

Fall 2014

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### Recommended Citation

Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105 (2014).  
Available at: <https://scholar.law.colorado.edu/lawreview/vol85/iss4/6>

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# COOPERATIVE FEDERALISM AND STATE MARIJUANA REGULATION

SAM KAMIN\*

## INTRODUCTION

I would like to thank Melissa Hart and the Byron R. White Center for the Study of American Constitutional Law for the opportunity to be here today and to learn from so many leading federalism scholars. I am particularly grateful for this opportunity because, while I write in areas that have strong federalism implications, I am not a federalism theorist. The chance to present my work to, and hear from, so many scholars who have thought carefully about these issues is a real treat for which I am very thankful.

The area I will be talking about today—marijuana regulation in the states—is, along with marriage equality<sup>1</sup> and immigration,<sup>2</sup> one of the principal places where federalism is being contested today. As we think about the appropriate distribution of power between the federal and state governments, the question of state marijuana regulation arises time and again. This is because the legal status of marijuana in the United States today is unique. Marijuana is the only substance, and its possession is the only activity, that is prohibited at the federal level while it is being taxed and regulated in the states. This legal status is unique not just at this moment, but also historically.<sup>3</sup>

I argue in this talk that the task before us today is not

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1. See generally Marc R. Poirier, “*Whiffs of Federalism*” in *United States v. Windsor: Power, Localism and Kulturkampf*, 85 COLO. L. REV. 935 (2014).

2. See generally Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 COLO. L. REV. 1087 (2014).

3. The closest parallel is to America’s brief experiment with alcohol prohibition, but that analogy is inexact. Only if the states had actively opposed the Eighteenth Amendment, legalizing alcohol in the face of the federal prohibition, would the situation directly mirror the current state of marijuana regulation.

determining whether the federal government or the states should be allowed to regulate marijuana. The current reality and future of marijuana regulation in this country involve regulation at *both* the federal and state levels. While this joint regulation has thus far been marked by suspicion and jockeying for power, in this talk I sketch out a possible cooperative federalism approach to marijuana regulation, an approach I am hoping to flesh out more fully in later writing.

## I. A BRIEF HISTORY OF MARIJUANA REGULATION IN THE UNITED STATES

I will begin with a short history of marijuana regulation in the United States.<sup>4</sup> Since the passage of the Marijuana Tax Act in 1937,<sup>5</sup> marijuana has been an illicit substance in the United States. The passage of the Controlled Substances Act (CSA) in 1970 cemented and systematized this prohibition.<sup>6</sup> The CSA lists marijuana as a Schedule I narcotic, which is defined as a drug with no medical benefits and a high likelihood of addiction.<sup>7</sup> Under the CSA, doctors are prohibited from prescribing marijuana, and the drug's manufacture, possession, and sale are serious felonies.<sup>8</sup> The Supreme Court has upheld Congress's authority to regulate marijuana—even marijuana grown at home for the personal use of the grower—under its Commerce Clause power.<sup>9</sup> Despite repeated attempts to amend, repeal, or alter marijuana's criminal status under the CSA or otherwise alter marijuana's criminal status,<sup>10</sup> marijuana prohibition remains very much the law of the land.

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4. I have written longer versions of this history elsewhere. See, e.g., Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147 (2012); Sam Kamin & Eli Wald, *Medical Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869 (2013).

5. Marijuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (1937).

6. 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)).

7. See *id.* § 812(b).

8. See *id.* § 841 (setting forth imprisonment of up to a life term for the cultivation of more than 1,000 marijuana plants).

9. *Gonzales v. Raich*, 545 U.S. 1, 6 (2005).

10. See, e.g., 153 Cong. Rec. H8484 (daily ed. July 25, 2007) (the Hinchey-Rohrbacher Amendment) (stating that “[n]one 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, or cultivation of medical marijuana.”).

