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The Evolving Federal Response to State Marijuana

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The Evolving Federal Response to State Marijuana Reforms

*Robert A. Mikos**

ABSTRACT

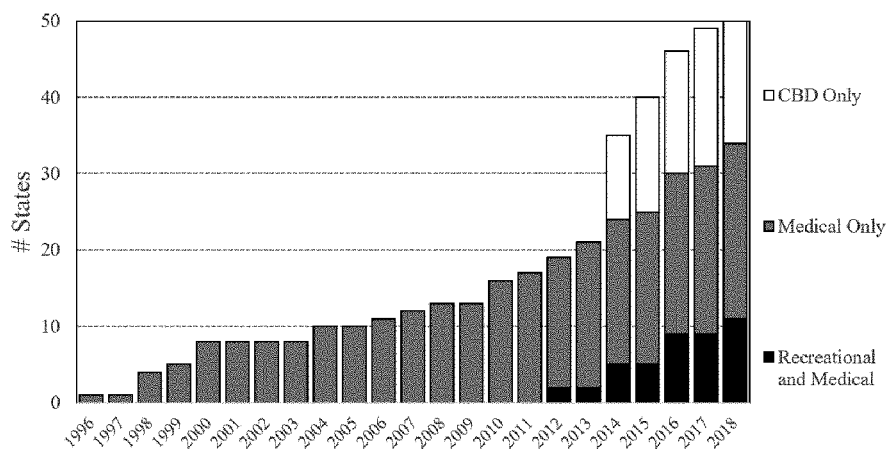
The states have launched a revolution in marijuana policy, creating a wide gap between state and federal marijuana law. While nearly every state has legalized marijuana in at least some circumstances, federal law continues to ban the substance outright. Nonetheless, the federal response to state reforms has been anything but static during this revolution. This Essay, based on my Distinguished Speaker Lecture at Delaware Law School, examines how the federal response to state marijuana reforms has evolved over time, from War, to Partial Truce, and, next (possibly) to Capitulation. It also illuminates the ways in which this shifting federal response has alternately constrained and liberated states as they seek to regulate marijuana as they deem fit.

* Professor of Law, Vanderbilt University Law School. This Essay is based on my Distinguished Speaker Keynote Lecture for the *Cannabis in the Tri-State Area* Symposium at Delaware Law School in March of 2019. I thank Professor Luke Scheuer and the editors and staff of the *Widener Law Review* for organizing and hosting the Symposium.

We are experiencing nothing short of a revolution in marijuana law. Just twenty-three years ago, every state in the Union banned marijuana outright.¹ Today, by contrast, only one state still does (Idaho).² Put another way, over the last two decades, forty-nine states plus the District of Columbia have legalized the use of marijuana for at least some purposes.³

Figure 1 illuminates the steady spread of these state marijuana reforms over time. The stacked bars show the total number of states that have legalized marijuana by the end of each year from 1996-2018.

FIGURE 1: STATES LEGALIZING MARIJUANA⁴



The earliest reforms, like California’s Compassionate Use Act (aka Proposition 215), legalized only medical use of the drug (at least in name).⁵ The gray portion of each stacked bar represents the share of states that legalized medical—and *only* medical—marijuana, at the end of each year depicted in Figure 1. The white portion of the stacked bar represents the share of states that adopted a very narrow version of a medical marijuana law. Starting with Alabama in 2014, states began legalizing medical use of marijuana, but only when the drug contained very little Tetrahydrocannabinol (“THC”), the psychoactive chemical (cannabinoid) produced by the cannabis plant.⁶ I label these “CBD Only” states because

¹ ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 3 (2017) [hereinafter MIKOS, MARIJUANA LAW].

² Robert A. Mikos, *Only One State Has Not Yet Legalized Marijuana in Some Form . . .*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (June 16, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/07/only-one-state-has-not-yet-legalized-marijuana-in-some-form/> [hereinafter Mikos, *Only One State*].

³ *Id.*

⁴ Figure 1 is updated and adapted from Figure 1.1 in MIKOS, MARIJUANA LAW, *supra* note 1, at 3.

⁵ *Id.* at 99.

⁶ *Id.* at 123.

they are interested in enabling access to another cannabinoid with reputed therapeutic benefits: cannabidiol (“CBD”).⁷ Although CBD is not psychoactive, it is (or was, until very recently) nearly always considered “marijuana” in the eyes of the law.⁸ But because these “CBD Only” laws are much narrower than the medical marijuana reforms depicted in gray, I have shown them separately in Figure 1.⁹

In 2012, some states that previously adopted medical marijuana laws began to legalize the drug for non-medical purposes as well.¹⁰ The black portion of the stacked bar in Figure 1 depicts the spread of these “Recreational and Medical” reforms. In a nutshell, states with “Recreational and Medical” marijuana laws permit anyone over twenty-one years of age to possess and use marijuana, regardless of their reasons for so doing; and nearly all of these states also permit commercial vendors to sell the drug to lawful consumers.¹¹

The last stacked bar at the far-right side of Figure 1 shows how far these three types of marijuana reform have proliferated across the states. At the end of 2018, ten states (plus the District of Columbia) had legalized adult use of marijuana (“Recreational and Medical”); another thirty-nine states had legalized marijuana exclusively for medical purposes, with twenty-three of those states allowing marijuana with THC (“Medical Only”) and another sixteen states allowing marijuana without THC (“CBD Only”).¹²

By itself, this dramatic transformation in state marijuana laws is quite remarkable. But the transformation is even more remarkable in light of the fact that it has taken place in the shadow of a strict federal ban on the drug. Since 1970—well before California launched the modern reform movement—federal law has banned the possession, manufacture, and distribution of marijuana, making no exception for medical (or other) use of the drug.¹³ In the ensuing half-century, the federal ban has survived constitutional challenges,¹⁴ as well as a groundswell in public support for legalization of the drug.¹⁵

⁷ MIKOS, MARIJUANA LAW, *supra* note 1, at 123.

