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Medical Marijuana and the Political Safeguards of Federalism

MEDICAL MARIJUANA AND THE POLITICAL SAFEGUARDS OF FEDERALISM

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Medical marijuana has emerged as one of the key federalism battlegrounds of the last two decades. Since 1996, sixteen states have passed new laws legalizing the drug for certain medical purposes.¹ All the while, the federal government has remained committed to zero-tolerance, prohibiting the possession, cultivation, and distribution of marijuana for any purpose.² The federal government's uncompromising stance against medical marijuana seemingly exposes the states' vulnerability to the whims of the national political process, and it has inspired calls for the courts to step in and protect state experimentation from this and other instances of arguable congressional over-reaching.³

I suggest, however, that the true story of the battle over medical marijuana and its implications for the political safeguards of federalism is more nuanced and less gloomy than the standard account portrays. True, the political safeguards of federalism failed to prevent passage of the federal ban. Indeed, it seems very little consideration was given to states' rights when the ban was passed as part of the Controlled Substances Act (CSA) in 1970. And, ironically, the very forces that originally failed to prevent passage of the ban now preserve it against increasingly loud calls

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1. These states include California (1996); Oregon (1998); Washington (1998); Alaska (1999); Maine (1999); Colorado (2000); Hawaii (2000); Montana (2004); Nevada (2004); Vermont (2004); Rhode Island (2006); New Mexico (2007); Michigan (2008); New Jersey (2010); Arizona (2010); and Delaware (2011). See MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS, 6-8 (2011), available at <http://www.mpp.org/legislation/state-by-state-medical-marijuana-laws.html>.

2. 21 U.S.C. § 841 (2010).

3. I say "arguable" because I do not believe the federal marijuana ban actually constitutes congressional over-reaching, even though many others have espoused that view. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 42-43 (2005) (O'Connor, J., dissenting) (arguing that federal marijuana ban exceeds Congress's Commerce power as applied to the purely local production and consumption of the drug); Brief of the States of Alabama, Louisiana, and Mississippi as Amici Curiae in Support of Respondents at 2-3, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 2336486 ("While the amici States may not see eye to eye with some of their neighbors concerning the wisdom of decriminalizing marijuana possession and use in certain instances, they support their neighbors' prerogative in our federalist system to serve as 'laboratories of experimentation.'" (footnote omitted) (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., Concurring))); Randy E. Barnett, *The Presumption of Liberty and the Public Interest: Medical Marijuana and Fundamental Rights*, 22 WASH. U.J.L. & POL'Y 29, 36-39 (2006) (recounting his advocacy on behalf of patients who challenged federal ban in *Gonzales v. Raich*).

for reform. But since the emergence of the medical marijuana movement in California in the mid-1990s, the political process has worked to undermine the federal ban's impact on medical use of the drug. The reality on the ground today is that the federal ban on marijuana is largely toothless. To be sure, it has bite in individual cases and it clearly shapes the way states regulate medical marijuana. But it hasn't stopped the medical marijuana movement. More than 400,000 people already use the drug pursuant to state medical marijuana programs.⁴ Medical marijuana dispensaries have proliferated—at one point, they supposedly outnumbered Starbucks and McDonalds in Los Angeles County.⁵ And nearly every year new states jump on the bandwagon and pass medical marijuana laws.⁶

The budding success of the medical marijuana movement offers a number of broader lessons about the power of the states in our federal system. In this symposium contribution, I use the case of medical marijuana to demonstrate that the national political process can protect states' prerogatives, even when Congress passes and the federal courts uphold legislation that arguably over-reaches. I suggest that political forces can help curtail the enforcement of federal laws post-enactment. Though these laws remain on the books, under-enforcement helps to preserve state prerogatives they supposedly supplant. I also briefly consider some shortcomings of these *de facto* constraints on the federal government's law-enforcement power, especially in comparison to formal *de jure* constraints on its lawmaking power.

The paper proceeds as follows. Part I briefly discusses the political safeguards literature and its focus on federal lawmaking. It also explains why medical marijuana poses a challenge to the political safeguards argument. Part II then discusses the political safeguards that exist at the law enforcement stage. It explains how the federal government's limited law enforcement capacity can help to undo at least some of the damage caused by (arguably) over-reaching federal legislation. Part III then identifies the shortcomings of relying exclusively on enforcement constraints to protect federalism. Nevertheless, it suggests that enforcement constraints can help to promote the values of federalism, even if imperfectly.

