



2013

Joins or the Joint: Colorado and Washington Square Off Against the United States

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Recommended Citation

Michael Vitiello, Joins or the Joint: Colorado and Washington Square Off Against the United States, 91 Or. L. Rev. 1009 (2013).

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Joints or the Joint: Colorado and Washington Square Off Against the United States

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INTRODUCTION

Over the past several years, many commentators, including myself, have predicted that we are on the road to legalizing marijuana.¹ More recently, with the passage of initiatives in Colorado and Washington “legalizing”² marijuana, headlines in the mainstream media have echoed that view. For example, a CNN headline touted those initiatives as “the biggest victory ever for the legalization

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¹ E.g., *The Washington Legislature Should Legalize Marijuana*, SEATTLE TIMES (Feb. 18, 2011, 2:37 PM), http://seattletimes.nwsourc.com/html/editorials/2014270472_edit20_legal.html; see also Michael Vitiello, *Why the Initiative Process is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215*, 43 MCGEORGE L. REV. 63, 63 (2012) [hereinafter Vitiello, *Lessons*].

² I place “legalizing” in quotation marks for a reason. Despite confusion among non-lawyers, states cannot preempt federal law and so, while states may no longer criminalize possession or distribution of marijuana, they are not legalizing it. Even possession of small amounts of marijuana remains a violation of federal law, albeit a crime not likely to be enforced by federal authorities.

movement.”³ The *Wall Street Journal* ran a headline asking “Reefer Madness or Investment Opportunity?”⁴ with a clear implication that marijuana may provide a lucrative investment opportunity.

Several factors point towards legalization. But any discussion of legalization of marijuana must begin with a discussion of the role of the federal government. Only if the federal government acquiesces in state reforms will marijuana become legal. And watching the federal government deal with the question of legalization may not inspire confidence that legalization is on the near horizon.

Most recently, for example, during the 2008 presidential campaign, then-candidate Barack Obama signaled a gentler approach to legitimate medical marijuana dispensaries.⁵ Attorney General Eric Holder’s statements,⁶ seemingly implementing that policy in 2009, led to a flood of medical marijuana facilities in states that had medical marijuana laws in place. Nowhere was the process more dramatic than in California.⁷

Since 2009, the federal government seemingly has reversed field with various strong-armed tactics. For example, federal authorities have conducted more raids of dispensaries than under the Bush administration,⁸ they have threatened building owners with forfeiture

³ Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNN MONEY (Nov. 8, 2012, 11:46 AM), <http://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html>.

⁴ Paul Vigna, *Market Hub: Reefer Madness or Investment Opportunity?*, WALL ST. J. (Nov. 13, 2012, 1:10 PM), <http://blogs.wsj.com/marketbeat/2012/11/13/market-hub-reefer-madness-or-investment-opportunity/>.

⁵ See M. Alex Johnson, *DEA to Halt Medical Marijuana Raids*, NBC NEWS (Feb. 27, 2009, 5:42 PM), http://www.msnbc.msn.com/id/29433708/ns/health-health_care/ (“‘My attitude is if the science and the doctors suggest that the best palliative care and the way to relieve pain and suffering is medical marijuana, then that’s something I’m open to,’ Obama said in November 2007 at a campaign stop in Audubon, Iowa. ‘There’s no difference between that and morphine when it comes to just giving people relief from pain.’”).

⁶ *Id.* (summarizing Attorney General Holder’s statement that “the Drug Enforcement Agency would end its raids on state-approved marijuana dispensaries”).

⁷ See Ryan Grim & Ryan J. Reilly, *Obama’s Drug War: After Medical Marijuana Mess, Feds Face Big Decision On Pot*, HUFFINGTON POST (Jan. 26, 2013, 11:18 AM), http://www.huffingtonpost.com/2013/01/26/obamas-drug-war-medical-marijuana_n_2546178.html (stating that the number of California medical marijuana shops grew “at an exponential rate” because of the change in federal policy).

⁸ Tim Dickinson, *Obama’s War on Pot*, ROLLING STONE (Feb. 16, 2012, 9:55 AM), <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216> (“But over the past year, the Obama administration has quietly unleashed a multiagency crackdown on medical cannabis that goes far beyond anything undertaken by George W. Bush.”).

if the owners rent to dispensaries,⁹ and the IRS has invoked Reagan-era legislation that disallows drug dealers to take ordinary business expenses.¹⁰ The latter strategy seemingly shuts down “legitimate” dispensaries trying to conform to the law.¹¹

But then, with the exception of a brief period during the Carter administration,¹² the federal response to legalization of marijuana has been hard-lined.¹³ The federal government has aggressively litigated against efforts to reschedule marijuana¹⁴ and continues to do so today.¹⁵

In light of continued federal intransigence, are efforts to legalize marijuana doomed to failure, at least in the near term? That is the subject of this Article. Part I briefly reviews recent developments in Colorado and Washington with passing reference to the national trends that seem to point towards legalization. Part II focuses on the federal response during the Obama administration. Part III addresses my core thesis: despite what appears to be a sharp reversal of policy and an aggressive overreaction to the expansion of the medical marijuana trade, one may be able to explain that reaction by focusing on unique aspects of California’s handling of medical marijuana where, in effect, anarchy has reigned. That section compares the federal response in Colorado, where medical marijuana has been more carefully regulated. I then explore some of the specific aspects of Colorado and Washington’s initiatives and ask whether their laws may make it easier for the Obama administration to allow more room for state law to function as the voters intended. In that discussion, I also consider some of the political calculations that may be at play in

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (stating that an obscure provision in the tax code allowed the IRS to target Harborside Health Center, which is considered “one of the largest and most respected providers of medical cannabis in California”).

¹² *Social History of Marijuana*, MASSCANN/NORML, <http://masscann.org/education/social-history-of-marijuana> (last visited Mar. 26, 2013) (describing the Carter administration’s efforts to decriminalize marijuana).

¹³ *Id.* (discussing the various federal statutes passed to combat marijuana use).

¹⁴ See *Marijuana Scheduling Petition; Denial of Petition*, 54 Fed. Reg. 53,767, 53,772–73 (Dec. 29, 1989) (“This agency, and the Government as a whole, would be doing the public a disservice by concluding that this complex psychoactive drug with serious adverse effects has a medical use based upon anecdotal and unreliable evidence.”).

¹⁵ *Ams. for Safe Access v. Drug Enforcement Admin.*, No. 11-1265, slip op. at 2 (D.C. Cir. 2013).

the Obama administration's formulation of its policy in dealing with Colorado and Washington's initiatives.

I REACHING THE POT OF GOLD?

