

## The Federal Response to State Marijuana Legalization: Room for Compromise?

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### INTRODUCTION

Ever since Californians voted to legalize medical marijuana in 1996, state and federal drug laws have been on something of a collision course. In the years since, the United States Supreme Court has decided two medical marijuana cases affirming federal authority to enforce prohibition laws against patients and providers acting in compliance with state laws.<sup>1</sup> And, with the exception of a brief interval at the beginning of President Barack Obama’s first term in office,<sup>2</sup> federal officials have exercised this power with great

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<sup>1</sup> See *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (holding that the federal government could criminalize the noncommercial intrastate possession and manufacture of marijuana as an essential part of a larger regulation of economic activity); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494–95 (2001) (holding that medical necessity was not a viable defense to prosecution for the manufacture and distribution of marijuana under the federal Controlled Substances Act).

<sup>2</sup> See Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep’t of Justice, on Investigations and Prosecutions in States Authorizing the Med. Use of Marijuana (Oct. 19, 2009), available at <http://blogs.justice.gov/main/archives/192>

enthusiasm.<sup>3</sup> Though these efforts have impacted the lives of those unlucky enough to be targeted by federal prosecutors,<sup>4</sup> they have not succeeded in blocking the adoption and implementation of state medical marijuana laws. Including California, medical marijuana is now legal in eighteen states and the District of Columbia.<sup>5</sup> In states that allow retail medical marijuana establishments, many continue to operate openly.

In November 2012, this conflict took on a new dimension with passage of ballot measures legalizing marijuana for recreational use in Colorado and Washington. The months since have seen a range of proposals for how the federal government should respond to state marijuana legalization laws. Prohibitionists have argued in favor of trying to block the laws, either by suing on a preemption theory or aggressively prosecuting anyone who obtains a state license to produce or sell marijuana.<sup>6</sup> Others would like to see the federal government let Washington and Colorado implement the new laws with little or no interference. Colorado Representative Jared Polis, for example, has introduced the Ending Federal Marijuana Prohibition Act, which would “de-federalize” marijuana policy by removing the drug from the Controlled Substances Act.<sup>7</sup> Until there is a change in federal law, some argue that the Obama administration should use its enforcement discretion to formally or informally allow Colorado and Washington to implement their laws without interference.<sup>8</sup>

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(advising federal prosecutors “not [to] focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana”).

<sup>3</sup> Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 DENV. U. L. REV. 1027, 1033–41 (2012) (describing federal enforcement against medical marijuana providers following the Ogden memorandum).

<sup>4</sup> See, e.g., Adam Nagourney, *In California, It’s U.S. vs. State Over Marijuana*, N.Y. TIMES, Jan. 14, 2013, at A1 (describing the federal prosecution of medical marijuana provider Matthew Davies who is facing a ten-year mandatory minimum sentence).

<sup>5</sup> Chelsea Conaboy, *Mass. Approves Medical Marijuana Ballot Question*, BOS. GLOBE (Nov. 7, 2012), <http://www.bostonglobe.com/news/politics/2012/11/06/massachusetts-voters-approve-ballot-measure-legalize-medical-marijuana/ecE64FD5S4qdRlcXcf2zqJ/story.html> (reporting that Massachusetts became the eighteenth state to legalize medical marijuana after passage of a 2012 ballot measure).

<sup>6</sup> See, e.g., Charlie Savage, *Administration Weighs Legal Action Against States That Legalized Marijuana Use*, N.Y. TIMES, Dec. 7, 2012, at A20 (reporting on Obama administration meetings to determine how to respond to the Colorado and Washington laws).

<sup>7</sup> Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013).

<sup>8</sup> See, e.g., Mark Kleiman, *Use the States as Laboratories for Marijuana Policy*, WASH. MONTHLY (Nov. 13, 2012, 10:09 AM), [http://www.washingtonmonthly.com/ten-miles-square/2012/11/use\\_the\\_states\\_as\\_laboratories041182.php](http://www.washingtonmonthly.com/ten-miles-square/2012/11/use_the_states_as_laboratories041182.php); Mark Osler, *U.S. Should*

These proposals have tended to frame the federal government's options in all-or-nothing terms. Either the federal government tries to block the laws or it lets them go forward. But the relationship between state and federal laws is not so constrained. This Article articulates another option available to the federal government, using marijuana policy in the Netherlands as a guide. Congress could amend federal drug laws to permit retail sales of marijuana while continuing to prohibit its commercial manufacture and wholesale distribution.