4. See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1464 (2009) (estimating participation at 400,000 as of 2009).

5. See Roger Parloff, *How Pot Became Legal*, FORTUNE, Sept. 28, 2009, at 156, available at <http://www.santabarbaraca.gov/NR/rdonlyres/82A61E58-3E97-4D45-864C-7CD80E1D72F1/0/FortuneMagazineArticle92809.pdf> (reporting that medical marijuana dispensaries outnumber Starbucks and McDonald's locations combined in L.A. County).

6. See MARIJUANA POLICY PROJECT, STATE MEDICAL MARIJUANA LEGISLATION 2012 (2012), available at <http://www.mpp.org/assets/pdfs/library/MMJBills2012.pdf> (cataloguing pending state medical marijuana legislation).

I. POLITICAL SAFEGUARDS AT THE LAW-MAKING STAGE

The standard account of the political safeguards of federalism focuses on how the national lawmaking process helps to block the passage of legislation that threatens the states' constitutional prerogatives.⁷ There are several features of the national political process that are supposed to keep Congress at bay. To illustrate the idea, I need only discuss a few.

First, the states have a strong voice and sympathetic ear in Washington. Nearly two-thirds of state governors maintain permanent offices in Washington, DC, through which they can lobby Congress on behalf of their states.⁸ State lawmakers and executive officials also engage in coordinated lobbying campaigns, managed by organizations like the National Conference of State Legislatures.⁹ What is more, it has been suggested that federal officials are prone to heed the demands of the states' lobbies because many of these officials began their careers in state government. As Larry Kramer explains, "A very high percentage of employees in all three branches of the federal government began their careers working for states. . . . With views shaped by this background and experience, these former state officials remain aware of and sympathetic to the concerns of state institutions—a feeling undoubtedly reinforced by continuing ties to friends and former colleagues still in the state system."¹⁰

Second, ordinary citizens may be reluctant to expand the federal government's authority vis-à-vis the states. As I have explained elsewhere,

First, some citizens may fear that congressional action on one issue may lay the groundwork for federalizing related issues—issues on which they would prefer state control. Second, citizens may worry about how laws will be enforced by Executive branch officials in the federal government. . . . Since they trust state governments more than they trust the federal government, and since they generally exert more control over state executive officials (via direct election and re-

7. The canonical work in the literature is, of course, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For a sampling of the literature inspired at least in part by Wechsler's thesis, see, for example, JENNA BEDNAR, *THE ROBUST FEDERATION: PRINCIPLES OF DESIGN* (2008); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990); Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OH. ST. L.J. 1669 (2007); Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329 (2003).

8. JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* 35 (2009).

9. Kramer, *supra* note 7, at 285 n.272.

10. *Id.* at 285.

calls), citizens may prefer to have state officials administer the laws (and have state courts interpret them), and hence, may oppose congressional legislation that vests enforcement authority in federal officials. Third, citizens also care about government processes, and not just the outcomes of those processes. Some citizens value the opportunity to participate directly in lawmaking that is only available at the state level (via ballot initiatives, etc.) and thus may resist efforts to federalize policy domains that crowd out such opportunities. Moreover, some citizens value federalism itself; that is, they have opinions about which level of government ought to control various policy domains, and these federalism beliefs may temper their support for congressional proposals which, though appealing on the merits, intrude into domains they believe in principle should be controlled by the states instead.¹¹

To the extent that members of Congress heed the preferences of their constituents, they might opt not to pursue legislation given what I have called the “[p]opulist [d]istaste for [f]ederalization.”¹²

Third, the national law-making process is designed to impede congressional action. Bicameralism, presentment, and the Senate filibuster create several chokepoints at which federal legislation can be blocked.¹³ By making it very difficult to enact federal laws, the Constitution “leave[s] the states free to govern” on many important issues.¹⁴

These features of our polity make the passage of federal legislation very difficult, but not *impossible*. What happens when these safeguards fail to block the passage of over-reaching legislation? This clearly happens. The corpus of federal criminal law alone is replete with examples. Any number of the 3,000 plus federal criminal provisions might seem to encroach upon state prerogatives.¹⁵ (The exact number of violations depends on one’s views regarding the proper national role in our federal system.)¹⁶

11. Mikos, *supra* note 7, at 1673–74; see also Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Test*, 4 J. EMPIRICAL LEGAL STUD. 589 (2007) (using survey experiment to demonstrate that citizens’ federalism beliefs and their judgments about the comparative trustworthiness of federal and state authorities could temper their support for congressional legislation).