⁸ Robert A. Mikos, *New Congressional Farm Bill Legalizes Some Marijuana*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Dec. 13, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/12/new-congressional-farm-bill-legalizes-some-marijuana/> [hereinafter Mikos, *New Congressional Farm Bill*].

⁹ For a discussion of the differences between Medical Only and CBD Only laws, see MIKOS, MARIJUANA LAW, *supra* note 1, at 123–124.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 443; see also Robert A. Mikos, *Some Observations on How Vermont Just Legalized Recreational Marijuana*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG. (Jan. 24, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/01/352/>.

¹² Mikos, *Only One State*, *supra* note 2.

¹³ 21 U.S.C. §§ 841, 844 (2016).

¹⁴ *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding application of the federal marijuana ban to the intra-state possession, cultivation, and distribution of marijuana).

¹⁵ *E.g.*, Justin McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, GALLUP (Oct. 22, 2018), <https://news.gallup.com/poll/243908/two-three-americans-support->

The tension between the federal marijuana ban and state reforms is one of the primary reasons why marijuana law has become such a hot field and the subject of symposia. The attention that the field is now attracting is warranted; in part because of the tension between state and federal law, the field raises some of the most fascinating and important legal issues of our day.¹⁶

To set the stage for our discussion on some of these issues, this essay discusses in more detail how the federal government has responded to state reforms. As I will show, the federal response has wielded a substantial and sometimes overlooked influence on the design of state marijuana laws. Furthermore, that influence has not been fixed across time. It is important to recognize that the federal response to state reforms has evolved over the past two decades, even though the federal law governing marijuana has remained largely the same. For the first decade (or so) of state reforms, the federal government took an overtly hostile and aggressive approach to marijuana legalization in the states.¹⁷ Among other things, it threatened to punish growers who distributed marijuana and physicians who recommended the drug to state-authorized patients. To defuse these threats, the states had to come up with creative solutions, which are evident in some otherwise puzzling features of state reforms (a few of which I will discuss in a moment).

But starting in 2009, the federal government began to adopt a far more tolerant approach toward legalization.¹⁸ In particular, the Department of Justice (“DOJ”), for the most part, stopped enforcing the federal marijuana ban against individuals who were acting in compliance with state law. This shift in federal response enabled states to pursue even broader reforms and to adopt more robust regulations of marijuana. Nonetheless, the ongoing tension between state and federal law continues to pose some unique challenges for the marijuana industry and for state officials tasked with regulating them. I will conclude by offering some thoughts on what it would take to remove these lingering challenges, should the federal government decide to change its marijuana policy once again.

legalizing-marijuana.aspx (reporting that 66% of Americans support legalizing marijuana as of 2018, compared to only 12% in 1970). For explanations of why these changes in public opinion have not yet triggered changes to federal marijuana law, see Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 UNIV. DENVER L. REV. 997–98 (2012) (identifying features of the national political process that help to preserve the federal marijuana ban against “increasingly loud calls for reform”); David S. Schwartz, *Presidential Politics as a Safeguard of Federalism: The Case of Marijuana Legalization*, 62 BUFF. L. REV. 599 (2014) (giving another view of the impact of the federal political process on federal marijuana law).

¹⁶ See MIKOS, MARIJUANA LAW, *supra* note 1, at 3–16 (identifying some key questions posed by marijuana law and policy).

¹⁷ See *infra* notes 19–49 and accompanying text.

¹⁸ See *infra* notes 51–80 and accompanying text.

THE FIRST PHASE: WAR

The first federal response to state reforms was overtly hostile and aggressive: call it “War.” Not long after California adopted the nation’s first modern medical marijuana law in 1996, the federal drug czar at the time, General Barry McCaffrey, urged federal agencies from the Drug Enforcement Administration (“DEA”) to the Department of Transportation (“DOT”) to do their part to quash the nascent medical marijuana movement.¹⁹ Many federal agencies heeded McCaffrey’s call to arms. The DEA, for example, raided a large number of dispensaries that had sprouted up to supply medical marijuana to qualifying patients in legalization states.²⁰ It also threatened to bar physicians from writing prescriptions for any controlled substance if they dared to prescribe marijuana to their patients.²¹

Of course, this federal War did not actually stop states from legalizing the drug. As you can see from Figure 1, the number of states legalizing medical marijuana continued to grow steadily after 1996, notwithstanding this federal hostility toward legalization. (I explain elsewhere why the federal government found it so difficult to stop this movement.²²)

Nonetheless, the federal War on marijuana clearly influenced (likely for the worse) how states designed their medical marijuana programs.²³ In particular, federal aggression made it more difficult for the states to regulate marijuana as they deemed fit,²⁴ leading the states to make some regulatory choices that are otherwise quite difficult to explain or justify. Let me give you two concrete examples to illustrate.

For one thing, the federal campaign against marijuana dispensaries likely dissuaded many states from authorizing companies to supply the needs of patients participating in state medical marijuana reforms. Notably, before 2003, *no state* had formally authorized companies to supply marijuana to patients commercially.²⁵ Instead, before 2003, every medical marijuana state expected patients to grow their own marijuana or get it from a “caregiver” who could grow it on their behalf (without remuneration).²⁶

¹⁹ Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6166 (Feb. 11, 1997).

²⁰ Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1443 (2009) (noting that the DEA raided “nearly 200 medical marijuana cooperatives in California alone” as part of a plan to “disrupt essential components of state marijuana programs”) [hereinafter Mikos, *On the Limits of Supremacy*].

²¹ *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002) (reviewing DEA policy).

²² See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1445–79 (detailing the *de jure* and *de facto* limits on federal influence over marijuana policy).

²³ See *id.* at 1428–30.