With the prospect of legislative change in Washington fairly remote, legislative attention has shifted to the states, with far more success. The first battle was over the passage of medical marijuana provisions. To date, twenty-one states and the District of Columbia have passed laws decriminalizing marijuana for those who demonstrate a medical need for the drug.<sup>11</sup> Advocates of medical marijuana laws see the laws as an important counterpoint to the federal government's pronouncement that marijuana has no accepted medical use; detractors see medical marijuana as a farce and as nothing more than a gateway to full legalization. Perhaps because of this criticism, and perhaps despite it, several states have considered moving beyond medical marijuana to a regime where any adult over twenty-one would be able to gain lawful access to marijuana.<sup>12</sup> In November 2012, Colorado and Washington passed so-called "adult-use voter initiatives" that fully legalized possession of less than one ounce of marijuana, and called upon state legislatures to pass enabling legislation for the licensing of growers and sellers of marijuana at the retail level.<sup>13</sup>

Thus, there is a growing conflict today between the way marijuana is treated by the federal government and the way it is treated by an increasing number of states. States are authorizing under their own laws the possession, manufacture, and distribution of the drug—either for medical patients or for all adults—while the federal government continues to treat marijuana as a prohibited substance. The scope and pace of marijuana law reform in the states has focused attention back on the federal government. How will Washington respond to the states' treatment of marijuana, either as a useful medicine or as a commodity to be taxed and regulated?

The anti-commandeering doctrine clearly prohibits the federal government from requiring the states to criminalize marijuana or from forcing reform states to repeal their decriminalization laws.<sup>14</sup> However, the federal government is

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11. See, e.g., *Legal Issues, State Laws, Medical Marijuana*, NORML, <http://norml.org/legal/medical-marijuana-2> (last visited Apr. 17, 2014) (listing states).

12. These provisions are often referred to as "recreational" or "adult use." I use these terms interchangeably throughout.

13. See COLO. CONST. amend. 64; Washington Initiative 502, No. 63-502, Reg. Sess. (Nov. 6, 2012). A similar proposal in Oregon was rejected.

14. See, e.g., *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that

hardly toothless in the face of state resistance to the CSA. At the most basic level, the federal government can simply continue to enforce its own laws, even against those operating in conformance with state law. Such criminal enforcement can have the effect of crippling state opposition, subjecting both practitioners and consumers to the threat of significant prison terms.<sup>15</sup> At its most confrontational, the federal government could sue to enjoin the implementation of the state regulatory apparatuses for the licensing and taxation of retail marijuana sales. This would lead to a showdown over the preemptive power of the CSA, an issue that has not been tested to date.<sup>16</sup>

Throughout this period, state and federal governments have engaged in a nervous dance as the states have looked to the nation's capital for enforcement guidance and have received in return a *mélange* of often-contradictory actions and pronouncements. It began in October 2009, when Deputy Attorney General David Ogden issued a memorandum to United States Attorneys around the country offering guidance on how to respond to state marijuana-law reform. This "Ogden memo" stated that although the CSA remained the law of the land and that the federal government would continue to use its

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local law enforcement officials cannot be required to participate in a federal regulatory regime); *New York v. United States*, 505 U.S. 144, 177 (1992) (holding that the federal government cannot "commandeer" state governments into the service of federal regulatory purposes by requiring the states to legislate in a particular area).

15. The CSA also permits the seizure of all assets being used in the violation of the Act. *See, e.g.*, 21 U.S.C. § 881 (a)(7) (stating that the following property is subject to forfeiture: "All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment").

16. The CSA expressly disclaims field preemption—that is, Congress did not intend to occupy the field of marijuana regulation as it has other areas, such as patent law. By contrast, the CSA states that federal law preempts inconsistent state-court enactments, but only to the extent that the two laws are so incompatible that compliance with both would be impossible. *See* 21 U.S.C. § 903 (2013) ("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."). Elsewhere, I argue that neither state decriminalization nor regulation runs afoul of the CSA. *See, e.g.*, Erwin Chermerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. (forthcoming 2015).

resources against those engaged in the production and distribution of prohibited substances,<sup>17</sup> it was not generally an appropriate use of scarce prosecutorial resources to pursue those operating in clear and unambiguous compliance with state medical marijuana laws.<sup>18</sup>

While the Ogden memo made clear that it was not to be read as a green light to the widespread distribution of marijuana in medical marijuana states,<sup>19</sup> many read it as exactly that. In Colorado and other states the number of storefront dispensaries exploded, growing from a handful to several hundred in just a matter of months.<sup>20</sup> United States Attorneys around the country responded to this explosive growth in varying ways. In Montana, the burgeoning industry was essentially shut down by enforcement actions.<sup>21</sup> Concerted action by California's four United States Attorneys shut down many dispensaries, leaving others in operation.<sup>22</sup> In Colorado, federal enforcement was largely limited to letters sent by the United States Drug Enforcement Administration to a number of dispensary owners informing them that they were prohibited from operating within 1,000 feet of schools.<sup>23</sup> If the Ogden memo was designed to give certainty and predictability to state

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17. The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department of Justice's efforts against narcotics and dangerous drugs. The Department's investigative and prosecutorial resources should be directed towards these objectives.

