).

¹⁹ See, e.g., Michelle Castillo, *Bloomberg: Medical Marijuana One of “Great Hoaxes of All Time,”* CBS NEWS (June 3, 2013, 7:47 PM), <http://www.cbsnews.com/news/bloomberg-medical-marijuana-one-of-great-hoaxes-of-all-time> (quoting New York Mayor Michael Bloomberg who described the concept of medical marijuana as “one of the great hoaxes of all time”); Norimitsu Onishi, *Cities Balk as Federal Law on Marijuana Is Enforced*, N.Y. TIMES (June 30, 2012), <http://www.nytimes.com/2012/07/01/us/hundreds-of-california-medical-marijuana-shops-close.html> (quoting U.S. Attorney Laura E. Duffy as stating, “Most often the individuals who are visiting these places have obtained sham doctor recommendations for really no purpose other than to engage in the recreational use of marijuana”).

production and sale, could point to the robustness and sincerity of their regulations in the face of those who argued that medical marijuana was nothing more than a farce.²⁰

The marijuana law reform movement built on these electoral and policy successes with medical marijuana, turning its attention to efforts to legalize marijuana use by all adults. An adult-use marijuana initiative²¹ failed in California in 2010 when the Obama administration made clear that it would look unfavorably on a law that made marijuana available even without a doctor's recommendation. However, beginning with Colorado and Washington in 2012 states began passing voter initiatives making possession of small amounts of marijuana legal for all adults. With Oregon, Alaska, and D.C. joining this list in 2014 and California, Nevada, Massachusetts, and Maine joining in 2016, a total of eight states now permit marijuana possession and use by all adults. With the exception of the District of Columbia, these jurisdictions also set up administrative apparatuses to tax and regulate marijuana for adult use.²² If medical marijuana laws were inconsistent with federal law because they authorized as medicine something the federal government has concluded has no medical properties, then recreational laws were nothing less than a thumb in the eye of the federal marijuana prohibition. Recreational laws short-circuit the entire rubric of the CSA framework, treating

²⁰ Other states, by contrast, were far less careful about their regulation of medical marijuana. For example, California, the first state to authorize medical marijuana, did not adopt state-wide marijuana regulation until 2015, 19 years after voters first approved the use of medical cannabis. See, e.g., John Schroyer, *California Lawmakers Vote to Adopt Statewide Medical Marijuana Regulations*, MARIJUANA BUS. DAILY (Sept. 12, 2015), <http://mjbizdaily.com/breaking-california-lawmakers-vote-to-adopt-statewide-medical-marijuana-regulations> (“Under the gun and almost out of time, lawmakers in California approved historic regulations on the state’s medical marijuana industry late Friday night, setting the stage for the largest MMJ market in the country to finally adopt comprehensive rules on cannabis businesses.”).

²¹ Making marijuana available for adults without a doctor's prescription is often described as recreational marijuana, adult-use marijuana, or full legalization. In this article, I use these terms interchangeably. Some marijuana advocates object to the use of the phrase “recreational” to describe a system where adults may choose to enjoy alcohol as they do other products such as tobacco or alcohol. See, e.g., Don Fitch, *Why Do They Call It Adult Use? And Why You Should Too*, MARIJUANA POLITICS (Apr. 4, 2015, 12:36 PM), <http://marijuanapolitics.com/call-adult-use/> (“For many, the term ‘recreational use’ in several ways belittles the use people actually make of cannabis.”).

²² See Marin Cogan, *Marijuana Is Now Legal in Washington, D.C. — So Why Is No One Acting Like It?*, N.Y. MAG. (Dec. 11, 2015, 9:43 AM), <http://nymag.com/daily/intelligencer/2015/12/washington-dc-americas-least-fun-pot-mecca.html> (“A month after D.C. voted to pass the law, House Republicans inserted a clause into its budget preventing the city from using any funds to regulate legalized weed.”).

marijuana not as a controlled substance at all, but as something more akin to alcohol or tobacco.

Buoyed by their state electoral victories, marijuana advocates are now likely to push for reform at the federal level. For, no matter how much success marijuana initiatives have in the states, none of these initiatives can remove the federal prohibition or insulate state citizens from its effects. In the next section I show that for all of the progress that marijuana law reform advocates have made in the states, their work is necessarily obstructed by the continuing federal marijuana prohibition.

B. *The Legal Impact of Marijuana Law Reform in the States*

It should be clear at this point that marijuana currently lives in a contested legal space in the United States. The states are increasingly authorizing, regulating, and taxing that which the federal government continues to prohibit in every instance. Marijuana thus occupies a legal status unprecedented in American history; no substance or conduct has ever been treated quite so disparately in our federal system — being licensed and regulated at the state level while expressly prohibited at the federal level. Needless to say, this leaves the legal, and practical, consequences of state marijuana law reform very much in doubt.

On the one hand, federal law clearly permits states to draft their own marijuana regulations, even if those regulations fail to mirror the federal prohibition; the CSA explicitly disclaims any intention to occupy the field and preempt all inconsistent state laws.²³ So, for example, the federal government has long tolerated state criminal prohibitions that are less robust than those of the CSA — state marijuana laws often have lighter penalties than their federal counterparts, for example; it has never seriously been argued that such lighter penalties are preempted by the more serious federal ones. Rather, by its terms, the CSA preempts inconsistent state laws only to the extent that there is a positive conflict between state and federal law such that the two laws cannot be read together.²⁴ State and federal

²³ Contrast, for example, patent law, where Congress has explicitly preempted the field, prohibiting the states from passing *any* laws in the area, even those that track exactly federal patent protections. *See, e.g., Cover v. Hydramatic Packing Co.*, 83 F.3d 1390, 1393 (Fed. Cir. 1996) (“Title 35 occupies the field of patent law.”).

²⁴ *See* 21 U.S.C.A. § 903 (West 2012) (“No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority

laws clearly cannot be read together when it is impossible to comply with both state and federal law. However, that is not the case with regard to states simply liberalizing or removing their own marijuana prohibitions. A citizen choosing to engage in no marijuana activity in such a state is in compliance with both state and federal law; it is only if the state were to *require* that which the federal government forbids that compliance with both state and federal law would become impossible.²⁵

Some courts have also read the language of the CSA to preempt state laws that merely create an impermissible obstacle to the enforcement of federal law.²⁶ That is, even in situations where it is not impossible to comply with both sets of laws, preemption is sometimes found

of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.”).

²⁵ It is for this reason that, so far, none of the states that have implemented marijuana law reform have adopted a public distribution model. Drawing on the experience of government run alcohol distribution in the states, there is reason to believe that there are advantages — in terms of revenue and public health outcomes — in a government monopoly on the distribution of cannabis. *See, e.g.*, Sam Kamin & Joel Warner, *Blazing a Trail: Colorado Is About to Become the First State in the Modern World to Legalize Marijuana from Seed to Sale — Is It Ready?*, SLATE (Dec. 12, 2013), http://www.slate.com/articles/news_and_politics/altered_state/2013/12/colorado_pot_1_egalization_how_much_can_the_state_learn_from_the_end_of_prohibition.html (“For one thing, studies show that state-run alcohol programs, thanks to their lack of targeted advertising and price competition, lead to significantly less spirit and wine consumption than free-market programs. For another, a state-run dispensary model would allow the state to reap the profits of marijuana sales, rather than just levying taxes and fees.”). However, such a system would likely be a direct conflict with federal law — the state itself would be in the business of violating federal law. *Id.* (arguing that a state-run model “would put Colorado in direct conflict with the federal government. It’s one thing to permit and even license a substance that’s against federal law; it’s something else entirely to require state employees, as part of their job, to violate that law.”). What is more, from the perspective of the public employees taking part in such a system, it would be impossible to comply with both federal law prohibiting all marijuana distribution and state law requiring them to do so.

²⁶ *See, e.g.*, *Emerald Steel Fabricators v. Bureau of Lab. & Indus.*, 230 P.3d 518, 528 (2010) (“Because the ‘physical impossibility’ prong of implied preemption is ‘vanishingly narrow,’ Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000), the Court’s decisions typically have turned on the second prong of implied preemption analysis — whether state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”); *see also* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 15 (2013) (“[C]ourts have applied a broad conflict preemption rule under the CSA. This rule finds state law preempted if it requires violation of federal law or otherwise undermines Congress’ objective of curbing marijuana consumption. Under this rule, courts have enjoined and state officials have scuttled a number of important reforms to state marijuana laws.”).

when state laws hamper the policy manifested in the federal law. It is not at all clear that state medical and recreational laws create such an obstacle, however. If the federal goal is to criminalize marijuana conduct, the fact that some states license and tax that conduct does little to prevent the enforcement of federal law; as we've seen, the federal government remains free to enforce its own laws anywhere in the country, including in those states in which that conduct is permitted by state law. If anything, the licensing and regulation of marijuana conduct makes that conduct more public — records must be kept, the names of principals must be revealed, etc. — in a way that could facilitate rather than impair federal enforcement.

Relatedly, even if a federal court were to determine that a state's marijuana law reform is preempted by the CSA, it is difficult to imagine what relief that court could grant to a complaining party.²⁷ The anti-commandeering principle operates as a limit on the Supremacy Clause — it states that the federal government cannot conscript the apparatuses of state government — whether executive or legislative — into the service of federal policy goals.²⁸ Thus, it seems

²⁷ See, e.g., Colorado's Brief in Opposition to Motion for Leave to File Complaint at 27, *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016) (No. 220144) (“[A] sovereign State cannot be compelled to pass and enforce legislation against the will of its voters. Ordering Colorado to recriminalize the use and cultivation of recreational marijuana, and further ordering the State to allocate resources to enforce that prohibition, would violate the Tenth Amendment. . . . Whatever the outer limits of [State] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.” (quoting *New York v. United States*, 505 U.S. 144, 188 (1992))). There is also the question of who would have standing to bring such a preemption suit. Neither the CSA, nor the supremacy clause itself, create a private right of action entitling anyone to sue. See, e.g., *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016) (“I agree with Hickenlooper that federal courts have uniformly held that the CSA does not create a private right of action.”); see also *Safe Sts. All. v. Alt. Holistic Healing, LLC*, No. 115-CV-00349-REB-CBS, 2016 WL 223815, at *3 (D. Colo. 2016) (citing the “strong presumption that criminal statutes, enacted for the protection of the general public, do not create private rights of action”).

