

## Joint Authority? The Case for State-Based Marijuana Regulation

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### ARTICLE

#### JOINT AUTHORITY? THE CASE FOR STATE-BASED MARIJUANA REGULATION

*Matthew Shechtman*<sup>1</sup>

*Over the past several decades the United States government has cast an intimidating shadow over the states in the drug policy arena. Congress inaugurated the “War on Drugs” in 1970 through the Controlled Substances Act, banning the possession, consumption, and distribution of a host of narcotic substances, including marijuana. The past decade, however, brought a revolution in the form of state-based marijuana regulation. Ranging from decriminalization to medical licensing, more than a dozen states have enacted laws contradicting the blunt legalist strictures of the CSA.*

*Relying on the tenets of public choice theory and jurisdictional competition for law, this article addresses a range of regulatory frameworks for marijuana regulation, concluding that decentralization in favor of the states provides the most efficient and pragmatic mechanism for marijuana policy. Though relatively uncommented on, the incoherent federal-state stance on drug policy leaves citizens and enforcement agencies in a troubling predicament regarding the legality of marijuana use and possession. After covering traditional externalities and “Race to the Bottom” scholarship, this article hypothesizes a possible “Race to Nowhere” conundrum wherein states contemplating drug policy may be faced with an all-or-nothing dilemma, forced to choose between a complete ban and outright legalization. While analogy to Prohibition and alcohol regulation gives some insight that this race exists,*

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*federal oversight is a poor regulatory mechanism when accounting for a variety of balanced incentives and extensive interest group influence.*

*Ultimately, America's "War on Drugs" has left its populace confused and disenfranchised, unable to employ their preferences to foster innovative and effective social policies. Decentralized regulation, on the other hand, provides states the ability to liberalize marijuana policy or maintain the status quo, leaving the choice over tax revenues, drug crime, prison overpopulation, and interest group lobbying to state lawmakers and their constituents.*

The United States' ongoing "War on Drugs" has reached a new level of confusion as several states have deviated from the unremitting federal policy against marijuana use and sale.<sup>2</sup> Contributing to the confusion are the co-extensive, yet sometimes conflicting Constitutional tenets of interstate commerce,<sup>3</sup> Tenth Amendment state sovereignty,<sup>4</sup> and historic principles of federalism in state criminal enforcement.<sup>5</sup> While there is no apparent end in sight for this overarching battle of federal versus state control, this article focuses on the highly controversial issue of what level of government should take responsibility for the formation of marijuana policy. Though much attention has been paid to the constitutionality and wisdom of drug enforcement,

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<sup>2</sup> See *infra* Part III.

<sup>3</sup> U.S. CONST. art. I, § 8.

<sup>4</sup> U.S. CONST. amend. X.

<sup>5</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.") (citations omitted).

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relatively little “has been paid to [the] level-of-government issues [present] in current drug policy discussions.”<sup>6</sup>

This article begins with a brief overview of the current regulatory background in the drug enforcement landscape, followed by a description of the regulatory dynamic at work from a jurisdictional competition perspective. Part II of this article discusses the currently established federal regulatory framework and ultimately argues that federal authority should be disbanded and decentralized in favor of state policymaking and enforcement authority. Part II thus suggests a state-based regulatory framework, arguing that competition between jurisdictions will benefit the market for marijuana policy and should result in state authority akin to alcohol regulation following the enactment of the Twenty-First Amendment. Part III presents a critique of the state consolidation posited by Michael O’Hear and his “Competitive Alternative” regulatory framework found in *Federalism and Drug Control*.<sup>7</sup> Part III also rebuts O’Hear’s criticisms, arguing that the market for marijuana law is not conducive to the market failures he posits. Finally, Part IV sets forth a previously undeveloped theory of state-based market failure, discussing a hypothetical “Race to Nowhere,” in which jurisdictions may be faced with an all-or-nothing choice between legalization and a complete ban on marijuana. Though ultimately concluding that the assumptions necessary to engender the “Race to Nowhere” are unlikely to be found in a market for marijuana policy, Part IV concludes by noting the possibility for such a polarizing problem and the need for informed regulatory decision making.

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<sup>6</sup> FRANKLIN ZIMRING & GORDON HAWKINS, THE SEARCH FOR RATIONAL DRUG CONTROL 159 (1992).

<sup>7</sup> Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783 (2004).

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### I. The Federal Government's "War on Drugs" and State Divergence in Marijuana Policymaking

The origin of today's "War on Drugs" emanated from Richard Nixon's 1968 presidential campaign, where he cited growing drug use as the next great problem facing the nation.<sup>8</sup> Just a few years later, the Nixon Administration created the federal Drug Enforcement Administration ("DEA") and increased the drug enforcement budget to nearly \$800 million.<sup>9</sup> Though Nixon was primarily concerned with the more potent and destructive heroin epidemic,<sup>10</sup> marijuana use was easily subsumed into the United States' drug war following three decades of haphazardly implemented anti-marijuana criminal and tax laws.<sup>11</sup>

The "War on Drugs" fire was stoked once again by a republican presidential campaign in 1980.<sup>12</sup> Backed by the powerful "parents' movement,"<sup>13</sup> Ronald Reagan re-established the "War on Drugs" through the "Just Say No" campaign and increased the federal drug-enforcement budget to nearly \$6 billion within the next three years.<sup>14</sup> The anti-drug establishment continued to escalate through the 1990s, enlisting almost \$20 billion in federal anti-drug

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<sup>8</sup> See TED GEST, *CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER* 110 (2001).

