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## The Battle of the Bulge: The Surprising Last Stand Against State Marijuana Legalization

# The Battle of the Bulge: The Surprising Last Stand Against State Marijuana Legalization

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5 Although marijuana possession remains a federal crime, twenty-three states now allow use of marijuana for medical purposes and four states have adopted tax-and-regulate policies permitting use and possession by those twenty-one and over. In this article, I examine recent developments regarding marijuana regulation. I show that the Obama administration, after initially sending mixed signals, has taken several steps indicating an increasingly accepting position toward marijuana law reform in states, even as the current situation regarding the dual legal status of marijuana is at best an unstable equilibrium. I also focus on what might be deemed the last stand of marijuana-legalization opponents, in the form of lawsuits filed by several states, sheriffs, and private plaintiffs challenging marijuana reform in Colorado (and by extension elsewhere). This analysis offers insights for federalism scholars regarding the speed with which marijuana law reform has occurred, the positions taken by various state and federal actors, and possible collaborative federalism solutions to the current state-federal standoff.

20 Although the federal government continues to treat marijuana as a Schedule I narcotic—a drug whose manufacture, distribution, and possession are all serious federal crimes—an ever-increasing number of states are adopting very different approaches to regulating the drug. As of this writing twenty-three states plus the District of Colombia have authorized the use of marijuana for medical purposes ([Marijuana Policy Project 2014](#)) and four states—Colorado, Washington, Oregon, and Alaska—along with D.C. have taken the additional step of taxing and regulating the manufacture and sale of small amounts of the drug to anyone over the age of twenty-one. Both adult use and medical marijuana initiatives will be on the ballot in several states in 2016 ([Ballotpedia 2015](#)) and polls consistently show strong majorities of Americans now favoring the full legalization of marijuana ([Saad 2014](#)).

30 This changing marijuana climate in the United States raises important questions regarding the distribution of power between the state and federal governments ([Pickerill and Chen 2008](#)) and offers several insights regarding the avenues through which political change can be achieved in the U.S. federal system. Marijuana

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activity is the only conduct completely prohibited by federal law while explicitly authorized in a growing number of states. It is easy enough to forget that all marijuana conduct remains illegal throughout the United States, even in those states adopting marijuana law reform. The resulting status quo is an uneasy one; the continued federal illegality of all marijuana conduct creates a world of risk and uncertainty for those using marijuana or producing and distributing it in accord with state law.

After the passage of the first full legalization initiatives in 2012, it seemed only a matter of time before the federal government sought to block Colorado and Washington from implementing their tax-and-regulate initiatives. U.S. Attorney General Eric Holder had threatened to do exactly that just two years earlier when California considered its own legalization initiative (Hoeffel 2010). That showdown never came, however. Instead, the federal government adopted a wait-and-see approach, allowing the two states to experiment with regulating marijuana rather than prohibiting it and emboldening other states to pass similar laws (Cole 2013). In fact, as legalized marijuana gathered steam throughout the western states, it seemed that the federalism showdown, many had been preparing for, would never arrive; the repeal of the federal marijuana prohibition began to seem inevitable.

As 2014 became 2015, however, a number of surrogates stepped into the place of the indifferent federal government, suing Colorado in federal court and seeking to enjoin the operation of Colorado's regulatory regime for adult-use marijuana. To date, four suits have been filed on a number of separate but related theories, seeking to roll back the regulatory apparatus in Colorado—and by analogy elsewhere. I call these suits the Battle of the Bulge for marijuana law reform opponents. With legalization sure to be on the ballot in a number of states in 2016, these suits operate as a last-gasp offensive against the swift and continued success of marijuana legalization at the ballot box.

In this article, I examine recent developments regarding marijuana regulation and draw lessons from this case about the way political reform can be achieved in the U.S. federal system. I begin by describing the stable if unsatisfying equilibrium of the moment, under which marijuana is legal for some purposes in an increasing number of states whereas remaining criminal at the federal level. Although an uneasy truce is in place between state and federal governments, this situation cannot continue in the long term. Second, I discuss the continued softening of the federal government's previously hardline against marijuana. Starting with the executive's decision to permit states to experiment with marijuana law reform, the federal government has taken a number of steps, both formal and informal and through both legislative and executive actions, that indicate an increasingly accepting position toward marijuana legal change. Finally, I discuss the surrogates who have stepped into this vacuum of federal enforcement, seeking to do what the federal government has the power to do but has chosen not to—to end marijuana law reform in the states.

This analysis offers several insights for federalism scholars, regarding both the unusual way reform has been achieved in this case and the surprising positions taken by a diverse set of state and federal actors. We generally expect reversals of federal policies to be achieved through congressional statutes or U.S. Supreme Court decisions. In the case of marijuana legalization, however, reform was initiated in the states, principally through the initiative process. Only recently have we seen grudging but growing acceptance on the part of federal executive officials. These recent developments also pose a challenge to the conventional assumption that state officials generally try to expand state autonomy, whereas federal officials seek to limit state autonomy when state and federal authority come in conflict. Marijuana law reform did follow this standard script for a period of time, in that federal officials initially responded to state legalization measures with threats of retaliation. In recent years, however, federal officials increasingly acquiesced to state legalization acts, due largely to a recognition that the federal government is, in practice, unable to enforce federal marijuana policy against unwilling states. At the same time, current challenges to state autonomy are coming not from federal officials but rather from state officials, along with other plaintiffs, and in a way that challenges dominant understandings about the behavior of federal and state officials.

## **Regulation of Marijuana in the United States**

### **Ebbing and Flowing Federal Enforcement**

In 1996, California voters approved Proposition 215, thus making California the first state in the nation to authorize the use of marijuana for medical purposes. Since then, twenty-two states plus the District of Columbia have followed suit, creating a medical use exception to their criminal laws generally prohibiting marijuana use, possession, and distribution. These medical-use exceptions stood—and continue to stand—in sharp contrast to federal law, which prohibits marijuana entirely, even in those states purporting to authorize it. As a Schedule I drug under the Controlled Substances Act (CSA), the production, distribution, and possession of marijuana are all serious federal crimes, punishable by long terms of imprisonment (CSA of 1970).

Marijuana's dual status in law reform states—permitted under state law although remaining strictly prohibited under federal law—creates novel federalism questions. There is simply no precedent in American history for conduct that is prohibited at the federal although permitted in a large number of states. As a result, the early years of marijuana law reform were marked by uncertainty, as the medical marijuana industry grew up in the shadow of the threat of federal enforcement.

During this period, the Obama administration issued a number of policy statements designed to help federal prosecutors exercise their discretion over

marijuana prosecutions in an environment of legal change in the states. Although addressed specifically to the nation's federal prosecutors, these statements were also read like tea leaves by marijuana activists in the states, likely creating more confusion than clarity on the issue. For example, in October 2009 the Obama Administration inadvertently kicked off a boom in medical marijuana dispensaries when it issued the so-called Ogden Memo. That memo read: "As a general matter, pursuit of [federal] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." (Ogden 2009) It is true that the Ogden memo was loaded with cautionary language, noting at one point: "This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." (Ogden 2009, 2) Nevertheless, it was taken by many to be a green light to the development in the states of commercial marijuana markets.

