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# Our Federalism on Drugs

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

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

### *Abstract*

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

## **Our Federalism on Drugs**

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

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

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

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

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

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

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

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

For the most part, federal agencies have not shown much interest in interfering with state-level reforms. In a series of memoranda issued during the Obama administration, the Department of Justice (DOJ) sought to clarify federal enforcement priorities, deemphasizing federal enforcement in states where marijuana possession is legal for some or all purposes. In 2009, Deputy Attorney General David Ogden issued a memorandum indicating that the Justice Department would focus its enforcement efforts on the production and distribution of marijuana in an effort to curb trafficking, but would not devote significant resources to pursue those who used or possessed marijuana in compliance with state laws allowing the use and possession of marijuana for medicinal purposes.<sup>17</sup> A follow-up memorandum issued by Ogden’s successor, James Cole, reaffirmed that, while the Justice Department was clarifying its enforcement

priorities, the possession, cultivation, and distribution of marijuana remained illegal under federal law.<sup>18</sup>

After Colorado and Washington voters passed their respective marijuana legalization initiatives, the Justice Department maintained this position. In August 2013, Deputy Attorney General Cole announced that the department would make no effort to block the implementation of either initiative, nor was it the federal government’s position that state-level regulations of marijuana were preempted by the CSA.<sup>19</sup> According to this memorandum, it was the Justice Department’s view that the cultivation, distribution, sale, and possession of marijuana in compliance with state laws was “less likely to threaten” federal priorities, such as curbing interstate trafficking and preventing youth access. So long as this assumption holds, the second Cole memorandum explained, “enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.”<sup>20</sup> Meanwhile, the DEA denied multiple petitions to reschedule marijuana under the CSA and ease its treatment under federal law.<sup>21</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Striking a Balance**

Questions about the proper balance between federal and state government have endured since the nation's founding. Marijuana policy is just the latest battleground in this longstanding conflict. It is also an issue that could cut across traditional right-left political lines.

Drug policy reform is often seen as a “liberal” issue. Conservatives are expected to be “tough on crime,” and voters who support marijuana legalization are more likely to support Democratic political candidates. Yet many Democrats continue to oppose changes to marijuana laws,<sup>37</sup> and it is those on the political right who are more likely to call for allowing states to deviate from one-size-fits-all federal policies. On everything from environmental regulation to education policy, Republican officeholders often argue that individual states should be free from federal interference to adopt their own policy priorities.

In December 2014, Nebraska and Oklahoma both filed suit seeking to force the preemption of Colorado's Amendment 64. Both these states have been active champions of state prerogatives, regularly challenging federal regulatory initiatives in other policy areas. Here, however, the two states sought federal support to suppress Colorado's experiment with marijuana, arguing that Colorado's decision to allow a legal market in

marijuana threatened to impose a nuisance on neighboring jurisdictions.<sup>38</sup> Colorado's experience to date, however, suggests that state governments are capable of effectively regulating intrastate marijuana markets.<sup>39</sup>

Some of the more difficult legal questions confronting state efforts to legalize marijuana involve the intersection between state law and the existing federal prohibition. Even if the federal government decides to scale back marijuana law enforcement in non-prohibition states, federal law remains federal law and it continues to have an effect. Banks, attorneys, and others are bound to respect federal law even in the absence of conforming state laws, as the legalization of a product by state law does not eliminate the federal prohibition.<sup>40</sup> Legalizing the possession and use of marijuana by adults poses the risk that marijuana will become more accessible to juveniles.<sup>41</sup> Just as some states may disagree with federal prohibition, some localities may disagree with their states' marijuana policy decisions, raising the question of whether marijuana federalism should become marijuana localism.<sup>42</sup>

The federal government has a legitimate interest in controlling interstate drug trafficking, but no particular interest in prosecuting those who seek to provide medical marijuana to local residents pursuant to state law. So it only makes sense for the Justice Department to tell federal prosecutors to focus their efforts on those who are not in compliance with state law, such as those who use medical marijuana distribution as a cover for other illegal activities, particularly interstate drug trafficking. California should be free to set its own marijuana policy, but the federal government retains an interest in preventing California's choice from adversely affecting neighboring states.

One possibility is for the federal government to treat marijuana like alcohol, retaining a federal role in controlling illegal interstate trafficking but leaving each state entirely free to set its

own marijuana policy, whether it be prohibition, decriminalization, or somewhere between.<sup>43</sup> Another alternative would be for the federal government to offer states waivers or enter into cooperative agreements with states that seek to adopt alternative approaches to marijuana policy.<sup>44</sup>

When alcohol prohibition was repealed, states retained the ability to prohibit or regulate alcohol, and the federal government focused on supporting state-level preferences by prohibiting interstate shipment of alcohol in violation of applicable state laws. There is no clear reason why a similar approach to marijuana would be less effective, though any such step would require legislative reform.

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

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

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

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

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

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

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

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

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

## Endnotes

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

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

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

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

<sup>5</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–889 (2006)). For a brief history, see John Hudak, *Marijuana: A Short History* (Washington, DC: Brookings Institution Press, 2016).

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

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

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

<sup>9</sup> 28 U.S.C. §280E.

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

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

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

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

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

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

<sup>16</sup> See *Printz v. United States*, 521 U.S. 898 (1997) (the federal government may not “commandeer” state and local governments to implement or enforce federal law); *New York v. United States*, 505 U.S. 144 (1992) (the federal government may not force a state to legislate in accord with federal policy).

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

<sup>18</sup> Memorandum from James M. Cole, Deputy Attorney General, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, June 29, 2011 ([www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf](http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf)).

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

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

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

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

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

<sup>24</sup> See Alex Kreit, “Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms,” *Chapman Law Review* 13 (2010), pp. 555–56 (“when it comes to federal drug law, traditional debates about prohibition, legalization, or decriminalization turn out to be surprisingly unimportant. Instead, as states begin to enact new policies the key question facing federal lawmakers and administration officials will be how to harmonize federal law with state reforms”).

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

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

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

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

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

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

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

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

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

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

<sup>35</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system, that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# OWNING MARIJUANA

John G. Sprankling\*

## ABSTRACT

*Legal marijuana is the fastest-growing industry in the United States. Tens of thousands of new businesses have arisen to meet the demand created by over 34 million Americans who use marijuana. And the millions of pounds of marijuana grown, processed, and sold this year will generate more than \$11 billion in revenue. This industry is premised on the assumption that marijuana ownership will be protected by law. But can marijuana be owned? This Article is the first scholarship to explore the issue.*

*Federal law classifies marijuana as contraband per se in which property rights cannot exist. Yet the Article demonstrates that marijuana can now be owned under the law of most states, even though no state statute or decision expressly addresses the issue. This conflict presents a fundamental question of federalism: Can property rights exist under state law if they are forbidden by federal law? The Article explains why federal law does not preempt state law on marijuana ownership.*

*This creates a paradox: state courts and other state authorities will protect property rights in marijuana, but their federal counterparts will not. The Article analyzes the challenges that this hybrid approach to marijuana ownership poses for businesses and individuals. It also examines the fragmented status of marijuana ownership in the interstate context, where business transactions involve states with conflicting approaches to the issue.*

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## INTRODUCTION

A plans to divorce B, who operates a marijuana<sup>1</sup> store, and obtain a share of B’s marijuana in the dissolution proceeding. C intends to make a loan to D that is secured by an interest in D’s marijuana. E sues F for damages after F negligently burns E’s marijuana crop. These hypothetical situations all present the same question: Can marijuana be owned?

The traditional answer was “no” because federal and state laws uniformly criminalized the possession and transfer of marijuana.<sup>2</sup> The question arises today because thirty states have now legalized these actions, although they are still illegal under federal law.<sup>3</sup> Yet no case or statute expressly addresses the issue. The legalization tidal wave has generated extensive scholarship on the criminal and constitutional issues that it poses.<sup>4</sup> But less attention has been

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<sup>1</sup> Marijuana consists of leaves, buds, and other parts of the plant *Cannabis sativa* L. 21 U.S.C. § 802(16) (2012). Accordingly, some authorities refer to it as “cannabis.” However, this Article uses the term “marijuana” because this word is more commonly used in U.S. law at present. This Article examines property rights in marijuana itself and, by extension, in products that contain marijuana or its active ingredient, tetrahydrocannabinol. *See infra* note 52. Thus, all references to “marijuana” include both marijuana and marijuana products unless the context indicates otherwise.

<sup>2</sup> Marijuana is considered to be contraband per se under federal law. As a result, it is subject to seizure by federal authorities without any payment or judicial process. *See infra* text accompanying notes 60-73.

<sup>3</sup> *See infra* text accompanying notes 76, 80. States that have legalized marijuana, either for medical use or for all purposes, are collectively referred to in this Article as “legalization states,” while those that continue to criminalize it are referred to as “ban states.” States that have legalized marijuana for all purposes are referred to as “full legalization states,” while those that have legalized it only for medical purposes are referred to as “medical marijuana states”.

<sup>4</sup> *See, e.g.*, Lea Brilmayer, *A General Theory of Preemption: With Comments on State Decriminalization of Marijuana*, 58 B.C. L. REV. 895 (2017); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015); Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 WASH. & LEE L. REV. 779 (2018); Don Stemen, *Beyond the Wars: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL’Y REV. 375 (2017).

devoted to exploring how legalization affects relationships among private actors. This Article is the first scholarship to explore whether marijuana can be owned.<sup>5</sup>

The distinction between property and nonproperty is fundamental. As a general matter, the law protects property—such as rights in a home—from interference by private parties or government actors. By definition, nonproperty receives no protection. Yet the determination of what constitutes property is traditionally governed by state law, not federal law.<sup>6</sup> Legalization naturally leads to the questions of whether property rights in marijuana can arise under state law and, if so, to what extent the federal government and other states must respect those rights.

These issues are important because legal marijuana is the fastest-growing industry in the United States.<sup>7</sup> Over 34 million American adults use marijuana regularly,<sup>8</sup> and thousands of new businesses have arisen to serve their needs.<sup>9</sup> The revenue from legal marijuana sales is estimated to be more than \$11 billion in 2018, and is projected to almost double by 2021.<sup>10</sup> Yet the legal marijuana industry is premised on the assumption that marijuana ownership will be protected by state law—despite the looming threat posed by contrary federal law. If property rights in marijuana cannot exist this industry will eventually die, harming millions of Americans.

This Article demonstrates that marijuana can be owned under state law, despite conflicting federal law. More broadly, it explores a fundamental issue in our federal system—the respective roles of federal and state governments in defining “property”—and provides a template for navigating future conflicts of this kind.

Part I of this Article examines the background doctrines that shape the analysis of property rights in marijuana: the positivistic view that “property” consists of legally-protected rights, not things, and the traditional primacy of state law in defining property rights.

Part II demonstrates that that property rights in marijuana do exist in legalization states pursuant to state law, but not under federal law. Broadly speaking, marijuana can be owned within certain parameters as a matter of state law. The Article then explores the uneasy tension between federal and state law on the issue, and analyzes the challenges arising from this hybrid approach to marijuana ownership.

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<sup>5</sup> This Article does not address property rights in land, vehicles, aircraft, equipment, and other assets that are used in connection with marijuana cultivation, processing, or sale. Such items are classified as derivative contraband under federal law, not contraband per se. *See infra* text accompanying notes 49, 50.

<sup>6</sup> *See infra* text accompanying notes 24-41.

<sup>7</sup> Chris Bennett, *Marijuana Farming Is Now for US Agriculture*, Jan. 8, 2018, available at <https://www.agweb.com/article/marijuana-farming-is-now-for-us-agriculture-naa-chris-bennett/>.

<sup>8</sup> Yahoo News/Marist Poll, *Weed & The American Family*, Apr. 17, 2017, available at [http://maristpoll.marist.edu/wp-content/misc/Yahoo%20News/20170417\\_Summary%20Yahoo%20News-Marist%20Poll\\_Weed%20and%20The%20American%20Family.pdf](http://maristpoll.marist.edu/wp-content/misc/Yahoo%20News/20170417_Summary%20Yahoo%20News-Marist%20Poll_Weed%20and%20The%20American%20Family.pdf). This survey finds that 34,688,319 Americans who are 18 or older use marijuana “regularly,” defined as “at least once or twice a month.” *Id.*

<sup>9</sup> Roger Vincent, *As pot growers cash in, so does L.A. landlord*, L.A. TIMES, Mar. 31, 2018, available at 2018 WLNR 9741858.

<sup>10</sup> Aaron Smith, *The U.S. legal marijuana industry is booming*, CNN MONEY, Jan. 31, 2018, available at <https://money.cnn.com/2018/01/31/news/marijuana-state-of-the-union/>.

Part III examines the fragmented status of marijuana property in the interstate context. Marijuana property conflicts may arise from relationships or transactions that involve both a legalization state and a ban state. This poses the risk that the ban state may undercut the property rights that exist in the legalization state. The Article analyzes how contract clauses, choice-of-law principles, and comity can be used to minimize this risk.

Finally, Part IV explores how potential permanent solutions to the marijuana debate may affect property rights. If legislation were adopted to legalize marijuana at the national level, regardless of conflicting state laws, it should be given retroactive effect. Under the more likely reform—where each state may choose whether to legalize marijuana—ban states should be required to respect marijuana property located in legalization states.

## I. PROPERTY AND FEDERALISM

### A. *The Bundle of Rights Metaphor*

The American property system is founded on legal positivism.<sup>11</sup> As Jeremy Bentham famously remarked: “Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”<sup>12</sup> Thus, “property” consists of legal rights concerning things that are enforced by government.<sup>13</sup> If government will protect a person’s rights in relation to a particular thing, the person has “property.” Conversely, if government will not protect such rights, the person has no “property.”

The scope of governmental protection for property rights has two dimensions: vertical and horizontal. The vertical dimension deals with the relationship between government actors and private actors; it bars government actors from unduly interfering with private property, even though regulation is permitted to a certain degree pursuant to the police power.<sup>14</sup> For example, the Fifth Amendment prohibits government from confiscating private property unless this serves a public purpose and just compensation is paid.<sup>15</sup> The horizontal dimension, in contrast, concerns the role that government plays in regulating relationships among private actors. Here government prevents private actors from interfering with the property rights of others or resolves conflicts among claimants to such property.

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<sup>11</sup> See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 4-5 (4<sup>th</sup> ed. 2017).

<sup>12</sup> JEREMY BENTHAM, THE THEORY OF LEGISLATION 69 (Oceana Publications, Inc. 1975) (1802). See also Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954) (“That is property to which the following label can be attached. To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The State.”).

<sup>13</sup> Nonlawyers regularly use the term “property” to refer to a thing. SPRANKLING, *supra* note 11, at 4. Judges, lawyers, legislators, and law professors also sometimes use the term in this everyday sense, as a shorthand reference for legally-protected rights in relation to a thing. For the purposes of this Article, I use the term in its technical sense. Thus, “marijuana property” as used herein means legal rights in relation to marijuana and marijuana products. Some scholars, however, have criticized the view that property consists of rights. See generally Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

<sup>14</sup> As Justice Holmes acknowledged in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), “to some extent values incident to property . . . are enjoyed under an implied limitation and must yield to the police power.”

<sup>15</sup> U.S. CONST. amend. V, § 3.

The definition of “property” in a legal sense presents two questions: What rights can a person have in relation to a thing? and What things may be the object of these rights?<sup>16</sup> The conventional answer to the first question is the bundle of rights metaphor. Courts and scholars routinely define the “bundle of rights that are commonly characterized as property”<sup>17</sup> as including the right to possess, the right to use, the right to exclude, and the right to transfer.<sup>18</sup>

Similarly, the standard answer to the second question is simple, if unsatisfying: property rights may exist in any thing except to the extent that some special prohibition exists. In other words, the baseline assumption in our system is that property rights may exist in virtually any type of thing, including land and buildings affixed to land, intangibles, and tangible objects.<sup>19</sup> The exceptions to this principle usually arise from major policy concerns, such as prohibiting property rights due to risks of widespread public injury (e.g., counterfeit money),<sup>20</sup> moral values (e.g., human beings),<sup>21</sup> or democratic values (e.g., votes).<sup>22</sup>

The logical consequence of the bundle of rights metaphor is that if the law prohibits a person from holding the core property rights in a particular thing—such as marijuana—then that person has no property in that thing. Conversely, if no governing law contains such a prohibition, then the thing may be owned.

### B. *State Primacy in Defining Property*

The boundary between property and nonproperty becomes blurred where state and federal laws differ about the categories of things in which property rights may exist.

Dual sovereignty is the heart of federalism. Both the federal government and the state government may exercise sovereign authority over certain activities within the state’s territory. This poses the risk that each may define property in a somewhat different manner. But it is well-settled that the definition of property—including the things in which property rights may exist—is usually determined by state law.<sup>23</sup> As the Supreme Court observed in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, “[g]enerally speaking, state

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<sup>16</sup> SPRANKLING, *supra* note 11, at 4.

<sup>17</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

<sup>18</sup> *See, e.g., Horne v. Dept. of Agric.*, 135 S. Ct. 2419, 2428 (2015) (observing that a government program eliminated “the entire ‘bundle’ of property rights in the appropriated raisins—‘the rights to possess, use and dispose of’ them”) (quoting *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419, 435 (1982)). *See also* SPRANKLING, *supra* note 11, at 7-9 (discussing rights in bundle).

<sup>19</sup> SPRANKLING, *supra* note 11, at 10-12.

<sup>20</sup> Counterfeit money is contraband per se, in which no property rights can exist. *See infra* notes 44-48.

<sup>21</sup> *Convention to Suppress the Slave Trade and Slavery*, arts. 1(1), 2(b), Sept. 25, 1926, 60 L.N.T.S. 253.

<sup>22</sup> Every state prohibits the sale of votes. *See* Rebecca Murray, Note, *Voteauction.net: Protected Free Speech or Treason?*, 5 J. HIGH TECH L. 357, 357 n. 51 (2005) (collecting state statutes).

<sup>23</sup> *See* Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 494 (2000) (“Property simply does not exist in the absence of state law.”); Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 84 (“[T]he content of property rights is determined by state law.”); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 257 (2004) (“Property rights are the product of positive state law.”).

law defines property interests . . . .”<sup>24</sup> Similarly, in *Giles v. California* the Court stressed that “States may allocate property rights as they see fit.”<sup>25</sup>

The principle that property rights arise from the states, not from the national government, is a core component of the federal system that the Framers envisioned.<sup>26</sup> The foundation of international law is that each nation-state has sovereignty over its own territory and, accordingly, has the exclusive right to adopt laws governing how private actors use that territory, including laws governing property rights.<sup>27</sup> In a broad sense, the Framers envisioned each former colony as a separate “state,” with a high degree of sovereignty over its territory. Thus, each state was empowered to craft its own laws governing property, which might differ to some extent.<sup>28</sup> This allocation of authority made practical sense in the era, when the principal source of wealth was real property—which by definition was permanently located within state borders—and chattels or other forms of personal property that usually remained within such borders as well.

As James Madison explained in *The Federalist*:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and infinite. . . . The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and *properties of the people* . . . .<sup>29</sup>

The Framers structured a national legislature with limited powers.<sup>30</sup> These did not include the power to define property rights except in two areas: patents and copyrights;<sup>31</sup> and “Legislation in all Cases whatsoever” for the future District of Columbia and “like Authority” over forts and similar federal installations, which would presumably include property rights in these regions.<sup>32</sup> The Tenth Amendment specifically provided that “[t]he powers not delegated” to the federal government—including the power to define property rights in most instances—were “reserved to the States respectively, or to the people.”<sup>33</sup>

Under the Constitution, then, the states were clearly to have the dominant role in the horizontal dimension of property rights: how government protection of property mediates relationships among private actors.<sup>34</sup> For example, state law regulates the manner in which

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<sup>24</sup> 560 U.S. 702, 707 (2010).

<sup>25</sup> 554 U.S. 353, 375 (2008). *See also* *Butner v. United States*, 440 U.S. 48, 55 (1979) (“[P]roperty interests are created and defined by state law.”).

<sup>26</sup> U.S. CONST. amend X.

<sup>27</sup> JOHN G. SPRANKLING, *THE INTERNATIONAL LAW OF PROPERTY* 3 (2014).

<sup>28</sup> U.S. CONST. amend. X.

<sup>29</sup> *THE FEDERALIST* NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). The Supreme Court quoted this language with approval in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

<sup>30</sup> U.S. CONST. art. III, § 8.

<sup>31</sup> *Id.* art. I, § 8, cl. 8.

<sup>32</sup> *Id.* cl. 17.

<sup>33</sup> *Id.* amend. X.

<sup>34</sup> The principal exceptions are (1) patents and copyrights; (2) property rights on federal installations; and (3) bankruptcy. By regulating patents and copyrights, federal law effectively supersedes conflicting state laws dealing with intellectual property and thus precludes states from creating such rights. *See supra* note 31. Similarly, property

property may be acquired in various transactions, including gifts, purchases, leases, and security interests. It protects property from interference by non-owners, in contexts ranging from enforcing the right to exclude to providing a remedy for property damage. And it determines how property is divided among families (e.g., at divorce or death) and business owners (e.g., at the dissolution of a partnership or the partition of a cotenancy). All of these examples and many others are governed by how the relevant state defines property. In practice, as the Framers envisioned, the vast majority of property law today is state law—as an examination of any property law treatise will demonstrate.<sup>35</sup>

The respective roles of federal and state laws in defining the vertical dimension of property rights—the relationship between governments and private actors—are less clear. There is no body of general federal property law. Thus, the vertical dimension is largely the province of specialized bodies of law other than property law, such as constitutional law, criminal law, or tax law.<sup>36</sup> The definition of property is important in the application of these doctrines, but they are not viewed as property law.

Certainly, the Framers were concerned that the federal government might interfere with state-created property rights. In this light, the property-related provisions of the Bill of Rights can be seen as attempts to restrict such interference—largely in reaction to the conduct of the British government in infringing colonial property rights before American independence.<sup>37</sup> For example, the Second Amendment bars the federal government from infringing the right to “keep and bear Arms,”<sup>38</sup> while the Third Amendment prohibits it from interfering with the right to possess real property by quartering troops “in any house.”<sup>39</sup> More broadly, the Fifth Amendment restricts the federal government from depriving an owner of property absent due process, a “public use” for the property, and payment of just “compensation.”<sup>40</sup> Even in applying these constitutional protections, however, federal courts usually defer to state law in defining the scope of property.<sup>41</sup>

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rights on federal installations are exclusively governed by federal law. *See supra* note 32. Finally, the power of Congress to establish bankruptcy laws necessarily means that federal law will impact state-created property rights of creditors. U.S. CONST., art I, § 8, cl. 4.

<sup>35</sup> *See, e.g.*, JOSEPH WILLIAM SINGER, PROPERTY (5<sup>th</sup> ed. 2016); WILLIAM STOEBCUK & DALE WHITMAN, LAW OF PROPERTY (3d ed. 2000).

<sup>36</sup> *See, e.g.*, *Drye v. United States*, 538 U.S. 30, 58 (1999) (“We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer’s state-delineated rights qualify as ‘property’ or ‘rights to property’ within the compass of the federal tax lien legislation.”).

<sup>37</sup> For an analysis of the property-related provisions of the Bill of Rights, see BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 102-20 (2001).

<sup>38</sup> U.S. CONST. amend. II. The Framers were aware that James II had attempted to expand the Catholic influence in England by seizing weapons from Protestants in the mid-1600s; the 1689 English Declaration of Rights, which expressly protected the right to bear arms in response to these seizures, was the forerunner of the Second Amendment. *See* *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008).

<sup>39</sup> U.S. CONST. amend. III. The British violated the traditional property rights of American owners by quartering troops in private homes, one of the abuses chronicled in the Declaration of Independence; this experience prompted adoption of the Third Amendment. *See* Thomas G. Sprankling, Note, *Does Three Equal Five? Reading the Takings Clause in Light of the Third Amendment’s Protection of Houses*, 112 COLUM. L. REV. 112, 124-29 (2012).

<sup>40</sup> U.S. CONST. amend. V, §§ 2, 3.

<sup>41</sup> *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000) (discussing the definition of “property” for purposes of the Constitution).

More recently, particularly with the rise of the modern regulatory state after World War II, actions taken by the federal government have increasingly affected state-created property rights.<sup>42</sup> In particular, federal statutes adopted under the authority of the Commerce Clause that primarily deal with subjects other than property sometimes affect property rights. For example, federal environmental statutes constrain—and in some situations effectively nullify—property rights arising under state law, primarily in the interest of protecting public health or endangered species.<sup>43</sup>

Further—and directly related to this Article—federal criminal statutes governing activities linked to interstate commerce also affect state-created property rights. Federal law classifies certain things as contraband per se: objects that are “intrinsically illegal in character,” “the possession of which, without more, constitutes a crime.”<sup>44</sup> An object is considered to be contraband per se “if there is no legal purpose to which the object could be put.”<sup>45</sup> Marijuana is classified as contraband per se under federal law.<sup>46</sup> The classification of an object as contraband per se directly affects property rights, particularly in the context of forfeiture to the government.<sup>47</sup> In general, property rights cannot exist in contraband per se. Accordingly, the federal government may seize such contraband at any time without infringing the possessor’s rights under the Constitution. In this context, the Fifth Circuit concluded in *Cooper v. City of Greenwood* that “one cannot have a property right in that which is not subject to legal possession.”<sup>48</sup>

The counterpart to contraband per se is derivative contraband—“items which are not inherently unlawful but which may become unlawful because of the use to which they are put—for example, an automobile used in a bank robbery.”<sup>49</sup> Because a property interest in such an item “is not extinguished automatically if the item is put to unlawful use, forfeiture of such an item is permitted only as authorized by statute” consistent with due process.<sup>50</sup>

## II. STATE V. FEDERAL GOVERNMENT: RECOGNIZING MARIJUANA PROPERTY

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<sup>42</sup> See generally JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 142-71 (3d ed. 2008) (discussing property rights and the modern regulatory state).

<sup>43</sup> For example, the Endangered Species Act, 16 U.S.C. §§ 1531-44 (2012), may effectively bar the development of certain private lands. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Oregon*, 515 U.S. 687 (1995) (upholding regulation issued pursuant to Endangered Species Act that prevented logging of certain old grown forests).

<sup>44</sup> *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699-700 (1965).

<sup>45</sup> *United States v. Harrell*, 530 F.3d 1051, 1057 (9<sup>th</sup> Cir. 2008).

<sup>46</sup> See *Gonzales v. Raich*, 545 U.S. 1, 27 (2005) (“The CSA designates marijuana as contraband for *any* purpose.”) (emphasis in original). See also *Schmidt v. County of Nevada*, No. 2:10-CV-3022FCD/EFB, 2011 WL 2967786, at \*6 (July 19, 2011 E.D. Cal.) (holding that the plaintiff had no “property interest” in marijuana because it is “undisputably illegal and contraband per se”).

<sup>47</sup> Although marijuana is contraband per se, it is still considered to be “property” for the purpose of prosecuting property crimes such as robbery or theft. See, e.g., *Taylor v. Phillips*, No. 05-CV-2596, 2016 WL 5678582 (Sept. 30, 2016 E.D.N.Y.); *Iowa v. Turner*, 900 N.W.2d 616 (Iowa Ct. App. 2017).

<sup>48</sup> 904 F.2d 302, 304 (5<sup>th</sup> Cir. 1990). See also *Bacon v. United States*, No. 2-13-CV-392, 2014 WL 12531093, at \*2 (Sept. 22, 2014 S.D. Tex.) (“A person may not claim a property interest in property he has no legal right to possess because the possession of the property is illegal.”).

<sup>49</sup> *Cooper*, 904 F.2d at 305.

<sup>50</sup> *Id.* See also *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 485 (6<sup>th</sup> Cir. 1993).

### A. *The Property-Nonproperty Boundary*

For decades, federal and state laws uniformly criminalized the possession or transfer of marijuana.<sup>51</sup> It was deemed to be contraband per se in which property rights could not exist. As a result, it could be confiscated at any time by federal or state officials without compensation. But the modern legalization of marijuana by most states challenges this approach. Today either property rights cannot exist in marijuana at all, or such rights can exist under the laws of legalization states but not under federal law or the laws of ban states.

Millions of Americans use marijuana for medical treatment or recreation. And the legalization wave has produced tens of thousands of new marijuana businesses, including growers, manufacturers, processors, and retailers.<sup>52</sup> These businesses all routinely utilize large quantities of marijuana.<sup>53</sup> For example, California growers alone produce 13.5 million pounds of marijuana each year.<sup>54</sup> Without legally-protected property rights in marijuana, these businesses could not exist—and millions of Americans would be deprived of the legal ability to obtain marijuana.

Consider hypothetical farmer G, who holds a license to cultivate marijuana in a legalization state. In order to carry on her business, G's rights to possess marijuana and exclude others from its possession must be recognized. Otherwise, government officials or ordinary citizens could seize G's marijuana without payment. Similarly, G's right to sell or otherwise transfer her crop must be protected. As Richard Posner concludes, "without property rights there is no incentive" for a farmer to plant and nurture her crop "because there is no reasonably assured reward" for doing so.<sup>55</sup>

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<sup>51</sup> See *infra* text accompanying notes 60-69, 74. See generally MARK K. OSBECK & HOWARD BROMBERG, *MARIJUANA LAW IN A NUTSHELL* 71-87 (2017) (discussing federal and states laws that criminalize the possession and transfer of marijuana). However, "marijuana was legal to grow and consume" in all states until the early twentieth century, when some jurisdictions began to criminalize it. Chemerinsky et al., *supra* note 4, at 81.

<sup>52</sup> Marijuana stores and dispensaries in full legalization states commonly sell both marijuana itself and various marijuana products. These products may include marijuana concentrates (e.g., oils and waxes), infusions into other types of products (e.g., lotions, pills, and shampoos), and edibles. John Campbell & Sahib Singh, *Budding Torts: Forecasting Emerging Tort Liability in the Cannabis Industry*, 30 *LOY. CONSUMER L. REV.* 338, 346-48 (2018). Examples of edibles include "rice crispy treats, lollipops, lemonade, butter, cookies, cooking oils, agave nectar, caramels, and even bacon cheddar biscuits." Mystica M. Alexander & William P. Wiggins, *The Lure of Tax Revenue from Recreational Marijuana: At What Price?*, 15 *U.C. DAVIS BUS. L.J.* 131, 159 (2015).

<sup>53</sup> A single store or dispensary may sell thousands of pounds of marijuana per year. See, e.g., Susan K. Livio, *2017 was banner year for medical marijuana*, *STAR-LEDGER*, May 23, 2018, available at 2018 WLNR 15375272 (noting that one New Jersey dispensary sold 2,302 pounds in 2017). Further, one farm can produce tens of thousands of pound of marijuana per year. See, e.g., Daniel Smithson, *New medical pot protections praised by industry advocate*, *ORLANDO SENTINEL*, Apr. 2, 2018, available at 2018 WLNR 9886420 (describing a Florida facility that will produce 27,000 pounds per year).

<sup>54</sup> *Pushing pot back into the shadows*, *ORANGE CNTY. REGISTER*, Nov. 12, 2017, available at 2017 WLNR 33285232.

<sup>55</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 40 (9<sup>th</sup> ed. 2014).

The legal marijuana industry is premised on the apparent belief that property rights in marijuana will be protected by law.<sup>56</sup> For example, the industry assumes that: contracts concerning marijuana such as insurance policies, leases, loans agreements, and purchase agreements will be enforced; marijuana will be viewed as an asset that corporations, partnerships, trusts, and other entities may legally hold; courts will provide a remedy against tortious conduct that damages marijuana; and investments in marijuana and marijuana-related businesses will be respected.<sup>57</sup>

Yet, as discussed below, the question of marijuana ownership presents a paradox. Under our tradition that state law defines property rights, marijuana can be owned under state law in legalization states.<sup>58</sup> Thus, state law prohibits third parties or the state itself from illegally interfering with farmer G's marijuana. But under federal law, marijuana is contraband per se that cannot be owned.<sup>59</sup> As a result, federal authorities may seize G's marijuana at any time without judicial process or payment of compensation. The result is legal schizophrenia: G owns marijuana (under state law) but does not own marijuana (under federal law).

#### B. Federal Law: *The Controlled Substances Act*

Federal regulation of marijuana is based on the Controlled Substances Act of 1970 (CSA), a comprehensive public health statute that covers hundreds of drugs.<sup>60</sup> Today many authorities believe that marijuana poses little or no risk to human health and in fact has substantial medical value.<sup>61</sup> However, it is still officially classified as a Schedule I drug, meaning that it “has a high potential for abuse,” “has no currently accepted medical use,” and

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<sup>56</sup> It is axiomatic that every business in a market economy relies on enforcement of property rights. *See, e.g.*, Barry R. Weingast, *Capitalism, Democracy, and Counter-majoritarian Institutions*, 23 SUP. CT. ECON. REV. 255, 256-57 (2015).

<sup>57</sup> Yet under the federal Controlled Substances Act, the federal government is empowered to seize marijuana as contraband per se, without judicial process or payment of compensation. *See infra* text accompanying notes 71-72. Thus, marijuana businesses and their customers face the risk that their marijuana, which is legal under state law, may nonetheless be forfeited to the federal government. However, to date the federal government has not generally exercised this authority in connection with sales that are legal under state law. *See infra* text accompanying notes 125-33. Presumably, the participants in the legal marijuana industry believe that the federal government will continue this policy.

<sup>58</sup> *See infra* text accompanying notes 76-78.

<sup>59</sup> *See infra* text accompanying notes 66-73.

<sup>60</sup> 21 U.S.C. §§ 801-904 (2012). The CSA uses the term “marihuana,” which is defined as “all parts of the plant *Cannabis sativa L.*,” its seeds, its resin, “and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin,” with limited exceptions such as stalks or fibers. 21 U.S.C § 802(16) (2012). This definition accordingly includes products that contain marijuana or its active ingredient, tetrahydrocannabinol.

<sup>61</sup> *See OSBECK & BROMBERG, supra* note 51, at 404-14 (summarizing research on health effects).

“[t]here is a lack of accepted safety for use of the drug.”<sup>62</sup> Examples of other Schedule I drugs include ecstasy,<sup>63</sup> heroin,<sup>64</sup> and LSD.<sup>65</sup>

The CSA imposes criminal penalties for the possession or transfer of any Schedule I drug, including marijuana. Section 844 provides that it “unlawful for any person knowingly or intentionally to possess a controlled substance” such as marijuana, regardless of the amount involved or the purpose for the possession; the penalty for a first offense is imprisonment for up to a year and/or a fine of at least \$1,000.<sup>66</sup> Further, under section 841 it is unlawful for anyone to either “possess” marijuana “with intent . . . to distribute” it or to “distribute” it, regardless of amount.<sup>67</sup> In this context, “distribute” means “to deliver (other than by administering or dispensing) a controlled substance.”<sup>68</sup> This language is broad enough to encompass any intentional transfer of marijuana by one person to another, whether by gift, sale, or otherwise. The penalty for distributing 1,000 kilograms of marijuana is imprisonment for ten years or longer and/or a fine of up to \$50 million.<sup>69</sup>

Since the mere possession or transfer of marijuana is illegal under the CSA, the argument logically follows that marijuana is contraband per se that cannot be the subject of property rights under federal law, and this is the conventional view. As a federal court explained in *Schmidt v. County of Nevada*, “[u]nder the Controlled Substances Act . . . it is illegal for any private person to possess marijuana . . . [and, accordingly] under federal law marijuana is contraband per se, which means that no person can have a cognizable legal interest in it.”<sup>70</sup>

This result is consistent with the traditional view that property consists of legal rights in relation to a particular thing. The CSA expressly precludes the rights to possess or transfer marijuana, as shown above. In practice, it also eliminates the rights to use and exclude. It is impossible for anyone to use a tangible object that cannot be possessed. Similarly, a person who has no right to possess such an object cannot protect her possession against intrusions by third

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<sup>62</sup> 21 U.S.C. § 812(c), Sched. I(c)(10) (2012). There is widespread agreement that marijuana is not as dangerous as other drugs listed in Schedule I. For example, in *United States v. Kiefer*, 477 F.2d 349, 356 (2<sup>nd</sup> Cir. 1973), the Second Circuit noted that “[i]t is apparently true that there is little or no basis for concluding that marihuana is as dangerous a substance as some of the other drugs included in Schedule I.” Yet in *United States v. Pickard*, 100 F. Supp. 3d 981, 1009 (E.D. Cal. 2015), the court refused to find that “its placement on Schedule I is so arbitrary or unreasonable as to render it unconstitutional.” There is evidence that long-term marijuana use can cause adverse health effects. See GERALD F. UELMEN & ALEX KREIT, 1 DRUG ABUSE AND THE LAW SOURCEBOOK § 3:75, Dec. 2017 Update.

<sup>63</sup> 21 U.S.C. § 812(c)(1) (2012).

<sup>64</sup> *Id.* § 812(b)(10).

<sup>65</sup> *Id.* § 812(c)(9).

<sup>66</sup> *Id.* § 844(a).

<sup>67</sup> *Id.* § 841(a)(1).

<sup>68</sup> *Id.* § 802(11).

<sup>69</sup> *Id.* § 841(b)(1)(A).

<sup>70</sup> No. 2:10-CV-3022FCD/EFB, 2011 WL 2967786, at \*5 (July 11, 2011 E.D. Cal.). See also *Barrios v. Cnty. of Tulare*, No. 1:13-CV-1665, 2014 WL 2174746, at \*5 (May 23, 2014 E.D. Cal.) (“Because marijuana is contraband under federal law, Barrios had no property interest in the marijuana that was protected by the Fourteenth Amendment due process clause.”). The Supreme Court has never addressed the issue of property rights in marijuana, though it has held that Congress was empowered to adopt the CSA pursuant to the Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1 (2005).

parties. Because the CSA abrogates all the core rights in the metaphorical bundle, it effectively prohibits ownership of marijuana.

Moreover, an independent basis for finding that federal law bars property rights in marijuana is arguably found in section 881(a) of the CSA.<sup>71</sup> It provides that “[a]ll controlled substances which have been . . . distributed . . . or acquired in violation of this subchapter” and “[a]ll controlled substances which have been possessed in violation of this subchapter” “shall be subject to forfeiture to the United States *and no property right shall exist in them . . .*”<sup>72</sup> In *Mazin v. True*, a federal court quoted this provision and then concluded that “marijuana is contraband *per se* under federal law, which expressly disavows any property right in such contraband.”<sup>73</sup> Accordingly, the federal government is empowered to seize marijuana from anyone who possesses it as a matter of federal law.

In summary, there are compelling arguments that marijuana cannot be owned—at least for the purposes of federal law. Yet this analysis does not resolve the separate question of whether property rights can exist in marijuana as a matter of state law, especially in the horizontal dimension.

### *C. State Law: The Legalization Tidal Wave*

Like federal law, state laws imposed criminal penalties for the possession or transfer of marijuana for decades.<sup>74</sup> Under this approach, marijuana was contraband *per se* in which property rights could not exist. But in recent years, most states have abandoned this absolutist position by adopting statutes that legalize the possession and transfer of marijuana under certain circumstances. These statutes do not expressly address the broader issue of marijuana ownership; nor has any court directly ruled on the question. However, analyzed in light of background principles of property law, these statutes support the view that marijuana can be owned—to some extent—as a matter of state law.<sup>75</sup>

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<sup>71</sup> However, the better interpretation of the italicized language in § 881(a) is that it applies only *after* a forfeiture occurs. CSA § 881(h) provides that “[a]ll *right, title, and interest in property* described in subsection (a) of this section shall vest in the United States *upon commission of the act* giving rise to forfeiture in this section.” 21 U.S.C. § 881(h) (2012) (emphasis added). Thus, the effect of the forfeiture process is to transfer existing property rights from an owner to the federal government. It is important to note that the items listed in subsection (a) include both contraband *per se* and derivative contraband. In context, the references to “property” in § 881(a) and (h) can only refer to derivative contraband, because forfeiture of such property (and thus transfer of property rights) occurs only when an illegal “act” is committed. Because property rights can never exist in contraband *per se* under federal law, the possessor has no “right, title, or interest” to transfer.

<sup>72</sup> 21 U.S.C. § 881(a)(1), (8) (2012) (emphasis added). But the more plausible reading of this language is that it was intended to apply only (a) to derivative contraband and (b) to the time period *after* such contraband is forfeited to the federal government. See *supra* note 107.

<sup>73</sup> No. 1:14-CV-00654-REB-CBS, 2015 WL 1228321, at \*2 (Mar. 16, 2015 D. Colo.).