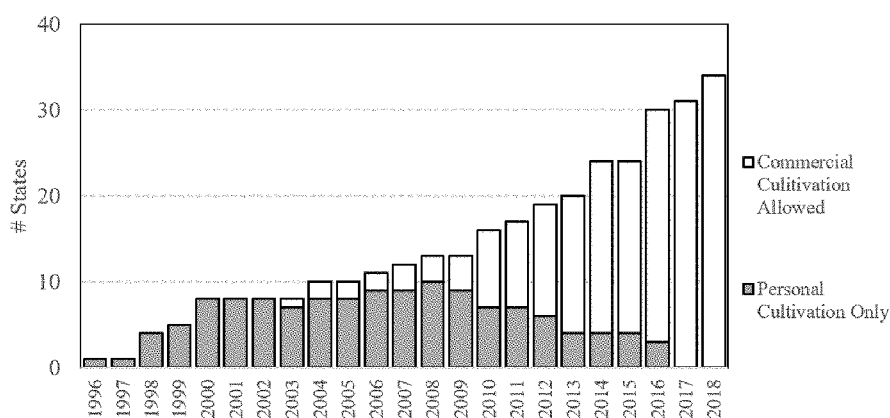
²⁴ See *id.* at 1465–66.

²⁵ See MIKOS, MARIJUANA LAW, *supra* note 1, at 532.

²⁶ *Id.* at 413–42 (explaining the rules governing personal and caregiver cultivation).

Figure 2 depicts the state-approved sources of supply from 1996-2018, the same time period covered by Figure 1. In other words, Figure 2 shows where qualifying patients could legally (under state law) obtain a drug they were allowed (again, under state law) to possess and use. To simplify, Figure 2 includes only the “Medical Only” and “Medical and Recreational” states from Figure 1.

FIGURE 2: MARIJUANA SUPPLY OPTIONS IN MEDICAL MARIJUANA STATES²⁷



The gray portion of each stacked bar in Figure 2 depicts the share of medical marijuana states in each year that required patients (or their caregivers) to grow the drug themselves but *did not also* (or instead) permit commercial dispensaries to supply it to them. These states have adopted what I call the “Personal Cultivation Only” supply model. The white portion of the stacked bars depict the share of medical marijuana states that allowed patients to buy the drug from commercial dispensaries. These states have adopted what I call the “Commercial Cultivation Allowed” model.²⁸

As you can see from Figure 2, there were very few medical marijuana states that allowed dispensaries to produce and sell marijuana before 2009 (i.e., most of the stacked bar is still gray in those early years), and none that did so explicitly before 2003. To be sure, there were some dispensaries operating before 2009; however, those dispensaries were technically illegal even under state law.²⁹ Hence, for more than the first decade of reform, medical marijuana states depended almost exclusively on personal

²⁷ MIKOS, MARIJUANA LAW, *supra* note 1, at 532 (Figure 2 is updated and adapted from Figure 10.1 in the book).

²⁸ Personal Cultivation and Commercial Cultivation are not mutually exclusive; indeed, several states allow both. For a more detailed breakdown of state models for the supply of marijuana, see *id.* at 480, 532–33.

²⁹ *Id.* at 532.

cultivation to supply the needs of patients whom they believed might benefit from the use of marijuana.³⁰

In the abstract, expecting seriously ill patients to “grow their own” medicine is an odd choice for the states to make. After all, no state says, “you may use Percocet – and indeed, we think you might benefit from it, but you’ll have to make it yourself.” In fact, states generally bar patients from making their own controlled substances at home, even if they are allowed to possess and use those same substances.³¹ But the federal government arguably gave the states no choice but to opt for the Personal Cultivation Only model. During this first phase, the federal government was threatening to shut down commercial marijuana suppliers (especially large ones).³² Thus, while the states could have tried to set up a well-regulated medical marijuana industry, they feared the effort would prove futile in the face of a likely federal crackdown.³³ Worse yet, states feared that a federal crackdown on a state-regulated industry might leave patients without any source of supply, especially if states required patients to buy the drug from licensed vendors rather than grow their own.³⁴

But states also recognized that the federal government’s ability to enforce its strict marijuana ban is limited, practically speaking. Even if it could shut down large commercial suppliers in the handful of states that had (in those early years) legalized medical marijuana, the federal government could not realistically stop patients or their caregivers from producing the drug in small batches.³⁵ There would simply be too many targets for federal law enforcement agents to handle. Consider that a single state like Colorado has over 100,000 registered medical marijuana patients, each of whom is allowed to grow a small number of plants to supply their own needs. Thus, even though personal cultivation has many shortcomings, the states may have viewed it as the only viable way to supply the needs of medical marijuana patients while the federal government waged war on commercial marijuana dispensaries.³⁶

The aggressive federal response to state reforms also warped the way that states structured the role of physicians in their medical marijuana programs. Not surprisingly, medical marijuana states have wanted physicians to help

³⁰ MIKOS, MARIJUANA LAW, *supra* note 1 at 532.

³¹ *Id.* at 415.

³² See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1443.

³³ Indeed, as I have demonstrated elsewhere, licensing marijuana dispensaries may have made those dispensaries even more vulnerable to a federal crackdown. Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PENN. L. REV. 103 (2012) (explaining that under the conventional wisdom, the federal government could seize any information gathered by the a state through its licensing process and use that information to identify and prosecute marijuana suppliers under federal law).

³⁴ ROBERT A. MIKOS, EXPERT REPORT IN ALLARD V. HER MAJESTY THE QUEEN IN RIGHT OF CANADA 14–17 (Oct. 10, 2014).

³⁵ See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1463–69.