Obviously, participants in this Symposium are aware of developments in Colorado and Washington, where voters approved initiatives in the fall 2012 election. In Colorado, Assembly Bill 64 allows anyone over twenty-one years old to buy up to one ounce of marijuana from a regulated dispensary or to grow up to six marijuana plants at home.¹⁶ Washington's statute from Initiative 502 similarly allows individuals who are twenty-one years old or older to possess a small amount of marijuana, although it does not allow individuals to grow marijuana (unless for medical use under its already existing medical marijuana law).¹⁷ Further, it limits sales to state-authorized growers and sellers.¹⁸ As developed below, quite importantly, both initiatives referred implementation of the initiatives to state government rather than attempting to create the framework before the election.¹⁹ The Colorado law left implementation to a task force to be created by the Governor;²⁰ Washington left the job to its Liquor Control Board.²¹

In the aftermath of last fall's election, many commentators weighed in concerning what the Colorado and Washington initiatives presage for efforts to legalize marijuana. They focused on President Obama's statements about having "bigger fish to fry" when he referred to the initiatives,²² various polls indicating increasing support

¹⁶ *Amendment 64: The Regulate Marijuana Like Alcohol Act of 2012*, CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL, <http://www.regulatemarijuana.org/s/regulate-marijuana-alcohol-act-2012> (last visited Apr. 9, 2013) [hereinafter *Amendment 64*].

¹⁷ WASH. REV. STAT. ANN. §§ 69.50.331(a)(1), 69.50.412(1), 69.51A.040(1)(a) (West, Westlaw through 2013 legislation).

¹⁸ *Id.* § 69.50.339.

¹⁹ See discussion *infra* Part IV.A.

²⁰ See Press Release, Amendment 64 Implementation Task Force, Amendment 64 Implementation Task Force Presents Its Report to Colorado Governor, Gen. Assembly and Attorney Gen. (Mar. 13, 2013) (on file with author).

²¹ Initiative Measure No. 502 (filed July 8, 2011), available at <http://www.newapproachwa.org/sites/newapproachwa.org/files/1-502%20bookmarked.pdf>.

²² Rachel Weiner, *Obama: I've Got 'Bigger Fish to Fry' Than Pot Smokers*, WASH. POST (Dec. 14, 2012, 8:35 AM), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/12/14/obama-ive-got-bigger-fish-to-fry-than-pot-smokers/>.

favoring legalization of marijuana,²³ changing demographics,²⁴ and the economic opportunity that some investors see in the marijuana trade.²⁵ Even before the 2012 election, commentators also pointed to the interest in taxing marijuana as a factor that may lead to its legalization.²⁶

Predicting that the United States will legalize marijuana in our lifetimes seems like a safe bet. Similar to the sea shift towards same-sex marriage, demographic shifts favor legalization.²⁷ With regard to marijuana, consider how the entertainment industry has changed its treatment of marijuana in my lifetime. By the time I saw *Reefer Madness*²⁸ in the late 1960s, many young people may have thought it was “camp,” but many other Americans did not. Legislators and law enforcement agencies certainly treated eradication of marijuana as a worthy goal with dramatically increased criminal sentences and vigorous enforcement of those provisions.²⁹ Fast-forward to my children’s generation: they have been raised on films like *The Big Lebowski*³⁰ and *Pineapple Express*.³¹ Even sports fans have seen “Crash” Davis and Annie Savoy smoking pot in the love scene in *Bull*

²³ Nate Cohn, *Marijuana: A Winning GOP Issue?*, NEW REPUBLIC (Dec. 8, 2012), <http://www.newrepublic.com/blog/electionate/110803/marijuana-poised-become-new-social-issue> (stating that surveys show “47 to 51 percent of Americans supporting legalization”).

²⁴ *Id.* (“The rise of the millennial generation—not persuasion of older voters—is primarily responsible for marijuana’s growing strength in national polls.”).

²⁵ Vigna, *supra* note 4 (focusing on “several small-cap stocks that stand to gain from marijuana’s growing acceptance”).

²⁶ See, e.g., Lawrence Goodwin, *Legalizing Marijuana, Hemp Could Increase Tax Revenue, Add Jobs*, DAILY GAZETTE (Feb. 20, 2011), http://www.dailygazette.com/news/2011/feb/20/0220_goodwin/ (discussing the various ways legalizing marijuana would boost the nation’s economy).

²⁷ Ariel Edwards-Levy, *Voters Back Legal Marijuana Usage, Divided Over Gay Marriage: Poll*, HUFFINGTON POST (Dec. 5, 2012, 12:43 PM), http://www.huffingtonpost.com/2012/12/05/marijuana-poll-support_n_2243353.html (stating that polls show the general public is becoming more accepting of both legalization of marijuana and gay marriage).

²⁸ REEFER MADNESS (George A. Hirliman Productions 1936).

²⁹ *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> (last visited Apr. 9, 2013) (describing the Nixon administration’s declaration of the “war on drugs” and its placement of marijuana in the Schedule One category, as well as the massive increase in rates of incarceration for non-violent drug offenses under the Reagan administration).

³⁰ THE BIG LEBOWSKI (Working Title Films 1998).

³¹ PINEAPPLE EXPRESS (Columbia Pictures 2008).

Durham.³² Perhaps not surprisingly, young people support legalization of marijuana by a large majority.³³ This demographic shift led one commentator to write a piece in *The New Republic* entitled, "Marijuana: A Winning GOP Issue?"³⁴

Traditional conservatives can get behind legalization efforts based on long-held principles like personal choice.³⁵ Further, as indicated in a *Wall Street Journal* article after the 2012 election, some business people see investment in marijuana as a good business activity.³⁶ That attitude was evident several years ago in Montana, where a newly elected conservative legislature backed repeal of the state's medical marijuana law.³⁷ Not all conservatives or Republicans agreed. For example, the mayor of Bozeman argued against repeal by pointing to the investment that entrepreneurs had already made in his city and to the jobs that resulted from the medical marijuana industry.³⁸

Similarly, many cities in California—notably Oakland—have seen the medical marijuana trade as an important source of tax revenue.³⁹ Despite economic recovery in many sectors, the public sector still remains mired in economic trouble with shrinking state budgets and the continued loss of jobs.⁴⁰ Despite a minor countertrend in

³² BULL DURHAM (The Mount Company 1988).

³³ Edwards-Levy, *supra* note 27 ("Two thirds of voters under age 30, and 59 percent of men, favor legalization, while 52 percent of women oppose it. Those over the age of 65 were mostly in opposition, with just 35 percent supporting legalization.").

³⁴ Cohn, *supra* note 23.

³⁵ See Peter de Marneffe, *Do We Have the Right to Use Drugs*, 10 PUB. AFF. Q. 229, 229 (1996) (presenting a case that drug control laws violate individual rights).