<sup>74</sup> All fifty states eventually adopted statutes similar to the CSA, largely based on the Uniform Controlled Substances Act of 1970 (hereinafter “UNIFORM CSA”). UNIF. CONTROLLED SUBSTANCES ACT, 9 Part V U.L.A. 853, 860 (2007). As a result, the possession or distribution of marijuana became illegal in all states.

<sup>75</sup> A number of states that prohibit the possession or transfer of marijuana for any purpose do permit the possession and sale of cannabidiol, a non-psychoactive substance that is derived from the cannabis plant. See OSBECK & BROMBERG, *supra* note 51, at 219. However, cannabidiol would seemingly be classed as a “derivative” of cannabis, and thus fall within the definition of “marihuana” under the CSA. 21 U.S.C. § 802(16) (2012).

Led by Colorado and Washington, nine states have legalized marijuana for all purposes—subject to various restrictions—and have thus sanctioned its possession and transfer.<sup>76</sup> For example, Colorado’s voter-approved amendment to the state constitution authorizes the cultivation, possession, purchase, transfer, transport, and use of marijuana.<sup>77</sup> Similarly, the successful voter initiative in Washington provides that the possession of marijuana by an adult and the production, delivery, distribution, sale, or possession of marijuana by state-approved businesses is permitted under state law.<sup>78</sup>

Broadly speaking, the legalization statutes in these states make a distinction between marijuana businesses and marijuana users. Under strict regulation, businesses are permitted to grow, possess, and process large quantities of marijuana, and to sell small quantities. Marijuana users are authorized to possess and use small quantities in these states, and may grow a limited number of marijuana plants. For example, in California it is lawful for a person to possess up to 28.5 grams of marijuana and to cultivate up to six marijuana plants.<sup>79</sup>

Further, twenty-one states have legalized marijuana for the limited purpose of medical treatment.<sup>80</sup> Although their approaches differ to some extent, they share the same basic pattern: closely-regulated businesses may cultivate, process, possess, and sell large quantities of marijuana; and patients with a doctor’s prescription may purchase and possess small quantities, and also grow a few marijuana plants. For example, North Dakota authorizes residents to “process or sell, possess, transport, dispense, or use marijuana” for medical purposes under limited circumstances.<sup>81</sup> A “cultivation facility” can possess up to 1,000 plants, while a “dispensary” can have up to 3,500 ounces of marijuana.<sup>82</sup> A qualifying patient may purchase up to 2.5 ounces of marijuana from a dispensary over a 30-day period, and may possess up to 3 ounces during this time.<sup>83</sup>

These legalization statutes are based on the belief that marijuana is relatively harmless, and indeed can be an effective medical treatment for some patients. Viewed from this perspective, marijuana should not be listed as a Schedule I drug—unlike other Schedule I drugs that are clearly harmful such as heroin and LSD. More broadly, marijuana is far less dangerous

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<sup>76</sup> Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington have legalized recreational use of marijuana. Mella Robinson et al., *States where marijuana is legal*, BUS. INSIDER, June 28, 2018, available at <https://www.businessinsider.com/legal-marijuana-states-2018-1>.

<sup>77</sup> COLO. REV. STAT. ANN., CONST. art. XVIII, § 16(3) (West 2017). For example, “possessing, using, displaying, purchasing, or transporting . . . one ounce or less of marijuana” is lawful. *Id.* But see *People v. Crouse*, 388 P.3d 39 (Colo. 2017) (holding that section of state’s medical marijuana law which required officers to return seized marijuana to patient was preempted by the CSA); Joel S. Neckers & Joel M. Pratt, *The Marijuana Industry after Crouse: Is the Glass Half Empty or Half Full?*, 47 COLO. LAW. 27, 29 (Jan. 2018) (warning that under *Crouse* “even an accusation of wrongdoing that leads to a cannabis seizure could mean the end of a business”).

<sup>78</sup> WASH. REV. CODE ANN. §§ 69.50.360, 69.50.363, 69.50.366 (West 2017).

<sup>79</sup> CAL. HEALTH & SAFETY CODE § 11362.1(a) (1), (3) (West 2017).

<sup>80</sup> See Robinson, *supra* note 76.

<sup>81</sup> N.D. CENT. CODE § 19-24.1-02 (2017).

<sup>82</sup> *Id.* § 19-24.1-24.

<sup>83</sup> *Id.* § 19-42.01(2).

than other things that are considered to be contraband per se under federal law, ranging from counterfeit money to sawed-off shotguns.<sup>84</sup>

The legalization wave has a profound impact on marijuana ownership. Although no statute or case directly addresses the issue, it now seems clear that marijuana may be owned in most states as a matter of state law. With the repeal of state statutes that criminalized marijuana, the traditional principle that property rights may exist in any tangible object now applies. Further, the state legalization statutes effectively recognize the core elements that constitute the traditional bundle of rights: the rights to possess, use, transfer, and exclude. These statutes expressly validate the rights to possess and transfer marijuana under certain circumstances.<sup>85</sup> The legalization of possession, in turn, effectively recognizes the rights to use and exclude. Prior state law eliminated the right to use only indirectly; because marijuana could not be possessed, it could not be used. Further, given legal recognition of the right to possess, it logically follows that state law will protect this right by preventing third parties from interfering with that possession, thus recognizing the owner's right to exclude. In sum, because a person may now hold the core property rights in marijuana, marijuana property exists under state law.<sup>86</sup>

This historic transition affects both the horizontal and vertical dimensions of property rights. Under state law, each legalization state will respect marijuana ownership in disputes among private actors to at least some extent<sup>87</sup> and refrain from seizing legally-owned marijuana from private actors.<sup>88</sup>

#### D. Resolving the Federal-State Conflict

##### 1. Joint Sovereignty in Context

Our hypothetical marijuana farmer G holds property rights in her crop under state law. But under federal law, she has no property rights in the crop—and federal officials may confiscate it at any time. These fundamentally inconsistent approaches to marijuana property raise the question of preemption.

The Supremacy Clause of the Constitution provides that the “laws of the United States . . . shall be the supreme law of the land; and the judges of every state shall be bound thereby, anything in the . . . laws of any State to the contrary notwithstanding.”<sup>89</sup> It arguably follows that

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<sup>84</sup> See, e.g., *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 485 (6<sup>th</sup> Cir. 1993) (listing counterfeit money and sawed-off shotguns as examples of contraband per se).

<sup>85</sup> See *supra* notes 76-83.

<sup>86</sup> Because all legalization states still restrict marijuana to some extent, however, the scope of marijuana property is limited. For example, because a legal marijuana user in California can possess only up to 28.5 grams, a person who possesses 100 grams does not hold property rights in the additional 71.5 grams. See *supra* note 79.

<sup>87</sup> Cf. *Muridan v. Redl*, 413 P.3d 1072 (Wash. Ct. App. 2018) (dividing marijuana-related assets as community property after cohabiting couple ended their relationship).

<sup>88</sup> See, e.g., *Oregon v. Ellis*, 316 P.3d 412 (Or. Ct. App. 2013) (ordering police to return “usable marijuana” to holder of medical marijuana card after it was seized during an arrest for driving while intoxicated); *Oregon v. Ehrenshing*, 296 P.3d 1279 (Or. Ct. App. 2013) (ordering sheriff to return marijuana to holder of medical marijuana card after it was seized during search of defendant’s premises).

<sup>89</sup> U.S. CONST. art. VI, § 2.

even states which have legalized marijuana—and, more to the point, judges in these states—should follow the federal view that marijuana property cannot exist.

But both federal and state governments possess “elements of sovereignty the other is bound to respect.”<sup>90</sup> As the Supreme Court has explained, the states retain “substantial sovereign authority under our constitutional system.”<sup>91</sup> One traditional area of state sovereignty is the right to determine what constitutes property within its borders, as discussed in Part I above. Accordingly, federal law will not supersede the state law definition of property absent either express preemption or implied preemption. However, the CSA probably does not preempt the state laws that effectively recognize marijuana property. Moreover, this outcome serves the core policies that underpin our federal system.

## 2. Preemption Is Unlikely

Express preemption occurs when Congress clearly states that federal law will supersede state law.<sup>92</sup> There are three types of implied preemption: (1) field preemption, where “Congress . . . has determined [that the field of law] must be regulated by its exclusive governance;”<sup>93</sup> (2) conflict preemption where “compliance with both federal and state regulations is a physical impossibility;”<sup>94</sup> and (3) conflict preemption where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>95</sup>

In applying these principles, courts utilize a presumption against preemption. As the Supreme Court observed in *Medtronic, Inc. v. Lohr*, “[i]n all pre-emption cases, and particularly those in which Congress has ‘legislated in a field which the states have traditionally occupied,’ we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”<sup>96</sup> Because property rights are created under state law, this presumption applies with particular force to question of whether the CSA supersedes state-created property rights in marijuana.

The CSA is an example of “cooperative federalism.”<sup>97</sup> It was intended to be part of an integrated system for regulating controlled substances that would be shared by federal and state governments. Under this framework, the federal government would take a lead role, while states would have parallel authority under state law.<sup>98</sup> Accordingly, almost all states enacted legislation patterned on the CSA, most commonly by adopting the Uniform Controlled

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<sup>90</sup> *Arizona v. United States*, 567 U.S. 387, 398 (2012).

<sup>91</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

<sup>92</sup> *Michigan Canners & Freezers Ass’n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 469 (1984).

<sup>93</sup> *Arizona*, 567 U.S. at 399.

<sup>94</sup> *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

<sup>95</sup> *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>96</sup> 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985)).

<sup>97</sup> See Chemerinsky et al., *supra* note 4; Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1 (2013); Matthew A. Melone, *Federal Marijuana Policy: Homage to Federalism in Form; Potemkin Federalism in Substance*, 63 WAYNE L. REV. 2015 (2018).

<sup>98</sup> In practice, the federal government “has prosecuted large-scale traffickers and drug cartels and left prosecution of everyday, street level marijuana activity to the states.” OSBECK & BROMBERG, *supra* note 51, at 472.

Substances Act of 1970 (Uniform CSA).<sup>99</sup> As its Prefatory Note observes, the Uniform CSA was “designed to complement the new Federal . . . legislation and provide an interlocking trellis of Federal and State law to enable government at all levels to more effectively control the drug abuse problem.”<sup>100</sup> The Uniform CSA criminalizes essentially the same conduct as the CSA, under state law.<sup>101</sup> However, it allows each state to establish its own schedules of controlled substances as a matter of state law, which may differ from the federally-regulated substances listed in the CSA schedules.<sup>102</sup>

Because federal and state governments have concurrent authority over controlled substances, Congress took care to minimize the risk of preemption. CSA section 903 specifies that none of its provisions “should be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, to the exclusion of any State law on the same subject matter that would otherwise be within the authority 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.”<sup>103</sup>

There is no serious argument that express preemption applies to state laws recognizing marijuana property. An example of express preemption is found in *Jones v. Rath Packing Co.*, where the Supreme Court held that a federal statute concerning meat packages which provided that “requirements in addition to, or different than, those made under this Act may not be made by any State” preempted state law.<sup>104</sup> No section of the CSA contains a similar express provision; and in fact Congress specifically restricted the preemptive scope of the CSA, as shown in section 903. It might be asserted that the phrase in CSA section 881(a)(1) that “no property right shall exist” in marijuana and other Schedule I substances supports express preemption. But nothing in that section expressly purports to affect state law.<sup>105</sup> Moreover, in context this language was intended only to relate to the status of property rights *after* forfeiture<sup>106</sup> to the federal government, not to property rights before forfeiture.<sup>107</sup> Because no

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<sup>99</sup> UNIFORM CSA, *supra* note 74, at 853.

<sup>100</sup> *Id.* at 854.

<sup>101</sup> Compare 21 U.S.C. §§ 841, 844(a) (2012) with UNIFORM CSA § 401(a), (c), *supra* note 74, at 886-87.

<sup>102</sup> UNIFORM CSA § 201(a) provides that a designated state agency may “add substances to or delete or reschedule all substances in the schedules.” UNIFORM CSA, *supra* note 74, at 866. The Comment to this section explains that “[t]he Uniform Act is not intended to prevent a State from adding or removing substances from the schedules.” *Id.* at 868. Thus, the drafters of the Uniform CSA contemplated that a state could choose not to criminalize the possession or transfer of a substance such as marijuana under state law.

<sup>103</sup> 21 U.S.C. § 903 (2012). See also H.R. REP. NO. 91-1444, 1970 U.S.C.C.A.N. 4629 (explaining that this section bars preemption unless there is a “direct and positive conflict” between federal and state legislation).

<sup>104</sup> 430 U.S. 519, 530-31 (1977).

<sup>105</sup> The only decision exploring the impact of this language on state-created property rights is *Mazin v. True*, No. 1:14-CV-00654-REB-CBS, 2015 WL 1228321 (Mar. 16, 2015 D. Colo.). There the court interpreted it to mean that “there is no recognized or protected property right in marijuana under *federal law*.” *Id.* at \*2 (emphasis added). In response to the argument that “state law defines property rights,” the court reasoned that “[t]he plaintiff has no *federally protected* property interest in his marijuana even if that marijuana is legal under Colorado law.” *Id.* (emphasis added).

<sup>106</sup> See *supra* note 71.

<sup>107</sup> The statutory language makes this reasonably clear. The complete introductory phrase in section 881(a) reads: “The following shall be subject to forfeiture to the *United States* and no property right shall exist in them. . . .” (emphasis added). In context, this subsection was not intended to apply to state-created property rights. Legislative history also supports this interpretation. The House Report on the CSA explained that this subsection merely “sets

provision of the CSA expressly states that it will supersede state law, there can be no express preemption.<sup>108</sup>

Next, as section 903 makes clear, Congress has chosen not to “occupy the field” of controlled substances regulation. Rather, the CSA contemplates that federal and state governments have shared authority in this area. Therefore, field preemption does not apply to marijuana property laws.<sup>109</sup>

The question of conflict preemption based on physical impossibility is more complex. Most decisions conclude that the CSA does not preempt state legalization laws as a general matter.<sup>110</sup> For example, the Michigan Supreme Court rejected the defendant city’s impossibility claim in *Ter Beek v. City of Wyoming*,<sup>111</sup> because the state’s medical marijuana statute did not require the city to violate the CSA. A Rhode Island court reached the same conclusion, noting that nothing in the state law legalizing marijuana “requires the Town—or anyone—to ‘manufacture, distribute, dispense, or possess’ marijuana or otherwise violate the CSA.”<sup>112</sup> In short, the state laws legalizing marijuana do not require its cultivation, possession, or transfer by private actors, but merely permit it. By the same token, the recognition of marijuana property under state law merely permits such ownership, without requiring it. Accordingly, compliance with both federal and state law is not physically impossible. Under this analysis, federal and state law can “consistently stand together” as section 903 contemplates.<sup>113</sup>

Similarly, most courts reject preemption arguments based on the general assertion that state marijuana legalization laws pose an obstacle to the federal approach.<sup>114</sup> As the Arizona Supreme Court stated in *Reed-Kaliher v. Hoggatt*, “[a] state law stands as an obstacle to a federal

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forth the conditions for forfeiture and the property to be forfeited” under federal law. H.R. REP. NO. 91-1444, 1970 U.S.C.C.A.N. 4623. There is no indication that it was also intended to supersede state law. In fact, the Uniform Controlled Substances Act contains its own provisions that govern forfeiture under state law. UNIFORM CSA § 505(a), *supra* note 74. *Cf.* *People v. Odenwald*, 285 P. 406, 408 (Cal. Ct. App. 1930) (observing that nearly-identical language included in the Volstead Act, which prohibited the possession of liquor, “was clearly intended solely to protect government officials in the exercise of their duties,” not to eliminate state-created property rights).

<sup>108</sup> See *White Mountain Health Ctr., Inc. v. Maricopa Cnty.*, 386 P.3d 614 (Ariz. Ct. App. 2016) (finding no express preemption under the CSA); *Rhode Island Patient Advocacy Coal. Found. v. Town of Smithfield*, No. PC-2017-2989, 2017 WL 4419055 (Sept. 27, 2017 R.I. Super. Ct.) (same).

<sup>109</sup> See *White Mountain Health Ctr., Inc.*, 386 P.3d 614 (finding no field preemption under the CSA); *Rhode Island Patient Advocacy Coal. Found.*, 2017 WL 4419055 (same).

<sup>110</sup> See *Brilmayer*, *supra* note 4 at 902-11; (arguing that the CSA does not preempt state laws legalizing marijuana); *Chemerinsky et al.*, *supra* note 4, at 100-13 (same).

<sup>111</sup> 846 N.W.2d 531 (Mich. 2014).

<sup>112</sup> *Rhode Island Patient Advocacy Coal. Found.*, 2017 WL 4419055, at \* 6. See also *City of Palm Springs v. Luna Crest, Inc.*, 200 Cal. Rptr. 3d 128 (Ct. App. 2016) (finding no conflict preemption).

<sup>113</sup> Preemption on this basis might arise in the property context under narrow circumstances. For example, where a state court appoints a receiver in a dispute concerning a business whose assets include marijuana, the receiver would necessarily take possession of the marijuana; in this situation, it would be physically impossible to comply with both federal and state law. *Cf.* *People v. Crouse*, 388 P.3d 39 (Colo. 2017) (finding preemption where state law required police officers to return marijuana to acquitted medical marijuana patient because this was an illegal distribution of a controlled substance under federal law). *But see* *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656 (Ct. App. 2008) (contra).

<sup>114</sup> See also *Chemerinsky*, *supra* note 4, at 111 (arguing that state legalization laws are consistent with the purposes and objectives of the CSA).

law “[i]f the purpose of the [federal law] cannot otherwise be accomplished . . . .”<sup>115</sup> The court reasoned that the “state-law immunity” created by Arizona’s medical marijuana law did not “frustrate the CSA’s goal of conquering drug abuse or controlling drug traffic . . . [because] the people of Arizona ‘chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana.’”<sup>116</sup> Moreover, as another court explained, its state law legalizing marijuana “does not (and could not) deny the federal government the ability to enforce the CSA, and does not (and could not) immunize medical marijuana users from prosecution.”<sup>117</sup> In the same manner, state recognition of marijuana property is not an obstacle to enforcement of the CSA by the federal government.<sup>118</sup> The federal government is free to enforce the CSA within legalization states if it chooses to do so, even though these states recognize marijuana property under state law.

In short, the state laws that effectively recognize marijuana property are not preempted under any of the four standard tests. If there was any doubt on this outcome, the strong presumption against superseding state laws that govern property—a field traditionally occupied by the states—would tip the balance against preemption.

### 3. Federalism Policies and Preemption

Ultimately, the preemption doctrine seeks to preserve the constitutional balance between federal and state governments. The normative justifications that underpin our federal system further support the conclusion that state laws recognizing marijuana property are not preempted. The preemption question will almost certainly be resolved by state courts<sup>119</sup>—not federal courts—and accordingly state judges should consider these policies in the decisional process.

As the Supreme Court explained in *Gregory v. Ashcroft*, our “federalist structure of joint sovereigns preserves to the people numerous advantages”:

It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>120</sup>

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<sup>115</sup> 347 P.3d 136, 141 (Ariz. 2015) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

<sup>116</sup> *Id.* (quoting *Ter Beck v. City of Wyoming*, 846 N.W.2d 531, 539 (Mich. 2014)).

<sup>117</sup> *Rhode Island Patient Advocacy Coal. Found.*, 2017 WL 4419055, at \*7. See also *City of Palm Springs*, 200 Cal. Rptr. 3d 128 (finding no obstacle preemption).

<sup>118</sup> However, some courts have found conflict preemption to parts of state legalization laws in specific circumstances. See, e.g., *People v. Crouse*, 388 P.3d 39 (Colo. 2017) (finding preemption of law that required police officers to return marijuana to acquitted medical marijuana patient, because such return was a distribution of a controlled substance); *Emerald Steel Fabricators, Inc. v. BOLI*, 230 P.3d 518 (Or. 2010) (finding limited preemption because state’s issuance of medical marijuana card to patient affirmatively authorized use of marijuana).

<sup>119</sup> In most states, decisions by lower federal courts are merely persuasive authority, not binding precedent. See Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 62 (2015). Therefore, even if federal courts of appeal and district courts have previously ruled on the question of preemption, state courts are entitled to decide the issue based on their own interpretation of the law.

<sup>120</sup> 501 U.S. 452, 458 (1991).

These policy goals are best served by finding that state laws recognizing marijuana property are not preempted.<sup>121</sup>

First, recognition of marijuana property both addresses the diverse needs of our society and allows for experimentation in government. It accommodates the wishes of the 34 million Americans who use marijuana in states that have chosen legalization. Further, it allows the states, as proverbial laboratories of democracy, to test the value of marijuana legalization.

A court considering preemption cannot ignore the legal environment in which the question arises. The ongoing tension between the federal government and legalization states over marijuana is akin to an unstable detente.<sup>122</sup> While maintaining that state legalization statutes are invalid under the Supremacy Clause as a theoretical matter, the federal government has diplomatically chosen to tolerate the status quo for years except in extreme situations<sup>123</sup>—and, accordingly, has tacitly accepted that marijuana property can exist under state law.<sup>124</sup> By its inaction, the federal government has acknowledged that legalization both responds to the diverse needs of our society and allows for potentially helpful experimentation.

For the last nine years, federal interest in enforcing the marijuana ban in legalization states has been tepid at best.<sup>125</sup> In a series of memoranda issued between 2009 and 2013 during the Obama administration, the Department of Justice gradually deprioritized federal enforcement in states that legalized marijuana as long as certain federal policy priorities were respected.<sup>126</sup>

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<sup>121</sup> These federalism justifications endorsed by the *Gregory* Court were based on Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987) and Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988). *Gregory*, 501 U.S. at 458. See also David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 783 (2017) (listing additional justifications).

<sup>122</sup> See, e.g., *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821, 832 (D. Colo. 2016) (observing that “the nominal federal prohibition against possession of marijuana conceals a far more nuanced (and perhaps even erratic) expression of federal Policy” given public statements by federal officials “that reflected an ambivalence toward enforcement of the Controlled Substances Act where a person or entity’s possession and distribution of marijuana was consistent with well-regulated state law”); *Green Cross Med., Inc. v. Gally*, 395 P.3d 302, 307 (Ariz. Ct. App. 2017) (refusing to invalidate a contract on the basis that it facilitated the illegal possession, use, and sale of marijuana, in part because of “the federal government’s lack of interest” in prosecuting people who comply with the state’s medical marijuana law).

<sup>123</sup> See *infra* text accompanying notes 125-33 (discussing federal responses to state legalization statutes).

<sup>124</sup> Even within legalization states, however, federal law governs activities that occur on federal lands such as national parks, national forests, military installations, and lands governed by the Bureau of Land Management. See *infra* text accompanying notes 161-63.

<sup>125</sup> The federal government has focused its anti-marijuana enforcement efforts on “large-scale traffickers and drug cartels.” OSBECK & BROMBERG, *supra* note 51, at 472. Given the limits imposed on marijuana possession and transfer by legalization states, it is highly unlikely that these state laws would shield such traffickers or cartels.

<sup>126</sup> See Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>; Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), <http://files.ctctcdn.com/201bc6cf001/10f50403-6ee6-4e47-bbc3-ed48d1912bbb.pdf>; Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attorneys, Marijuana Enforcement (Aug. 29, 2013) (hereafter “2013 Cole Memorandum”), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

Because the state programs did not infringe these priorities, the memoranda effectively acquiesced to state legalization.<sup>127</sup> Moreover, in 2014 Congress adopted the Rohrbacher-Farr Amendment to an omnibus spending bill, which prohibited the Department of Justice from using federal funds to prevent the implementation of state laws legalizing medical marijuana.<sup>128</sup> In *United States v. McIntosh*, the Ninth Circuit held that this amendment not only barred direct action against such states, but also precluded federal prosecution of medical marijuana growers and retailers whose activities complied with state law.<sup>129</sup>

This lack of enforcement has continued under the Trump administration. On the one hand, Attorney General Sessions issued a new memorandum essentially rescinding the Obama-era documents.<sup>130</sup> Yet Congress extended the financial ban on medical marijuana prosecution in a 2018 spending bill, which President Trump signed.<sup>131</sup> Further, during the current administration “there have apparently been no federal raids or seizures at pot companies for sales that are legal under state law”—and thus in practice the Obama-era policy is still being followed.<sup>132</sup> Finally, President Trump has expressed tentative support for federal legislation that would respect state legalization laws.<sup>133</sup>

Second, legalization of marijuana—and the concomitant recognition of marijuana property—reflect citizen involvement in the political process. In many states, legalization occurred as a direct result of voter initiatives, while in others it stemmed from public pressure on legislators. Moreover, the arc of history is moving toward legalization at some point in the future. For example, a recent survey shows that 93% of Americans favor the legalization of marijuana for medical purposes—including overwhelming majorities of Republican, Democratic, and independent voters.<sup>134</sup> Today 63% of Americans favor national legalization for all purposes,

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<sup>127</sup> The eight federal priorities were to prevent the distribution of marijuana to minors; prevent revenue from marijuana sales from going to criminals; prevent diversion of marijuana to states where it was illegal; prevent marijuana activity from being used as a pretext for other illegal activity; prevent violence in the cultivation and distribution of marijuana; prevent adverse public health consequences associated with marijuana; prevent the growing of marijuana on public lands; and prevent marijuana possession or use on federal property. See 2013 Cole Memorandum, *supra* note 126.

<sup>128</sup> Consolidated and Further Continuing Appropriations Act, 2015, [Pub. L. No. 113-235, § 538, 128 Stat. 2130 \(2014\)](#).

<sup>129</sup> 833 F.3d 1163 (9<sup>th</sup> Cir. 2016).

<sup>130</sup> Memorandum from Jefferson B. Sessions, Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attorneys, Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

<sup>131</sup> *Trump Signs Spending Bill That Included Medical Marijuana Protections*, MARIJUANA BUS. DAILY, Mar. 23, 2018, available at <https://mjbizdaily.com/trump-signs-spending-bill-includes-medical-marijuana-protections/>.

<sup>132</sup> Evan Halper, *Trump inclined to back ending pot ban*, L.A. TIMES, June 9, 2018, available at 2018 WLNR 17754974. The same article quotes John Vardaman, a former Department of Justice attorney who participated in creating the Obama era approach, as saying: “Remarkably little, if anything, has changed. Almost every U.S. attorney in states where marijuana is legal has decided to apply the same principles.” *Id.* On an overall basis, “[t]here have been dramatic declines in marijuana arrests in states that have legalized.” Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 106 (2018).

<sup>133</sup> Halper, *supra* note 132 (quoting President Trump as saying that he would “probably end up supporting” a proposed bill allowing states to legalize marijuana).

<sup>134</sup> Quinnipiac University Poll, *Support for Marijuana Hits New High*, April 16, 2018, available at <https://poll.qu.edu/national/release-detail?ReleaseID=2539>. Legalization of medical marijuana is supported by 86% of Republicans, 97% of Democrats, and 95% of independent voters. *Id.*

and this percentage will increase over time with demographic transition because support is strongest among those under 65 years old.<sup>135</sup>

Finally, honoring property rights in marijuana makes government more responsive to citizen needs, thus creating competition among the states for a mobile citizenry. As noted above, legal marijuana is the fastest-growing industry in the United States.<sup>136</sup> Businesses involved in growing, processing, and selling marijuana are premised on the existence of state laws that will protect their property rights. Third parties that do business with marijuana businesses—such as lenders, landlords, and insurers—similarly rely on the continued success of those entities, and hence on the existence of marijuana property. Consistent with our tradition of federalism, each state should be allowed to determine whether it will recognize marijuana property, and thus attract citizens from other states.

It is axiomatic that property rights comprise the foundation of every market economy. As intended by the Framers, this foundation is governed by state law. Thus, each state government is essentially administering its own property law system and must utilize a definition of property that is stable and functional in order to respond to societal needs. For example, state laws govern on-going business relationships involving property, including financing, insurance, investments, leases, sales, and other relationships. In many situations, state courts must divide property among co-owners—including divorce,<sup>137</sup> intestate succession, partition, partnership dissolution, and partition. And state law provides remedies when disputes concerning property occur, such as tort or contract claims. Having legalized marijuana under state law, state governments cannot turn their backs on the property rights they have created—and their decision to create such rights in response to citizen needs is entitled to a certain degree of deference by the federal government.

### *E. Challenges Posed by the Hybrid System*

#### 1. Toward the Hybrid System

In sum, the CSA does not preempt state laws legalizing marijuana<sup>138</sup> and, accordingly, the state laws that effectively recognize marijuana property have full force and effect. The time has come to acknowledge that this conflict effectively creates a hybrid property system: marijuana property exists under state law, but not federal law. Accordingly, the legislative, judicial, and executive branches of each legalization state will respect and protect property rights in marijuana even though their federal counterparts will not.

For example, in *City of Garden Grove v. Superior Court*,<sup>139</sup> a California appellate court ordered that marijuana seized by police during a traffic stop be returned to the driver, who held a physician's approval to use marijuana for medical reasons. Acknowledging that the driver's

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<sup>135</sup> Support for national legalization of marijuana is closely tied to demographics. Among Americans between 18 and 34 years old, 82% favor it; in the 35-49 year age group, support is at 70%; in the 50-64 year age group, it is at 63%. *Id.* In contrast, 52% of those 65 and over oppose legalization. *Id.*

<sup>136</sup> See *supra* note 7.

<sup>137</sup> Cf. *Muridan v. Redl*, 413 P.3d 1072 (Wash. Ct. App. 2018) (dividing share of marijuana business and interest in promissory note for sale of marijuana equipment as community property).

<sup>138</sup> See also OSBECK & BROMBERG, *supra* note 51, at 146-52.

<sup>139</sup> 68 Cal. Rptr. 3d 656 (Ct. App. 2008).

“marijuana possession was legal under state law, but illegal under federal law,”<sup>140</sup> the court reasoned that the Controlled Substances Act did not preempt the California law on point. It accordingly held that “due process and fundamental fairness” required the return of the marijuana,<sup>141</sup> consistent with “the principles of federalism embodied in the United States Constitution.”<sup>142</sup>

Recognition of the hybrid system is a first step toward mitigating the tension between the federal and state approaches. Once this practical reality is accepted, courts and scholars can begin charting the legal terrain governed by each approach, and marijuana owners can structure their affairs to best protect their property rights.

## 2. Judicial Recognition of the System

The outline of the hybrid system can already be discerned in a handful of cases. No decision has expressly held that state law authorizes marijuana ownership despite conflicting federal law. But some courts have implicitly embraced this approach in cases dealing with property rights related to marijuana.<sup>143</sup>

The hybrid approach is reflected in certain decisions dealing with the vertical dimension of property rights. An example is *Schmidt v. County of Nevada*,<sup>144</sup> where a federal district court rejected the plaintiff’s claim under the Constitution for damages following the destruction of his marijuana, even though his right to possession was protected by California’s medical marijuana law. It reasoned that “plaintiff cannot recover damages as a result of the confiscation or destruction of marijuana because he had no cognizable property interest in the marijuana. Plaintiff asserts a due process claim under the *federal* Constitution in *federal* court where, under *federal* law, marijuana is undisputably illegal and contraband per se.”<sup>145</sup> As a later federal court summarized in *Little v. Gore*, “even though ‘state law creates a property interest, not all state-created rights rise to the level of a constitutionally protected interest.’ With respect to medical marijuana, although California state law may create a property interest in the marijuana, California district [that is, federal] courts have found there is no protected interest *for purposes of the Fourteenth Amendment*.”<sup>146</sup> In contrast, the California appellate court in *City of Garden*

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<sup>140</sup> *Id.* at 670.

<sup>141</sup> *Id.* at 680. *But see* *Barrios v. Cnty. of Tulare*, No. 1:13-CV-1665AWI/GSA, 2014 WL 2174746 (May 23, 2014 E.D. Cal.) (contra).

<sup>142</sup> *City of Garden Grove*, 68 Cal. Rptr. 3d at 682.

<sup>143</sup> *See, e.g., Barrios*, 2014 WL 2174746, at \*5 (“Although California may provide *Barrios* with the right to possess medical marijuana, federal law does not. Because marijuana is contraband under federal law, *Barrios* had no property interest that was protected by the Fourteenth Amendment due process clause.”); *Mazin v. True*, No. 1:14-CV-00654-REB-CBS, 2015 WL 1228321, at \*2 (Mar. 16, 2015 D. Colo.) (“The plaintiff argues that state law defines property rights and consideration of overlaying federal law is of no consequence when resolving his claims under the Fourth and Fourteenth Amendments. As a matter of law, this position is incorrect. ‘Although the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.’” (quoting *Town of Castlerock v. Gonzales*, 545 U.S. 748, 757 (2005))).

<sup>144</sup> No. 2:10-CV-3022FCD/EFB, 2011 WL 2967786 (July 19, 2011 E.D. Cal.).

<sup>145</sup> *Id.* at \*6 (emphasis added).

<sup>146</sup> 148 F. Supp. 3d 936, 955 (S.D. Cal. 2015) (quoting *Brady v. Gebbie*, 859 F.2d 1543, 1548 n. 3 (9<sup>th</sup> Cir. 1988) (emphasis added)). *See also* *River North Props., LLC v. City of Denver*, No. 13-CV-01410-CMA-CBS, 2014 WL

*Grove v. Superior Court* mandated that local police return marijuana to the owner following its seizure because the “marijuana possession was legal under *state law*.”<sup>147</sup>

Moreover, a few decisions implicitly utilize the hybrid approach in the horizontal dimension, recognizing the existence of marijuana property in litigation among private actors. For example, in *Green Earth Wellness Center v. Atain Specialty Insurance Co.*, a commercial marijuana grower sued its insurance company for compensation after smoke and ash damaged marijuana plants.<sup>148</sup> The policy provisions covered damage to “Business Personal Property.”<sup>149</sup> The federal district court denied the insurance company’s motion for summary judgment, reasoning that (1) “Property” as defined in the policy could include marijuana plants and (2) the policy exclusion for “Contraband” was “rendered ambiguous by the difference between the federal government’s *de jure* and *de facto* public policies regarding state-regulated medical marijuana.”<sup>150</sup>

Similarly, in *Green Cross Medical, Inc. v. Gally*, an Arizona appellate court refused to invalidate a lease between a landowner and a state-licensed medical marijuana dispensary operator on theory that it was an illegal contract because it facilitated “possession, use, or sale of marijuana” in violation of the CSA.<sup>151</sup> In reaching this conclusion, the court emphasized “the federal government’s lack of interest in prosecuting individuals in compliance with [the state’s medical marijuana law], as well as a public policy that favors enforcement of the lease compliant with state law.”<sup>152</sup>

### 3. Contours of the System

Under the hybrid system, property rights in marijuana located within the borders of a legalization state should be treated like any other form of property under state law—no better and no worse. Assume again that G grows marijuana in a legalization state in a manner that complies with state law. Her property rights should be recognized and enforced by the courts of that state in both the horizontal and vertical dimensions, including the following sample situations.<sup>153</sup>

Parties to business transactions in legalization states should be entitled to rely on state law to protect their marijuana property. For example, the law should recognize the authority of attorneys-in-fact, conservators, corporate officers, guardians, partners, trustees,<sup>154</sup> and others to

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7437048, at \*5 (Dec. 30, 2014 D. Colo.), (granting motion to dismiss plaintiff’s claims on the basis that plaintiff had not pleaded a “cognizable property interest” in the cultivation of marijuana under the federal Constitution).

<sup>147</sup> *City of Garden Grove*, 68 Cal. Rptr. 3d at 670 (emphasis added).

<sup>148</sup> 163 F. Supp. 3d 821 (D. Colo. 2016).

<sup>149</sup> *Id.* at 827.

<sup>150</sup> *Id.* at 823.

<sup>151</sup> 395 P.3d 302, 307 (Ariz. Ct. App. 2017). In reaching this conclusion, the court emphasized “the federal government’s lack of interest in prosecuting individuals in compliance with [the state’s medical marijuana law], as well as a public policy that favors enforcement of the lease compliant with state law.” *Id.* at 308.

<sup>152</sup> *Id.* at 308.

<sup>153</sup> Similarly, the owner of marijuana property will be subject to all liabilities that are generally imposed on property. For example, creditors should be able to levy on such property to satisfy judgments.

<sup>154</sup> *Cf.* *Green Cross Med., Inc. v. Gally*, 395 P.3d 302 (Ariz. Ct. App. 2017) (trustee leased trust property to tenant for use as medical marijuana dispensary).

hypothecate, lease, sell, or otherwise transfer such property. Similarly, parties to contracts that relate to marijuana property must be entitled to rely on the validity of such contracts under state law, without concern that such a contract might be held invalid as illegal or against public policy.<sup>155</sup> And state courts should adjudicate disputes concerning title to marijuana.

Property rights in marijuana should also be respected in legalization states in situations where property is to be divided among co-owners. Thus, in divorce proceedings marijuana property should be deemed to be community property for allocation in community property states,<sup>156</sup> and marital property subject to equitable distribution in separate property states. For example, if H divorces I in a separate property state that has legalized marijuana, marijuana owned by H should be subject to equitable distribution. Similarly, courts should treat marijuana property like any other type of property when distributing assets pursuant to a will, trust, or intestate succession. Further, courts should allocate marijuana property like any other asset when dissolving a corporation, partnership, or other business entity, or partitioning cotenancy property.

Finally, state courts should provide the owner of marijuana property with the normal remedies that any owner has against tortious actions of third parties that injure property. For instance, if J negligently burns K's marijuana, K should be entitled to recover damages from J. Similarly, marijuana property should be recognized in the context of other tort actions, such as conversion and trespass.

However, under the hybrid system marijuana property is not recognized under federal law and thus receives no protection in either the vertical or horizontal dimension. Thus, in the vertical dimension there is a risk that federal authorities may seize marijuana from a farmer like G in a legalization state, with no obligation to pay compensation or otherwise respect her property rights under state law. Given the federal government's anemic enforcement efforts in recent years, however, this risk may be more theoretical than real.

A more direct consequence of the hybrid system is marijuana owners are deprived of access to federal courts and agencies in any matter relating to the vertical dimension of property rights. For example, despite anemic enforcement of the federal criminal laws governing marijuana, federal courts actively continue to treat marijuana as contraband per se in civil litigation governed by federal law that involve the vertical dimension—such as banking law, constitutional law, environmental law, and tax law.<sup>157</sup>

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<sup>155</sup> Even certain federal courts have refused to invalidate marijuana-related contracts on this basis. *See, e.g.*, *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821 (D. Colo. 2016) (insurance policy); *Mann v. Gullickson*, No. 15-CV-03630-MEJ, 2016 WL 6473215 (Nov. 2, 2016 N.D. Cal.) (promissory note). *Cf.* *Kinetic Dev. LLC v. Sky Unlimited LLC*, No. 17-CV-0562-WJM-MLC, 2017 WL 6523512 (Nov. 22, 2017 D. Colo.) (granting motion to remand case involving real estate purchase contract to state court on basis that no federal question existed, despite contingency in contract that buyer obtain a license to sell marijuana on the property). *See also Green Cross Med., Inc.*, 395 P.3d 302 (refusing to invalidate lease). *But see Haeberle v. Lowden*, No. 2011CV709, 2012 WL 7149098 (Aug. 8, 2012 Colo. Dist. Ct.) (refusing to enforce contract for sale of marijuana).

<sup>156</sup> *Cf.* *Muridan v. Redl*, 413 P.3d 1072 (Wash. Ct. App. 2018) (treating share in marijuana business and interest in promissory note for sale of marijuana-related equipment as community property).

<sup>157</sup> *See supra* notes 144-46.

Finally, the system also affects the horizontal dimension of property rights under federal law to some degree. For example, farmer G could not file for bankruptcy because a federal court cannot administer assets that include marijuana without violating the CSA.<sup>158</sup> Nor could she obtain a federal trademark for her marijuana or marijuana products.<sup>159</sup>

#### 4. Reflections on the System

The concept that marijuana property can exist within the territory of a particular state under state law—but not under federal law—is fraught with legal and geographical complexity. This schism will inevitably cause confusion and generate litigation.

For example, the extent to which federal courts will recognize marijuana ownership in situations governed by state law, if at all, remains hazy. It is conceivable that a federal court in a legalization state might defer to state law on the point when adjudicating a state law claim,<sup>160</sup> such as a diversity action stemming from intentional destruction of a marijuana crop.<sup>161</sup> Until this uncertainty is resolved, there is a significant risk that litigants will take strategic advantage of the hybrid system in forum shopping or removal proceedings. A marijuana owner in a legalization state will presumably avoid filing actions in federal court, given the danger that it will not honor her property rights. Conversely, a party to a dispute with a marijuana owner may file a preemptive lawsuit in federal court with the hope that the choice of forum will effectively prohibit the owner from obtaining relief. Similarly, where a marijuana property owner sues in state court, the defendant may seek to remove the action to federal court—solely to benefit from the federal view that marijuana property cannot exist.

