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INTRODUCTION: MARIJUANA LAWS AND FEDERALISM

ERWIN CHEMERINSKY*

In 1971, as a college freshman debater, one of the issues we debated was whether marijuana should be legalized. As I researched the topic, the arguments were overwhelmingly in favor of legalization, and it was difficult to put together a credible case for continued criminalization. Over 45 years have passed and the law has finally begun to change. An increasing number of states now have legalized or decriminalized possession of small amounts of marijuana.¹ As a result of initiatives in the November 2016 election, Colorado, Alaska, Oregon and Washington are now joined by California, Maine, Massachusetts and Nevada in legalizing possession of small amounts of marijuana.² Nearly half of the states allow medical use of marijuana.³

At the same time, however, marijuana remains a Schedule I controlled substance under the federal Controlled Substances Act, along with opioids, like heroin, and hallucinogenics, like LSD.⁴ The current Attorney General of the United States, Jeff Sessions, strongly opposes legalization of marijuana, and there is the real prospect of greater federal prosecutions for violations of the Controlled Substances Act.⁵

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¹ See Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How?*, 50 UC Davis L. Rev. 617, 620-24 (2016) (providing a brief history of state marijuana legalization efforts).

² See CAL. HEALTH & SAFETY CODE § 11362.1 (West 2017); NEV. REV. STAT. ANN. § I.P. Question 2, § 1-18 (West 2017); ME. REV. STAT. ANN. tit. 7 §§ 2441-2454 (2017); H.B. 3932, 189th Gen. Court (Mass. 2016).

³ See, e.g., FLA. CONST. art. X § 29; Act of Apr. 28, 2010, ch. 194, 2010 Ariz. Adv. Legis. Serv. (2010); Arkansas Medical Marijuana Amendment of 2016, const. amend. 98, 2016 Ark. Legis. Serv. (2016); Act Concerning the Palliative Use of Marijuana, Pub. Act No. 12-55, 2012 Conn. Acts 147 (Reg. Sess. 2012); An Act to Amend Title 16 of the Delaware Code Creating the Delaware Medical Marijuana Act, ch. 23, 2011-2012 Del. Laws (2011); Legalization of Marijuana for Medical Treatment Amendment Act of 2010, D.C. Law 18-210, 57 D.C. Reg. 34 (Aug. 20, 2010); Act of Aug. 1, 2013, Pub. Act. No. 98-0122, 2013 Ill. Laws 3015; Act No. 343, 2016 La. Sess. Law Serv. (2016).

⁴ Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-904 (2012)).

⁵ See Andrew Blake, *Jeff Sessions Says He's 'Surprised' Americans Aren't Embracing His Anti-Marijuana Stance*, WASH. TIMES (Apr. 13, 2017), <http://www.washingtontimes.com/news/2017/apr/13/jeff-sessions-surprised-americans-marijuana/> [perma.cc/RV3V-83L6]; James Higdon, *Jeff Sessions' Coming War on Legal Marijuana*, POLITICO (Dec. 5, 2016), <http://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501> [perma.cc/C9U5-

These changing laws have resulted in an enormous inconsistency in the laws with regard to marijuana between the federal government and the states as well as among the states. Contrary to what many believe, marijuana laws continued to be enforced. For example, in 2014, according to statistics from the Federal Bureau of Investigation, 700,993 individuals in the United States—one every forty-five seconds—were arrested and charged with marijuana violations and of these, 619,678, or 88 percent, were arrested for simple possession.⁶ For marijuana to remain illegal, there is an enormous cost in terms of law enforcement resources, the criminal justice system, and people's lives. Even for those arrested and never prosecuted or convicted, arrest records have real harms in terms of the ability to get jobs, loans, housing and benefits.⁷ Like all drug laws, the prohibition against marijuana is much more likely to be enforced against African-Americans and Latinos than against whites. According to a 2013 study conducted by the American Civil Liberties Union, whites and African-Americans use marijuana at roughly the same rates, but African-Americans are 3.7 times more likely than whites to be arrested for possession of marijuana.⁸

At the same time, however, marijuana is a huge cash crop in the in the United States. According to some industry estimates, the total American cannabis industry generated retail sales of \$53 billion in 2015.⁹ Further, over the past two years, the fraction of marijuana sold through legal channels has grown from an estimated \$3 billion to nearly \$6 billion, as more states have voted to allow medical or recreational use.¹⁰ Professor DeVeaux notes that “[m]arijuana is the most lucrative cash crop in the United States.”¹¹

SQZH]; Carrie Johnson, *Legal Marijuana Advocates Are Uneasy with Sessions' Stance*, NPR (Apr. 6, 2017), <http://www.npr.org/2017/04/06/522821701/legal-marijuana-advocates-are-uneasy-with-sessions-stance> [perma.cc/NMH6-WUZT].