18. As a general matter, pursuit of these priorities should not focus federal resources in on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.

19. Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law. Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.

20. Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, in 89 DENV. U. L. REV. 977, 981 (2012) (charting the growth).

21. See, e.g., Matt Volz, *Montana's Medical Marijuana Industry Goes Down*, BUSINESS INSIDER, May 12, 2013, <http://www.businessinsider.com/montana-medical-marijuana-federal-crackdown-2013-5>.

22. See, e.g., Normitsu Onishi, *Cities Balk as Federal Law on Marijuana Is Enforced*, N.Y. TIMES, June 30, 2012, [http://www.nytimes.com/2012/07/01/us/hundreds-of-california-medical-marijuana-shops-close.html?\\_r=0](http://www.nytimes.com/2012/07/01/us/hundreds-of-california-medical-marijuana-shops-close.html?_r=0).

23. See, e.g., John Ingold, *Colorado Medical Pot Dispensaries to Get Letters from Feds Saying They're Too Close to Schools*, DENVER POST, Jan. 13, 2012, [http://www.denverpost.com/ci\\_19733017](http://www.denverpost.com/ci_19733017).

legislatures, marijuana practitioners, and patients throughout the nation, it came much closer to doing the opposite.

In June 2011, Ogden's successor, James Cole, wrote a follow-up to the Ogden memo, attempting to clarify the federal government's position with respect to marijuana reform in the states. Cole wrote that many had misinterpreted his predecessor's memo to signal a hands-off view from Main Justice.<sup>24</sup> The Cole memo, like its predecessor, distinguished between individual caregivers providing marijuana to their patients and those engaged in the commercial distribution of marijuana, even under the auspices of state law permitting such conduct. Only the former were meant to find solace in the Ogden memo; commercial manufacturers and distributors of marijuana continued to do so at their peril. Consistent with this distinction between true medical marijuana provisions and those permitting commercial distribution of the drug, Attorney General Eric Holder weighed in against California's adult-use initiative in 2010. Although the initiative had been ahead in the polls just weeks before the election, it failed to pass after Attorney General Holder's denouncement.<sup>25</sup> While the federal government had been mostly tolerant of the states' dalliance with medical marijuana, Attorney General Holder made clear that full legalization would cross a red line.

It was against this background that Colorado and Washington passed their legalization initiatives in 2012. This time, the federal government was silent as voters in those states considered legalization.<sup>26</sup> Almost immediately, the governors of both states appealed to the nation's capital for

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24. 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, at 2, *available at* <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf> ("The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.").

25. *See, e.g.*, John Hoeffel, *Holder Vows Fight Over Prop. 19*, L.A. TIMES, Oct. 16, 2010, <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016>.

26. I believe that President Obama's presence on the ballot in 2012, but not in 2010, was a large factor in federal silence during the later election cycle. The President could not risk alienating young voters in 2012 by coming out against marijuana legalization and was thus forced to remain silent as Washington, Oregon, and Colorado voted on legalization.

guidance. The Colorado and Washington initiatives called for the establishment of elaborate regulatory apparatuses for the licensing and regulation of marijuana producers and vendors. Before implementing these regimes, the governors of both states wanted assurances that the federal government would not be moving to undo their work. In particular, the states were concerned that the federal government might sue to enjoin the implementation of the regulatory regime as preempted by the CSA, similar to how it sued Arizona to prevent the implementation of its restrictive immigration bill in 2010.<sup>27</sup>

After months of waiting, the states finally received their answer on August 27, 2013. Deputy Cole announced that the Department of Justice would not be moving to block the implementation of recreational marijuana regulation in Colorado and Washington.<sup>28</sup> This second Cole memo noted the historical reality that nearly all marijuana enforcement is done at the local level.<sup>29</sup> While the federal government continues to have strong policy concerns about marijuana—e.g., the sale to minors, the diversion of marijuana between states, and the involvement of organized crime—it has generally left the enforcement of those priorities to the states:

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 regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those

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27. *Arizona v. United States*, 132 S. Ct. 2492, 2492 (2012).