<sup>9</sup> See SAM STALEY, *DRUG POLICY AND THE DECLINE OF AMERICAN CITIES* 188 (1992).

<sup>10</sup> CAROLINE JEAN ACKER, *CREATING THE AMERICAN JUNKIE: ADDICTION RESEARCH IN THE CLASSIC ERA OF NARCOTIC CONTROL* 217-18 (2002).

<sup>11</sup> See O'Hear, *supra* note 7, at 796-97.

<sup>12</sup> GEST, *supra* note 8, at 113.

<sup>13</sup> ERIC SCHLOSSER, *REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET* 23-24 (2003).

<sup>14</sup> GEST, *supra* note 8, at 115. Without turning the "War on Drugs" into a partisan political manifesto, it is interesting to note that President Jimmy Carter publicly endorsed the decriminalization of marijuana. *Id.* at 111.

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coffers by 1998.<sup>15</sup> The 21st century has seen little retreat from the legalist regime of the past three decades as the political ante continues to intensify. A modern example is exemplified by the Bush Administration's National Drug Control Strategy, aimed at "healing America's drug users."<sup>16</sup>

Most relevant to today's marijuana legalization debate is the Controlled Substances Act ("CSA"), which incorporates marijuana among its many listed illicit substances.<sup>17</sup> Maximum penalties for marijuana possession, cultivation, and distribution range from one year to life in prison, with maximum fines from one thousand to eight million dollars depending on the amount of marijuana at issue and the circumstances underlying the conviction.<sup>18</sup> The CSA is undoubtedly one of the most salient consequences of current Supreme Court jurisprudence regarding Congress' interstate commerce power. Notably, the Court found in *Gonzales v. Raich* that Congress did not overstep its Constitutional authority by regulating the trade of illicit substances, including marijuana.<sup>19</sup> Relying on *Wickard v. Filburn*,<sup>20</sup> the Court held that even purely intrastate cultivation and distribution of marijuana is subject to federal regulation under the interstate commerce

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<sup>15</sup> GEST, *supra* note 8, at 115.

<sup>16</sup> THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY (2003); *see also* O'Hear, *supra* note 7, at 802.

<sup>17</sup> 21 U.S.C. § 841(b)(1)(A)(vii) (2006).

<sup>18</sup> 21 U.S.C. §§ 841(b)(1)(A), 844(a) (2006); *see* Vijay Sekhon, Comment, *Highly Uncertain Times: An Analysis of the Executive Branch's Decision to not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws*, 37 HASTINGS CONST. L.Q. 553, 553-54 (2010).

<sup>19</sup> *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

<sup>20</sup> *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (establishing that Congress has the power to regulate purely local activities that make up an economic class of activities that have a substantial effect on interstate commerce).

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clause—and hence constitutionally controlled under the CSA.<sup>21</sup>

Even before Supreme Court jurisprudence dramatically extended Congress' ability to regulate illicit substances in interstate commerce, several commentators decried a federal "monopoly" over drug policy.<sup>22</sup> Though the federal government has always possessed "an impressive array of tools to influence policymaking at lower levels of government,"<sup>23</sup> recent developments in academia and state-based drug policies, suggest that state authority and policy innovation has established a solid footing in the marijuana law paradigm, ranging from medical-use licensing to decriminalization.<sup>24</sup> While recognizing the federal government's oversight role in drug enforcement policy, this article ultimately argues for horizontal competition—at the expense of federal supremacy<sup>25</sup>—in marijuana policy for several reasons.

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<sup>21</sup> *Gonzales*, 545 U.S. at 18, 33.

<sup>22</sup> See DANIEL K. BENJAMIN & ROGER LEROY MILLER, UNDOING DRUGS: BEYOND LEGALIZATION 97, 217, 219 (1991); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1192 (1995) ("In the fight against drugs . . . the federal government is effectively the only government.").

<sup>23</sup> See O'Hear, *supra* note 7, at 806.

<sup>24</sup> See O'Hear, *supra* note 7, at 806-20 (noting that the federal government maintains considerable media control and sway over the citizenry, formidable direct enforcement capabilities, conditional monetary spending, control over forfeiture and equitable sharing laws, and multi-jurisdictional task forces).