²⁸ See *Printz v. United States*, 521 U.S. 898, 925 (1997) (forbidding the commandeering of local law enforcement officials in the service of a federal gun law); *New York v. United States*, 505 U.S. at 149 (forbidding the federal government from commandeering the state legislatures in the service by requiring them to legislate in the area of nuclear waste); see also Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 102-03 (2015) (“The federal government may not commandeer states by forcing them to enact laws or by requiring state officers to assist the federal government in enforcing its own laws within the state. Under this doctrine, the federal government cannot require states to enact or maintain on the books any laws prohibiting marijuana.”); Mikos, *supra* note 26, at 16 (“In a nutshell, the anti-commandeering rule says that Congress may not force the states to

clear that no branch of the federal government can order the states to participate in marijuana prohibition. The federal government cannot require a state to enforce federal law, to keep its own marijuana prohibition on the books, to recriminalize marijuana, or to enforce any law that it does have on the books.²⁹ While a federal court might conclude that state tax and licensing regimes for marijuana create an impermissible obstacle to the enforcement of federal criminal law — an opportunity the Supreme Court passed up when it chose not to hear the complaint that Oklahoma and Nebraska brought against the marijuana regulatory regime in Colorado in early 2016 — it simply cannot require a state to participate in the prohibition of marijuana.³⁰

On the other hand it is equally clear that the states are powerless, either on their own or in combination, to escape the strictures of federal prohibition. Marijuana law reform in the states exists largely because the federal government allows it to exist; the federal government could decide at any time that the states' experimentation with drug law reform has gone far enough and simply by enforcing federal marijuana laws in those states. While the federal government clearly will never have the resources to prosecute the thousands of businesses and millions of marijuana consumers exercising their rights under state law³¹ — in much the same way that the Department of

'enact or administer a federal regulatory program.' This means that Congress could not force the states to enact a marijuana ban. Neither, logically, could it force the states to keep bans already enacted but no longer wanted. To put it another way, Congress may not 'preempt' state legalization, because doing so forces states to keep pre-existing marijuana bans — bans that Congress could not force the states to adopt in the first instance.”).

²⁹ The states of Oklahoma and Nebraska admitted as much when they sought permission from the Supreme Court to file a complaint under the Court's original jurisdiction to enjoin the Colorado regulatory regime as preempted by the CSA. In so doing, the states acknowledged the right of Colorado, as a sovereign state, to legalize marijuana under its state laws. “Despite Congress's consistent refusal to reschedule marijuana, marijuana activists have sought not only to legalize marijuana — a decision any state may make with respect to its own criminal law — but also to facilitate the creation of a marijuana industry in direct contravention of federal law.” Petition for Writ of Certiorari at 5, *Nebraska v. Colorado*, 136 S. Ct. 1034 (2014), 2014 WL 7474136. There remains the question, after *Sebelius*, whether Congress can use the spending power to criminalize marijuana.

³⁰ Dissenting, Justices Alito and Thomas argued that the Court was obligated to hear the suit and that at a minimum it ought to give reasons for declining to exercise its jurisdiction over the case. See *Nebraska v. Colorado*, 136 S. Ct. at 1034 (dissenting from the denial of a motion for leave to file a bill of complaint). They were able to secure only two votes, however, and the reasons for the decision not to hear the case remain opaque.

³¹ See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the*

Homeland Security will never have the resources or the political will to deport the estimated 11 million people in the country illegally³² — full enforcement would hardly be necessary to deal a serious blow to the pace of marijuana law reform. The prosecution of only a few high-profile businesses and the seizure and forfeiture of their assets would have a devastating impact on the willingness of business owners to continue to operate, landlords to rent, utility companies to supply, and financial services companies to work with those operating under state law.³³ These businesses have grown up in a time of prosecutorial forbearance; the immediate threat of arrest, prosecution, and imprisonment would drastically change the cost-benefit calculus for these businesses.

Thus, the indulgence of the federal government has always been a necessary precondition of state-level law reform. Although guidance from the Justice Department vacillated wildly during President Obama's first term,³⁴ by 2013 it was clear that the Obama Justice

States' Overlooked Power to Legalize Federal Crime, 62 VAND. L. REV. 1421, 1464 (2009) (“[T]he federal government does not have the resources to impose [criminal sanctions] frequently enough to make a meaningful impact on proscribed behavior.”); see also Colorado's Brief in Opposition to Motion for Leave to File Complaint, *supra* note 26, at 5 (“[M]arijuana policy is driven almost entirely by state and local officials pursuing state and local priorities. ‘Since the CSA’s implementation more than forty years ago, nearly all marijuana enforcement in the United States has taken place at the state level.’ . . . Federal arrests make up a tiny fraction — less than 1% — of marijuana-related arrests.” (quoting Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 84 (2015))).

³² For a comparison of the two enforcement contexts see Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, OHIO ST. J. CRIM. L. (forthcoming 2016).

³³ While legislative change might be needed in order for the federal government to prosecute those operating in compliance with state *medical* marijuana laws, those operating in compliance with state recreational marijuana laws continue to do so without any legal protection. See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) (“None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”). The fact that they are not currently being prosecuted is nothing more than an exercise of prosecutorial grace.

³⁴ Compare Memorandum from David W. Ogden, Deputy Att’y Gen. of the U.S., to selected U.S. Att’ys regarding Investigations and Prosecutions in States Authorizing

Department would not be intervening to stop the states from reforming their marijuana laws. In September of that year the Department reaffirmed that the enforcement of drug laws — like the enforcement of most criminal laws — was a task generally left to the state rather than federal governments.³⁵ If some states wished to regulate marijuana rather than prohibiting it, the so-called Cole Memorandum stated, the federal government would defer to that judgment so long as the states met eight federal policy priorities.

“The Department is . . . committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of these objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government.

the Medical Use of Marijuana (Oct. 19, 2009) [hereinafter Ogden Memorandum] (“The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department’s efforts against narcotics and dangerous drugs, and the Department’s investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.”), *with* Memorandum from James M. Cole, Deputy Att’y Gen. of the U.S., to U.S. Att’y regarding Guidance regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011) [hereinafter 2011 Cole Memorandum] (“The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.”).

³⁵ Memorandum from James M. Cole, Deputy Att’y Gen. of the U.S., to U.S. Att’y regarding Guidance regarding Marijuana Enforcement (Aug. 29, 2013) [hereinafter 2013 Cole Memorandum] (“[T]he federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”).

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.”³⁶

Private statements by President Obama and his outgoing Attorney General confirmed this policy of deference to state judgment on marijuana policy.³⁷

C. Ancillary Consequences

Although the Obama Administration’s announcement of a hands-off policy with regard to state law reform brought welcome clarity to an ambiguous legal landscape, it is important to understand how fragile the resulting status quo truly is. A policy of selective enforcement is obviously effective only for so long as it remains federal policy — non-enforcement is an act of prosecutorial grace which, by its very terms, does not create enforceable substantive rights.³⁸ With Donald Trump

³⁶ *Id.* at 1-2.

³⁷ See Jeremy Diamond, *Holder “Cautiously Optimistic” on Legal Pot*, CNN POLITICS (Oct. 21, 2014, 10:21 AM), <http://www.cnn.com/2014/10/21/politics/holder-marijuana-optimistic/> (describing outgoing U.S. attorney general Eric Holder’s opinion on marijuana legalization); Zachary Treu, *Obama on Marijuana Legalization: “Important for It to Go Forward”*, PBS NEWSHOUR (Jan. 20, 2014, 12:55 PM), <http://www.pbs.org/newshour/rundown/obama-on-marijuana-legalization-important-for-it-to-go-forward/> (describing President Obama’s opinion on marijuana legalization).

³⁸ See, e.g., 2013 Cole Memorandum, *supra* note 35, at 4 (“As with the Department’s previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This

to be sworn in as President in January 2017, the possibility of a fundamental change in federal enforcement is suddenly a very real possibility.

But it is also important to see that, even without a fundamental reversal at the federal level, the current legal balance between state and federal power in this area is inherently unsatisfactory. That is because, so long as marijuana remains illegal at the federal level, marijuana activity in the states will have significant negative consequences even if the federal government never enforced the marijuana provisions of the CSA again. Criminal enforcement is only the most dramatic and significant consequence of prohibition; it is far from the only one.

For example, the Colorado Supreme Court ruled in 2015 that a company doing business in the state could fire an employee for consuming marijuana in his off hours, even absent any showing that the employee was ever impaired while at work.³⁹ Because marijuana conduct is still illegal at the federal level, the Court reasoned, the employee was not protected by Colorado's statute prohibiting the termination of employees for engaging in lawful off duty conduct;⁴⁰ his conduct simply wasn't legal. Similar reasoning could be applied to deny probationers and parolees access to marijuana while under supervision, to justify the termination of the parental rights of those using marijuana in conformance with state law, or the denial of federal benefits such as subsidized housing.⁴¹ In each of those contexts, the fact that the marijuana user is violating the law — even a law that is currently unenforced — can be used to put her other rights in peril despite the fact that she is breaking no state laws.⁴²

memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.”).

³⁹ See *Coats v. Dish Network, LLC*, 350 P.3d 849, 850 (Colo. 2015) (upholding appellate court's decision that “because plaintiff's state-licensed medical marijuana use was, at the time of his termination, subject to and prohibited by federal law, . . . it was not ‘lawful activity’” (quoting *Coats v. Dish Network, LLC*, 303 P.3d 147, 152 (Colo. App. 2013))).

⁴⁰ See COLO. REV. STAT. ANN. § 24-34-402.5 (West 2007) (“It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours.”).

⁴¹ See Chemerinsky et al., *supra* note 28, at 97-100 (cataloguing the risks associated with marijuana use so long as marijuana remains criminal under federal law).