To be clear at the outset, I do not argue that this proposal is preferable to other alternatives. An approach like this would address some of the chief concerns raised by legalization opponents while still giving states like Colorado and Washington a great deal of flexibility and autonomy. It may therefore represent a compromise position in the debate over the federal response to state legalization laws. But there would be costs. Retaining a prohibition on manufacture would mean leaving a large black market force open in the marijuana trade, for example. And it would not eliminate the conflict between federal law and state laws entirely, since both Colorado and Washington permit commercial manufacture and wholesale distribution. For these reasons, among others, I remain personally inclined toward the resolution offered by Representative Polis. Nevertheless, I put this idea forward as an alternative to existing proposals in the hope that it will contribute to a more robust discussion about the interaction between state and federal drug laws.

## I

### THE FEAR OF ANOTHER "BIG TOBACCO" AND INSIGHTS FROM THE NETHERLANDS

For many marijuana legalization opponents, the potential impact of marijuana advertising and development of a marijuana industry on use rates is a central concern. The recently formed marijuana prohibition advocacy group, Smart Approaches to Marijuana, lists "preventing another big tobacco" as the first issue page on its website,

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*Honor States' New Pot Laws*, CNN (Nov. 13, 2012, 12:36 PM), <http://www.cnn.com/2012/11/13/opinion/osler-marijuana-federal-law> ("The Obama administration should employ [its] discretionary power in line with our oldest and best principles and step back from continuing marijuana prosecutions in Colorado and Washington.").

for example.<sup>9</sup> The group argues that, “if it’s legalized, marijuana will be commercialized” and “[a] commercial marijuana industry will act just as the tobacco industry acts.”<sup>10</sup> This fear is not limited to legalization opponents. Prominent marijuana legalization agnostics, like Mark Kleiman, often cite the risk of mass marketing of marijuana in explaining their position. As Kleiman sees it, “[c]annabis isn’t harmful enough to be worth banning. But that doesn’t mean that it’s safe to give America’s marketing geniuses a new vice to peddle.”<sup>11</sup>

If a big-tobacco-style marijuana industry ever were to develop, there would first need to be large-scale marijuana manufacturers selling branded products. For example, a convenience store chain like 7-Eleven might sell cigarettes and alcohol, but manufacturers like Phillip Morris and Coors are the companies behind nationwide marketing of tobacco and alcohol. Similarly, the prospect of commercial manufacture and wholesale distribution is likely to account for a significant percentage of any reduction in the price of marijuana under a legalization system.<sup>12</sup>

The experience of the Netherlands is instructive on this point. Although there is a perception that the Dutch have legalized marijuana, this is not quite true. Rather, “[t]he Netherlands has quasi-legalized only retail sales, not commercial production and distribution.”<sup>13</sup> The average Dutch marijuana user or tourist in Amsterdam is unlikely to notice this distinction, but most researchers believe it helps to explain why marijuana use rates and prices in the Netherlands are not much different than in many European countries with marijuana prohibition.<sup>14</sup>

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<sup>9</sup> *Preventing Another Big Tobacco*, SMART APPROACHES TO MARIJUANA, <http://learnaboutsam.com/marijuana-is-like-tobacco/> (last visited Mar. 22, 2013).