<sup>25</sup> Even if the federal government can utilize its preemptive power to force states to institute marijuana enforcement laws, there is good reason to argue that it should not. As discussed *infra*, unlike other crimes with no clear societal benefit, marijuana legalization arguably provides significant societal benefits. In contrast to the "Race to the Bottom" proposed by Teichman in the market for penal laws aimed at sex crimes, marijuana laws provide a wide array of consequences, both positive and negative, to lead to an arguably efficient market for marijuana laws. Doron Teichman, *The Market for Criminal Justice*:

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First, it is not clear that the federal government has constitutional authority to mandate state drug policy.<sup>26</sup> Though preemption, through properly enacted federal law, plays an important role in drug enforcement, the federal government cannot require a state to enforce federal laws.<sup>27</sup> Second, though the mere presence of federal enforcement undoubtedly affects state policymaking, the lack of federal enforcement resources strongly limits the feasibility of effective wide-scale federal enforcement. To be sure, drug laws are almost exclusively implemented and policed by

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*Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1867 (2005). Given the small likelihood of a “Race to the Bottom” effect, federal preemption and the necessity for centralization to pursue optimality is reduced, if not eliminated. *Cf.* William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 217 (1997). Though the supplemental argument to the preemption point is aimed at legal uniformity and avoiding the added informational costs, this consequence of disuniformity may be limited given the publicity of marijuana laws and extensive consumer knowledge in a unique area of consumer lifestyle choice. *Cf. id.* at 273.

<sup>26</sup> Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1422 (2009) (“Contrary to conventional wisdom, state laws legalizing conduct banned by Congress remain in force and, in many instances, may even constitute the de facto governing law of the land.”). In an interesting preemption caveat, carved by the Tenth Amendment, a congressional attempt to preempt state “inaction”—state failure to enact laws banning the use of marijuana—would be an effective command for the states to take an action to proscribe medical marijuana, in violation of the Supreme Court’s anti-commandeering rule established in *New York v. United States*, 505 U.S. 144, 188 (1992). *Id.* at 1424. This article does note, however, the likely counterargument that state enactment of medical marijuana laws may conflict with the CSA, thereby invoking established conflict preemption principles. But for the purposes of this limited foray into jurisdictional competition, this article presumes that Congress cannot force the states to enact drug laws, nor preempt states’ medical marijuana regulatory mechanisms.

<sup>27</sup> *New York*, 505 U.S. at 188.



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state and local governments.<sup>28</sup> As such, the likelihood of vertical competition from the federal government is reduced.<sup>29</sup> Lastly, federal regulation is inefficient and burdensome, diminishing citizen autonomy, while hindering innovation and consumer choice.<sup>30</sup>

Regardless of the federal government's involvement in drug policy, current state innovation in marijuana legislation is undoubtedly significant. Presently, sixteen

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<sup>28</sup> The Obama administration has indicated through Executive Order that it no longer wishes to prosecute users or dispensaries unless they violate both federal and state law, effectively leaving the legalization choice up to states, while their citizens can feel comfortable they will not be prosecuted by the federal government. Josh Meyer & Scott Glover, *Medical Marijuana Dispensaries Will no Longer be Prosecuted, U.S. Attorney General Says*, L.A. TIMES, (Mar. 19, 2009), <http://articles.latimes.com/2009/mar/19/local/me-medpot19>; see also Devlin Barrett, *Attorney General Signals Marijuana Policy Shift*, MSNBC.COM, (Mar. 18, 2009), [http://www.msnbc.msn.com/id/29760656/ns/politics-white\\_house/t/attorney-general-signals-marijuana-policy-shift/#.TrC5g3EYfYY](http://www.msnbc.msn.com/id/29760656/ns/politics-white_house/t/attorney-general-signals-marijuana-policy-shift/#.TrC5g3EYfYY); Memorandum from David W. Odgen, Deputy Att'y Gen., to Selected United States Attorneys (Oct. 19, 2009), <http://www.justice.gov/opa/documents/medical-marijuana.pdf>. Though the federal government governs enormous resources, it only manages one percent of the nearly 800,000 marijuana cases generated each year. Mikos, *supra* note 26, at 1424. As such, most regular users under a state-enabled medical marijuana regime are very unlikely to be prosecuted by the federal government. *Id.*

<sup>29</sup> Harvard Professor, Mark Roe, has recognized that vertical competition in the corporate legal model may disrupt the traditional theory of corporate law rules in a jurisdictional competitive framework. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 635 (2003). In this vertical competition model, Delaware's real competition for corporate legal rules comes not from sister states, but from the federal government where "Delaware corporate law can be displaced by, and is often influenced by, federal authorities, thereby rendering any pure race . . . impossible, however attractive it might be in theory." *Id.* Realistically, Roe's vertical competition argument is fundamentally viable outside of the corporate framework. Given the two aforementioned federal regulatory limitations, however, it seems less likely to apply to the marijuana debate.

<sup>30</sup> See *infra* Part III.