⁴² *But see Green Earth Wellness Ctr., LLC v. Atain Specialty Ins.*, 163 F. Supp. 3d 821, 826-31 (D. Colo. 2016). In this insurance case, Judge Krieger held that the

For marijuana businesses operating under state law, the continuing federal illegality of their product poses additional obstacles. Marijuana businesses famously have difficulty accessing basic banking services — the specter of federal money-laundering laws is sufficient to deter most banks from engaging in any transactions involving funds derived from a violation of the CSA.⁴³ Although the Obama administration has also issued memoranda appearing to permit banks to take on marijuana clients,⁴⁴ these memoranda have, if anything, had the opposite effect. The unavailability of banking services is more than a minor inconvenience for marijuana businesses. The inability of these businesses to obtain banking services poses a significant safety and regulatory threat to the public as well — when criminals know that large amounts of cash (as well as a quasi-illicit substance) can be found at a particular location, that location necessarily becomes a

insurer was obligated to pay for a marijuana cultivator's losses, despite an explicit exclusion from the contract for "[c]ontraband, or property in the course of illegal transportation or trade." *Id.* at 832. Although acknowledging that marijuana remained illegal under federal law, the court stated that "the nominal federal prohibition against possession of marijuana conceals a far more nuanced (and perhaps even erratic) expression of federal Policy." *Id.* But the court did not stop there; Judge Krieger went on to question:

Other than pointing to federal criminal statutes, Atain offers no evidence that the application of existing federal public policy statements would be expected to result in criminal enforcement against Green Earth for possession or distribution of medical marijuana, nor does Atain assert that Green Earth's operations were somehow in violation of Colorado law. In short, the Policy's "Contraband" exclusion is rendered ambiguous by the difference between the federal government's *de jure* and *de facto* public policies regarding state-regulated medical marijuana." *Id.* at 833.

In other words, a federal court refused to recognize marijuana as contraband simply because the sale of marijuana remains prohibited by federal law.

⁴³ See Yuka Hayashi, *Marijuana Companies Stuck Doing Business the Old-Fashioned Way*, in *Cash*, WALL STREET J. (Mar. 31, 2016, 5:30 AM), <http://www.wsj.com/articles/marijuana-companies-stuck-doing-business-the-old-fashioned-way-in-cash-1459416605> ("Two years after Colorado fully legalized the sale of marijuana, most banks here still don't offer services to the businesses involved. Financial institutions are caught between state law that has legalized marijuana and federal law that bans it. Banks' federal regulators don't fully recognize such businesses and impose onerous reporting requirements on banks that deal with them.").

⁴⁴ See U.S. DEP'T OF TREASURY, FIN. CRIMES ENF'T NETWORK, FIN-2014-G001, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014) ("This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and aligns the information provided by financial institutions in BSA reports with federal and state law enforcement priorities. This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.").

target.⁴⁵ Furthermore, from a regulatory perspective, banking creates a paper trail that is simply not present when transactions are carried out predominantly in cash.⁴⁶ The lack of banking services thus makes it difficult for state regulators to meet their obligations to ensure that marijuana is not being diverted out of state and that revenues are being appropriately reported and taxed. In this way, the unavailability of banking services for the marijuana industry is one of the rare instances where the interests of the regulator and the interests of the regulated are perfectly aligned: both would greatly prefer for banking services to be available, albeit for slightly different reasons. Nonetheless, and despite the best efforts of entrepreneurs and state regulators alike, banking remains an intractable problem given marijuana's continued federal prohibition.⁴⁷

However, banking is just the best known of the ordinary business services that remain beyond the reach of the nascent marijuana industry. Things that other businesses take for granted — the predictable enforcement of their contracts, access to lawyers and the courts, insurance, intellectual property — are all imperiled by marijuana's continued illegality at the federal level. And while it would be tempting to simply write off these concerns as the price entrepreneurs have to pay to engage in conduct still prohibited by federal law, as with banking there are significant costs for the public as well. The United States developed a system of federal trademark rights in order to protect consumers by helping them identify the true source

⁴⁵ See Tony Dokoupil & Bill Briggs, *High Crimes: Robber Gangs Terrorize Colorado Pot Shops*, NBC NEWS (Feb. 5, 2014, 12:15 AM), <http://www.nbcnews.com/storyline/legal-pot/high-crimes-robber-gangs-terrorize-colorado-pot-shops-n20111> (“Because marijuana remains banned by Congress, banks and security firms deny services to most dispensaries. That leaves them cash-based and vulnerable, a magnet for criminals who like the idea of unguarded counting rooms and shelves lined with lucrative horticulture.”).

⁴⁶ Patrick A. Tighe, *Underbanked: Cooperative Banking as a Potential Solution to the Marijuana-Banking Problem*, 114 MICH. L. REV. 803, 811-12 (2016) (“Because activists have pitched legalization in part on its ability to generate tax revenue for the state, ensuring that a marijuana-related business pays its state and local taxes is essential. Since the industry is largely cash-only, however there is no paper trail, making it harder for state regulators to ensure that marijuana-related businesses pay the proper amount of taxes.”).

⁴⁷ See, e.g., Douglas Fischer & Jodi Avergun, *Pot Banking 2016: More State Ballots but Continued Unease*, AM. BANKER (Feb. 1, 2016), <http://www.americanbanker.com/bankthink/pot-banking-2016-more-state-ballots-but-continued-unease-1079125-1.html> (“Despite its astounding growth in recent years, the marijuana industry remains hampered by its own banking crisis. Marijuana businesses' difficulty in accessing financial services has created problems for businesses and government alike.”).

of the products they purchase;⁴⁸ the alternative to the enforcement of contract in court is the private enforcement of agreements through force or intimidation; businesses attempting to navigate complex regulatory regimes are more likely to stay within the bounds of law if they are allowed to have the assistance of counsel. The inability of marijuana businesses to operate in the way other businesses do thus impedes the states from expressing their policy preferences with regard to drug policy. In a very real way, continued prohibition creates significant risks for all involved with marijuana in the states, whether they are seeking to take advantage of those laws themselves or not.

D. *A Silver Lining: (Relatively) Slow Growth*

For all of the complications that marijuana prohibition has caused for consumers, regulators, and businesses, it has also had at least one effect that can rightly be seen as beneficial and is often overlooked by commentators. Because all marijuana conduct remains illegal, the marijuana industry has been forced to grow slowly in those states that have permitted it; at a minimum, the marijuana industry grew more slowly than it might have without these regulations in place. In the four states that have legalized marijuana, and in many of the medical marijuana states as well, regulation has largely been strict and the obstacles put in place of the industry have operated as a heavy drag on growth.⁴⁹

These state requirements were put in place with a careful eye on the federal prohibition and compliance with federal enforcement priorities. Given the dictates of the Cole Memorandum — that marijuana businesses not be fronts for organized crime, that marijuana not flow from states where it authorized by law to states where it is not, etc. — regulators imposed expensive, complicated regulations on

⁴⁸ See, e.g., Jason Allen Cody, Note, *Initial Interest Confusion: What Ever Happened to Traditional Likelihood of Confusion Analysis?*, 12 FED. CIR. B.J. 643, 649 (2003) (“[T]rademark law primarily serves to protect the public from deception. It does this by ensuring that consumers have adequate information to easily identify the source of a product and to distinguish it from the products of others.”).

⁴⁹ In places like California that have not taken the regulation of marijuana seriously, the drag on growth has largely come in the form of periodic enforcement of federal law. See, e.g., Chris Roberts, *Major Cannabis Company Raided in Sonoma Today*, SF WKLY. (June 15, 2016, 5:09 PM), <http://archives.sfweekly.com/thesnitch/2016/06/15/major-cannabis-oil-company-raided-in-sonoma-today-possible-police-mistake> (“Local law enforcement and Drug Enforcement Administration agents in Santa Rosa raided the production labs of prominent cannabis company Care By Design this morning, possibly after receiving a complaint from a disgruntled former employee, according to reports.”).

the growing industry. Although marijuana legalization was pitched to voters as a move to regulate marijuana like alcohol, the regulations put in place in fact far surpassed those imposed on the liquor industry. For example, in Colorado, every employee with access to marijuana must be background checked and badged at all times; seed-to-sale surveillance of marijuana production involves both video cameras throughout licensed premises and RFID tags that follow each plant throughout the production process. In addition, broad advertising restrictions have been in place since legalization took place. Outdoor advertising is generally prohibited;⁵⁰ other advertising can only take place in fora for which the licensed marijuana entity can demonstrate a super-majority of the audience is adult;⁵¹ pop-up ads and ads targeting those outside of Colorado are entirely prohibited. In addition, for the first two-plus years of a regulated marijuana market in Colorado, only Colorado residents who had been in the state for more than two years were entitled to have an equity interest in a licensed business.⁵² Other limits — like the requirement that

⁵⁰ See COLO. CODE REGS. § 212-2.1111(B) (2016) (“Outdoor Advertising Generally Prohibited. Except as otherwise provided in this rule, it shall be unlawful for any Retail Marijuana Establishment to engage in Advertising that is visible to members of the public from any street, sidewalk, park or other public place, including Advertising utilizing any of the following media: any billboard or other outdoor general Advertising device; any sign mounted on a vehicle, any hand-held or other portable sign; or any handbill, leaflet or flier directly handed to any person in a public place, left upon a motor vehicle, or posted upon any public or private property without the consent of the property owner.”).

⁵¹ See *id.* § 212-2.1106 (“A Retail Marijuana Establishment shall not engage in Advertising in a print publication unless the Retail Marijuana Establishment has reliable evidence that no more than 30 percent of the publication’s readership is reasonably expected to be under the age of 21.”).

⁵² COLO. REV. STAT. ANN. § 12-43.4-306(k) (2013) (repealed 2016) (“A license provided by this article shall not be issued to or held by: . . . An owner who has not been a resident of Colorado for at least two years prior to the date of the owner’s application.”). Like the advertising ban, there is great reason to think that the residency requirement fails to pass constitutional muster. See, e.g., Canna Law Blog, *Cannabis Residency Restrictions: Are They Unconstitutional?*, CANNA L. GROUP: CANNA L. BLOG (Sept. 9, 2015), <http://www.cannalawblog.com/cannabis-residency-restrictions-are-they-unconstitutional/> (“There is almost no chance a federal court would tolerate similar residency restrictions if applied to any other legal business. But since cannabis remains an illegal, Schedule I controlled substance, courts might be reluctant to even entertain a Dormant Commerce Clause challenge to state cannabis laws. Even so, it’s only a matter of time before the federal government recognizes cannabis as lawful commercial activity and once that happens, these residency restrictions could be immediately susceptible to constitutional challenges that would probably succeed.”).

businesses be vertically integrated in Colorado — also operate as a drag on growth.⁵³

These regulations are expensive and difficult to comply with.⁵⁴ Combined with the consequences of continued federal prohibition mentioned above they function to cut directly into the bottom line of marijuana businesses.⁵⁵ Nonetheless, businesses operating in this environment have generally understood that heavy regulations and relatively low profit margins were a necessary part of moving from the

⁵³ For the first several years of legalized marijuana in Colorado, each business was required to produce 70% of what it sold at the retail level and to retail 70% of what it produced. See *Colorado's Marijuana Market Getting New Competition*, THE GAZETTE (Oct. 1, 2014, 7:34 AM), <http://gazette.com/colorados-marijuana-market-getting-new-competition/article/1538584> (“[On] Wednesday, Colorado’s pot industry sees the end of the state’s so-called “70/30 Rule,” which stipulated that pot shops had to grow 70 percent of what they sold. The rule was instituted in 2010, to address concerns that medical marijuana shops were acquiring marijuana from the black market. The rule was extended into the recreational market for the first few months, also to reduce volatility.”). Ironically, Washington State adopted exactly the opposite approach to the structure of its industry, forbidding vertical integration out of fear that vertically integrated businesses would develop too much market power. Instead, Washington adopted a three-tier distribution similar to that employed in the alcohol industry, prohibiting any individual from both producing and retailing marijuana. WASH. REV. CODE §§ 69.50.325-.328 (2016) (setting forth the three types of licenses available and stating: “[n]either a licensed marijuana producer nor a licensed marijuana processor shall have a direct or indirect financial interest in a licensed marijuana retailer”).