In situations where state and federal courts have concurrent jurisdiction—for example, a claim against a city arising under the federal Due Process Clause—presumably a state court in a legalization jurisdiction would recognize marijuana property, even though a federal court would not do so in the same setting. Yet this outcome is by no means certain.

Individuals and businesses involved in transactions relating to marijuana property can minimize the risks inherent in the hybrid system by utilizing contract clauses that mandate arbitration, mediation, or other forms of alternative dispute resolution. Where the selected method requires application of law, the contract should contain a choice of law clause that selects the law of the legalization state to govern disputes. Where the parties to a transaction prefer not to use alternative dispute resolution, their contract should at least include such a choice of law clause.

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<sup>158</sup> See, e.g., *In re Arenas*, 514 B.R. 887, 891 (D. Colo. 2014) (dismissing bankruptcy action filed by marijuana growers because its administration would involve “the Court and the Trustee in the Debtors’ ongoing criminal violation of the CSA”); *In re McGinnis*, 453 B.R. 770 (D. Or. 2011) (refusing confirmation of reorganization plan that involved sale and cultivation of marijuana).

<sup>159</sup> Cf. *In re Morgan Brown*, 110 U.S.P.Q.2d 1350 (T.T.A.B. 2016) (denying federal registration of trademark for store that would sell marijuana).

<sup>160</sup> Cf. *Green Earth Wellness Ctr., LLC*, 163 F. Supp. 3d 821 (treating marijuana plants as covered property under an insurance policy).

<sup>161</sup> Just as marijuana is generally considered to be “property” for the purposes of property crimes such as theft, the same policy concern against intentional misconduct might extend to intentional torts that cause damage. See *supra* note 47.

The hybrid system also produces geographical uncertainty. The Constitution provides that Congress has broad power to enact legislation governing activities on lands owned by the federal government.<sup>162</sup> Thus, even within a legalization state, federal law will govern activities on public lands within that state that are owned by the federal government.<sup>163</sup> These include lands controlled by the National Park Service, the National Forest Service, the Bureau of Land Management, and the Department of Defense, and other federal agencies. In fact, the federal government owns huge tracts of land in states that have legalized marijuana. For example, federal lands comprise 45.8% of California and 35.9% of Colorado.<sup>164</sup> As a practical matter, it may be difficult for individuals and entities to know where marijuana property is legally recognized, even within legalization states. As an illustration, lands managed by the Bureau of Land Management are frequently leased to private parties for grazing or mineral extraction; and the boundaries between these lands (subject to federal law) and adjacent private-owned parcels (subject to state law) may not be marked.

In sum, the hybrid system effectively creates two inconsistent sets of rules for marijuana property within a legalization state. Marijuana property can exist under state law—except on lands owned by the federal government. At the same time, under federal law marijuana property will not be recognized by federal courts under most circumstances; nor will it be honored by other branches of the federal government.

### III. STATE V. STATE: THE MARIJUANA PROPERTY CONUNDRUM

#### A. *Interstate Conflicts*

Marijuana property conflicts can also arise in the interstate context.<sup>165</sup> Unsurprisingly, the categories of tangible things in which property rights may exist vary somewhat among states. For example, some states permit private ownership of certain animals (e.g., lions)<sup>166</sup> or drugs (e.g., peyote),<sup>167</sup> while others do not.<sup>168</sup> Historically, litigation involving conflicts between such state laws has been rare. But given the size and growth rate of the legal marijuana industry—and the sharp disagreement among state laws governing marijuana—it is inevitable that interstate conflicts will occur.

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<sup>162</sup> U.S. CONST. art I., § 8, cl. 17.

<sup>163</sup> U.S. CONST. art 4, § 3, cl. 2.

<sup>164</sup> Daniel Johnson & Pratheek Rebala, *Here's Where the Federal Government Owns the Most Land*, TIME, Jan. 5, 2015, <http://time.com/4167983/federal-government-land-oregon/>.

<sup>165</sup> This Part assumes that the CSA does not preempt state legalization statutes, for the reasons discussed in Part II.

<sup>166</sup> See Summary of State Laws Relating to Private Possession of Exotic Animals, available at [http://www.bornfreeusa.org/b4a2\\_exotic\\_animals\\_summary.php](http://www.bornfreeusa.org/b4a2_exotic_animals_summary.php) (listing state laws on ownership of exotic animals) (hereafter “State Animal Laws”).

<sup>167</sup> See David Bogen & Leslie F. Goldstein, *Culture, Religion and Indigenous People*, 69 MD. L. REV. 48, 61-62 (2009) (concluding that most states allow the use of peyote for religious purposes, but that such use is illegal in some states). Although peyote is a Schedule I drug under the CSA, there is a regulatory exception for its use in religious ceremonies. 21 C.F.R. § 1307.31 (2017).

<sup>168</sup> For example, Connecticut and Kentucky prohibit private ownership of lions, with special exceptions for zoos and other research institutions. See State Animal Laws, *supra* note 165. See also Bogen & Goldstein, *supra* note 166, (noting that some states do not allow use of peyote for any purpose).

Many states still follow the view that the possession or transfer of marijuana is a criminal offense. For instance, Idaho classifies marijuana as a Schedule I substance under its controlled substances law.<sup>169</sup> It is unlawful for any person to cultivate, transfer, or possess marijuana in Idaho,<sup>170</sup> and any such marijuana is “subject for forfeiture.”<sup>171</sup> Thus, marijuana is contraband per se in the state and, accordingly, property rights cannot exist in marijuana located within its borders.<sup>172</sup>

Consider an example of a potential interstate conflict. Suppose L and M are married in a separate property state that recognizes marijuana property; L operates a legal business that sells recreational marijuana in that state; and M later moves to another separate property state that does not recognize marijuana property, where he establishes a new domicile and files for divorce. Will the forum state treat L’s marijuana property as “property” for purposes of equitable distribution and accordingly award a share to M?

The same issue can arise between a full legalization state and a medical marijuana state. Applying this variant to the L-M hypothetical above, would the forum state which has only legalized medical marijuana award M any share in L’s recreational marijuana property?<sup>173</sup>

The common theme in these examples is that litigation arises from a relationship that involves two states: the state where the legal marijuana is located and the forum state which has a more restrictive approach.<sup>174</sup> It is unlikely that interstate conflicts would arise between two states that share the same legalization approach, either two full legalization states or two medical marijuana states. Similarly, such interstate disputes will not occur between two ban states because neither would recognize marijuana property.

This interstate conflict concern applies with equal force to many other situations involving property rights, including the authority of attorneys-in-fact, conservators, corporate officers, guardians, partners, trustees, and others to hypothecate, lease, sell, or otherwise transfer marijuana property; the validity of contracts for these purposes; disputes concerning title to marijuana; distribution of marijuana property pursuant to a will, trust, or intestate succession; dissolution of corporations, partnerships, and other business entities that own marijuana property; partition of cotenancies owning marijuana property; and tort actions stemming from injury to marijuana.

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<sup>169</sup> IDAHO CODE ANN. § 37-2705(d)(19) (West 2017) (listing it as “marihuana”).

<sup>170</sup> *Id.* § 37-2732(a) provides that it is “unlawful for any person to manufacture or deliver . . . a controlled substance.” The term “manufacture” includes “propagation” or growing, while the term “deliver” means “the actual, constructive, or attempted transfer from one person to another” of a controlled substance. *Id.* § 37-2701((g), (s). Further, it is “unlawful for any person to possess a controlled substance.” *Id.* § 37-2732(c).

<sup>171</sup> *Id.* § 37-2744(a)(1).

<sup>172</sup> *See supra* text accompanying notes 66-70.

<sup>173</sup> Another variant situation is a conflict between a ban state and a Native American tribe that legalizes marijuana on its reservation in that state. *See OSBECK & BROMBERG, supra* note 51, at 166-71.

<sup>174</sup> *See, e.g.,* Ginsburg v. ICC Holdings, No. 3:16:CV-2311, 2017 WL 5467688 (Nov. 13, 2017 N.D. Tex.) (refusing to dismiss breach of contract claim relating to defendants’ medical marijuana business where contract selected Illinois law, which authorized medical marijuana, but suit was brought in Texas, which did not).

These situations all present a choice-of-law question: Will the forum state utilize its own law or the law of the legalization state?<sup>175</sup> Regrettably, modern choice-of-law theory is in “considerable disarray,” while “[t]he disarray in the courts may be worse” because a number of approaches are currently in use.<sup>176</sup> At bottom, however, interstate disputes related to marijuana property present two basic choice-of-law variants. First, where the applicable choice-of-law rule directs the forum state to use the law of the legalization state, should the forum state refuse to do so based on its own public policy? Second, where the applicable rule permits the forum state to use its own law, should it instead use the law of the legalization state as a matter of comity?

## B. *Legalization State v. Ban State*

### 1. Situs Law and Public Policy

In most relevant situations, the applicable choice-of-law rule will direct the forum state to use the law of the legalization state—thereby recognizing marijuana property. The forum state should not refuse to do so based on a public policy objection.<sup>177</sup>

As a general rule, ownership interests in a tangible thing are determined by the law of the state that “has the most significant relationship to the thing and the parties” in litigation.<sup>178</sup> The Restatement (Second) of Conflicts of Law provides that seven principles should be used in making this determination: (a) “the needs of the interstate or international system;” (b) “the relevant policies of the forum;” (c) “the relevant policies of other interested states and the relative interests of other states in the determination of the particular issue;” (d) “the protection of justified expectations;” (e) “the basic policies underlying the particular field of law;” (f) “certainty, predictability and uniformity of result”; and (g) “ease in the determination and application of the law to be applied.”<sup>179</sup> This analysis usually results in the forum state using the law of the state where the particular thing is located. Thus, a leading treatise concludes that “[s]itus law is likely to be most appropriately concerned with goods within the confines of the state.”<sup>180</sup> Under the Restatement approach, the law of the legalization state will usually have the most significant relationship to the marijuana and the parties to the dispute and thus will normally govern, particularly because the marijuana is physically located outside of the forum state’s territory.<sup>181</sup>

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<sup>175</sup> This analysis assumes that federal law does not preempt marijuana legalization statutes, as discussed in Part II.D above.

<sup>176</sup> WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS 285 (4<sup>th</sup> ed. 2013).

<sup>177</sup> Of course, a litigant may choose not to raise such an objection for strategic reasons. The plaintiff who brings a divorce action in a ban state against a spouse who operates a marijuana business in a legalization state, for example, would benefit from avoiding use of the forum state law.

<sup>178</sup> RESTATEMENT (SECOND) CONFLICTS OF LAW § 222 (1969).

<sup>179</sup> *Id.* § 6.

<sup>180</sup> PETER HAY ET AL., CONFLICT OF LAWS (5<sup>th</sup> ed. 2010). *Cf. Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2<sup>nd</sup> Cir. 1998) (holding that Russian law determined ownership of a copyright, but that United States law determined whether the copyright was infringed).

<sup>181</sup> The conflict between federal law and state law in legalization states arises because both the federal government and the relevant state government share sovereign authority over the territory where the marijuana is located. In the context of the interstate conflicts, however, the forum state has no sovereignty over the territory where the marijuana is located and, accordingly, lacks substantial justification for utilizing its own law.

In addition, choice-of-law rules will direct the forum state to use the law of the legalization state in a number of specific situations. For example, the validity and effect of a contract for the sale of goods—including marijuana—is typically governed by the choice-of-law clause in the contract; given the risk of interstate conflicts, prudent contracting parties will insert a clause selecting the law of the legalization state to govern disputes.<sup>182</sup> Similarly, the validity of security interests in personal property are governed by the law of the state where the debtor resides, which in the context of marijuana property litigation would usually be a legalization state.<sup>183</sup> A parallel rule applies to divorce proceedings, where interests in personal property are usually determined by the law of the marital domicile when the asset is acquired.<sup>184</sup> Another example is a tort action concerning injury to tangible personal property, which is governed by the law of the state where the injury occurs.<sup>185</sup>

However, it is well settled that the forum state may utilize its law when the use of another state's law would violate its own public policy.<sup>186</sup> As the Supreme Court noted in *Baker v. General Motors Corporation*, “[t]he Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’ . . . A court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy.”<sup>187</sup> Yet the parties to a consensual transaction relating to marijuana property—as in the contract examples above—can minimize the risk of a successful public policy objection by using a choice-of-law clause that selects the law of the particular legalization state.<sup>188</sup>

Where the parties have utilized such a clause, the scope of the exception is narrow; the clause must be enforced unless the “chosen state has no substantial relationship to the parties or the transaction” or application of the chosen law would be “contrary to a fundamental public policy of a state which has a materially greater interest in the determination of the particular issue . . . .”<sup>189</sup> It would be difficult to successfully argue that this exception applies to a transaction in a legalization state that involves marijuana property. In this situation, the forum state has no relationship to the transaction and no substantial relation to any parties based in a legalization state. Further, the legalization state would have the “greater interest” in applying its own public policy in favor of marijuana property.

The public policy exception applies with somewhat greater force where no choice-of-law clause is involved—for example, in the divorce and tort illustrations discussed above. Restatement (Second) of Conflicts of Law § 90 provides that “[n]o action will be entertained on

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<sup>182</sup> U.C.C. § 1-105(c)(1).

<sup>183</sup> U.C.C. § 9-301.

<sup>184</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 258(2) (1969).

<sup>185</sup> *Id.* § 147.

<sup>186</sup> Unfortunately, “[p]ublic policy,’ as every law student well knows . . . is all too often employed as a talisman to avoid reasoning on the underlying issues.” RICHMAN, *supra* note 175, at 185.

<sup>187</sup> 522 U.S. 222, 233 (1998) (quoting *Pacific Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939)).

<sup>188</sup> *Cf.* *Ginsburg v. ICC Holdings*, No. 3:16-CV-2311-D, 2017 WL 5467688 (Nov. 13, 2017 N.D. Tex.) (parties to contract relating to medical marijuana business selected Illinois law, which recognized medical marijuana, to govern disputes but suit was brought in Texas, which did not).

<sup>189</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187(2)(a), (b) (1969).

a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.”<sup>190</sup> But the Reporter’s Notes to this section specify that “[a]ctions should rarely be dismissed because of the rule of this Section,” quoting Justice Cardozo’s conclusion that such a dismissal should not occur unless failure to do so “would violate some fundamental principle of justice, some prevalent conception of morals, some deep-seated tradition of the commonweal.”<sup>191</sup>

A state law that criminalizes the possession or transfer of marijuana clearly embodies public policy against such conduct. However, in a marijuana property dispute it is unlikely to qualify as a strong public policy. First, although a ban state may have a legitimate interest in enforcing this policy against conduct within its own territory, it has little or no interest in doing so when the conduct occurs outside of its borders. Second, given the federal government’s own schizophrenic approach to marijuana legalization, some federal courts have rejected public policy attacks in cases relating to marijuana property<sup>192</sup>—and the forum state may have similar misgivings. Finally, application of the marijuana ban policy might conflict with a more important policy of the forum state on the facts of the particular case. For instance, in a divorce action, a spouse domiciled in a legalization state might argue that her marijuana property should not be deemed “property” for purposes of equitable distribution given the forum’s public policy—but this would disadvantage the spouse domiciled in the forum state, and thus conflict with the policy of allowing a resident spouse to receive a fair share of marital assets.<sup>193</sup> In sum, a public policy objection to the use of a legalization state’s law is unlikely to be successful.<sup>194</sup>

Finally, even if a public policy objection were otherwise appropriate, its use might violate the Due Process Clause. The Supreme Court explained in *Allstate Insurance Co. v. Hague* that “if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional.”<sup>195</sup> An example is *John Hancock Mutual Life Insurance Co. v. Yates*, where a New York resident purchased an insurance policy from a Massachusetts corporation, and the insured’s widow later moved to Georgia where she brought suit on the policy under Georgia law. On these facts, the Court held that application of Georgia law was unconstitutional due to the state’s de minimis connection. Similarly, if two parties enter

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<sup>190</sup> *Id.* § 90.

<sup>191</sup> *Id.* Reporter’s Note (quoting *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 202 (N.Y. 1918)).

<sup>192</sup> *See, e.g.*, *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821 (D. Colo. 2016); *Mann v. Gullickson*, No. 15-CV-03630-MEJ, 2016 WL 6473215 (Nov. 2, 2016 N.D. Cal.).

<sup>193</sup> Alternatively, suppose that a resident of a ban state intentionally destroys marijuana in a legalization state, and the owner then sues for damages in the ban state. Applying the anti-marijuana policy on these facts would conflict with the forum state’s own presumed public policy against allowing one person to intentionally injure property owned by another. Even ban states will prosecute a person who steals marijuana from its possessor because this conduct conflicts with the public policy against theft. *See supra* note 47.

<sup>194</sup> In contrast, a ban state is clearly required to enforce a judgment issued by a legalization state that relates to marijuana property, despite a public policy concern. Under the Full Faith and Credit Clause of the Constitution, each state is obligated to respect the “judicial proceedings” of other states. U.S. CONST. art. IV, § 1. There is no public policy exception to this rule. *See Fauntleroy v. Lum*, 210 U.S. 230 (1908) (rejecting public policy defense to enforcement of judgment); *see also* RESTATEMENT (SECOND) CONFLICTS OF LAW § 117 (1969) (stating that such a judgment must be enforced “even though the strong public policy of the [forum] State would have precluded recovery in its courts on the original claim”).

<sup>195</sup> 449 U.S. 302, 310-11 (1981) (plurality opinion). *See also Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930) (noting that the forum state’s choice of law “may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them”).

into a contract related to marijuana property in a legalization state, without a choice-of-law clause, and one later moves to a ban state where he is sued for breach of contract, this contract would probably be too minor to allow the use of the ban state's law.

## 2. Forum Law and Comity

In some situations, a choice-of-law rule will authorize the forum state to use its own law in cases involving marijuana—most commonly in connection with the division or distribution of property. For example, the law of the testator's domicile at death usually determines whether a will transfers any legal interest in tangible personal property such as marijuana<sup>196</sup> and also governs rights to such property that pass through intestate succession.<sup>197</sup> Similarly, forum law normally governs the dissolution of a corporation or partnership based in that state, including the distribution of its property.<sup>198</sup> Yet a ban state's mechanical use of its own law in such a situation produces a troublesome result: the court will not recognize marijuana property located in a legalization state as "property" and hence will not distribute it to the putative owners. As a result, title to such assets will be either appropriated by adverse possession<sup>199</sup> or escheat to the legalization state.<sup>200</sup> Either outcome will injure residents of the ban state and unjustly enrich residents of the legalization state.

Under these circumstances, the ban state might use the legalization state's law as a matter of comity—not because this is required by choice-of-law rules, but rather because the court determines that it is appropriate under the circumstances.<sup>201</sup> While observing that attorneys who do not specialize in conflict of laws may "find the field mystifying, frustrating, and a bit silly," Larry Kramer suggests a number of canons that courts could adopt to clarify the subject.<sup>202</sup> Two of those canons might be used in cases involving marijuana property: one based on obsolescence, the other on reliance.

First, Kramer argues that "[w]here one of two conflicting laws is obsolete [i.e., inconsistent with prevailing legal and social norms in the state that enacted it], the other law should be applied."<sup>203</sup> A state statute that criminalizes marijuana possession and transfer is likely to be inconsistent with social norms even a ban state, because marijuana use is increasingly accepted. Further, even in such a state, the statute is unlikely to be enforced with vigor.

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<sup>196</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 263(1) (1969). *See also* *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007) (holding that law of domicile at death determined whether testatrix held a right of publicity that could be devised). However, a testator can avoid the risk that a ban state might invalidate a devise of rights in marijuana property by including a choice-of-law clause in the will that directs the use of the law of a legalization state. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 264(1) (1969) (providing that a will that devises "an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will").

<sup>197</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 260 (1969).

<sup>198</sup> HAY, *supra* note 179, at 1413.

<sup>199</sup> *See* SPRANKLING, *supra* note 11, at § 7.02.

<sup>200</sup> *See, e.g.*, CAL. CODE CIV. PROC. § 1410 (West 2007).

<sup>201</sup> *See generally* Joseph William Singer, *Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV. 1923 (discussing role of comity in conflict of laws).

<sup>202</sup> Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990).

<sup>203</sup> *Id.* at 335.

Second, he suggests that “[w]here two laws conflict, but the parties actually and reasonably relied on one of them, that law should be applied.”<sup>204</sup> In many situations involving marijuana property, the parties will have relied on the belief that such property located in a legalization state would be judicially protected. For example, the partners who invest in marijuana assets or the testator who devises such property presumably all share the same good faith belief that their ownership rights will be respected.

### *C. Full Legalization State v. Medical Marijuana State*

The choice-of-law issues discussed above may also arise in litigation involving a full legalization state and a medical marijuana state because the scope of their respective laws will differ. For instance, assume that N and O are married in a separate property state that has legalized marijuana for all purposes; O establishes a farm that legally grows marijuana for recreational use; and N then moves to a state that only permits marijuana cultivation under tightly controlled circumstances and restricts marijuana use to medical purposes. When N files for divorce, will the forum state recognize O’s marijuana property as “property” for purposes of the divorce if it was grown in a manner that violates the forum state’s law?

Where the applicable choice-of-law rule directs the forum state to use the legalization state’s law, it seems quite unlikely that a public policy objection would succeed. Both states would share the same view that marijuana property should be recognized as a general matter, even though they disagree on the parameters of ownership. Such disagreement can hardly be viewed as a convincing public policy objection. A helpful analogy is found in *Intercontinental Hotels Corporation v. Golden*, where the plaintiff brought suit in New York to enforce I.O.U.s given by the defendant in payment of gambling debts legally incurred at a casino in Puerto Rico.<sup>205</sup> Although gambling was generally illegal under New York law, the court refused to reject the use of Puerto Rico law on public policy grounds, noting that the legalization of limited forms of gambling in New York—“pari-mutuel betting and the operation of bingo games”—indicated that “the New York public does not consider authorized gambling” to violate public policy.<sup>206</sup> Similarly, the partial acceptance of legalized marijuana by a medical marijuana state indicates that it does not have a strong public policy against marijuana as a general matter.

Similarly, where the forum state is authorized to use its own law, the argument that it should defer to the legalization state’s law as a matter of comity is strong. Kramer’s obsolescence canon applies with even greater force to a medical marijuana state, since such a state already recognizes marijuana property to some extent. The reliance canon is also helpful in a medical marijuana state when one or more of the affected parties have relied on the law in a legalization state in entering into a contract or other relationship concerning marijuana located in such a state.

## IV. THE FUTURE OF MARIJUANA PROPERTY

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<sup>204</sup> *Id.* at 337.

<sup>205</sup> 203 N.E.2d 210 (N.Y. 1964).

<sup>206</sup> *Id.* at 213.

### A. *End of Marijuana Détente?*

The legalization wave shows no signs of abating. Given the overwhelming popular support for medical marijuana, it is likely that more states will adopt this position in the future. Efforts are currently underway to legalize medical marijuana in five more states.<sup>207</sup> At the same time, active campaigns are in progress to legalize recreational marijuana in six other states.<sup>208</sup>

The current marijuana détente between the federal government and legalization states may ultimately be ended by aggressive federal enforcement of the CSA. But the more likely outcome is that the status quo will continue into the foreseeable future—as it has for nine years. The possibility of future legalization should not overshadow the importance of grappling with the federal-state and interstate conflicts discussed above. Eventually, however, some form of new federal legislation may endorse the legalization effort, either by sanctioning marijuana on a nationwide basis or by allowing each state to decide the issue for itself. Under either approach, there is a risk that marijuana property may not be fully protected.

### B. *Impact of Nationwide Legalization*

Because most Americans now favor national legalization, in the long run the current impasse is likely to be resolved by federal legislation that legalizes the possession and transfer of marijuana for all purposes throughout the United States.<sup>209</sup> Congress clearly has the power to adopt such legislation under its authority to regulate interstate commerce. In *Gonzales v. Raich*, the Supreme Court rejected the claim that the CSA’s “prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes” was not authorized by the Commerce Clause.<sup>210</sup> It stressed that Congress was empowered to “regulate purely local activities” that have a substantial effect on interstate commerce, which includes the cultivation “for home consumption, of a fungible commodity for which there is an established, albeit illegal, interstate market.”<sup>211</sup> Under this logic, the legalization of marijuana cultivation, distribution, and possession would similarly be valid, even as to “purely local activities” within a particular state.

Under this national legalization approach, property rights would clearly exist in marijuana in all states as a matter of federal law.<sup>212</sup> Presumably, such a statute would expressly provide that it preempts any contrary state laws, so that no uncertainty about preemption would arise. This would end the current impasse, but potentially leave an open issue: Would the recognition of marijuana property have retroactive effect?

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<sup>207</sup> These states are Kentucky, Missouri, Oklahoma, South Dakota, and Utah. Linley Sanders, *Marijuana Legalization 2018: Which States Might Consider Cannabis Laws this Year?*, NEWSWEEK, Jan. 2, 2018, available at <https://www.newsweek.com/marijuana-legalization-2018-which-states-will-consider-cannabis-laws-year-755282>.

<sup>208</sup> *Id.* These states are Delaware, Connecticut, Michigan, New Jersey, Ohio, and Rhode Island.

<sup>209</sup> Another possibility is that national legislation would legalize the possession and transfer of marijuana only for medical purposes. This might be an interim step toward national legalization for all purposes. However, national legalization only for medical purposes would leave open the issues discussed in Part III.C above.

<sup>210</sup> 545 U.S. 1, 15 (2005).

<sup>211</sup> *Id.* at 18.

<sup>212</sup> See *supra* the analysis in Part II.

There is a compelling argument that marijuana property already exists today in legalization states, as discussed in Part II above. However, a national legalization statute should retroactively validate marijuana property rights to obviate any lingering uncertainty. Today millions of people and tens of thousands of businesses rely on the existence of these rights as a practical matter, even though the legal status of marijuana property remains officially unsettled.<sup>213</sup>

Federal courts traditionally presume that a statute does not have retroactive effect “absent clear congressional intent favoring such a result.”<sup>214</sup> This presumption is applied most frequently in cases involving new legislation “affecting contractual or property rights, matters in which predictability and stability are of prime importance.”<sup>215</sup> In the context of marijuana property, however, predictability and stability would be enhanced—not imperiled—by retroactive application. For this reason, a court might choose not to apply the presumption. To avoid uncertainty, however, Congress should expressly provide that a national legalization statute has retroactive effect.

### *C. Impact of State Option Legalization*

The more likely near-term approach would be federal legislation that amends the CSA to provide that each state may, at its option, legalize the possession and transfer of marijuana, by analogy to the historic treatment of alcoholic beverages.<sup>216</sup> This recalibration could be accomplished through legislation that deletes the reference to “marihuana” in Schedule 1 of the CSA, without preempting contrary state laws.<sup>217</sup> Of course, this state option approach would not resolve the interstate conflict problems discussed in Part III above.

Driven by religious beliefs and health concerns, early twentieth-century reformers mounted a successful campaign to amend the Constitution to ban alcoholic beverages. In 1919, the Eighteenth Amendment accordingly prohibited the “manufacture, sale, or transportation of intoxicating liquors within [and] the importation thereof into . . . the United States . . . for beverage purposes.”<sup>218</sup> The Twenty-first Amendment repealed this prohibition in 1933, but provided that any state could restrict such beverages at its option.<sup>219</sup> Its second clause stated that the “transportation or importation into any state . . . for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited.”<sup>220</sup> Accordingly, today each state has the power to restrict the distribution and use of alcoholic beverages.<sup>221</sup> This power is

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<sup>213</sup> See *supra* text accompanying notes 53-56.

<sup>214</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

<sup>215</sup> *Id.* at 271.

<sup>216</sup> See Chemerinsky et al., *supra* note 4, at 115-22 (advocating this approach).

<sup>217</sup> Alternatively, marijuana could be removed from Schedule I by an administrative decision of the Drug Enforcement Administration. For a discussion of past efforts to administratively reclassify marijuana, see UELMEN & KREIT, *supra* note 62, at § 3:85. This approach would not resolve the interstate conflicts discussed in Part III above.

<sup>218</sup> U.S. CONST. art. XVII, § 1. Notably, the amendment did not prohibit the possession of alcoholic beverages. As a result, alcoholic beverages were not classified as contraband per se and could thus be the subject of property rights.

<sup>219</sup> U.S. CONST. art. XXI.

<sup>220</sup> *Id.* § 2 (emphasis added).

<sup>221</sup> *But see* *Granholm v. Heald*, 544 U.S. 460 (2005) (holding that states do not have the power to prohibit interstate shipments of alcohol).

typically delegated to the county level and, as a result, today “dry counties” exist in some states where the sale of alcohol is either prohibited or tightly controlled.<sup>222</sup>

A confluence of public opinion, political reality, and federalism theory is fueling movement toward the state option approach.<sup>223</sup> Although there is determined opposition to national legalization,<sup>224</sup> a recent poll shows that 74% of Americans favor “protecting states that have legalized medical or recreational marijuana from federal prosecution.”<sup>225</sup> A variety of political figures,<sup>226</sup> including President Trump,<sup>227</sup> have expressed support for this approach because it accommodates the current political reality that states remain divided on key questions: (1) Should marijuana be legalized at all? and (2) If so, should it be legalized only for medical use or also for recreational use? Finally, this approach is consistent with our tradition of federalism, under which states are afforded broad discretion in areas of social and economic policy. As the Supreme Court acknowledged in *Arizona State Legislature v. Arizona Independent Restricting Commission*, it “has ‘long recognized the role of the States as laboratories for devising solutions to difficult legal problems.’”<sup>228</sup>

Under the state option approach, property rights in marijuana would clearly exist within legalization states—because it is no longer contraband per se under federal law. But presumably some states would retain their existing laws that criminalize its possession and transfer; as a result, property rights in marijuana would not exist in those states. This creates the risk that marijuana property conflicts may arise between legalization states and ban states, despite the solutions analyzed in Part III above.

Accordingly, federal legislation adopting the state option approach should expressly provide that ban states must respect the existence of marijuana property in legalization states when interstate conflicts occur, whether they arise from business transactions or personal

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<sup>222</sup> See Hunter Schwarz, *Where in the United States You Can't Purchase Alcohol*, WASH. POST, Sept. 2, 2014, <https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/02/where-in-the-united-states-you-cant-purchase-alcohol/> (identifying ten states that allow counties to criminalize the sale or purchase of alcohol).

<sup>223</sup> Bills implementing this approach have been introduced in Congress. See, e.g., Marijuana Freedom and Opportunity Act, S. 3174, 115<sup>th</sup> Cong. (2018); Strengthening the Tenth Amendment Through Entrusting States Act, S. 3032, 115<sup>th</sup> Cong. (2018). See also Compassionate Access, Research Expansion, and Respect States Act of 2017, H.R. 2920, 115<sup>th</sup> Cong. (2017) (allowing state option only for medical marijuana).

<sup>224</sup> Quinnipiac University Poll, *supra* note 134. Although 63% of Americans favor the national legalization of marijuana, most Republicans disagree: 41% favor this step, while 55% oppose it. *Id.*

<sup>225</sup> *Id.* Notably, the same poll indicated that 52% of Republicans also favor this approach.

<sup>226</sup> See, e.g., Dan Adams, *Warren aims to bar federal interference in state pot laws*, BOSTON GLOBE, June 8, 2018, available at 2018 WLNR 1769829 (discussing support for state option approach by Senators Elizabeth Warren and Cory Gardner).

<sup>227</sup> Evan Halper, *Trump inclined to back ending pot ban*, L.A. TIMES, June 9, 2018, available at 2018 WLNR 17754974 (quoting President Trump as saying he would “probably end up supporting” a bill that uses the state option approach).

<sup>228</sup> 135 S. Ct. 2652, 2673 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). See also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 211 (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social . . . experiments without risk to the rest of the country.”).

relationships. This would preclude a ban state from applying its own law to effectively nullify property rights in marijuana located outside of its borders.<sup>229</sup>

## CONCLUSION

In sum, marijuana can be owned under state law despite conflicting federal law. Yet the hybrid property system produced by this divergence will generate uncertainty—and thus litigation—until either judicial decisions better chart the terrain between state and federal law or marijuana property is legalized through nationwide legislation. In the interim, legalization states and ban states will struggle with a similar challenge in the interstate setting.

More broadly, sovereign conflicts over the existence of property rights are inevitable in our federal system. The rights recognized by a particular state will sometimes be inconsistent with federal law or with the law of other states. After the current impasse over marijuana property is finally resolved, the problem will recur in other contexts. Although the question of marijuana ownership has unique facets, the approaches analyzed in this Article may provide a useful framework for navigating future conflicts.

Given the dominant role that state law plays in defining property rights under the Tenth Amendment, federal preemption of such rights should rarely occur. When it does, federal and state authorities will be confronted with a hybrid system where property exists as a matter of state law, but not under federal law. But ultimately these conflicting sovereigns will need to accept a certain amount of inconsistency between their approaches.

Conflicts between states over property rights raise different problems due to the impossibility of preemption. Private actors can circumvent this jurisdictional inconsistency to some extent through litigation strategy, choice-of-law clauses, or alternative dispute resolution techniques. Beyond this point, the forum state should give appropriate deference to the law of the situs state, consistent with the traditional view that the situs state has the greater interest in the application of its own law.

Ultimately, federalism is “messy, untidy, and always a little out of control,” as Charles Handy observes.<sup>230</sup> Our goal should be to reduce the systemic friction produced by federal-state conflicts and interstate conflicts, while appreciating that complete harmonization of property law doctrines is both unlikely to occur and arguably counterproductive, given the traditional role of the states as laboratories of democracy.

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<sup>229</sup> In addition, legislation implementing this approach should be retroactive for the reasons discussed in Part IV. B.

<sup>230</sup> CHARLES HANDY, *THE AGE OF PARADOX* 111 (1995).

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### **The Evolving Federal Response to State Marijuana Reforms**

**25 Widener Law Review – Forthcoming 2019**

Robert A. Mikos  
Vanderbilt University Law School

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*The Evolving Federal Response to State Marijuana Reforms*

— WIDENER LAW REVIEW — (forthcoming)

Robert A. Mikos, Vanderbilt University

The states have launched a revolution in marijuana policy, creating a wide gap between state and federal marijuana law. While nearly every state has legalized marijuana in at least some circumstances, federal law continues to ban the substance outright. Nonetheless, the federal response to state reforms has been anything but static during this revolution. This Essay, based on my Distinguished Speaker Lecture at Delaware Law School, examines how the federal response to state marijuana reforms has evolved over time, from War, to Partial Truce, and, next (possibly) to Capitulation. It also illuminates the ways in which this shifting federal response has alternately constrained and liberated states as they seek to regulate marijuana as they deem fit.

***The Evolving Federal Response to State Marijuana Reforms***

Robert A. Mikos\*

We are experiencing nothing short of a revolution in marijuana law. Just twenty-three years ago, every state in the Union banned marijuana outright.<sup>1</sup> Today, by contrast, only one state still does (Idaho).<sup>2</sup> Put another way, over the last two decades, forty-nine states plus the District of Columbia have legalized the use of marijuana for at least some purposes.<sup>3</sup>

**Figure 1** illuminates the steady spread of these state marijuana reforms over time. The stacked bars show the total number of states that have legalized marijuana by the end of each year from 1996-2018.

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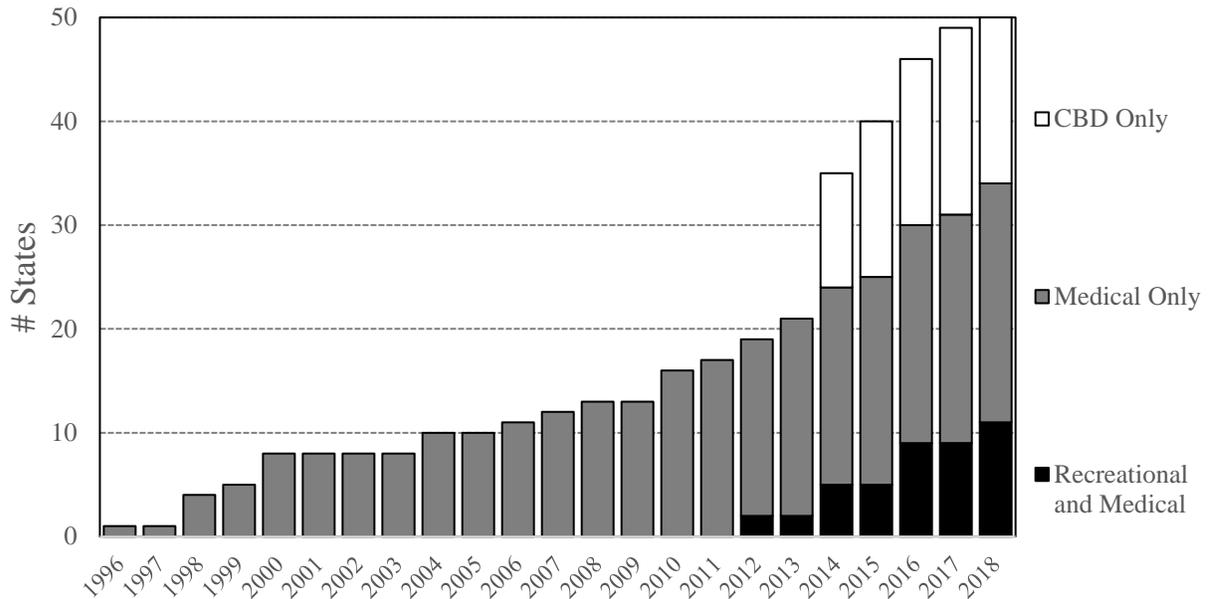
\* Professor of Law, Vanderbilt University Law School. This Essay is based on my Distinguished Speaker Keynote Lecture for the *Cannabis in the Tri-State Area* Symposium at Delaware Law School in March of 2019. I thank Professor Luke Scheuer and the editors and staff of the *Widener Law Review* for organizing and hosting the Symposium.

<sup>1</sup> ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 3 (2017) [hereinafter MIKOS, MARIJUANA LAW].

<sup>2</sup> Robert A. Mikos, *Only One State Has Not Yet Legalized Marijuana in Some Form . . .*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (June 16, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/07/only-one-state-has-not-yet-legalized-marijuana-in-some-form/> [hereinafter Mikos, *Only One State*].

<sup>3</sup> *Id.*

**Figure 1: States Legalizing Marijuana<sup>4</sup>**



The earliest reforms, like California’s Compassionate Use Act (aka Proposition 215), legalized only medical use of the drug (at least in name).<sup>5</sup> The gray portion of each stacked bar represents the share of states that legalized medical—and *only* medical—marijuana, at the end of each year depicted in **Figure 1**. The white portion of the stacked bar represents the share of states that adopted a very narrow version of a medical marijuana law. Starting with Alabama in 2014, states began legalizing medical use of marijuana, but only when the drug contained very little Tetrahydrocannabinol (“THC”), the psychoactive chemical (cannabinoid) produced by the cannabis plant.<sup>6</sup> I label these “CBD Only” states because they are interested in enabling access to another cannabinoid with reputed therapeutic benefits: cannabidiol (“CBD”).<sup>7</sup> Although CBD is not psychoactive, it is (or was, until very recently) nearly always considered “marijuana” in the

<sup>4</sup> Figure 1 is updated and adapted from Figure 1.1 in MIKOS, MARIJUANA LAW, *supra* note 1, at 3.

<sup>5</sup> *Id.* at 99.

<sup>6</sup> *Id.* at 123.

<sup>7</sup> *Id.*

eyes of the law.<sup>8</sup> But because these “CBD Only” laws are much narrower than the medical marijuana reforms depicted in gray, I have shown them separately in **Figure 1**.<sup>9</sup>

In 2012, some states that previously adopted medical marijuana laws began to legalize the drug for non-medical purposes as well.<sup>10</sup> The black portion of the stacked bar in **Figure 1** depicts the spread of these “Recreational and Medical” reforms. In a nutshell, states with “Recreational and Medical” marijuana laws permit anyone over twenty-one years of age to possess and use marijuana, regardless of their reasons for so doing; and nearly all of these states also permit commercial vendors to sell the drug to lawful consumers.<sup>11</sup>

The last stacked bar at the far-right side of **Figure 1** shows how far these three types of marijuana reform have proliferated across the states. At the end of 2018, ten states (plus the District of Columbia) had legalized adult use of marijuana (“Recreational and Medical”); another thirty-nine states had legalized marijuana exclusively for medical purposes, with twenty-three of those states allowing marijuana with THC (“Medical Only”) and another sixteen states allowing marijuana without THC (“CBD Only”).<sup>12</sup>

By itself, this dramatic transformation in state marijuana laws is quite remarkable. But the transformation is all the more remarkable in light of the fact that it has taken place in the shadow of a strict federal ban on the drug. Since 1970—well before California launched the modern reform

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<sup>8</sup> Robert A. Mikos, *New Congressional Farm Bill Legalizes Some Marijuana*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Dec. 13, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/12/new-congressional-farm-bill-legalizes-some-marijuana/> [hereinafter Mikos, *New Congressional Farm Bill*].