³⁶ See, e.g., Vigna, *supra* note 4.

³⁷ Kirk Johnson, *In Montana, an Economic Boom Faces Repeal Effort*, N.Y. TIMES, Mar. 5, 2011, http://www.nytimes.com/2011/03/06/us/06marijuana.html?pagewanted=1&_f=0&ref=us ("In the Legislature, a resurgent Republican majority elected last fall is leading a drive to repeal the six-year-old voter-approved statute permitting the use of marijuana for medical purposes, which opponents argue is promoting recreational use and crime.").

³⁸ *Id.* ("In Bozeman, a college and tourism town north of Yellowstone National Park, construction jobs and tax collections dried up just as the marijuana business was blossoming; residents and politicians here say the interconnection of economics and legal drugs would be much more complicated to undo.").

³⁹ Michael Cooper, *Struggling Cities Turn to a Crop for Cash*, N.Y. TIMES, Feb. 11, 2012, <http://www.nytimes.com/2012/02/12/us/cities-turn-to-a-crop-for-cash-medical-marijuana.html>.

⁴⁰ See *id.* (discussing how medical marijuana is "a small but growing source of new tax collections for cities and states that have been struggling to balance their budgets for more than four years").

California,⁴¹ many Americans are not in the mood to pay higher taxes.⁴² That increases the appeal at least to some legislators and voters to legalize and tax marijuana.⁴³

Successful medical marijuana entrepreneurs may also provide the capital to secure legislative reforms. Many medical marijuana backers resist legalization and have opposed reform efforts.⁴⁴ Their goals may differ. For example, some medical marijuana advocates truly believe in the health benefits of marijuana and see their cause as tainted by those interested in recreational use.⁴⁵ But overlap exists between those who have backed medical marijuana and who favor legalization. Early proponents of California's medical marijuana law were sometimes open in admitting that their ultimate goal was legalization.⁴⁶ And surely users of medical marijuana include large numbers of recreational users. As one commentator noted, after Colorado legalized medical marijuana, the state went from the healthiest in the nation to one with thousands of mostly young adults in need of medical "treatment."⁴⁷

Without being unduly cynical, one must recognize that changing any law almost always requires cash. Until the widespread medical

⁴¹ See *Voters Approve Brown's Tax Measure, Proposition 30, AP Says*, L.A. TIMES (Nov. 7, 2012, 4:03 AM), <http://latimesblogs.latimes.com/california-politics/2012/11/brown-tax-measure-proposition-30-early-results.html> (describing Proposition 30 as a measure to increase state sales tax, as well as income taxes on the wealthy).

⁴² Eduardo Porter, *America's Aversion to Taxes*, N.Y. TIMES, Aug. 14, 2012, <http://www.nytimes.com/2012/08/15/business/economy/slipping-behind-because-of-an-aversion-to-taxes.html> ("Excluding Chile and Mexico, the United States raises less tax revenue, as a share of the economy, than every other industrial country.").

⁴³ See Robert Long, *Bill to Legalize, Tax Marijuana in Maine Gains 35 Co-Sponsors*, BANGOR DAILY NEWS (Mar. 27, 2013, 3:30 PM), <http://bangordailynews.com/2013/03/27/politics/bill-to-legalize-tax-marijuana-in-maine-gains-35-co-sponsors/>; Yuxing Zheng, *Oregon Lawmakers Consider Legalizing, Taxing Marijuana as Pot Advocates Ponder 2014 Ballot Initiative*, THE OREGONIAN (Mar. 18, 2013, 8:16 PM), http://www.oregonlive.com/politics/index.ssf/2013/03/oregon_lawmakers_consider_lega.html.

⁴⁴ Robin Hindry, *Medical Marijuana Advocates Oppose California Legalization*, HUFFINGTON POST (Sept. 21, 2010, 7:07 PM), http://www.huffingtonpost.com/2010/09/21/medical-marijuana-advocat_0_n_734063.html.

⁴⁵ See *id.* ("Critics [of a California proposition to legalize and regulate recreational marijuana] question the economic effects and contend the initiative will simply serve to boost marijuana usage and drug-related crimes.").

⁴⁶ Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 714–16 (1998) [hereinafter Vitiello, *Proposition 215*] (discussing broader motives behind a campaign in California that pushed to legalize marijuana for medicinal purposes).

⁴⁷ Gerald Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 MCGEORGE L. REV. 127, 130 (2012).

marijuana movement,⁴⁸ drug dealers and others who profited from illegal traffic were not interested in spending money to reform the law.⁴⁹ That seems to be changing as entrepreneurs see the possibility of high returns on investment if marijuana becomes legal.⁵⁰

Often proponents of legalization also point to the failed War on Drugs and the cost of those efforts as more support for reforming our drug laws.⁵¹ At least in some proponents' minds, states will need to spend less on law enforcement, jails, and prisons if states legalize marijuana.⁵²

As I have argued elsewhere, some of these goals may be in conflict. For example, increasing tax revenue from controlled sales may be possible only by maintaining a high level of enforcement of other marijuana laws to prevent black-market sales from eroding tax revenues.⁵³ But for now, these arguments seem to have traction and make discussion of legalization of marijuana worthwhile.

II

REACHING FOR FOOL'S GOLD?

Not so fast, Cheech! But for two brief periods since the 1930s, the federal government has demonstrated little flexibility with regard to the legalization of marijuana.⁵⁴

⁴⁸ See *18 Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited Apr. 9, 2013) (listing all states where medical marijuana is legal).

⁴⁹ No doubt, drug cartels and other dealers are not likely to favor legalization today. Undercutting drug cartels is often cited as a reason to legalize marijuana. Ioan Grillo, *Hit Mexico's Cartels with Legalization*, N.Y. TIMES, Nov. 1, 2012, <http://www.nytimes.com/2012/11/02/opinion/hit-mexicos-cartels-with-legalization.html>.

⁵⁰ Andrew Tangel, *Wall Street Sees Opportunity in Marijuana*, L.A. TIMES, Mar. 23, 2013, <http://articles.latimes.com/2013/mar/23/business/la-fi-0324-wall-street-marijuana-20130324>.

⁵¹ See, e.g., Richard Branson, *War on Drugs a Trillion-Dollar Failure*, CNN OPINION (Dec. 7, 2012, 6:05 PM), <http://www.cnn.com/2012/12/06/opinion/branson-end-war-on-drugs> ("The U.S. is the No. 1 nation in the world with illegal drug use. As with Prohibition, banning alcohol didn't stop people drinking—it just stopped people obeying the law.").

⁵² *Id.*

⁵³ Vitiello, *Lessons*, *supra* note 1, at 87–89 (discussing the possibility of drug cartels circumventing the tax system). For a detailed analysis of issues surrounding legal marijuana taxation, see generally Jonathan Caulkins et al., *High Tax States: Options for Gleaning Revenue from Legal Cannabis*, 91 OR. L. REV. 1041 (2013).