That this reading was an error was made clear two years later with the circulation of the Cole Memo, which declared: "The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the CSA, regardless of state law." (Cole 2011) In other words, the Cole Memo reiterated the federal government's willingness to enforce federal law even in those states that were modifying their own marijuana laws. And during these years the federal government did just that, enforcing the CSA—albeit sporadically—throughout those states that were allowing marijuana to be grown and sold to those who could demonstrate a medical use of the drug (Kelly 2012; KABC-TV 2011).

During this time, and notwithstanding the new bellicose tone from Washington, nationwide support for marijuana legalization continued to rise, both in public opinion polls and at the ballot boxes. One by one, states joined the list of those permitting medical marijuana use. Meanwhile, an initiative to make marijuana use and possession legal for all adults narrowly failed to pass in California in 2010 (California Secretary of State 2010). Although the Obama administration actively opposed the passage of that initiative and threatened to retaliate against the state if it passed, in 2012 it remained largely silent as Colorado and Washington became the first states in the union to actually authorize possession of marijuana by anyone over the age of twenty-one (Coffman and Neroulias 2012). The federal government's opposition to the prospect of legalization in California and then puzzling silence after it passed in Colorado and Washington—coupled with its willingness to enforce federal law against those in *medical* marijuana states—led to

wide-spread uncertainty whether the federal government would use its resources to attempt to block legalization efforts in these states and elsewhere.

There followed nine months of uncertainty as Colorado and Washington ramped up their regulatory efforts in the shadow of uneasy silence from the nation's capital. Given the complex nature of this regulatory task facing these states—no jurisdiction in the world had ever legalized, taxed, and regulated marijuana, let alone one within a federal system continuing to prohibit it—the Governors of the two states appealed to the nation's capital for some indication of whether the federal government would seek to block full implementation of the legalization initiatives. Finally, on August 29, 2013, with the issuance of a Second Cole Memo, the federal government announced that it would allow Colorado and Washington to proceed with their tax and regulation experiment:

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulation is less likely to threaten the federal priorities set forth above . . . In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. (Cole 2013)

In doing so, the Department of Justice also announced the eight criteria it would be using to monitor state progress on marijuana regulation going forward:

The Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- preventing the distribution of marijuana to minors;
- preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- preventing state authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- preventing marijuana possession or use on federal property (Cole 2013).

## Uneasy Status Quo

While this announcement of the Obama administration's wait-and-see enforcement position was welcome news in those states engaged in the difficult regulatory work required to tax and regulate marijuana, it is important to understand why this policy pronouncement is far from a solution to the federalism questions raised by marijuana law reform. For one thing, as the torturous history of pronouncements from the Department of Justice makes clear, a statement of nonenforcement from Washington is only effective until that policy is amended. With an election looming in 2016 and a new administration certain to take office, there is no guarantee that the new president and attorney general will share the Obama administration's wait-and-see approach. More fundamentally, however, a promise of federal nonenforcement is inherently unsatisfying from the perspective of marijuana reform advocates. Much more follows from marijuana's continuing criminality than just the threat of arrest and prosecution. The fact of marijuana's ongoing criminality colors both the nascent marijuana industry and those who would seek to be its customers.

Even after the federal government made clear that it would not be intervening to block the implementation of marijuana legalization, marijuana remains illegal, creating hurdles for those who would attempt to make a business out of the production and distribution of the drug. The most well known of these obstacles is probably the banking problem (Hill 2015). Marijuana businesses—both medical and retail—have faced an inability to obtain even the most basic of banking services. Dealing in the proceeds of marijuana transactions has always carried with it the threat of money-laundering charges, and the federal government—which is largely responsible for regulating banks—has not hesitated to remind financial institutions of the risks of catering to the marijuana industry (Cole 2011).<sup>1</sup> Although the Justice and Treasury Departments have produced new guidelines for financial institutions dealing with marijuana clients, these new regulations seem to have done little to hurry the availability of banking services to those marijuana businesses that most need them (e.g., Financial Crimes Enforcement Network [FinCEN] 2014).<sup>2</sup>

As a result of the marijuana industry's inability to obtain banking services, marijuana is largely a cash business today with all of the attendant problems that come with it (Hill 2015, 6). The irony, of course, is that by keeping marijuana a cash-only business, the federal government is making it increasingly difficult for the states to comply with the announced enforcement criteria on which the federal government has announced they will be judged. Marijuana business owners, knowing they are targets for criminals, may resort to self-help to protect themselves, increasing the possibility that marijuana businesses will become associated with "violence and the use of firearms" (Cole 2013). For this reason, the



interests of the industry and its state regulators are perfectly aligned with regard to banking—the provision of banking services would make life easier and safer for marijuana businesses *and* would aid regulators in making sure that state regulations were being complied with.

5 Marijuana businesses also face disadvantageous federal tax rules as a result of the drug’s continued federal prohibition. Under a Reagan-era tax provision, those violating the CSA (but not other federal laws) are required to pay taxes on their earnings but are not entitled to take the deductions that other businesses are (Roche 2013). With the exception of the costs of goods, marijuana businesses must  
10 pay federal tax on their gross revenues (Roche 2013, 437). This can have crippling consequences on a growing business; in fact, it is hard to imagine any business that could survive without deducting those things that account for the bulk of ordinary business expenses—rent, insurance, salaries, etc.

For the marijuana consumer things are, if anything, more problematic and less  
15 certain than they are for those in the marijuana business. Aside from the remote yet persistent threat of prosecution and incarceration, perhaps the biggest risk marijuana users face is the loss of employment as a result of their marijuana use. The most high-profile case, to come to light, thus far is that of Brandon Coats in Colorado (*Coats v. Dish Network*, 303 P.3d 147 [2013]). Mr. Coats, a quadriplegic  
20 who uses medical marijuana to control seizures was fired by his employer for testing positive for marijuana even though there was no evidence in the record that he was ever impaired during work hours. He complained that the state’s lawful off-duty conduct statute precluded his termination for using marijuana in compliance with state law, but both the state trial and intermediate appellate courts disagreed,  
25 reasoning that “because plaintiff’s state-licensed medical marijuana use was, at the time of his termination, subject to and prohibited by federal law, we conclude that it was not ‘lawful activity.’ ” (*Coats v. Dish Network*, 152).

As serious as it is, losing one’s livelihood is only one of the many risks still being taken by those choosing to use marijuana consistent with the laws of their states.  
30 Hence, for example, the Aid Elimination Penalty of the Higher Education Act, 20 USC § 1091, delays or denies federal financial aid to those convicted of drug crimes in either state or federal court. Since going into effect in 2000, up to 200,000 students have been rendered ineligible for federal aid under the law (Students for Sensible Drug Policy n.d.). Furthermore, parents who use marijuana risk losing  
35 their parental rights if their use of marijuana is found to be detrimental to the safety of their minor children. For example, the case of five-month-old Bree Green made headlines in 2013 when she was taken from her parents by Michigan Child Protective Services after reports of marijuana being present in the home. Although her mother was a licensed marijuana care-giver under state law, the child was  
40 nonetheless removed from the home (Palmer 2013).