⁵⁴ One downside of such expense and complication is that the legal marijuana market has thus far continued many of the disparities associated with the black market that it was supposed to replace. Because traditional fund-raising is not available to marijuana businesses, for example, those who have been successful in it are generally those who already had wealth to draw on. This fact, coupled with many states’ bans on those with drug convictions, has led to disparities in who receives licenses in these states. See Angela Bacca, *The Unbearable Whiteness of the Marijuana Industry*, ALTERNET (Mar. 31, 2015), <http://www.alternet.org/drugs/incredible-whiteness-colorado-cannabis-business> (“[A]s the industry continues to grow, women, people of color and people of different gender identities are noticeably absent from a lot of the success driving the historic national headlines. Despite being the groups to bear the damaging judicial brunt of the War on Drugs — particularly people of color — they are seemingly the last to be experiencing the windfalls of the evolving legal landscape.”); Tina Griego, *Inside Colorado’s Flourishing, Segregated Black Market for Pot*, WASH. POST (July 30, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/07/30/inside-colorados-flourishing-segregated-black-market-for-pot/> (arguing that minorities are being excluded from the legal marijuana industry).

⁵⁵ See Sam Kamin & Joel Warner, *Dime Store: How Lucrative Is It to Be One of Colorado’s Legal Marijuana Dealers? (Not as Lucrative as Being an Illegal One.)*, SLATE (Jan. 16, 2014, 11:34 PM), http://www.slate.com/articles/news_and_politics/altered_state/2014/01/colorado_marijuana_legalization_how_lucrative_is_it_to_be_a_legal_weed_dealer.html (describing the revenues and expenses of an anonymous licensed marijuana business in Colorado).

illegal market — where many had been operating for years — into the sunshine. While marijuana businesses in Colorado have certainly lobbied for favorable regulations or for relief from unworkable or outdated rules, the relationship between regulators and regulated has never been particularly antagonistic or hostile. For example, although the advertising bans put in place in Colorado are of questionable constitutionality,⁵⁶ the industry has generally acquiesced to their strictures rather than suing to enjoin those limits. The industry, which operates through a number of trade groups,⁵⁷ has apparently concluded that such restrictions are necessary to insure the industry's long term health. This is another way in which the regulators and regulated share common interests while the federal prohibition remains in place. Bad headlines — regarding diversion of marijuana out of state, increasing youth usage rates, accidental overdoses, etc. — could lead to a federal crackdown that would bankrupt the industry and prevent state regulators from carrying out the will of the voters. As a result industry and regulators have, at least for now, generally worked in concert to produce sensible regulations that neither cripple nor give a free hand to the industry.

And it's not hard to see what motivates this consensus. Even with these restrictions in place, marijuana has become very big business. In 2015, licensed marijuana businesses in Colorado sold nearly \$1 billion in products and paid more than \$135 million in taxes;⁵⁸ a marijuana investment fund has predicted that the legal marijuana business in 2016

⁵⁶ See, e.g., Editorial, *Restrictions on Marijuana Advertising Violate First Amendment*, DENV. POST, (Apr. 27, 2016), <http://www.denverpost.com/2014/02/14/restrictions-on-marijuana-advertising-violate-first-amendment/> (“Amendment 64, which Colorado voters in 2012 put in the constitution, says marijuana should be regulated ‘in a manner similar to alcohol.’ But advertising rules for pot and booze are clearly not comparable. And the First Amendment generally protects commercial speech as long as it concerns a lawful activity and is not misleading.”). These rules were challenged by two plaintiffs, a publication and an association of small publishers, but the lawsuit was dismissed for lack of standing. *Colo. Press Ass’n v. Brohl*, No. 14-cv-00370-MSK-MJW, 2015 U.S. Dist. LEXIS 31141, at *21 (Mar. 12, 2015) (“Because neither Plaintiff has demonstrated standing to pursue the claims asserted in the Fifth Amended Complaint, the Court grants the State’s Motion to Dismiss and dismisses this action for lack of subject-matter jurisdiction.”). So far as I am aware, no licensed entity in Colorado has brought a legal challenge to the regulations as of July 1, 2016.

⁵⁷ See MARIJUANA INDUSTRY GROUP, <http://marijuanaindustrygroup.org/> (last visited Oct. 17, 2016); *Mission and Values*, NAT’L CANNABIS INDUSTRY ASS’N, <http://thecannabisindustry.org/mission-and-values/#> (last visited Oct. 17, 2016).

⁵⁸ See Ricardo Baca, *Colorado Marijuana Sales Skyrocket to More than \$996 million in 2015*, CANNABIST (Feb. 9, 2016, 7:09 PM), <http://www.thecannabist.co/2016/02/09/colorado-marijuana-sales-2015-reach-996-million/47886/> (discussing the profits of Colorado’s legal marijuana industry).

will top \$6 billion nationwide.⁵⁹ The illicit market for marijuana is obviously far bigger than that; the country's long experiment with prohibition has failed to kill demand for the drug and we can only expect the market for cannabis to grow as marijuana use becomes normalized and legalized. Heavy regulation at the birth of legal marijuana helped keep this growth sensible and relatively problem-free.⁶⁰

But this happy coincidence of interests cannot be expected to endure indefinitely. In particular, once federal prohibition goes away and the market is opened to national players, the willingness of the industry to cooperate with regulators for the common good will necessarily be diminished. A change in the current federal prohibition raises a specter that almost everyone involved in marijuana law and policy seeks to avoid — the prospect of a Big Marijuana industry along the lines of Big Tobacco, Big Pharma, and Big Agriculture. The fear of large, powerful companies engaging in profit-maximizing behaviors with little regard for public health and welfare could have a significant, negative effect on the public. To quote one prominent legalization opponent:

Like Big Tobacco of yesteryear, Big Marijuana knows that it needs lifelong addicted customers to prosper. Addictive industries generate the lion's share of their profits from addicts, not casual users. This means that creating addicts is the central goal. And — as every good tobacco executive knows (but won't tell you) — this, in turn, means targeting the young.

⁵⁹ Tom Huddleston, Jr., *Legal Marijuana Sales Could Hit \$6.7 Billion in 2016*, FORTUNE (Feb. 1, 2016, 6:00 AM), <http://fortune.com/2016/02/01/marijuana-sales-legal/> (“A new report by a leading marijuana industry investment and research firm found legal cannabis sales jumped 17%, to \$5.4 billion, in 2015 and they will grow by a whopping 25% this year to reach \$6.7 billion in total U.S. sales.”).

⁶⁰ It is also worth noting that expensive regulation produces winners and losers just as much as a free market approach does — larger, better-funded entities are better able to flourish in such an environment and are able to push out smaller players and consolidate the market. *See, e.g.*, Griego, *supra* note 54 (“[T]hese first curious months of the legal recreational market have laid bare a socioeconomic fault line. Resentment bubbles in the neighborhoods where marijuana has always been easy to get. The resentment goes something like: We Latinos and African Americans from the ‘hood were stigmatized for marijuana use, disdained and disproportionately prosecuted in the war on drugs. We grew up in the culture of marijuana, with grandmothers who made oil from the plants and rubbed it on arthritic hands. We sold it as medicine. We sold it for profit and pleasure. Now pot is legalized and who benefits? Rich people with their money to invest and their clean criminal records and 800 credit scores. And here we are again: on the outskirts of opportunity. A legion of entrepreneurs with big plans and rewired basements chafes with every monthly state tax revenue report.”).

Welcome to Big Tobacco 2.0. In the emerging marijuana industry, potent edibles in the form of colorfully packaged cookies, candies, sodas and brownies are being advertised on the Internet and in mainstream newspapers and magazines across the state. A relentless marijuana lobby insists that these products are not especially attractive to children, yet continues to block controls on advertising, labeling, shape and color.⁶¹

But concern about a politically powerful marijuana lobby is not limited to the drug's opponents.⁶² Several long-time advocates of marijuana law reform have become concerned that a movement once dominated by concerns about social justice has morphed into a lobbying effort on behalf of profit-seeking businesses:

Longtime marijuana reform activists like Ethan Nadelmann, founder of the Drug Policy Alliance, have declared, 'We're entering a new era of marijuana law reform in which the influence of funders and organizations driven primarily by concerns for civil rights and personal liberties, and not by any financial interest in legalizing marijuana, will be superseded by people and corporations driven largely by their pursuit of legal profits.'⁶³

Not everyone is so worried about the specter of Big Marijuana, however. The Brookings Institute made headlines in June 2016 by arguing that the size of marijuana businesses in the world of legal marijuana was far less important than commonly understood:

Rather than attempting to prejudge or shape the emerging marijuana market, government should seek to create a regulatory environment in which markets can be successful at doing what markets do well: capitalizing businesses, ensuring regular supply, finding and generating efficiencies.

⁶¹ *Big Tobacco 2.0 — Big Marijuana*, SAM, <https://learnaboutsam.org/the-issues/big-tobacco-2-0-big-marijuana/> (last visited Sept. 8, 2016).

⁶² See JOHN HUDAK & JONATHAN RAUCH, BROOKINGS INST., WORRY ABOUT BAD MARIJUANA — NOT BIG MARIJUANA 3 (2016), <https://www.brookings.edu/wp-content/uploads/2016/07/big-marijuana-1.pdf> ("Ironically, however, those decrying Big Marijuana also include many of marijuana reform's most ardent supporters, who fear that big companies will bulldoze small operators and, with them, the social ideals of marijuana counterculture.")