⁵⁴ The first federal law regulating marijuana was enacted in 1914. Harrison Narcotics Tax Act, ch.1, Pub. L. No. 233, 38 Stat. 785 (1914). But enforcement efforts ramped up under Harry J. Anslinger, who headed the Federal Bureau of Narcotics and "molded

Many commentators have written about early aggressive and discriminatory enforcement of marijuana laws, especially in the post-Prohibition era,⁵⁵ and the modern efforts of the government in spite of increased calls for legalization.⁵⁶

The first brief moment when the federal government seemed ready to reevaluate its position on marijuana occurred during Jimmy Carter's presidency. President Carter called for its decriminalization. Also during the Carter presidency, the government implemented a compassionate use program, allowing some seriously ill patients access to marijuana through a carefully controlled federal program.⁵⁷

Begun during Richard Nixon's presidency,⁵⁸ the War on Drugs proliferated during Ronald Reagan's presidency.⁵⁹ Penalties were increased, often with mandatory minimum sentences.⁶⁰ And those laws were enforced, often vigorously.⁶¹

Under federal drug laws, marijuana is categorized as a Schedule I drug, one for which there is no recognized medical benefit.⁶² The government has fought all efforts to reschedule marijuana. It fought early efforts of the National Organization for the Reform of Marijuana Laws (NORML) to do so. As I summarized elsewhere,

Litigation dragged on between 1972 and 1992, with drug enforcement agencies using various procedural maneuvers to prevent a hearing on the issue. Despite an administrative law judge's recommendation, the DEA administrator ruled against

America's drug policy." *History of U S Drug Policy*, STANFORD U., http://www.stanford.edu/class/e297c/poverty_prejudice/paradox/htele.html (last visited Apr. 9, 2013).

⁵⁵ See, e.g., Gregg A. Bilz, *The Medical Use of Marijuana: The Politics of Medicine*, 13 *HAMLIN J. PUB. L. & POL'Y* 117, 119–21 (1992).

⁵⁶ Grim & Reilly, *supra* note 7.

⁵⁷ Steve Chapman, *Medical Marijuana and its Witless Enemies*, CHI. TRIB. (Feb. 29, 2004), http://articles.chicagotribune.com/2004-02-29/news/0402290314_1_patients-and-suppliers-medical-marijuana-cannabis.

⁵⁸ *Timeline: America's War on Drugs*, NPR (Apr. 2, 2007, 5:56 PM), <http://www.npr.org/templates/story/story.php?storyId=9252490> (stating that Nixon "officially declare[d] a 'war on drugs'" in June of 1971).

⁵⁹ *Id.* (describing the Anti-Drug Abuse Act of 1986, signed into law by Reagan, which designated \$1.7 billion to the war on drugs).

⁶⁰ *Id.*

⁶¹ *Id.* Many commentators see the erosion of Fourth Amendment protections during the 1980s as a result of the war on drugs. See, e.g., Susan F. Mandiberg, *Marijuana Prohibition and the Shrinking of the Fourth Amendment*, 43 *MCGEORGE L. REV.* 23, 23 (2012).

⁶² *List of Controlled Substances*, DRUG ENFORCEMENT ADMIN., <http://www.dea.diversion.usdoj.gov/schedules/> (last visited Apr. 9, 2013).

reclassification. . . . [Every] president[] between Carter and Obama [has] pursued an aggressive War on Drugs, including marijuana.⁶³

More recent efforts to reschedule marijuana have been met with similar resistance by the federal government. Protracted litigation has ended recently with a federal court of appeals again upholding the Drug Enforcement Agency's (DEA) refusal to reschedule marijuana.⁶⁴

During the 2008 presidential campaign, candidate Obama gave supporters of legalization of marijuana hope when he stated that he would stop raids on "legitimate" medical marijuana dispensaries.⁶⁵ Shortly after the election, the Attorney General's office issued a memorandum seemingly implementing that promise.⁶⁶ Almost certainly, the government's "softer" approach led to rapid expansion of dispensaries in states with existing medical marijuana laws⁶⁷ and to passage of medical marijuana statutes elsewhere.⁶⁸

That was then. But what followed seems like a U-turn in administration policy. Notably, in California, marijuana providers opened hundreds of dispensaries, often in central business locations.⁶⁹ The Obama administration reacted forcefully. Under his administration, there have been more raids on marijuana dispensaries in California than there were under the Bush administration.⁷⁰ Federal government agents have threatened landlords with forfeiture of their

⁶³ Vitiello, *Lessons*, *supra* note 1, at 70.

⁶⁴ Mike Riggs, *Breaking: In Fight Over Marijuana's Scheduling, Appeals Court Rules in Favor of DEA and Schedule 1*, REASON (Jan. 22, 2013, 12:40 PM), <http://reason.com/blog/2013/01/22/in-fight-over-marijuans-scheduling-appea>.

⁶⁵ Johnson, *supra* note 5.

⁶⁶ Dickinson, *supra* note 8 ("The Ogden memo sent a clear message to the states: The feds will only intervene if you allow pot dispensaries to operate as a front for criminal activity.").

⁶⁷ *Id.* ("In California, which had allowed 'caregivers' to operate dispensaries, medical pot blossomed into a \$1.3 billion enterprise—shielded from federal blowback by the Ogden memo.").

⁶⁸ *See id.* ("States from New Mexico to Maine moved quickly to license and regulate dispensaries through their state health departments—giving medical marijuana unprecedented legitimacy.").

⁶⁹ *Id.*; *see also* Melissa Coker, *Feds Crack Down on Medical Marijuana Dispensaries*, SACRAMENTO PRESS (Oct. 12, 2011, 11:28 PM), http://www.sacramentopress.com/headline/58551/Feds_crack_down_on_medical_marijuana_dispensaries ("A new influx of dispensaries—including some large-scale, industrial marijuana cultivation centers with revenue projections in the millions of dollars—quickly caught the attention of the DOJ.").

⁷⁰ Lucia Graves, *Obama Administration's War on Pot: Oaksterdam Founder Richard Lee's Exclusive Interview After Raid*, HUFFINGTON POST (Apr. 18, 2012, 3:17 PM), http://www.huffingtonpost.com/2012/04/18/obama-war-on-weed-richard-lee-oaksterdam-raid_n_1427435.html.

property if they lease to dispensaries.⁷¹ They have invoked federal drug laws that heighten penalties when drug dealers sell drugs within proximity to schools.⁷² Finally, the Internal Revenue Service has pursued “legitimate” dispensaries.