Even this partial list of the negative consequences stemming from marijuana's continuing illegality under federal law should make clear that even a federal promise not to prosecute marijuana users and businesses results in a status quo that is unsatisfying from the perspective of a number of political actors, including but not limited to citizens and state officials seeking enhanced autonomy regarding regulation of marijuana.<sup>3</sup> It leaves those, both in the marijuana business and using marijuana pursuant to state law, without a full understanding of their rights or an appreciation of the risks associated with their conduct. It is not surprising, therefore, that advocates of marijuana law reform have pressed federal officials to take further steps to relax or even cease enforcement of the CSA in states with contrary policies. Furthermore, as we will see below, the status quo is unsatisfying to those in favor of the federal prohibition as well; to many of them, the promise not to enforce the CSA is nothing more than an abdication of the Obama administration's obligation to enforce the law as written. It is this frustration that has led to the recent litigation over the validity of state marijuana laws.

## Federalism and Marijuana Regulation

In seeking to bring about change in federal marijuana policy, reformers have enjoyed little success pressing their case in the U.S. Supreme Court, which has made clear that Congress possesses broad authority to regulate marijuana and that the Justice Department may enforce those regulations even in states legalizing marijuana. There are limits, however, on what the federal government may force the states to do on its behalf; the anti-commandeering principle of the Tenth Amendment operates as a significant drag on the federal government's ability to impose a uniform drug policy on the states. Furthermore, the Obama administration seemed to grow weary of enforcing the federal marijuana prohibition in the states, leading the Justice Department to issue a series of memos tacitly endorsing marijuana reform in the states and, most recently, in Indian Country. In terms of congressional action, various bills to amend the CSA by limiting its applicability in marijuana reform states have attracted support from a bipartisan and diverse cast of house and senate members and generated more attention than in prior years. The main congressional action to date, is a Fiscal Year 2015 appropriations act provision prohibiting use of federal funds to enforce the CSA against persons in medical-use states; although the exact protections afforded by this measure are unclear, it stands as an indication of Congress' increasing willingness to move away from an absolute marijuana prohibition.

### Supreme Court Doctrine

The U.S. Supreme Court has made clear that Congress has the authority, quite broadly, to regulate marijuana throughout the country. In *Gonzales v. Raich*, 545

U.S. 1 (2005), the Supreme Court rejected a Commerce Clause challenge to the CSA, finding that even marijuana grown on a patient's own property for her own use had an effect on the interstate market for marijuana and was thus within Congress' reach. What is more, in *United States v. Oakland Cannabis Buyers' Collective*, 532 U.S. 483 (2001), the Supreme Court made explicit what the CSA clearly implies: it is no defense in a federal prosecution under CSA that the defendant was acting in compliance with applicable state law. Together, these cases solidify the power of the federal government to criminalize all marijuana conduct and to enforce that law even in states coming to a very different conclusion about the propriety of such conduct.

Beyond these foundational principles, however, things are not quite so clear. Although federal law remains the law of the land and applies with equal force throughout the country regardless of state law to the contrary, the reality is that the federal government is dependent upon the states for the effectuation of marijuana policy. Although the CSA has been the eight-hundred pound gorilla of marijuana prohibition, in reality the federal government does a vanishingly small amount of the drug enforcement that occurs in the United States each year; nearly everyone arrested on marijuana charges is arrested under state rather than federal authority ([Marijuana Policy Project 2013](#), 2). It is equally clear that the federal government cannot simply outsource the enforcement of federal law to unwilling state governments in *Printz v. United States*, 521 U.S. 898 (1997), the Court held that although states are free to cooperate in the enforcement of federal law if they wish to do so, state apparatuses cannot be conscripted into the service of federal policy: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." (*Printz v. U.S.*, 935) Thus, although the federal government may arrest anyone in any state who is producing or selling marijuana, it lacks the resources (and, quite clearly, the will) to arrest, prosecute, and incarcerate all of those who are not in compliance with federal law.

It is for this reason that much of the speculation after the passage of Amendment 64 in Colorado and Initiative 502 in Washington State in 2012 focused not on the threat of increased prosecutions under federal law, but rather on legal action by the federal government to curtail the nascent regulatory processes. In particular, the states feared that the federal government would sue to prevent the implementation of the new regulatory regimes as it had sued just a few years earlier to enjoin the operation of Arizona's new immigration regulations. *Arizona v. United States*, 132 S.Ct. 2492 (2012). It was with such a suit in mind that the governors of Washington and Colorado appealed to the federal government for

guidance regarding the federal government's enforcement intentions; with heavy regulatory work ahead of them, the states wanted some assurance that their regulations would not be immediately undone by federal legal action.

### Executive Branch Actions

5 As we have seen, the U.S. Justice Department announced in August 2013 that it would allow marijuana regulations to proceed in the states so long as eight enforcement priorities were complied with. This pronouncement forestalled, at least for the moment, the threat of a federal preemption suit in the federal courts. More than that, however, it seemed to signal a significant, if not radical, change at the federal level with regard to marijuana policy. For example, in January 2014  
10 President Obama told the *New Yorker* magazine that he thought that marijuana was less dangerous than alcohol and expressed his thoughts on marijuana law reform in the states that: "it's important for it to go forward because it's important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished" (Remnick 2014).<sup>4</sup>  
15 Obama's departing Attorney General Eric Holder—whose intervention in California was one of the factors that doomed Proposition 19 in California in 2010—also seemed to have an evolution in his views on the subject. When asked in late 2014 if he would support the rescheduling of marijuana, he seemed quite open to the idea:

20 I think it's certainly a question we need to ask ourselves, whether or not marijuana is as serious of a drug as heroin. Especially given what we've seen recently with regard to heroin – the progression of people from using opioids to heroin use, the spread and the destruction that heroin has perpetrated all around our country. And to see by contrast, what the impact is of marijuana  
25 use. Now it can be destructive if used in certain ways, but the question of whether or not they should be in the same category is something that we need to ask ourselves and use science as the basis for making that determination (Ferner 2014).

30 What is more, the executive branch's apparent change in direction was not limited to unofficial statements given in interviews given by senior members of the administration. For example, the Obama administration surprised many when it announced, apparently unprovoked, a memo indicating that it would treat marijuana in Indian Country the same way it does in states legalizing marijuana for some purposes. The memo, dated October 2014 but first made public in December  
35 2014, stated in part: "The eight priorities in the Cole Memorandum will guide United States Attorneys' marijuana enforcement efforts in Indian Country, including in the event that sovereign Indian Nations seek to legalize the cultivation or use of marijuana in Indian Country" (Wilkinson 2014). There had not been

much controversy with regard to marijuana production and sale on tribal lands prior to the issuance of this directive. Even more than the issuance of the Ogden memo nearly six years earlier, this pronouncement seemed like little more than an invitation to the nation's Indian tribes to consider the production of marijuana. Taken together with the FinCEN guidance regarding banking and the second Cole Memo issued in 2013, all of these statements—both official and unofficial—provide mounting evidence of a much more cooperative approach to marijuana federalism within the Obama administration.