<sup>10</sup> *Id.*; see also, e.g., Kevin Sabet, *A New Direction? Yes. Legalization? No. Drawing on Evidence to Determine Where to Go in Drug Policy*, 91 OR. L. REV. 1153, 1173 (2013)

<sup>11</sup> Mark Kleiman, *Against Commercial Cannabis*, ATLANTIC (Aug. 14, 2010, 1:05 PM ET), <http://www.theatlantic.com/national/archive/2010/08/against-commercial-cannabis/61492/#>; see also JONATHAN P. CAULKINS, ANGELA HAWKEN, BEAU KILMER & MARK A.R. KLEIMAN, *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 243 (2012). Kleiman’s preferred marijuana policy would include “noncommercial legalization with small consumer-owned co-ops.” *Id.*

<sup>12</sup> BEAU KILMER ET AL., RAND DRUG POLICY RESEARCH CTR., *ALTERED STATE?* 24 (2010) (“[N]one of these case studies is directly analogous to full-scale regulated legalization—even the Dutch maintain a prohibition on high-level cannabis trafficking and large-scale production—and none appears to involve a drop in prices of the magnitude that could occur under full legalization.”).

<sup>13</sup> CAULKINS ET AL., *supra* note 11, at 128.

<sup>14</sup> See, e.g., Peter H. Reuter, *Marijuana Legalization: What Can Be Learned from Other Countries?* 2 (RAND Drug Policy Research Ctr., Working Paper, July 2010) (“Dutch

In 2011, Robert J. MacCoun conducted a thorough review of the literature on Dutch marijuana policy. MacCoun found that, although “[t]here are several lines of circumstantial evidence that the Dutch retail system increased consumption, especially in its early years,” today “Dutch citizens use cannabis at more modest rates than some of their neighbors, and they do not appear to be particularly likely to escalate their use relative to their counterparts in Europe and the United States.”<sup>15</sup> Similarly, U.S. and Dutch marijuana prices appear to be roughly comparable.<sup>16</sup>

Why hasn’t legalization had a bigger impact on prices and use in the Netherlands? MacCoun cites the Dutch prohibition on commercial manufacturing as a probable explanation. He notes it is “likely that prices in the Netherlands are elevated by their unusual hybrid regime which approximates legalization at the user level, but European style prohibition at the level of growers and traffickers.”<sup>17</sup> Jonathan Caulkins, Angela Hawken, Beau Kilmer, and Mark Kleiman similarly argue that “[b]y keeping production and wholesale distribution illegal, the Dutch kept their cannabis prices high and marketing to a minimum. That situation is a far cry from legalization.”<sup>18</sup>

In contrast to the Netherlands, the marijuana legalization laws in both Colorado and Washington include the commercial production of marijuana. In Washington, those who obtain a marijuana producer’s license will be permitted to “produce marijuana for sale at wholesale to marijuana processors.”<sup>19</sup> In turn, processors will package and distribute the produce to retailers.<sup>20</sup> In Colorado, marijuana cultivation facilities will be licensed to grow marijuana and sell it directly to retail stores.<sup>21</sup> This feature makes Colorado and

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enforcement against growers has kept the retail prices comparable to levels in neighboring European countries, though they have not prevented the Netherlands from becoming the major European producer for consumption in the European Union.”)

<sup>15</sup> Robert J. MacCoun, *What Can We Learn from the Dutch Cannabis Coffeeshop System?*, 106 ADDICTION 1899, 1909 (2011).

<sup>16</sup> *Id.* at 1907 (reviewing price data).

<sup>17</sup> *Id.* at 1908; *see also id.* at 1909 (citing the “hybrid system in which high-level enforcement probably served to keep prices from dropping the way they might in a full-scale legalization scheme”).

<sup>18</sup> CAULKINS ET AL., *supra* note 11, at 213.

<sup>19</sup> WASH. REV. CODE § 69.50.325(1) (2013).

<sup>20</sup> *Id.* § 69.50.325(2).

<sup>21</sup> COLO. CONST. art. 18, sect. 16, § (2)(h) (amended in 2012). Colorado also lets users grow up to six marijuana plants and “transfer of one ounce or less of marijuana without remuneration” without having to obtain a permit. *Id.* § (3).

Washington's laws broader than the Dutch marijuana policy and has fueled prohibitionists' concerns about the impact on use rates.