⁶³ Joel Warner, *Marijuana Legalization 2015: Major Pot Activist Quits Marijuana Policy Project, Says Industry Is Taking over Movement*, INT'L BUS. TIMES (Dec. 1, 2015, 10:47 AM), <http://www.ibtimes.com/marijuana-legalization-2015-major-pot-activist-quits-marijuana-policy-project-says-2203385>.

Government, industry, consumers, activists, and their communities should set clear goals about what they want the marijuana industry to do and what they do not want it to do. The role of public policy is to develop regulations, pass laws, levy taxes, and foster incentives with an eye toward avoiding specific harmful practices. Regulatory boundaries should target corporate behavior, not corporate size. Basing policy decisions on a stereotypical notion of “Big Marijuana” is like bringing a hatchet into a surgical suite.⁶⁴

As I discussed at the outset, there is reason to believe that the fight over Big Marijuana is coming sooner rather than later. With the federal government currently reconsidering the classification of marijuana in Schedule I and with the states continuing their slow but steady march away from state-level prohibition, the question of how marijuana will be regulated at the federal level after prohibition is coming to a head. In the next section I discuss some of the policy alternatives available to the next Congress and President.

II. POLICY ALTERNATIVES

As should be clear by now, to state that the federal marijuana prohibition cannot survive much longer is to say only so much. For while it may seem clear that the federal prohibition will be disappearing before too long, it remains very unclear what, exactly, will take its place. In preparing a report on the prospect of marijuana legalization in Vermont, the Rand Corporation developed a rubric of twelve possible marijuana production models, ranging from increased prohibition on one far extreme to a simple repeal of state prohibitions on the other.⁶⁵

In this section, I focus on the broad policy choices available to legislators considering marijuana regulation in the United States. One of the most important things to realize about these categories is that we are simply at the first fork in the road for policy-makers. As will become clear as I move through these categories, each regulatory alternative is really just an umbrella term for a set of more specific approaches to marijuana in a post-prohibition world.

⁶⁴ HUDAK & RAUCH, *supra* note 62, at 17.

⁶⁵ JONATHAN P. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS, 49-50 (2015) (producing 12 distinct approaches to regulating marijuana in the states, ranging from retained prohibition with increased sanctions on one extreme to a free-market model with no marijuana specific regulations on the other).

A. Enforced Prohibition

Though little-discussed in the run-up to 2017, there remains the possibility that law reform in the states will lead not to the weakening of prohibition at the federal level, but to its strengthening. As we have seen, President Obama issued a number of both official and unofficial statements making clear that he was not willing to enforce the Controlled Substances Act as written.⁶⁶ However, he was also unwilling to expend scarce political capital on seeking to undo marijuana prohibition in a way that would survive his administration. What followed was an unstable equilibrium in which a marijuana industry developed in the states while every transaction carried out in the industry was a serious crime. As documented briefly above and in greater depth elsewhere, this led to a number of ancillary consequences for both marijuana businesses and consumers.⁶⁷ Nonetheless, the Obama administration's forbearance emboldened marijuana law reformers and led to the flourishing of medical and recreational cannabis markets as well as continued electoral victories in the states.

This acquiescence did not sit well with everyone. Former drug enforcement officials lobbied the Obama administration to take a firmer stand against law reform initiatives in the states.⁶⁸ Others, not content to lobby and unable to sue the federal government to force it to change policy,⁶⁹ have sued Colorado in federal court in an attempt to block the tax and regulatory regime in place there.⁷⁰ While these suits have not met with much success, they demonstrate both the unwillingness of many to accept the end of prohibition, and the perseverance of support for marijuana prohibition.

⁶⁶ See 2013 Cole Memorandum, *supra* note 35, at 2-3; Treu, *supra* note 37.

⁶⁷ See *supra* notes 38-48 and accompanying text; *supra* Part I.C.

⁶⁸ Alex Dobuzinskis, *Ex-DEA Heads Urge Holder Oppose Marijuana Ballots*, REUTERS (Sept. 7, 2012), <http://www.reuters.com/article/us-usa-marijuana-holder-idUSBRE8861C120120908> ("Nine former heads of the U.S. Drug Enforcement Administration urged Attorney General Eric Holder on Friday to take a stand against possible legalization of recreational marijuana in three western states, saying silence would convey acceptance.").

⁶⁹ Nebraska and Oklahoma sued Colorado in the Supreme Court rather than suing the United States directly, presumably because they understand that they lack standing to require the federal government to enforce its own laws.

⁷⁰ See, e.g., *Smith v. Hickenlooper*, No. 15-cv-00462-WYD-NYW, 2016 WL 759163, at *1 (D. Colo. Feb. 26, 2016) (finding that the Controlled Substances Act does not create a private cause of action); *Safe Sts. All. v. Alt. Holistic Healing, LLC*, No. 1:15-cv-00349-REB-CBS, 2015 WL 4245823, at *1 (D. Colo. July 14, 2015) (dismissing RICO claims brought against public and private defendants in Colorado).

While marijuana law reform is hardly a purely partisan issue, it appears clear that the likelihood of full enforcement of the CSA would be far greater under a Republican administration than under a Democratic one. In 2014, House Republicans expressed their displeasure over the Cole Memo and passed a resolution that would have given members of Congress the authority to sue the President to demand full enforcement of the CSA. President-Elect Trump has indicated that he will appoint United States Senator Jeff Sessions to be his attorney general; Sessions is a long-time opponent of marijuana law reform who may seek a way to undo marijuana's electoral success over the last two decades.⁷¹

Thus, it is certainly possible that a new administration will attempt to roll back the marijuana law reform happening in the states. As we've seen, however, there is only so much that the federal government can do to reverse the tide of marijuana law reform; it can neither prevent more states from legalizing marijuana nor require any state to re-implement marijuana prohibition.⁷² However it is equally clear that the federal government retains the ability to prosecute federal law everywhere in the country including those states adverse to the federal prohibition.⁷³ Perhaps more ominously, the federal government could commence (or even threaten to commence) civil asset forfeiture proceedings against those in violation of the CSA. The federal government's practice of sending threatening letters to the landlords of marijuana businesses urging them to evict their marijuana tenants has proven an effective tool in reining in marijuana activity in the past.⁷⁴

⁷¹ See Mike McPhate, *California Today: What Jeff Sessions Could Mean for Legal Marijuana*, N.Y. TIMES (Nov. 22, 2016), <http://www.nytimes.com/2016/11/22/us/california-today-jeff-sessions-marijuana.html>.

⁷² An unresolved question is the power of Congress to achieve through the Spending Power that which it cannot do by other means. Prior to *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), it was presumed that Congress could condition the allocation of federal funds on the state meeting certain preconditions. In *Sebelius*, however, the Court held that the inducement of federal funds can become a "gun to the head" if the threat to withhold federal funds would operate as a heavy burden on the state budget. *Id.* at 2604.

⁷³ See 2013 Cole Memorandum, *supra* note 35, at 4 (stating that the CSA remains in place and that everyone violating it remains subject to prosecution). While the Rohrabacher-Farr Amendment is currently seen as an impediment to the enforcement of federal law against medical marijuana businesses, it is important to remember that there is nothing to prevent the prosecution of recreational businesses in those places where they are authorized by state law.

⁷⁴ See *US Attorney Walsh: Pot Letters Are Not a Bluff*, DENV. POST (Jan. 19, 2012, 9:21 AM), <http://www.denverpost.com/2012/01/19/us-attorney-walsh-pot-letters-are->

The largest obstacle to a policy of enforcement of the CSA is thus not legal but one of political will. Although the marijuana legalization initiative on the ballot in Ohio in 2015 failed, the national momentum is clearly toward relaxing prohibition rather than extending it. What is more, a number of important swing states — Colorado, Arizona, New Mexico, Ohio, Florida — are among the states where marijuana law reform has been focused. A politician would risk alienating all of these states at their peril.

B. Unenforced Prohibition — Maintaining the Status Quo

Since late 2013, the Obama administration has taken an explicitly hands-off approach to marijuana law reform in the states. It has published eight enforcement priorities to guide the states in their passage of marijuana regulations, but has generally refrained from enforcing federal law against those in compliance with robust state marijuana laws. Perhaps the most likely policy direction, looking forward to 2017, is that the new administration would continue this policy of non-enforcement of the CSA in those states enacting robust marijuana law reform.

In fact, Congress has already taken steps to make the Obama administration's limited enforcement policy more permanent. In 2014, Congress passed a measure barring the Department of Justice from preventing states from implementing their own medical marijuana laws.⁷⁵ The following year this provision was interpreted by Federal Judge Charles Breyer as preventing the federal government from pursuing enforcement actions against individuals in the states engaged

not-a-bluff/ (“[United States Attorney John] Walsh said letters sent last week to 23 marijuana dispensaries near schools and their landlords — giving them until Feb. 27 to shut down, move or face federal penalties — are not a bluff and that criminal prosecution is possible. Dispensary and property owners are being threatened with losing their assets and property in civil action in federal court if they don't comply with the letters.”).

⁷⁵ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) (“None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”).

in conduct that complies with state marijuana laws.⁷⁶ If Judge Breyer's opinion is upheld, the federal government would be prohibited from enforcing the CSA against those in conformance with state *medical* marijuana laws — it says nothing about state recreational laws. The measure would thus give the force of law to the hands-off policy of the Obama administration and provide a level of certainty to those operating in law reform states.

Such a move would give needed predictability and certainty to both marijuana consumers and providers. It would add another level of protection to those relying on the passage of state laws permitting some marijuana conduct, but it would remain an imperfect solution. As I have documented both here and elsewhere, significant negative consequences flow from the fact of marijuana's continuing illegality at the federal level.⁷⁷ These consequences would not be removed if another impediment to the *enforcement* of federal law were put in place; only dissolution of the federal prohibition would make marijuana conduct truly *legal* in the states and hence not subject ancillary consequences.⁷⁸

C. Cooperative Federalism

Another possibility is that the federal and state governments develop a cooperative solution to the problem of marijuana regulation, sharing responsibility between the two. I have laid out one way that this could

⁷⁶ *United States v. Marin All. for Med. Marijuana*, 139 F. Supp. 3d 1039, 1040 (2015) (“As long as Congress precludes the Department of Justice from expanding funds in this manner, [criminal enforcement would be permitted only] insofar as that organization is in violation of California ‘State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.’”).

⁷⁷ See, e.g., Chemerinsky et al., *supra* note 28, at 90-101 (setting forth the challenges the CSA poses for both businesses and consumers in marijuana law reform states); *supra* Part I.C.