12. Mikos, *supra* note 7 at 1691.

13. Clark, *supra* note 7, at 1339 (arguing that “[m]ultiple veto gates establish, in effect, a supermajority requirement[.]” for the passage of federal laws); see also Mikos, *supra* note 7, at 1691 (concluding that the states’ majoritarian-friendly lawmaking procedures gives them a decided advantage vis-à-vis Congress in satisfying citizens’ policy preferences).

14. Clark, *supra* note 7, at 1329.

15. See, e.g., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS’N, THE FEDERALIZATION OF CRIMINAL LAW (1998).

16. There are at least some federal criminal statutes that are uncontroversial, either because they serve a distinct federal interest—e.g., protecting the President—or because they target a “problem” the states readily acknowledge but are not capable of addressing—e.g., smuggling of narcotics across international borders.

The ban on medical marijuana is one prominent example. The ban obviously made its way through the “gauntlet”¹⁷ that is the federal law-making process. The scheduling of marijuana was but one issue among many in the comprehensive federal drug reforms that were passed by Congress in 1970. Indeed, Congress chose to place marijuana on Schedule I—a categorization reserved for the most dangerous and least redeeming of substances—in spite of the misgivings of some prominent Nixon Administrative officials. In testimony before Congress in 1969, for example, Assistant Secretary of Health and Scientific Affairs Dr. Roger Egeberg recommended that Congress “make a clear legal distinction between marihuana and the hard narcotics, with which it has erroneously been associated in law and the public mind.”¹⁸ Despite Egeberg’s protestations, however, Congress proceeded to list marijuana on Schedule I, and despite repeated petitions to revisit that decision,¹⁹ marijuana has remained on that list for more than forty years.

For those who believe that Congress has no business regulating marijuana, the political safeguards failed in a very important sense. The political safeguards failed to stop Congress from running roughshod over state prerogatives concerning this important issue. The federal ban that was enacted makes no exceptions, for medical use or otherwise.²⁰ Even research employing the drug is permitted only sparingly.²¹ Anyone who possesses, distributes, or cultivates marijuana pursuant to state law can be criminally prosecuted—among other things—for violating the federal ban.²² State medical marijuana laws provide no defense against federal enforcement actions.²³

What is more, as if to throw salt on the wound, the same forces that originally failed to block adoption of the federal marijuana ban now

17. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEXAS L. REV. 1549, 1609 (2000).

18. Crime in America—Views on Marihuana: Hearings Before the House Select Comm. on Crime, 91st Cong. 7 (Oct. 14, 1969) (statement of Dr. Roger O. Egeberg delivered by Dr. Jesse Steinfeld).

19. *E.g.*, NAT’L COMM’N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING (1972) (recommending de-criminalization of simple possession of marijuana); see also *Gonzales v. Raich*, 545 U.S. 1, 15 n.23 (2005) (recounting history of failed petitions before the DEA to re-schedule marijuana); Letter from Lincoln Chafee, Governor of R.I., & Christine Gregoire, Governor of Wash., to Michele Leonhart, Administrator, Drug Enforcement Administration (Nov. 30, 2011), available at http://www.governor.wa.gov/priorities/healthcare/petition/combined_document.pdf (detailing governors’ recent petition to reschedule marijuana).

20. 21 U.S.C. § 841 (2010); see also *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491 (2001) (holding that the terms of the statute “leave no doubt that [a medical necessity] defense is unavailable” in criminal prosecutions under the CSA).

21. See *Mikos*, *supra* note 4, at 1433–34 (discussing federal government’s apparent reluctance to approve research on medical uses for marijuana).

22. For a discussion of the civil sanctions that can be imposed against medical marijuana, see Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633, 634 (2011).

23. See *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

work to entrench it. Public opinion polls consistently show that more than 70% of American adults favor legalization of medical marijuana.²⁴ Yet, given the obstacles to federal lawmaking outlined above, it still seems unthinkable that Congress would act to reschedule marijuana anytime soon—even 70% support may not be enough.