## II

### PERMITTING RETAIL SALES WHILE PROHIBITING COMMERCIAL MANUFACTURE

The conflict between federal law and the Colorado and Washington legalization measures appears to present a choice between two options. Either the federal government can try and interfere with these laws, or it can let them move forward. But there is room for compromise between these two positions. The federal government could give states the leeway to implement Netherlands-style retail sales while continuing to prohibit the commercial manufacture and wholesale distribution of marijuana.

A policy like this could be accomplished relatively easily as a matter of legislative drafting. The main Controlled Substances Act offenses are manufacture, distribution, possession with the intent to distribute, and possession.<sup>22</sup> Congress could allow states to pursue quasi-legalization regimes like that of the Netherlands by eliminating some of these offenses and altering others for marijuana.<sup>23</sup>

For example, consider a regime in which it was no longer a federal crime to possess or possess with the intent to distribute marijuana, but manufacture and distribution of more than one ounce of the drug were still prohibited. In a system like this, federal law would criminalize the cultivation and wholesale distribution of marijuana, much like the Dutch policy. But states like Colorado and Washington would have the freedom to regulate retail marijuana sales outlets without significant federal interference. These establishments would be able to sell an ounce or less of marijuana to customers—an amount consistent with both the Colorado and Washington laws<sup>24</sup>—without violating federal law. Retail stores would need to be able to possess large quantities of marijuana in order to operate, of course, and

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<sup>22</sup> 21 U.S.C. § 841(a)(1) (2006) (making it a crime “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”); *id.* § 844(a) (“It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . .”).

<sup>23</sup> Congress would also need to make similar changes to additional controlled substances offenses. *See, e.g., id.* § 843(b) (making it a crime “for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this . . . chapter”).

<sup>24</sup> COLO. CONST. art. 18, sect. 16; WASH. REV. CODE § 69.50.4013.

removing federal prohibitions on possession and possession with the intent to distribute marijuana would allow them to do this.<sup>25</sup>

How would a system like this compare to the status quo and to proposals to remove all federal obstacles to state marijuana legalization?

Drug warriors are unlikely to embrace any proposal that is at odds with the vision of states as loyal soldiers, dutifully carrying out the federal strategy by arresting and prosecuting marijuana offenders. But pragmatic prohibitionists might come to see a policy like this as the least-bad choice among the federal government's options for responding to state legalization laws.<sup>26</sup> This is because, if the experience with medical marijuana laws is any indication, it may not be possible for the federal government to effectively stop states from legalizing marijuana.

The Supremacy Clause might seem to present a straightforward and cost effective method for blocking state marijuana legalization laws. Colorado and Washington's laws certainly make it more difficult to enforce the federal Controlled Substances Act, after all. So, don't they stand "as an obstacle to the accomplishment of Congress's full objectives under the"<sup>27</sup> Controlled Substances Act? The problem for any preemption challenge to Colorado and Washington is that while the federal government can prosecute marijuana cases under the Controlled Substances Act, it cannot conscript state and local actors into doing so. The anti-commandeering principle forbids the federal government from forcing states to criminalize conduct<sup>28</sup> and, for this reason, would be

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<sup>25</sup> This basic framework is intended only as an example of how a policy like this might work. Details could be modified in any number of ways to allow greater or lesser federal oversight of state medical marijuana laws. For example, sentencing reductions for commercial manufacture could be incorporated into the proposal. The essential point is that federal law could be revised to strike a compromise position between interfering with state marijuana legalization laws and letting them go forward without any restriction.

<sup>26</sup> Stuart Taylor, Jr., *Marijuana Policy and Presidential Leadership: How to Avoid a Federal-State Train Wreck*, BROOKINGS, 1 (Apr. 2013), [http://www.brookings.edu/~media/Research/Files/Papers/2013/04/11%20marijuana%20legalization%20taylor/Marijuana%20Policy%20and%20Presidential%20Leadership\\_v24.pdf](http://www.brookings.edu/~media/Research/Files/Papers/2013/04/11%20marijuana%20legalization%20taylor/Marijuana%20Policy%20and%20Presidential%20Leadership_v24.pdf).