The IRS’s position is especially threatening to states’ hopes of raising tax revenues. Reagan-era legislation makes it unlawful for drug dealers to deduct ordinary business expenses, including salaries paid to staff.⁷³ At least according to news reports, the IRS has targeted some of the most law-abiding dispensaries in California.⁷⁴ That stance, if upheld by the courts,⁷⁵ has a potentially perverse effect: dispensary owners most interested in complying with the law would be forced out of business, while those who are interested in using medical marijuana laws as a cover for drug trafficking may be able to remain in business.

Some observers express little surprise in the Obama administration’s shift in its position.⁷⁶ An outsider might conclude

⁷¹ David Downs, *Feds Threaten Forfeiture of Biggest Dispensary in America—Harborside Health Center*, SMELL THE TRUTH (July 11, 2012, 3:28 PM), <http://blog.sfgate.com/smellthetruth/2012/07/11/feds-threaten-forfeiture-of-biggest-dispensary-in-america-harborside-health-center/>.

⁷² See *id.* (“This latest federal action to seize property flies in the face of promises made by Haag to exclusively target dispensaries less than 1000 feet from a school, and recent statements from U.S. Attorney General Eric Holder, who stated that only those dispensaries out of compliance with state law would be subject to Federal enforcement actions.”).

⁷³ 26 U.S.C. § 280E (1982); see Steve Hargreaves, *Marijuana Dealers Get Slammed by Taxes*, CNN MONEY (Feb. 25, 2013, 3:17 PM), <http://money.cnn.com/2013/02/25/smallbusiness/marijuana-tax/index.html> (“It may have been effective against cocaine dealers and smugglers of other hard drugs, but the law now means purveyors of medical marijuana in the 18 states that have legalized the drug can’t take typical things like rent or payroll as a business expense.”).

⁷⁴ Dickinson, *supra* note 8. I have put “law-abiding” in quotation marks because anyone involved in the marijuana trade is violating federal law. But not all dispensaries are created equal: some appear to be fronts for the illegal trade, while others are run by individuals trying to conform to state law.

⁷⁵ *Contra* Nicole Flatow, *Largest U.S. Medical Marijuana Dispensary Beats Back Another Shutdown Attempt*, THINKPROGRESS (Jan. 8, 2013, 1:10 PM), <http://thinkprogress.org/justice/2013/01/08/1415311/largest-us-medical-marijuana-dispensary-beats-back-another-shutdown-attempt/> (describing a U.S. magistrate judge’s rejection of a landlord’s attempt to evict a marijuana dispensary).

⁷⁶ See, e.g., William Yardley, *New Federal Crackdown Confounds States That Allow Medical Marijuana*, N.Y. TIMES (May 7, 2011), <http://www.nytimes.com/2011/05/08/us/08marijuana.html?pagewanted=1> (“Some federal prosecutors say states have simply let medical marijuana get out of hand. Many supporters of medical marijuana agree. ‘Seeing storefront dispensaries advertise with neon pot leaves is inconsistent with the idea most

that the Obama administration discovered a reality of modern government: change is hard because of inertia resulting from entrenched vested interests of governmental agencies. Thus, the administration's policy shift may have resulted from a conflict between Obama's more tolerant position towards marijuana and officials in the Office of National Drug Policy, the DEA, and other law enforcement agencies.⁷⁷ Unwilling to take on entrenched bureaucrats, especially after the 2010 election debacle, the administration simply folded.

If that narrative is accurate, then at least for the next several years, talk of legalization of marijuana is wishful thinking. Using its full arsenal, the federal government can prevent Colorado and Washington from implementing their laws. At least as drug laws are written, state officials who participate in the state-authorized drug trade—for example, as employees providing marijuana—would be violating federal law. As the federal government has done in California, it can invoke various laws, including forfeiture laws and tax laws, to drive state-authorized drug sellers out of business. Again, continuing the same narrative, efforts to legalize marijuana create an existential crisis for agencies like the DEA: officials in those agencies will not go away without a fight. Viewed from that perspective, reports of the demise of marijuana laws are greatly exaggerated.

III TELLING STORIES

After the 2012 elections in Colorado and Washington, Attorney General Holder stated that the administration would announce “relatively soon” a policy on how the administration would deal with the newly enacted laws in those states.⁷⁸ That policy announcement may moot some of this discussion if the Attorney General makes that announcement before publication of this Article. I suspect that he is waiting until after Colorado and Washington have announced how they will implement their laws. Thus, speculating how the government may respond to those laws may be worthwhile. As a

people have of medical marijuana,’ said Ms. Holcomb, of the A.C.L.U. ‘But until you let states regulate these dispensaries, you have no way to control that.’”

⁷⁷ See Grim & Reilly, *supra* note 7 (describing the tension between various departments created by the Ogden memo).

⁷⁸ Josh Gerstein, *Holder: Feds to Set Pot Legalization Response “Relatively Soon,”* POLITICO (Feb. 26, 2013, 11:43 AM), <http://www.politico.com/blogs/under-the-radar/2013/02/holder-feds-to-set-pot-legalization-response-relatively-157895.html>.

result, this section explores two themes: my first point is that the extent of a perceived U-turn in the administration's position on medical marijuana dispensaries may be overstated. That is, I offer a counter-narrative that may explain the administration's hard-line stance in California.

The second theme explores ways in which implementation of Colorado and Washington's laws may produce a national approach to legalization of marijuana. Here, I invoke Justice Brandeis's dictum that the states may become a laboratory for democracy.⁷⁹ That is, the nation will be watching how those states implement their laws to see whether pursuing legalization is worth the risks. In that discussion, I also focus on some possible political calculations and strategies that may give those states breathing room to implement their laws.

Since the inception of its medical marijuana experiment, California has done a bad job of balancing regulation of dispensaries with legitimate law enforcement needs. The drafters of Proposition 215 framed its language broadly to move towards de facto legalization.⁸⁰ Law enforcement agencies in California have usually not worked with medical marijuana advocates to facilitate the process; instead, they have often worked with federal agencies to implement aggressive antidrug policies.⁸¹ Legislative efforts to regulate medical marijuana in California have been only marginally successful in achieving a fair balance.⁸²

California's medical marijuana law failed to address how qualifying patients would get medical marijuana.⁸³ It did not set limits

⁷⁹ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

⁸⁰ Vitiello, *Proposition 215*, *supra* note 46, at 719–24.

⁸¹ See, e.g., *id.* at 714 ("As a result of Governor Wilson's strong stance against the legalization of marijuana in any form, long time marijuana activist Dennis Peron decided to resort to the initiative process."); Greg Lucas, *Medical Marijuana Bill Approved*, S.F. CHRON., Aug. 19, 1994, at A20 (reporting the Governor was embroiled in a re-election battle with being tough on crime as his main platform).