<sup>9</sup> For a discussion of the differences between Medical Only and CBD Only laws, see MIKOS, MARIJUANA LAW, *supra* note 1, at 123–124.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 443; see also Robert A. Mikos, *Some Observations on How Vermont Just Legalized Recreational Marijuana*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG. (Jan. 24, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/01/352/>.

<sup>12</sup> Mikos, *Only One State*, *supra* note 2.

movement—federal law has banned the possession, manufacture, and distribution of marijuana, making no exception for medical (or other) use of the drug.<sup>13</sup> In the ensuing half-century, the federal ban has survived constitutional challenges,<sup>14</sup> as well as a groundswell in public support for legalization of the drug.<sup>15</sup>

The tension between the federal marijuana ban and state reforms is one of the primary reasons why marijuana law has become such a hot field and the subject of symposia. The attention that the field is now attracting is warranted; in part because of the tension between state and federal law, the field raises some of the most fascinating and important legal issues of our day.<sup>16</sup>

To set the stage for our discussion on some of these issues, this essay discusses in more detail how the federal government has responded to state reforms. As I will show, the federal response has wielded a substantial and sometimes overlooked influence on the design of state marijuana laws. Furthermore, that influence has not been fixed across time. It is important to recognize that the federal response to state reforms has evolved over the past two decades, even though the federal law governing marijuana has remained largely the same. For the first decade (or so) of state reforms, the federal government took an overtly hostile and aggressive approach to marijuana legalization in the states.<sup>17</sup> Among other things, it threatened to punish growers who

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<sup>13</sup> 21 U.S.C. §§ 841, 844 (2016).

<sup>14</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding application of the federal marijuana ban to the intra-state possession, cultivation, and distribution of marijuana).

<sup>15</sup> *E.g.*, Justin McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, GALLUP (Oct. 22, 2018), <https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx> (reporting that 66% of Americans support legalizing marijuana as of 2018, compared to only 12% in 1970). For explanations of why these changes in public opinion have not yet triggered changes to federal marijuana law, see Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 UNIV. DENVER L. REV. 997–98 (2012) (identifying features of the national political process that help to preserve the federal marijuana ban against “increasingly loud calls for reform”); David S. Schwartz, *Presidential Politics as a Safeguard of Federalism: The Case of Marijuana Legalization*, 62 BUFF. L. REV. 599 (2014) (giving another view of the impact of the federal political process on federal marijuana law).

<sup>16</sup> See MIKOS, MARIJUANA LAW, *supra* note 1, at 3–16 (identifying some key questions posed by marijuana law and policy).

<sup>17</sup> See *infra* notes 19–49 and accompanying text.

distributed marijuana and physicians who recommended the drug to state-authorized patients. To defuse these threats, the states had to come up with creative solutions, which are evident in some otherwise puzzling features of state reforms (a few of which I will discuss in a moment).

But starting in 2009, the federal government began to adopt a far more tolerant approach toward legalization.<sup>18</sup> In particular, the Department of Justice (“DOJ”), for the most part, stopped enforcing the federal marijuana ban against individuals who were acting in compliance with state law. This shift in federal response enabled states to pursue even broader reforms and to adopt more robust regulations of marijuana. Nonetheless, the ongoing tension between state and federal law continues to pose some unique challenges for the marijuana industry and for state officials tasked with regulating them. I will conclude by offering some thoughts on what it would take to remove these lingering challenges, should the federal government decide to change its marijuana policy once again.

### **The First Phase: War**

The first federal response to state reforms was overtly hostile and aggressive: call it “War.” Not long after California adopted the nation’s first modern medical marijuana law in 1996, the federal drug czar at the time, General Barry McCaffrey, urged federal agencies from the Drug Enforcement Administration (“DEA”) to the Department of Transportation (“DOT”) to do their part to quash the nascent medical marijuana movement.<sup>19</sup> Many federal agencies heeded McCaffrey’s call to arms. The DEA, for example, raided a large number of dispensaries that had sprouted up to supply medical marijuana to qualifying patients in legalization states.<sup>20</sup> It also

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<sup>18</sup> See *infra* notes 51–80 and accompanying text.

<sup>19</sup> Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6166 (Feb. 11, 1997).

<sup>20</sup> Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1443 (2009) (noting that the DEA raided “nearly 200 medical marijuana

threatened to bar physicians from writing prescriptions for any controlled substance if they dared to prescribe marijuana to their patients.<sup>21</sup>

Of course, this federal War did not actually stop states from legalizing the drug. As you can see from **Figure 1**, the number of states legalizing medical marijuana continued to grow steadily after 1996, notwithstanding this federal hostility toward legalization. (I explain elsewhere why the federal government found it so difficult to stop this movement.<sup>22</sup>)

Nonetheless, the federal War on marijuana clearly influenced (likely for the worse) how states designed their medical marijuana programs.<sup>23</sup> In particular, federal aggression made it more difficult for the states to regulate marijuana as they deemed fit,<sup>24</sup> leading the states to make some regulatory choices that are otherwise quite difficult to explain or justify. Let me give you two concrete examples to illustrate.

For one thing, the federal campaign against marijuana dispensaries likely dissuaded many states from authorizing companies to supply the needs of patients participating in state medical marijuana reforms. Notably, before 2003, *no state* had formally authorized companies to supply marijuana to patients commercially.<sup>25</sup> Instead, before 2003, every medical marijuana state expected patients to grow their own marijuana or get it from a “caregiver” who could grow it on their behalf (without remuneration).<sup>26</sup>

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cooperatives in California alone” as part of a plan to “disrupt essential components of state marijuana programs”) [hereinafter Mikos, *On the Limits of Supremacy*].

<sup>21</sup> Conant v. Walters, 309 F.3d 629, 634 (9th Cir. 2002) (reviewing DEA policy).

<sup>22</sup> See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1445–79 (detailing the *de jure* and *de facto* limits on federal influence over marijuana policy).

<sup>23</sup> See *id.* at 1428–30.

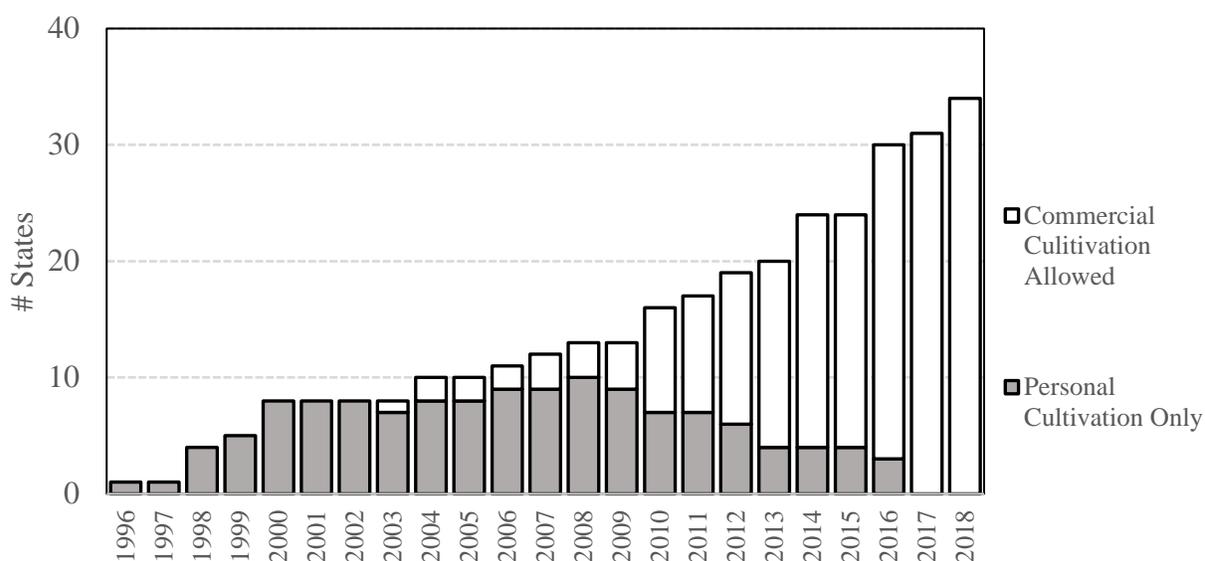
<sup>24</sup> See *id.* at 1465–66.

<sup>25</sup> See MIKOS, MARIJUANA LAW, *supra* note 1, at 532.

<sup>26</sup> *Id.* at 413–42 (explaining the rules governing personal and caregiver cultivation).

**Figure 2** depicts the state-approved sources of supply from 1996-2018, the same time period covered by **Figure 1**. In other words, **Figure 2** shows where qualifying patients could legally (under state law) obtain a drug they were allowed (again, under state law) to possess and use. To simplify, **Figure 2** includes only the “Medical Only” and “Medical and Recreational” states from **Figure 1**.

**Figure 2: Marijuana Supply Options in Medical Marijuana States<sup>27</sup>**



The gray portion of each stacked bar in **Figure 2** depicts the share of medical marijuana states in each year that required patients (or their caregivers) to grow the drug themselves but *did not also* (or instead) permit commercial dispensaries to supply it to them. These states have adopted what I call the “Personal Cultivation Only” supply model. The white portion of the stacked bars depict the share of medical marijuana states that allowed patients to buy the drug from commercial

<sup>27</sup> Mikos, MARIJUANA LAW, *supra* note 1, at 532 (Figure 2 is updated and adapted from Figure 10.1 in the book).

dispensaries. These states have adopted what I call the “Commercial Cultivation Allowed” model.<sup>28</sup>

As you can see from **Figure 2**, there were very few medical marijuana states that allowed dispensaries to produce and sell marijuana before 2009 (i.e., most of the stacked bar is still gray in those early years), and none that did so explicitly before 2003. To be sure, there were some dispensaries operating before 2009; however, those dispensaries were technically illegal even under state law.<sup>29</sup> Hence, for more than the first decade of reform, medical marijuana states depended almost exclusively on personal cultivation to supply the needs of patients whom they believed might benefit from the use of marijuana.<sup>30</sup>

In the abstract, expecting seriously ill patients to “grow their own” medicine is an odd choice for the states to make. After all, no state says, “you may use Percocet – and indeed, we think you might benefit from it, but you’ll have to make it yourself.” In fact, states generally bar patients from making their own controlled substances at home, even if they are allowed to possess and use those same substances.<sup>31</sup> But the federal government arguably gave the states no choice but to opt for the Personal Cultivation Only model. During this first phase, the federal government was threatening to shut down commercial marijuana suppliers (especially large ones).<sup>32</sup> Thus, while the states could have tried to set up a well-regulated medical marijuana industry, they feared the effort would prove futile in the face of a likely federal crackdown.<sup>33</sup> Worse yet, states feared

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<sup>28</sup> Personal Cultivation and Commercial Cultivation are not mutually exclusive; indeed, several states allow both. For a more detailed breakdown of state models for the supply of marijuana, see *id.* at 480, 532–33.

<sup>29</sup> *Id.* at 532.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 415.

<sup>32</sup> See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1443.

<sup>33</sup> Indeed, as I have demonstrated elsewhere, licensing marijuana dispensaries may have made those dispensaries even more vulnerable to a federal crackdown. Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PENN. L. REV. 103 (2012) (explaining that under the conventional wisdom, the federal government could seize

that a federal crackdown on a state-regulated industry might leave patients without any source of supply, especially if states required patients to buy the drug from licensed vendors rather than grow their own.<sup>34</sup>

But states also recognized that the federal government's ability to enforce its strict marijuana ban is limited, practically speaking. Even if it could shut down large commercial suppliers in the handful of states that had (in those early years) legalized medical marijuana, the federal government could not realistically stop patients or their caregivers from producing the drug in small batches.<sup>35</sup> There would simply be too many targets for federal law enforcement agents to handle. Consider that a single state like Colorado has over 100,000 registered medical marijuana patients, each of whom is allowed to grow a small number of plants to supply their own needs. Thus, even though personal cultivation has many shortcomings, the states may have viewed it as the only viable way to supply the needs of medical marijuana patients while the federal government waged war on commercial marijuana dispensaries.<sup>36</sup>

The aggressive federal response to state reforms also warped the way that states structured the role of physicians in their medical marijuana programs. Not surprisingly, medical marijuana states have wanted physicians to help them identify who should be allowed to use marijuana for medical purposes.<sup>37</sup> (In the 1990s and early 2000s, states were not yet ready to legalize marijuana

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any information gathered by the a state through its licensing process and use that information to identify and prosecute marijuana suppliers under federal law).

<sup>34</sup> ROBERT A. MIKOS, EXPERT REPORT IN ALLARD V. HER MAJESTY THE QUEEN IN RIGHT OF CANADA 14–17 (Oct. 10, 2014).

<sup>35</sup> See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1463–69.

<sup>36</sup> MIKOS, EXPERT REPORT, *supra* note 34, at 14–17.

<sup>37</sup> See MIKOS, MARIJUANA LAW, *supra* note 1, at 601.

for non-medical purposes.) But recall that the DEA was threatening to revoke the prescription-writing authority of physicians who dared to prescribe marijuana to their patients.<sup>38</sup>

Thus, to entice physicians to perform this critical gatekeeping function, states had to find a way to defuse the DEA sanctions. To that end, states like California started to ask physicians to “recommend” rather than “prescribe” marijuana to their patients.<sup>39</sup> Such a recommendation entails telling a patient that his/her medical condition might benefit from the use of marijuana.<sup>40</sup> Of course, there appears to be little practical difference between *prescribing* marijuana, on the one hand, and *recommending* the drug, on the other. However, physicians convinced a prominent federal appeals court that the two practices were legally distinguishable. In *Conant v. Walters*, the Ninth Circuit held that merely “recommending” marijuana to a patient is First Amendment protected speech, meaning that physicians could not be punished for recommending marijuana to their patients, even though physicians could be punished for *prescribing* it.<sup>41</sup> The court reasoned (dubiously) that a patient who receives a recommendation would not necessarily use it to obtain marijuana; for example, the court suggested, that “the patient upon receiving the recommendation could petition the government to change the law.”<sup>42</sup> By contrast, the court suggested that a prescription served no purpose other than to enable a patient to obtain a drug; writing a prescription for marijuana (a federally proscribed drug) would thus aid and abet a patient’s unlawful possession

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<sup>38</sup> See *supra*, note 21, and accompanying text.

<sup>39</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 110–11.

<sup>40</sup> See, e.g., Mich. Comp. Laws Ann. § 333.26423(q) (“‘Written certification’ means a document signed by a physician, stating all of the following: (1) The patient’s debilitating medical condition. (2) The physician has completed a full assessment of the patient’s medical history and current medical condition, including a relevant, in-person, medical evaluation. (3) In the physician’s professional opinion, *the patient is likely to receive therapeutic or palliative benefit* from the medical use of marihuana to treat or alleviate the patient’s debilitating medical condition or symptoms associated with the debilitating medical condition or symptoms associated with the debilitating medical condition.”). The states sometimes use different words to describe the “recommendation” (e.g., certification, authorization, etc.), but the requirements are very similar across the states. For a further discussion of the recommendation requirement, see MIKOS, MARIJUANA LAW, *supra* note 1, at 110.

<sup>41</sup> *Conant*, 309 F.3d at 632–33.

<sup>42</sup> *Id.* at 634.

of marijuana, making it unprotected crime-facilitating speech.<sup>43</sup> Although the court's reasoning regarding the actual function of a recommendation is questionable,<sup>44</sup> the DEA did not challenge the ruling and it has abided by the *Conant* court's decision ever since. For this reason, all thirty-four medical marijuana states (and D.C.) do not ask physicians to write prescriptions for marijuana, but rather ask them only to recommend the drug to their patients.<sup>45</sup>

Even though the states were able to work around this second federal roadblock, asking physicians to issue "recommendations" in lieu of "prescriptions" is less than ideal (just like asking patients to grow their own marijuana is less than ideal). For one thing, although physicians are well-versed in the requirements for writing prescriptions, they are less familiar with the novel requirements for issuing recommendations, and this unfamiliarity may have needlessly exposed some patients to criminal sanctions. In one early case, for example, a medical marijuana patient in Washington state was prosecuted for possession of marijuana because the words his physician recited in recommending marijuana for his condition ("the potential benefits of the medical use of marijuana *may* outweigh the health risks") did not precisely match the magic words required by the state's medical marijuana law ("the potential benefits of the medical use of marijuana *would likely* outweigh the health risks").<sup>46</sup> In addition, states could not use established *prescription* drug monitoring programs ("PDMPs") to track medical marijuana *recommendations*.<sup>47</sup> PDMPs are an enormously valuable tool states use to combat prescription drug mills and abuse of prescription

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<sup>43</sup> *Id.* at 633.

<sup>44</sup> *E.g.*, Pearson v. McCaffrey, 139 F. Supp. 2d 113, 120–21 (D.D.C. 2001) (reasoning that "a recommendation is analogous to a prescription"); Nicole Santamaria, Note, *Medical Marijuana Legislation in Florida: The Recommendation vs. Prescription Distinction for Healthcare Providers*, 45 STETSON L. REV. 537, 558 (2016) (suggesting that it is "willfully ignorant to say that a physician who recommends medical marijuana to a patient does not intend that the patient will use that recommendation as a means to obtain medical marijuana").

<sup>45</sup> See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1467 ("By carefully circumscribing the task that physicians must perform, the states . . . prevented the federal government from squeezing one of the most important chokepoints in state medical marijuana programs.").

<sup>46</sup> Washington v. Shepherd, 41 P.3d 1235 (Wash. App. 2002) (emphases added).

<sup>47</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 625 n.6.

drugs (like opioid painkillers).<sup>48</sup> Thus, to monitor physician recommendation practices and possible abuse of medical marijuana programs, states had to create a parallel medical marijuana registration process at an added cost to state budgets.<sup>49</sup>

In sum, during this first phase of state reforms, the federal government was overtly hostile to the legalization of marijuana. It waged war on individuals – and especially suppliers – who sought to take advantage of the states’ newfound openness to medical marijuana. The federal hostility did not stop reforms from spreading across the states; by the end of this period (2008), twelve states and the District of Columbia had legalized medical marijuana.<sup>50</sup> It did, however, leave its mark on those reforms, by shaping and warping the way that states regulated marijuana suppliers and physicians.

### **The Second Phase: A (Partial) Truce**

Following the election of President Barack Obama in 2008, the federal government began to adopt a softer response toward state reforms. During this Second Phase, the federal laws governing marijuana did not change much (as I have already noted), but the way that the federal government enforced those laws *did* change.<sup>51</sup> Most notably, in 2009, senior leadership in the Department of Justice (DOJ) began to discourage United States Attorneys from prosecuting individuals who used and/or supplied marijuana in compliance with state marijuana reforms.<sup>52</sup> In

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<sup>48</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 625 n.6.

<sup>49</sup> *Id.* at 116–18, 239–41 (discussing registration requirements).

<sup>50</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 3.

<sup>51</sup> There has been only one notable substantive change to federal marijuana law since 1996. The 2018 Farm Bill narrowed somewhat the definition of marijuana under federal law to exclude cannabis plants that are low in THC. Those plants and any substances extracted therefrom (like CBD) are now considered “hemp.” For further discussion of the 2018 Farm Bill, see *infra* notes 81–84 and accompanying text.

<sup>52</sup> See generally Robert A. Mikos, *A Critical Appraisal of the Department Of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633 (2011) [hereinafter Mikos, *A Critical Appraisal*].

other words, senior DOJ officials urged federal prosecutors to turn a blind eye to violations of the federal marijuana ban.<sup>53</sup>

Even though this enforcement guidance conferred no legal rights on marijuana users/suppliers,<sup>54</sup> it still signaled that the federal government was willing to call a “Truce” in its longstanding war on marijuana.<sup>55</sup> (For reasons I explain below, it might be more accurate to describe the federal response to state reforms during this Second Phase as a “Partial Truce.”) The federal government has continued to abide by this “Partial Truce” even after the change in Administrations. President Trump’s first Attorney General, Jeff Sessions, was adamantly opposed to marijuana legalization; Attorney General Sessions even rescinded the Obama Administration enforcement guidance.<sup>56</sup> Importantly, however, for reasons I have explained in greater detail elsewhere, Sessions did not actually change federal enforcement practices—and indeed, there was probably little he could have done, even if he had desired to turn back the clock and reinstate the federal War on state reforms.<sup>57</sup> Among other reasons, since 2014, Congress has attached riders to the DOJ’s annual budget, barring the agency from using any of its funding to prosecute individuals for possession, production or distribution of marijuana that complies with state medical marijuana reforms.<sup>58</sup>

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<sup>53</sup> See Memorandum from David W. Ogdan, Deputy Att’y Gen., to Selected U.S.

Attorneys (Oct 19, 2009); Memorandum from James M. Cole, Deputy Att’y Gen., to All U.S. Att’ys (Aug. 29, 2013).

<sup>54</sup> See Mikos, *A Critical Appraisal*, *supra* note 52, at 640–643. See also Zachary Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017).

<sup>55</sup> Professor Alex Kreit has helped to popularize the term “truce” to describe the federal government’s post (drug)-war drug policy. See Alex Kreit, *Drug Truce*, 77 OH. ST. L. J. 1323 (2016).

<sup>56</sup> See Memorandum from Jefferson B. Sessions, Att’y Gen., to All U.S. Att’ys (Jan. 4, 2018).

<sup>57</sup> Robert A. Mikos, *Jeff Sessions Rescinds Obama-Era Enforcement Guidance: Five Observations*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Jan. 5, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/01/jeff-sessions-rescinds-obama-era-enforcement-guidance-six-observations/>.

<sup>58</sup> The latest rider provides that:

None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana,

This Partial Truce, like the War it replaced, had a substantial effect on the design of state marijuana reforms. The states interpreted the DOJ enforcement guidance (and later, the congressional spending riders) as giving them the green light to set up a legal, but highly regulated, commercial marijuana industry. Thus, starting in 2009, an increasing share of medical marijuana states authorized the commercial production and distribution of marijuana<sup>59</sup>—as shown by the growing white portion of the stacked bars in **Figure 2**. In fact, by the end of 2018, each of the thirty-four medical marijuana states (and D.C.) had authorized companies to produce and sell medical marijuana.<sup>60</sup> In 2002, by contrast, *none* of the eight medical marijuana states had allowed companies to grow and sell the drug, and even by 2008, only three out of thirteen medical marijuana states had done so.<sup>61</sup> Starting around 2009, the states also adopted the first comprehensive regulations to govern the newly-legalized marijuana industry. For example, states began to restrict the packaging and labeling of marijuana products and to impose onerous seed-to-sale tracking requirements on state-licensed marijuana vendors.<sup>62</sup> Today, roughly 5,000

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Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

CONSOLIDATED APPROPRIATIONS ACT, 2018, Pub. L. No. 115–141, § 538, 132 Stat. 348, 444–45 (Mar. 23, 2018). *See also* United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016) (interpreting rider language as barring the DOJ from prosecuting individuals for actions taken in compliance with state medical marijuana laws).

<sup>59</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 531–32; MIKOS, EXPERT REPORT, *supra* note 34, at 14–17.

<sup>60</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 532.

<sup>61</sup> *Id.*

<sup>62</sup> *See, e.g.*, COLO. DEP’T OF REVENUE, MARIJUANA ENFORCEMENT DIVISION, RETAIL MARIJUANA RULES, <https://perma.cc/ARE5-UYD2>. State regulations of the marijuana industry are discussed in depth in MIKOS, MARIJUANA LAW, *supra* note 1, at 443–78.

companies are growing and selling marijuana openly with the blessing of state government.<sup>63</sup> None of this would have been possible without the federal government's forbearance.

As I suggested earlier, however, this truce is only *partial*. Federal agencies have not—and arguably *could* not—eliminate all of the restrictions federal law now imposes on the marijuana industry simply by exercising their enforcement discretion. I will briefly highlight three examples of how federal law continues to bedevil the state-licensed marijuana industry, notwithstanding the DOJ's refusal (or inability) to prosecute.

Difficulty in obtaining banking services is probably the most notable obstacle federal law continues to impose on state licensed marijuana suppliers. Banks remain reluctant to deal with state-licensed marijuana suppliers, in large part, because it remains a federal crime to conduct financial transactions involving the proceeds of unlawful activity (which includes the sale of marijuana).<sup>64</sup> While the Department of the Treasury has reassured banks that they will not be punished for doing business with the marijuana industry, most banks want something more than the agency's non-binding verbal reassurances that it is okay for them to break the law. In any event, in return for its enforcement forbearance, Treasury has demanded that banks monitor their marijuana clients closely and complete burdensome reports on virtually all of their financial transactions, at enormous cost.<sup>65</sup> For these reasons, even state law-abiding marijuana suppliers currently have difficulty obtaining even basic banking services, like checking accounts and loans.

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<sup>63</sup> As of August 1, 2019, Colorado alone had licensed 571 retail marijuana shops and 454 medical marijuana shops. See COLO. DEP'T OF REVENUE, MARIJUANA ENFORCEMENT DIVISION, *MED Resources and Statistics*, <https://www.colorado.gov/pacific/enforcement/med-resources-and-statistics> (last visited Aug. 03, 2019).

<sup>64</sup> See generally Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE WESTERN RES. L. REV. 597 (2015) (providing an insightful and comprehensive analysis of federal regulations that now limit the marijuana industry's access to banking services).

<sup>65</sup> *Id.* at 617.

State licensed marijuana suppliers are currently also subject to an unusually high effective federal tax rate.<sup>66</sup> All income is taxable, regardless of its source.<sup>67</sup> Thus, like all other businesses, marijuana suppliers must pay federal taxes on their income, even though their source of income is criminal under federal law. Unlike most other businesses, however, marijuana suppliers cannot deduct their usual operating expenses (e.g., expenditures on legal services and marketing) from their revenues when calculating their federal tax liability. A special provision of the Tax Code—Section 280E—bars illicit drug dealers (which, again, includes state-licensed marijuana suppliers) from making those deductions.<sup>68</sup> As a result, a business that sells marijuana is now subject to a much higher effective federal tax rate than a business that sells, say, alcohol or tobacco products.<sup>69</sup>

As a final example of the way that federal law continues to hound state licensed marijuana businesses under the Partial Truce, consider that marijuana suppliers also remain vulnerable to private civil Racketeer Influenced and Corrupt Organization (RICO) lawsuits.<sup>70</sup> Every state-licensed marijuana business likely violates the federal RICO statute.<sup>71</sup> To be sure, those businesses do not have to worry about being prosecuted criminally for these violations; after all, the DOJ's non-enforcement policy discussed earlier applies as much to these RICO offenses as it does to the marijuana trafficking offenses that the businesses are committing. But unlike the Controlled

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<sup>66</sup> See Benjamin M. Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523 (2014).

<sup>67</sup> *Id.*

<sup>68</sup> 26 U.S.C. §280E (“No deduction or credit shall be allowed for any amount paid or incurred during that taxable year in carrying on any trade or business if such trade or business . . . consists of trafficking in controlled substances . . . which is prohibited by Federal law . . .”).

<sup>69</sup> For discussions of Section 280E and its impact on the state-licensed marijuana industry, see Leff, *Tax Planning for Marijuana Dealers*, *supra* note 66 (discussing impact of Section 280E and possible workarounds); Robert A. Mikos, *The Corporate Tax Cut Might Have Done More for Marijuana Suppliers than Repealing Section 280E Would Have*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG, <https://my.vanderbilt.edu/marijuanalaw/2018/02/the-corporate-tax-cut-might-have-done-more-for-marijuana-suppliers-than-repealing-section-280e-would-have/> (Feb. 16, 2018) (demonstrating that recent federal tax cuts have mitigated the impact of Section 280E).

<sup>70</sup> Mikos, *A Critical Appraisal*, *supra* note 52, at 649.

<sup>71</sup> 18 U.S.C. § 1961 (2016). See also Mikos, *A Critical Appraisal*, *supra* note 52, at 649–51 (explaining how marijuana suppliers almost invariably violate the RICO statute).

Substances Act (CSA), the federal RICO statute can also be enforced by private plaintiffs.<sup>72</sup> In particular, the RICO statute empowers anyone who has suffered an injury to their “business or property” by racketeering activity (here, growing or selling marijuana) to bring a civil cause of action against the perpetrator.<sup>73</sup> What is more, the RICO statute promises treble damages to victorious plaintiffs.<sup>74</sup> Critically, private plaintiffs are not bound by DOJ prosecutorial decisions or congressional spending riders. In other words, private plaintiffs can sue marijuana dispensaries even if the DOJ declines to bring (or is forbidden by Congress from bringing) a criminal prosecution against them.<sup>75</sup> In fact, private plaintiffs have already filed several prominent civil RICO lawsuits against state-licensed marijuana suppliers, seeking large damages.<sup>76</sup> While these suits have not been very successful to date,<sup>77</sup> the allure of treble damages likely ensures that these private lawsuits will continue until Congress legalizes the industry’s activities or immunizes the industry from RICO lawsuits.

These are just a few of the challenges that the federal marijuana ban continues to pose for the state licensed marijuana industry, notwithstanding the Partial Truce called by the Obama Administration. While these (and other<sup>78</sup>) challenges have not quashed the marijuana industry,

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<sup>72</sup> 18 U.S.C. § 1964(c) (Any person injured in his business or property by reason of a violation . . . of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee. . .”).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *E.g.*, Robert A. Mikos, *Federal Appeals Court Allows Private Civil RICO Suit to Proceed Against State-Licensed Marijuana Grower* (Safe Streets), MARIJUANA LAW, POLICY, AND AUTHORITY BLOG, <https://my.vanderbilt.edu/marijuanalaw/2017/07/federal-appeals-court-allows-private-civil-rico-to-proceed-against-state-licensed-marijuana-grower-safe-streets/> (July 25, 2017).

<sup>76</sup> *Id.*

<sup>77</sup> *E.g.*, Robert A. Mikos, *UPDATE: Plaintiff Loses Colorado RICO Lawsuit* (Safe Streets), MARIJUANA LAW, POLICY, AND AUTHORITY BLOG, <https://my.vanderbilt.edu/marijuanalaw/2018/11/update-plaintiff-loses-colorado-rico-lawsuit-safe-streets/> (Nov. 1, 2018); Robert A. Mikos, *Court Dismisses Civil RICO Suit Against Marijuana Supplier, Tees Up Potential Circuit Split*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG, <https://my.vanderbilt.edu/marijuanalaw/2018/08/court-dismisses-civil-rico-suit-against-marijuana-supplier-tees-up-potential-circuit-split/> (Aug. 27, 2018).

<sup>78</sup> For discussions of some of the other obstacles posed by the federal marijuana ban, see, e.g., MIKOS, MARIJUANA LAW, *supra* note 1, at 407–09 (discussing bar on federal trademark registration); Robert A. Mikos, *PharmaCann v.*

they do add to the industry's cost of doing business. For example, the lack of access to banking means that marijuana suppliers must conduct most of their transactions (e.g., paying employees) in cash, and handling that cash cuts into the industry's bottom line.<sup>79</sup> Furthermore, the federal challenges arguably undermine state regulations. For example, because they leave no paper trail, cash transactions are much more difficult to monitor than would be electronic transactions (e.g., credit card payments).<sup>80</sup> As a result, regulators may struggle to verify a marijuana supplier's compliance with state tax collection requirements.

### **The Third Phase: Leadership or Capitulation?**

The current regulatory quagmire is less than ideal for the states, the parties they regulate, the federal government, and those who either support or oppose legalization. Because of dissatisfaction with the status quo, pressure is mounting to change federal marijuana policy—but what does the future hold? How will the federal government respond to state reforms going forward?

Congress has already taken a limited step toward reforming federal marijuana policy. The 2018 Farm Bill exempted “hemp” and “hemp” derived products—including, most notably, CBD—from the federal CSA.<sup>81</sup> Under the Farm Bill, hemp is defined as cannabis containing less than .3% (by dry weight) THC.<sup>82</sup> Previously, the CSA defined “marijuana” to include *all* cannabis (except stalks and non-germinating seeds), *regardless* of its THC content—making most hemp

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BV Development: *Another Land Use Issue Confronts Marijuana Suppliers*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG, <https://my.vanderbilt.edu/marijuanalaw/2018/03/pharmacann-v-bv-development-another-land-use-issue-confronts-marijuana-suppliers/> (Mar. 21, 2018) (restrictive covenants); Luke Scheuer, *Are “Legal” Marijuana Contracts “Illegal”?*, 16 U.C. DAVIS BUS. L. J. 31 (2015) (contract enforcement).

<sup>79</sup> Hill, *Banks, Marijuana, and Federalism*, *supra* note 64, at 597.

<sup>80</sup> *Id.*

<sup>81</sup> Mikos, *New Congressional Farm Bill*, *supra* note 8.

<sup>82</sup> *Id.*

legally indistinguishable from recreational strains, like Purple Haze or Sour Diesel.<sup>83</sup> Now that hemp is no longer a controlled substance under the federal CSA, the hemp industry is booming and products made from hemp, including various CBD products, are becoming ubiquitous.<sup>84</sup>

Foretelling the future and what the federal government might do next necessarily involves some speculation. I will briefly outline two possible scenarios for the future of federal marijuana policy. The first (and less likely) scenario involves the federal government assuming a more proactive leadership role in marijuana policy, one in which it would wield greater influence over marijuana activities. Although I think it worth considering, I am skeptical that this Leadership Scenario will materialize for a simple reason: Congress will struggle to reach consensus around any substantive marijuana policy that seeks to re-invigorate or replace the current prohibition.

On the one hand, it is almost inconceivable that the federal government would attempt to assume leadership in this field by restarting its “War on Marijuana.” The public has grown increasingly favorable toward outright marijuana legalization over the last two decades. Indeed, the latest opinion polls estimate that roughly 66% of Americans favor legalization of adult use of marijuana (even higher numbers support medical legalization).<sup>85</sup> Given the popularity of legalization, Congress is highly unlikely to devote the resources that would be needed to mount an effective campaign against legal marijuana, or even to lift the restrictions it has imposed on the use of existing enforcement resources (through the spending riders noted earlier).<sup>86</sup> It is simply too late to put the proverbial cat back in the bag.

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<sup>83</sup> *Id.*

<sup>84</sup> Mikos, *New Congressional Farm Bill*, *supra* note 8.

<sup>85</sup> See McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, *supra* note 15.

<sup>86</sup> See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1463–65, 1469 (discussing the level of additional resources that would be required to effectively combat marijuana activities without state assistance).

On the other hand, I also suspect that Congress will be reluctant to play a more active role in regulating legal marijuana. One major reason is that legalization states would resist any push to federalize key aspects of marijuana policy. After all, many states benefit from the current state-driven marijuana policy—it allows them to impose rules that favor local interests over outside interests.<sup>87</sup> These states might lose out on tax revenues and jobs if the market for marijuana became more national in scope—a likely outcome if Congress were at the helm of marijuana policy.

To be sure, some federal agencies may seek to play a prominent role in the regulation of legal marijuana. For example, citing its authority under the Food, Drug, and Cosmetics Act, the Food and Drug Administration (FDA) is considering new federal rules to govern the inter-state sale of food products containing hemp-derived CBD.<sup>88</sup> But outside of such limited pockets of federal influence, I suspect that most features of marijuana policy will continue to be set primarily by the states, rather than by the federal government.

The dim prospects for federal leadership in this field are unfortunate. Whatever one might think of our current federal marijuana policy, there is a very strong normative argument to be made for federal control of this drug.<sup>89</sup> Marijuana activities generate significant interstate spillover effects (e.g., think of cross-border smuggling), and states have little incentive to address these

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<sup>87</sup> See Brannon P. Denning, *One Toke Over the (State) Line: Constitutional Limits on ‘Pot Tourism’ Restrictions*, 66 FLA. L. REV. 2279 (2012).

<sup>88</sup> See Tal Axelrod, *FDA holds its first hearing on regulating CBD*, THE HILL, <https://thehill.com/policy/healthcare/446450-fda-holds-its-first-hearing-on-regulating-cbd> (May 31, 2019). For an excellent analysis of the FDA’s authority to regulate marijuana products, see Sean M. O’Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even after Descheduling*, 68 AM. U. L. REV. 823 (2019).

<sup>89</sup> See Robert A. Mikos, *Why the Federal Government Should Set Marijuana Policy*, in DEBATING REFORM: CONFLICTING PERSPECTIVES ON HOW TO FIX THE AMERICAN POLITICAL SYSTEM 50-56 (Richard Ellis & Mike Nelson, eds., 4th ed. CQ Press, forthcoming 2020) [hereinafter Mikos, *Why the Federal Government Should Set Marijuana Policy*].

spillovers.<sup>90</sup> There are also substantial advantages to coordinating marijuana policies (e.g., labeling laws), and that coordination can best be achieved by the federal government.<sup>91</sup> Furthermore, public opinion has converged on the most important issues surrounding marijuana policy, suggesting that there is little to be gained from allowing states to apply their own, idiosyncratic rules to marijuana activities.<sup>92</sup> Despite the strong normative case for federal leadership, however, I doubt that Congress or any federal agency will be able to take charge of marijuana policy anytime soon (if ever).

This leaves a second, more likely scenario for future federal marijuana policy, one I call “Capitulation.” Capitulation simply means that the federal government would cede even more control of marijuana policy to the states. In other words, it would remove federal obstacles to marijuana activities and give the states even wider latitude to regulate marijuana as they deem fit. (Under the Leadership Scenario, by contrast, the federal government would set some rules or at least meaningfully limit state discretionary authority.)

Capitulation could follow either of two paths. First, it might proceed incrementally, through the adoption of piecemeal legislation that removes, one-by-one, the federal legal obstacles that now bedevil the state-licensed marijuana industry. The Secure and Fair Enforcement (SAFE) Banking Act<sup>93</sup> is an illustrative example of such incremental capitulatory legislation. The SAFE Banking Act would bar federal financial regulators from penalizing banks that serve state-licensed marijuana businesses.<sup>94</sup> The Act would thus make it considerably easier for those businesses to

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> SAFE Banking Act of 2019 (H.R. 1595), <https://www.congress.gov/bill/116th-congress/house-bill/1595/text?q=%7B%22search%22%3A%5B%22safe+banking+act%22%5D%7D&r=2&s=1>.

<sup>94</sup> *Id.*

secure basic banking services, like checking accounts and lines of credit.<sup>95</sup> In similar fashion, other proposed legislation would target other, discrete problems now caused by the federal marijuana ban.<sup>96</sup>

Second, Capitulation could also proceed more swiftly, through passage of more comprehensive federal reform legislation. The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act is perhaps the leading example of such legislation.<sup>97</sup> The STATES Act would empower states to opt-out of the federal CSA's ban on marijuana. Namely, if a state authorized an activity, such as the distribution of marijuana to adults, the federal CSA would no longer ban that activity.<sup>98</sup> Because their activities would no longer be federally unlawful, state-licensed-marijuana businesses could obtain banking services, deduct operating expenses when calculating their federal tax liabilities, and so on.<sup>99</sup> Put another way, the STATES Act would eliminate all of the legal obstacles that now flow from the federal marijuana ban (or at least, those obstacles posed by the CSA in states that legalize the drug).<sup>100</sup>

The Marijuana Justice Act (MJA) is another example of comprehensive capitulatory legislation.<sup>101</sup> Proposed by Senator Cory Booker, the MJA would de-schedule marijuana, making

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<sup>95</sup> Robert A. Mikos, *Federal Marijuana Banking Bill Advances (a Little)*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Mar. 30, 2019), <https://my.vanderbilt.edu/marijuanalaw/2019/03/federal-marijuana-banking-bill-advances-a-little/> (analyzing likely effects of SAFE Banking Act).

<sup>96</sup> *E.g.*, Veterans Medical Marijuana Safe Harbor Act, S.3409, 115th Cong. § 3(a)(2) (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/3409/text?format=txt> (allowing, inter alia, Veterans Administration physicians to recommend marijuana to patients, where authorized by state law).

<sup>97</sup> Strengthening the Tenth Amendment Through Entrusting States Act, S.1028, 116<sup>th</sup> Cong. (2019-2020), <https://www.congress.gov/bill/116th-congress/senate-bill/1028?q=%7B%22search%22%3A%5B%22strengthening+the+tenth+amendment%22%5D%7D&s=6&r=1>.