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states as well as the District of Columbia have enacted legislation legalizing the possession, cultivation, and use of marijuana for the treatment of certain illnesses.<sup>31</sup> Against this state regulatory backdrop loom the CSA and the potential for DEA and FBI enforcement. As previously mentioned, however, the federal government plays a very small role in the enforcement and prosecution of marijuana users, growers, and dispensaries—the United States Attorney only manages about one percent of all marijuana cases, leaving the rest to state enforcement.<sup>32</sup> Given that federal resources are unable to manage the overwhelming drug caseload, and that many states have already shown their unwillingness to cede power over drug regulation and enforcement, there is significant room for states to implement and experiment with new marijuana laws. With state experimentation comes the possibility for competition between states in the enactment of innovative marijuana regulatory schemes and legalization policies. This dynamic is known as jurisdictional competition, or more simply, the market for laws.<sup>33</sup> The basic premise of the jurisdictional competition paradigm is that governments compete to supply laws in order to support the influx of business and economic benefits, taxes, and citizenry.<sup>34</sup> This legal market

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<sup>31</sup> These states include Alaska, Arizona, California, Colorado, Delaware, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Washington, and Vermont, in addition to the District of Columbia. Nat'l Org. for the Reform of Marijuana Laws, *Medical Marijuana*, NORML.ORG, (last visited Nov. 1, 2011), <http://norml.org/legal/medical-marijuana-2>. Maryland has decriminalized the possession of less than one ounce of marijuana by individuals who can demonstrate, as an affirmative defense, that their use of marijuana is out of medical necessity. Nat'l Org. for the Reform of Marijuana Laws, *Maryland Medical Marijuana*, NORML.ORG, (last visited Nov. 1, 2011), [http://norml.org/legal/item/maryland-medical-marijuana?category\\_id=835](http://norml.org/legal/item/maryland-medical-marijuana?category_id=835); see also Sekhon, *supra* note 18, at 553.

<sup>32</sup> See Mikos, *supra* note 26.

<sup>33</sup> See Teichman, *supra* note 25, at 1833.

<sup>34</sup> See *id.*

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concept has been applied most extensively in the corporate law context, focusing on Delaware's market dominance. The market concept has, however, found a receptive audience in the fields of environmental law, tax, bankruptcy, trusts, and family law.<sup>35</sup>

This article embarks on an analysis of the competitive framework over drug lawmaking authority and enforcement. While recognizing the historic dominance of federal authority in the field,<sup>36</sup> it argues against the efficacy of federal authority and in favor of decentralized regulation over marijuana policy. Using alcohol regulation as a guiding example, this article argues for state authority over marijuana regulation, with localized enforcement and state discretion over local policymaking authority.

Notwithstanding the ban on possession, cultivation, distribution, and use, there are a number of regulatory mechanisms states can implement outside of absolute illegality. For instance, states can institute penalty schemes, by varying sentencing guidelines or establishing statutory penalty frameworks that differentiate between

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<sup>35</sup> *Id.* (citing, *inter alia*, Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Louis Kaplow, *Fiscal Federalism and the Deductibility of State and Local Taxes Under the Federal Income Tax*, 82 VA. L. REV. 413 (1996); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom,"* 54 VAND L. REV. 231 (2001); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000); Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995)).

<sup>36</sup> See Roe, *supra* note 29, and accompanying text (while the CSA is technically the supreme law of the land regarding drug possession, use, and distribution, it is rarely enforced, though recognizably could be with the proper resources).

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misdemeanor and felony violations.<sup>37</sup> In addition, some states have employed alternative sentencing schemes, experimenting with drug treatment courts and probation dependent upon the successful completion of a rehabilitation program.<sup>38</sup> Outside of varying penalties, states have an array of legalization options, ranging from full legalization<sup>39</sup> to marijuana licenses for medical use.<sup>40</sup> Not to mention, several states have instituted decriminalization laws wherein possession and use is either legal or considered a misdemeanor, while distribution and trafficking remains criminal.<sup>41</sup>

Enhanced forfeiture is also an interesting option for reform that has potential incentive effects not only for

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<sup>37</sup> For example, the famous 1973 Rockefeller drug laws included very strict mandatory minimum sentences. GEST, *supra* note 8, at 199. Even as early as the 1970s, however, many states decriminalized marijuana possession to some extent, providing minimal fines for first offenders. Albert DiChiara & John F. Galliher, *Dissonance and Contradictions in the Origins of Marijuana Decriminalizations*, 28 LAW & SOC'Y REV. 41, 48 (1994). This trend has continued today in California, which makes marijuana possession a misdemeanor. CAL. HEALTH & SAFETY CODE § 11357 (LEXIS through 2011 legislation). Possession of less than one ounce is punishable by a maximum \$100 fine. *Id.*

<sup>38</sup> Both Miami's Dade County and the city of Denver implemented specific drug courts for the purpose of expediting drug case management and instituting alternative treatment paradigms in an effort to reduce the caseload and burgeoning prison populations. O'Hear, *supra* note 7, at 823-28. These programs met with mixed success and general federal hostility. *Id.*

<sup>39</sup> No state has completely decriminalized marijuana, though there have been initiatives in Alaska, Nevada, Arizona, and South Dakota. O'Hear, *supra* note 7, at 836-37.

<sup>40</sup> The most visible medical marijuana law is undoubtedly California's Proposition 215, which legalizes the possession or cultivation of marijuana for any patient or primary caregiver who has "the written or oral recommendation or approval of a physician." CAL. HEALTH & SAFETY CODE § 11362.5 (LEXIS through 2011 legislation).