### **Congressional Actions and Proposals**

During this period developments in Congress also seemed to signal an interest on the part of many legislators in significantly curtailing federal prohibition. For example, the [Regulate Marijuana like Alcohol Act \(2015\)](#) was introduced in the House by Colorado Representative Jared Polis. The name of the measure should be familiar; this was the appellation given to Amendment 64, Colorado's 2012 marijuana legalization initiative. Polis' bill would remove marijuana from the CSA, retaining punishments only for the international trafficking of the drug. Similarly, Representative Earl Blumenauer of Oregon introduced the [Marijuana Tax Revenue Act \(2015\)](#), calling for the federal taxing of adult-use marijuana (medical marijuana would be immune from tax under the provision). The introduction of these bills was not new; similar bills had been before Congress for years, rarely generating much traction.

The largest change, though, and one that actually made its way into law, was likely the quietest. Buried in the massive year-end budget resolution that passed Congress in late 2014, in paragraph 538, was a prohibition on the use of government funds to impede state medical marijuana laws:

None of the funds made available in this Act to the Department of Justice may be used . . . to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana. (Consolidated and Further Continuing Appropriations Act, 2015, para. 538)

When President Obama signed this spending bill on December 16, 2014 press reports trumpeted this provision as the end of the federal war on medical marijuana in the states (e.g., [Halper 2014](#)). To many, this provision seemed to be the solidifying into law of the Second Cole Memo's wait-and-see approach; paragraph 538 appeared to give state marijuana law reform experiments the explicit federal protection they had been craving. It is not clear, however, exactly what the provision means. Certainly, it would seem to prohibit the Department of Justice from suing to enjoin or prevent the implementation of medical marijuana

provisions in the states. Whether it would preclude all federal law enforcement action against those acting in compliance with state law, however, is another question.<sup>5</sup> Certainly, if that were Congress' intention, such a provision would be easy enough to draft.<sup>6</sup> But what is more, this spending provision does not legalize marijuana, it merely makes the enforcement of existing federal prohibition more difficult. As discussed in the previous section, it is the illegality of marijuana at the federal level that causes so many of the problems seen at the state level. The 2014 spending bill does nothing to change this.

Other bills that *would* radically transform the federal prohibition are in the works as well. In early 2015, three prominent senators—Cory Booker (D-NJ), Kirsten Gillibrand (D-NY), and Rand Paul (R-KY)—introduced the Compassionate Access, Research Expansion, and Respect States (CARERS) Act (2015). The CARERS Act would make the CSA inapplicable to those acting in compliance with their state's medical marijuana laws and would immediately make banking available to all marijuana businesses. It would also allow increased medical experimentation on marijuana's effects and remove entirely from the CSA low potency marijuana products used to treat medical conditions. Unlike the appropriations bill passed in 2014, the CARERS Act would make marijuana conduct in law reform states legal rather than simply immune from prosecution. The CARERS Act, like the bills introduced by Representatives Blumenauer and Polis, is thus as close to a repeal of the CSA as we are likely to see in the near term. What is more, because it has been proposed by a bipartisan coalition of well-known senators from states at the fringes of marijuana law reform, it is likely to be taken far more seriously than the annual updates sponsored by marijuana's two principal advocates in Congress.<sup>7</sup>

## 25 Lawsuits

With the Obama administration's increasing acceptance of state marijuana legalization and growing support in Congress for measures curtailing enforcement of the CSA, a number of other actors stepped into the void. Angered that the federal government had moved away from enforcement of the CSA in marijuana law reform states and the apparent changing mood in Washington, state governments, public officials, and private individuals began suing Colorado entities—both public and private—seeking to undo marijuana legalization there.

On December 17, 2014, the states of Oklahoma and Nebraska sought to sue Colorado in the U.S. Supreme Court (*Nebraska and Oklahoma v. Colorado*). The states alleged that the taxation and regulation of marijuana in Colorado created a *casus belli*<sup>8</sup>—they argued that marijuana flooding into their states across the Colorado border created negative consequences including increased law enforcement and court expenditures. Although the states did not ask for money damages, they did ask the Supreme Court to declare Colorado's regulatory regime preempted

by the CSA. Except for the fact that the neighboring states were standing in for the federal government, the Oklahoma and Nebraska lawsuit was in many ways the one that marijuana law reform proponents had been girding for since the passage of legalization initiatives in 2012.

5 If the Oklahoma and Nebraska suit was largely by the book, the next set of suits that were filed was anything but. In February 2015 two private plaintiffs brought suits under the Racketeer-Influenced and Corrupt Organizations (RICO) Act naming a number of defendants including marijuana businesses, their financiers, insurers, contractors, and the state and local entities that had licensed them (*Safe Streets Alliance, Phillis Windy Hope Reilly, and Michael P. Reilly v. Alternative*  
10 *Holistic Healing*, 1:15-cv-00349; *Safe Streets Alliance and New Vision Hotels Two, LLC v. Medical Marijuana of the Rockies*, 1:15-cv-00350).<sup>9</sup> These suits alleged that the imminent opening of two licensed marijuana businesses has caused the plaintiffs and would continue to cause the plaintiffs harm. In one suit, an hotelier  
15 alleged that the planned opening of a marijuana dispensary in the same retail complex has led to guest cancellations; in the other, a rural land owner alleged that her enjoyment of her property has been hampered by the construction of a marijuana cultivation facility on the adjacent property.

The final barrage (to date) came the next month when a number of sheriffs  
20 from Colorado and neighboring states sued seeking to enjoin both Colorado's regulatory regime *and* its decision to legalize marijuana for adult users. The sheriffs argue that "[t]he formulation of policy for controlling and regulating these controlled substances and for balancing of controlled-substances regulation, possession, and distribution priorities is a matter exclusively reserved for the federal  
25 government. Such regulations do not fall within the state's traditional police powers and remain the exclusive province of the federal government" (*Smith et al. v. Hickenlooper*, 1:15-cv-00462, Plaintiffs' Complaint, para. 38). Because sheriffs are sworn to uphold both the state and federal constitutions, the suit alleges, the passage of Amendment 64 and its implementing legislation place the plaintiffs in an  
30 unresolvable bind—they simply cannot uphold both oaths (*Smith et al. v. Hickenlooper*, Plaintiffs' Complaint, para. 78).