<sup>98</sup> Robert A. Mikos, *Analysis of the Warren-Gardner STATES Act*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (June 7, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/06/analysis-of-the-warren-gardner-states-act/>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Marijuana Justice Act of 2019, S.597, 116th Cong. (2019-2020), <https://www.congress.gov/bill/116th-congress/senate-bill/597?q=%7B%22search%22%3A%5B%22STATES+Act+marijuana%22%5D%7D&s=3&r=21>.

the CSA inapplicable to the drug regardless of the content of state law.<sup>102</sup> In other words, marijuana would be legal under federal law regardless of how state law treated the drug. But apart from repealing federal prohibition in all states or just some of them, neither the MJA nor the STATES Act envisions much of a federal role in regulating legal marijuana<sup>103</sup>—hence the “Capitulation” moniker appears apt for both of them.

Although incremental and comprehensive federal reforms have both garnered some bipartisan support, I think that Congress is more likely to pursue the incremental approach. For one thing, it is easier for a legislature to build consensus behind a narrow, targeted measure like the SAFE Banking Act. Indeed, the SAFE Banking Act has already sailed through one key House Committee.<sup>104</sup> Furthermore, the passage of incremental legislation will likely reduce the pressure on Congress to adopt bolder, more comprehensive reforms.

### Conclusion

While federal marijuana law appears quite static in comparison to the marijuana laws of the states, we are witnessing a gradual evolution in the federal response to state reforms. The federal government has already called a Partial Truce in its long-time War on marijuana legalization. For the most part, this evolution in federal policy has been driven by changes in the way that the federal government enforces its laws, rather than changes in the substance of those laws. Although this Partial Truce has enabled states to pursue some regulatory reforms, federal law continues to pose obstacles for the marijuana industry. Mounting dissatisfaction with the

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<sup>102</sup> *Id.*

<sup>103</sup> See Mikos, *Analysis of the Warren-Gardner STATES Act*, *supra* note 98; Robert A. Mikos, *Forget Obamacare. Congress Should Repeal and Replace This Instead*, FORTUNE (Aug. 4, 2017), <http://fortune.com/2017/08/04/senator-cory-booker-marijuana-bill-justice-act-legalization/?iid=sr-link1>.

<sup>104</sup> See Tom Angell, *Marijuana Banking Bill Approved by Congressional Committee*, FORBES (Mar. 28, 2019), <https://www.forbes.com/sites/tomangell/2019/03/28/marijuana-banking-bill-approved-by-congressional-committee/#636d068b2ce1>.

Partial Truce is likely to spur further changes to federal marijuana policy. The next chapter is yet to be written, but signs portend some form of federal capitulation. In other words, the federal government is likely to cede even more control to the states, enabling them (for better or worse) to pursue their own, idiosyncratic state marijuana policies, increasingly free of federal interference.

# OWNING MARIJUANA

John G. Sprankling\*

## ABSTRACT

*Legal marijuana is the fastest-growing industry in the United States. Tens of thousands of new businesses have arisen to meet the demand created by over 34 million Americans who use marijuana. And the millions of pounds of marijuana grown, processed, and sold this year will generate more than \$11 billion in revenue. This industry is premised on the assumption that marijuana ownership will be protected by law. But can marijuana be owned? This Article is the first scholarship to explore the issue.*

*Federal law classifies marijuana as contraband per se in which property rights cannot exist. Yet the Article demonstrates that marijuana can now be owned under the law of most states, even though no state statute or decision expressly addresses the issue. This conflict presents a fundamental question of federalism: Can property rights exist under state law if they are forbidden by federal law? The Article explains why federal law does not preempt state law on marijuana ownership.*

*This creates a paradox: state courts and other state authorities will protect property rights in marijuana, but their federal counterparts will not. The Article analyzes the challenges that this hybrid approach to marijuana ownership poses for businesses and individuals. It also examines the fragmented status of marijuana ownership in the interstate context, where business transactions involve states with conflicting approaches to the issue.*

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## INTRODUCTION

A plans to divorce B, who operates a marijuana<sup>1</sup> store, and obtain a share of B’s marijuana in the dissolution proceeding. C intends to make a loan to D that is secured by an interest in D’s marijuana. E sues F for damages after F negligently burns E’s marijuana crop. These hypothetical situations all present the same question: Can marijuana be owned?

The traditional answer was “no” because federal and state laws uniformly criminalized the possession and transfer of marijuana.<sup>2</sup> The question arises today because thirty states have now legalized these actions, although they are still illegal under federal law.<sup>3</sup> Yet no case or statute expressly addresses the issue. The legalization tidal wave has generated extensive scholarship on the criminal and constitutional issues that it poses.<sup>4</sup> But less attention has been

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<sup>1</sup> Marijuana consists of leaves, buds, and other parts of the plant *Cannabis sativa* L. 21 U.S.C. § 802(16) (2012). Accordingly, some authorities refer to it as “cannabis.” However, this Article uses the term “marijuana” because this word is more commonly used in U.S. law at present. This Article examines property rights in marijuana itself and, by extension, in products that contain marijuana or its active ingredient, tetrahydrocannabinol. *See infra* note 52. Thus, all references to “marijuana” include both marijuana and marijuana products unless the context indicates otherwise.

<sup>2</sup> Marijuana is considered to be contraband per se under federal law. As a result, it is subject to seizure by federal authorities without any payment or judicial process. *See infra* text accompanying notes 60-73.

<sup>3</sup> *See infra* text accompanying notes 76, 80. States that have legalized marijuana, either for medical use or for all purposes, are collectively referred to in this Article as “legalization states,” while those that continue to criminalize it are referred to as “ban states.” States that have legalized marijuana for all purposes are referred to as “full legalization states,” while those that have legalized it only for medical purposes are referred to as “medical marijuana states”.

<sup>4</sup> *See, e.g.*, Lea Brilmayer, *A General Theory of Preemption: With Comments on State Decriminalization of Marijuana*, 58 B.C. L. REV. 895 (2017); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015); Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 WASH. & LEE L. REV. 779 (2018); Don Stemen, *Beyond the Wars: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL’Y REV. 375 (2017).

devoted to exploring how legalization affects relationships among private actors. This Article is the first scholarship to explore whether marijuana can be owned.<sup>5</sup>

The distinction between property and nonproperty is fundamental. As a general matter, the law protects property—such as rights in a home—from interference by private parties or government actors. By definition, nonproperty receives no protection. Yet the determination of what constitutes property is traditionally governed by state law, not federal law.<sup>6</sup> Legalization naturally leads to the questions of whether property rights in marijuana can arise under state law and, if so, to what extent the federal government and other states must respect those rights.

These issues are important because legal marijuana is the fastest-growing industry in the United States.<sup>7</sup> Over 34 million American adults use marijuana regularly,<sup>8</sup> and thousands of new businesses have arisen to serve their needs.<sup>9</sup> The revenue from legal marijuana sales is estimated to be more than \$11 billion in 2018, and is projected to almost double by 2021.<sup>10</sup> Yet the legal marijuana industry is premised on the assumption that marijuana ownership will be protected by state law—despite the looming threat posed by contrary federal law. If property rights in marijuana cannot exist this industry will eventually die, harming millions of Americans.

This Article demonstrates that marijuana can be owned under state law, despite conflicting federal law. More broadly, it explores a fundamental issue in our federal system—the respective roles of federal and state governments in defining “property”—and provides a template for navigating future conflicts of this kind.

Part I of this Article examines the background doctrines that shape the analysis of property rights in marijuana: the positivistic view that “property” consists of legally-protected rights, not things, and the traditional primacy of state law in defining property rights.

Part II demonstrates that that property rights in marijuana do exist in legalization states pursuant to state law, but not under federal law. Broadly speaking, marijuana can be owned within certain parameters as a matter of state law. The Article then explores the uneasy tension between federal and state law on the issue, and analyzes the challenges arising from this hybrid approach to marijuana ownership.

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<sup>5</sup> This Article does not address property rights in land, vehicles, aircraft, equipment, and other assets that are used in connection with marijuana cultivation, processing, or sale. Such items are classified as derivative contraband under federal law, not contraband per se. *See infra* text accompanying notes 49, 50.

<sup>6</sup> *See infra* text accompanying notes 24-41.

<sup>7</sup> Chris Bennett, *Marijuana Farming Is Now for US Agriculture*, Jan. 8, 2018, available at <https://www.agweb.com/article/marijuana-farming-is-now-for-us-agriculture-naa-chris-bennett/>.

<sup>8</sup> Yahoo News/Marist Poll, *Weed & The American Family*, Apr. 17, 2017, available at [http://maristpoll.marist.edu/wp-content/misc/Yahoo%20News/20170417\\_Summary%20Yahoo%20News-Marist%20Poll\\_Weed%20and%20The%20American%20Family.pdf](http://maristpoll.marist.edu/wp-content/misc/Yahoo%20News/20170417_Summary%20Yahoo%20News-Marist%20Poll_Weed%20and%20The%20American%20Family.pdf). This survey finds that 34,688,319 Americans who are 18 or older use marijuana “regularly,” defined as “at least once or twice a month.” *Id.*

<sup>9</sup> Roger Vincent, *As pot growers cash in, so does L.A. landlord*, L.A. TIMES, Mar. 31, 2018, available at 2018 WLNR 9741858.

<sup>10</sup> Aaron Smith, *The U.S. legal marijuana industry is booming*, CNN MONEY, Jan. 31, 2018, available at <https://money.cnn.com/2018/01/31/news/marijuana-state-of-the-union/>.

Part III examines the fragmented status of marijuana property in the interstate context. Marijuana property conflicts may arise from relationships or transactions that involve both a legalization state and a ban state. This poses the risk that the ban state may undercut the property rights that exist in the legalization state. The Article analyzes how contract clauses, choice-of-law principles, and comity can be used to minimize this risk.

Finally, Part IV explores how potential permanent solutions to the marijuana debate may affect property rights. If legislation were adopted to legalize marijuana at the national level, regardless of conflicting state laws, it should be given retroactive effect. Under the more likely reform—where each state may choose whether to legalize marijuana—ban states should be required to respect marijuana property located in legalization states.

## I. PROPERTY AND FEDERALISM

### A. *The Bundle of Rights Metaphor*

The American property system is founded on legal positivism.<sup>11</sup> As Jeremy Bentham famously remarked: “Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”<sup>12</sup> Thus, “property” consists of legal rights concerning things that are enforced by government.<sup>13</sup> If government will protect a person’s rights in relation to a particular thing, the person has “property.” Conversely, if government will not protect such rights, the person has no “property.”

The scope of governmental protection for property rights has two dimensions: vertical and horizontal. The vertical dimension deals with the relationship between government actors and private actors; it bars government actors from unduly interfering with private property, even though regulation is permitted to a certain degree pursuant to the police power.<sup>14</sup> For example, the Fifth Amendment prohibits government from confiscating private property unless this serves a public purpose and just compensation is paid.<sup>15</sup> The horizontal dimension, in contrast, concerns the role that government plays in regulating relationships among private actors. Here government prevents private actors from interfering with the property rights of others or resolves conflicts among claimants to such property.

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<sup>11</sup> See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 4-5 (4<sup>th</sup> ed. 2017).

<sup>12</sup> JEREMY BENTHAM, THE THEORY OF LEGISLATION 69 (Oceana Publications, Inc. 1975) (1802). See also Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954) (“That is property to which the following label can be attached. To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The State.”).

<sup>13</sup> Nonlawyers regularly use the term “property” to refer to a thing. SPRANKLING, *supra* note 11, at 4. Judges, lawyers, legislators, and law professors also sometimes use the term in this everyday sense, as a shorthand reference for legally-protected rights in relation to a thing. For the purposes of this Article, I use the term in its technical sense. Thus, “marijuana property” as used herein means legal rights in relation to marijuana and marijuana products. Some scholars, however, have criticized the view that property consists of rights. See generally Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

<sup>14</sup> As Justice Holmes acknowledged in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), “to some extent values incident to property . . . are enjoyed under an implied limitation and must yield to the police power.”

<sup>15</sup> U.S. CONST. amend. V, § 3.

The definition of “property” in a legal sense presents two questions: What rights can a person have in relation to a thing? and What things may be the object of these rights?<sup>16</sup> The conventional answer to the first question is the bundle of rights metaphor. Courts and scholars routinely define the “bundle of rights that are commonly characterized as property”<sup>17</sup> as including the right to possess, the right to use, the right to exclude, and the right to transfer.<sup>18</sup>

Similarly, the standard answer to the second question is simple, if unsatisfying: property rights may exist in any thing except to the extent that some special prohibition exists. In other words, the baseline assumption in our system is that property rights may exist in virtually any type of thing, including land and buildings affixed to land, intangibles, and tangible objects.<sup>19</sup> The exceptions to this principle usually arise from major policy concerns, such as prohibiting property rights due to risks of widespread public injury (e.g., counterfeit money),<sup>20</sup> moral values (e.g., human beings),<sup>21</sup> or democratic values (e.g., votes).<sup>22</sup>

The logical consequence of the bundle of rights metaphor is that if the law prohibits a person from holding the core property rights in a particular thing—such as marijuana—then that person has no property in that thing. Conversely, if no governing law contains such a prohibition, then the thing may be owned.

### B. *State Primacy in Defining Property*

The boundary between property and nonproperty becomes blurred where state and federal laws differ about the categories of things in which property rights may exist.

Dual sovereignty is the heart of federalism. Both the federal government and the state government may exercise sovereign authority over certain activities within the state’s territory. This poses the risk that each may define property in a somewhat different manner. But it is well-settled that the definition of property—including the things in which property rights may exist—is usually determined by state law.<sup>23</sup> As the Supreme Court observed in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, “[g]enerally speaking, state

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<sup>16</sup> SPRANKLING, *supra* note 11, at 4.

<sup>17</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

<sup>18</sup> *See, e.g., Horne v. Dept. of Agric.*, 135 S. Ct. 2419, 2428 (2015) (observing that a government program eliminated “the entire ‘bundle’ of property rights in the appropriated raisins—‘the rights to possess, use and dispose of’ them”) (quoting *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419, 435 (1982)). *See also* SPRANKLING, *supra* note 11, at 7-9 (discussing rights in bundle).

<sup>19</sup> SPRANKLING, *supra* note 11, at 10-12.

<sup>20</sup> Counterfeit money is contraband per se, in which no property rights can exist. *See infra* notes 44-48.

<sup>21</sup> *Convention to Suppress the Slave Trade and Slavery*, arts. 1(1), 2(b), Sept. 25, 1926, 60 L.N.T.S. 253.

<sup>22</sup> Every state prohibits the sale of votes. *See* Rebecca Murray, Note, *Voteauction.net: Protected Free Speech or Treason?*, 5 J. HIGH TECH L. 357, 357 n. 51 (2005) (collecting state statutes).

<sup>23</sup> *See* Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 494 (2000) (“Property simply does not exist in the absence of state law.”); Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 84 (“[T]he content of property rights is determined by state law.”); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 257 (2004) (“Property rights are the product of positive state law.”).

law defines property interests . . . .”<sup>24</sup> Similarly, in *Giles v. California* the Court stressed that “States may allocate property rights as they see fit.”<sup>25</sup>

The principle that property rights arise from the states, not from the national government, is a core component of the federal system that the Framers envisioned.<sup>26</sup> The foundation of international law is that each nation-state has sovereignty over its own territory and, accordingly, has the exclusive right to adopt laws governing how private actors use that territory, including laws governing property rights.<sup>27</sup> In a broad sense, the Framers envisioned each former colony as a separate “state,” with a high degree of sovereignty over its territory. Thus, each state was empowered to craft its own laws governing property, which might differ to some extent.<sup>28</sup> This allocation of authority made practical sense in the era, when the principal source of wealth was real property—which by definition was permanently located within state borders—and chattels or other forms of personal property that usually remained within such borders as well.

As James Madison explained in *The Federalist*:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and infinite. . . . The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and *properties of the people* . . . .<sup>29</sup>

The Framers structured a national legislature with limited powers.<sup>30</sup> These did not include the power to define property rights except in two areas: patents and copyrights;<sup>31</sup> and “Legislation in all Cases whatsoever” for the future District of Columbia and “like Authority” over forts and similar federal installations, which would presumably include property rights in these regions.<sup>32</sup> The Tenth Amendment specifically provided that “[t]he powers not delegated” to the federal government—including the power to define property rights in most instances—were “reserved to the States respectively, or to the people.”<sup>33</sup>

Under the Constitution, then, the states were clearly to have the dominant role in the horizontal dimension of property rights: how government protection of property mediates relationships among private actors.<sup>34</sup> For example, state law regulates the manner in which

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<sup>24</sup> 560 U.S. 702, 707 (2010).

<sup>25</sup> 554 U.S. 353, 375 (2008). *See also* *Butner v. United States*, 440 U.S. 48, 55 (1979) (“[P]roperty interests are created and defined by state law.”).

<sup>26</sup> U.S. CONST. amend X.

<sup>27</sup> JOHN G. SPRANKLING, *THE INTERNATIONAL LAW OF PROPERTY* 3 (2014).

<sup>28</sup> U.S. CONST. amend. X.

<sup>29</sup> *THE FEDERALIST* NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). The Supreme Court quoted this language with approval in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

<sup>30</sup> U.S. CONST. art. III, § 8.

<sup>31</sup> *Id.* art. I, § 8, cl. 8.

<sup>32</sup> *Id.* cl. 17.

<sup>33</sup> *Id.* amend. X.

<sup>34</sup> The principal exceptions are (1) patents and copyrights; (2) property rights on federal installations; and (3) bankruptcy. By regulating patents and copyrights, federal law effectively supersedes conflicting state laws dealing with intellectual property and thus precludes states from creating such rights. *See supra* note 31. Similarly, property

property may be acquired in various transactions, including gifts, purchases, leases, and security interests. It protects property from interference by non-owners, in contexts ranging from enforcing the right to exclude to providing a remedy for property damage. And it determines how property is divided among families (e.g., at divorce or death) and business owners (e.g., at the dissolution of a partnership or the partition of a cotenancy). All of these examples and many others are governed by how the relevant state defines property. In practice, as the Framers envisioned, the vast majority of property law today is state law—as an examination of any property law treatise will demonstrate.<sup>35</sup>

The respective roles of federal and state laws in defining the vertical dimension of property rights—the relationship between governments and private actors—are less clear. There is no body of general federal property law. Thus, the vertical dimension is largely the province of specialized bodies of law other than property law, such as constitutional law, criminal law, or tax law.<sup>36</sup> The definition of property is important in the application of these doctrines, but they are not viewed as property law.

Certainly, the Framers were concerned that the federal government might interfere with state-created property rights. In this light, the property-related provisions of the Bill of Rights can be seen as attempts to restrict such interference—largely in reaction to the conduct of the British government in infringing colonial property rights before American independence.<sup>37</sup> For example, the Second Amendment bars the federal government from infringing the right to “keep and bear Arms,”<sup>38</sup> while the Third Amendment prohibits it from interfering with the right to possess real property by quartering troops “in any house.”<sup>39</sup> More broadly, the Fifth Amendment restricts the federal government from depriving an owner of property absent due process, a “public use” for the property, and payment of just “compensation.”<sup>40</sup> Even in applying these constitutional protections, however, federal courts usually defer to state law in defining the scope of property.<sup>41</sup>

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rights on federal installations are exclusively governed by federal law. *See supra* note 32. Finally, the power of Congress to establish bankruptcy laws necessarily means that federal law will impact state-created property rights of creditors. U.S. CONST., art I, § 8, cl. 4.

<sup>35</sup> *See, e.g.*, JOSEPH WILLIAM SINGER, PROPERTY (5<sup>th</sup> ed. 2016); WILLIAM STOEBCUK & DALE WHITMAN, LAW OF PROPERTY (3d ed. 2000).

<sup>36</sup> *See, e.g.*, *Drye v. United States*, 538 U.S. 30, 58 (1999) (“We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer’s state-delineated rights qualify as ‘property’ or ‘rights to property’ within the compass of the federal tax lien legislation.”).

<sup>37</sup> For an analysis of the property-related provisions of the Bill of Rights, see BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 102-20 (2001).

<sup>38</sup> U.S. CONST. amend. II. The Framers were aware that James II had attempted to expand the Catholic influence in England by seizing weapons from Protestants in the mid-1600s; the 1689 English Declaration of Rights, which expressly protected the right to bear arms in response to these seizures, was the forerunner of the Second Amendment. *See* *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008).

<sup>39</sup> U.S. CONST. amend. III. The British violated the traditional property rights of American owners by quartering troops in private homes, one of the abuses chronicled in the Declaration of Independence; this experience prompted adoption of the Third Amendment. *See* Thomas G. Sprankling, Note, *Does Three Equal Five? Reading the Takings Clause in Light of the Third Amendment’s Protection of Houses*, 112 COLUM. L. REV. 112, 124-29 (2012).

<sup>40</sup> U.S. CONST. amend. V, §§ 2, 3.

<sup>41</sup> *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000) (discussing the definition of “property” for purposes of the Constitution).

More recently, particularly with the rise of the modern regulatory state after World War II, actions taken by the federal government have increasingly affected state-created property rights.<sup>42</sup> In particular, federal statutes adopted under the authority of the Commerce Clause that primarily deal with subjects other than property sometimes affect property rights. For example, federal environmental statutes constrain—and in some situations effectively nullify—property rights arising under state law, primarily in the interest of protecting public health or endangered species.<sup>43</sup>

Further—and directly related to this Article—federal criminal statutes governing activities linked to interstate commerce also affect state-created property rights. Federal law classifies certain things as contraband per se: objects that are “intrinsically illegal in character,” “the possession of which, without more, constitutes a crime.”<sup>44</sup> An object is considered to be contraband per se “if there is no legal purpose to which the object could be put.”<sup>45</sup> Marijuana is classified as contraband per se under federal law.<sup>46</sup> The classification of an object as contraband per se directly affects property rights, particularly in the context of forfeiture to the government.<sup>47</sup> In general, property rights cannot exist in contraband per se. Accordingly, the federal government may seize such contraband at any time without infringing the possessor’s rights under the Constitution. In this context, the Fifth Circuit concluded in *Cooper v. City of Greenwood* that “one cannot have a property right in that which is not subject to legal possession.”<sup>48</sup>

The counterpart to contraband per se is derivative contraband—“items which are not inherently unlawful but which may become unlawful because of the use to which they are put—for example, an automobile used in a bank robbery.”<sup>49</sup> Because a property interest in such an item “is not extinguished automatically if the item is put to unlawful use, forfeiture of such an item is permitted only as authorized by statute” consistent with due process.<sup>50</sup>

## II. STATE V. FEDERAL GOVERNMENT: RECOGNIZING MARIJUANA PROPERTY

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<sup>42</sup> See generally JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 142-71 (3d ed. 2008) (discussing property rights and the modern regulatory state).

<sup>43</sup> For example, the Endangered Species Act, 16 U.S.C. §§ 1531-44 (2012), may effectively bar the development of certain private lands. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Oregon*, 515 U.S. 687 (1995) (upholding regulation issued pursuant to Endangered Species Act that prevented logging of certain old grown forests).

<sup>44</sup> *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699-700 (1965).

<sup>45</sup> *United States v. Harrell*, 530 F.3d 1051, 1057 (9<sup>th</sup> Cir. 2008).

<sup>46</sup> See *Gonzales v. Raich*, 545 U.S. 1, 27 (2005) (“The CSA designates marijuana as contraband for *any* purpose.”) (emphasis in original). See also *Schmidt v. County of Nevada*, No. 2:10-CV-3022FCD/EFB, 2011 WL 2967786, at \*6 (July 19, 2011 E.D. Cal.) (holding that the plaintiff had no “property interest” in marijuana because it is “undisputably illegal and contraband per se”).

<sup>47</sup> Although marijuana is contraband per se, it is still considered to be “property” for the purpose of prosecuting property crimes such as robbery or theft. See, e.g., *Taylor v. Phillips*, No. 05-CV-2596, 2016 WL 5678582 (Sept. 30, 2016 E.D.N.Y.); *Iowa v. Turner*, 900 N.W.2d 616 (Iowa Ct. App. 2017).

<sup>48</sup> 904 F.2d 302, 304 (5<sup>th</sup> Cir. 1990). See also *Bacon v. United States*, No. 2-13-CV-392, 2014 WL 12531093, at \*2 (Sept. 22, 2014 S.D. Tex.) (“A person may not claim a property interest in property he has no legal right to possess because the possession of the property is illegal.”).

<sup>49</sup> *Cooper*, 904 F.2d at 305.

<sup>50</sup> *Id.* See also *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 485 (6<sup>th</sup> Cir. 1993).

### A. *The Property-Nonproperty Boundary*

For decades, federal and state laws uniformly criminalized the possession or transfer of marijuana.<sup>51</sup> It was deemed to be contraband per se in which property rights could not exist. As a result, it could be confiscated at any time by federal or state officials without compensation. But the modern legalization of marijuana by most states challenges this approach. Today either property rights cannot exist in marijuana at all, or such rights can exist under the laws of legalization states but not under federal law or the laws of ban states.

Millions of Americans use marijuana for medical treatment or recreation. And the legalization wave has produced tens of thousands of new marijuana businesses, including growers, manufacturers, processors, and retailers.<sup>52</sup> These businesses all routinely utilize large quantities of marijuana.<sup>53</sup> For example, California growers alone produce 13.5 million pounds of marijuana each year.<sup>54</sup> Without legally-protected property rights in marijuana, these businesses could not exist—and millions of Americans would be deprived of the legal ability to obtain marijuana.

Consider hypothetical farmer G, who holds a license to cultivate marijuana in a legalization state. In order to carry on her business, G's rights to possess marijuana and exclude others from its possession must be recognized. Otherwise, government officials or ordinary citizens could seize G's marijuana without payment. Similarly, G's right to sell or otherwise transfer her crop must be protected. As Richard Posner concludes, "without property rights there is no incentive" for a farmer to plant and nurture her crop "because there is no reasonably assured reward" for doing so.<sup>55</sup>

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<sup>51</sup> See *infra* text accompanying notes 60-69, 74. See generally MARK K. OSBECK & HOWARD BROMBERG, MARIJUANA LAW IN A NUTSHELL 71-87 (2017) (discussing federal and states laws that criminalize the possession and transfer of marijuana). However, "marijuana was legal to grow and consume" in all states until the early twentieth century, when some jurisdictions began to criminalize it. Chemerinsky et al., *supra* note 4, at 81.

<sup>52</sup> Marijuana stores and dispensaries in full legalization states commonly sell both marijuana itself and various marijuana products. These products may include marijuana concentrates (e.g., oils and waxes), infusions into other types of products (e.g., lotions, pills, and shampoos), and edibles. John Campbell & Sahib Singh, *Budding Torts: Forecasting Emerging Tort Liability in the Cannabis Industry*, 30 LOY. CONSUMER L. REV. 338, 346-48 (2018). Examples of edibles include "rice crispy treats, lollipops, lemonade, butter, cookies, cooking oils, agave nectar, caramels, and even bacon cheddar biscuits." Mystica M. Alexander & William P. Wiggins, *The Lure of Tax Revenue from Recreational Marijuana: At What Price?*, 15 U.C. DAVIS BUS. L.J. 131, 159 (2015).

<sup>53</sup> A single store or dispensary may sell thousands of pounds of marijuana per year. See, e.g., Susan K. Livio, *2017 was banner year for medical marijuana*, STAR-LEDGER, May 23, 2018, available at 2018 WLNR 15375272 (noting that one New Jersey dispensary sold 2,302 pounds in 2017). Further, one farm can produce tens of thousands of pound of marijuana per year. See, e.g., Daniel Smithson, *New medical pot protections praised by industry advocate*, ORLANDO SENTINEL, Apr. 2, 2018, available at 2018 WLNR 9886420 (describing a Florida facility that will produce 27,000 pounds per year).

<sup>54</sup> *Pushing pot back into the shadows*, ORANGE CNTY. REGISTER, Nov. 12, 2017, available at 2017 WLNR 33285232.

<sup>55</sup> RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 40 (9<sup>th</sup> ed. 2014).

The legal marijuana industry is premised on the apparent belief that property rights in marijuana will be protected by law.<sup>56</sup> For example, the industry assumes that: contracts concerning marijuana such as insurance policies, leases, loans agreements, and purchase agreements will be enforced; marijuana will be viewed as an asset that corporations, partnerships, trusts, and other entities may legally hold; courts will provide a remedy against tortious conduct that damages marijuana; and investments in marijuana and marijuana-related businesses will be respected.<sup>57</sup>

Yet, as discussed below, the question of marijuana ownership presents a paradox. Under our tradition that state law defines property rights, marijuana can be owned under state law in legalization states.<sup>58</sup> Thus, state law prohibits third parties or the state itself from illegally interfering with farmer G's marijuana. But under federal law, marijuana is contraband per se that cannot be owned.<sup>59</sup> As a result, federal authorities may seize G's marijuana at any time without judicial process or payment of compensation. The result is legal schizophrenia: G owns marijuana (under state law) but does not own marijuana (under federal law).

#### B. Federal Law: *The Controlled Substances Act*

Federal regulation of marijuana is based on the Controlled Substances Act of 1970 (CSA), a comprehensive public health statute that covers hundreds of drugs.<sup>60</sup> Today many authorities believe that marijuana poses little or no risk to human health and in fact has substantial medical value.<sup>61</sup> However, it is still officially classified as a Schedule I drug, meaning that it “has a high potential for abuse,” “has no currently accepted medical use,” and

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<sup>56</sup> It is axiomatic that every business in a market economy relies on enforcement of property rights. See, e.g., Barry R. Weingast, *Capitalism, Democracy, and Counter-majoritarian Institutions*, 23 SUP. CT. ECON. REV. 255, 256-57 (2015).

<sup>57</sup> Yet under the federal Controlled Substances Act, the federal government is empowered to seize marijuana as contraband per se, without judicial process or payment of compensation. See *infra* text accompanying notes 71-72. Thus, marijuana businesses and their customers face the risk that their marijuana, which is legal under state law, may nonetheless be forfeited to the federal government. However, to date the federal government has not generally exercised this authority in connection with sales that are legal under state law. See *infra* text accompanying notes 125-33. Presumably, the participants in the legal marijuana industry believe that the federal government will continue this policy.

<sup>58</sup> See *infra* text accompanying notes 76-78.

<sup>59</sup> See *infra* text accompanying notes 66-73.

<sup>60</sup> 21 U.S.C. §§ 801-904 (2012). The CSA uses the term “marihuana,” which is defined as “all parts of the plant *Cannabis sativa* L.,” its seeds, its resin, “and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin,” with limited exceptions such as stalks or fibers. 21 U.S.C § 802(16) (2012). This definition accordingly includes products that contain marijuana or its active ingredient, tetrahydrocannabinol.

<sup>61</sup> See OSBECK & BROMBERG, *supra* note 51, at 404-14 (summarizing research on health effects).

“[t]here is a lack of accepted safety for use of the drug.”<sup>62</sup> Examples of other Schedule I drugs include ecstasy,<sup>63</sup> heroin,<sup>64</sup> and LSD.<sup>65</sup>

The CSA imposes criminal penalties for the possession or transfer of any Schedule I drug, including marijuana. Section 844 provides that it “unlawful for any person knowingly or intentionally to possess a controlled substance” such as marijuana, regardless of the amount involved or the purpose for the possession; the penalty for a first offense is imprisonment for up to a year and/or a fine of at least \$1,000.<sup>66</sup> Further, under section 841 it is unlawful for anyone to either “possess” marijuana “with intent . . . to distribute” it or to “distribute” it, regardless of amount.<sup>67</sup> In this context, “distribute” means “to deliver (other than by administering or dispensing) a controlled substance.”<sup>68</sup> This language is broad enough to encompass any intentional transfer of marijuana by one person to another, whether by gift, sale, or otherwise. The penalty for distributing 1,000 kilograms of marijuana is imprisonment for ten years or longer and/or a fine of up to \$50 million.<sup>69</sup>

Since the mere possession or transfer of marijuana is illegal under the CSA, the argument logically follows that marijuana is contraband per se that cannot be the subject of property rights under federal law, and this is the conventional view. As a federal court explained in *Schmidt v. County of Nevada*, “[u]nder the Controlled Substances Act . . . it is illegal for any private person to possess marijuana . . . [and, accordingly] under federal law marijuana is contraband per se, which means that no person can have a cognizable legal interest in it.”<sup>70</sup>

This result is consistent with the traditional view that property consists of legal rights in relation to a particular thing. The CSA expressly precludes the rights to possess or transfer marijuana, as shown above. In practice, it also eliminates the rights to use and exclude. It is impossible for anyone to use a tangible object that cannot be possessed. Similarly, a person who has no right to possess such an object cannot protect her possession against intrusions by third

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<sup>62</sup> 21 U.S.C. § 812(c), Sched. I(c)(10) (2012). There is widespread agreement that marijuana is not as dangerous as other drugs listed in Schedule I. For example, in *United States v. Kiefer*, 477 F.2d 349, 356 (2<sup>nd</sup> Cir. 1973), the Second Circuit noted that “[i]t is apparently true that there is little or no basis for concluding that marihuana is as dangerous a substance as some of the other drugs included in Schedule I.” Yet in *United States v. Pickard*, 100 F. Supp. 3d 981, 1009 (E.D. Cal. 2015), the court refused to find that “its placement on Schedule I is so arbitrary or unreasonable as to render it unconstitutional.” There is evidence that long-term marijuana use can cause adverse health effects. See GERALD F. UELMEN & ALEX KREIT, 1 DRUG ABUSE AND THE LAW SOURCEBOOK § 3:75, Dec. 2017 Update.

<sup>63</sup> 21 U.S.C. § 812(c)(1) (2012).

<sup>64</sup> *Id.* § 812(b)(10).

<sup>65</sup> *Id.* § 812(c)(9).

<sup>66</sup> *Id.* § 844(a).

<sup>67</sup> *Id.* § 841(a)(1).

<sup>68</sup> *Id.* § 802(11).

<sup>69</sup> *Id.* § 841(b)(1)(A).

<sup>70</sup> No. 2:10-CV-3022FCD/EFB, 2011 WL 2967786, at \*5 (July 11, 2011 E.D. Cal.). See also *Barrios v. Cnty. of Tulare*, No. 1:13-CV-1665, 2014 WL 2174746, at \*5 (May 23, 2014 E.D. Cal.) (“Because marijuana is contraband under federal law, Barrios had no property interest in the marijuana that was protected by the Fourteenth Amendment due process clause.”). The Supreme Court has never addressed the issue of property rights in marijuana, though it has held that Congress was empowered to adopt the CSA pursuant to the Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1 (2005).

parties. Because the CSA abrogates all the core rights in the metaphorical bundle, it effectively prohibits ownership of marijuana.

Moreover, an independent basis for finding that federal law bars property rights in marijuana is arguably found in section 881(a) of the CSA.<sup>71</sup> It provides that “[a]ll controlled substances which have been . . . distributed . . . or acquired in violation of this subchapter” and “[a]ll controlled substances which have been possessed in violation of this subchapter” “shall be subject to forfeiture to the United States *and no property right shall exist in them . . .*”<sup>72</sup> In *Mazin v. True*, a federal court quoted this provision and then concluded that “marijuana is contraband *per se* under federal law, which expressly disavows any property right in such contraband.”<sup>73</sup> Accordingly, the federal government is empowered to seize marijuana from anyone who possesses it as a matter of federal law.

In summary, there are compelling arguments that marijuana cannot be owned—at least for the purposes of federal law. Yet this analysis does not resolve the separate question of whether property rights can exist in marijuana as a matter of state law, especially in the horizontal dimension.

### *C. State Law: The Legalization Tidal Wave*

Like federal law, state laws imposed criminal penalties for the possession or transfer of marijuana for decades.<sup>74</sup> Under this approach, marijuana was contraband *per se* in which property rights could not exist. But in recent years, most states have abandoned this absolutist position by adopting statutes that legalize the possession and transfer of marijuana under certain circumstances. These statutes do not expressly address the broader issue of marijuana ownership; nor has any court directly ruled on the question. However, analyzed in light of background principles of property law, these statutes support the view that marijuana can be owned—to some extent—as a matter of state law.<sup>75</sup>

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<sup>71</sup> However, the better interpretation of the italicized language in § 881(a) is that it applies only *after* a forfeiture occurs. CSA § 881(h) provides that “[a]ll *right, title, and interest in property* described in subsection (a) of this section shall vest in the United States *upon commission of the act* giving rise to forfeiture in this section.” 21 U.S.C. § 881(h) (2012) (emphasis added). Thus, the effect of the forfeiture process is to transfer existing property rights from an owner to the federal government. It is important to note that the items listed in subsection (a) include both contraband *per se* and derivative contraband. In context, the references to “property” in § 881(a) and (h) can only refer to derivative contraband, because forfeiture of such property (and thus transfer of property rights) occurs only when an illegal “act” is committed. Because property rights can never exist in contraband *per se* under federal law, the possessor has no “right, title, or interest” to transfer.

<sup>72</sup> 21 U.S.C. § 881(a)(1), (8) (2012) (emphasis added). But the more plausible reading of this language is that it was intended to apply only (a) to derivative contraband and (b) to the time period *after* such contraband is forfeited to the federal government. See *supra* note 107.

<sup>73</sup> No. 1:14-CV-00654-REB-CBS, 2015 WL 1228321, at \*2 (Mar. 16, 2015 D. Colo.).

<sup>74</sup> All fifty states eventually adopted statutes similar to the CSA, largely based on the Uniform Controlled Substances Act of 1970 (hereinafter “UNIFORM CSA”). UNIF. CONTROLLED SUBSTANCES ACT, 9 Part V U.L.A. 853, 860 (2007). As a result, the possession or distribution of marijuana became illegal in all states.

<sup>75</sup> A number of states that prohibit the possession or transfer of marijuana for any purpose do permit the possession and sale of cannabidiol, a non-psychoactive substance that is derived from the cannabis plant. See OSBECK & BROMBERG, *supra* note 51, at 219. However, cannabidiol would seemingly be classed as a “derivative” of cannabis, and thus fall within the definition of “marihuana” under the CSA. 21 U.S.C. § 802(16) (2012).

Led by Colorado and Washington, nine states have legalized marijuana for all purposes—subject to various restrictions—and have thus sanctioned its possession and transfer.<sup>76</sup> For example, Colorado’s voter-approved amendment to the state constitution authorizes the cultivation, possession, purchase, transfer, transport, and use of marijuana.<sup>77</sup> Similarly, the successful voter initiative in Washington provides that the possession of marijuana by an adult and the production, delivery, distribution, sale, or possession of marijuana by state-approved businesses is permitted under state law.<sup>78</sup>

Broadly speaking, the legalization statutes in these states make a distinction between marijuana businesses and marijuana users. Under strict regulation, businesses are permitted to grow, possess, and process large quantities of marijuana, and to sell small quantities. Marijuana users are authorized to possess and use small quantities in these states, and may grow a limited number of marijuana plants. For example, in California it is lawful for a person to possess up to 28.5 grams of marijuana and to cultivate up to six marijuana plants.<sup>79</sup>

Further, twenty-one states have legalized marijuana for the limited purpose of medical treatment.<sup>80</sup> Although their approaches differ to some extent, they share the same basic pattern: closely-regulated businesses may cultivate, process, possess, and sell large quantities of marijuana; and patients with a doctor’s prescription may purchase and possess small quantities, and also grow a few marijuana plants. For example, North Dakota authorizes residents to “process or sell, possess, transport, dispense, or use marijuana” for medical purposes under limited circumstances.<sup>81</sup> A “cultivation facility” can possess up to 1,000 plants, while a “dispensary” can have up to 3,500 ounces of marijuana.<sup>82</sup> A qualifying patient may purchase up to 2.5 ounces of marijuana from a dispensary over a 30-day period, and may possess up to 3 ounces during this time.<sup>83</sup>

These legalization statutes are based on the belief that marijuana is relatively harmless, and indeed can be an effective medical treatment for some patients. Viewed from this perspective, marijuana should not be listed as a Schedule I drug—unlike other Schedule I drugs that are clearly harmful such as heroin and LSD. More broadly, marijuana is far less dangerous

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<sup>76</sup> Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington have legalized recreational use of marijuana. Mella Robinson et al., *States where marijuana is legal*, BUS. INSIDER, June 28, 2018, available at <https://www.businessinsider.com/legal-marijuana-states-2018-1>.