³⁶ MIKOS, EXPERT REPORT, *supra* note 34, at 14–17.

them identify who should be allowed to use marijuana for medical purposes.³⁷ (In the 1990s and early 2000s, states were not yet ready to legalize marijuana for non-medical purposes.) But recall that the DEA was threatening to revoke the prescription-writing authority of physicians who dared to prescribe marijuana to their patients.³⁸

Thus, to entice physicians to perform this critical gatekeeping function, states had to find a way to defuse the DEA sanctions. To that end, states like California started to ask physicians to “recommend” rather than “prescribe” marijuana to their patients.³⁹ Such a recommendation entails telling a patient that his/her medical condition might benefit from the use of marijuana.⁴⁰ Of course, there appears to be little practical difference between *prescribing* marijuana, on the one hand, and *recommending* the drug, on the other. However, physicians convinced a prominent federal appeals court that the two practices were legally distinguishable. In *Conant v. Walters*, the Ninth Circuit held that merely “recommending” marijuana to a patient is First Amendment protected speech, meaning that physicians could not be punished for recommending marijuana to their patients, even though physicians could be punished for *prescribing* it.⁴¹ The court reasoned (dubiously) that a patient who receives a recommendation would not necessarily use it to obtain marijuana; for example, the court suggested, that “the patient upon receiving the recommendation could petition the government to change the law.”⁴² By contrast, the court suggested that a prescription served no purpose other than to enable a patient to obtain a drug; writing a prescription for marijuana (a federally proscribed drug) would thus aid and abet a patient’s unlawful possession of marijuana, making it unprotected crime-facilitating speech.⁴³ Although the court’s reasoning regarding the actual function of a recommendation is questionable,⁴⁴ the

³⁷ See MIKOS, MARIJUANA LAW, *supra* note 1, at 601.

³⁸ See *supra*, note 21, and accompanying text.

³⁹ MIKOS, MARIJUANA LAW, *supra* note 1, at 110–11.

⁴⁰ See, e.g., Mich. Comp. Laws Ann. § 333.26423(q) (explaining that “[w]ritten certification” means a document signed by a physician, stating all of the following: (1) The patient’s debilitating medical condition. (2) The physician has completed a full assessment of the patient’s medical history and current medical condition, including a relevant, in-person, medical evaluation. (3) In the physician’s professional opinion, *the patient is likely to receive therapeutic or palliative benefit* from the medical use of marihuana to treat or alleviate the patient’s debilitating medical condition or symptoms associated with the debilitating medical condition.”). The states sometimes use different words to describe the “recommendation” (e.g., certification, authorization, etc.), but the requirements are very similar across the states. For a further discussion of the recommendation requirement, see MIKOS, MARIJUANA LAW, *supra* note 1, at 110.

⁴¹ *Conant*, 309 F.3d at 632–33.

⁴² *Id.* at 634.

⁴³ *Id.* at 633.

⁴⁴ Nicole Santamaria, *Note, Medical Marijuana Legislation in Florida: The Recommendation vs. Prescription Distinction for Healthcare Providers*, 45 STETSON L. REV. 537, 558 (2016) (suggesting that it is “willfully ignorant to say that a physician who

DEA did not challenge the ruling and it has abided by the *Conant* court's decision ever since. For this reason, all thirty-four medical marijuana states (and D.C.) do not ask physicians to write prescriptions for marijuana, but rather ask them only to recommend the drug to their patients.⁴⁵

Even though the states were able to work around this second federal roadblock, asking physicians to issue “recommendations” in lieu of “prescriptions” is less than ideal (just like asking patients to grow their own marijuana is less than ideal). For one thing, although physicians are well-versed in the requirements for writing prescriptions, they are less familiar with the novel requirements for issuing recommendations, and this unfamiliarity may have needlessly exposed some patients to criminal sanctions. In one early case, for example, a medical marijuana patient in Washington state was prosecuted for possession of marijuana because the words his physician recited in recommending marijuana for his condition (“the potential benefits of the medical use of marijuana *may* outweigh the health risks”) did not precisely match the magic words required by the state’s medical marijuana law (“the potential benefits of the medical use of marijuana *would likely* outweigh the health risks”).⁴⁶ In addition, states could not use established *prescription* drug monitoring programs (“PDMPs”) to track medical marijuana *recommendations*.⁴⁷ PDMPs are an enormously valuable tool states use to combat prescription drug mills and abuse of prescription drugs (like opioid painkillers).⁴⁸ Thus, to monitor physician recommendation practices and possible abuse of medical marijuana programs, states had to create a parallel medical marijuana registration process at an added cost to state budgets.⁴⁹

In sum, during this first phase of state reforms, the federal government was overtly hostile to the legalization of marijuana. It waged war on individuals – and especially suppliers – who sought to take advantage of the states’ newfound openness to medical marijuana. The federal hostility did not stop reforms from spreading across the states; by the end of this period (2008), twelve states and the District of Columbia had legalized medical

recommends medical marijuana to a patient does not intend that the patient will use that recommendation as a means to obtain medical marijuana”); e.g., *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 120–21 (D.D.C. 2001) (reasoning that “a recommendation is analogous to a prescription”).

⁴⁵ See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1467 (“By carefully circumscribing the task that physicians must perform, the states . . . prevented the federal government from squeezing one of the most important chokepoints in state medical marijuana programs.”).

⁴⁶ *Washington v. Shepherd*, 41 P.3d 1235 (Wash. App. 2002) (emphases added).

⁴⁷ MIKOS, MARIJUANA LAW, *supra* note 1, at 625 n.6.

⁴⁸ *Id.*

⁴⁹ *Id.* at 116–18, 239–41 (discussing registration requirements).

marijuana.⁵⁰ It did, however, leave its mark on those reforms, by shaping and warping the way that states regulated marijuana suppliers and physicians.

THE SECOND PHASE: A (PARTIAL) TRUCE

Following the election of President Barack Obama in 2008, the federal government began to adopt a softer response toward state reforms. During this Second Phase, the federal laws governing marijuana did not change much (as I have already noted), but the way that the federal government enforced those laws *did* change.⁵¹ Most notably, in 2009, senior leadership in the Department of Justice (DOJ) began to discourage United States Attorneys from prosecuting individuals who used and/or supplied marijuana in compliance with state marijuana reforms.⁵² In other words, senior DOJ officials urged federal prosecutors to turn a blind eye to violations of the federal marijuana ban.⁵³

Even though this enforcement guidance conferred no legal rights on marijuana users/suppliers,⁵⁴ it still signaled that the federal government was willing to call a “Truce” in its longstanding war on marijuana.⁵⁵ (For reasons I explain below, it might be more accurate to describe the federal response to state reforms during this Second Phase as a “Partial Truce.”) The federal government has continued to abide by this “Partial Truce” even after the change in Administrations. President Trump’s first Attorney General, Jeff Sessions, was adamantly opposed to marijuana legalization; Attorney General Sessions even rescinded the Obama Administration enforcement guidance.⁵⁶ Importantly, however, for reasons I have explained in greater detail elsewhere, Sessions did not actually change federal enforcement practices—and indeed, there was probably little he could have done, even if he had desired to turn back the clock and reinstate the federal War on state

⁵⁰ MIKOS, MARIJUANA LAW, *supra* note 1, at 3.