As I explain below, I believe all three sets of suits are without merit. They are important for these purposes, though, because they represent the last stand of  
35 marijuana law reform opponents against a steady stream of legislative and voter victories for marijuana law reformers. Faced with the prospect of legalization in as many as a half-dozen additional states by 2016, those seeking to maintain the federal prohibition seem to have realized that if they did not act soon, events on the ground would leave them behind. These suits represent a Battle of the Bulge—a last desperate offensive by an army in full retreat. Additionally, and of particular  
40 note for federalism scholars, these lawsuits seeking to limit state autonomy regarding marijuana regulation have been filed not by federal officials seeking to



maintain their own authority but by state governments and officials, along with a range of private plaintiffs.

### The Oklahoma and Nebraska Preemption Lawsuits

A number of potential criticisms could be leveled at the Oklahoma and Nebraska lawsuits. First, the complaints are pled in a very bare bones manner, filled with allegations of injury that call on a court to make many significant logical leaps. When plaintiffs allege that their enforcement costs have increased as a result of marijuana flowing into (or through) their states from Colorado they are susceptible to the criticism that they have either chosen to increase their marijuana enforcement efforts or else have shifted their enforcement efforts from targeting marijuana imported from Mexico or California to targeting marijuana imported from Colorado. In either event, the state cannot sue Colorado because it has chosen to reassign its own enforcement priorities. Absent some objective showing of increased drug trafficking, it simply does not follow from the fact that the plaintiff states are spending more on marijuana interdiction than they were prior to the passage of Amendment 64 that they have been harmed by Colorado's decision to tax and regulate marijuana rather than prohibit it.

Although issues of this sort could be solved through amended pleading, other, more fundamental, obstacles remain in the path of the plaintiff states. For example, the conduct about which the states complain—the importation of marijuana from Colorado into Oklahoma and Nebraska—is conduct that is illegal under the laws of the federal government, Oklahoma, Nebraska, *and* Colorado. Thus, the states are complaining not about Colorado's regulation of adult use marijuana but about those criminals who are not complying with those regulations. As the U.S. Supreme Court has made clear, when challenging government conduct, “there must be a causal connection between the injury and the conduct complained of – the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . the] result [of] the independent action of some third party not before the court’ ” (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 [1992], internal citation omitted). Here, there is no plausible argument that it is agents of the state of Colorado that are directly causing harm to the plaintiff states.

Even more fundamental, though, is the central legal question raised by the Oklahoma and Nebraska suit and, at least in part, by each of the others that has been filed to date: whether Colorado's regulatory regime is preempted by the CSA. As the most anticipated and straightforward of the lawsuits filed against Colorado, the Oklahoma and Nebraska suit is probably the one that has been most fully theorized by scholars. A number of authors (e.g., Mikos 2009, 1446)—myself included—have written on the topic of whether state marijuana regulation is preempted by existing federal law, and the clear consensus seems to be that they are not.



This result might seem counterintuitive. If, as the plaintiff states rightly allege, the goal of the CSA is to treat marijuana as a criminal substance—a substance with no legitimate medical use and a high likelihood of abuse—then the decisions of the several states to treat marijuana as medicine and a potential source of revenue are clearly in tension with that federal policy. But tension between state and federal law is not nearly enough to make out a claim that the state law is preempted. Preemption is, in all areas where the federal government may legislate, a question of Congressional intent (Kamin 2012, 158). Should it choose to do so, Congress could invalidate all state marijuana laws, even those that are functionally identical to the CSA; although it does not have the resources to do so, the federal government could choose to be the sole regulator of marijuana in the United States. But this, it quite clearly chose not to do. Instead, Congress preempted only those state laws that stood as a positive conflict with federal law such that the two cannot be read together.<sup>10</sup> The preemption language Congress used in the CSA has been read—albeit not in another context—to preempt only those state laws that make it impossible for an individual to comply with both federal and state law (Chemerinsky et al. 2015).<sup>11</sup> It is only in such situations that the two laws cannot be read together. It is easy enough for a Coloradan to comply with both state and federal marijuana laws: she need only avoid all marijuana conduct to do so. Because Colorado’s regulations do not require anyone to violate the CSA, therefore, they do not create a direct conflict with federal law.

Even when Congress has clearly indicated its desire only to preempt only those state laws that present a positive conflict with federal law, courts sometimes nonetheless apply a broader obstacle preemption analysis.

Under obstacle preemption, whether a state law presents a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects: for when the question is whether a federal act overrides a state law, the entire scheme of the statute must be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. (*County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 478 [2008]).

Under this analysis as well, the preemption argument is likely to fail. As the California Court of Appeals noted in response to a suit by a county arguing that California’s medical marijuana regulations were preempted by the CSA, “the unstated predicate of this argument is that the federal government is entitled to conscript a state’s law enforcement officers into enforcing federal enactments, over

the objection of that state, and this entitlement will be obstructed” (*County of San Diego v. San Diego NORML*, 483).

Which brings us to the core factor which is likely to doom the states’ preemption suits: even if the Supreme Court were to disagree and find that the states’ regulatory regime were preempted by federal law, it is not at all clear that the Court (or any federal court) could provide the plaintiffs relief. While the Court could invalidate Colorado’s regulatory regime, *even the plaintiffs acknowledge* that it cannot require Colorado to recriminalize possession of marijuana (*Nebraska and Oklahoma v. Colorado*, Brief in Support of Motion for Leave to File Complaint, 5). Because the federal government cannot require the states to enforce federal law, to pass laws consistent with federal law, or to enforce the laws they have on the books (*Printz v. U.S.*, p. 512; *New York v. U.S.*, 505 U.S. 144, 162 [1992]; [Chemersinsky et al. 2015](#); [Mikos 2009](#), 1446), the effect of invalidating Colorado’s regulatory system would be very difficult to anticipate in advance. In place of the existing marijuana regulatory regime, the state might, as is its right, either repeal all marijuana laws or choose not to enforce any of the marijuana laws remaining on its books. Such policy choices, although clearly available to the state of Colorado under the Tenth Amendment, might prove ruinous for Colorado’s neighbors. Unfettered marijuana production and distribution in Colorado would almost certainly result in a glut of marijuana, much of which would inevitably find its way across Colorado’s borders and beyond. If a ruling in the plaintiffs’ favor would not necessarily cure the harms of which the states complain, and could very well exacerbate them, they will likely be found to lack standing to sue (*Lujan v. Defenders of Wildlife*, 561).

### The RICO Suits<sup>12</sup>

The Racketeer Influenced and Corrupt Organizations (RICO) Act was passed in 1970 to give federal prosecutors an additional tool in fighting the mob. RICO criminalized, among other things, the running of a business through a pattern of racketeering activity. Congress also created a civil cause of action under RICO, providing incentives for those injured in their “business or property” by RICO organizations to sue; the statute provides for treble damages, and attorneys’ fees against those found to have harmed plaintiffs through their racketeering activity.