II. THE POLITICAL SAFEGUARDS AT THE LAW ENFORCEMENT STAGE

So, does episodic overreaching by Congress demonstrate that the political safeguards of federalism are a failure? Does it bolster the case for more aggressive judicial review of federalism issues? In the context of medical marijuana, does it make the claim that *Gonzales v. Raich*²⁵—a seminal Supreme Court case upholding the federal marijuana ban—was wrongly decided, and that the Court should have barred Congress from regulating some activities regarding marijuana?

Not necessarily. Putting aside debates over the legitimacy of relying exclusively on the political safeguards approach,²⁶ I suggest that the political safeguards haven't necessarily failed to protect state prerogatives. Even when the federal government passes over-reaching legislation, the political process may nonetheless preserve state prerogatives by curbing enforcement of such legislation.

Most federalism scholars pay too little attention to the important role that enforcement priorities could play in protecting states' rights.²⁷ From a legal realist perspective, enforcement clearly matters—it arguably “controls the effective meaning of the law.”²⁸ In the extreme, an utter lack of enforcement of a law is tantamount to repeal of that law. Notably,

24. See Mikos, *supra* note 4, at 1462 (discussing polling data).

25. 545 U.S. 1 (2005).

26. For the view that the Constitution requires judicial review of Congress's lawmaking powers, see, for example, Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 20 (1988) (“If the Constitution forbids federal interference with state autonomy, then the courts cannot abandon their duty to enforce that limit simply because the political process appears to provide a tolerable substitute for judicial review.”); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1466–68 (2001); William W. Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1732 (1985).

27. For some noteworthy exceptions, see, for example, Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 899 (2000) (“Overlooked in much of the debate about federalization is the central role that prosecutors play in the federalization of crime—and the important role they can play in controlling federalization.”); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 U.C.L.A. L. REV. 757, 759 (1999) (suggesting that “the nature and extent” of Congress's delegation of lawmaking authority to federal prosecutors “cannot be assessed simply by reference to the specificity of substantive lawmaking (or the lack thereof)”, but must also consider Congress's “interactions with, and manipulation of, the federal enforcement bureaucracy”); see also Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 167 (2012) (examining Colorado's medical marijuana industry and concluding that “the disconnect between the law as written and the conduct on the ground may simply have gotten too great to be tenable going forward”).

28. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 700 (2011).

of the 3,000 or so federal criminal laws now on the books,²⁹ many appear to be rarely (if ever) enforced.³⁰

Enforcement of any law requires the ongoing appropriation of fiscal and political capital, both of which are in short supply. The federal government employs about 100,000 law enforcement agents.³¹ That's a very large number, but it's still only enough to investigate, prosecute, and punish a tiny fraction of all criminal violations of federal law. And increasing the federal government's capacity to enforce all of its criminal laws vigorously would necessarily require raising taxes, a prospect that is generally disfavored (to put it mildly) by most voters.

Hence, every year, federal lawmakers must decide how to allocate this relatively fixed and finite level of resources across an expansive and growing set of enforcement priorities.³² Not surprisingly, the squeaky wheel gets the grease in this process. The crisis that sparked federal legislation in some past year commonly fades away and is eclipsed by a new crisis that demands a portion of the enforcement pie. This means that law enforcement priorities may shift over time, even though the content of the law remains largely fixed. The appropriations process gives opponents of federal legislation the opportunity to scuttle it—*de facto*, if not *de jure*—on an almost annual basis. The old laws stay on the books (removing them is too difficult) but they can fade away, just like the crises that inspired them.

A similar process is played out in the Executive Branch. Congress budgets enforcement expenditures into categories,³³ but sometimes

29. This figure is, at best, an estimate of the total number of federal crimes. See Mila Sohoni, *The Idea of "Too Much Law"*, 80 *FORDHAM L. REV.* 1585, 1603–06 (noting that it is impossible to tabulate precisely the number of federal crimes on the books).

30. *Cf. id.* at 1606–07 (“Federal criminal law enforcement accounts for only about 6 percent of the country’s total felony prosecutions each year. A blinkered focus on metrics of numerosity obscures these substantive details, which have obvious relevance to the question whether the quantum of federal criminal law has exceeded the optimal level.”).