⁸² See, e.g., SB 420, 2003 Leg., 2003–2004 Reg. Sess. (Cal. 2003) (enacted) [hereinafter SB 420] (attempting to resolve ongoing issues created with the legalization of medical marijuana).

⁸³ See Vitiello, *Proposition 215*, *supra* note 46, at 744 ("The statute implies that patients and caregivers can grow marijuana for medical use, but where will they get the marijuana seeds?").

on how much marijuana a qualifying patient may possess.⁸⁴ It did not define key terms like “attending physician,” “qualifying patient,” or “caregiver.”⁸⁵ Subsequent legislation solved some, but not all, of the problems, as did other state actors, including the state’s attorney general’s office.⁸⁶

As a result of the lack of clear regulations of the medical marijuana trade, when Attorney General Holder announced the Obama administration’s policy in 2009, all hell broke loose in California. As discussed above, dispensaries proliferated, with hundreds of them popping up in major cities, with little observance of zoning laws⁸⁷ or federal laws like those enhancing penalties for drug sales near schools.⁸⁸ Instead of effective statewide regulation, local governments were left to find solutions. Some, like Oakland, aggressively pursued the medical marijuana trade, in large part to supplement shrinking revenue.⁸⁹ Notably, entrepreneurs expanded “Oaksterdam” University, where students learned about various facets of the trade, including growing techniques and legal issues that could arise.⁹⁰ Other local governments rezoned areas where dispensaries could open, forcing them into locations far from patients.⁹¹ Still others banned them completely.⁹² Currently before the California Supreme

⁸⁴ See SB 420. *supra* note 82 (setting limits, in response to California’s medical marijuana law, on the amount of marijuana a qualifying patient may possess).

⁸⁵ Vitiello, *Proposition 215*. *supra* note 46, at 722–24.

⁸⁶ See generally CAL. DEP’T OF JUSTICE, GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE (2008); CAL. HEALTH & SAFETY CODE §§ 11362.7–11362.9 (West 2007).

⁸⁷ Dickinson, *supra* note 8; *Medical Marijuana Dispensaries Face Confusion Over Local Zoning Laws*, PLASTIRAS & TERRIZZI, <http://ptlawfirm.wordpress.com/2009/10/29/medical-marijuana-dispensaries-face-confusion-over-local-zoning-laws/> (last visited Apr. 9, 2013).

⁸⁸ Meredith Bennett-Smith, *DEA Tells Washington Medical Marijuana Dispensaries Near Schools To Shut Down*, HUFFINGTON POST (Aug. 24, 2012, 2:02 PM), http://www.huffingtonpost.com/2012/08/24/dea-to-washington-medical-marijuana-dispensaries-shut-down_n_1828031.html.

⁸⁹ Cooper, *supra* note 39.

⁹⁰ Graves, *supra* note 70.

⁹¹ Sandra Emerson & Wes Woods II, *Cities Await Court Decision on Medical Marijuana Dispensaries*, INLAND VALLEY DAILY BULL., http://www.dailybulletin.com/news/ci_22664892/inland-empire-cities-await-court-decision-marijuana-dispensaries (last updated Feb. 25, 2013, 9:29 PM) (“Riverside has attempted to shut down the dispensary because, like many cities, its zoning code prohibits dispensaries.”).

⁹² *Id.* (“Redlands recently became aware of a dispensary operating within its limits. It has begun issuing daily fines for violating its ordinance banning dispensaries . . .”).

Court is the question whether local governments may impose a complete ban on dispensaries.⁹³

The resulting chaos in California led to an opportunity for drug traffickers to set up shop.⁹⁴ According to news reports, many dispensaries were merely for-profit, brick-and-mortar drug dealerships.⁹⁵

If that perception is accurate, one can explain the government's reaction in California not so much as a reversal of its stated tolerance for "legitimate" medical marijuana dispensaries,⁹⁶ but as an implementation of that policy. In other words, the aggressive federal response may be a way to pressure California into regulating its medical marijuana trade.

The best evidence in support of this point is to compare the federal government's different approach to dispensaries in Colorado prior to its adoption of Assembly Bill 64. Colorado's medical marijuana law provides for extensive regulation of the marijuana trade, in effect, tracking production from seed to smoke.⁹⁷ There, although not

⁹³ *Id.*

⁹⁴ *E.g., Man Sentenced for Creating Pot Dispensaries as Front for Drug Ring*, ABC 10 NEWS (Jan. 24, 2013), <http://www.10news.com/news/man-sentenced-for-creating-pot-dispensaries-as-front-for-drug-ring>.

⁹⁵ Press Release, Drug Enforcement Admin., San Diego Man is Sentenced to 100 Months for Running Marijuana Dispensary and Money Laundering (Jan. 24, 2013) ("This case illustrates the kind of criminal activity going on within medical marijuana dispensary operations . . . [t]he proprietors of these operations are simply drug dealers who are hiding behind the guise of compassionate care, when in fact their only motivation is making money.").

⁹⁶ David Stout & Solomon Moore, *U.S. Won't Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES (Oct. 20, 2009), <http://www.nytimes.com/2009/10/20/us/20-cannabis.html> (quoting Attorney General Eric H. Holder, Jr.: "It will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana . . . but we will not tolerate drug traffickers who hide behind claims of compliance with state law to mask activities that are clearly illegal."); see also Cathy Locke, *Nevada County Man Pleads Guilty to Role in Sacramento Marijuana Dispensary*, SACRAMENTO BEE (Mar. 28, 2013, 8:29 PM), <http://blogs.sacbee.com/crime/archives/2013/03/nevada-county-man-pleads-guilty-to-role-in-sacramento-marijuana-dispensary.html>.

⁹⁷ COLO. REV. STAT. ANN. §§ 12-43.3-101 to -901 (West, Westlaw through 2013 legislation); see also Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 151 (2012) ("For the first time in the United States, and perhaps the world, a state regulatory regime was put in place to oversee the commercial sale of marijuana. If a dispensary owner met the law's requirements (including state residency and, controversially, a clean criminal record) she could receive permission from the state to sell marijuana for profit.").

without some federal intervention,⁹⁸ the government's response has been more tolerant than in California.⁹⁹

If this thesis is correct, all eyes should be on how Colorado and Washington implement their laws. Probably observing the failure of Proposition 19 (California's effort to legalize marijuana), the drafters of Colorado and Washington's initiatives left the details of implementation for other agencies.¹⁰⁰ Elsewhere, I have described the inadequacies of Proposition 19.¹⁰¹ For example, its drafters seemed more interested in legalizing marijuana than in regulating and taxing its production and use.¹⁰² It created various loopholes and uncertainties that seemingly would have continued the chaos in California's marijuana laws.¹⁰³

⁹⁸ See Felisa Cardona, *Colorado Medical-Marijuana Bill Draws U.S. Attorney's Warning*, DENV. POST (Apr. 27, 2011, 1:33 PM), http://www.denverpost.com/news/marijuana/ci_17936371 ("The U.S. attorney for Colorado warned state lawmakers Tuesday that pending legislation adjusting rules for medical marijuana would conflict with federal law and could lead to federal prosecutions.").