<sup>27</sup> *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

<sup>28</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997). The Supreme Court recently reiterated this principle in even stronger terms in the context of the federal Medicaid expansion, holding that the anti-commandeering prohibition applies "whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

likely to make any preemption lawsuit dead on arrival.<sup>29</sup> Tellingly, the federal government has never sued to block any state or local medical marijuana law on preemption grounds.

Direct enforcement may be effective at keeping marijuana stores from opening up in Colorado and Washington in the short term, but over time it can become a bit like trying to drain the ocean with a thimble. This has certainly been the case with medical marijuana.<sup>30</sup> During the Bush administration, the federal government raided nearly 200 medical marijuana dispensaries and criminally prosecuted a number of medical marijuana caregivers. However, around the time Bush left office, there were between 300,000 and 400,000 medical marijuana patients in California and over 700 medical marijuana storefronts in the state.<sup>31</sup> Since 2011, the Obama administration has waged war on state medical marijuana laws,<sup>32</sup> and yet in late-2012, it was estimated that there were at least 500 (and perhaps more than 1,000) dispensaries in Los Angeles alone.<sup>33</sup>

The problem for the federal government is that it is almost entirely dependent upon states to enforce drug prohibition. In 2010, for example, there were 853,838 arrests for marijuana offenses.<sup>34</sup> That same year, there were only 7,130 marijuana cases disposed of in federal court<sup>35</sup>—just 0.8 percent of the number of arrests. To put this

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<sup>29</sup> See generally Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y (forthcoming 2013) (concluding that “only a few state marijuana reforms pose a direct conflict with the CSA” such as “[l]aws requiring landlords to rent property to marijuana distributors”).

<sup>30</sup> See Robert A. Mikos, *On the Limits of Federal Supremacy When States Relax (or Abandon) Marijuana Bans*, CATO INST., 19–21 (Dec. 12, 2012), <http://www.cato.org/sites/cato.org/files/pubs/pdf/PA714.pdf> (arguing that the federal government has been unable to effectively stop medical marijuana laws in part because of lack of resources).

<sup>31</sup> Roger Parloff, *How Medical Marijuana Became Legal*, CNN MONEY (Sept. 18, 2009, 3:30 PM ET), [http://money.cnn.com/2009/09/11/magazines/fortune/medical\\_marijuana\\_legalizing.fortune/](http://money.cnn.com/2009/09/11/magazines/fortune/medical_marijuana_legalizing.fortune/).

<sup>32</sup> 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> (“[T]he Obama administration has quietly unleashed a multiagency crackdown on medical cannabis that goes far beyond anything undertaken by George W. Bush.”).

<sup>33</sup> Norimitsu Onishi, *Marijuana Only for the Sick? A Farce, Some Angelenos Say*, N.Y. TIMES, Oct. 8, 2012, at A16 (“Nobody even knows how many medical marijuana dispensaries are in Los Angeles. Estimates range from 500 to more than 1,000. The only certainty, supporters and opponents agree, is that they far outnumber Starbucks.”).

<sup>34</sup> Table 29: *Estimated Number of Arrests*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/persons-arrested> (last visited Mar. 22, 2013).

<sup>35</sup> HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. AT ALBANY, CRIMINAL DEFENDANTS DISPOSED OF IN U.S. DISTRICT COURTS BY OFFENSE AND TYPE OF

in perspective, if the federal government were to attempt to prosecute all medical marijuana dispensaries in Los Angeles, that would represent between a seven percent and fourteen percent increase in the number of all federal marijuana cases *nationwide*. Even more revealing, in 2011, there were only thirty-nine federal marijuana prosecutions (including medical and non-medical marijuana prosecutions) in the Central District of California, which includes Los Angeles.<sup>36</sup> This dynamic explains why the federal government has been unable to successfully block state medical marijuana laws and, in the long run, is not likely to have any more success when it comes to state marijuana legalization laws. Indeed, instead of stopping the implementation of state medical marijuana laws, the primary effect of federal enforcement efforts seems to have been to make state medical marijuana laws less well controlled than they otherwise might be.<sup>37</sup>

It is worth noting that even if it were possible to effectively block implementation of state marijuana legalization laws, federal elected officials may not have the political will to pursue this strategy for long. One January 2013 poll reported that, while Americans remain split roughly evenly in their views on marijuana legalization, a sizable majority believes states should have the option to pursue legalization laws without federal interference.<sup>38</sup> Sixty-eight percent of respondents said the federal government should not arrest marijuana growers who are in compliance with state law while sixty-four percent said sellers in compliance with state law should also be protected.<sup>39</sup>

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DISPOSITION, FISCAL YEAR 2010, TABLE 5.24.2010 (2010), *available at* <http://www.albany.edu/sourcebook/pdf/t5242010.pdf>.