28. See JAMES M. COLE, U.S. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., GUIDANCE REGARDING MARIJUANA ENFORCEMENT, Aug. 29, 2013, available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter Cole Memo II].

29. *Id.* at 2.



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. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.<sup>30</sup>

What Deputy Attorney General Cole set out, in other words, is a cooperative federalism approach to marijuana enforcement. The federal government announces its enforcement priorities and leaves it to the states to come up with a means of achieving those goals. Of course, the states do not have to regulate marijuana or otherwise change their laws in any way. The second Cole memo makes clear that the enforcement of the CSA remains the default option, either for those states that prefer it or for those states unable to address federal marijuana concerns. But those states that wish to tax and regulate marijuana—either for medical or adult use—will be left to their own devices so long as they can demonstrate that their regulations are achieving the federal goals.<sup>31</sup>

As I will make clear in my concluding Part, I believe that the policy behind the second Cole memo—giving the states an opportunity to come up with a marijuana policy fundamentally at odds with the CSA—is a laudable one. The next Part, however, points out remaining obstacles to the exercise of policy discretion in the states.

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30. *Id.* at 3.

31. *See id.* at 3 (“[P]revious guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution . . . . As explained above, however, both the existence of a strong and effective state regulatory system, and an operation’s compliance with such a system, may allay the threat that an operation’s size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department’s enforcement priorities listed above.”).

## II. A STEP IN THE RIGHT DIRECTION – BUT PROBLEMS REMAIN

By forestalling, at least for now, the threat of federal injunctive suit, the second Cole memo removed much of the uncertainty that has governed federal-state interaction in this area for the last five years. Although the memo was too long in coming, it made clear that the federal government would give the states an opportunity to prove themselves capable of managing the negative externalities of marijuana legalization, regulation, and taxation. As such, it is a positive, cooperative vision for the future of marijuana regulation in this country.<sup>32</sup>

But the second Cole memo did not—and no similar memorandum could—remove the ancillary consequences of marijuana remaining a Schedule I narcotic under the CSA. As marijuana-law reform moves from a focus on medical use to an increasing emphasis on adult or recreational use, it confronts the consequences of marijuana’s continuing federal prohibition. This Part sets forth some of the principal problems caused by marijuana’s continued prohibition before turning to a solution in the next Part.

### A. *Consequences for the Industry*

#### 1. Contracting

Because marijuana remains illegal at the federal level, much of the predictability that comes from enforceable contracts is unavailable to marijuana practitioners. In 2012, for example, an Arizona state court refused to enforce a loan agreement between two Arizona residents and a Colorado marijuana dispensary on the basis that the contract was void as against public policy.<sup>33</sup> Although this ruling had the effect of

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32. The recent federal-state crackdown on selected marijuana dispensaries and grow operations in Colorado is not evidence to the contrary. See Jeremy P. Meyer, et al., *Fed Raids on Colorado Marijuana Businesses Seek Ties to Colombian Drug Cartels*, DENVER POST, Nov. 22, 2013, [http://www.denverpost.com/breakingnews/ci\\_24580571/fed-raids-colorado-marijuana-businesses-seek-ties-colombian](http://www.denverpost.com/breakingnews/ci_24580571/fed-raids-colorado-marijuana-businesses-seek-ties-colombian). The federal government has indicated that these raids were brought against those believed to be out of compliance with state law. See Ana Campoy & Andrew Grossman, *Crime-Link Concerns Triggered Raids of Marijuana Businesses*, WALL ST. J., Nov. 30, 2013, <http://online.wsj.com/news/articles/SB10001424052702303332904579228200231126242/>.

33. *Hammer v. Today’s Health Care II*, CV2011-051350 (Apr. 17, 2012) (“The

providing a windfall to the illegally-operating dispensary, the court felt itself without recourse; so long as the trafficking of marijuana remains illegal under federal law, contracts designed to facilitate that conduct remain void. This result reminds us why the enforceability of contracts is important not just to the parties but to society more generally. When those who have loaned \$500,000 (the amount in issue in the Arizona case) to a cash business find themselves without recourse to the courts, they might be tempted to engage in what the law euphemistically refers to as “self-help.” Everyone is better off when contracts are enforced by courts rather than by individuals with an ax to grind.