⁷⁸ While it could be argued that which the federal government does not enforce as illegal is therefore not illegal — the doctrine of desuetude — it is not at all clear that marijuana conduct falls under that heading. For example, West Virginia appears to be the only US state to recognize desuetude as a defense to a criminal prosecution. See, e.g., Note, *Desuetude*, 119 HARV. L. REV. 2209, 2211 (2006). In that state, in order to invoke the defense, a defendant would have to show 1) that her conduct was *mala prohibita*, not *mala in se*; 2) that her violation of the statute was open and notorious; and 3) that the decision not to enforce the law was conspicuous. With regard to the first two prongs, a good argument could be made; marijuana businesses are flagrant in their violation of the CSA and the use of psychoactive drugs is often given as the paradigmatic example of *mala prohibita* crimes. However, the third requirement would be more difficult, as the federal government's decision not to enforce federal law has been far more ambiguous than conspicuous.

occur,⁷⁹ but there are certainly others.⁸⁰ As I've imagined it, the states would be given the choice to opt in or out of the CSA. If a state opted in, the CSA would apply within their state just as it does today. By contrast, if a state chose to opt out of the CSA, it would apply to the federal government to be freed of those provisions. The federal government would set the priorities and criteria for allowing a state to opt out and would monitor the states to be sure they were meeting their obligations under the opt-out agreement. Beyond that, however, marijuana regulation would be turned completely over to the states in those states choosing to opt out of federal marijuana law.

So, for example, the state of Utah, which has never enacted marijuana law reform, would likely choose to remain subject to the CSA — all marijuana conduct within the state would be governed by state as well as federal law and would be prohibited by both. By contrast in Colorado, which has taken the lead on marijuana law reform, state, rather than federal law would govern marijuana conduct. In an opt-out state, marijuana conduct that complied with state law would be legal (because the CSA would not apply within the state) and conduct that did not comply with state law would be illegal. Thus, businesses and individuals complying with state marijuana laws would be free not just from the threat of federal prosecution, but from the ancillary consequences of federal prohibition as well. Their conduct would be completely legal, prohibited by neither state nor federal law.

While such a solution would be a boon for marijuana reform states, it would not be a perfect solution. It would create a patchwork of regulation across the nation; some states would be subject to federal law while others would be governed exclusively by their own laws. This would keep marijuana businesses from developing into national concerns, unable to produce and ship their products throughout the country. Furthermore, extensive regulations would have to be created to determine which states were eligible for a waiver and which were

⁷⁹ See, e.g., Chemerinsky et al., *supra* note 28, at 74 (“We suggest an incremental and effective solution that would allow willing states to experiment with novel regulatory approaches while leaving the federal prohibition intact for the remaining states: The federal government should adopt a cooperative federalism approach that allows states meeting specified federal criteria — criteria along lines that the DOJ has already set forth — to opt out of the CSA provisions relating to marijuana.”).

⁸⁰ See, e.g., 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 41, 43-48 (2013) (proposing a system of legislatively-authorized policy waivers or cooperative agreements authorized by the executive branch that would allow states to explore new policies within their own borders).

not; disputes and litigation would no doubt ensue regarding the ability of the states to opt out of the CSA or to demonstrate that they were meeting their obligations.

D. Rescheduling of Marijuana

For many years, the focus of the marijuana law reform movement was the removal of marijuana from Schedule I and its rescheduling into another part of the Controlled Substances Act. The Act contains five schedules, from I, the most serious, to V, the least. Schedule I drugs, like marijuana, are defined as those having no approved medical use and a high likelihood of addiction.⁸¹ Besides marijuana, some of the drugs classified under Schedule I include ecstasy, heroin, LSD, and peyote. Schedule I drugs cannot be prescribed by licensed physicians and it is nearly impossible to study their pharmacological properties. The possession, manufacture, and distribution of Schedule I drugs is a serious felony.

By contrast the next four schedules deal with decreasingly addictive drugs that can be used medically with a doctor's prescription. Schedule II contains the serious narcotics Dilaudid, morphine, opium, OxyContin, Percocet, and oxycodone as well as stimulants such as Dexedrine, Adderall, and Ritalin.⁸² Schedule V, the lowest of the regulated substances under the CSA, applies to substances such as cough remedies containing small amounts of codeine.⁸³ While drugs outside of Schedule I may be prescribed by a licensed physician, significant regulations pertaining to dosage and refills are in place to control for misuse and criminal penalties can apply to those distributing them without authorization.

If marijuana were moved from Schedule I to one of the lower categories — a decision that could be made either by Congress or unilaterally by the executive branch — then its manufacture and distribution would be lawful, but only under certain narrowly defined conditions. As the DEA has described this process:

⁸¹ 21 U.S.C. § 812(b)-(c) (2012) (stating that substances in this schedule, “ha[ve] a high potential for abuse” and “ha[ve] no currently accepted medical use” and “a lack of accepted safety for use of the drug”).

⁸² *See id.* (stating that substances in this schedule have a high potential for abuse which may lead to severe psychological or physical dependence).

⁸³ *See id.* (stating that schedule V drugs, substances, or chemicals are defined as drugs with lower potential for dependence than Schedule IV and consist of preparations containing limited quantities of certain narcotics).

Under the CSA, Congress established a “closed system” of distribution designed to prevent the diversion of controlled substances. As part of this closed system, all persons who lawfully handle controlled substances must be registered with DEA or exempt from registration by the CSA or DEA regulations. Another central element of this closed system is that DEA registrants must maintain strict records of all transactions in controlled substances. Consistent with the CSA requirements, current DEA regulations employ a system to account for all controlled substances received, stored, distributed, dispensed, or otherwise disposed of. Under this system, all controlled substances used in legitimate commerce may be transferred only between persons or entities who are DEA registrants or who are exempted from the requirement of registration, until they are dispensed to the ultimate user. Thus, for example, a controlled substance, after being manufactured by a DEA-registered manufacturer, may be transferred to a DEA-registered distributor for subsequent distribution to a DEA-registered retail pharmacy. After a DEA-registered practitioner, such as a physician or a dentist, issues a prescription for a controlled substance to a patient (i.e., the ultimate user), that patient can fill that prescription at a retail pharmacy to obtain that controlled substance. In this system, the manufacturer, the distributor, the practitioner, and the retail pharmacy are all required to be DEA registrants, or to be exempted from the requirement of registration, to participate in the process.⁸⁴

Distribution outside of these channels would remain illegal, just as the street distribution of cocaine, opium, and Percocet are today.⁸⁵

This approach to regulating marijuana would solve many of the problems of the unstable marijuana status quo but it would likely give rise to others. For those arguing for marijuana’s beneficial medical

⁸⁴ Disposal of Controlled Substances by Persons Not Registered with the Drug Enforcement Administration, 74 Fed. Reg. 3480, 3481 (proposed Jan. 21, 2009) (to be codified at 21 C.F.R. pts. 1300, 1301-05).

⁸⁵ Penalties for the distribution of Controlled Substances do not necessarily track the Schedule in which the drug appears. So, for example, distribution of between 40 and 399 grams of Fentanyl, a Schedule IV drug is treated in the same way as distribution of between 500 and 4,999 grams of cocaine, a Schedule II drug, or between 100 and 999 grams of heroin, a Schedule I drug. See *Federal Trafficking Penalties for Schedules I, II, III, IV, and V (except Marijuana)*, DRUG ENFT ADMIN., https://www.dea.gov/druginfo/ftp_chart1.pdf (last visited Sept. 1, 2016).

attributes, rescheduling would ensure the availability of medicine for those in need. Schedule II-V drugs are produced in laboratory conditions and are likely to be more consistent in terms of both purity and dosage than those prepared outside the strict dictates of DEA-registered manufacturing. More than that, rescheduling would permit, for the first time since the passage of the CSA, for extensive clinical trials on the drug and its effects.⁸⁶

However, it is important to see that rescheduling would be incredibly disruptive to the existing marijuana industry. Whether marijuana were moved to Schedule II with addictive narcotics and stimulants or to the lowest category with mildly opiate cough medicines, it would nonetheless require a doctor's prescription before it could be purchased and would generally be available only from a state-licensed, DEA-registered pharmacy. Few currently licensed marijuana businesses in the states have the wherewithal to meet such requirements and would likely be squeezed out of the emerging medical marijuana industry.⁸⁷ Scheduled drugs are not sold from storefronts without a prescription; in the same way that there are not heroin, Adderall, or OxyContin retail stores in the states, federal law would not condone the production and sale of marijuana outside of this heavily regulated pharmaceutical system.

This assumes, of course, that the federal government rescinds the Cole Memo and actually enforces federal law against those selling marijuana outside of this complicated regulatory regime. For the last several years, the federal government has essentially allowed state-licensed businesses to flaunt federal law. In large part, this reaction from the federal government was an acknowledgment of the mismatch

⁸⁶ See Trevor Hughes, *DEA Could Reclassify Marijuana, Allowing Doctors to Conduct More Research*, USA TODAY (May 24, 2016, 3:01 PM), <http://www.usatoday.com/story/news/2016/05/21/dea-could-reschedule-marijuana-allowing-doctors-conduct-more-research/84670716/> ("Reclassifying marijuana would make it easier for researchers to work with the plant, which is currently subject to strict limitations and officially can be acquired only from a single government garden. Schedule 2 drugs include morphine, methamphetamine and oxycodone.").

⁸⁷ Alex Halperin, *What Will Rescheduling Marijuana Mean for the Pot Industry?*, ROLLING STONE (Apr. 20, 2016), <http://www.rollingstone.com/culture/news/what-will-rescheduling-marijuana-mean-for-the-pot-industry-20160420> ("If the federal government determines that medical marijuana must be subjected to FDA approval, companies would have to enter a process that can take years to complete and cost more than \$1 billion per product. Few, if any, cannabis companies in the U.S. have the resources for that, which might open the door for Big Pharma to muscle in and take over the business. 'They could put every medical provider in the country out of business in a matter of months,' says Dean Heizer, chief legal strategist at LivWell, one of Colorado's largest marijuana companies.").

between the demand for marijuana and its illicit status under federal law. If federal law were to change, however, to better reflect marijuana's relative dangerousness, it is hard to see the federal government could continue to turn a blind eye to those not complying with federal regulations and simply selling the drug from storefronts. What is more, the regulatory scheme of Schedules II-V is expressly a closed system, the sole regulatory regime governing the lawful distribution of Scheduled drugs. While the federal government shares the enforcement of *criminal* laws with the states, it alone regulates the licensed distribution of drugs covered within the CSA. This makes the federal government far less likely to tolerate state deviations from these rules (and more likely to challenge inconsistent state laws as preempted by federal regulation).