<sup>41</sup> Nat'l Org. for the Reform of Marijuana Laws, *Marijuana Decriminalization and Its Impact on Use*, NORML.ORG, (last visited Nov. 1, 2011), [http://norml.org/index.cfm?Group\\_ID=3383](http://norml.org/index.cfm?Group_ID=3383).

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criminal possessors but for state coffers.<sup>42</sup> As most state laws currently stand, asset forfeiture “provides a significant incentive for state and local governments both to allocate substantial resources to drug enforcement and to cooperate with federal agencies.”<sup>43</sup> On the other hand, from a marijuana user’s perspective, reform initiatives aimed at limiting state and federal ability to confiscate property in conjunction with drug seizures may be a considerable incentive to relocate.<sup>44</sup>

Given the myriad of potential decentralized alternatives for marijuana regulation, there is significant room for jurisdictional competition among state and municipal governments for citizens, businesses, tax revenues, and reduced violent crime. On the other hand, the drug debate is never quite so clear-cut; there are significant political<sup>45</sup> and moral considerations—*e.g.* addiction, rehabilitation, and health care expenditures, as well as the potential for decreased economic productivity in the wake

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<sup>42</sup> See O’Hear, *supra* note 7, at 834-35.

<sup>43</sup> *Id.* at 834.

<sup>44</sup> Oregon and Utah have both proposed laws aimed at limiting asset forfeiture laws in an effort to reduce the potential for abuses and conflicts of interest “that arise when police get to keep the proceeds of their own drug busts.” O’Hear, *supra* note 7, at 835. “Imagine if IRS auditors were paid a commission for every deduction they threw out.” Libertarian Party of Or., *Argument in Favor of Oregon’s Measure 3*, STATE.OR.US, (last visited Nov. 1, 2011), <http://www.sos.state.or.us/elections/pages/history/archive/nov72000/guide/mea/m3/3fa.htm>.

<sup>45</sup> Though outside the scope of this article, the underground drug trade is a hotly debated political issue, both domestically and abroad. United States’ demand for drugs has drastic effects on both Central and South American countries, including El Salvador, Nicaragua, Mexico, Panama, and Columbia. *The Drug War Hits Central America*, THE ECONOMIST, Apr. 14, 2011, available at <http://www.economist.com/node/18560287> (noting that despite efforts to stem the tide of violence in countries south of the border, United States drug policy has an enormous effect on the underground influence of organized drug crime, making many Central American provinces “deadlier . . . than most conventional war zones”).

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of potentially rampant drug abuse. Given the complex considerations involved, the next Part will introduce a new theory of decentralized marijuana regulation modeled partly after state alcohol regulation, while accounting for possible spillover effects, interest group influence, and political incentives unique to the market for marijuana.

### **II. Invigorating the Market for Marijuana Laws – Embracing a Decentralized Role for Regulation**

With fundamentally different individual and political viewpoints in the marijuana debate, citizen autonomy should be at the forefront of the regulatory policymaking agenda, providing an avenue for increased individual choice and more efficient and innovative lawmaking. Accordingly, the core argument in this article promotes the redistribution of marijuana regulatory authority away from the federal government and into the hands of the states and local authorities.

After first outlining the current regulatory framework, this Part argues for the rejection of federal control over marijuana policymaking. Noting the federal government's failure to account for state innovation and autonomy, the first section utilizes public choice theory to establish a state-based framework akin to alcohol regulation following the Twenty-First Amendment. The following section explains criticisms of such a position, but ultimately dispels these analyses in favor of the state as central decision-maker. The following section, however, points out, and expands upon, two well-founded critiques of consolidated state control so as to build on the decentralization framework; placing state and local politics at the forefront of the marijuana regulatory regime.

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### *A. Federal Involvement in Drug Policy*

Ironically, current drug policy can best be described by the “Cooperative Federalism” framework. This regulatory depiction is “a combination of federal policy mandates and inducements (such as conditional grants) that require or provide strong financial incentives for states to implement the federal policy.”<sup>46</sup> National policy issues that are not only resource intensive, but also respond to hypothetical state-to-state externalities further buoy the federally dominated regulatory regime.<sup>47</sup> Sparked by states enacting reactive policies to a particular problem, the federal government responds at the behest of states and interest groups most invested in the issue.<sup>48</sup>

On one hand, states concerned about the capacity to fund these programs and the ability to successfully implement the program if other states do not conform push the federal government to enact a national program.<sup>49</sup> On the other hand, federal politicians can garner the political support of vocal interest groups,<sup>50</sup> while only paying for part of the overarching program.<sup>51</sup> In the context of drug policy, “Cooperative Federalism” is illustrated by the pioneer states that first prohibited marijuana, and the resulting federal program, implemented through the CSA and the “War on Drugs.” As the “Cooperative Federalism” framework predicts, the drug regulation dynamic balances

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<sup>46</sup> O’Hear, *supra* note 7, at 843-44.

<sup>47</sup> *Id.* at 844-45.