⁵¹ There has been only one notable substantive change to federal marijuana law since 1996. The 2018 Farm Bill narrowed somewhat the definition of marijuana under federal law to exclude cannabis plants that are low in THC. Those plants and any substances extracted therefrom (like CBD) are now considered “hemp.” For further discussion of the 2018 Farm Bill, see *infra* notes 81–84 and accompanying text.

⁵² See generally Robert A. Mikos, *A Critical Appraisal of the Department Of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633 (2011) [hereinafter Mikos, *A Critical Appraisal*].

⁵³ Memorandum from James M. Cole, Deputy Att’y Gen., to all U.S. Att’ys (Aug. 29, 2013); see Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected U.S. Attorneys (Oct. 19, 2009).

⁵⁴ See Mikos, *A Critical Appraisal*, *supra* note 52, at 640–643. See also Zachary Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017).

⁵⁵ Professor Alex Kreit has helped to popularize the term “truce” to describe the federal government’s post (drug)-war drug policy. See Alex Kreit, *Drug Truce*, 77 OH. ST. L. J. 1323 (2016).

⁵⁶ See Memorandum from Jefferson B. Sessions, Att’y Gen., to all U.S. Att’ys (Jan. 4, 2018).

reforms.⁵⁷ Among other reasons, since 2014, Congress has attached riders to the DOJ's annual budget, barring the agency from using any of its funding to prosecute individuals for possession, production, or distribution of marijuana that complies with state medical marijuana reforms.⁵⁸

This Partial Truce, like the War it replaced, had a substantial effect on the design of state marijuana reforms. The states interpreted the DOJ enforcement guidance (and later, the congressional spending riders) as giving them the green light to set up a legal, but highly regulated, commercial marijuana industry. Thus, starting in 2009, an increasing share of medical marijuana states authorized the commercial production and distribution of marijuana⁵⁹—as shown by the growing white portion of the stacked bars in Figure 2. In fact, by the end of 2018, each of the thirty-four medical marijuana states (and D.C.) had authorized companies to produce and sell medical marijuana.⁶⁰ In 2002, by contrast, *none* of the eight medical marijuana states had allowed companies to grow and sell the drug, and even by 2008, only three out of thirteen medical marijuana states had done so.⁶¹ Starting around 2009, the states also adopted the first comprehensive regulations to govern the newly-legalized marijuana industry. For example, states began to restrict the packaging and labeling of marijuana products and to impose onerous seed-to-sale tracking requirements on state-licensed marijuana vendors.⁶² Today, roughly 5,000 companies are growing and

⁵⁷ Robert A. Mikos, *Jeff Sessions Rescinds Obama-Era Enforcement Guidance: Five Observations*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Jan. 5, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/01/jeff-sessions-rescinds-obama-era-enforcement-guidance-six-observations/>.

⁵⁸ The latest rider provides that:

None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

CONSOLIDATED APPROPRIATIONS ACT, 2018, Pub. L. No. 115–141, § 538, 132 Stat. 348, 444–45 (Mar. 23, 2018). *See also* *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016) (interpreting rider language as barring the DOJ from prosecuting individuals for actions taken in compliance with state medical marijuana laws).

⁵⁹ MIKOS, MARIJUANA LAW, *supra* note 1, at 531–32; MIKOS, EXPERT REPORT, *supra* note 34, at 14–17.

⁶⁰ MIKOS, MARIJUANA LAW, *supra* note 1, at 532.

⁶¹ *Id.*

⁶² *See, e.g.*, COLO. DEP'T OF REVENUE, MARIJUANA ENFORCEMENT DIVISION, RETAIL MARIJUANA RULES (AUG. 21, 2019, 3:22 PM), <https://perma.cc/ARE5-UYD2>. State

selling marijuana openly with the blessing of state government.⁶³ None of this would have been possible without the federal government's forbearance.

As I suggested earlier, however, this truce is only *partial*. Federal agencies have not—and arguably *could* not—eliminate all of the restrictions federal law now imposes on the marijuana industry simply by exercising their enforcement discretion. I will briefly highlight three examples of how federal law continues to bedevil the state-licensed marijuana industry, notwithstanding the DOJ's refusal (or inability) to prosecute.

Difficulty in obtaining banking services is probably the most notable obstacle federal law continues to impose on state licensed marijuana suppliers. Banks remain reluctant to deal with state-licensed marijuana suppliers, in large part, because it remains a federal crime to conduct financial transactions involving the proceeds of unlawful activity (which includes the sale of marijuana).⁶⁴ While the Department of the Treasury has reassured banks that they will not be punished for doing business with the marijuana industry, most banks want something more than the agency's non-binding verbal reassurances that it is okay for them to break the law. In any event, in return for its enforcement forbearance, Treasury has demanded that banks monitor their marijuana clients closely and complete burdensome reports on virtually all of their financial transactions, at enormous cost.⁶⁵ For these reasons, even state law-abiding marijuana suppliers currently have difficulty obtaining even basic banking services, like checking accounts and loans.

State licensed marijuana suppliers are currently also subject to an unusually high effective federal tax rate.⁶⁶ All income is taxable, regardless of its source.⁶⁷ Thus, like all other businesses, marijuana suppliers must pay federal taxes on their income, even though their source of income is criminal under federal law. Unlike most other businesses, however, marijuana suppliers cannot deduct their usual operating expenses (e.g., expenditures on legal services and marketing) from their revenues when calculating their federal tax liability. A special provision of the Tax Code—Section 280E—bars illicit drug dealers (which, again, includes state-licensed marijuana

regulations of the marijuana industry are discussed in depth in MIKOS, MARIJUANA LAW, *supra* note 1, at 443–78.