<sup>36</sup> U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING: PART C6, at 44 (2013), *available at* [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Booker\\_Reports/2012\\_Booker/Part\\_C6\\_Marijuana\\_Offenses.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_C6_Marijuana_Offenses.pdf).

<sup>37</sup> Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 569–75 (2010) (arguing that federal enforcement has made state medical marijuana laws more difficult to control and easier to abuse).

<sup>38</sup> Jacob Sullum, *Poll Finds Most Americans Support Treating Marijuana Like Alcohol; Even More Think the Feds Should Let States Do So*, REASON (Jan. 31, 2013, 12:41 PM), <http://reason.com/blog/2013/01/31/poll-finds-most-americans-support-treati> (reporting that fifty-three percent agreed with the statement that “the government should treat marijuana the same as alcohol” though only forty-seven percent supported “legalizing marijuana for recreational use”).

<sup>39</sup> *Id.*

Given these dynamics, state marijuana legalization opponents who are hoping the federal government can block Colorado and Washington's laws may be out of luck. If that is the case, they may be better served by focusing attention on the aspects of legalization they find most worrisome: commercial manufacture and wholesale distribution. This goal is also much more achievable than preventing retail storefronts. That is because the number of large manufacturers and wholesalers is much smaller than the number of retailers.<sup>40</sup> To be sure, the government cannot stop all marijuana manufacture and distribution. The fact that 42.4% of Americans admit to having used marijuana<sup>41</sup> despite its decades-long prohibition is a testament to that. But it is very likely that the federal government could keep marijuana production in the black market in states that legalize marijuana, unlike retail sales. This would address the chief concern raised by most legalization opponents: the prospect of another big tobacco-type industry.

For similar reasons, limiting federal prohibition to commercial manufacture and distribution is likely to be effective at preventing spillover effects into non-legalization states. To be sure, legal retail outlets in Washington and Colorado might allow individuals from other states to purchase up to an ounce of marijuana.<sup>42</sup> But, with marijuana so readily available already<sup>43</sup> retail sales of small quantities of marijuana are unlikely to result in a significant amount of marijuana importation into other states. Legal commercial manufacture and distribution, by contrast, have greater potential to decrease the price of marijuana and impact the marijuana market nationwide.

Voters in Colorado and Washington and marijuana legalization supporters would not get all that they wish under this proposal. But they would be in a better position with respect to federal law and

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<sup>40</sup> Jonathan P. Caulkins et al., *High Tax States: Options for Gleaning Revenue from Legal Cannabis*, 91 OR. L. REV. 1041, 1047 (2013).

<sup>41</sup> Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLOS MED. 1053, 1057 tbl.2 (2008).

<sup>42</sup> See Jacob Sullum, *Colorado Task Force Says Visitors Should be Allowed to Buy Marijuana*, REASON (Feb. 21, 2013, 5:06 PM), <http://reason.com/blog/2013/02/21/colorado-task-force-recommends-letting-v>.

<sup>43</sup> See, e.g., NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE, COLUMBIA UNIV., NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE XIII, at 17 fig.3.P (2008), available at <http://www.casacolumbia.org/articlefiles/380-2008%20Teen%20Survey%20Report.pdf> (showing twenty-three percent of teens say marijuana is the easiest drug for them to buy while only fifteen percent say beer is easier).

enforcement than they are now. Permitting retail sales and personal possession would also achieve the primary goals of marijuana legalization. States would be able to realize significant tax revenue and remove the vast majority of marijuana activity from the criminal justice system.