<sup>77</sup> COLO. REV. STAT. ANN., CONST. art. XVIII, § 16(3) (West 2017). For example, “possessing, using, displaying, purchasing, or transporting . . . one ounce or less of marijuana” is lawful. *Id.* But see *People v. Crouse*, 388 P.3d 39 (Colo. 2017) (holding that section of state’s medical marijuana law which required officers to return seized marijuana to patient was preempted by the CSA); Joel S. Neckers & Joel M. Pratt, *The Marijuana Industry after Crouse: Is the Glass Half Empty or Half Full?*, 47 COLO. LAW. 27, 29 (Jan. 2018) (warning that under *Crouse* “even an accusation of wrongdoing that leads to a cannabis seizure could mean the end of a business”).

<sup>78</sup> WASH. REV. CODE ANN. §§ 69.50.360, 69.50.363, 69.50.366 (West 2017).

<sup>79</sup> CAL. HEALTH & SAFETY CODE § 11362.1(a) (1), (3) (West 2017).

<sup>80</sup> See Robinson, *supra* note 76.

<sup>81</sup> N.D. CENT.CODE § 19-24.1-02 (2017).

<sup>82</sup> *Id.* § 19-24.1-24.

<sup>83</sup> *Id.* § 19-42.01(2).

than other things that are considered to be contraband per se under federal law, ranging from counterfeit money to sawed-off shotguns.<sup>84</sup>

The legalization wave has a profound impact on marijuana ownership. Although no statute or case directly addresses the issue, it now seems clear that marijuana may be owned in most states as a matter of state law. With the repeal of state statutes that criminalized marijuana, the traditional principle that property rights may exist in any tangible object now applies. Further, the state legalization statutes effectively recognize the core elements that constitute the traditional bundle of rights: the rights to possess, use, transfer, and exclude. These statutes expressly validate the rights to possess and transfer marijuana under certain circumstances.<sup>85</sup> The legalization of possession, in turn, effectively recognizes the rights to use and exclude. Prior state law eliminated the right to use only indirectly; because marijuana could not be possessed, it could not be used. Further, given legal recognition of the right to possess, it logically follows that state law will protect this right by preventing third parties from interfering with that possession, thus recognizing the owner's right to exclude. In sum, because a person may now hold the core property rights in marijuana, marijuana property exists under state law.<sup>86</sup>

This historic transition affects both the horizontal and vertical dimensions of property rights. Under state law, each legalization state will respect marijuana ownership in disputes among private actors to at least some extent<sup>87</sup> and refrain from seizing legally-owned marijuana from private actors.<sup>88</sup>

#### D. Resolving the Federal-State Conflict

##### 1. Joint Sovereignty in Context

Our hypothetical marijuana farmer G holds property rights in her crop under state law. But under federal law, she has no property rights in the crop—and federal officials may confiscate it at any time. These fundamentally inconsistent approaches to marijuana property raise the question of preemption.

The Supremacy Clause of the Constitution provides that the “laws of the United States . . . shall be the supreme law of the land; and the judges of every state shall be bound thereby, anything in the . . . laws of any State to the contrary notwithstanding.”<sup>89</sup> It arguably follows that

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<sup>84</sup> See, e.g., *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 485 (6<sup>th</sup> Cir. 1993) (listing counterfeit money and sawed-off shotguns as examples of contraband per se).

<sup>85</sup> See *supra* notes 76-83.

<sup>86</sup> Because all legalization states still restrict marijuana to some extent, however, the scope of marijuana property is limited. For example, because a legal marijuana user in California can possess only up to 28.5 grams, a person who possesses 100 grams does not hold property rights in the additional 71.5 grams. See *supra* note 79.

<sup>87</sup> Cf. *Muridan v. Redl*, 413 P.3d 1072 (Wash. Ct. App. 2018) (dividing marijuana-related assets as community property after cohabiting couple ended their relationship).

<sup>88</sup> See, e.g., *Oregon v. Ellis*, 316 P.3d 412 (Or. Ct. App. 2013) (ordering police to return “usable marijuana” to holder of medical marijuana card after it was seized during an arrest for driving while intoxicated); *Oregon v. Ehrenshing*, 296 P.3d 1279 (Or. Ct. App. 2013) (ordering sheriff to return marijuana to holder of medical marijuana card after it was seized during search of defendant’s premises).

<sup>89</sup> U.S. CONST. art. VI, § 2.

even states which have legalized marijuana—and, more to the point, judges in these states—should follow the federal view that marijuana property cannot exist.

But both federal and state governments possess “elements of sovereignty the other is bound to respect.”<sup>90</sup> As the Supreme Court has explained, the states retain “substantial sovereign authority under our constitutional system.”<sup>91</sup> One traditional area of state sovereignty is the right to determine what constitutes property within its borders, as discussed in Part I above. Accordingly, federal law will not supersede the state law definition of property absent either express preemption or implied preemption. However, the CSA probably does not preempt the state laws that effectively recognize marijuana property. Moreover, this outcome serves the core policies that underpin our federal system.

## 2. Preemption Is Unlikely

Express preemption occurs when Congress clearly states that federal law will supersede state law.<sup>92</sup> There are three types of implied preemption: (1) field preemption, where “Congress . . . has determined [that the field of law] must be regulated by its exclusive governance;”<sup>93</sup> (2) conflict preemption where “compliance with both federal and state regulations is a physical impossibility;”<sup>94</sup> and (3) conflict preemption where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>95</sup>

In applying these principles, courts utilize a presumption against preemption. As the Supreme Court observed in *Medtronic, Inc. v. Lohr*, “[i]n all pre-emption cases, and particularly those in which Congress has ‘legislated in a field which the states have traditionally occupied,’ we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”<sup>96</sup> Because property rights are created under state law, this presumption applies with particular force to question of whether the CSA supersedes state-created property rights in marijuana.

The CSA is an example of “cooperative federalism.”<sup>97</sup> It was intended to be part of an integrated system for regulating controlled substances that would be shared by federal and state governments. Under this framework, the federal government would take a lead role, while states would have parallel authority under state law.<sup>98</sup> Accordingly, almost all states enacted legislation patterned on the CSA, most commonly by adopting the Uniform Controlled

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<sup>90</sup> *Arizona v. United States*, 567 U.S. 387, 398 (2012).

<sup>91</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

<sup>92</sup> *Michigan Canners & Freezers Ass’n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 469 (1984).

<sup>93</sup> *Arizona*, 567 U.S. at 399.

<sup>94</sup> *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

<sup>95</sup> *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>96</sup> 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985)).

<sup>97</sup> See Chemerinsky et al., *supra* note 4; Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1 (2013); Matthew A. Melone, *Federal Marijuana Policy: Homage to Federalism in Form; Potemkin Federalism in Substance*, 63 WAYNE L. REV. 2015 (2018).

<sup>98</sup> In practice, the federal government “has prosecuted large-scale traffickers and drug cartels and left prosecution of everyday, street level marijuana activity to the states.” OSBECK & BROMBERG, *supra* note 51, at 472.

Substances Act of 1970 (Uniform CSA).<sup>99</sup> As its Prefatory Note observes, the Uniform CSA was “designed to complement the new Federal . . . legislation and provide an interlocking trellis of Federal and State law to enable government at all levels to more effectively control the drug abuse problem.”<sup>100</sup> The Uniform CSA criminalizes essentially the same conduct as the CSA, under state law.<sup>101</sup> However, it allows each state to establish its own schedules of controlled substances as a matter of state law, which may differ from the federally-regulated substances listed in the CSA schedules.<sup>102</sup>

Because federal and state governments have concurrent authority over controlled substances, Congress took care to minimize the risk of preemption. CSA section 903 specifies that none of its provisions “should be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, to the exclusion of any State law on the same subject matter that would otherwise be within the authority 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.”<sup>103</sup>

There is no serious argument that express preemption applies to state laws recognizing marijuana property. An example of express preemption is found in *Jones v. Rath Packing Co.*, where the Supreme Court held that a federal statute concerning meat packages which provided that “requirements in addition to, or different than, those made under this Act may not be made by any State” preempted state law.<sup>104</sup> No section of the CSA contains a similar express provision; and in fact Congress specifically restricted the preemptive scope of the CSA, as shown in section 903. It might be asserted that the phrase in CSA section 881(a)(1) that “no property right shall exist” in marijuana and other Schedule I substances supports express preemption. But nothing in that section expressly purports to affect state law.<sup>105</sup> Moreover, in context this language was intended only to relate to the status of property rights *after* forfeiture<sup>106</sup> to the federal government, not to property rights before forfeiture.<sup>107</sup> Because no

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<sup>99</sup> UNIFORM CSA, *supra* note 74, at 853.

<sup>100</sup> *Id.* at 854.

<sup>101</sup> Compare 21 U.S.C. §§ 841, 844(a) (2012) with UNIFORM CSA § 401(a), (c), *supra* note 74, at 886-87.

<sup>102</sup> UNIFORM CSA § 201(a) provides that a designated state agency may “add substances to or delete or reschedule all substances in the schedules.” UNIFORM CSA, *supra* note 74, at 866. The Comment to this section explains that “[t]he Uniform Act is not intended to prevent a State from adding or removing substances from the schedules.” *Id.* at 868. Thus, the drafters of the Uniform CSA contemplated that a state could choose not to criminalize the possession or transfer of a substance such as marijuana under state law.

<sup>103</sup> 21 U.S.C. § 903 (2012). See also H.R. REP. NO. 91-1444, 1970 U.S.C.C.A.N. 4629 (explaining that this section bars preemption unless there is a “direct and positive conflict” between federal and state legislation).

<sup>104</sup> 430 U.S. 519, 530-31 (1977).

<sup>105</sup> The only decision exploring the impact of this language on state-created property rights is *Mazin v. True*, No. 1:14-CV-00654-REB-CBS, 2015 WL 1228321 (Mar. 16, 2015 D. Colo.). There the court interpreted it to mean that “there is no recognized or protected property right in marijuana under *federal law*.” *Id.* at \*2 (emphasis added). In response to the argument that “state law defines property rights,” the court reasoned that “[t]he plaintiff has no *federally protected* property interest in his marijuana even if that marijuana is legal under Colorado law.” *Id.* (emphasis added).

<sup>106</sup> See *supra* note 71.

<sup>107</sup> The statutory language makes this reasonably clear. The complete introductory phrase in section 881(a) reads: “The following shall be subject to forfeiture to the *United States* and no property right shall exist in them. . . .” (emphasis added). In context, this subsection was not intended to apply to state-created property rights. Legislative history also supports this interpretation. The House Report on the CSA explained that this subsection merely “sets

provision of the CSA expressly states that it will supersede state law, there can be no express preemption.<sup>108</sup>

Next, as section 903 makes clear, Congress has chosen not to “occupy the field” of controlled substances regulation. Rather, the CSA contemplates that federal and state governments have shared authority in this area. Therefore, field preemption does not apply to marijuana property laws.<sup>109</sup>

The question of conflict preemption based on physical impossibility is more complex. Most decisions conclude that the CSA does not preempt state legalization laws as a general matter.<sup>110</sup> For example, the Michigan Supreme Court rejected the defendant city’s impossibility claim in *Ter Beek v. City of Wyoming*,<sup>111</sup> because the state’s medical marijuana statute did not require the city to violate the CSA. A Rhode Island court reached the same conclusion, noting that nothing in the state law legalizing marijuana “requires the Town—or anyone—to ‘manufacture, distribute, dispense, or possess’ marijuana or otherwise violate the CSA.”<sup>112</sup> In short, the state laws legalizing marijuana do not require its cultivation, possession, or transfer by private actors, but merely permit it. By the same token, the recognition of marijuana property under state law merely permits such ownership, without requiring it. Accordingly, compliance with both federal and state law is not physically impossible. Under this analysis, federal and state law can “consistently stand together” as section 903 contemplates.<sup>113</sup>

Similarly, most courts reject preemption arguments based on the general assertion that state marijuana legalization laws pose an obstacle to the federal approach.<sup>114</sup> As the Arizona Supreme Court stated in *Reed-Kaliher v. Hoggatt*, “[a] state law stands as an obstacle to a federal

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forth the conditions for forfeiture and the property to be forfeited” under federal law. H.R. REP. NO. 91-1444, 1970 U.S.C.C.A.N. 4623. There is no indication that it was also intended to supersede state law. In fact, the Uniform Controlled Substances Act contains its own provisions that govern forfeiture under state law. UNIFORM CSA § 505(a), *supra* note 74. *Cf.* *People v. Odenwald*, 285 P. 406, 408 (Cal. Ct. App. 1930) (observing that nearly-identical language included in the Volstead Act, which prohibited the possession of liquor, “was clearly intended solely to protect government officials in the exercise of their duties,” not to eliminate state-created property rights).

<sup>108</sup> See *White Mountain Health Ctr., Inc. v. Maricopa Cnty.*, 386 P.3d 614 (Ariz. Ct. App. 2016) (finding no express preemption under the CSA); *Rhode Island Patient Advocacy Coal. Found. v. Town of Smithfield*, No. PC-2017-2989, 2017 WL 4419055 (Sept. 27, 2017 R.I. Super. Ct.) (same).

<sup>109</sup> See *White Mountain Health Ctr., Inc.*, 386 P.3d 614 (finding no field preemption under the CSA); *Rhode Island Patient Advocacy Coal. Found.*, 2017 WL 4419055 (same).

<sup>110</sup> See *Brilmayer*, *supra* note 4 at 902-11; (arguing that the CSA does not preempt state laws legalizing marijuana); *Chemerinsky et al.*, *supra* note 4, at 100-13 (same).

<sup>111</sup> 846 N.W.2d 531 (Mich. 2014).

<sup>112</sup> *Rhode Island Patient Advocacy Coal. Found.*, 2017 WL 4419055, at \* 6. See also *City of Palm Springs v. Luna Crest, Inc.*, 200 Cal. Rptr. 3d 128 (Ct. App. 2016) (finding no conflict preemption).

<sup>113</sup> Preemption on this basis might arise in the property context under narrow circumstances. For example, where a state court appoints a receiver in a dispute concerning a business whose assets include marijuana, the receiver would necessarily take possession of the marijuana; in this situation, it would be physically impossible to comply with both federal and state law. *Cf.* *People v. Crouse*, 388 P.3d 39 (Colo. 2017) (finding preemption where state law required police officers to return marijuana to acquitted medical marijuana patient because this was an illegal distribution of a controlled substance under federal law). *But see* *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656 (Ct. App. 2008) (contra).

<sup>114</sup> See also *Chemerinsky*, *supra* note 4, at 111 (arguing that state legalization laws are consistent with the purposes and objectives of the CSA).

law “[i]f the purpose of the [federal law] cannot otherwise be accomplished . . . .”<sup>115</sup> The court reasoned that the “state-law immunity” created by Arizona’s medical marijuana law did not “frustrate the CSA’s goal of conquering drug abuse or controlling drug traffic . . . [because] the people of Arizona ‘chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana.’”<sup>116</sup> Moreover, as another court explained, its state law legalizing marijuana “does not (and could not) deny the federal government the ability to enforce the CSA, and does not (and could not) immunize medical marijuana users from prosecution.”<sup>117</sup> In the same manner, state recognition of marijuana property is not an obstacle to enforcement of the CSA by the federal government.<sup>118</sup> The federal government is free to enforce the CSA within legalization states if it chooses to do so, even though these states recognize marijuana property under state law.

In short, the state laws that effectively recognize marijuana property are not preempted under any of the four standard tests. If there was any doubt on this outcome, the strong presumption against superseding state laws that govern property—a field traditionally occupied by the states—would tip the balance against preemption.

### 3. Federalism Policies and Preemption

Ultimately, the preemption doctrine seeks to preserve the constitutional balance between federal and state governments. The normative justifications that underpin our federal system further support the conclusion that state laws recognizing marijuana property are not preempted. The preemption question will almost certainly be resolved by state courts<sup>119</sup>—not federal courts—and accordingly state judges should consider these policies in the decisional process.

As the Supreme Court explained in *Gregory v. Ashcroft*, our “federalist structure of joint sovereigns preserves to the people numerous advantages”:

It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>120</sup>

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<sup>115</sup> 347 P.3d 136, 141 (Ariz. 2015) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

<sup>116</sup> *Id.* (quoting *Ter Beck v. City of Wyoming*, 846 N.W.2d 531, 539 (Mich. 2014)).

<sup>117</sup> *Rhode Island Patient Advocacy Coal. Found.*, 2017 WL 4419055, at \*7. See also *City of Palm Springs*, 200 Cal. Rptr. 3d 128 (finding no obstacle preemption).

<sup>118</sup> However, some courts have found conflict preemption to parts of state legalization laws in specific circumstances. See, e.g., *People v. Crouse*, 388 P.3d 39 (Colo. 2017) (finding preemption of law that required police officers to return marijuana to acquitted medical marijuana patient, because such return was a distribution of a controlled substance); *Emerald Steel Fabricators, Inc. v. BOLI*, 230 P.3d 518 (Or. 2010) (finding limited preemption because state’s issuance of medical marijuana card to patient affirmatively authorized use of marijuana).

<sup>119</sup> In most states, decisions by lower federal courts are merely persuasive authority, not binding precedent. See Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 62 (2015). Therefore, even if federal courts of appeal and district courts have previously ruled on the question of preemption, state courts are entitled to decide the issue based on their own interpretation of the law.

<sup>120</sup> 501 U.S. 452, 458 (1991).

These policy goals are best served by finding that state laws recognizing marijuana property are not preempted.<sup>121</sup>

First, recognition of marijuana property both addresses the diverse needs of our society and allows for experimentation in government. It accommodates the wishes of the 34 million Americans who use marijuana in states that have chosen legalization. Further, it allows the states, as proverbial laboratories of democracy, to test the value of marijuana legalization.

A court considering preemption cannot ignore the legal environment in which the question arises. The ongoing tension between the federal government and legalization states over marijuana is akin to an unstable detente.<sup>122</sup> While maintaining that state legalization statutes are invalid under the Supremacy Clause as a theoretical matter, the federal government has diplomatically chosen to tolerate the status quo for years except in extreme situations<sup>123</sup>—and, accordingly, has tacitly accepted that marijuana property can exist under state law.<sup>124</sup> By its inaction, the federal government has acknowledged that legalization both responds to the diverse needs of our society and allows for potentially helpful experimentation.

For the last nine years, federal interest in enforcing the marijuana ban in legalization states has been tepid at best.<sup>125</sup> In a series of memoranda issued between 2009 and 2013 during the Obama administration, the Department of Justice gradually deprioritized federal enforcement in states that legalized marijuana as long as certain federal policy priorities were respected.<sup>126</sup>

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<sup>121</sup> These federalism justifications endorsed by the *Gregory* Court were based on Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987) and Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988). *Gregory*, 501 U.S. at 458. See also David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 783 (2017) (listing additional justifications).

<sup>122</sup> See, e.g., *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821, 832 (D. Colo. 2016) (observing that “the nominal federal prohibition against possession of marijuana conceals a far more nuanced (and perhaps even erratic) expression of federal Policy” given public statements by federal officials “that reflected an ambivalence toward enforcement of the Controlled Substances Act where a person or entity’s possession and distribution of marijuana was consistent with well-regulated state law”); *Green Cross Med., Inc. v. Gally*, 395 P.3d 302, 307 (Ariz. Ct. App. 2017) (refusing to invalidate a contract on the basis that it facilitated the illegal possession, use, and sale of marijuana, in part because of “the federal government’s lack of interest” in prosecuting people who comply with the state’s medical marijuana law).

<sup>123</sup> See *infra* text accompanying notes 125-33 (discussing federal responses to state legalization statutes).

<sup>124</sup> Even within legalization states, however, federal law governs activities that occur on federal lands such as national parks, national forests, military installations, and lands governed by the Bureau of Land Management. See *infra* text accompanying notes 161-63.

<sup>125</sup> The federal government has focused its anti-marijuana enforcement efforts on “large-scale traffickers and drug cartels.” OSBECK & BROMBERG, *supra* note 51, at 472. Given the limits imposed on marijuana possession and transfer by legalization states, it is highly unlikely that these state laws would shield such traffickers or cartels.

<sup>126</sup> See Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>; Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), <http://files.ctctcdn.com/201bc6cf001/10f50403-6ee6-4e47-bbc3-ed48d1912bbb.pdf>; Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attorneys, Marijuana Enforcement (Aug. 29, 2013) (hereafter “2013 Cole Memorandum”), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

Because the state programs did not infringe these priorities, the memoranda effectively acquiesced to state legalization.<sup>127</sup> Moreover, in 2014 Congress adopted the Rohrbacher-Farr Amendment to an omnibus spending bill, which prohibited the Department of Justice from using federal funds to prevent the implementation of state laws legalizing medical marijuana.<sup>128</sup> In *United States v. McIntosh*, the Ninth Circuit held that this amendment not only barred direct action against such states, but also precluded federal prosecution of medical marijuana growers and retailers whose activities complied with state law.<sup>129</sup>

This lack of enforcement has continued under the Trump administration. On the one hand, Attorney General Sessions issued a new memorandum essentially rescinding the Obama-era documents.<sup>130</sup> Yet Congress extended the financial ban on medical marijuana prosecution in a 2018 spending bill, which President Trump signed.<sup>131</sup> Further, during the current administration “there have apparently been no federal raids or seizures at pot companies for sales that are legal under state law”—and thus in practice the Obama-era policy is still being followed.<sup>132</sup> Finally, President Trump has expressed tentative support for federal legislation that would respect state legalization laws.<sup>133</sup>

Second, legalization of marijuana—and the concomitant recognition of marijuana property—reflect citizen involvement in the political process. In many states, legalization occurred as a direct result of voter initiatives, while in others it stemmed from public pressure on legislators. Moreover, the arc of history is moving toward legalization at some point in the future. For example, a recent survey shows that 93% of Americans favor the legalization of marijuana for medical purposes—including overwhelming majorities of Republican, Democratic, and independent voters.<sup>134</sup> Today 63% of Americans favor national legalization for all purposes,

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<sup>127</sup> The eight federal priorities were to prevent the distribution of marijuana to minors; prevent revenue from marijuana sales from going to criminals; prevent diversion of marijuana to states where it was illegal; prevent marijuana activity from being used as a pretext for other illegal activity; prevent violence in the cultivation and distribution of marijuana; prevent adverse public health consequences associated with marijuana; prevent the growing of marijuana on public lands; and prevent marijuana possession or use on federal property. See 2013 Cole Memorandum, *supra* note 126.

<sup>128</sup> Consolidated and Further Continuing Appropriations Act, 2015, [Pub. L. No. 113-235, § 538, 128 Stat. 2130 \(2014\)](#).

<sup>129</sup> 833 F.3d 1163 (9<sup>th</sup> Cir. 2016).

<sup>130</sup> Memorandum from Jefferson B. Sessions, Att’y Gen., U.S. Dep’t of Justice, to all U.S. Attorneys, Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

<sup>131</sup> *Trump Signs Spending Bill That Included Medical Marijuana Protections*, MARIJUANA BUS. DAILY, Mar. 23, 2018, available at <https://mjbizdaily.com/trump-signs-spending-bill-includes-medical-marijuana-protections/>.

<sup>132</sup> Evan Halper, *Trump inclined to back ending pot ban*, L.A. TIMES, June 9, 2018, available at 2018 WLNR 17754974. The same article quotes John Vardaman, a former Department of Justice attorney who participated in creating the Obama era approach, as saying: “Remarkably little, if anything, has changed. Almost every U.S. attorney in states where marijuana is legal has decided to apply the same principles.” *Id.* On an overall basis, “[t]here have been dramatic declines in marijuana arrests in states that have legalized.” Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 106 (2018).

<sup>133</sup> Halper, *supra* note 132 (quoting President Trump as saying that he would “probably end up supporting” a proposed bill allowing states to legalize marijuana).

<sup>134</sup> Quinnipiac University Poll, *Support for Marijuana Hits New High*, April 16, 2018, available at <https://poll.qu.edu/national/release-detail?ReleaseID=2539>. Legalization of medical marijuana is supported by 86% of Republicans, 97% of Democrats, and 95% of independent voters. *Id.*

and this percentage will increase over time with demographic transition because support is strongest among those under 65 years old.<sup>135</sup>

Finally, honoring property rights in marijuana makes government more responsive to citizen needs, thus creating competition among the states for a mobile citizenry. As noted above, legal marijuana is the fastest-growing industry in the United States.<sup>136</sup> Businesses involved in growing, processing, and selling marijuana are premised on the existence of state laws that will protect their property rights. Third parties that do business with marijuana businesses—such as lenders, landlords, and insurers—similarly rely on the continued success of those entities, and hence on the existence of marijuana property. Consistent with our tradition of federalism, each state should be allowed to determine whether it will recognize marijuana property, and thus attract citizens from other states.

It is axiomatic that property rights comprise the foundation of every market economy. As intended by the Framers, this foundation is governed by state law. Thus, each state government is essentially administering its own property law system and must utilize a definition of property that is stable and functional in order to respond to societal needs. For example, state laws govern on-going business relationships involving property, including financing, insurance, investments, leases, sales, and other relationships. In many situations, state courts must divide property among co-owners—including divorce,<sup>137</sup> intestate succession, partition, partnership dissolution, and partition. And state law provides remedies when disputes concerning property occur, such as tort or contract claims. Having legalized marijuana under state law, state governments cannot turn their backs on the property rights they have created—and their decision to create such rights in response to citizen needs is entitled to a certain degree of deference by the federal government.

### *E. Challenges Posed by the Hybrid System*

#### 1. Toward the Hybrid System

In sum, the CSA does not preempt state laws legalizing marijuana<sup>138</sup> and, accordingly, the state laws that effectively recognize marijuana property have full force and effect. The time has come to acknowledge that this conflict effectively creates a hybrid property system: marijuana property exists under state law, but not federal law. Accordingly, the legislative, judicial, and executive branches of each legalization state will respect and protect property rights in marijuana even though their federal counterparts will not.

For example, in *City of Garden Grove v. Superior Court*,<sup>139</sup> a California appellate court ordered that marijuana seized by police during a traffic stop be returned to the driver, who held a physician's approval to use marijuana for medical reasons. Acknowledging that the driver's

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<sup>135</sup> Support for national legalization of marijuana is closely tied to demographics. Among Americans between 18 and 34 years old, 82% favor it; in the 35-49 year age group, support is at 70%; in the 50-64 year age group, it is at 63%. *Id.* In contrast, 52% of those 65 and over oppose legalization. *Id.*

<sup>136</sup> See *supra* note 7.

<sup>137</sup> Cf. *Muridan v. Redl*, 413 P.3d 1072 (Wash. Ct. App. 2018) (dividing share of marijuana business and interest in promissory note for sale of marijuana equipment as community property).

<sup>138</sup> See also OSBECK & BROMBERG, *supra* note 51, at 146-52.

<sup>139</sup> 68 Cal. Rptr. 3d 656 (Ct. App. 2008).

“marijuana possession was legal under state law, but illegal under federal law,”<sup>140</sup> the court reasoned that the Controlled Substances Act did not preempt the California law on point. It accordingly held that “due process and fundamental fairness” required the return of the marijuana,<sup>141</sup> consistent with “the principles of federalism embodied in the United States Constitution.”<sup>142</sup>

Recognition of the hybrid system is a first step toward mitigating the tension between the federal and state approaches. Once this practical reality is accepted, courts and scholars can begin charting the legal terrain governed by each approach, and marijuana owners can structure their affairs to best protect their property rights.

## 2. Judicial Recognition of the System

The outline of the hybrid system can already be discerned in a handful of cases. No decision has expressly held that state law authorizes marijuana ownership despite conflicting federal law. But some courts have implicitly embraced this approach in cases dealing with property rights related to marijuana.<sup>143</sup>

The hybrid approach is reflected in certain decisions dealing with the vertical dimension of property rights. An example is *Schmidt v. County of Nevada*,<sup>144</sup> where a federal district court rejected the plaintiff’s claim under the Constitution for damages following the destruction of his marijuana, even though his right to possession was protected by California’s medical marijuana law. It reasoned that “plaintiff cannot recover damages as a result of the confiscation or destruction of marijuana because he had no cognizable property interest in the marijuana. Plaintiff asserts a due process claim under the *federal* Constitution in *federal* court where, under *federal* law, marijuana is undisputably illegal and contraband per se.”<sup>145</sup> As a later federal court summarized in *Little v. Gore*, “even though ‘state law creates a property interest, not all state-created rights rise to the level of a constitutionally protected interest.’ With respect to medical marijuana, although California state law may create a property interest in the marijuana, California district [that is, federal] courts have found there is no protected interest *for purposes of the Fourteenth Amendment*.”<sup>146</sup> In contrast, the California appellate court in *City of Garden*

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<sup>140</sup> *Id.* at 670.

<sup>141</sup> *Id.* at 680. *But see* *Barrios v. Cnty. of Tulare*, No. 1:13-CV-1665AWI/GSA, 2014 WL 2174746 (May 23, 2014 E.D. Cal.) (contra).

<sup>142</sup> *City of Garden Grove*, 68 Cal. Rptr. 3d at 682.

<sup>143</sup> *See, e.g., Barrios*, 2014 WL 2174746, at \*5 (“Although California may provide *Barrios* with the right to possess medical marijuana, federal law does not. Because marijuana is contraband under federal law, *Barrios* had no property interest that was protected by the Fourteenth Amendment due process clause.”); *Mazin v. True*, No. 1:14-CV-00654-REB-CBS, 2015 WL 1228321, at \*2 (Mar. 16, 2015 D. Colo.) (“The plaintiff argues that state law defines property rights and consideration of overlaying federal law is of no consequence when resolving his claims under the Fourth and Fourteenth Amendments. As a matter of law, this position is incorrect. ‘Although the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.’” (quoting *Town of Castlerock v. Gonzales*, 545 U.S. 748, 757 (2005))).

<sup>144</sup> No. 2:10-CV-3022FCD/EFB, 2011 WL 2967786 (July 19, 2011 E.D. Cal.).

<sup>145</sup> *Id.* at \*6 (emphasis added).

<sup>146</sup> 148 F. Supp. 3d 936, 955 (S.D. Cal. 2015) (quoting *Brady v. Gebbie*, 859 F.2d 1543, 1548 n. 3 (9<sup>th</sup> Cir. 1988) (emphasis added)). *See also* *River North Props., LLC v. City of Denver*, No. 13-CV-01410-CMA-CBS, 2014 WL

*Grove v. Superior Court* mandated that local police return marijuana to the owner following its seizure because the “marijuana possession was legal under *state law*.”<sup>147</sup>

Moreover, a few decisions implicitly utilize the hybrid approach in the horizontal dimension, recognizing the existence of marijuana property in litigation among private actors. For example, in *Green Earth Wellness Center v. Atain Specialty Insurance Co.*, a commercial marijuana grower sued its insurance company for compensation after smoke and ash damaged marijuana plants.<sup>148</sup> The policy provisions covered damage to “Business Personal Property.”<sup>149</sup> The federal district court denied the insurance company’s motion for summary judgment, reasoning that (1) “Property” as defined in the policy could include marijuana plants and (2) the policy exclusion for “Contraband” was “rendered ambiguous by the difference between the federal government’s *de jure* and *de facto* public policies regarding state-regulated medical marijuana.”<sup>150</sup>

Similarly, in *Green Cross Medical, Inc. v. Gally*, an Arizona appellate court refused to invalidate a lease between a landowner and a state-licensed medical marijuana dispensary operator on theory that it was an illegal contract because it facilitated “possession, use, or sale of marijuana” in violation of the CSA.<sup>151</sup> In reaching this conclusion, the court emphasized “the federal government’s lack of interest in prosecuting individuals in compliance with [the state’s medical marijuana law], as well as a public policy that favors enforcement of the lease compliant with state law.”<sup>152</sup>

### 3. Contours of the System

Under the hybrid system, property rights in marijuana located within the borders of a legalization state should be treated like any other form of property under state law—no better and no worse. Assume again that G grows marijuana in a legalization state in a manner that complies with state law. Her property rights should be recognized and enforced by the courts of that state in both the horizontal and vertical dimensions, including the following sample situations.<sup>153</sup>

Parties to business transactions in legalization states should be entitled to rely on state law to protect their marijuana property. For example, the law should recognize the authority of attorneys-in-fact, conservators, corporate officers, guardians, partners, trustees,<sup>154</sup> and others to

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7437048, at \*5 (Dec. 30, 2014 D. Colo.), (granting motion to dismiss plaintiff’s claims on the basis that plaintiff had not pleaded a “cognizable property interest” in the cultivation of marijuana under the federal Constitution).

<sup>147</sup> *City of Garden Grove*, 68 Cal. Rptr. 3d at 670 (emphasis added).

<sup>148</sup> 163 F. Supp. 3d 821 (D. Colo. 2016).

<sup>149</sup> *Id.* at 827.

<sup>150</sup> *Id.* at 823.

<sup>151</sup> 395 P.3d 302, 307 (Ariz. Ct. App. 2017). In reaching this conclusion, the court emphasized “the federal government’s lack of interest in prosecuting individuals in compliance with [the state’s medical marijuana law], as well as a public policy that favors enforcement of the lease compliant with state law.” *Id.* at 308.

<sup>152</sup> *Id.* at 308.

<sup>153</sup> Similarly, the owner of marijuana property will be subject to all liabilities that are generally imposed on property. For example, creditors should be able to levy on such property to satisfy judgments.

<sup>154</sup> *Cf.* *Green Cross Med., Inc. v. Gally*, 395 P.3d 302 (Ariz. Ct. App. 2017) (trustee leased trust property to tenant for use as medical marijuana dispensary).

hypothecate, lease, sell, or otherwise transfer such property. Similarly, parties to contracts that relate to marijuana property must be entitled to rely on the validity of such contracts under state law, without concern that such a contract might be held invalid as illegal or against public policy.<sup>155</sup> And state courts should adjudicate disputes concerning title to marijuana.

Property rights in marijuana should also be respected in legalization states in situations where property is to be divided among co-owners. Thus, in divorce proceedings marijuana property should be deemed to be community property for allocation in community property states,<sup>156</sup> and marital property subject to equitable distribution in separate property states. For example, if H divorces I in a separate property state that has legalized marijuana, marijuana owned by H should be subject to equitable distribution. Similarly, courts should treat marijuana property like any other type of property when distributing assets pursuant to a will, trust, or intestate succession. Further, courts should allocate marijuana property like any other asset when dissolving a corporation, partnership, or other business entity, or partitioning cotenancy property.

Finally, state courts should provide the owner of marijuana property with the normal remedies that any owner has against tortious actions of third parties that injure property. For instance, if J negligently burns K's marijuana, K should be entitled to recover damages from J. Similarly, marijuana property should be recognized in the context of other tort actions, such as conversion and trespass.

However, under the hybrid system marijuana property is not recognized under federal law and thus receives no protection in either the vertical or horizontal dimension. Thus, in the vertical dimension there is a risk that federal authorities may seize marijuana from a farmer like G in a legalization state, with no obligation to pay compensation or otherwise respect her property rights under state law. Given the federal government's anemic enforcement efforts in recent years, however, this risk may be more theoretical than real.

A more direct consequence of the hybrid system is marijuana owners are deprived of access to federal courts and agencies in any matter relating to the vertical dimension of property rights. For example, despite anemic enforcement of the federal criminal laws governing marijuana, federal courts actively continue to treat marijuana as contraband per se in civil litigation governed by federal law that involve the vertical dimension—such as banking law, constitutional law, environmental law, and tax law.<sup>157</sup>

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<sup>155</sup> Even certain federal courts have refused to invalidate marijuana-related contracts on this basis. *See, e.g.*, *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821 (D. Colo. 2016) (insurance policy); *Mann v. Gullickson*, No. 15-CV-03630-MEJ, 2016 WL 6473215 (Nov. 2, 2016 N.D. Cal.) (promissory note). *Cf.* *Kinetic Dev. LLC v. Sky Unlimited LLC*, No. 17-CV-0562-WJM-MLC, 2017 WL 6523512 (Nov. 22, 2017 D. Colo.) (granting motion to remand case involving real estate purchase contract to state court on basis that no federal question existed, despite contingency in contract that buyer obtain a license to sell marijuana on the property). *See also Green Cross Med., Inc.*, 395 P.3d 302 (refusing to invalidate lease). *But see Haeberle v. Lowden*, No. 2011CV709, 2012 WL 7149098 (Aug. 8, 2012 Colo. Dist. Ct.) (refusing to enforce contract for sale of marijuana).

<sup>156</sup> *Cf.* *Muridan v. Redl*, 413 P.3d 1072 (Wash. Ct. App. 2018) (treating share in marijuana business and interest in promissory note for sale of marijuana-related equipment as community property).

<sup>157</sup> *See supra* notes 144-46.

Finally, the system also affects the horizontal dimension of property rights under federal law to some degree. For example, farmer G could not file for bankruptcy because a federal court cannot administer assets that include marijuana without violating the CSA.<sup>158</sup> Nor could she obtain a federal trademark for her marijuana or marijuana products.<sup>159</sup>

#### 4. Reflections on the System

The concept that marijuana property can exist within the territory of a particular state under state law—but not under federal law—is fraught with legal and geographical complexity. This schism will inevitably cause confusion and generate litigation.

For example, the extent to which federal courts will recognize marijuana ownership in situations governed by state law, if at all, remains hazy. It is conceivable that a federal court in a legalization state might defer to state law on the point when adjudicating a state law claim,<sup>160</sup> such as a diversity action stemming from intentional destruction of a marijuana crop.<sup>161</sup> Until this uncertainty is resolved, there is a significant risk that litigants will take strategic advantage of the hybrid system in forum shopping or removal proceedings. A marijuana owner in a legalization state will presumably avoid filing actions in federal court, given the danger that it will not honor her property rights. Conversely, a party to a dispute with a marijuana owner may file a preemptive lawsuit in federal court with the hope that the choice of forum will effectively prohibit the owner from obtaining relief. Similarly, where a marijuana property owner sues in state court, the defendant may seek to remove the action to federal court—solely to benefit from the federal view that marijuana property cannot exist.

In situations where state and federal courts have concurrent jurisdiction—for example, a claim against a city arising under the federal Due Process Clause—presumably a state court in a legalization jurisdiction would recognize marijuana property, even though a federal court would not do so in the same setting. Yet this outcome is by no means certain.

Individuals and businesses involved in transactions relating to marijuana property can minimize the risks inherent in the hybrid system by utilizing contract clauses that mandate arbitration, mediation, or other forms of alternative dispute resolution. Where the selected method requires application of law, the contract should contain a choice of law clause that selects the law of the legalization state to govern disputes. Where the parties to a transaction prefer not to use alternative dispute resolution, their contract should at least include such a choice of law clause.

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<sup>158</sup> See, e.g., *In re Arenas*, 514 B.R. 887, 891 (D. Colo. 2014) (dismissing bankruptcy action filed by marijuana growers because its administration would involve “the Court and the Trustee in the Debtors’ ongoing criminal violation of the CSA”); *In re McGinnis*, 453 B.R. 770 (D. Or. 2011) (refusing confirmation of reorganization plan that involved sale and cultivation of marijuana).

<sup>159</sup> Cf. *In re Morgan Brown*, 110 U.S.P.Q.2d 1350 (T.T.A.B. 2016) (denying federal registration of trademark for store that would sell marijuana).

<sup>160</sup> Cf. *Green Earth Wellness Ctr., LLC*, 163 F. Supp. 3d 821 (treating marijuana plants as covered property under an insurance policy).

<sup>161</sup> Just as marijuana is generally considered to be “property” for the purposes of property crimes such as theft, the same policy concern against intentional misconduct might extend to intentional torts that cause damage. See *supra* note 47.

The hybrid system also produces geographical uncertainty. The Constitution provides that Congress has broad power to enact legislation governing activities on lands owned by the federal government.<sup>162</sup> Thus, even within a legalization state, federal law will govern activities on public lands within that state that are owned by the federal government.<sup>163</sup> These include lands controlled by the National Park Service, the National Forest Service, the Bureau of Land Management, and the Department of Defense, and other federal agencies. In fact, the federal government owns huge tracts of land in states that have legalized marijuana. For example, federal lands comprise 45.8% of California and 35.9% of Colorado.<sup>164</sup> As a practical matter, it may be difficult for individuals and entities to know where marijuana property is legally recognized, even within legalization states. As an illustration, lands managed by the Bureau of Land Management are frequently leased to private parties for grazing or mineral extraction; and the boundaries between these lands (subject to federal law) and adjacent private-owned parcels (subject to state law) may not be marked.

In sum, the hybrid system effectively creates two inconsistent sets of rules for marijuana property within a legalization state. Marijuana property can exist under state law—except on lands owned by the federal government. At the same time, under federal law marijuana property will not be recognized by federal courts under most circumstances; nor will it be honored by other branches of the federal government.