## 2. Banking

Marijuana businesses are also currently denied one of the most basic of business needs: access to banking services. As has been widely reported,<sup>34</sup> threats of money-laundering prosecution from the federal government<sup>35</sup> have made banks gun-shy about lending to marijuana businesses. Currently, in Colorado, no bank will do business with marijuana businesses.<sup>36</sup> There are many negative consequences of withholding banking services from marijuana businesses. Principally, the lack of banking services keeps marijuana businesses operating in the shadows of society. As cash businesses, they are targets for violent crime. Faced with this ever-present threat, marijuana business operators are left with

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explicitly stated purpose of these loan agreements was to finance the sale and distribution of marijuana. This was in clear violation of the laws of the United States. As such, this contract is void and unenforceable.”).

34. See, e.g., Ashley Southall, *Answers Sought for When Marijuana Laws Collide*, N.Y. TIMES, Sept. 13, 2013, <http://www.nytimes.com/2013/09/11/us/answers-sought-for-when-marijuana-laws-collide.html>.

35. See Memorandum from James M. Cole, U.S. Dep’t of Justice, Off. of the Att’y Gen., Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 2 (June 29, 2011), available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf> (“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.”).

36. See, e.g., John Ingold, *Last Bank Shuts Doors on Colorado Pot Dispensaries*, DENVER POST, Oct. 1, 2010, [http://www.denverpost.com/ci\\_19016660](http://www.denverpost.com/ci_19016660).

a Hobson's choice: they can either remain cash businesses and accept the risk and stigma that comes with that, or they can attempt to bank surreptitiously, through the use of their personal accounts or holding companies designed to purge the taint of marijuana transactions. These latter options, of course, open practitioners to the same threat of money-laundering charges that led to the unavailability of banking services in the first place. The governors of Colorado and Washington appealed to the federal government for assistance with this problem,<sup>37</sup> and in February of 2014 the Department of Justice and the Department of Treasury's Financial Crimes Enforcement Network released memos purporting to permit banks to do business with those in the marijuana industry.<sup>38</sup> However, the banking memos, like the second Cole memo which preceded it, stopped short of removing the specter of future enforcement actions.<sup>39</sup> One leading bank official was immediately quoted as saying, "We're still not going to bank them."<sup>40</sup>

### 3. Legal Services

The legal minefield described in the previous Section calls out for experienced legal counsel to help marijuana practitioners negotiate the complicated, ever-changing web of marijuana rules and regulations. Marijuana's continuing illegality makes the provision of these legal services particularly fraught, however. As long as marijuana remains a prohibited substance—and as long as the CSA continues to criminalize those who aid and abet marijuana distribution or

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37. Letter from John W. Hickenlooper, Governor of Colo. & Jay Inslee, Governor of Wash., to Jacob Lew, Sec'y of the Treasury, et al. (Oct. 2, 2013), available at <http://alturl.com/a6rmy>.

38. See, e.g., Evan Perez, *Banks Cleared to Accept Marijuana Business*, CNN (Feb. 17, 2014), <http://www.cnn.com/2014/02/14/politics/u-s-marijuana-banks/index.html>.

39. *Id.* ("The guidance falls short of the explicit legal authorization that banking industry officials had pushed the government to provide."); David Migoya & Allison Sherry, *Banks Given the Go-Ahead on Working with Marijuana Businesses*, DENVER POST, Feb. 17, 2014, [http://www.denverpost.com/business/ci\\_25143792/feds-give-historic-green-light-banks-working-marijuana](http://www.denverpost.com/business/ci_25143792/feds-give-historic-green-light-banks-working-marijuana) ("Bankers were less-than-tepid while the marijuana industry reacted enthusiastically to the announcement, acknowledging the allowance for critical business services, but reiterating how an act of Congress will settle the question.").

40. *Id.*

join in a conspiracy to distribute it—lawyers who assist their marijuana clients in setting up or running marijuana businesses necessarily put themselves at risk. Although the second Cole memo declares that states decriminalizing marijuana would generally be permitted to enforce marijuana laws themselves, the specter of federal prosecution of marijuana lawyers for aiding and abetting the illegal conduct of their clients continues to loom.