⁶ U.S. Dep't of Justice, Fed. Bureau of Investigation, *2014 Crime in the United States*, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/main> [perma.cc/MB9K-DFTD] (last visited June 5, 2017); see also Carimah Townes, *Marijuana Arrests Suddenly Rose Last Year Even as States Legalized Pot*, THINKPROGRESS (Sept. 28, 2015), <https://thinkprogress.org/marijuana-arrests-suddenly-rose-last-year-even-as-states-legalized-pot-f664220f4f32> [perma.cc/V23M-5VKT].

⁷ See Jesse Wegman, *The Injustice of Marijuana Arrests*, N.Y. TIMES (July 28, 2014), https://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?_r=0 [perma.cc/FC2U-AX3L] (describing the devastating toll of a marijuana arrest).

⁸ AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS* 9 (2013).

⁹ Melia Robinson, *People in the US and Canada Spent Over \$53 Billion on Marijuana in 2016*, BUS. INSIDER (Jan. 18, 2017), <http://www.businessinsider.com/us-canada-marijuana-spending-legal-illicit-2017-1> [perma.cc/KR3G-29L8].

¹⁰ See ARCVIEW MARKET RESEARCH, EXECUTIVE SUMMARY, *THE STATE OF LEGAL MARIJUANA MARKETS* 4 (5th ed. 2017).

¹¹ Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. REV. 953, 958 (2017).

Illegality under federal law and in many states, though, poses serious legal problems. Professor Berch notes: “Federally insured banks may decline to accept money from marijuana commerce because of the threat of money laundering prosecutions, leaving the businesses largely cash-only and cash-on-site. Marijuana dispensaries may not deduct business expenses from federal taxes. Lawyers may encounter ethical dilemmas advising marijuana businesses because attorneys cannot knowingly assist clients in illegal conduct, even if that conduct is legal in state in which the lawyer practices or the client acts.”¹²

From the perspective of constitutional law, the inconsistency in marijuana laws between the federal government and many states, among the states, and between the states and Native American tribes raises serious and often unprecedented federalism issues. This wonderful collection of Articles addresses them.

One set of issues arises when considering whether the federal law prohibiting even possession of small amounts of marijuana preempts state laws that allow possession of small amounts of marijuana.¹³ The simple answer should be no, states can have any law they want – including none at all – with regard to marijuana. No state is required to have a law prohibiting or regulating marijuana.¹⁴ Indeed, it would violate the Tenth Amendment for Congress to compel states to have and enforce laws prohibiting possession of marijuana.¹⁵ A state may choose to have no law prohibiting marijuana, a law prohibiting marijuana with an exception for medical use, or a law allowing possession of small amounts of marijuana—essentially anything else it wants. Of course, the choice by a state to legalize marijuana does not have any effect on the federal law or federal enforcement of it. Under current law, possession of marijuana is still a federal crime and the federal government can choose to enforce its law however it chooses. Legalization by a state, in some or all circumstances, just means that it is not a state crime.

The more difficult arising issue is whether states, by legalizing marijuana and then regulating and taxing it, are impeding the federal government from achieving its goals in making marijuana a Schedule 1 controlled substance. One way of finding preemption is if a state interferes with achieving an objec-

¹² Jessica Berch, *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover from Their Legalizing Neighbors*, 58 B.C. L. REV. 863, 970 (2017).

¹³ See Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 10 (2013) (citing cases that employed broad conflicts preemption analysis).

¹⁴ See *id.*

¹⁵ See TODD GARVEY, CONGRESSIONAL RESEARCH SERVICE, *MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS* 6 (2012) (“Congress’s ability to compel the states to enact similar criminal prohibitions, to repeal medical marijuana exemptions, or to direct state police officers to enforce the federal law remains limited. The Tenth Amendment likely prevents such an intrusion into state sovereignty.”).

tive under federal law. Professor Lea Brilmayer addresses this in her Article *A Central Theory of Preemption: With Comments on State Decriminalization of Marijuana*.¹⁶ Professor Brilmayer points to the key considerations in such a preemption analysis, including the motives of Congress and of the states, the baselines – “the standard of comparison against which the state’s challenged law must be judged” and the magnitude of the state’s failure to cooperate with federal law enforcement.¹⁷

A second set of federalism issues, and the ones most focused on in this Symposium, arise from the enormous variance among the states with regard to marijuana laws. The Articles in this Symposium often refer to these issues as “horizontal federalism issues,” as distinct to the “vertical” ones that arise from the relationship of the federal government and the states. For example, Professor Gabriel J. Chin, in his Article *Policy, Preemption and Pot: Extraterritorial Citizen Jurisdiction* asks the question: “[C]an one state prohibit its citizens from using marijuana elsewhere in the United States or anywhere in the world?”¹⁸ Although he concludes that “states of the United States generally do not regulate the conduct of their citizens on a nationwide or international basis,” he does not preclude the possibility of their doing so.¹⁹ Professor Mark D. Rosen, in his Article *Marijuana, State Extraterritoriality, and Congress*, argues that states may regulate conduct in other states, but that Congress should act to determine the bounds of state’s extraterritorial powers.²⁰