⁹⁹ Compare Bob Giles, *Washington and Colorado as Precedent for Cannabis Legalization?*, GLOBALPOST (Dec. 29, 2012, 9:47 PM), <http://www.globalpost.com/dispatches/news/regions/americas/usa/washington-and-colorado-precedent-cannabis-legalizati> ("In Colorado, the federal government has largely allowed the state-regulated medical-marijuana industry to operate . . ."), with Dickinson, *supra* note 8. Dickinson's more benign view of the administration's actions in California downplays the IRS's efforts to pursue "legitimate" dispensaries in California. Dickinson, *supra* note 8. Even there, one could hypothesize that the government, aware of a judge's ruling that the law does not apply to dispensaries, is interested in clarification of the law. That is, its litigation strategy may be to have a court put in place lines between "legitimate" and illicit organizations.

¹⁰⁰ COLO. CONST. art. XVIII, § 16; Initiative Measure No. 502 (filed July 8, 2011), available at <http://www.newapproachwa.org/sites/newapproachwa.org/files/I-502%20bookmarked.pdf>; see also Josh Richman, *California Inspired—and Now Inspired by—Other States' Marijuana Legalization Measures*, SAN JOSE MERCURY NEWS (Dec. 26, 2012, 10:37 AM), http://www.mercurynews.com/medical-marijuana/ci_22196985/california-inspired-and-now-inspired-by-other-states ("Yet the legalization measure's [Proposition 19] poor timing, lackluster funding and vague regulatory plan offered vital lessons that allowed activists in Colorado and Washington state to succeed last month where California had failed.").

¹⁰¹ Vitiello, *Lessons*, *supra* note 1, at 85–89.

¹⁰² *Id.* at 85; see also *California Proposition 19, the Marijuana Legalization Initiative (2010)*, BALLOTEDIA, [http://ballotpedia.org/wiki/index.php/California_Proposition_19_the_Marijuana_Legalization_Initiative_\(2010\)](http://ballotpedia.org/wiki/index.php/California_Proposition_19_the_Marijuana_Legalization_Initiative_(2010)) (stating that estimated fiscal impact of taxation is unknown, but "potentially" significant).

¹⁰³ *E.g.*, Proposition 19 art. 5, § 11300(a)(2) (filed July 27, 2010), available at <http://cdn.sos.ca.gov/vig2010/general/pdf/english/text-proposed-laws.pdf> (allowing any individual to grow marijuana on a twenty-five square foot plot, which would be free from taxation).

It is too early to tell how Colorado and Washington will implement their laws, even as a few details have started to emerge.¹⁰⁴ Reports suggest that Colorado, for example, will allow “marijuana tourism” (not limiting access to Coloradans) because of fears of a black market trade, but the task force also recommends that the state not allow transportation beyond its borders.¹⁰⁵ If the Colorado task force and Washington Liquor Control Board put in place tight regulations of marijuana, the Obama administration may back away from aggressive intervention.¹⁰⁶

As a matter of principle, the Obama administration can argue in favor of federalism if it puts in place a policy tolerant of local marijuana laws. In developing its policy, the Obama administration may be making a more overtly political calculation: ignoring local laws in Colorado and Washington will alienate young voters in those states. President Obama won both states, in part, because of strong support among young voters who also favor legalization of marijuana.¹⁰⁷ While the President does not face reelection, he may be under political pressure from Colorado and Washington Democrats who will rely on the youth vote in the future. But the calculation may be even more difficult.

Several senators, including Patrick Leahy, have pushed the administration to take a position to accommodate local marijuana laws.¹⁰⁸ Other members of Congress, including Dana Rohrabacher,

¹⁰⁴ Kristen Wyatt, *Pot Tourism in Colorado Ok'd by Marijuana Task Force*, HUFFINGTON POST (Feb. 19, 2013, 8:06 PM), http://www.huffingtonpost.com/2013/02/19/marijuana-task-force-give_n_2721084.html (summarizing the Colorado task force's determination that the law legalizing marijuana allows *any* adult over 21 to use the drug, not just Colorado residents).

¹⁰⁵ See, e.g., *id.*

¹⁰⁶ That is certainly the sense that members of Colorado's task force have. As reported on February 19, 2013, the task force is crafting regulations that would force purchasers in Colorado to use it in Colorado and not transport it home. As summarized by one task force member, “[w]e could attract greater federal scrutiny and displeasure of our neighbors” if Colorado's liberation of the marijuana laws result in the flow of marijuana across its borders. *Id.*

¹⁰⁷ See Michael Humphrey, *Updated: Will Obama Harsh Colorado's Historic Marijuana Legalization?*, FORBES (Nov. 7, 2012, 10:08 AM), <http://www.forbes.com/sites/michaelhumphrey/2012/11/07/will-obama-harsh-colorados-historic-marijuana-legalization/> (“It's a little ironic, isn't it? Liberal voters in Colorado and Washington, along with Obama, helped each other feel high last night. Now they may be each other's reasons for coming down.”).

¹⁰⁸ Nick Wing, *Patrick Leahy Floats Legalizing Marijuana Possession A Federal Level For Pro-Pot States*, HUFFINGTON POST (Dec. 13, 2012, 11:35 AM), http://www.huffingtonpost.com/2012/12/13/patrick-leahy-marijuana_n_2293601.html; *Pelosi to DOJ:*

have begun proposing federal legislation to recognize local options.¹⁰⁹ If the Obama administration fails to take the lead on creating space for state law, Congress may give him cover by enacting such legislation. The President and the Attorney General must factor in the probability of Congress taking the lead on the issue if they fail to do so. And here, they must recognize how dysfunctional Congress has become.¹¹⁰

A congressional solution may be more desirable from a number of perspectives, including greater certainty for those interested in investing in the marijuana trade in Colorado and Washington. After all, a policy of forbearance by the executive branch can be overturned by the next administration. Overturning legislation would be more difficult.¹¹¹ Either scenario would give Colorado and Washington the opportunity to implement their laws without fear of aggressive federal intrusion. But that begs yet other questions and invites my concluding thoughts on the road to legalization.

CONCLUSION

Many voters favor legalization of marijuana simply because they want access to marijuana without the hassle of finding a dealer and the risk of being arrested. But a substantial number of voters (me included) favor legalization with some trepidation and with the hope of regulation and taxation of marijuana.¹¹² Those of us who fall into the latter category will be attentive to how Colorado and Washington implement their laws.