Model Rule of Professional Conduct 1.2(d)<sup>41</sup> and its state analogs prohibit attorneys from knowingly facilitating criminal conduct. A literal reading of that rule would preclude a lawyer from providing any assistance—e.g., drafting contracts, negotiating leases—to clients whom the attorney knows are engaged in on-going violations of the CSA. In fact, there is a split of authority among those states that have considered whether providing legal services to the marijuana industry violates a lawyer's obligations under the rules of professional responsibility.<sup>42</sup> Colorado, having previously found such conduct to violate its state ethics rules,<sup>43</sup> later amended those

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41. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2013) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

42. See Me. Prof'l Ethics Comm'n, Formal Op. 199 (2010), *available at* [http://www.maine.gov/tools/whatsnew/index.php?topic=mebar\\_overseers\\_ethics\\_opinions&id=110134&v=article](http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=110134&v=article) ("Where the line is drawn between permitted and forbidden activities needs to be evaluated on a case by case basis. Bar Counsel has asked for a general opinion regarding the kind of analysis which must be undertaken. We cannot determine which specific actions would run afoul of the ethical rules. We can, however, state that participation in this endeavor by an attorney involves a significant degree of risk which needs to be carefully evaluated."); State Bar of Ariz., Formal Op. 11-01 (2011), *available at* <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710> ("A lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act ("Act"), despite the fact that such conduct potentially may violate applicable federal law."); *see also* Colo. Ethics Comm., Formal Op. 125 (2013), *available at* [http://www.cobar.org/tcl/tcl\\_articles.cfm?articleid=8370](http://www.cobar.org/tcl/tcl_articles.cfm?articleid=8370) ("Colorado is one of a handful of states conducting an experiment in democracy: the gradual decriminalizing of marijuana. The Committee notes that, as a consequence of COLO. RPC 1.2(d) as written, Colorado risks conducting this experiment either without the help of its lawyers or by putting its lawyers in jeopardy of violating its rules of professional conduct.").

43. State Bar of Colo., Formal Op. 125, *The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities* (adopted Oct. 21, 2013; Addendum dated Oct. 21, 2013), *available at* <http://www.cobar.org/repository/>

rules to explicitly permit lawyers to serve marijuana industry clients.<sup>44</sup>

As I have argued elsewhere, I believe that other, countervailing policy considerations argue against such a literal reading of Rule 1.2(d) and its state-law equivalents.<sup>45</sup> Because states that are legalizing marijuana—either for medical patients or for adult users—are creating a complex regulatory apparatus, fairness requires the assistance of lawyers in navigating that system. Without the assistance of competent counsel, a state regulatory regime becomes a trap for the unwary. Furthermore, denying competent legal counsel to those engaged in the marijuana industry can have profound distributive effects. Powerful actors will be able either to secure legal assistance or to proceed without it; those without the same means will necessarily be disadvantaged and subject to considerable risk. Nonetheless, marijuana’s continuing federal illegality means that attorneys may be unwilling to serve those who are in critical need of legal services.

### *B. Consequences for Marijuana Users*

While negative externalities discussed above primarily affect marijuana practitioners, the consequences are no less profound for those simply wishing to consume marijuana in compliance with their state’s laws. These consequences are real and will persist so long as marijuana remains prohibited by the CSA; promises from the federal government to let the states

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Ethics/FormalEthicsOpion/FormalEthicsOpinion\_125\_2013.pdf (“[U]nless and until there is a change in applicable federal law or in the Colorado Rules of Professional Conduct, a lawyer cannot advise a client regarding the full panoply of conduct permitted by the marijuana amendments to the Colorado Constitution and implementing statutes and regulations. To the extent that advice were to cross from advising or representing a client regarding the consequences of a client’s past or contemplated conduct under federal and state law to counseling the client to engage, or assisting the client, in conduct the lawyer knows is criminal under federal law, the lawyer would violate Rule 1.2(d).”).

44. See COLO. RULES OF PROF’L CONDUCT, Rule 1.2, cmt. 14 (“A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.”).

45. See Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 917–18 (2013).

take the lead in marijuana enforcement simply do not undo the consequences of federal prohibition.