It is revealing that more than two-thirds of all federal criminal prosecutions in 2011 involved just three broad crime categories: drugs (31%), immigration (28%), and fraud (13%). THOMAS F. HOGAN, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2011 ANNUAL REPORT OF THE DIRECTOR* 17–19 (2011), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>. For more detailed data on the number of federal prosecutions by crime, see U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/fjsrc/> (last visited Dec. 18, 2012).

31. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: FEDERAL LAW ENFORCEMENT (last updated Dec. 18, 2012), <http://www.bjs.gov/index.cfm?ty=tp&tid=74> (reporting 105,000 federal agents whose primary function is the “prevention, detection, and investigation of crime and the apprehension of alleged offenders”).

32. To be sure, Congress cannot necessarily control the level of enforcement resources dedicated to particular crimes—e.g., marijuana distribution, health care fraud, etc. See Richman, *supra* note 27, at 798. However, Congress can (and does) achieve a less precise level of control over enforcement by assigning responsibility for particular crime types (e.g., drug offenses) to particular agencies (e.g., the DEA) and then controlling the funding of such agencies. See *id.* at 796–799.

33. For a breakdown of the Department of Justice’s fiscal year 2012 budget, see DEPARTMENT OF JUSTICE, *FY 2012 BUDGET & PERFORMANCE SUMMARY* (2012),

agents have broad discretion in spending the funds they've been allocated. If they disagree with legislation or simply don't consider it a high priority, these agents can effectively scuttle it by refusing to enforce it—openly or *sub silentio*.³⁴

I do not suggest that under-enforced laws are entirely irrelevant. Indeed, even un-enforced laws could have some impact on individual behavior, if people feel pressured to obey them due to moral obligations or social norms.³⁵ But the states' regulatory choices seem more likely to matter when the federal government doesn't enforce its own.

Now, consider how the political forces just discussed have helped to constrain enforcement of the federal ban on medical marijuana, thereby preserving state prerogatives at least to some extent. The federal ban hasn't quashed the medical marijuana movement—far from it. Sixteen states have legalized medical marijuana as a matter of state law, notwithstanding the federal ban.³⁶ Six of those states have done so after *Gonzales v. Raich* put to rest any serious doubts about Congress's authority to proscribe marijuana.³⁷ Marijuana use is rampant: "More than 14.4 million people regularly use marijuana in the United States. . . ."³⁸ This includes more than—and perhaps many more than—400,000 medical marijuana users in just sixteen states.³⁹ Oregon alone has 57,000 registered users.⁴⁰ Marijuana dispensaries have proliferated in some medical marijuana states. Before a local ordinance limited their number, as many as 1,000 dispensaries may have been operating in Los Angeles County alone.⁴¹ Ten dispensaries will soon open in the District of Columbia, Congress's own backyard.⁴² Unlike most illicit drug dealers, these dispensaries are operating in plain sight—in other words, they're not hiding from the federal government. The Discovery Channel even hosts a documentary series, *Weed Wars*, showcasing people who are unabashed about flouting the ban. And while the federal Executive continues to squeeze medical marijuana distributors, some of its actions suggest the federal ban is now

<http://www.justice.gov/jmd/2012summary/pdf/fy12-bud-summary-request-performance.pdf#budsum>.

34. For a discussion of how federal prosecutors prioritize their limited enforcement resources, see generally Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221 (2003).

35. See, e.g., TOM TYLER, *WHY PEOPLE OBEY LAW* (1990).

36. See MARIJUANA POLICY PROJECT, *supra* note 1.

37. *Id.*

38. Mikos, *supra* note 4, at 1464 (emphasis added) (citing SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH, fig. 2.1, available at <http://www.oas.samhsa.gov/NSDUH/2k7NSDUH/2k7results.cfm#Ch2>).

39. *Id.* (estimating number of medical marijuana users in thirteen states as of 2009).

40. OR. HEALTH AUTH., OREGON MEDICAL MARIJUANA PROGRAM STATISTICS, <http://public.health.oregon.gov/diseasesconditions/chronicdisease/medicalmarijuanaprogram/pages/data.aspx> (reporting enrollment statistics for state medical marijuana registry).

41. See Parloff, *supra* note 5.

42. Tim Craig, *D.C. Council Approves Limits on Medical Marijuana Growth*, WASH. POST (Jan. 17, 2012), http://www.washingtonpost.com/local/dc-politics/dc-council-approves-limits-on-medical-marijuana-growth/2012/01/17/gIQAxLNa6P_story.html.