Don't mess with Washington, Colorado pot laws (Mar. 12, 2013), <http://blog.seattlepi.com/seattlepolitics/category/marijuana-legalization/>.

¹⁰⁹ Gene Johnson, *New Bill Would Ease State-Federal Pot Conflict*, ASSOCIATED PRESS, Apr. 12, 2013, available at http://www.oregonlive.com/politics/index.ssf/2013/04/new_bill_would_ease_federal_st.html.

¹¹⁰ A bill proposing a local option would put Republicans in a bind. Many in the libertarian wing of the party, like Ron Paul, have called for legalization of marijuana. Depending on the issue, many have favored states' rights (as in the healthcare debate). And the party has been struggling since the 2012 election to find ways to become more relevant to a diverse electorate. Cohn, *supra* note 23.

¹¹¹ One other path towards legalization might be executive action rescheduling marijuana, thereby allowing physicians to prescribe marijuana. Given the government's recent victory in the court of appeals (continuing its opposition to rescheduling marijuana), *Ams. for Safe Access v. Drug Enforcement Admin.*, No. 11-1265, slip op. at 4 (D.C. Cir. 2013), such a move is unlikely in the short term.

¹¹² Vitiello, *Lessons, supra* note 1, at 79; see also Tom McNichol, *Is Marijuana the Answer to California's Budget Woes?*, TIME (July 24, 2009), <http://www.time.com/time/nation/article/0,8599,1912113,00.html>.

Here are a few of the things worth watching: Proponents of both initiatives promised increased tax revenue and a shift in law enforcement priorities as benefits of those laws.¹¹³ Elsewhere, I have argued the potential conflict between those goals.¹¹⁴ Law enforcement of marijuana laws invites a black-market trade, eroding revenue. Can Colorado and Washington have it both ways?

Reformers have acknowledged concerns about keeping marijuana out of the hands of teenagers¹¹⁵ and about driving under the influence of marijuana.¹¹⁶ Will Colorado and Washington succeed in limiting teen access (at least more effectively than they do currently)?¹¹⁷ Will the threat of arrest for driving under the influence be sufficient to deter the conduct, or will deaths resulting from drug use change public sentiment, scaring voters in other states?

Long a topic of heated debate is the extent to which marijuana is harmful and addictive.¹¹⁸ While researchers are divided on the question,¹¹⁹ most agree that drug usage has “cleanup costs,” i.e., a

¹¹³ *Washington Marijuana Legalization and Regulation, Initiative 502 (2012)*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/Washington_Marijuana_Legalization_and_Regulation,_Initiative_502_\(2012\)#Arguments](http://ballotpedia.org/wiki/index.php/Washington_Marijuana_Legalization_and_Regulation,_Initiative_502_(2012)#Arguments) (last visited Apr. 9, 2013); *Amendment 64*, *supra* note 16.

¹¹⁴ Michael Vitiello, *Legalizing Marijuana: California's Pot of Gold?*, 2009 WIS. L. REV. 1349 (2009) [hereinafter Vitiello, *Legalizing Marijuana*].

¹¹⁵ *Regulating Marijuana Works!*, CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL, <http://www.regulatemarijuana.org/regulation-works> (last visited Apr. 9, 2013). While studies of the effects of marijuana on health are conflicting and depend on the specific question under study, data do suggest adverse effects on younger users. Keith Coffman & Alex Dobuzinskis, *Opponents of Legalizing Marijuana Focus on Risk to Teens*, REUTERS (Sept. 22, 2012, 11:32 AM), <http://www.reuters.com/article/2012/09/22/us-usa-marijuana-legalization-idUSBRE88L07S20120922> (citing a recent study that showed “chronic pot use among teens led to an average eight point decline in IQ”).

¹¹⁶ E.g., Joseph Rose, *Washington's New 'Driving High' DUI Law for Marijuana Users Stirs Fears (Poll)*, OREGONIAN (Dec. 5, 2012, 6:58 PM), http://blog.oregonlive.com/commuting/2012/12/washingtons_new_driving_high_d.html (“Under a provision intended to make the recreational legalization of weed more palatable to voters, people with a THC blood content of 5 nanograms per milliliter can’t get behind the wheel.”).

¹¹⁷ *Regulating Marijuana Works!*, *supra* note 115 (“In fact, there is substantial evidence that it is actually increasing its accessibility to young people. By forcing marijuana into an underground market, we are guaranteeing that sales will be entirely uncontrolled and that the individuals selling it will not ask for ID.”).

¹¹⁸ Sarah Kershaw & Rebecca Cathcart, *Marijuana is Gateway Drug for Two Debates*, N.Y. TIMES (July 17, 2009), <http://www.nytimes.com/2009/07/19/fashion/19pot.html?pagewanted=all>.

¹¹⁹ *Id.*

cost to the family of users.¹²⁰ Proponents of legalization often promise that some of the funds from legalization will be earmarked for drug treatment.¹²¹ Will Colorado and Washington follow through on promises to address healthcare problems likely to arise from expanded drug use? In addition, the experience in those states may settle the debate whether legalization will lead to greater or lesser use of marijuana.¹²² The manner of implementation in those states may affect the outcome and influence voters elsewhere.

The questions posed in this section are hardly the only ones that may weigh on voters' minds elsewhere.¹²³ But they suggest the kinds of questions that may influence voters around the country. That suggests my parting thoughts about the role of the federal government in reaction to the Colorado and Washington initiatives: if the government gives those states latitude to implement their laws, we may have an example of Justice Brandeis' dictum that the states are the laboratory for democracy.¹²⁴ For years, the marijuana debate has been dominated by overly heated rhetoric and little empirical support for extravagant claims.¹²⁵ Colorado and Washington may provide hard data that may focus future choices about whether the nation ought to legalize marijuana.

¹²⁰ *Id.* (describing how one marijuana addict has become estranged from his children, lost two houses, and is currently in treatment because his girlfriend threatened to leave him).

¹²¹ See, e.g., *I-502-Fiscal Impact Statement*, WASH. SECRETARY OF ST., <http://vote.wa.gov/guides/2012/I-502-Fiscal-Impact.html> (last visited Apr. 9, 2013).

¹²² Vitiello, *Legalizing Marijuana*, *supra* note 114, at 1370–71.

¹²³ Vitiello, *Lessons*, *supra* note 1, at 89.

¹²⁴ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

¹²⁵ E.g., *Forum with Michael Krasny: Legalizing Marijuana?* KQED (Mar. 2, 2009, 9:00 AM), <http://www.kqed.org/epArchive/R903020900>.