However, there are downsides to this proposal for both legalization opponents and advocates. Prohibitionists may prefer to continue to fight state legalization laws, even while conceding that they cannot block their implementation entirely, in the belief that anything else would yield too much ground. Similarly, prohibitionists might worry that any change in federal law or policy could encourage more states to follow Colorado and Washington's lead than might do so otherwise.

Those who support taxing and regulating marijuana like alcohol are unlikely to find much to recommend in this proposal as compared to, for example, Representative Polis's bill to de-federalize marijuana policy entirely. Continuing to prohibit manufacture and wholesale of marijuana under federal law would mean the pernicious effects of the black market would remain for those activities. Colorado and Washington would lose out on tax revenue from producers and a significant piece of their laws would remain in conflict with federal policy. A system that permits the retail sale and possession of marijuana but also continues to criminalize producers would raise significant concerns about equity, particularly without any change in current federal sentencing laws for marijuana.<sup>44</sup> Marijuana manufacturers would be violating federal law and could be subject to lengthy mandatory minimum sentences, while marijuana retailers would be free to operate lawfully and make significant profits.

Finally, drug producer and transit countries like Mexico may be justifiably upset if the United States government were to permit retail sales. These countries suffer most of the negative effects of drug prohibition,<sup>45</sup> and some are interested in the possibility of legalizing

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<sup>44</sup> Cf. Michael J.Z. Mannheimer, *Federalism Battles in the War on Drugs: Cruel and Unusual Punishment*, PRAWFSBLAWG (Feb. 21, 2013), <http://prawnsblawg.blogs.com/prawnsblawg/2013/02/federalism-battles-in-the-war-on-drugs-cruel-and-unusual-punishment.html> (posing the question whether a ten-year federal sentence for conduct that is legal under state law may constitute cruel and unusual punishment).

<sup>45</sup> E.g., Seth Harp, Note, *Globalization of the U.S. Black Market: Prohibition, the War on Drugs, and the Case of Mexico*, 85 N.Y.U. L. REV. 1661, 1665 (2010) (arguing that "because drugs are produced abroad, much of the human misery immanent in black

drug production.<sup>46</sup> How could the United States ask these countries to continue to suffer widespread violence and corruption by criminalizing marijuana production and wholesale, while its retail sale is permitted in Colorado and Washington?<sup>47</sup>

### CONCLUSION

The passage of groundbreaking marijuana legalization ballot measures in Colorado and Washington has made clear that the conflict between states and the federal government on drug policy is not likely to subside any time soon. To date, most commentary on this conflict has proceeded from the premise that the federal government must choose between blocking these laws and allowing them to be implemented without interference.

This Article highlights that there are a range of policy options available to federal lawmakers and argues that, within these options, there may be room for compromise. This Article outlines one possible compromise position based on the Dutch model. Under this idea, the federal government would permit states to legalize the retail sale of marijuana without interference and focus its efforts on blocking the legal manufacture and wholesale distribution of marijuana.

Neither prohibitionists nor legalization advocates are likely to be entirely satisfied by this proposal. But, this Article argues, both groups may have reason to view this sort of proposal as an acceptable alternative to the current state of affairs. And, if there is one lesson to be drawn for marijuana legalization from the federal and state conflict over medical marijuana laws, it is that the status quo is not sustainable.

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markets of every kind has been offloaded onto people in third world countries" (footnote omitted)).

<sup>46</sup> *E.g.*, THE LATIN AM. COMM'N ON DRUGS AND DEMOCRACY, DRUGS AND DEMOCRACY: TOWARD A PARADIGM SHIFT 1 (2009) (arguing that after a decades-long war "[w]e are farther than ever from the announced goal of eradicating drugs").

<sup>47</sup> See Alfonso Serrano, *U.S. Marijuana Laws Ricochet Through Latin America*, TIME (Jan. 7, 2013), <http://world.time.com/2013/01/07/u-s-marijuana-laws-ricochet-through-latin-america/> ("Latin American decisionmakers are now openly questioning why they should continue to sacrifice police and soldiers to enforce drug laws when legal markets for marijuana now exist in the U.S.").