“more of what you’d call a ‘guideline’ than an actual rule.”⁴³ In Colorado, for example, the United States Attorney recently issued letters to twenty-three marijuana dispensaries, threatening them with civil and criminal penalties, that is, unless they *moved* (all of the dispensaries in question were located near schools). In other words, one United States Attorney is now asking individuals who are openly flouting federal law not to stop doing so altogether, but to do so more discretely.⁴⁴

Why has the federal ban been so ineffectual at stopping the medical marijuana movement? In large part, it is because political realities severely curtail enforcement of it. To enforce a federal ban on medical marijuana *effectively* would entail monumental financial and political costs. It would take a massive commitment of new law enforcement resources to hire more agents, pursue more arrests, launch more prosecutions, and build more prisons just to dent the medical marijuana drug trade. The federal government already spends approximately \$2.4 billion per year to combat marijuana.⁴⁵ Just imagine how much more it would take to seriously curtail this ubiquitous drug. All of this would require comparable increases in federal taxation—and Congress is reluctant to raise taxes, probably even to curb drugs.

But raising taxes to fund a troop surge in the war against medical marijuana would be especially unpopular. Medical marijuana now has a great deal of public support, apparently even among those who don’t use it. As mentioned earlier, over 70% of the population supports legalization of the drug for medical purposes.⁴⁶ It stands to reason that most politicians who oppose medical marijuana will incur some political costs in so doing.

In the midst of this enforcement gap, states have been able to pursue modest medical marijuana reforms. People are willing to participate in state medical marijuana programs because the perceived benefits can be quite high and because the legal consequences under federal law are—at least on average—far from dire. States have been able to further weaken the deterrent influence of the federal ban. For one thing, “[b]y legalizing medical use of marijuana . . . state laws may have softened public attitudes towards it. The use of marijuana may seem more efficacious and less dangerous or wicked because it is permitted by state law.”⁴⁷ In addition, “people may feel relieved of the [moral] obligation to obey the fed-

43. To paraphrase Captain Barbossa in *PIRATES OF THE CARIBBEAN: CURSE OF THE BLACK PEARL* (Disney 2003).

44. John Ingold, *All Targeted Colorado Marijuana Dispensaries Near Schools Shut Down, Feds Say*, DENVER POST (Feb. 28, 2012), http://www.denverpost.com/news/marijuana/ci_20064569.

45. JEFFREY A. MIRON, *THE BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITION* 9–10 (2005), available at http://www.cannabis-commerce.com/library/Miron_Report_2005.pdf; see also Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223, 230–31 (discussing expenditures on marijuana prohibition).

46. See *supra* note 24 and accompanying text.

47. Mikos, *supra* note 4, at 1472.

eral ban because state law permits marijuana use,”⁴⁸ especially “when they deem the state—and not Congress—as having the ‘legitimate right to dictate their behavior’ regarding marijuana use.”⁴⁹ Finally, the “passage of . . . state [medical marijuana] laws, many by wide margins, signals that society is more likely to support than to censure medical use of marijuana,” thereby removing the threat of social sanctions.⁵⁰ In short, by passing their own laws approving of marijuana, “[s]tates have succeeded at removing—or at least diminishing—the biggest obstacles curbing medical use of marijuana: state legal sanctions and the personal, moral, and social disapproval that may once have inhibited use of the drug.”⁵¹

Importantly, the Supreme Court helps to ensure that these forces continue to constrain Congress. In particular, Congress can’t sidestep the resource constraints and political gauntlet outlined above by commandeering the states’ own lawmaking and law enforcement resources.⁵² This is a crucial constraint on Congress, because the states have substantial law enforcement capacity—for example, they now handle 99% of all marijuana cases.⁵³ Congress can’t duck the need to raise taxes—or the potential wrath that would be caused by an even more aggressive campaign against medical marijuana—by ordering state legislatures or state executives to help quash the drug. The anti-commandeering rule enables states to passively resist federal authority. The only thing the states may not do is actively facilitate violations of the federal ban—e.g., by growing the drug themselves or helping others to do so.⁵⁴

III. ARE CONSTRAINTS ON FEDERAL LAW ENFORCEMENT NECESSARILY A GOOD THING?

Are these constraints on federal law enforcement a desirable supplement—or perhaps, even an alternative—to the other safeguards of federalism? In this part, I offer some very tentative thoughts concerning these questions.