<sup>48</sup> See Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 558 (2000).

<sup>49</sup> *Id.*

<sup>50</sup> ZIMRING & HAWKINS, *supra* note 6, at 167. This framework is undoubtedly played out in the drug policy arena, where federal enforcement accounts for roughly one percent of marijuana prosecution, and the “War on Drugs” has been a steadfast political soapbox.

<sup>51</sup> *Id.* (estimating that the federal government pays somewhere between thirty-five and fifty percent of the total cost of the “War on Drugs”).

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“federal desires for control (and hence political support) and . . . engagement of state and local law enforcement in the war on drugs (and hence minimization of costs to the federal budget).”<sup>52</sup>

Extensive federal involvement, however, does not leave adequate room for state innovation in the drug policy arena.<sup>53</sup> Rather, this paradigm is only responsive to the dynamic wherein states and the federal government express views that are in agreement, or at the very least, that can be squared through political compromise.<sup>54</sup> As a result, states are left to either venture on their own, in defiance of federal policy initiatives, or maintain some complicity with the “War on Drugs.”

### *B. Federal Drug Regulation is Hampering the Market for Marijuana Policy*

Amidst the federal drug policy debate, there are abundant theories for optimal policymaking and response to population preferences. These theories are based on principles of federalism, public choice, and efficient competition, and range from strong federal control to variations of hybrid state-federal policymaking that either attempt to explain the current dynamic or argue for a shift in regulatory policy to better engender efficient drug policy.

This article advocates for decentralized drug policymaking in an effort to promote democracy, autonomy, and efficiency. The federal government has instituted a “War on Drugs,” stemming from political and moral opposition that predominantly began in the 1970s. Out of political necessity and increasing violence attributed to drug trafficking, the federal executive branch invested

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<sup>52</sup> O’Hear, *supra* note 7, at 848.

<sup>53</sup> *See id.* at 853.

<sup>54</sup> *See id.*



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ever-increasing resources into drug regulation and enforcement.<sup>55</sup> Rather than promoting uniformity, curing hypothetical negative externalities, or stemming drug-use, the federal drug regime led to divergent state drug policies<sup>56</sup> and an Executive Order that retreats from the strictures of the CSA.<sup>57</sup> This drug regime also confuses the citizenry and retail merchants as to how the federal government will react to marijuana use, possession, and distribution.<sup>58</sup>

In contrast to federal marijuana laws, alcohol policy covering use and distribution is largely left to the states.<sup>59</sup> Given the similarities between these two substances,<sup>60</sup> it is relevant, if not absolutely necessary, to compare the maladies documented from alcohol prohibition in the 1920s in an effort to engender a new era of efficient and autonomous marijuana policymaking in the hands of state and local governments.

### 1. The Pitfalls of Prohibition

The federal government has three basic positions it can take in response to a given state policy: active support,

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<sup>55</sup> See GEST, *supra* note 8, and accompanying text.

<sup>56</sup> See Nat'l Org. for the Reform of Marijuana Laws, *supra* note 29 and accompanying text.

<sup>57</sup> See Memorandum from David W. Odgen, *supra* note 28 and accompanying text.

<sup>58</sup> See, e.g., *Marijuana USA* (CNBC television broadcast Dec. 8, 2010); *Marijuana Bill in Congress: Barney Frank, Ron Paul Legislation Would End Federal Ban on Pot*, HUFFINGTON POST, (June 22, 2011) [http://www.huffingtonpost.com/2011/06/22/marijuana-bill-barney-frank-ron-paul\\_n\\_882707.html](http://www.huffingtonpost.com/2011/06/22/marijuana-bill-barney-frank-ron-paul_n_882707.html) (noting several prominent federal drug raids despite an Executive Order purportedly ending enforcement of the CSA).

<sup>59</sup> BENJAMIN & MILLER, *supra* note 22, at 187.

<sup>60</sup> *Id.* at 15 (“The enactment of the Eighteenth Amendment in 1920 began the era known as Prohibition, whose parallels to the present are simply too compelling to ignore.”).

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neutrality, or active discouragement.<sup>61</sup> In the drug regulation arena, the federal government's traditional stance has been based almost entirely on how closely state policy resembles the "War on Drugs" paradigm.<sup>62</sup> In contrast, the federal government's role in the alcohol arena strongly supports state efforts at policymaking,<sup>63</sup> where the only independent roles for the federal government lie in labeling,<sup>64</sup> taxation,<sup>65</sup> and interstate distribution.<sup>66</sup>

Current United States alcohol policy is hardly surprising given Prohibition's sordid past. On January 16, 1920, the Eighteenth Amendment to the Constitution went into effect and prohibited "the manufacture, sale, or transportation of intoxicating liquors . . . for beverage purposes. . . ."<sup>67</sup> Within a few short years, alcohol use once again became rampant, but was now unregulated, dangerous, and controlled by organized crime; prisons were overpopulated, and corruption in public officials was unprecedented.<sup>68</sup> Prohibition's failure is distinctly ironic,

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<sup>61</sup> O'Hear, *supra* note 7, at 853.