⁶³ As of August 1, 2019, Colorado alone had licensed 571 retail marijuana shops and 454 medical marijuana shops. See COLO. DEP'T OF REVENUE, MARIJUANA ENFORCEMENT DIVISION, *MED Resources and Statistics*, <https://www.colorado.gov/pacific/enforcement/med-resources-and-statistics> (last visited Aug. 03, 2019).

⁶⁴ See generally Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE WESTERN RES. L. REV. 597 (2015) (providing an insightful and comprehensive analysis of federal regulations that now limit the marijuana industry's access to banking services).

⁶⁵ *Id.* at 617.

⁶⁶ See Benjamin M. Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523 (2014).

⁶⁷ *Id.*

suppliers) from making those deductions.⁶⁸ As a result, a business that sells marijuana is now subject to a much higher effective federal tax rate than a business that sells, say, alcohol or tobacco products.⁶⁹

As a final example of the way that federal law continues to hound state licensed marijuana businesses under the Partial Truce, consider that marijuana suppliers also remain vulnerable to private civil Racketeer Influenced and Corrupt Organization (RICO) lawsuits.⁷⁰ Every state-licensed marijuana business likely violates the federal RICO statute.⁷¹ To be sure, those businesses do not have to worry about being prosecuted criminally for these violations; after all, the DOJ's non-enforcement policy discussed earlier applies as much to these RICO offenses as it does to the marijuana trafficking offenses that the businesses are committing. But unlike the Controlled Substances Act (CSA), the federal RICO statute can also be enforced by private plaintiffs.⁷² In particular, the RICO statute empowers anyone who has suffered an injury to their "business or property" by racketeering activity (here, growing or selling marijuana) to bring a civil cause of action against the perpetrator.⁷³ What is more, the RICO statute promises treble damages to victorious plaintiffs.⁷⁴ Critically, private plaintiffs are not bound by DOJ prosecutorial decisions or congressional spending riders. In other words, private plaintiffs can sue marijuana dispensaries even if the DOJ declines to bring (or is forbidden by Congress from bringing) a criminal prosecution against them.⁷⁵ In fact, private

⁶⁸ 26 U.S.C. §280E ("No deduction or credit shall be allowed for any amount paid or incurred during that taxable year in carrying on any trade or business if such trade or business . . . consists of trafficking in controlled substances . . . which is prohibited by Federal law . . .").

⁶⁹ For discussions of Section 280E and its impact on the state-licensed marijuana industry, see Leff, *Tax Planning for Marijuana Dealers*, *supra* note 66 (discussing impact of Section 280E and possible workarounds); Robert A. Mikos, *The Corporate Tax Cut Might Have Done More for Marijuana Suppliers than Repealing Section 280E Would Have*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Feb. 16, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/02/the-corporate-tax-cut-might-have-done-more-for-marijuana-suppliers-than-repealing-section-280e-would-have/> (demonstrating that recent federal tax cuts have mitigated the impact of Section 280E).

⁷⁰ Mikos, *A Critical Appraisal*, *supra* note 52, at 649.

⁷¹ 18 U.S.C. § 1961 (2016). See also Mikos, *A Critical Appraisal*, *supra* note 52, at 649–51 (explaining how marijuana suppliers almost invariably violate the RICO statute).

⁷² 18 U.S.C. § 1964(c) (Any person injured in his business or property by reason of a violation . . . of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .").

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ E.g., Robert A. Mikos, *Federal Appeals Court Allows Private Civil RICO Suit to Proceed Against State-Licensed Marijuana Grower* (Safe Streets), MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (July 25, 2017), <https://my.vanderbilt.edu/marijuanalaw/2017/07/federal-appeals-court-allows-private-civil-rico-to-proceed-against-state-licensed-marijuana-grower-safe-streets/>.

plaintiffs have already filed several prominent civil RICO lawsuits against state-licensed marijuana suppliers, seeking large damages.⁷⁶ While these suits have not been very successful to date,⁷⁷ the allure of treble damages likely ensures that these private lawsuits will continue until Congress legalizes the industry's activities or immunizes the industry from RICO lawsuits.

These are just a few of the challenges that the federal marijuana ban continues to pose for the state licensed marijuana industry, notwithstanding the Partial Truce called by the Obama Administration. While these (and other⁷⁸) challenges have not quashed the marijuana industry, they do add to the industry's cost of doing business. For example, the lack of access to banking means that marijuana suppliers must conduct most of their transactions (e.g., paying employees) in cash, and handling that cash cuts into the industry's bottom line.⁷⁹ Furthermore, the federal challenges arguably undermine state regulations. For example, because they leave no paper trail, cash transactions are much more difficult to monitor than would be electronic transactions (e.g., credit card payments).⁸⁰ As a result, regulators may struggle to verify a marijuana supplier's compliance with state tax collection requirements.

THE THIRD PHASE: LEASERSHIP OR CAPITULATION?

The current regulatory quagmire is less than ideal for the states, the parties they regulate, the federal government, and those who either support or oppose legalization. Because of dissatisfaction with the status quo, pressure is mounting to change federal marijuana policy—but what does the future hold? How will the federal government respond to state reforms going forward?

⁷⁶ Mikos, *Federal Appeals Court Allows Private Civil RICO Suit to Proceed Against State-Licensed Marijuana Grower (Safe Streets)*, *supra* note 75.

⁷⁷ Robert A. Mikos, *Court Dismisses Civil RICO Suit Against Marijuana Supplier, Tees Up Potential Circuit Split*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Aug. 27, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/08/court-dismisses-civil-rico-suit-against-marijuana-supplier-tees-up-potential-circuit-split/>; e.g., Robert A. Mikos, *UPDATE: Plaintiff Loses Colorado RICO Lawsuit (Safe Streets)*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Nov. 1, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/11/update-plaintiff-loses-colorado-rico-lawsuit-safe-streets/>.