Other Articles in this Symposium address aspects of the relationship among the states with regard to their varying marijuana laws. Professor Jessica Berch, in her Article *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover from their Legalizing Neighbors*, argues that states should change their laws to allow civil liability against those who sell marijuana to those who cause harms.²¹ She says: “A Gram Shop Act, like its namesake, the Dram Shop Act, would create liability against out-of-state marijuana dispensaries that sell to Home State Buyers who, while high, injure third parties in the Home State or those who are residents of the Home State.”²²

In contrast, Professor DeVeaux’s Article *One Toke Too Far: The Demise of the Dormant Commerce Clause’s Extraterritoriality Doctrine Threatens the*

¹⁶ See generally Lea Brilmayer, *A Central Theory of Preemption: With Comments on State Decriminalization of Marijuana*, 58 B.C. L. REV. 895, 902 (2017).

¹⁷ *Id.* at 911.

¹⁸ Gabriel J. Chin, *Policy, Preemption and Pot: Extraterritorial Citizen Jurisdiction*, 58 B.C. L. REV. 929, 931 (2017).

¹⁹ *Id.* at 949.

²⁰ See generally Mark D. Rosen, *Marijuana, State Extraterritoriality, and Congress*, 58 B.C. L. REV. 1013, 1015 (2017).

²¹ See generally Berch, *supra* note 12.

²² *Id.* at 972.

Marijuana-Legalization Experiment argues that the dormant commerce clause should be understood to limit the ability of a state to regulate conduct in other states.²³ He urges the courts to revitalize the dormant commerce clause's constraints on the ability of a state to impose extra-territorial regulation and expresses concern that without this limit states will be undermined in their ability to experiment with legalizing marijuana.

Like Professor DeVeaux, Professor Alex Kreit, in his Article *Marijuana Legalization and Nosed Neighbor States*, seeks to keep states that prohibit marijuana from preventing other states from legalizing it.²⁴ Both professors begin by describing the lawsuit filed in the Supreme Court by Nebraska and Oklahoma against Colorado claiming injury from the latter's legalization of small amounts of marijuana. Although the Supreme Court did not take this case, the underlying issue presented remains. Professor Kreit argues that "as currently constituted state marijuana laws are unlikely to have anything more than a negligible effect on neighboring states."²⁵ In part, this is because "marijuana is already relatively inexpensive and easy to find in prohibition states."²⁶ Additionally, in Professor Kreit's view, this is because "state marijuana legalization laws all share a number of features that make it difficult to make much money by exporting the product across state lines."²⁷

Professor Katherine Florey, in her Article *Budding Conflicts: Marijuana's Impact on Unsettled Questions of Tribal-State Relations*, examines the horizontal federalism question in a different context: the relationship to Native American tribes.²⁸ She examines current tribal policies with regard to marijuana and examines the similarities and differences to efforts to allowing gambling on Native American reservations. She urges allowing tribal autonomy, while recognizing the great tensions created when marijuana is legal within the Native American controlled area of a state that otherwise prohibits marijuana. She says that it may be necessary for the federal government to act "to provide both protection for tribal sovereignty and mechanisms for resolving legitimate spillover concerns."²⁹

Of course, to a large extent, the problems discussed in this Symposium could be solved by federal government action. If Congress passed a law legalizing possessing small amounts of marijuana and preempted states from prohibiting this, the federalism issues would be solved. As many of the Articles in

²³ See generally DeVeaux, *supra* note 11.

²⁴ See generally Alex Kreit, *Marijuana Legalization and Nosed Neighbor States*, 58 B.C. L. REV. 1059 (2017).

²⁵ *Id.* at 1062.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See generally Katherine Florey, *Budding Conflicts: Marijuana's Impact on Unsettled Questions of Tribal-State Relations*, 58 B.C. L. REV. 991 (2017).

²⁹ *Id.* at 1021.

this Symposium noted, public attitudes towards marijuana are changing and now substantially favor legalization, but such federal legislation legalizing marijuana is not on the horizon. Instead, the legal landscape is likely to remain one in which there is a conflict among the laws of various jurisdictions—federal, state, and tribal. Thus, the federalism issues addressed in this Symposium are likely to be discussed and litigated for years to come. Lawyers, judges, legislators, and academics dealing with these questions will benefit enormously from this collection of Articles.