It is clear that, as things stand, marijuana businesses qualify as RICO enterprises—they are really nothing more than businesses that are run through a pattern of racketeering activity. Among the crimes qualifying as racketeering activity under RICO are violations of the CSA.<sup>13</sup> Thus, the real litigation in the RICO suits will focus not on whether the defendants are RICO enterprises, but rather on whether the operation of these RICO businesses has harmed the plaintiffs. Congress and the federal courts have been very careful in defining what counts as harm in this context. First, as the statute itself makes clear, the harm cannot be to something as intangible

as one's sense of aesthetics or justice; the defendant must be harmed in her "business or property." Hence, for example, it is insufficient to allege, as one of the Colorado RICO plaintiffs did, that the opening of marijuana businesses harmed her piece of mind: "[t]he ongoing construction has already marred the mountain views from the [plaintiffs'] property, thus making it less suitable for hiking and horseback riding. The building's purpose—the manufacture of illegal drugs—exacerbates this injury, for when the [plaintiffs] and their children visit the property they are reminded of the racketeering enterprise next door every time they look to the west." (*Safe Streets Alliance, Phillis Windy Hope Reilly, and Michael P. Reilly v. Alternative Holistic Healing*, Complaint, para. 75)

That said, the RICO suits face an even more difficult obstacle. For even though they do allege business or property harms in addition to the psychic ones just mentioned, the plaintiffs will have a great deal of difficulty showing that the complained-of injury was caused by the defendants' RICO activity. The Supreme Court has ruled that it is insufficient to demonstrate that the defendants were the but-for cause of the plaintiffs' injuries; the RICO conduct must also be the direct cause of the injuries suffered by plaintiffs (e.g., *Anza v. Ideal Steel Supply Corp*, 547 U.S. 451, 458–61 [2006]).

In the context of the Colorado suits, this directness requirement is likely fatal to the damages claims. Hence, for example, in the hotelier's lawsuit, the financial loss alleged to be attributable to the defendants is that third-party patrons will decide not to stay at plaintiff's hotel as a result of the presence of defendant's marijuana business. Thus, the loss would be attributable to the economic decisions of other actors and not to any conduct of the defendants themselves. In the ranch suit, the link between the defendants' *criminal* conduct and the plaintiffs' harms is, if anything, even more tenuous: the plaintiff has made no real allegation that she has suffered a financial—as opposed to psychic—harm as a result of the defendants' criminal conduct. Even if a depreciation in the value of the plaintiffs' property can fairly be tied to the defendants' new business, plaintiffs would have to show that the same diminution in value would not have occurred if the defendants were growing tomatoes rather than marijuana on their property. These problems have led one leading commentator to remark: "[I]t is quite possible that no plaintiff would have standing to bring a civil RICO claim against a . . . marijuana dispensary" (Mikos 2011, 653).

Although there are clearly a number of obstacles to recovery, the RICO suits represent a serious threat to the Colorado marijuana industry. This has less to do with the merits than with the fact that plaintiffs have sought each of these remedies and have sought them from a diverse group of defendants. They have sued not only those businesses they argue are causing (or, more accurately, will cause them harm) but also, those who financed, built, insured, or otherwise aided the construction and operation of those businesses. This is an important and troubling development

for advocates of marijuana law reform in Colorado; even if none of these plaintiffs are able to prevail against any of these defendants, these suits will exert a not insubstantial cost on marijuana businesses *and anyone who would assist those businesses*.

## 5 **Sheriffs' Suit**

The most recent suit filed against the state of Colorado, and perhaps the most confounding, is the one brought by Colorado and Kansas sheriffs seeking an injunction to undo not just Colorado's tax and regulate system for marijuana, but also its decision to legalize possession of small amounts of marijuana (*Smith et al. v. Hickenlooper*, Plaintiffs' Complaint, para. 105). The latter of these claims is obviously unmeritorious, for reasons that should already be clear by this point in the analysis. As discussed above, a state cannot be forced to pass criminal laws, enforce either its laws or federal law or, as the states of Oklahoma and Nebraska explicitly acknowledged in their suit, to keep its existing criminal laws on the books. Given that, it is hard to imagine what relief the sheriffs seek with regard to Colorado's legalization decision. The sheriffs ask for an injunction against Colorado's governor "prohibiting the application and implementation" of marijuana decriminalization. However, such an injunction preventing a governor from "implementing" decriminalization would be the functional equivalent of the federal government requiring a state to implement federal policy, a power we have seen the federal government simply lacks, as Colorado makes clear in its response to the Nebraska and Oklahoma lawsuit: "Ordering Colorado to recriminalize the use and cultivation of recreational marijuana, and further ordering the State to allocate resources to enforce that prohibition, would violate the Tenth Amendment." (*Nebraska and Oklahoma v. Colorado*, Colorado's Brief in Opposition to Motion for Leave to File Complaint, 27).

The legal reasoning of the rest of the sheriffs' lawsuit is no more meritorious. Like Colorado's neighboring states or the business owner plaintiffs in the RICO suits, the sheriffs have great difficulty showing a cognizable injury that could be remedied by an appropriate federal court injunction. Their alleged harm appears to be that they are somehow precluded from enforcing federal law which they allege creates a crisis of conscience for them. Each of the plaintiffs, the complaint alleges:

has taken an oath of office to uphold the United States Constitution in the performance of his duties. Each also has taken, in the same oath of office, an oath to uphold the Colorado Constitution. Since the enactment of Amendment 64, these oaths contradict each other. Each Colorado Plaintiff-Sheriff routinely is required to violate one of these oaths in performing his duties relating to conflicting federal and Colorado marijuana laws (*Smith et al. v. Hickenlooper*, Plaintiffs' Complaint, para. 74).

Exactly how not enforcing federal law violates the sheriffs' oath to obey the federal constitution is not explained. The argument seems to be, though, that it places the sheriffs in an impermissible bind to require them to turn a blind eye to violations of federal law when they observe them (*Smith et al. v. Hickenlooper*, Plaintiffs' Complaint, para. 78). This is merely another way of saying that county sheriffs have an obligation to enforce federal law, an obligation we have seen cannot be imposed upon them. And one of the plaintiff sheriffs has said as much publicly, albeit in another context. In 2013, Larimer County Sheriff Justin Smith, the *lead* plaintiff in the sheriffs' lawsuit, announced on his facebook page that he would not participate in the enforcement of any new federal gun control laws (Holden 2013).

## Conclusion

Marijuana law and policy are changing quickly in the United States today. As with the debate over marriage equality, change in public opinion, and at the ballot box has moved the law forward at a pace that might have been unimaginable just five years ago. And as with marriage equality, a corner seems to have been turned; with regard to both issues, the outcome is often seen as inevitable (Wolf 2014; Wyatt 2014).

Although there appear to be majorities in favor of marijuana legalization in the country, federal policy has been slow to change; state officials and electorates have clearly been the initiators of policy change in this area since the 1990s. It is not unusual for the states to take the lead in policy change in a given area; regional differences and smaller stakes make innovation at the state level likelier. But marijuana law reform is highly unusual, in fact unprecedented—never before have a number of states chosen to legalize conduct that remains illegal under federal law.