### III. STATE V. STATE: THE MARIJUANA PROPERTY CONUNDRUM

#### A. *Interstate Conflicts*

Marijuana property conflicts can also arise in the interstate context.<sup>165</sup> Unsurprisingly, the categories of tangible things in which property rights may exist vary somewhat among states. For example, some states permit private ownership of certain animals (e.g., lions)<sup>166</sup> or drugs (e.g., peyote),<sup>167</sup> while others do not.<sup>168</sup> Historically, litigation involving conflicts between such state laws has been rare. But given the size and growth rate of the legal marijuana industry—and the sharp disagreement among state laws governing marijuana—it is inevitable that interstate conflicts will occur.

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<sup>162</sup> U.S. CONST. art I., § 8, cl. 17.

<sup>163</sup> U.S. CONST. art 4, § 3, cl. 2.

<sup>164</sup> Daniel Johnson & Pratheek Rebala, *Here's Where the Federal Government Owns the Most Land*, TIME, Jan. 5, 2015, <http://time.com/4167983/federal-government-land-oregon/>.

<sup>165</sup> This Part assumes that the CSA does not preempt state legalization statutes, for the reasons discussed in Part II.

<sup>166</sup> See Summary of State Laws Relating to Private Possession of Exotic Animals, available at [http://www.bornfreeusa.org/b4a2\\_exotic\\_animals\\_summary.php](http://www.bornfreeusa.org/b4a2_exotic_animals_summary.php) (listing state laws on ownership of exotic animals) (hereafter “State Animal Laws”).

<sup>167</sup> See David Bogen & Leslie F. Goldstein, *Culture, Religion and Indigenous People*, 69 MD. L. REV. 48, 61-62 (2009) (concluding that most states allow the use of peyote for religious purposes, but that such use is illegal in some states). Although peyote is a Schedule I drug under the CSA, there is a regulatory exception for its use in religious ceremonies. 21 C.F.R. § 1307.31 (2017).

<sup>168</sup> For example, Connecticut and Kentucky prohibit private ownership of lions, with special exceptions for zoos and other research institutions. See State Animal Laws, *supra* note 165. See also Bogen & Goldstein, *supra* note 166, (noting that some states do not allow use of peyote for any purpose).

Many states still follow the view that the possession or transfer of marijuana is a criminal offense. For instance, Idaho classifies marijuana as a Schedule I substance under its controlled substances law.<sup>169</sup> It is unlawful for any person to cultivate, transfer, or possess marijuana in Idaho,<sup>170</sup> and any such marijuana is “subject for forfeiture.”<sup>171</sup> Thus, marijuana is contraband per se in the state and, accordingly, property rights cannot exist in marijuana located within its borders.<sup>172</sup>

Consider an example of a potential interstate conflict. Suppose L and M are married in a separate property state that recognizes marijuana property; L operates a legal business that sells recreational marijuana in that state; and M later moves to another separate property state that does not recognize marijuana property, where he establishes a new domicile and files for divorce. Will the forum state treat L’s marijuana property as “property” for purposes of equitable distribution and accordingly award a share to M?

The same issue can arise between a full legalization state and a medical marijuana state. Applying this variant to the L-M hypothetical above, would the forum state which has only legalized medical marijuana award M any share in L’s recreational marijuana property?<sup>173</sup>

The common theme in these examples is that litigation arises from a relationship that involves two states: the state where the legal marijuana is located and the forum state which has a more restrictive approach.<sup>174</sup> It is unlikely that interstate conflicts would arise between two states that share the same legalization approach, either two full legalization states or two medical marijuana states. Similarly, such interstate disputes will not occur between two ban states because neither would recognize marijuana property.

This interstate conflict concern applies with equal force to many other situations involving property rights, including the authority of attorneys-in-fact, conservators, corporate officers, guardians, partners, trustees, and others to hypothecate, lease, sell, or otherwise transfer marijuana property; the validity of contracts for these purposes; disputes concerning title to marijuana; distribution of marijuana property pursuant to a will, trust, or intestate succession; dissolution of corporations, partnerships, and other business entities that own marijuana property; partition of cotenancies owning marijuana property; and tort actions stemming from injury to marijuana.

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<sup>169</sup> IDAHO CODE ANN. § 37-2705(d)(19) (West 2017) (listing it as “marihuana”).

<sup>170</sup> *Id.* § 37-2732(a) provides that it is “unlawful for any person to manufacture or deliver . . . a controlled substance.” The term “manufacture” includes “propagation” or growing, while the term “deliver” means “the actual, constructive, or attempted transfer from one person to another” of a controlled substance. *Id.* § 37-2701((g), (s). Further, it is “unlawful for any person to possess a controlled substance.” *Id.* § 37-2732(c).

<sup>171</sup> *Id.* § 37-2744(a)(1).

<sup>172</sup> See *supra* text accompanying notes 66-70.

<sup>173</sup> Another variant situation is a conflict between a ban state and a Native American tribe that legalizes marijuana on its reservation in that state. See OSBECK & BROMBERG, *supra* note 51, at 166-71.

<sup>174</sup> See, e.g., *Ginsburg v. ICC Holdings*, No. 3:16:CV-2311, 2017 WL 5467688 (Nov. 13, 2017 N.D. Tex.) (refusing to dismiss breach of contract claim relating to defendants’ medical marijuana business where contract selected Illinois law, which authorized medical marijuana, but suit was brought in Texas, which did not).

These situations all present a choice-of-law question: Will the forum state utilize its own law or the law of the legalization state?<sup>175</sup> Regrettably, modern choice-of-law theory is in “considerable disarray,” while “[t]he disarray in the courts may be worse” because a number of approaches are currently in use.<sup>176</sup> At bottom, however, interstate disputes related to marijuana property present two basic choice-of-law variants. First, where the applicable choice-of-law rule directs the forum state to use the law of the legalization state, should the forum state refuse to do so based on its own public policy? Second, where the applicable rule permits the forum state to use its own law, should it instead use the law of the legalization state as a matter of comity?

## B. *Legalization State v. Ban State*

### 1. Situs Law and Public Policy

In most relevant situations, the applicable choice-of-law rule will direct the forum state to use the law of the legalization state—thereby recognizing marijuana property. The forum state should not refuse to do so based on a public policy objection.<sup>177</sup>

As a general rule, ownership interests in a tangible thing are determined by the law of the state that “has the most significant relationship to the thing and the parties” in litigation.<sup>178</sup> The Restatement (Second) of Conflicts of Law provides that seven principles should be used in making this determination: (a) “the needs of the interstate or international system;” (b) “the relevant policies of the forum;” (c) “the relevant policies of other interested states and the relative interests of other states in the determination of the particular issue;” (d) “the protection of justified expectations;” (e) “the basic policies underlying the particular field of law;” (f) “certainty, predictability and uniformity of result”; and (g) “ease in the determination and application of the law to be applied.”<sup>179</sup> This analysis usually results in the forum state using the law of the state where the particular thing is located. Thus, a leading treatise concludes that “[s]itus law is likely to be most appropriately concerned with goods within the confines of the state.”<sup>180</sup> Under the Restatement approach, the law of the legalization state will usually have the most significant relationship to the marijuana and the parties to the dispute and thus will normally govern, particularly because the marijuana is physically located outside of the forum state’s territory.<sup>181</sup>

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<sup>175</sup> This analysis assumes that federal law does not preempt marijuana legalization statutes, as discussed in Part II.D above.

<sup>176</sup> WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS 285 (4<sup>th</sup> ed. 2013).

<sup>177</sup> Of course, a litigant may choose not to raise such an objection for strategic reasons. The plaintiff who brings a divorce action in a ban state against a spouse who operates a marijuana business in a legalization state, for example, would benefit from avoiding use of the forum state law.

<sup>178</sup> RESTATEMENT (SECOND) CONFLICTS OF LAW § 222 (1969).

<sup>179</sup> *Id.* § 6.

<sup>180</sup> PETER HAY ET AL., CONFLICT OF LAWS (5<sup>th</sup> ed. 2010). *Cf. Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2<sup>nd</sup> Cir. 1998) (holding that Russian law determined ownership of a copyright, but that United States law determined whether the copyright was infringed).

<sup>181</sup> The conflict between federal law and state law in legalization states arises because both the federal government and the relevant state government share sovereign authority over the territory where the marijuana is located. In the context of the interstate conflicts, however, the forum state has no sovereignty over the territory where the marijuana is located and, accordingly, lacks substantial justification for utilizing its own law.

In addition, choice-of-law rules will direct the forum state to use the law of the legalization state in a number of specific situations. For example, the validity and effect of a contract for the sale of goods—including marijuana—is typically governed by the choice-of-law clause in the contract; given the risk of interstate conflicts, prudent contracting parties will insert a clause selecting the law of the legalization state to govern disputes.<sup>182</sup> Similarly, the validity of security interests in personal property are governed by the law of the state where the debtor resides, which in the context of marijuana property litigation would usually be a legalization state.<sup>183</sup> A parallel rule applies to divorce proceedings, where interests in personal property are usually determined by the law of the marital domicile when the asset is acquired.<sup>184</sup> Another example is a tort action concerning injury to tangible personal property, which is governed by the law of the state where the injury occurs.<sup>185</sup>

However, it is well settled that the forum state may utilize its law when the use of another state's law would violate its own public policy.<sup>186</sup> As the Supreme Court noted in *Baker v. General Motors Corporation*, “[t]he Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’ . . . A court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy.”<sup>187</sup> Yet the parties to a consensual transaction relating to marijuana property—as in the contract examples above—can minimize the risk of a successful public policy objection by using a choice-of-law clause that selects the law of the particular legalization state.<sup>188</sup>

Where the parties have utilized such a clause, the scope of the exception is narrow; the clause must be enforced unless the “chosen state has no substantial relationship to the parties or the transaction” or application of the chosen law would be “contrary to a fundamental public policy of a state which has a materially greater interest in the determination of the particular issue . . . .”<sup>189</sup> It would be difficult to successfully argue that this exception applies to a transaction in a legalization state that involves marijuana property. In this situation, the forum state has no relationship to the transaction and no substantial relation to any parties based in a legalization state. Further, the legalization state would have the “greater interest” in applying its own public policy in favor of marijuana property.

The public policy exception applies with somewhat greater force where no choice-of-law clause is involved—for example, in the divorce and tort illustrations discussed above. Restatement (Second) of Conflicts of Law § 90 provides that “[n]o action will be entertained on

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<sup>182</sup> U.C.C. § 1-105(c)(1).

<sup>183</sup> U.C.C. § 9-301.

<sup>184</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 258(2) (1969).

<sup>185</sup> *Id.* § 147.

<sup>186</sup> Unfortunately, “[p]ublic policy,’ as every law student well knows . . . is all too often employed as a talisman to avoid reasoning on the underlying issues.” RICHMAN, *supra* note 175, at 185.

<sup>187</sup> 522 U.S. 222, 233 (1998) (quoting *Pacific Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939)).

<sup>188</sup> *Cf.* *Ginsburg v. ICC Holdings*, No. 3:16-CV-2311-D, 2017 WL 5467688 (Nov. 13, 2017 N.D. Tex.) (parties to contract relating to medical marijuana business selected Illinois law, which recognized medical marijuana, to govern disputes but suit was brought in Texas, which did not).

<sup>189</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187(2)(a), (b) (1969).

a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.”<sup>190</sup> But the Reporter’s Notes to this section specify that “[a]ctions should rarely be dismissed because of the rule of this Section,” quoting Justice Cardozo’s conclusion that such a dismissal should not occur unless failure to do so “would violate some fundamental principle of justice, some prevalent conception of morals, some deep-seated tradition of the commonweal.”<sup>191</sup>

A state law that criminalizes the possession or transfer of marijuana clearly embodies public policy against such conduct. However, in a marijuana property dispute it is unlikely to qualify as a strong public policy. First, although a ban state may have a legitimate interest in enforcing this policy against conduct within its own territory, it has little or no interest in doing so when the conduct occurs outside of its borders. Second, given the federal government’s own schizophrenic approach to marijuana legalization, some federal courts have rejected public policy attacks in cases relating to marijuana property<sup>192</sup>—and the forum state may have similar misgivings. Finally, application of the marijuana ban policy might conflict with a more important policy of the forum state on the facts of the particular case. For instance, in a divorce action, a spouse domiciled in a legalization state might argue that her marijuana property should not be deemed “property” for purposes of equitable distribution given the forum’s public policy—but this would disadvantage the spouse domiciled in the forum state, and thus conflict with the policy of allowing a resident spouse to receive a fair share of marital assets.<sup>193</sup> In sum, a public policy objection to the use of a legalization state’s law is unlikely to be successful.<sup>194</sup>

Finally, even if a public policy objection were otherwise appropriate, its use might violate the Due Process Clause. The Supreme Court explained in *Allstate Insurance Co. v. Hague* that “if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional.”<sup>195</sup> An example is *John Hancock Mutual Life Insurance Co. v. Yates*, where a New York resident purchased an insurance policy from a Massachusetts corporation, and the insured’s widow later moved to Georgia where she brought suit on the policy under Georgia law. On these facts, the Court held that application of Georgia law was unconstitutional due to the state’s de minimis connection. Similarly, if two parties enter

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<sup>190</sup> *Id.* § 90.

<sup>191</sup> *Id.* Reporter’s Note (quoting *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 202 (N.Y. 1918)).

<sup>192</sup> *See, e.g.*, *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821 (D. Colo. 2016); *Mann v. Gullickson*, No. 15-CV-03630-MEJ, 2016 WL 6473215 (Nov. 2, 2016 N.D. Cal.).

<sup>193</sup> Alternatively, suppose that a resident of a ban state intentionally destroys marijuana in a legalization state, and the owner then sues for damages in the ban state. Applying the anti-marijuana policy on these facts would conflict with the forum state’s own presumed public policy against allowing one person to intentionally injure property owned by another. Even ban states will prosecute a person who steals marijuana from its possessor because this conduct conflicts with the public policy against theft. *See supra* note 47.

<sup>194</sup> In contrast, a ban state is clearly required to enforce a judgment issued by a legalization state that relates to marijuana property, despite a public policy concern. Under the Full Faith and Credit Clause of the Constitution, each state is obligated to respect the “judicial proceedings” of other states. U.S. CONST. art. IV, § 1. There is no public policy exception to this rule. *See Fauntleroy v. Lum*, 210 U.S. 230 (1908) (rejecting public policy defense to enforcement of judgment); *see also* RESTATEMENT (SECOND) CONFLICTS OF LAW § 117 (1969) (stating that such a judgment must be enforced “even though the strong public policy of the [forum] State would have precluded recovery in its courts on the original claim”).

<sup>195</sup> 449 U.S. 302, 310-11 (1981) (plurality opinion). *See also Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930) (noting that the forum state’s choice of law “may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them”).

into a contract related to marijuana property in a legalization state, without a choice-of-law clause, and one later moves to a ban state where he is sued for breach of contract, this contract would probably be too minor to allow the use of the ban state's law.

## 2. Forum Law and Comity

In some situations, a choice-of-law rule will authorize the forum state to use its own law in cases involving marijuana—most commonly in connection with the division or distribution of property. For example, the law of the testator's domicile at death usually determines whether a will transfers any legal interest in tangible personal property such as marijuana<sup>196</sup> and also governs rights to such property that pass through intestate succession.<sup>197</sup> Similarly, forum law normally governs the dissolution of a corporation or partnership based in that state, including the distribution of its property.<sup>198</sup> Yet a ban state's mechanical use of its own law in such a situation produces a troublesome result: the court will not recognize marijuana property located in a legalization state as "property" and hence will not distribute it to the putative owners. As a result, title to such assets will be either appropriated by adverse possession<sup>199</sup> or escheat to the legalization state.<sup>200</sup> Either outcome will injure residents of the ban state and unjustly enrich residents of the legalization state.

Under these circumstances, the ban state might use the legalization state's law as a matter of comity—not because this is required by choice-of-law rules, but rather because the court determines that it is appropriate under the circumstances.<sup>201</sup> While observing that attorneys who do not specialize in conflict of laws may "find the field mystifying, frustrating, and a bit silly," Larry Kramer suggests a number of canons that courts could adopt to clarify the subject.<sup>202</sup> Two of those canons might be used in cases involving marijuana property: one based on obsolescence, the other on reliance.

First, Kramer argues that "[w]here one of two conflicting laws is obsolete [i.e., inconsistent with prevailing legal and social norms in the state that enacted it], the other law should be applied."<sup>203</sup> A state statute that criminalizes marijuana possession and transfer is likely to be inconsistent with social norms even a ban state, because marijuana use is increasingly accepted. Further, even in such a state, the statute is unlikely to be enforced with vigor.

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<sup>196</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 263(1) (1969). *See also* *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007) (holding that law of domicile at death determined whether testatrix held a right of publicity that could be devised). However, a testator can avoid the risk that a ban state might invalidate a devise of rights in marijuana property by including a choice-of-law clause in the will that directs the use of the law of a legalization state. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 264(1) (1969) (providing that a will that devises "an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will").

<sup>197</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 260 (1969).

<sup>198</sup> HAY, *supra* note 179, at 1413.

<sup>199</sup> *See* SPRANKLING, *supra* note 11, at § 7.02.

<sup>200</sup> *See, e.g.*, CAL. CODE CIV. PROC. § 1410 (West 2007).

<sup>201</sup> *See generally* Joseph William Singer, *Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV. 1923 (discussing role of comity in conflict of laws).

<sup>202</sup> Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990).

<sup>203</sup> *Id.* at 335.

Second, he suggests that “[w]here two laws conflict, but the parties actually and reasonably relied on one of them, that law should be applied.”<sup>204</sup> In many situations involving marijuana property, the parties will have relied on the belief that such property located in a legalization state would be judicially protected. For example, the partners who invest in marijuana assets or the testator who devises such property presumably all share the same good faith belief that their ownership rights will be respected.

### *C. Full Legalization State v. Medical Marijuana State*

The choice-of-law issues discussed above may also arise in litigation involving a full legalization state and a medical marijuana state because the scope of their respective laws will differ. For instance, assume that N and O are married in a separate property state that has legalized marijuana for all purposes; O establishes a farm that legally grows marijuana for recreational use; and N then moves to a state that only permits marijuana cultivation under tightly controlled circumstances and restricts marijuana use to medical purposes. When N files for divorce, will the forum state recognize O’s marijuana property as “property” for purposes of the divorce if it was grown in a manner that violates the forum state’s law?

Where the applicable choice-of-law rule directs the forum state to use the legalization state’s law, it seems quite unlikely that a public policy objection would succeed. Both states would share the same view that marijuana property should be recognized as a general matter, even though they disagree on the parameters of ownership. Such disagreement can hardly be viewed as a convincing public policy objection. A helpful analogy is found in *Intercontinental Hotels Corporation v. Golden*, where the plaintiff brought suit in New York to enforce I.O.U.s given by the defendant in payment of gambling debts legally incurred at a casino in Puerto Rico.<sup>205</sup> Although gambling was generally illegal under New York law, the court refused to reject the use of Puerto Rico law on public policy grounds, noting that the legalization of limited forms of gambling in New York—“pari-mutuel betting and the operation of bingo games”—indicated that “the New York public does not consider authorized gambling” to violate public policy.<sup>206</sup> Similarly, the partial acceptance of legalized marijuana by a medical marijuana state indicates that it does not have a strong public policy against marijuana as a general matter.

Similarly, where the forum state is authorized to use its own law, the argument that it should defer to the legalization state’s law as a matter of comity is strong. Kramer’s obsolescence canon applies with even greater force to a medical marijuana state, since such a state already recognizes marijuana property to some extent. The reliance canon is also helpful in a medical marijuana state when one or more of the affected parties have relied on the law in a legalization state in entering into a contract or other relationship concerning marijuana located in such a state.

## IV. THE FUTURE OF MARIJUANA PROPERTY

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<sup>204</sup> *Id.* at 337.

<sup>205</sup> 203 N.E.2d 210 (N.Y. 1964).

<sup>206</sup> *Id.* at 213.

### A. *End of Marijuana Détente?*

The legalization wave shows no signs of abating. Given the overwhelming popular support for medical marijuana, it is likely that more states will adopt this position in the future. Efforts are currently underway to legalize medical marijuana in five more states.<sup>207</sup> At the same time, active campaigns are in progress to legalize recreational marijuana in six other states.<sup>208</sup>

The current marijuana détente between the federal government and legalization states may ultimately be ended by aggressive federal enforcement of the CSA. But the more likely outcome is that the status quo will continue into the foreseeable future—as it has for nine years. The possibility of future legalization should not overshadow the importance of grappling with the federal-state and interstate conflicts discussed above. Eventually, however, some form of new federal legislation may endorse the legalization effort, either by sanctioning marijuana on a nationwide basis or by allowing each state to decide the issue for itself. Under either approach, there is a risk that marijuana property may not be fully protected.

### B. *Impact of Nationwide Legalization*

Because most Americans now favor national legalization, in the long run the current impasse is likely to be resolved by federal legislation that legalizes the possession and transfer of marijuana for all purposes throughout the United States.<sup>209</sup> Congress clearly has the power to adopt such legislation under its authority to regulate interstate commerce. In *Gonzales v. Raich*, the Supreme Court rejected the claim that the CSA’s “prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes” was not authorized by the Commerce Clause.<sup>210</sup> It stressed that Congress was empowered to “regulate purely local activities” that have a substantial effect on interstate commerce, which includes the cultivation “for home consumption, of a fungible commodity for which there is an established, albeit illegal, interstate market.”<sup>211</sup> Under this logic, the legalization of marijuana cultivation, distribution, and possession would similarly be valid, even as to “purely local activities” within a particular state.

Under this national legalization approach, property rights would clearly exist in marijuana in all states as a matter of federal law.<sup>212</sup> Presumably, such a statute would expressly provide that it preempts any contrary state laws, so that no uncertainty about preemption would arise. This would end the current impasse, but potentially leave an open issue: Would the recognition of marijuana property have retroactive effect?

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<sup>207</sup> These states are Kentucky, Missouri, Oklahoma, South Dakota, and Utah. Linley Sanders, *Marijuana Legalization 2018: Which States Might Consider Cannabis Laws this Year?*, NEWSWEEK, Jan. 2, 2018, available at <https://www.newsweek.com/marijuana-legalization-2018-which-states-will-consider-cannabis-laws-year-755282>.

<sup>208</sup> *Id.* These states are Delaware, Connecticut, Michigan, New Jersey, Ohio, and Rhode Island.

<sup>209</sup> Another possibility is that national legislation would legalize the possession and transfer of marijuana only for medical purposes. This might be an interim step toward national legalization for all purposes. However, national legalization only for medical purposes would leave open the issues discussed in Part III.C above.

<sup>210</sup> 545 U.S. 1, 15 (2005).

<sup>211</sup> *Id.* at 18.

<sup>212</sup> See *supra* the analysis in Part II.

There is a compelling argument that marijuana property already exists today in legalization states, as discussed in Part II above. However, a national legalization statute should retroactively validate marijuana property rights to obviate any lingering uncertainty. Today millions of people and tens of thousands of businesses rely on the existence of these rights as a practical matter, even though the legal status of marijuana property remains officially unsettled.<sup>213</sup>

Federal courts traditionally presume that a statute does not have retroactive effect “absent clear congressional intent favoring such a result.”<sup>214</sup> This presumption is applied most frequently in cases involving new legislation “affecting contractual or property rights, matters in which predictability and stability are of prime importance.”<sup>215</sup> In the context of marijuana property, however, predictability and stability would be enhanced—not imperiled—by retroactive application. For this reason, a court might choose not to apply the presumption. To avoid uncertainty, however, Congress should expressly provide that a national legalization statute has retroactive effect.

### *C. Impact of State Option Legalization*

The more likely near-term approach would be federal legislation that amends the CSA to provide that each state may, at its option, legalize the possession and transfer of marijuana, by analogy to the historic treatment of alcoholic beverages.<sup>216</sup> This recalibration could be accomplished through legislation that deletes the reference to “marihuana” in Schedule 1 of the CSA, without preempting contrary state laws.<sup>217</sup> Of course, this state option approach would not resolve the interstate conflict problems discussed in Part III above.

Driven by religious beliefs and health concerns, early twentieth-century reformers mounted a successful campaign to amend the Constitution to ban alcoholic beverages. In 1919, the Eighteenth Amendment accordingly prohibited the “manufacture, sale, or transportation of intoxicating liquors within [and] the importation thereof into . . . the United States . . . for beverage purposes.”<sup>218</sup> The Twenty-first Amendment repealed this prohibition in 1933, but provided that any state could restrict such beverages at its option.<sup>219</sup> Its second clause stated that the “transportation or importation into any state . . . for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited.”<sup>220</sup> Accordingly, today each state has the power to restrict the distribution and use of alcoholic beverages.<sup>221</sup> This power is

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<sup>213</sup> See *supra* text accompanying notes 53-56.

<sup>214</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

<sup>215</sup> *Id.* at 271.

<sup>216</sup> See Chemerinsky et al., *supra* note 4, at 115-22 (advocating this approach).

<sup>217</sup> Alternatively, marijuana could be removed from Schedule I by an administrative decision of the Drug Enforcement Administration. For a discussion of past efforts to administratively reclassify marijuana, see UELMEN & KREIT, *supra* note 62, at § 3:85. This approach would not resolve the interstate conflicts discussed in Part III above.

<sup>218</sup> U.S. CONST. art. XVII, § 1. Notably, the amendment did not prohibit the possession of alcoholic beverages. As a result, alcoholic beverages were not classified as contraband per se and could thus be the subject of property rights.

<sup>219</sup> U.S. CONST. art. XXI.

<sup>220</sup> *Id.* § 2 (emphasis added).

<sup>221</sup> *But see* *Granholm v. Heald*, 544 U.S. 460 (2005) (holding that states do not have the power to prohibit interstate shipments of alcohol).

typically delegated to the county level and, as a result, today “dry counties” exist in some states where the sale of alcohol is either prohibited or tightly controlled.<sup>222</sup>

A confluence of public opinion, political reality, and federalism theory is fueling movement toward the state option approach.<sup>223</sup> Although there is determined opposition to national legalization,<sup>224</sup> a recent poll shows that 74% of Americans favor “protecting states that have legalized medical or recreational marijuana from federal prosecution.”<sup>225</sup> A variety of political figures,<sup>226</sup> including President Trump,<sup>227</sup> have expressed support for this approach because it accommodates the current political reality that states remain divided on key questions: (1) Should marijuana be legalized at all? and (2) If so, should it be legalized only for medical use or also for recreational use? Finally, this approach is consistent with our tradition of federalism, under which states are afforded broad discretion in areas of social and economic policy. As the Supreme Court acknowledged in *Arizona State Legislature v. Arizona Independent Restricting Commission*, it “has ‘long recognized the role of the States as laboratories for devising solutions to difficult legal problems.’”<sup>228</sup>

Under the state option approach, property rights in marijuana would clearly exist within legalization states—because it is no longer contraband per se under federal law. But presumably some states would retain their existing laws that criminalize its possession and transfer; as a result, property rights in marijuana would not exist in those states. This creates the risk that marijuana property conflicts may arise between legalization states and ban states, despite the solutions analyzed in Part III above.

Accordingly, federal legislation adopting the state option approach should expressly provide that ban states must respect the existence of marijuana property in legalization states when interstate conflicts occur, whether they arise from business transactions or personal

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<sup>222</sup> See Hunter Schwarz, *Where in the United States You Can't Purchase Alcohol*, WASH. POST, Sept. 2, 2014, <https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/02/where-in-the-united-states-you-cant-purchase-alcohol/> (identifying ten states that allow counties to criminalize the sale or purchase of alcohol).

<sup>223</sup> Bills implementing this approach have been introduced in Congress. See, e.g., Marijuana Freedom and Opportunity Act, S. 3174, 115<sup>th</sup> Cong. (2018); Strengthening the Tenth Amendment Through Entrusting States Act, S. 3032, 115<sup>th</sup> Cong. (2018). See also Compassionate Access, Research Expansion, and Respect States Act of 2017, H.R. 2920, 115<sup>th</sup> Cong. (2017) (allowing state option only for medical marijuana).

<sup>224</sup> Quinnipiac University Poll, *supra* note 134. Although 63% of Americans favor the national legalization of marijuana, most Republicans disagree: 41% favor this step, while 55% oppose it. *Id.*

<sup>225</sup> *Id.* Notably, the same poll indicated that 52% of Republicans also favor this approach.

<sup>226</sup> See, e.g., Dan Adams, *Warren aims to bar federal interference in state pot laws*, BOSTON GLOBE, June 8, 2018, available at 2018 WLNR 1769829 (discussing support for state option approach by Senators Elizabeth Warren and Cory Gardner).

<sup>227</sup> Evan Halper, *Trump inclined to back ending pot ban*, L.A. TIMES, June 9, 2018, available at 2018 WLNR 17754974 (quoting President Trump as saying he would “probably end up supporting” a bill that uses the state option approach).

<sup>228</sup> 135 S. Ct. 2652, 2673 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). See also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 211 (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social . . . experiments without risk to the rest of the country.”).

relationships. This would preclude a ban state from applying its own law to effectively nullify property rights in marijuana located outside of its borders.<sup>229</sup>

## CONCLUSION

In sum, marijuana can be owned under state law despite conflicting federal law. Yet the hybrid property system produced by this divergence will generate uncertainty—and thus litigation—until either judicial decisions better chart the terrain between state and federal law or marijuana property is legalized through nationwide legislation. In the interim, legalization states and ban states will struggle with a similar challenge in the interstate setting.

More broadly, sovereign conflicts over the existence of property rights are inevitable in our federal system. The rights recognized by a particular state will sometimes be inconsistent with federal law or with the law of other states. After the current impasse over marijuana property is finally resolved, the problem will recur in other contexts. Although the question of marijuana ownership has unique facets, the approaches analyzed in this Article may provide a useful framework for navigating future conflicts.

Given the dominant role that state law plays in defining property rights under the Tenth Amendment, federal preemption of such rights should rarely occur. When it does, federal and state authorities will be confronted with a hybrid system where property exists as a matter of state law, but not under federal law. But ultimately these conflicting sovereigns will need to accept a certain amount of inconsistency between their approaches.

Conflicts between states over property rights raise different problems due to the impossibility of preemption. Private actors can circumvent this jurisdictional inconsistency to some extent through litigation strategy, choice-of-law clauses, or alternative dispute resolution techniques. Beyond this point, the forum state should give appropriate deference to the law of the situs state, consistent with the traditional view that the situs state has the greater interest in the application of its own law.

Ultimately, federalism is “messy, untidy, and always a little out of control,” as Charles Handy observes.<sup>230</sup> Our goal should be to reduce the systemic friction produced by federal-state conflicts and interstate conflicts, while appreciating that complete harmonization of property law doctrines is both unlikely to occur and arguably counterproductive, given the traditional role of the states as laboratories of democracy.

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<sup>229</sup> In addition, legislation implementing this approach should be retroactive for the reasons discussed in Part IV. B.

<sup>230</sup> CHARLES HANDY, *THE AGE OF PARADOX* 111 (1995).

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### **The Evolving Federal Response to State Marijuana Reforms**

**25 Widener Law Review – Forthcoming 2019**

Robert A. Mikos  
Vanderbilt University Law School

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*The Evolving Federal Response to State Marijuana Reforms*

— WIDENER LAW REVIEW — (forthcoming)

Robert A. Mikos, Vanderbilt University

The states have launched a revolution in marijuana policy, creating a wide gap between state and federal marijuana law. While nearly every state has legalized marijuana in at least some circumstances, federal law continues to ban the substance outright. Nonetheless, the federal response to state reforms has been anything but static during this revolution. This Essay, based on my Distinguished Speaker Lecture at Delaware Law School, examines how the federal response to state marijuana reforms has evolved over time, from War, to Partial Truce, and, next (possibly) to Capitulation. It also illuminates the ways in which this shifting federal response has alternately constrained and liberated states as they seek to regulate marijuana as they deem fit.

***The Evolving Federal Response to State Marijuana Reforms***

Robert A. Mikos\*

We are experiencing nothing short of a revolution in marijuana law. Just twenty-three years ago, every state in the Union banned marijuana outright.<sup>1</sup> Today, by contrast, only one state still does (Idaho).<sup>2</sup> Put another way, over the last two decades, forty-nine states plus the District of Columbia have legalized the use of marijuana for at least some purposes.<sup>3</sup>

**Figure 1** illuminates the steady spread of these state marijuana reforms over time. The stacked bars show the total number of states that have legalized marijuana by the end of each year from 1996-2018.

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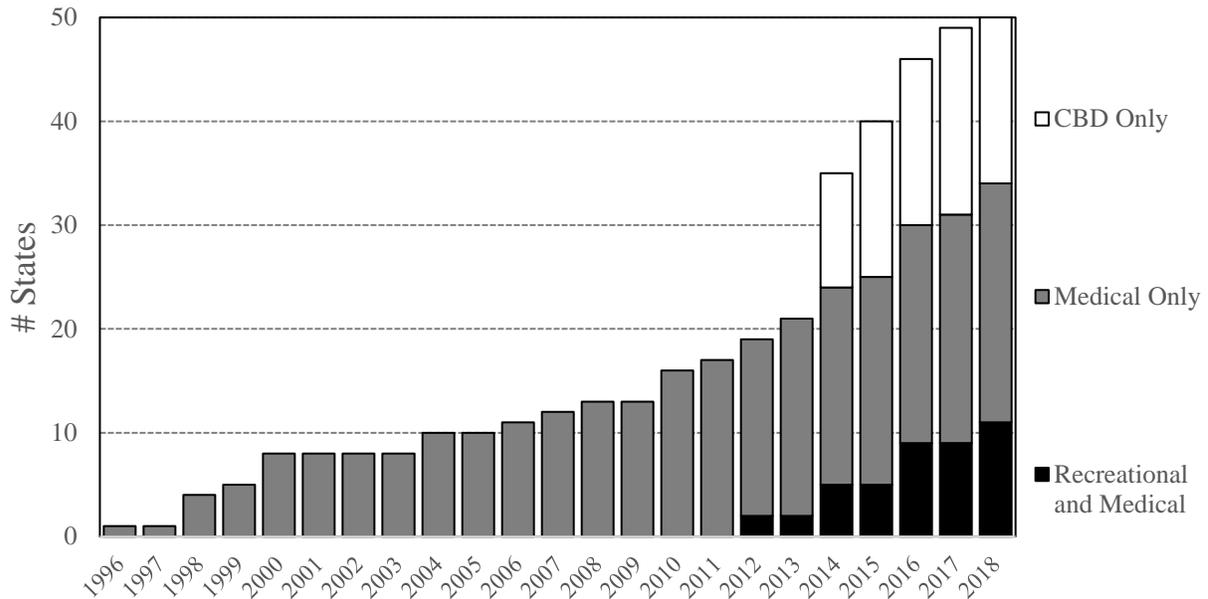
\* Professor of Law, Vanderbilt University Law School. This Essay is based on my Distinguished Speaker Keynote Lecture for the *Cannabis in the Tri-State Area* Symposium at Delaware Law School in March of 2019. I thank Professor Luke Scheuer and the editors and staff of the *Widener Law Review* for organizing and hosting the Symposium.

<sup>1</sup> ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 3 (2017) [hereinafter MIKOS, MARIJUANA LAW].

<sup>2</sup> Robert A. Mikos, *Only One State Has Not Yet Legalized Marijuana in Some Form . . .*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (June 16, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/07/only-one-state-has-not-yet-legalized-marijuana-in-some-form/> [hereinafter Mikos, *Only One State*].

<sup>3</sup> *Id.*

**Figure 1: States Legalizing Marijuana<sup>4</sup>**



The earliest reforms, like California’s Compassionate Use Act (aka Proposition 215), legalized only medical use of the drug (at least in name).<sup>5</sup> The gray portion of each stacked bar represents the share of states that legalized medical—and *only* medical—marijuana, at the end of each year depicted in **Figure 1**. The white portion of the stacked bar represents the share of states that adopted a very narrow version of a medical marijuana law. Starting with Alabama in 2014, states began legalizing medical use of marijuana, but only when the drug contained very little Tetrahydrocannabinol (“THC”), the psychoactive chemical (cannabinoid) produced by the cannabis plant.<sup>6</sup> I label these “CBD Only” states because they are interested in enabling access to another cannabinoid with reputed therapeutic benefits: cannabidiol (“CBD”).<sup>7</sup> Although CBD is not psychoactive, it is (or was, until very recently) nearly always considered “marijuana” in the

<sup>4</sup> Figure 1 is updated and adapted from Figure 1.1 in MIKOS, MARIJUANA LAW, *supra* note 1, at 3.

<sup>5</sup> *Id.* at 99.

<sup>6</sup> *Id.* at 123.

<sup>7</sup> *Id.*

eyes of the law.<sup>8</sup> But because these “CBD Only” laws are much narrower than the medical marijuana reforms depicted in gray, I have shown them separately in **Figure 1**.<sup>9</sup>

In 2012, some states that previously adopted medical marijuana laws began to legalize the drug for non-medical purposes as well.<sup>10</sup> The black portion of the stacked bar in **Figure 1** depicts the spread of these “Recreational and Medical” reforms. In a nutshell, states with “Recreational and Medical” marijuana laws permit anyone over twenty-one years of age to possess and use marijuana, regardless of their reasons for so doing; and nearly all of these states also permit commercial vendors to sell the drug to lawful consumers.<sup>11</sup>

The last stacked bar at the far-right side of **Figure 1** shows how far these three types of marijuana reform have proliferated across the states. At the end of 2018, ten states (plus the District of Columbia) had legalized adult use of marijuana (“Recreational and Medical”); another thirty-nine states had legalized marijuana exclusively for medical purposes, with twenty-three of those states allowing marijuana with THC (“Medical Only”) and another sixteen states allowing marijuana without THC (“CBD Only”).<sup>12</sup>

By itself, this dramatic transformation in state marijuana laws is quite remarkable. But the transformation is all the more remarkable in light of the fact that it has taken place in the shadow of a strict federal ban on the drug. Since 1970—well before California launched the modern reform

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<sup>8</sup> Robert A. Mikos, *New Congressional Farm Bill Legalizes Some Marijuana*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Dec. 13, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/12/new-congressional-farm-bill-legalizes-some-marijuana/> [hereinafter Mikos, *New Congressional Farm Bill*].

<sup>9</sup> For a discussion of the differences between Medical Only and CBD Only laws, see MIKOS, MARIJUANA LAW, *supra* note 1, at 123–124.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 443; see also Robert A. Mikos, *Some Observations on How Vermont Just Legalized Recreational Marijuana*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG. (Jan. 24, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/01/352/>.

<sup>12</sup> Mikos, *Only One State*, *supra* note 2.

movement—federal law has banned the possession, manufacture, and distribution of marijuana, making no exception for medical (or other) use of the drug.<sup>13</sup> In the ensuing half-century, the federal ban has survived constitutional challenges,<sup>14</sup> as well as a groundswell in public support for legalization of the drug.<sup>15</sup>

The tension between the federal marijuana ban and state reforms is one of the primary reasons why marijuana law has become such a hot field and the subject of symposia. The attention that the field is now attracting is warranted; in part because of the tension between state and federal law, the field raises some of the most fascinating and important legal issues of our day.<sup>16</sup>

To set the stage for our discussion on some of these issues, this essay discusses in more detail how the federal government has responded to state reforms. As I will show, the federal response has wielded a substantial and sometimes overlooked influence on the design of state marijuana laws. Furthermore, that influence has not been fixed across time. It is important to recognize that the federal response to state reforms has evolved over the past two decades, even though the federal law governing marijuana has remained largely the same. For the first decade (or so) of state reforms, the federal government took an overtly hostile and aggressive approach to marijuana legalization in the states.<sup>17</sup> Among other things, it threatened to punish growers who

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<sup>13</sup> 21 U.S.C. §§ 841, 844 (2016).

<sup>14</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding application of the federal marijuana ban to the intra-state possession, cultivation, and distribution of marijuana).

<sup>15</sup> *E.g.*, Justin McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, GALLUP (Oct. 22, 2018), <https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx> (reporting that 66% of Americans support legalizing marijuana as of 2018, compared to only 12% in 1970). For explanations of why these changes in public opinion have not yet triggered changes to federal marijuana law, see Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 UNIV. DENVER L. REV. 997–98 (2012) (identifying features of the national political process that help to preserve the federal marijuana ban against “increasingly loud calls for reform”); David S. Schwartz, *Presidential Politics as a Safeguard of Federalism: The Case of Marijuana Legalization*, 62 BUFF. L. REV. 599 (2014) (giving another view of the impact of the federal political process on federal marijuana law).