E. Descheduling of Marijuana

The final, and perhaps most revolutionary approach to post-prohibition marijuana policy would be to remove marijuana entirely from the Controlled Substances Act. This is the approach that has now been taken by eight states and the District of Columbia — Colorado, Washington, Oregon, Alaska, California, Massachusetts, Nevada and Maine have all chosen to tax and regulate marijuana like alcohol. In fact, this is expressly how marijuana legalization was pitched in these states: marijuana is a less dangerous substance than alcohol and should be taxed and regulated accordingly. And it is easy to understand the appeal of this approach. Although marijuana's classification in Schedule I creates something of a self-fulfilling prophecy (because it is classified as having no medical use, doing clinical trials on it is nearly impossible; because there are no clinical trials indicating its effectiveness, there is no reason to move it from Schedule I) there is nonetheless reason to believe that marijuana is far less dangerous than other substances — principally alcohol and tobacco — available on the market without a prescription.

Notwithstanding widespread public support for the legalization of marijuana — more than 50% of Americans now support legalization. Nonetheless, support for descheduling marijuana at the federal level is at best only lukewarm thus far. While bills have been introduced in both houses of Congress to deschedule the drug,⁸⁸ they have made little headway. Descheduling marijuana is a radical step for which the political will does not yet seem present.

⁸⁸ Ending Federal Marijuana Prohibition Act of 2015, S. 2237, 114th Cong. § 3(a) (2015); Regulate Marijuana Like Alcohol Act, H.R. 1013, 114th Cong. § 101(a) (2015).

But it's important to remember that descheduling marijuana can mean many different things. It is in this context that it becomes most clear that the decision to move away from prohibition creates more questions than it answers. Even if we decide that marijuana should be treated like alcohol rather than heroin, consider the various ways in which alcohol is produced and sold in the United States. Almost everywhere, packaged wine, beer, and spirits can be purchased from a store for consumption at home; some states require it to be purchased from a dedicated liquor store while others allow it to be sold alongside food and housewares in a supermarket. But alcohol can also be enjoyed socially with others in many contexts — bars, restaurants, baseball games, and city parks. So far, no state has adopted a model that would permit such consumption. Furthermore, alcohol is advertised on TV and radio; stores that sell it often display neon signs indicating the brands and products they carry. Again, no state currently permits such conduct.

Legalization, thus, is a constellation of ideas rather than a specific policy. It is possible to legalize marijuana — to remove it from the CSA and repeal the criminal penalties for its production and sale — while at the same time discouraging its use. Taxes can be imposed, advertising can be limited, means of production and distribution can be curtailed. It is possible, in other words, to imagine a decriminalization regime that makes marijuana scarcely more available than it is today in many states.

F. Final Thoughts on Options for Marijuana Reform

The point of this section was not to exhaustively list the various ways in which marijuana could be regulated by the federal government in the post-prohibition world. Rather, my goal was simply to paint with a broadest brush some of the basic policy choices facing Congress in the years to come. As I have tried to make clear, each of these choices is really just the first step along a regulatory path that branches almost infinitely as we move away from prohibition. If Congress, or the Executive, chooses to reschedule marijuana, for example, how will it do so? Will it move marijuana to Schedule II, III, IV, or V? Will it create protections for existing market players or will it write rules that spell doom for those currently operating in the states? Will it create a single set of regulations or will it allow the states to continue to operate as laboratories of ideas? The experience of the states is that each step down the path of marijuana regulation simply leads to more choices.

III. SO WHICH OPTION TO CHOOSE?

This raises the obvious question — how is a federal policy-maker to start down this path, let alone to make the hundreds of regulatory decisions that are sure to follow? Given the panoply of regulatory options, how does one choose? The answer, of course, depends on what one sees as the goals of marijuana regulation. For the past 45 years, suppressing marijuana conduct was the principal, if not the only, goal of federal marijuana regulation. Prohibition followed quite naturally from this goal. As I demonstrate in this section, there are likely to be a number of policy outcomes motivating the choices regulators will be forced to make, however they will not always point directly to a regulatory solution.

A. *Free-Market Capitalism*

One argument for legalization is that it makes no sense for the federal government to criminalize a substance that history and common sense demonstrate has a significant demand in the United States.⁸⁹ Notwithstanding marijuana's prohibition for almost 80 years in the United States, marijuana use has continued and often increased.⁹⁰ Government, a free market capitalist might argue, should

⁸⁹ Coincident with this concern is the disparate impact that marijuana prohibition has had on vulnerable groups. In particular, although marijuana use appears to be fairly consistent across different ethnic groups, the impact on communities of color was profound. See AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 9 (2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf> (“The War on Marijuana has largely been a war on people of color. Despite the fact that marijuana is used at comparable rates by whites and Blacks, state and local governments have aggressively enforced marijuana laws selectively against Black people and communities. In 2010, the Black arrest rate for marijuana possession was 716 per 100,000, while the white arrest rate was 192 per 100,000. Stated another way, a Black person was 3.73 times more likely to be arrested for marijuana possession than a white person — a disparity that increased 32.7% between 2001 and 2010.”). On the other hand, it is worth noting that legalization of marijuana has hardly made these problems disappear. See, e.g., German Lopez, *After Colorado Legalized Marijuana, Arrests Fell for White Kids — but Rose for Black Kids*, VOX (May 11, 2016, 12:40 PM), <http://www.vox.com/2016/5/11/11656582/colorado-marijuana-arrests-race> (“For white kids ages 10 to 17, the marijuana arrest rate fell by 9 percent between 2012, the last year in which pot was illegal in Colorado, and 2014, the first year of legal pot sales. For black kids of the same age, arrests went up 52 percent. And for Hispanic kids, arrests rose by 22 percent — although they remained less likely to be arrested for pot than their white or black counterparts. Most arrests were for possession.”).

⁹⁰ See, e.g., SARRA L. HEDDEN ET AL., *SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP'T OF HEALTH & HUMAN SERVS., BEHAVIORAL HEALTH TRENDS IN THE UNITED STATES: RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH 1* (2015),

facilitate the creation of a market to meet demand rather than standing as an obstacle between the people and a substance they clearly desire.

Colorado followed a limited version of this theory in regulating marijuana following the passage of Amendment 64 in 2012. It set no caps on the number of licenses that would issue, on the number of licenses any individual or entity could hold, or on the total amount of marijuana that could be produced within the state. The idea was to let the market set supply and price, rather than to impose those limits artificially. Such openness was also motivated by a desire to crush the previously existing black market in marijuana; the freer the legal market for marijuana, the more difficult it would be for black marketers to compete with it. High taxes, high barriers to entry, limits on particular products or supply, all of these would simply drive consumers to the black market and undercut the benefits of legalization.

The downside of a free market model, of course, is the lack of restraint on the profit motive. In an unregulated market, there will be no check on the desire of businesses to increase profits at the expense of customers. The profit motive will drive businesses to develop new products and cultivate new consumers by targeting new users. Furthermore, as with the tobacco and alcohol industries, there is reason to be concerned that a commercial marijuana industry will seek to profit from the heavy users who account for the overwhelming majority of marijuana consumed.⁹¹ While I have argued that heavy regulation and federal prohibition have mitigated these concerns thus far, the concern remains that a free market approach will lead to a Big Marijuana to rival Big Tobacco, Big Pharma, and Big Alcohol. And these fears are not unfounded: Alcohol leads to nearly 90,000

<http://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf> (showing that while most drug use declined after 2002, marijuana use had increased).

⁹¹ See Jonathan P. Caulkins, *The Real Dangers of Marijuana*, NAT'L AFFS., 21, 28 (2016) (“[M]arijuana use is highly concentrated among the small proportion who use daily or near-daily (defined conservatively as reporting use on 21 or more days in the past month, which excludes the lump of people who report using on 20 days). Only one in five past-year marijuana users report consuming that often. However, because they use the drug so frequently and because they consume a lot when they do use, they consume most of the marijuana consumed in America. The best data pertain to days of use. These most-frequent users, though they represent just 20% of all users, account for two-thirds of all the days of use that are reported. Data on grams consumed per day are sketchier, but it appears that daily and near-daily users consume about two or three times as much per day as do occasional users, which would imply that they account for roughly 80% of the quantity consumed.”).

premature deaths in the United States each year;⁹² tobacco kills as many as five times that amount.⁹³ While marijuana is far less toxic than either of these substances, there is nonetheless reason to be concerned about the public health consequences of creating another powerful industry selling a psychoactive drug for profit.⁹⁴

B. Harm Reduction

The concept of harm reduction is an acknowledgement that people have an unquenchable desire for drugs, and other temptation goods,⁹⁵ and that the appropriate role of government is to minimize the harm associated with those behaviors rather than futilely trying to prevent them.⁹⁶ The classic example of harm reduction is needle exchange programs for drug addicts. Rather than (or in addition to) fully legalizing heroin use, a number of jurisdictions have sought a harm reduction model by which addicts are given access to clean needles and often a location where they can safely inject their drugs. In so doing, these governments hope to mitigate the negative secondary effects of drug use — infections, communicable diseases, hazardous

⁹² *Alcohol Use and Your Health*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/alcohol/pdfs/alcoholyourhealth.pdf> (last visited Oct. 18, 2016) (excessive alcohol use led to approximately 88,000 deaths and 2.5 million years of potential life lost (YPLL) each year in the United States from 2006–2010, shortening the lives of those who died by an average of 30 years).

⁹³ *Fast Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm#toll (last updated Dec. 11, 2015) (“Cigarette smoking is responsible for more than 480,000 deaths per year in the United States, including nearly 42,000 deaths resulting from secondhand smoke exposure. This is about one in five deaths annually, or 1,300 deaths every day.”).

⁹⁴ See Caulkins, *supra* note 91, at 32.

⁹⁵ See Abhijit Banerjee & Sendhil Mullainathan, *The Shape of Temptation: Implications for the Economic Lives of the Poor* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 15973, 2010), <http://www.nber.org/papers/w15973.pdf> (“[T]he donut or the cigarette represents a temptation good. In the moment we would spend money on it. But we would like future selves to not spend money on it. Temptation goods give us utility in the moment but it is not utility we care for when considering future selves. This is in alternative to other goods where present and future selves agree: in the moment we spend on them and we would like future selves to spend on them as well. These are goods like a good education for our child, [or] a nice house to retire in.”).