⁷⁸ For discussions of some of the other obstacles posed by the federal marijuana ban, see, e.g., MIKOS, MARIJUANA LAW, *supra* note 1, at 407–09 (discussing the bar on federal trademark registration); Robert A. Mikos, *PharmaCann v. BV Development: Another Land Use Issue Confronts Marijuana Suppliers*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Mar. 21, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/03/pharmacann-v-bv-development-another-land-use-issue-confronts-marijuana-suppliers/> (restrictive covenants); Luke Scheuer, *Are "Legal" Marijuana Contracts "Illegal"?*, 16 U.C. DAVIS BUS. L. J. 31 (2015) (contract enforcement).

⁷⁹ Hill, *Banks, Marijuana, and Federalism*, *supra* note 64, at 597.

⁸⁰ *Id.*

Congress has already taken a limited step toward reforming federal marijuana policy. The 2018 Farm Bill exempted “hemp” and “hemp” derived products—including, most notably, CBD—from the federal CSA.⁸¹ Under the Farm Bill, hemp is defined as cannabis containing less than .3% (by dry weight) THC.⁸² Previously, the CSA defined “marijuana” to include *all* cannabis (except stalks and non-germinating seeds), *regardless* of its THC content—making most hemp legally indistinguishable from recreational strains, like Purple Haze or Sour Diesel.⁸³ Now that hemp is no longer a controlled substance under the federal CSA, the hemp industry is booming and products made from hemp, including various CBD products, are becoming ubiquitous.⁸⁴

Foretelling the future and what the federal government might do next necessarily involves some speculation. I will briefly outline two possible scenarios for the future of federal marijuana policy. The first (and less likely) scenario involves the federal government assuming a more pro-active leadership role in marijuana policy, one in which it would wield greater influence over marijuana activities. Although I think it worth considering, I am skeptical that this Leadership Scenario will materialize for a simple reason: Congress will struggle to reach consensus around any substantive marijuana policy that seeks to re-invigorate or replace the current prohibition.

On the one hand, it is almost inconceivable that the federal government would attempt to assume leadership in this field by restarting its “War on Marijuana.” The public has grown increasingly favorable toward outright marijuana legalization over the last two decades. Indeed, the latest opinion polls estimate that roughly 66% of Americans favor legalization of adult use of marijuana (even higher numbers support medical legalization).⁸⁵ Given the popularity of legalization, Congress is highly unlikely to devote the resources that would be needed to mount an effective campaign against legal marijuana, or even to lift the restrictions it has imposed on the use of existing enforcement resources (through the spending riders noted earlier).⁸⁶ It is simply too late to put the proverbial cat back in the bag.

On the other hand, I also suspect that Congress will be reluctant to play a more active role in regulating legal marijuana. One major reason is that legalization states would resist any push to federalize key aspects of marijuana policy. After all, many states benefit from the current state-driven marijuana policy—it allows them to impose rules that favor local interests

⁸¹ Mikos, *New Congressional Farm Bill*, *supra* note 8.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, *supra* note 15.

⁸⁶ See Mikos, *On the Limits of Supremacy*, *supra* note 20, at 1463–65, 1469 (discussing the level of additional resources that would be required to effectively combat marijuana activities without state assistance).

over outside interests.⁸⁷ These states might lose out on tax revenues and jobs if the market for marijuana became more national in scope—a likely outcome if Congress were at the helm of marijuana policy.

To be sure, some federal agencies may seek to play a prominent role in the regulation of legal marijuana. For example, citing its authority under the Food, Drug, and Cosmetics Act, the Food and Drug Administration (FDA) is considering new federal rules to govern the inter-state sale of food products containing hemp-derived CBD.⁸⁸ But outside of such limited pockets of federal influence, I suspect that most features of marijuana policy will continue to be set primarily by the states, rather than by the federal government.

The dim prospects for federal leadership in this field are unfortunate. Whatever one might think of our current federal marijuana policy, there is a very strong normative argument to be made for federal control of this drug.⁸⁹ Marijuana activities generate significant interstate spillover effects (e.g., think of cross-border smuggling), and states have little incentive to address these spillovers.⁹⁰ There are also substantial advantages to coordinating marijuana policies (e.g., labeling laws), and that coordination can best be achieved by the federal government.⁹¹ Furthermore, public opinion has converged on the most important issues surrounding marijuana policy, suggesting that there is little to be gained from allowing states to apply their own, idiosyncratic rules to marijuana activities.⁹² Despite the strong normative case for federal leadership, however, I doubt that Congress or any federal agency will be able to take charge of marijuana policy anytime soon (if ever).

This leaves a second, more likely scenario for future federal marijuana policy, one I call “Capitulation.” Capitulation simply means that the federal government would cede even more control of marijuana policy to the states. In other words, it would remove federal obstacles to marijuana activities and give the states even wider latitude to regulate marijuana as they deem fit. (Under the Leadership Scenario, by contrast, the federal government would set some rules or at least meaningfully limit state discretionary authority.)

⁸⁷ See Brannon P. Denning, *One Toke Over the (State) Line: Constitutional Limits on ‘Pot Tourism’ Restrictions*, 66 FLA. L. REV. 2279 (2012).

⁸⁸ See Tal Axelrod, *FDA holds its first hearing on regulating CBD*, THE HILL (May 31, 2019), <https://thehill.com/policy/healthcare/446450-fda-holds-its-first-hearing-on-regulating-cbd>. For an excellent analysis of the FDA’s authority to regulate marijuana products, see Sean M. O’Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even after Descheduling*, 68 AM. U. L. REV. 823 (2019).

⁸⁹ See Robert A. Mikos, *Why the Federal Government Should Set Marijuana Policy*, in DEBATING REFORM: CONFLICTING PERSPECTIVES ON HOW TO FIX THE AMERICAN POLITICAL SYSTEM 50-56 (Richard Ellis & Mike Nelson, eds., 4th ed. CQ Press, forthcoming 2020) [hereinafter Mikos, *Why the Federal Government Should Set Marijuana Policy*].