<sup>16</sup> See MIKOS, MARIJUANA LAW, *supra* note 1, at 3–16 (identifying some key questions posed by marijuana law and policy).

<sup>17</sup> See *infra* notes 19–49 and accompanying text.

distributed marijuana and physicians who recommended the drug to state-authorized patients. To defuse these threats, the states had to come up with creative solutions, which are evident in some otherwise puzzling features of state reforms (a few of which I will discuss in a moment).

But starting in 2009, the federal government began to adopt a far more tolerant approach toward legalization.<sup>18</sup> In particular, the Department of Justice (“DOJ”), for the most part, stopped enforcing the federal marijuana ban against individuals who were acting in compliance with state law. This shift in federal response enabled states to pursue even broader reforms and to adopt more robust regulations of marijuana. Nonetheless, the ongoing tension between state and federal law continues to pose some unique challenges for the marijuana industry and for state officials tasked with regulating them. I will conclude by offering some thoughts on what it would take to remove these lingering challenges, should the federal government decide to change its marijuana policy once again.

### **The First Phase: War**

The first federal response to state reforms was overtly hostile and aggressive: call it “War.” Not long after California adopted the nation’s first modern medical marijuana law in 1996, the federal drug czar at the time, General Barry McCaffrey, urged federal agencies from the Drug Enforcement Administration (“DEA”) to the Department of Transportation (“DOT”) to do their part to quash the nascent medical marijuana movement.<sup>19</sup> Many federal agencies heeded McCaffrey’s call to arms. The DEA, for example, raided a large number of dispensaries that had sprouted up to supply medical marijuana to qualifying patients in legalization states.<sup>20</sup> It also

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<sup>18</sup> See *infra* notes 51–80 and accompanying text.

<sup>19</sup> Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6166 (Feb. 11, 1997).

<sup>20</sup> Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1443 (2009) (noting that the DEA raided “nearly 200 medical marijuana

threatened to bar physicians from writing prescriptions for any controlled substance if they dared to prescribe marijuana to their patients.<sup>21</sup>

Of course, this federal War did not actually stop states from legalizing the drug. As you can see from **Figure 1**, the number of states legalizing medical marijuana continued to grow steadily after 1996, notwithstanding this federal hostility toward legalization. (I explain elsewhere why the federal government found it so difficult to stop this movement.<sup>22</sup>)

Nonetheless, the federal War on marijuana clearly influenced (likely for the worse) how states designed their medical marijuana programs.<sup>23</sup> In particular, federal aggression made it more difficult for the states to regulate marijuana as they deemed fit,<sup>24</sup> leading the states to make some regulatory choices that are otherwise quite difficult to explain or justify. Let me give you two concrete examples to illustrate.

For one thing, the federal campaign against marijuana dispensaries likely dissuaded many states from authorizing companies to supply the needs of patients participating in state medical marijuana reforms. Notably, before 2003, *no state* had formally authorized companies to supply marijuana to patients commercially.<sup>25</sup> Instead, before 2003, every medical marijuana state expected patients to grow their own marijuana or get it from a “caregiver” who could grow it on their behalf (without remuneration).<sup>26</sup>

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cooperatives in California alone” as part of a plan to “disrupt essential components of state marijuana programs”) [hereinafter Mikos, *On the Limits of Supremacy*].

<sup>21</sup> Conant v. Walters, 309 F.3d 629, 634 (9th Cir. 2002) (reviewing DEA policy).

<sup>22</sup> See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1445–79 (detailing the *de jure* and *de facto* limits on federal influence over marijuana policy).

<sup>23</sup> See *id.* at 1428–30.

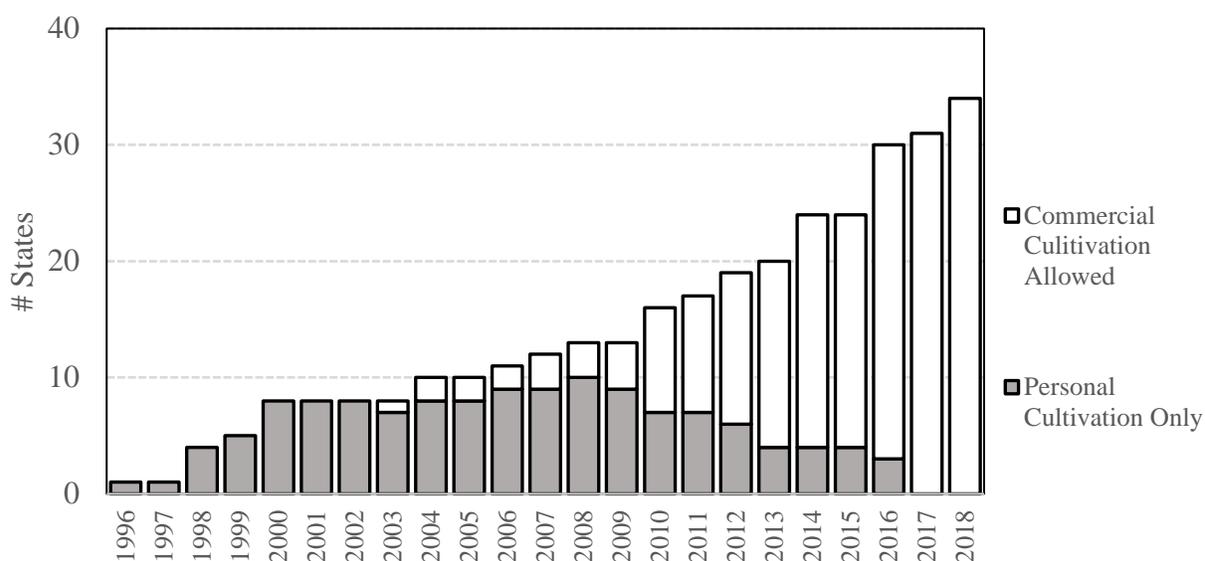
<sup>24</sup> See *id.* at 1465–66.

<sup>25</sup> See MIKOS, MARIJUANA LAW, *supra* note 1, at 532.

<sup>26</sup> *Id.* at 413–42 (explaining the rules governing personal and caregiver cultivation).

**Figure 2** depicts the state-approved sources of supply from 1996-2018, the same time period covered by **Figure 1**. In other words, **Figure 2** shows where qualifying patients could legally (under state law) obtain a drug they were allowed (again, under state law) to possess and use. To simplify, **Figure 2** includes only the “Medical Only” and “Medical and Recreational” states from **Figure 1**.

**Figure 2: Marijuana Supply Options in Medical Marijuana States<sup>27</sup>**



The gray portion of each stacked bar in **Figure 2** depicts the share of medical marijuana states in each year that required patients (or their caregivers) to grow the drug themselves but *did not also* (or instead) permit commercial dispensaries to supply it to them. These states have adopted what I call the “Personal Cultivation Only” supply model. The white portion of the stacked bars depict the share of medical marijuana states that allowed patients to buy the drug from commercial

<sup>27</sup> Mikos, MARIJUANA LAW, *supra* note 1, at 532 (Figure 2 is updated and adapted from Figure 10.1 in the book).

dispensaries. These states have adopted what I call the “Commercial Cultivation Allowed” model.<sup>28</sup>

As you can see from **Figure 2**, there were very few medical marijuana states that allowed dispensaries to produce and sell marijuana before 2009 (i.e., most of the stacked bar is still gray in those early years), and none that did so explicitly before 2003. To be sure, there were some dispensaries operating before 2009; however, those dispensaries were technically illegal even under state law.<sup>29</sup> Hence, for more than the first decade of reform, medical marijuana states depended almost exclusively on personal cultivation to supply the needs of patients whom they believed might benefit from the use of marijuana.<sup>30</sup>

In the abstract, expecting seriously ill patients to “grow their own” medicine is an odd choice for the states to make. After all, no state says, “you may use Percocet – and indeed, we think you might benefit from it, but you’ll have to make it yourself.” In fact, states generally bar patients from making their own controlled substances at home, even if they are allowed to possess and use those same substances.<sup>31</sup> But the federal government arguably gave the states no choice but to opt for the Personal Cultivation Only model. During this first phase, the federal government was threatening to shut down commercial marijuana suppliers (especially large ones).<sup>32</sup> Thus, while the states could have tried to set up a well-regulated medical marijuana industry, they feared the effort would prove futile in the face of a likely federal crackdown.<sup>33</sup> Worse yet, states feared

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<sup>28</sup> Personal Cultivation and Commercial Cultivation are not mutually exclusive; indeed, several states allow both. For a more detailed breakdown of state models for the supply of marijuana, see *id.* at 480, 532–33.

<sup>29</sup> *Id.* at 532.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 415.

<sup>32</sup> See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1443.

<sup>33</sup> Indeed, as I have demonstrated elsewhere, licensing marijuana dispensaries may have made those dispensaries even more vulnerable to a federal crackdown. Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PENN. L. REV. 103 (2012) (explaining that under the conventional wisdom, the federal government could seize

that a federal crackdown on a state-regulated industry might leave patients without any source of supply, especially if states required patients to buy the drug from licensed vendors rather than grow their own.<sup>34</sup>

But states also recognized that the federal government's ability to enforce its strict marijuana ban is limited, practically speaking. Even if it could shut down large commercial suppliers in the handful of states that had (in those early years) legalized medical marijuana, the federal government could not realistically stop patients or their caregivers from producing the drug in small batches.<sup>35</sup> There would simply be too many targets for federal law enforcement agents to handle. Consider that a single state like Colorado has over 100,000 registered medical marijuana patients, each of whom is allowed to grow a small number of plants to supply their own needs. Thus, even though personal cultivation has many shortcomings, the states may have viewed it as the only viable way to supply the needs of medical marijuana patients while the federal government waged war on commercial marijuana dispensaries.<sup>36</sup>

The aggressive federal response to state reforms also warped the way that states structured the role of physicians in their medical marijuana programs. Not surprisingly, medical marijuana states have wanted physicians to help them identify who should be allowed to use marijuana for medical purposes.<sup>37</sup> (In the 1990s and early 2000s, states were not yet ready to legalize marijuana

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any information gathered by the a state through its licensing process and use that information to identify and prosecute marijuana suppliers under federal law).

<sup>34</sup> ROBERT A. MIKOS, EXPERT REPORT IN ALLARD V. HER MAJESTY THE QUEEN IN RIGHT OF CANADA 14–17 (Oct. 10, 2014).

<sup>35</sup> See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1463–69.

<sup>36</sup> MIKOS, EXPERT REPORT, *supra* note 34, at 14–17.

<sup>37</sup> See MIKOS, MARIJUANA LAW, *supra* note 1, at 601.

for non-medical purposes.) But recall that the DEA was threatening to revoke the prescription-writing authority of physicians who dared to prescribe marijuana to their patients.<sup>38</sup>

Thus, to entice physicians to perform this critical gatekeeping function, states had to find a way to defuse the DEA sanctions. To that end, states like California started to ask physicians to “recommend” rather than “prescribe” marijuana to their patients.<sup>39</sup> Such a recommendation entails telling a patient that his/her medical condition might benefit from the use of marijuana.<sup>40</sup> Of course, there appears to be little practical difference between *prescribing* marijuana, on the one hand, and *recommending* the drug, on the other. However, physicians convinced a prominent federal appeals court that the two practices were legally distinguishable. In *Conant v. Walters*, the Ninth Circuit held that merely “recommending” marijuana to a patient is First Amendment protected speech, meaning that physicians could not be punished for recommending marijuana to their patients, even though physicians could be punished for *prescribing* it.<sup>41</sup> The court reasoned (dubiously) that a patient who receives a recommendation would not necessarily use it to obtain marijuana; for example, the court suggested, that “the patient upon receiving the recommendation could petition the government to change the law.”<sup>42</sup> By contrast, the court suggested that a prescription served no purpose other than to enable a patient to obtain a drug; writing a prescription for marijuana (a federally proscribed drug) would thus aid and abet a patient’s unlawful possession

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<sup>38</sup> See *supra*, note 21, and accompanying text.

<sup>39</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 110–11.

<sup>40</sup> See, e.g., Mich. Comp. Laws Ann. § 333.26423(q) (“‘Written certification’ means a document signed by a physician, stating all of the following: (1) The patient’s debilitating medical condition. (2) The physician has completed a full assessment of the patient’s medical history and current medical condition, including a relevant, in-person, medical evaluation. (3) In the physician’s professional opinion, *the patient is likely to receive therapeutic or palliative benefit* from the medical use of marihuana to treat or alleviate the patient’s debilitating medical condition or symptoms associated with the debilitating medical condition or symptoms associated with the debilitating medical condition.”). The states sometimes use different words to describe the “recommendation” (e.g., certification, authorization, etc.), but the requirements are very similar across the states. For a further discussion of the recommendation requirement, see MIKOS, MARIJUANA LAW, *supra* note 1, at 110.

<sup>41</sup> *Conant*, 309 F.3d at 632–33.

<sup>42</sup> *Id.* at 634.

of marijuana, making it unprotected crime-facilitating speech.<sup>43</sup> Although the court's reasoning regarding the actual function of a recommendation is questionable,<sup>44</sup> the DEA did not challenge the ruling and it has abided by the *Conant* court's decision ever since. For this reason, all thirty-four medical marijuana states (and D.C.) do not ask physicians to write prescriptions for marijuana, but rather ask them only to recommend the drug to their patients.<sup>45</sup>

Even though the states were able to work around this second federal roadblock, asking physicians to issue "recommendations" in lieu of "prescriptions" is less than ideal (just like asking patients to grow their own marijuana is less than ideal). For one thing, although physicians are well-versed in the requirements for writing prescriptions, they are less familiar with the novel requirements for issuing recommendations, and this unfamiliarity may have needlessly exposed some patients to criminal sanctions. In one early case, for example, a medical marijuana patient in Washington state was prosecuted for possession of marijuana because the words his physician recited in recommending marijuana for his condition ("the potential benefits of the medical use of marijuana *may* outweigh the health risks") did not precisely match the magic words required by the state's medical marijuana law ("the potential benefits of the medical use of marijuana *would likely* outweigh the health risks").<sup>46</sup> In addition, states could not use established *prescription* drug monitoring programs ("PDMPs") to track medical marijuana *recommendations*.<sup>47</sup> PDMPs are an enormously valuable tool states use to combat prescription drug mills and abuse of prescription

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<sup>43</sup> *Id.* at 633.

<sup>44</sup> *E.g.*, Pearson v. McCaffrey, 139 F. Supp. 2d 113, 120–21 (D.D.C. 2001) (reasoning that "a recommendation is analogous to a prescription"); Nicole Santamaria, Note, *Medical Marijuana Legislation in Florida: The Recommendation vs. Prescription Distinction for Healthcare Providers*, 45 STETSON L. REV. 537, 558 (2016) (suggesting that it is "willfully ignorant to say that a physician who recommends medical marijuana to a patient does not intend that the patient will use that recommendation as a means to obtain medical marijuana").

<sup>45</sup> See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1467 ("By carefully circumscribing the task that physicians must perform, the states . . . prevented the federal government from squeezing one of the most important chokepoints in state medical marijuana programs.").

<sup>46</sup> Washington v. Shepherd, 41 P.3d 1235 (Wash. App. 2002) (emphases added).

<sup>47</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 625 n.6.

drugs (like opioid painkillers).<sup>48</sup> Thus, to monitor physician recommendation practices and possible abuse of medical marijuana programs, states had to create a parallel medical marijuana registration process at an added cost to state budgets.<sup>49</sup>

In sum, during this first phase of state reforms, the federal government was overtly hostile to the legalization of marijuana. It waged war on individuals – and especially suppliers – who sought to take advantage of the states’ newfound openness to medical marijuana. The federal hostility did not stop reforms from spreading across the states; by the end of this period (2008), twelve states and the District of Columbia had legalized medical marijuana.<sup>50</sup> It did, however, leave its mark on those reforms, by shaping and warping the way that states regulated marijuana suppliers and physicians.

### **The Second Phase: A (Partial) Truce**

Following the election of President Barack Obama in 2008, the federal government began to adopt a softer response toward state reforms. During this Second Phase, the federal laws governing marijuana did not change much (as I have already noted), but the way that the federal government enforced those laws *did* change.<sup>51</sup> Most notably, in 2009, senior leadership in the Department of Justice (DOJ) began to discourage United States Attorneys from prosecuting individuals who used and/or supplied marijuana in compliance with state marijuana reforms.<sup>52</sup> In

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<sup>48</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 625 n.6.

<sup>49</sup> *Id.* at 116–18, 239–41 (discussing registration requirements).

<sup>50</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 3.

<sup>51</sup> There has been only one notable substantive change to federal marijuana law since 1996. The 2018 Farm Bill narrowed somewhat the definition of marijuana under federal law to exclude cannabis plants that are low in THC. Those plants and any substances extracted therefrom (like CBD) are now considered “hemp.” For further discussion of the 2018 Farm Bill, see *infra* notes 81–84 and accompanying text.

<sup>52</sup> See generally Robert A. Mikos, *A Critical Appraisal of the Department Of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633 (2011) [hereinafter Mikos, *A Critical Appraisal*].

other words, senior DOJ officials urged federal prosecutors to turn a blind eye to violations of the federal marijuana ban.<sup>53</sup>

Even though this enforcement guidance conferred no legal rights on marijuana users/suppliers,<sup>54</sup> it still signaled that the federal government was willing to call a “Truce” in its longstanding war on marijuana.<sup>55</sup> (For reasons I explain below, it might be more accurate to describe the federal response to state reforms during this Second Phase as a “Partial Truce.”) The federal government has continued to abide by this “Partial Truce” even after the change in Administrations. President Trump’s first Attorney General, Jeff Sessions, was adamantly opposed to marijuana legalization; Attorney General Sessions even rescinded the Obama Administration enforcement guidance.<sup>56</sup> Importantly, however, for reasons I have explained in greater detail elsewhere, Sessions did not actually change federal enforcement practices—and indeed, there was probably little he could have done, even if he had desired to turn back the clock and reinstate the federal War on state reforms.<sup>57</sup> Among other reasons, since 2014, Congress has attached riders to the DOJ’s annual budget, barring the agency from using any of its funding to prosecute individuals for possession, production or distribution of marijuana that complies with state medical marijuana reforms.<sup>58</sup>

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<sup>53</sup> See Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected U.S.

Attorneys (Oct 19, 2009); Memorandum from James M. Cole, Deputy Att’y Gen., to All U.S. Att’ys (Aug. 29, 2013).

<sup>54</sup> See Mikos, *A Critical Appraisal*, *supra* note 52, at 640–643. See also Zachary Price, *Reliance on Nonenforcement*, 58 WM. & MARY. L. REV. 937 (2017).

<sup>55</sup> Professor Alex Kreit has helped to popularize the term “truce” to describe the federal government’s post (drug)-war drug policy. See Alex Kreit, *Drug Truce*, 77 OH. ST. L. J. 1323 (2016).

<sup>56</sup> See Memorandum from Jefferson B. Sessions, Att’y Gen., to All U.S. Att’ys (Jan. 4, 2018).

<sup>57</sup> Robert A. Mikos, *Jeff Sessions Rescinds Obama-Era Enforcement Guidance: Five Observations*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Jan. 5, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/01/jeff-sessions-rescinds-obama-era-enforcement-guidance-six-observations/>.

<sup>58</sup> The latest rider provides that:

None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana,

This Partial Truce, like the War it replaced, had a substantial effect on the design of state marijuana reforms. The states interpreted the DOJ enforcement guidance (and later, the congressional spending riders) as giving them the green light to set up a legal, but highly regulated, commercial marijuana industry. Thus, starting in 2009, an increasing share of medical marijuana states authorized the commercial production and distribution of marijuana<sup>59</sup>—as shown by the growing white portion of the stacked bars in **Figure 2**. In fact, by the end of 2018, each of the thirty-four medical marijuana states (and D.C.) had authorized companies to produce and sell medical marijuana.<sup>60</sup> In 2002, by contrast, *none* of the eight medical marijuana states had allowed companies to grow and sell the drug, and even by 2008, only three out of thirteen medical marijuana states had done so.<sup>61</sup> Starting around 2009, the states also adopted the first comprehensive regulations to govern the newly-legalized marijuana industry. For example, states began to restrict the packaging and labeling of marijuana products and to impose onerous seed-to-sale tracking requirements on state-licensed marijuana vendors.<sup>62</sup> Today, roughly 5,000

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Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

CONSOLIDATED APPROPRIATIONS ACT, 2018, Pub. L. No. 115–141, § 538, 132 Stat. 348, 444–45 (Mar. 23, 2018). *See also* United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016) (interpreting rider language as barring the DOJ from prosecuting individuals for actions taken in compliance with state medical marijuana laws).

<sup>59</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 531–32; MIKOS, EXPERT REPORT, *supra* note 34, at 14–17.

<sup>60</sup> MIKOS, MARIJUANA LAW, *supra* note 1, at 532.

<sup>61</sup> *Id.*

<sup>62</sup> *See, e.g.*, COLO. DEP’T OF REVENUE, MARIJUANA ENFORCEMENT DIVISION, RETAIL MARIJUANA RULES, <https://perma.cc/ARE5-UYD2>. State regulations of the marijuana industry are discussed in depth in MIKOS, MARIJUANA LAW, *supra* note 1, at 443–78.

companies are growing and selling marijuana openly with the blessing of state government.<sup>63</sup> None of this would have been possible without the federal government's forbearance.

As I suggested earlier, however, this truce is only *partial*. Federal agencies have not—and arguably *could* not—eliminate all of the restrictions federal law now imposes on the marijuana industry simply by exercising their enforcement discretion. I will briefly highlight three examples of how federal law continues to bedevil the state-licensed marijuana industry, notwithstanding the DOJ's refusal (or inability) to prosecute.

Difficulty in obtaining banking services is probably the most notable obstacle federal law continues to impose on state licensed marijuana suppliers. Banks remain reluctant to deal with state-licensed marijuana suppliers, in large part, because it remains a federal crime to conduct financial transactions involving the proceeds of unlawful activity (which includes the sale of marijuana).<sup>64</sup> While the Department of the Treasury has reassured banks that they will not be punished for doing business with the marijuana industry, most banks want something more than the agency's non-binding verbal reassurances that it is okay for them to break the law. In any event, in return for its enforcement forbearance, Treasury has demanded that banks monitor their marijuana clients closely and complete burdensome reports on virtually all of their financial transactions, at enormous cost.<sup>65</sup> For these reasons, even state law-abiding marijuana suppliers currently have difficulty obtaining even basic banking services, like checking accounts and loans.

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<sup>63</sup> As of August 1, 2019, Colorado alone had licensed 571 retail marijuana shops and 454 medical marijuana shops. See COLO. DEP'T OF REVENUE, MARIJUANA ENFORCEMENT DIVISION, *MED Resources and Statistics*, <https://www.colorado.gov/pacific/enforcement/med-resources-and-statistics> (last visited Aug. 03, 2019).

<sup>64</sup> See generally Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE WESTERN RES. L. REV. 597 (2015) (providing an insightful and comprehensive analysis of federal regulations that now limit the marijuana industry's access to banking services).

<sup>65</sup> *Id.* at 617.

State licensed marijuana suppliers are currently also subject to an unusually high effective federal tax rate.<sup>66</sup> All income is taxable, regardless of its source.<sup>67</sup> Thus, like all other businesses, marijuana suppliers must pay federal taxes on their income, even though their source of income is criminal under federal law. Unlike most other businesses, however, marijuana suppliers cannot deduct their usual operating expenses (e.g., expenditures on legal services and marketing) from their revenues when calculating their federal tax liability. A special provision of the Tax Code—Section 280E—bars illicit drug dealers (which, again, includes state-licensed marijuana suppliers) from making those deductions.<sup>68</sup> As a result, a business that sells marijuana is now subject to a much higher effective federal tax rate than a business that sells, say, alcohol or tobacco products.<sup>69</sup>

As a final example of the way that federal law continues to hound state licensed marijuana businesses under the Partial Truce, consider that marijuana suppliers also remain vulnerable to private civil Racketeer Influenced and Corrupt Organization (RICO) lawsuits.<sup>70</sup> Every state-licensed marijuana business likely violates the federal RICO statute.<sup>71</sup> To be sure, those businesses do not have to worry about being prosecuted criminally for these violations; after all, the DOJ's non-enforcement policy discussed earlier applies as much to these RICO offenses as it does to the marijuana trafficking offenses that the businesses are committing. But unlike the Controlled

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<sup>66</sup> See Benjamin M. Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523 (2014).

<sup>67</sup> *Id.*

<sup>68</sup> 26 U.S.C. §280E (“No deduction or credit shall be allowed for any amount paid or incurred during that taxable year in carrying on any trade or business if such trade or business . . . consists of trafficking in controlled substances . . . which is prohibited by Federal law . . .”).

<sup>69</sup> For discussions of Section 280E and its impact on the state-licensed marijuana industry, see Leff, *Tax Planning for Marijuana Dealers*, *supra* note 66 (discussing impact of Section 280E and possible workarounds); Robert A. Mikos, *The Corporate Tax Cut Might Have Done More for Marijuana Suppliers than Repealing Section 280E Would Have*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG, <https://my.vanderbilt.edu/marijuanalaw/2018/02/the-corporate-tax-cut-might-have-done-more-for-marijuana-suppliers-than-repealing-section-280e-would-have/> (Feb. 16, 2018) (demonstrating that recent federal tax cuts have mitigated the impact of Section 280E).

<sup>70</sup> Mikos, *A Critical Appraisal*, *supra* note 52, at 649.

<sup>71</sup> 18 U.S.C. § 1961 (2016). See also Mikos, *A Critical Appraisal*, *supra* note 52, at 649–51 (explaining how marijuana suppliers almost invariably violate the RICO statute).

Substances Act (CSA), the federal RICO statute can also be enforced by private plaintiffs.<sup>72</sup> In particular, the RICO statute empowers anyone who has suffered an injury to their “business or property” by racketeering activity (here, growing or selling marijuana) to bring a civil cause of action against the perpetrator.<sup>73</sup> What is more, the RICO statute promises treble damages to victorious plaintiffs.<sup>74</sup> Critically, private plaintiffs are not bound by DOJ prosecutorial decisions or congressional spending riders. In other words, private plaintiffs can sue marijuana dispensaries even if the DOJ declines to bring (or is forbidden by Congress from bringing) a criminal prosecution against them.<sup>75</sup> In fact, private plaintiffs have already filed several prominent civil RICO lawsuits against state-licensed marijuana suppliers, seeking large damages.<sup>76</sup> While these suits have not been very successful to date,<sup>77</sup> the allure of treble damages likely ensures that these private lawsuits will continue until Congress legalizes the industry’s activities or immunizes the industry from RICO lawsuits.

These are just a few of the challenges that the federal marijuana ban continues to pose for the state licensed marijuana industry, notwithstanding the Partial Truce called by the Obama Administration. While these (and other<sup>78</sup>) challenges have not quashed the marijuana industry,

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<sup>72</sup> 18 U.S.C. § 1964(c) (Any person injured in his business or property by reason of a violation . . . of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee. . .”).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *E.g.*, Robert A. Mikos, *Federal Appeals Court Allows Private Civil RICO Suit to Proceed Against State-Licensed Marijuana Grower* (Safe Streets), MARIJUANA LAW, POLICY, AND AUTHORITY BLOG, <https://my.vanderbilt.edu/marijuanalaw/2017/07/federal-appeals-court-allows-private-civil-rico-to-proceed-against-state-licensed-marijuana-grower-safe-streets/> (July 25, 2017).

<sup>76</sup> *Id.*

<sup>77</sup> *E.g.*, Robert A. Mikos, *UPDATE: Plaintiff Loses Colorado RICO Lawsuit* (Safe Streets), MARIJUANA LAW, POLICY, AND AUTHORITY BLOG, <https://my.vanderbilt.edu/marijuanalaw/2018/11/update-plaintiff-loses-colorado-rico-lawsuit-safe-streets/> (Nov. 1, 2018); Robert A. Mikos, *Court Dismisses Civil RICO Suit Against Marijuana Supplier, Tees Up Potential Circuit Split*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG, <https://my.vanderbilt.edu/marijuanalaw/2018/08/court-dismisses-civil-rico-suit-against-marijuana-supplier-tees-up-potential-circuit-split/> (Aug. 27, 2018).

<sup>78</sup> For discussions of some of the other obstacles posed by the federal marijuana ban, see, e.g., MIKOS, MARIJUANA LAW, *supra* note 1, at 407–09 (discussing bar on federal trademark registration); Robert A. Mikos, *PharmaCann v.*

they do add to the industry's cost of doing business. For example, the lack of access to banking means that marijuana suppliers must conduct most of their transactions (e.g., paying employees) in cash, and handling that cash cuts into the industry's bottom line.<sup>79</sup> Furthermore, the federal challenges arguably undermine state regulations. For example, because they leave no paper trail, cash transactions are much more difficult to monitor than would be electronic transactions (e.g., credit card payments).<sup>80</sup> As a result, regulators may struggle to verify a marijuana supplier's compliance with state tax collection requirements.

### **The Third Phase: Leadership or Capitulation?**

The current regulatory quagmire is less than ideal for the states, the parties they regulate, the federal government, and those who either support or oppose legalization. Because of dissatisfaction with the status quo, pressure is mounting to change federal marijuana policy—but what does the future hold? How will the federal government respond to state reforms going forward?

Congress has already taken a limited step toward reforming federal marijuana policy. The 2018 Farm Bill exempted “hemp” and “hemp” derived products—including, most notably, CBD—from the federal CSA.<sup>81</sup> Under the Farm Bill, hemp is defined as cannabis containing less than .3% (by dry weight) THC.<sup>82</sup> Previously, the CSA defined “marijuana” to include *all* cannabis (except stalks and non-germinating seeds), *regardless* of its THC content—making most hemp

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BV Development: *Another Land Use Issue Confronts Marijuana Suppliers*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG, <https://my.vanderbilt.edu/marijuanalaw/2018/03/pharmacann-v-bv-development-another-land-use-issue-confronts-marijuana-suppliers/> (Mar. 21, 2018) (restrictive covenants); Luke Scheuer, *Are “Legal” Marijuana Contracts “Illegal”?*, 16 U.C. DAVIS BUS. L. J. 31 (2015) (contract enforcement).

<sup>79</sup> Hill, *Banks, Marijuana, and Federalism*, *supra* note 64, at 597.

<sup>80</sup> *Id.*

<sup>81</sup> Mikos, *New Congressional Farm Bill*, *supra* note 8.

<sup>82</sup> *Id.*

legally indistinguishable from recreational strains, like Purple Haze or Sour Diesel.<sup>83</sup> Now that hemp is no longer a controlled substance under the federal CSA, the hemp industry is booming and products made from hemp, including various CBD products, are becoming ubiquitous.<sup>84</sup>

Foretelling the future and what the federal government might do next necessarily involves some speculation. I will briefly outline two possible scenarios for the future of federal marijuana policy. The first (and less likely) scenario involves the federal government assuming a more proactive leadership role in marijuana policy, one in which it would wield greater influence over marijuana activities. Although I think it worth considering, I am skeptical that this Leadership Scenario will materialize for a simple reason: Congress will struggle to reach consensus around any substantive marijuana policy that seeks to re-invigorate or replace the current prohibition.

On the one hand, it is almost inconceivable that the federal government would attempt to assume leadership in this field by restarting its “War on Marijuana.” The public has grown increasingly favorable toward outright marijuana legalization over the last two decades. Indeed, the latest opinion polls estimate that roughly 66% of Americans favor legalization of adult use of marijuana (even higher numbers support medical legalization).<sup>85</sup> Given the popularity of legalization, Congress is highly unlikely to devote the resources that would be needed to mount an effective campaign against legal marijuana, or even to lift the restrictions it has imposed on the use of existing enforcement resources (through the spending riders noted earlier).<sup>86</sup> It is simply too late to put the proverbial cat back in the bag.

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<sup>83</sup> *Id.*

<sup>84</sup> Mikos, *New Congressional Farm Bill*, *supra* note 8.

<sup>85</sup> See McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, *supra* note 15.

<sup>86</sup> See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1463–65, 1469 (discussing the level of additional resources that would be required to effectively combat marijuana activities without state assistance).

On the other hand, I also suspect that Congress will be reluctant to play a more active role in regulating legal marijuana. One major reason is that legalization states would resist any push to federalize key aspects of marijuana policy. After all, many states benefit from the current state-driven marijuana policy—it allows them to impose rules that favor local interests over outside interests.<sup>87</sup> These states might lose out on tax revenues and jobs if the market for marijuana became more national in scope—a likely outcome if Congress were at the helm of marijuana policy.

To be sure, some federal agencies may seek to play a prominent role in the regulation of legal marijuana. For example, citing its authority under the Food, Drug, and Cosmetics Act, the Food and Drug Administration (FDA) is considering new federal rules to govern the inter-state sale of food products containing hemp-derived CBD.<sup>88</sup> But outside of such limited pockets of federal influence, I suspect that most features of marijuana policy will continue to be set primarily by the states, rather than by the federal government.

The dim prospects for federal leadership in this field are unfortunate. Whatever one might think of our current federal marijuana policy, there is a very strong normative argument to be made for federal control of this drug.<sup>89</sup> Marijuana activities generate significant interstate spillover effects (e.g., think of cross-border smuggling), and states have little incentive to address these

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<sup>87</sup> See Brannon P. Denning, *One Toke Over the (State) Line: Constitutional Limits on ‘Pot Tourism’ Restrictions*, 66 FLA. L. REV. 2279 (2012).

<sup>88</sup> See Tal Axelrod, *FDA holds its first hearing on regulating CBD*, THE HILL, <https://thehill.com/policy/healthcare/446450-fda-holds-its-first-hearing-on-regulating-cbd> (May 31, 2019). For an excellent analysis of the FDA’s authority to regulate marijuana products, see Sean M. O’Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even after Descheduling*, 68 AM. U. L. REV. 823 (2019).

<sup>89</sup> See Robert A. Mikos, *Why the Federal Government Should Set Marijuana Policy*, in DEBATING REFORM: CONFLICTING PERSPECTIVES ON HOW TO FIX THE AMERICAN POLITICAL SYSTEM 50-56 (Richard Ellis & Mike Nelson, eds., 4th ed. CQ Press, forthcoming 2020) [hereinafter Mikos, *Why the Federal Government Should Set Marijuana Policy*].

spillovers.<sup>90</sup> There are also substantial advantages to coordinating marijuana policies (e.g., labeling laws), and that coordination can best be achieved by the federal government.<sup>91</sup> Furthermore, public opinion has converged on the most important issues surrounding marijuana policy, suggesting that there is little to be gained from allowing states to apply their own, idiosyncratic rules to marijuana activities.<sup>92</sup> Despite the strong normative case for federal leadership, however, I doubt that Congress or any federal agency will be able to take charge of marijuana policy anytime soon (if ever).

This leaves a second, more likely scenario for future federal marijuana policy, one I call “Capitulation.” Capitulation simply means that the federal government would cede even more control of marijuana policy to the states. In other words, it would remove federal obstacles to marijuana activities and give the states even wider latitude to regulate marijuana as they deem fit. (Under the Leadership Scenario, by contrast, the federal government would set some rules or at least meaningfully limit state discretionary authority.)

Capitulation could follow either of two paths. First, it might proceed incrementally, through the adoption of piecemeal legislation that removes, one-by-one, the federal legal obstacles that now bedevil the state-licensed marijuana industry. The Secure and Fair Enforcement (SAFE) Banking Act<sup>93</sup> is an illustrative example of such incremental capitulatory legislation. The SAFE Banking Act would bar federal financial regulators from penalizing banks that serve state-licensed marijuana businesses.<sup>94</sup> The Act would thus make it considerably easier for those businesses to

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> SAFE Banking Act of 2019 (H.R. 1595), <https://www.congress.gov/bill/116th-congress/house-bill/1595/text?q=%7B%22search%22%3A%5B%22safe+banking+act%22%5D%7D&r=2&s=1>.

<sup>94</sup> *Id.*

secure basic banking services, like checking accounts and lines of credit.<sup>95</sup> In similar fashion, other proposed legislation would target other, discrete problems now caused by the federal marijuana ban.<sup>96</sup>

Second, Capitulation could also proceed more swiftly, through passage of more comprehensive federal reform legislation. The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act is perhaps the leading example of such legislation.<sup>97</sup> The STATES Act would empower states to opt-out of the federal CSA's ban on marijuana. Namely, if a state authorized an activity, such as the distribution of marijuana to adults, the federal CSA would no longer ban that activity.<sup>98</sup> Because their activities would no longer be federally unlawful, state-licensed-marijuana businesses could obtain banking services, deduct operating expenses when calculating their federal tax liabilities, and so on.<sup>99</sup> Put another way, the STATES Act would eliminate all of the legal obstacles that now flow from the federal marijuana ban (or at least, those obstacles posed by the CSA in states that legalize the drug).<sup>100</sup>

The Marijuana Justice Act (MJA) is another example of comprehensive capitulatory legislation.<sup>101</sup> Proposed by Senator Cory Booker, the MJA would de-schedule marijuana, making

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<sup>95</sup> Robert A. Mikos, *Federal Marijuana Banking Bill Advances (a Little)*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Mar. 30, 2019), <https://my.vanderbilt.edu/marijuanalaw/2019/03/federal-marijuana-banking-bill-advances-a-little/> (analyzing likely effects of SAFE Banking Act).

<sup>96</sup> *E.g.*, Veterans Medical Marijuana Safe Harbor Act, S.3409, 115th Cong. § 3(a)(2) (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/3409/text?format=txt> (allowing, inter alia, Veterans Administration physicians to recommend marijuana to patients, where authorized by state law).

<sup>97</sup> Strengthening the Tenth Amendment Through Entrusting States Act, S.1028, 116<sup>th</sup> Cong. (2019-2020), <https://www.congress.gov/bill/116th-congress/senate-bill/1028?q=%7B%22search%22%3A%5B%22strengthening+the+tenth+amendment%22%5D%7D&s=6&r=1>.

<sup>98</sup> Robert A. Mikos, *Analysis of the Warren-Gardner STATES Act*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (June 7, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/06/analysis-of-the-warren-gardner-states-act/>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Marijuana Justice Act of 2019, S.597, 116th Cong. (2019-2020), <https://www.congress.gov/bill/116th-congress/senate-bill/597?q=%7B%22search%22%3A%5B%22STATES+Act+marijuana%22%5D%7D&s=3&r=21>.

the CSA inapplicable to the drug regardless of the content of state law.<sup>102</sup> In other words, marijuana would be legal under federal law regardless of how state law treated the drug. But apart from repealing federal prohibition in all states or just some of them, neither the MJA nor the STATES Act envisions much of a federal role in regulating legal marijuana<sup>103</sup>—hence the “Capitulation” moniker appears apt for both of them.

Although incremental and comprehensive federal reforms have both garnered some bipartisan support, I think that Congress is more likely to pursue the incremental approach. For one thing, it is easier for a legislature to build consensus behind a narrow, targeted measure like the SAFE Banking Act. Indeed, the SAFE Banking Act has already sailed through one key House Committee.<sup>104</sup> Furthermore, the passage of incremental legislation will likely reduce the pressure on Congress to adopt bolder, more comprehensive reforms.

### Conclusion

While federal marijuana law appears quite static in comparison to the marijuana laws of the states, we are witnessing a gradual evolution in the federal response to state reforms. The federal government has already called a Partial Truce in its long-time War on marijuana legalization. For the most part, this evolution in federal policy has been driven by changes in the way that the federal government enforces its laws, rather than changes in the substance of those laws. Although this Partial Truce has enabled states to pursue some regulatory reforms, federal law continues to pose obstacles for the marijuana industry. Mounting dissatisfaction with the

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<sup>102</sup> *Id.*

<sup>103</sup> See Mikos, *Analysis of the Warren-Gardner STATES Act*, *supra* note 98; Robert A. Mikos, *Forget Obamacare. Congress Should Repeal and Replace This Instead*, FORTUNE (Aug. 4, 2017), <http://fortune.com/2017/08/04/senator-cory-booker-marijuana-bill-justice-act-legalization/?iid=sr-link1>.

<sup>104</sup> See Tom Angell, *Marijuana Banking Bill Approved by Congressional Committee*, FORBES (Mar. 28, 2019), <https://www.forbes.com/sites/tomangell/2019/03/28/marijuana-banking-bill-approved-by-congressional-committee/#636d068b2ce1>.

Partial Truce is likely to spur further changes to federal marijuana policy. The next chapter is yet to be written, but signs portend some form of federal capitulation. In other words, the federal government is likely to cede even more control to the states, enabling them (for better or worse) to pursue their own, idiosyncratic state marijuana policies, increasingly free of federal interference.