The response of federal officials to state marijuana reform laws has been equally notable. Although the Obama administration initially sent mixed signals, during the last two years administration officials have increasingly acquiesced and even encouraged marijuana law reform in the states. This is most evident in a 2013 Justice Department memo signaling that the administration would defer to state laws regulating marijuana so long as the state could demonstrate effectiveness in meeting eight federal criteria; Justice Department officials later extended this policy to Indian Country as well. Meanwhile, Congress in late 2014 took a modest step toward limiting enforcement of federal law in medical-use marijuana states, even though this appropriations rider falls well short of stronger measures—such as the CARERS Act—that have since been proposed.

Finally, the reaction to the federal government's acquiescence to state law reform has also been telling. As we have seen, the principal legal challenges to marijuana-legalization measures in 2014–2015 have been filed not by federal officials but by other states—Oklahoma and Nebraska—along with private plaintiffs and several sheriffs both in Colorado and its neighboring states. Although these plaintiffs are

unlikely to prevail on the merits of their suits, their decision to step in as proxies for the federal government both reveals creative lines of argumentation and challenges the dominant expectation that in cases of conflict federal officials will generally seek to limit state autonomy and state officials will seek to expand such autonomy.

5 This is typified, perhaps, by the reaction within Oklahoma to the state's lawsuit against Colorado. The week after the lawsuit was filed, a number of state officials wrote to the Attorney General to protest his decision to sue Colorado over marijuana legalization:

10 Our primary concerns surround the implications of this lawsuit for states' rights, the Tenth Amendment, and the ability of states and citizens to govern themselves as they see fit. As you know, Oklahoma has been a pioneer and a leader in standing up to federal usurpations on everything from gun control to Obamacare and beyond.

15 We believe this lawsuit against our sister state has the potential, if it were to be successful at the Supreme Court, to undermine all of those efforts to protect our own state's right to govern itself under the Tenth Amendment to the U.S. Constitution (Ritze, 2014).

20 The legislators' opposition serves as a reminder that the odd path taken by marijuana law reform has forced a reexamination of some of our basic understandings of federalism. However, the federalism clash over marijuana is ultimately resolved, a solution will need to be found that permits states to either take ownership of the issue or to permit continued federal leadership.

## Notes

25 I would like to thank Richard Re, Alan Chen, Robert Mikos, Allen Hopper, and Erwin Chemerinsky. All remaining errors are mine.

1 The memo stated in part: "State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws" (Cole 2011).

2 As this 2014 FinCEN memo stated in part: "Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a [Suspicious Activity Report] on activity involving a marijuana-related business (including those duly licensed under state law), in accordance with this guidance and FinCEN's suspicious activity reporting requirements and related thresholds."

3 This is why even the concept of an enforceable waiver is insufficient to solve the current problems with marijuana's continuing illegality. See, for example, Kleiman 2013.

4 As the author pointed out, Obama is quite able to argue both sides of an issue almost at the same time: “As is his habit, he nimbly argued the other side. ‘Having said all that, those who argue that legalizing marijuana is a panacea and it solves all these social problems I think are probably overstating the case. There is a lot of hair on that policy.  
5 And the experiment that’s going to be taking place in Colorado and Washington is going to be, I think, a challenge” (Remnick 2014).

5 See, for example, Sullum 2014 :

The Drug Policy Alliance describes this provision, versions of which Rohrabacher has been championing since 2003, as “language prohibiting the U.S. Justice Department from spending any money to undermine state medical marijuana laws.” Similarly, the  
10 Marijuana Policy Project says Rohrabacher’s amendment “prohibit[s] the U.S. Justice Department—which includes the DEA—from interfering with state-level medical marijuana laws.” But actions that could be described as undermining or interfering with medical marijuana laws do not necessarily “prevent” states from “implementing”  
15 those laws, which is the actual language used in the bill.

6 Interestingly, Congress included in the same piece of legislation rider that would prevent federal funds from being spent to implement the District of Columbia’s decision to legalize marijuana for all adult users. See, Consolidated and Further Continuing  
20 Appropriations Act, 2015, paragraph 809:

(a) None of the Federal funds contained in this Act may be used to enact or carry out any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the  
25 CSA 21 (21 U.S.C. 801 and the following.) or any tetrahydrocannabinols derivative.

(b) None of the funds contained in this Act may be used to enact any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the CSA (21 U.S.C. 801 and the following) or any tetrahydrocannabinols derivative for recreational purposes.

30 That legalization was curtailed only in the District of Columbia likely says more about the federal government’s complicated relationship with its seat of government than it does about changing views of marijuana law reform, however.

7 I have argued elsewhere (Chemerinsky et al. 2015, 80) for a cooperative federalism solution not unlike CARERS, one that gives the federal government a leading role in  
35 those states that wish to retain marijuana prohibition but that allows other states to opt out if they believe that regulation and taxation is a better approach than prohibition:

Under our cooperative federalism approach the Attorney General would be required to create a certification process allowing states to opt out of the CSA’s marijuana provisions if state laws and regulatory frameworks satisfy enforcement criteria that  
40 the DOJ has already announced. In optout states certified by the Attorney General, only state law would govern marijuana-related activities and the CSA marijuana

provisions would cease to apply. Federal agencies could continue to cooperate with opt-out states and their local governments to jointly enforce marijuana laws, but state law rather than the CSA would control within those states' borders. Equally important, nothing would change in those states content with the status quo under the CSA.

8 In order for one state to sue another in the Supreme Court, it must allege that its sister state's conduct would amount to a *casus belli*—grounds for war—if committed by one sovereign nation against another. See, for example, *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983)

9 One of the suits also named state and local officials as defendants; the other did not.

10 See CSA, Sec. 903:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority 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.

11 [Chemerinsky, et al. 2015](#) write: “The phrase ‘positive conflict . . . so that the two cannot consistently stand together’ in section 903 has been interpreted as narrowly restricting the preemptive reach of the CSA to ‘cases of an actual conflict with federal law such that “compliance with both federal and state regulations is a physical impossibility.”’” (quoting *S. Blasting Servs., Inc. v. Wilkes Cnty*, 288 F.3d 584, 591 (4th Cir. 2002)).

12 A much shorter version of this analysis appeared in [Kamin 2015](#).

13 The RICO ACT, section 1961(1)(d), includes in “racketeering activity” “the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the CSA), punishable under any law of the United States.”

## References

Ballotpedia. 2015. Marijuana on the Ballot. [http://ballotpedia.org/Marijuana\\_on\\_the\\_ballot#tab.3DBy\\_year](http://ballotpedia.org/Marijuana_on_the_ballot#tab.3DBy_year)

California Secretary of State. 2010. *Votes For and Against November 2, 2010, Statewide Ballot Measures*. <https://www.sos.ca.gov/elections/sov/2010-general/07-for-against.pdf>.

Chemerinsky Erwin, Jolene Forman, Allen Hopper, and Sam Kamin. 2015. Cooperative federalism and marijuana regulation. *U.C.L.A. Law Review* 62: 74–122.