### 1. Employment

Currently, one of the biggest impediments to the legalization of marijuana in the states is the fact that those who test positive for marijuana can lose their employment even if their conduct is entirely consistent with state law. In Colorado, both state<sup>46</sup> and federal courts<sup>47</sup> have held that Colorado's "lawful off-duty conduct" statute does not govern the consumption of marijuana. Because the possession of marijuana remains illegal under federal law, these courts have reasoned that consuming marijuana is not "lawful" conduct, even if it does not violate state law. Furthermore, the Colorado courts have concluded that an individual fired for testing positive for marijuana is ineligible for unemployment benefits under the same reasoning, even if that individual is a marijuana patient acting in compliance with state law.<sup>48</sup>

### 2. Probation/Parole

Similarly, state courts have used marijuana's continuing illegality at the federal level to deny otherwise qualified criminal defendants probation or parole.<sup>49</sup> Because it is generally a standard condition of supervised release—either following a term of imprisonment or in lieu of one—that the defendant agree to commit no new offenses during the period of

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46. *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 150–51 (Colo. App. 2013).

47. *Curry v. MillerCoors, Inc.*, No. 12-cv-02471-JLK, 2013 WL 449430712,\*6 (D. Colo. Aug. 21, 2013).

48. *See Beinor v. Indus. Claims Appeal Office*, 262 P.3d 970, 974–75 (Colo. App. 2011) ("We conclude that the medical use of marijuana by an employee holding a registry card under amendment XVIII, section 14 is not pursuant to a prescription, and therefore does not constitute the use of 'medically prescribed controlled substances' within the meaning of section 8-73-108(5)(e)(IX.5). Accordingly, the presence of medical marijuana in an individual's system during working hours is a ground for a disqualification from unemployment benefits under that section.").

49. *See, e.g., People v. Watkins*, 282 P.3d 500, 502–03 (Colo. App. 2012) (finding that a trial judge must make it a condition of probation that a probationer commit no new offenses and that, because the possession and use of marijuana remain illegal at the federal level, such possession or use constitutes a new offense notwithstanding state law to the contrary).

release,<sup>50</sup> courts have held that a defendant's positive test for marijuana permits his re-arrest. Unless or until legislatures in marijuana states make explicit provision for marijuana use consistent with state law,<sup>51</sup> the federal prohibition will continue to cast a shadow over the availability of supervised release for those using marijuana either medically or recreationally.

### 3. Public Services Generally

A number of other public benefits, from public housing to student loans to government employment, are conditioned on the recipient's abstinence from illegal-drug use. For example, the federal program that helps fund local public housing agencies (PHAs) forbids those agencies from admitting into public housing facilities families that include members who use marijuana.<sup>52</sup> While PHAs have the discretion not to *evict* residents who use medical marijuana,<sup>53</sup> that discretion does not extend to *admitting* marijuana users into public housing even where their use is compliant with state law. A single medical marijuana patient, in other words, can make an entire

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50. See, e.g., COLO. REV. STAT. ANN. § 18-1.3-204(1) (West 2013) (“[T]he court shall provide as [an] explicit condition[ ] of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation.”).

51. See, e.g., CAL. HEALTH & SAFETY CODE § 11362.795(a) (West 2004) (“(1) Any criminal defendant who is eligible to use marijuana pursuant to section 11362.5 may request that the court confirm that he or she is allowed to use medical marijuana while he or she is on probation or released on bail. (2) The court’s decision and the reasons for the decision shall be stated on the record and an entry stating those reasons shall be made in the minutes of the court. (3) During the period of probation or release on bail, if a physician recommends that the probationer or defendant use medical marijuana, the probationer or defendant may request a modification of the conditions of probation or bail to authorize the use of medical marijuana. (4) The court’s consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.”).

52. See, e.g., Memorandum from Helen R. Kanovsky, Office of the Gen. Counsel, U.S. Dep’t of Hous. & Urban Dev., to John Trasvina, Assistant Sec’y for Fair Hous. & Equal Opportunity, U.S. Dep’t of Hous. & Urban Dev., et al. (Jan. 20, 2011) (“PHAs and owners must deny *admission* to those applicant households with individuals who are, at the time of consideration for admission, using medical marijuana.”) (on file with author).