First, it is important to note that resource constraints won’t always prevent enforcement of over-reaching federal legislation. Marijuana is, in some respects, an unusually tough test for the federal government. The federal ban on the drug is tough to enforce in large part because the drug is so popular and so easy to grow. But other congressional prohibitions are comparatively easy to enforce. This is true, for example, when the

48. *Id.* at 1474.

49. *Id.*

50. *Id.* at 1478.

51. *Id.* at 1479; *see also* Robert A. Mikos, Compliance in Federal Systems (2012) (unpublished manuscript) (on file with author) (presenting empirical evidence that conflict between state and federal laws erodes compliance with restrictive regulations).

52. *Printz v. United States*, 521 U.S. 898, 935 (1997).

53. *See* Mikos, *supra* note 4, at 1443 n.90.

54. *See id.* at 1445–50, for a detailed explanation of the extent to which the anti-commandeering rule limits Congress’s power to preempt state medical marijuana laws.

proscribed behavior is relatively uncommon. The federal Partial Birth Abortion Ban Act, for example, proscribes one abortion procedure that is relatively uncommon (the procedure was performed in about 4,000 cases per year, prior to the ban) and one that can be performed by only a very small cadre of specially-trained physicians.⁵⁵ Not surprisingly, it would seem that few people are willing to flout that ban (at least openly), even though thirty-two states apparently permit the procedure outright (pursuant to state law), and all of the rest permit the procedure in at least some cases (e.g., to protect the mental health of a pregnant woman) when federal law does not.⁵⁶

Even when the behavior Congress targets is more commonplace, as with marijuana use, Congress can sometimes fill enforcement gaps by empowering private citizens to help enforce its laws. Federal employment discrimination laws provide a prime example. Congress has empowered the Equal Employment Opportunity Commission (EEOC) to enforce such laws, but the agency faces a daunting task: in 2011, for example, nearly 100,000 individuals brought employment discrimination claims to the agency's attention.⁵⁷ The agency, with a total staff of 2,470 and a budget of \$367 million, cannot fully investigate and prosecute every such claim.⁵⁸ Indeed, it typically files a rather paltry number of suits against employers—only 300 in FY 2011.⁵⁹ However, the EEOC's litigation statistics clearly under-state the impact of federal employment law, at least in part because federal law creates a private right of action against employers who discriminate. In other words, aggrieved employees can bring suit directly against their employers (though sometimes, only after they have filed a charge with the EEOC), "thereby lessening the need for [the EEOC] to enforce the law."⁶⁰

Second, even when the federal government cannot enforce its laws vigorously, it can still limit the states' regulatory options in important ways. The CSA, for example, makes it difficult for the states to monitor and control their medical marijuana exemptions. Among other things, it

55. The prohibition is found in 18 U.S.C. § 1531 (2003). For a discussion of the frequency of the procedure, see *Gonzales v. Carhart*, 550 U.S. 124, 134–35 (2007).

56. For a survey of state laws governing partial birth abortion, see *Bans on "Partial-Birth" Abortion*, GUTTMACHER INSTITUTE (Dec. 1, 2012), available at http://www.guttmacher.org/statecenter/spibs/spib_BPBA.pdf.

57. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, CHARGE STATISTICS FY1997 THROUGH FY 2011, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

58. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC BUDGET AND STAFFING HISTORY 1980 TO PRESENT, available at <http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm>.

59. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC LITIGATION STATISTICS, FY 1997 THROUGH FY 2011, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

60. Mikos, *supra* note 4, at 1468 n.169. The number of suits brought by the EEOC (300 in 2011) comprises only a small fraction of the total number of employment and labor law suits filed in federal court (roughly 37,000 in 2002). See Ann C. Hodges, *Medication and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 369 n.27 (2004) (citing FEDERAL JUDICIAL CASELOAD STATISTICS tbl C-2 (2002)).