Coffman, Keith, and Nicole Neroulias. 2012. Colorado, Washington First States to Legalize Recreational Pot. *Reuters*, November 7. <http://www.reuters.com/article/2012/11/07/us-usa-marijuana-legalization-idUSBRE8A602D20121107>.

Cole, James M. 2011. U.S. Department of Justice. Office of the Deputy Attorney General. Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for



Medical Use, June 29. <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

———. 2013. U.S. Department of Justice. Office of the Deputy Attorney General. Memorandum for all United States Attorneys: Guidance Regarding Marijuana Enforcement, August 29. <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

CARERS Act. 2015. U.S. Congress. Senate. 114<sup>th</sup> Congress. S. 683. <https://www.congress.gov/bill/114th-congress/senate-bill/683>.

Controlled Substances Act of 1970, Pub. L. No. 91–513, 84 Stat. 1236. Codified as amended at 21 U.S.C. § 812 (2012).

Ferner, Matt. 2014. Eric Holder Signals Support for Marijuana Reform Just as He’s Heading out the Door. *Huffington Post*, September 25. [http://www.huffingtonpost.com/2014/09/25/eric-holder-marijuana-rescheduling\\_n\\_5884128.html](http://www.huffingtonpost.com/2014/09/25/eric-holder-marijuana-rescheduling_n_5884128.html).

Financial Crimes Enforcement Network. 2014. BSA Expectations Regarding Marijuana Related Business. February 14. [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-G001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf).

Halper, Evan. 2014. Congress Quietly Ends Federal Government’s Ban on Medical Marijuana. *Los Angeles Times*, December 16. <http://www.latimes.com/nation/la-na-medical-pot-20141216-story.html>.

Hill, Julie Andersen. 2015. Banks, marijuana, and federalism. *Case Western Reserve Law Review* 65: 1.

Hoeffel, John. 2010. Holder Vows Fight Over Prop. 19. *Los Angeles Times*, October 16: A4. <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016>.

Holden, Will C. 2013. Larimer Sheriff Threatens Not to Enforce New Gun Laws. *Fox 31 News*, January 18. <http://kdvr.com/2013/01/18/larimer-county-sheriff-threatens-not-to-enforce-proposed-new-gun-laws/>.

KABC-TV. 2011. See Feds Warn, Indict California Medical Marijuana Dispensary Operators. October 7: <http://abclocal.go.com/kabc/story?section=news/state&id=8383655>.

Kamin, Sam. 2012. Medical marijuana in Colorado and the future of marijuana regulation in the United States. *McGeorge Law Review* 43: 147.

———. 2015. Can You Fight Marijuana Laws with RICO Suits? *JURIST - Academic Commentary*, April 6. <http://jurist.org/forum/2015/04/sam-kamin-marijuana-rico.php>.

Kelly, Jamie. 2012. Former Grizzly Pleads Not Guilty to Federal Drug Charges. *Missoulian*, January 19. [http://missoulian.com/news/state-and-regional/former-grizzly-pleads-not-guiltyto-federal-drug-charges/article\\_5166136a-4304-11e1-a886-0019bb2963f4.html#ixzz1k1FXdfT4](http://missoulian.com/news/state-and-regional/former-grizzly-pleads-not-guiltyto-federal-drug-charges/article_5166136a-4304-11e1-a886-0019bb2963f4.html#ixzz1k1FXdfT4).

Kleiman, Mark. 2013. Cooperative enforcement agreements and policy waivers: new options for federal accommodation to state-level cannabis legalization. *Journal of Drug Policy Analysis* 6 (July): 41–50.

Marijuana Policy Project. 2013. 2012 Annual Report. November. [http://www.mpp.org/about/MPP\\_2012\\_Annual\\_Report.pdf](http://www.mpp.org/about/MPP_2012_Annual_Report.pdf).

- . 2014. The twenty three states and one federal district with effective medical marijuana laws. July 14. <http://www.mpp.org/assets/pdfs/library/MMJLawsSummary.pdf>.
- Marijuana Tax Revenue Act. 2015. U.S. Congress. House of Representatives. 114<sup>th</sup> Congress. H.R. 1014. <https://www.congress.gov/bill/114th-congress/house-bill/1014>.
- Mikos, Robert A. 2009. On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime. *Vanderbilt Law Review* 62: 1421-1482.
- . 2011. A critical appraisal of the department of justice's new approach to medical marijuana. *Stanford Law and Policy Review* 22: 63369.
- Ogden, David. 2009. U.S. Department of Justice. Office of the Deputy Attorney General. Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, October 19. <http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.
- Palmer, Ken. 2013. Medical Marijuana Advocates Protest Removal of Lansing Baby. *Detroit Free Press*, September 18. <http://archive.freep.com/article/20130918/NEWS06/309180085/Lansing-medical-marijuana-Gordon-and-Maria-Green-Bree-Green>.
- Pickerill, J. Mitchell, and Paul Chen. 2008. Medical marijuana policy and the virtues of federalism. *Publius: The Journal of Federalism*. 38: 22–55.
- RICO. 1970. 18 U.S.C. Section 1961 and the following.
- Regulate Marijuana like Alcohol Act. 2015. U.S. Congress. House of Representatives. 114<sup>th</sup> Congress. H.R. 1013. <https://www.congress.gov/bill/114th-congress/house-bill/1013>.
- Remnick, David. 2014. Going the Distance. *New Yorker*. January 27. <http://www.newyorker.com/magazine/2014/01/27/going-the-distance-2>.
- Ritze, Mike. 2014. Letter to Attorney General Scott Pruitt. December 31. <http://cloudfront-assets.reason.com/assets/db/14204887006055.pdf>.
- Roche, Edward J., Jr. 2013. Federal income taxation of medical marijuana business. *Tax Lawyer* 66: 429.
- Saad, Lydia. 2014. Majority Continues to Support Pot Legalization in U.S. Gallup Poll. November 6. <http://www.gallup.com/poll/179195/majority-continues-support-pot-legalization.aspx>.
- Students for Sensible Drug Policy. n.d. The Higher Education Act. <http://ssdp.org/campaigns/the-higher-education-act/>.
- Sullum, Jacob. 2014. Will the Rohrabacher Amendment Actually Block Federal Prosecution of Medical Marijuana Patients and their Suppliers. *Reason.com*, December 15. <http://reason.com/blog/2014/12/15/will-the-rohrbacher-amendment-actually>.
- Wilkinson, Monty. 2014. U.S. Department of Justice. Executive Office for United States Attorneys. Policy Statement Regarding Marijuana in Indian Country, October 28. <http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf>.

Wolf, Richard. 2014. Gay Marriage, Once Inconceivable, Now Appears Inevitable. *USA Today*, October 6. <http://www.usatoday.com/story/news/politics/2014/10/02/supreme-court-gay-lesbian-marriage/16264389/>.

5 Wyatt, Kristen. 2014. Poll: Marijuana Legalization Inevitable. *Associated Press*, April 2. <http://www.usatoday.com/story/news/nation/2014/04/02/poll-marijuana-legalization-inevitable/7210215/>.