⁹⁰ *Id.*

⁹¹ Mikos, *Why the Federal Government Should Set Marijuana Policy*, *supra* note 89.

⁹² *Id.*

Capitulation could follow either of two paths. First, it might proceed incrementally, through the adoption of piecemeal legislation that removes, one-by-one, the federal legal obstacles that now bedevil the state-licensed marijuana industry. The Secure and Fair Enforcement (SAFE) Banking Act⁹³ is an illustrative example of such incremental capitulatory legislation. The SAFE Banking Act would bar federal financial regulators from penalizing banks that serve state-licensed marijuana businesses.⁹⁴ The Act would thus make it considerably easier for those businesses to secure basic banking services, like checking accounts and lines of credit.⁹⁵ In similar fashion, other proposed legislation would target other, discrete problems now caused by the federal marijuana ban.⁹⁶

Second, Capitulation could also proceed more swiftly, through passage of more comprehensive federal reform legislation. The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act is perhaps the leading example of such legislation.⁹⁷ The STATES Act would empower states to opt-out of the federal CSA's ban on marijuana. Namely, if a state authorized an activity, such as the distribution of marijuana to adults, the federal CSA would no longer ban that activity.⁹⁸ Because their activities would no longer be federally unlawful, state-licensed-marijuana businesses could obtain banking services, deduct operating expenses when calculating their federal tax liabilities, and so on.⁹⁹ Put another way, the STATES Act would eliminate all of the legal obstacles that now flow from the federal marijuana ban (or at least, those obstacles posed by the CSA in states that legalize the drug).¹⁰⁰

⁹³ SAFE Banking Act of 2019 (H.R. 1595), <https://www.congress.gov/bill/116th-congress/house-bill/1595/text?q=%7B%22search%22%3A%5B%22safe+banking+act%22%5D%7D&r=2&s=1>.

⁹⁴ *Id.*

⁹⁵ Robert A. Mikos, *Federal Marijuana Banking Bill Advances (a Little)*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (Mar. 30, 2019), <https://my.vanderbilt.edu/marijuanalaw/2019/03/federal-marijuana-banking-bill-advances-a-little/> (analyzing likely effects of SAFE Banking Act).

⁹⁶ *E.g.*, Veterans Medical Marijuana Safe Harbor Act, S.3409, 115th Cong. § 3(a)(2) (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/3409/text?format=txt> (allowing, inter alia, Veterans Administration physicians to recommend marijuana to patients, where authorized by state law).

⁹⁷ Strengthening the Tenth Amendment Through Entrusting States Act, S.1028, 116th Cong. (2019-2020), <https://www.congress.gov/bill/116th-congress/senate-bill/1028?q=%7B%22search%22%3A%5B%22strengthening+the+tenth+amendment%22%5D%7D&s=6&r=1>.

⁹⁸ Robert A. Mikos, *Analysis of the Warren-Gardner STATES Act*, MARIJUANA LAW, POLICY, AND AUTHORITY BLOG (June 7, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/06/analysis-of-the-warren-gardner-states-act/>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

The Marijuana Justice Act (MJA) is another example of comprehensive capitulatory legislation.¹⁰¹ Proposed by Senator Cory Booker, the MJA would de-schedule marijuana, making the CSA inapplicable to the drug regardless of the content of state law.¹⁰² In other words, marijuana would be legal under federal law regardless of how state law treated the drug. But apart from repealing federal prohibition in all states or just some of them, neither the MJA nor the STATES Act envision much of a federal role in regulating legal marijuana¹⁰³—hence the “Capitulation” moniker appears apt for both of them.

Although incremental and comprehensive federal reforms have both garnered some bi-partisan support, I think that Congress is more likely to pursue the incremental approach. For one thing, it is easier for a legislature to build consensus behind a narrow, targeted measure like the SAFE Banking Act. Indeed, the SAFE Banking Act has already sailed through one key House Committee.¹⁰⁴ Furthermore, the passage of incremental legislation will likely reduce the pressure on Congress to adopt bolder, more comprehensive reforms.

CONCLUSION

While federal marijuana law appears quite static in comparison to the marijuana laws of the states, we are witnessing a gradual evolution in the federal response to state reforms. The federal government has already called a Partial Truce in its long-time War on marijuana legalization. For the most part, this evolution in federal policy has been driven by changes in the way that the federal government enforces its laws, rather than changes in the substance of those laws. Although this Partial Truce has enabled states to pursue some regulatory reforms, federal law continues to pose obstacles for the marijuana industry. Mounting dissatisfaction with the Partial Truce is likely to spur further changes to federal marijuana policy. The next chapter is yet to be written, but signs portend some form of federal capitulation. In other words, the federal government is likely to cede even more control to the states, enabling them (for better or worse) to pursue their own,

¹⁰¹ Marijuana Justice Act of 2019, S.597, 116th Cong. (2019-2020), <https://www.congress.gov/bill/116th-congress/senate-bill/597?q=%7B%22search%22%3A%5B%22STATES+Act+marijuana%22%5D%7D&s=3&r=21>.

¹⁰² Marijuana Justice Act of 2019, *supra* note 101.

¹⁰³ See Mikos, *Analysis of the Warren-Gardner STATES Act*, *supra* note 98; Robert A. Mikos, *Forget Obamacare. Congress Should Repeal and Replace This Instead*, FORTUNE (Aug. 4, 2017), <http://fortune.com/2017/08/04/senator-cory-booker-marijuana-bill-justice-act-legalization/?iid=sr-link1>.

¹⁰⁴ See Tom Angell, *Marijuana Banking Bill Approved by Congressional Committee*, FORBES (Mar. 28, 2019), <https://www.forbes.com/sites/tomangell/2019/03/28/marijuana-banking-bill-approved-by-congressional-committee/#636d068b2ccl>.

idiosyncratic state marijuana policies, increasingly free of federal interference.