53. See *id.* (“[W]hile PHAs and owners may elect to terminate occupancy based on illegal drug use, they are *not* required to evict current tenants for such use.”).



family ineligible to receive public housing, as long as marijuana remains illegal under federal law.

#### 4. Conclusion

This non-exhaustive list of examples of consequences makes clear that the continued prohibition of marijuana at the federal level leads to unsettled expectations, not just for those trying to make a living in the marijuana industry but also for those who would take advantage of state laws permitting marijuana use. Deputy Attorney General Cole stated that federal policy is to let states achieve federal goals through the taxing and regulation of marijuana rather than state-level prohibition, but the criminality of marijuana at the federal level makes such experimentation essentially impossible in practice. The following Part proposes a cooperative federalism approach to marijuana regulation. If states that wish to opt out of the CSA are permitted to do so, if that law simply does not apply within those states, then they will truly be able to function as laboratories of ideas with regard to marijuana regulation and taxation.

### III. A SOLUTION: MAKING THE SECOND COLE MEMO LAW

The second Cole memo is a cooperative step toward solving the apparent contradiction created when states legalize a drug that the federal government continues to prohibit. This concluding Part sketches a solution that I hope to expand upon in a later article.<sup>54</sup> I propose that Congress amend the CSA in a manner that allows states to opt out of its marijuana provisions. The federal government has already set forth the criteria to be used in determining whether a state is regulating marijuana in a manner consistent with federal priorities. Under this approach, Congress would authorize the Attorney General, or some other executive official, to certify that a state is regulating marijuana in a manner consistent with federal priorities.<sup>55</sup> Upon certification, the state's regulations would

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54. See Kamin et al., *supra* note 16.

55. As will be more fully explained in the later article, the proposal that I suggest herein bears a close similarity to existing federal programs. For example, the Clean Air Act calls on the states to submit to the federal government an air quality implementation plan. See 42 U.S.C. § 7410(a)(1) (2012). If the federal

become the sole regulations governing marijuana within that state. Those state provisions, rather than the CSA, would then apply to the manufacture, distribution, and use of marijuana.<sup>56</sup>

While this approach might closely resemble the status quo in which states are allowed to experiment with marijuana legalization so long as they keep in mind and help achieve federal goals, it has one crucial difference. Under the current approach, states are allowed to experiment with marijuana law reform through an act of prosecutorial grace. Those using, selling, or manufacturing marijuana under state law are not subject to criminal prosecution simply because federal prosecutors have chosen not to prosecute them. This decision can be undone by yet another memo. A newly elected president may chart a new policy course or may invoke the wiggle-room written into the second Cole memo. Thus, those using or selling marijuana pursuant to state law could be arrested and prosecuted without any change in federal law.

But more than that, the problem with the status quo is that marijuana possession, manufacture, and distribution remain illegal under the second Cole memo. Even if the government keeps its promise not to intervene in states that have enacted robust marijuana regulations, the continuance of federal marijuana prohibition has a profound effect in those states. Only by making marijuana truly legal in those states, by allowing qualified states to opt out of the CSA, can the

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government does not receive or does not approve the plan submitted by the state, it is authorized to implement its own plan. *See id.* § 7410(c)(1). Similarly, under the proposal I suggest, the Attorney General or her designee will have the authority to apply the CSA to a state or accept a state plan for regulating marijuana.

56. In this way, our proposal looks similar to United States Congresswoman Diana DeGette's proposal. *See* H.R. 964, 113th Cong. (2013). The principal difference is that Congresswoman DeGette's bill speaks only to preemption, not to the coverage of the CSA; it gives states the power to enact their own regulations, but it does not preclude the enforcement of federal law within marijuana legalization states. Similarly, Professor Mark Kleiman has suggested a number of possible law reforms, including changing federal policy to defer to state lawmaking. *See, e.g.,* Mark A.R. Kleiman, *Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization*, 6 J. DRUG POL'Y ANALYSIS 1 (2013). Our paper will argue that only one of Kleiman's many suggestions—the issuance of waivers to states who meet set federal criteria—solves the problems identified above. Furthermore, Kleiman's concern about the establishment of criteria for the issuing of waivers is largely satisfied by the fact that the second Cole memo has since established a valid set of such criteria.

states truly be empowered to chart their own policy direction.