<sup>62</sup> *Id.*

<sup>63</sup> U.S. CONST. amend. XXI, § 2; see BENJAMIN & MILLER, *supra* note 22, at 187 ("[P]rohibition was not repealed in 1933; only *federal* prohibition was repealed. The states and their local jurisdictions were free to exercise whatever degree of regulation, control, or prohibition of alcohol they felt appropriate. Indeed, the Twenty-first Amendment went one step further to reaffirm and strengthen the states' power to control alcoholic beverages: Section 2 of the amendment expressly prohibits the transportation or importation of alcohol into any state whenever and wherever such actions violate state and local laws.").

<sup>64</sup> See The Federal Alcohol Administration Act ("FAAA"), 27 U.S.C. § 205 (2006).

<sup>65</sup> BENJAMIN & MILLER, *supra* note 22, at 188.

<sup>66</sup> See FAAA, 27 U.S.C. §§ 201 - 219a. The federal government has, however, used financial incentives over highway funding to establish what amounts to a national minimum drinking age. See 23 U.S.C. § 158 (2006).

<sup>67</sup> U.S. CONST. amend. XVIII.

<sup>68</sup> Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INSTITUTE POLICY ANALYSIS NO. 157, 1 (July 17, 1991).

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given its lofty social and public health goals. Indeed, the “noble experiment” as it came to be known, “was undertaken to reduce crime and corruption, solve social problems, reduce the tax burden created by prisons and poorhouses, and improve health and hygiene in America.”<sup>69</sup> These goals are similarly idealized by the CSA,<sup>70</sup> which has been espoused as no less than the protector of the nation’s health and public welfare.<sup>71</sup>

Ignoring the pitfalls of Prohibition and the social ills befalling blind adherence to rigid moral high ground not only ignores potential economic boons due to product taxation and retail sale, but also leaves “controlled” substances to be bartered for in the underground market, adulterated by drug dealers, and subject only to regulation through the criminal underworld.<sup>72</sup> To be sure, despite the noble ideals pushed by Prohibitionists in an effort to rid society of the social ills created by alcohol, the homicide

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<sup>69</sup> *Id.*

<sup>70</sup> CSA, 21 U.S.C. § 801(2) (2006) (“The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.”).

<sup>71</sup> David E. Joranson & Aaron Gilson, *Controlled Substances, Medical Practice, and the Law*, in *PSYCHIATRIC PRACTICE UNDER FIRE: THE INFLUENCE OF GOVERNMENT, THE MEDIA, AND SPECIAL INTERESTS ON SOMATIC THERAPIES* 173-187 (Harold I. Schwartz ed., 1994) (“Today’s war on drugs is distinguished by intense media coverage of drug-related crime, new antidrug laws, and efforts to educate schoolchildren and the public to ‘just say no’ to drugs. The message is clear: Drugs are dangerous and must be avoided.”).

<sup>72</sup> The theory known as the “Iron Law of Prohibition” posits that as drug and alcohol enforcement increases so does the potency, variability, and adulteration of the substances. See Richard Cowan, *How the Narcs Created Crack*, *NATIONAL REVIEW*, Dec. 5, 1986, at 30-31. Further, the drugs will not be produced or consumed under normal market constraints, potentially destroying any possible benefits attributed to the decrease in consumption ascribed to the law in the first instance. See MARK THORNTON, *THE ECONOMICS OF PROHIBITION* 176-79 (1991).

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rate increased by seventy-eight percent during Prohibition, all other crimes increased by twenty-four percent, and arrests for drunkenness and disorderly conduct increased by forty-one percent.<sup>73</sup> In essence, “[m]ore crimes were committed because [P]rohibition destroy[ed] legal jobs, create[d] black-market violence, divert[ed] resources from enforcement of other laws, and greatly increase[d] the prices people ha[d] to pay for the prohibited goods.”<sup>74</sup> The analogy to marijuana is striking considering the enormous rate of violent crime attributed to drug *trafficking*, yet the exorbitant number of inmates in United States prisons are incarcerated as a result of simple drug *possession*.<sup>75</sup>

### 2. A State-Based Solution to Federal Marijuana Prohibition

In response to the historically apt analogy to Prohibition and the arguable shortcomings inherent in the current federal drug regime, some commentators argue for adoption of the “Constitutional Alternative.”<sup>76</sup> Finding support in basic public choice theory, supporters of the “Constitutional Alternative” argue for a basic reversion of authority to the states, wherein “the power to control the manufacture, distribution, and consumption of all psychoactives” would be under state control.<sup>77</sup> Strongly resembling the current federal-state dynamic over alcohol distribution,<sup>78</sup> this dynamic, however, would leave the regulation of interstate drug distribution to the federal government.<sup>79</sup> Rather than purporting to legalize marijuana distribution, this power-shift is “intended to provide states

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<sup>73</sup> Thornton, *supra* note 68, at 6.

<sup>74</sup> *Id.*

<sup>75</sup> See Ahdieh, *infra* note 187 and accompanying text.