prevents the states from directly cultivating and distributing marijuana,⁶¹ an approach that would undoubtedly enhance their ability to prevent diversion of the drug into the black market and to protect patient health. (Indeed, many states assumed ownership of all liquor stores following the repeal of Prohibition, in order to better control the consumption of alcohol.⁶²) And some states have been reluctant to scrutinize individuals' eligibility to use marijuana under state law, out of fear that any information they gather about patients could be seized and exploited by federal law enforcement agents.⁶³

Third, the constraints on the federal government's law enforcement power may not protect individual rights adequately, even when they do protect states' rights. With respect to medical marijuana, most people flouting the federal ban will never be caught or punished. That is why I have argued that "the states, and not the federal government, . . . have emerged the victors" in the battle over medical marijuana.⁶⁴ But some individuals have been and will continue to be prosecuted under the federal ban. To the extent the federal ban represents a usurpation of state power, these prosecutions will seem unjust in our constitutional system. And even if they are infrequent, the prosecutions may seem all the more arbitrary and unjust due to their infrequency.⁶⁵ We're much more comfortable in a world where troubling federal laws can't be enforced, but only the lawmaking safeguards or judicial safeguards could provide that assurance.

Lastly, it is important to recognize the danger that embracing open defiance of federal law could breed contempt for the rule of law itself.⁶⁶ The mode of preserving state prerogatives discussed herein hinges on private citizens being willing to defy federal law—the more the better. Some may applaud citizens who openly flout the federal marijuana ban,

61. Mikos, *supra* note 4, at 1426 (arguing that state distribution and cultivation programs are preempted by the CSA); see also Mikos, *supra* note 22, at 662–63 (discussing the ease with which preemption challenges could be raised in state courts).

62. See Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 MILBANK Q. 461, 473–76 (1991) (suggesting that one of the primary means of controlling alcohol once Prohibition was repealed was through state ownership of retail distribution).

63. See Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?* 161 U. PA. L. REV. 103 (2012).

64. Mikos, *supra* note 4, at 1425.

65. Cf. Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 948 (2005) (decrying disproportionate sanctions that arise as a result of federal case selection). There is another reason not everyone will enjoy the benefits of the enforcement safeguards. Namely, some people may feel a moral obligation to obey federal law, even if they know they will never be caught and punished for so doing. These people will only enjoy the benefits of state law if the federal law is repealed or invalidated by a court decision.

66. See, e.g., David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1866 (2005). This is a danger, of course, that the Supreme Court itself has arguably invited, by refusing to impose a duty of fidelity upon the states. For an insightful discussion of competing views of responsibility to the central authority in federal systems, see generally Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731 (2004).

perhaps even hoping their actions will encourage others to do the same. But what happens if such actions also encourage defiance of other federal laws, such as federal school desegregation orders?

In spite of these concerns, the constraints on federal law enforcement power generate some important benefits for our federal system that should not be overlooked. In the gaps created by the under-enforcement of federal law, states have been able to craft new policies that better reflect local preferences regarding the medical use of marijuana. In sixteen different laboratories (far more, if local variations are included), policy-makers are demonstrating the wisdom—or folly—of alternative approaches to medicine and drug abuse. The satisfaction derived and lessons learned from these experiments would never have emerged but for the federal government's inability to vigorously enforce its own zero-tolerance solution.

In the view of those who deem that federal policy oppressive, the states are also serving as a valuable check against federal tyranny. To be sure, they cannot shield their citizens from federal sanctions. But by giving medical marijuana use their blessing, the states might further erode support for and the efficacy of federal law. In this way, the states might serve as a modern instantiation of the Framers' vision of the states as checks on federal tyranny.

IV. CONCLUSION

The conflict over medical marijuana policy holds some important insights for the study of federalism more generally. Among other things, the conflict exposes the shortcomings of assessing the federal government's power vis-à-vis the states based on the mere existence of a federal law governing some (ostensibly) state domain. The law as written clearly matters, but how the law is enforced is perhaps a more accurate yardstick of federal power.

The federal government passed a stringent ban on marijuana more than four decades ago. Today, however, the federal government lacks the fiscal and political capital needed to enforce that ban aggressively and to quash the burgeoning medical marijuana movement. For example, the number of prosecutions now being brought under the CSA pales in comparison to the number of violations now occurring. In the gap between the federal ban as written and the federal ban as enforced, a growing number of states have begun to experiment with more tolerant approaches to marijuana policy. As long as the political process continues to underfund enforcement of the federal ban, it will provide some protection for state power.