⁹⁶ See, e.g., *Principles of Harm Reduction*, HARM REDUCTION COAL., <http://harmreduction.org/about-us/principles-of-harm-reduction/> (last visited Sept. 3, 2016) (“Harm reduction is a set of practical strategies and ideas aimed at reducing negative consequences associated with drug use. Harm Reduction is also a movement for social justice built on a belief in, and respect for, the rights of people who use drugs.”).

waste — while recognizing that attempts to suppress such behavior are doomed to fail.

With respect to marijuana, harm reduction might recommend ensuring that marijuana was available for those seeking it as medicine or even for recreational purposes. This could mean anything from permitting the medical production of marijuana by a regulated market or, as Uruguay has proposed, a model that includes government provision of the drug to those who seek it. It might also include limits on products or methods of ingestion that are deemed particularly harmful to consumers or to limit predatory marketing and advertising practices. It is important to see, however, harm reduction could be invoked on either side of important regulatory debates. Public health officials have often advocated placing a limit on the percentage of THC in marijuana, arguing that the public needs to be protected from high-potency products.⁹⁷ However the same harm reduction argument could be made *in favor* of high potency marijuana and marijuana concentrates in at least two ways. First, high potency marijuana requires less inhaled smoke than lower potency pot, while vaporized concentrate requires no combustion whatsoever. Second, if there is a demand for high potency marijuana and concentrates, it is argued that the legal, regulated market should be permitted to make those products available rather than driving consumers to the black market to find them.⁹⁸

This quandary highlights the fact that not only will there be several potential motivations for regulating marijuana post-prohibition, and not only will these motivations often conflict with one another, but the *same* motivation may be invoked to argue both sides of a single issue.

C. Revenue Generation

The marijuana market in the United States is estimated to be worth \$40 billion annually.⁹⁹ Notwithstanding marijuana law reform in the

⁹⁷ See, e.g., *Marijuana Skeptics Take Aim at Potency in Colorado*, DENV. POST (June 17, 2016, 11:15 AM), <http://www.denverpost.com/2016/06/17/marijuana-potency-limits-colorado/>.

⁹⁸ This is particularly true of marijuana concentrates, the private production of which can prove extremely dangerous. See, e.g., Kieran Nicholson, *Man, 22, Charged in Hash Oil Explosion, Fire at Denver Apartment Complex*, DENV. POST (June 24, 2016, 4:28 PM), <http://www.denverpost.com/2016/06/24/man-22-charged-in-hash-oil-explosion-fire-at-denver-apartment-complex/>.

⁹⁹ BEAU KILMER ET AL., RAND CORP., *HOW BIG IS THE U.S. MARKET FOR ILLEGAL DRUGS?* (2014), http://www.rand.org/content/dam/rand/pubs/research_briefs/RB9700/RB9770/RAND_RB9770.pdf.

states, that money is largely made by criminal syndicates and untaxed by government. A lawmaker with a view toward increased revenue might choose to regulate marijuana in a way designed to bring as much of that revenue into the public fisc as possible. So, for example, a government-run model would move the production and sale of marijuana from the black market, allowing the federal government to capture the revenue currently being taken entirely by criminals.¹⁰⁰ Short of this, the government might levy heavy taxes on marijuana (akin to those on cigarettes) in order to obtain as much revenue as possible from the sale of the drug.

It is not entirely unprecedented for government to take over a once illicit business and run it with an eye to revenue generation. As an example, the history of lotteries shows that they were a source of public revenue in colonial America, prohibited for more than a century, and are now, once again, an important source of revenue for state governments.¹⁰¹ Much of the rhetoric surrounding marijuana legalization has used the idea of taking a substance controlled exclusively by cartels and the black market and generating tax revenue from it. In fact, the argument sometimes went, there might be a double fiscal savings as money that used to be spent on criminal law enforcement could be saved while at the same time new revenue would be generated from the regulation and taxation of a previously black market substance.

The practical realities of marijuana legalization are far more complicated than this simple model, however. In the first place, the success of any regulatory regime for marijuana requires the funneling of all marijuana conduct into that regulated environment. If licensed business are required to pay licensing fees and taxes, they need assurance that they will not have to compete with those who are not meeting these requirements. This means that law enforcement dollars will continue to be spent on marijuana conduct, even after marijuana

¹⁰⁰ And, unlike with private, regulated production of marijuana, the government would be able to capture the profit, not simply the tax on that profit.

¹⁰¹ See Stephen J. Leacock, *Lotteries and Public Policy in American Law*, 46 J. MARSHALL L. REV. 37, 41-42 (2012) (“The historical continuum of the legality of lotteries has imitated a pendulum. This pendulum phenomenon of widespread public playing of lotteries to the abstention from playing them has taken place in synchrony with successive state legalization followed by state prohibition of public lotteries. The sequence may be analogized to pendulum swings from feast to famine and back again to feast with a vengeance in the present-day era.”); Robert J. Rychlak, *Lotteries, Revenues, and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 12 (1992) (discussing the role of lotteries throughout American history).

has been “legalized.” Second, and perhaps more fundamental, the desire for revenue will necessarily conflict with other important goals such as harm reduction. Almost no one makes the argument that the lottery is good for those who play it; in fact it is a deeply regressive tax on those who can least afford to play it.¹⁰² The same thing would be true if marijuana came to be viewed as an important source of revenue for a state government; who would want to break the news to the governor the bad news that marijuana consumption amongst teens was dropping?¹⁰³

D. Libertarianism/Minimal Government

Finally, there is a notion of marijuana regulation grounded in the libertarian principle that people should be free to put into their bodies any substance they please. Building on the increasing personal freedoms that the Supreme Court has recognized under the right to privacy — the right to engage in consensual sex,¹⁰⁴ to obtain an abortion,¹⁰⁵ to access birth control,¹⁰⁶ to view pornography¹⁰⁷ — many argue that the right to personal autonomy should include the right to consume any substance one chooses:

¹⁰² See Jonah Lehrer, *Cracking the Scratch Lottery Code*, WIRED (Jan. 31, 2011, 12:00 PM), https://www.wired.com/2011/01/ff_lottery/ (“While approximately half of Americans buy at least one lottery ticket at some point, the vast majority of tickets are purchased by about 20 percent of the population. These high-frequency players tend to be poor and uneducated, which is why critics refer to lotteries as a regressive tax. (In a 2006 survey, 30 percent of people without a high school degree said that playing the lottery was a wealth-building strategy.) On average, households that make less than \$12,400 a year spend 5 percent of their income on lotteries — a source of hope for just a few bucks a throw.”).

¹⁰³ A similar conflict exists with regard to the cigarette tax revenue that states receive as a result of the 1998 Master Tobacco Settlement Agreement. See, e.g., Walter J. Jones & Gerard A. Silvestri, *The Master Tobacco Agreement and Its Impact on Tobacco Use Ten Years Later*, 137 CHEST 692, 698 (2010) (“Because tobacco is a lucrative and heavily taxed product, governments that both regulate tobacco and require tax revenue will always be ambivalent in their attitudes toward tobacco consumption and cessation.”); Jody Sindelar & Tracy Falba, *Securitization of Tobacco Settlement Payments to Reduce States’ Conflict of Interest*, 23 HEALTH AFFAIRS 188, 191 (2004) (“[W]hile states sued tobacco companies prior to the MSA in part to reduce tobacco sales, they now are also financially interested in the tobacco companies’ payments to the state. States may be less compelled to reduce smoking through increased cigarette taxes, anti-tobacco advertising, and other mechanisms.”).

¹⁰⁴ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁰⁵ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹⁰⁶ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

¹⁰⁷ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

The idea that drug use was essentially a civil right had particular resonance in the 1960s and 1970s, as several movements broke down barriers of governmental prohibition on personal conduct. The civil rights, gay rights, and feminist movements battled to give certain citizens the rights they deserved but had long been denied. In *Loving vs. Virginia* (1967), the Supreme Court ruled that banning interracial marriage was unconstitutional. In *Roe vs. Wade* (1973), women were given increased control over their own reproductive systems. That this thinking would extend to the rights of individuals to consume what they please was . . . a natural line of thought. And this right was worth preserving, they argued, so long as no one else got hurt, an argument used to support many of the other civil rights advancements of the time as well.¹⁰⁸

In this libertarian view, the role of government is to protect the public from predation, but otherwise to allow people to engage in any conduct they choose so long as it does not directly harm others.

This might sound similar to the free enterprise model — and surely there is overlap — but the motivation here is actually quite different. The libertarian view is that marijuana should be widely available to individuals, whether through a regulated market or outside of it. To see the difference, consider the question of home cultivation. The ability to produce marijuana at home was written into Colorado's Amendment 64 but was explicitly prohibited in Washington State's Initiative 502 — citizens in that state may possess marijuana, but only if it was obtained from a government-licensed store. While one concerned about markets might argue that home-cultivation threatens a well-regulated market for marijuana by creating the potential of a black market, a libertarian might argue that at the very core of the right to consume marijuana is the right to produce it oneself.

¹⁰⁸ Emily Dufton, *The War on Drugs: Should It Be Your Right to Use Narcotics?*, ATLANTIC (Mar. 28, 2012), <http://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-should-it-be-your-right-to-use-narcotics/254317/>. Dufton notes that the right to be left alone is not an inherently left wing notion: "The right to consume drugs wasn't monopolized by the left, however. Others, particularly libertarian psychiatrist Thomas Szasz and renowned neoliberal economist Milton Friedman, have supported rights-driven drug use by citing the free market to support their claims." *Id.*

E. Finding the Right Mix

These goals both overlap with and contradict one another: A policy that might further revenue generation might be bad for harm reduction; the principle of harm reduction could be used to justify both sides of a particular issue. In practice, any policy solution will require a compromise between and among various policy motivations; it is hard to imagine any plausible regulation that would be motivated by an unalloyed desire for revenue, for example, or one that was so focused on harm reduction that it recreated many of the problems of prohibition itself.

CONCLUSION

This essay has been long on possibility and short on solutions. My point throughout has not been to dictate or event necessarily to suggest how the federal government should regulate marijuana in the years to come. Rather, my goal was far more modest. I have endeavored to show that prohibition does not have an on/off switch; very soon Congress will be forced to answer the question not whether to remove the federal prohibition but how to do so. In order to answer that question, it is important for policy-makers to pause and consider what they hope to achieve by regulating marijuana. It is only by thinking clearly about these issues from a remove that we can hope to achieve a sensible policy outcome in the years to come.