<sup>76</sup> BENJAMIN & MILLER, *supra* note 22, at 186-249.

<sup>77</sup> *Id.* at 194.

<sup>78</sup> See U.S. CONST. amend. XXI, § 2.

<sup>79</sup> BENJAMIN & MILLER, *supra* note 22, at 194.

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with greater autonomy by ‘permitting the states to choose drug-control strategies more in line with the preferences and circumstances of their citizens.’”<sup>80</sup>

This state-based framework is supported by two overarching policy rationales: 1) citizen choice; and 2) policy innovation.<sup>81</sup> Decentralization would promote more autonomy among the United States population to choose the laws and regulations that fit their lifestyle preferences so that if a “resident of one state does not like the rules imposed by the majority there, he is free to move to a state whose laws better suit his preferences or circumstances.”<sup>82</sup> For example, if a nation consisted of one hundred people, forty of whom want marijuana to be legalized and sixty who would opt to retain the status quo, the ban on marijuana possession will remain in place—as it is in the CSA—leaving forty citizens unhappy with the law.<sup>83</sup> If, however, the nation were divided into separate states, each with the power to enforce its own laws, then more citizens would be content with the nation’s regulatory policy.<sup>84</sup> For instance, if one state contains fifty residents who favor the status quo and ten residents who would opt for legalization, while another state contains ten residents favoring continued illegality, and thirty who would opt for legalization, then one state will opt to maintain marijuana’s illegal status, while the other will opt for some form of legalization.<sup>85</sup> Simple arithmetic provides that eighty of the nation’s citizenry will be satisfied, while twenty are still

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<sup>80</sup> O’Hear, *supra* note 7, at 854 (quoting BENJAMIN & MILLER, *supra* note 22, at 196).

<sup>81</sup> BENJAMIN & MILLER, *supra* note 22, at 192-93.

<sup>82</sup> *Id.* at 193.

<sup>83</sup> This example is analogized from O’Hear, *supra* note 7, at 857 (adapted from Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”*: A theory of Judicial Enforcement of Federalism, 68 S. CAL. L. REV. 1447, 1467-68 (1995)).

<sup>84</sup> See O’Hear, *supra* note 7, at 857.

<sup>85</sup> See *id.*

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unhappy with the policy.<sup>86</sup> Adding in the option for citizen mobility and minimal transactions costs, the net benefits could be even greater.<sup>87</sup>

Decentralization also promotes policy innovation where states with divergent political considerations experiment with new—and possibly more optimal—regulatory policy.<sup>88</sup> In stark contrast, a purely unitary federal policy only gives the political process one shot to respond to social needs.<sup>89</sup> As Justice Brandeis' famous dissent points out, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>90</sup> The simplistic example above shows us how the policy innovation rationale easily fits into the public choice model wherein two states adopting different policies can adapt, amend, or reject their own policies in response to the consequences—both positive and negative—displayed by their peer state's policy choices.<sup>91</sup>

Policymakers should take heed; just as Prohibition failed to cure, and even exacerbated, the social ills it attempted to curtail, the federal reign over marijuana law could do the same; it has already created an enormous taxpayer burden while leading to increased violent crime and addiction.<sup>92</sup> Though federal legislators may lose the political soapbox federal regulation so conveniently provides, repeal of the CSA (as it relates to marijuana) will lead to the same benefits we saw following enactment of

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<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See* BENJAMIN & MILLER, *supra* note 22, at 193.

<sup>89</sup> *See id.* at 193.

<sup>90</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>91</sup> O'Hear, *supra* note 7, at 858.

<sup>92</sup> Thornton, *supra* note 68, at 8-9.

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the Twenty-First Amendment:<sup>93</sup> reduced corruption and organized crime, job creation, and invigorated addiction support programs.<sup>94</sup>

### **III. Spillover Effects and Negative Externalities: Evaluating the Criticisms of Consolidated State Control**

Commentators have not unanimously rejoiced at the prospect of bolstering state power in drug policymaking. Rejecting the “Constitutional Alternative” approach to United States drug policy, Michael O’Hear argues that the federal government must “adopt a clear, coherent policy towards state innovation,”<sup>95</sup> through the adoption of a theory of government control he labels the “Competitive Alternative.”<sup>96</sup> O’Hear critiques the purely state-based policymaking approach, arguing that it may actually “reduce the degree of decentralization in national drug policy by consolidating state control, and . . . [producing] perverse incentives that warrant federal intervention.”<sup>97</sup> The first section to this Part outlines O’Hear’s concerns with an outright reversion of federal power to state regulatory authority. The following section attempts to rebut O’Hear’s most salient critiques by utilizing traditional theory in the field of jurisdictional competition. The next section follows with an analysis of the focal points of O’Hear’s “Competitive Alternative,” evaluating the federal media machine and asset forfeiture laws. Finally, this Part attempts to reconcile and incorporate some of O’Hear’s most salient and practical points with this article’s approach to state control over marijuana regulatory policy.

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<sup>93</sup> U.S. CONST. amend. XXI; *see also* Thornton, *supra* note 68, at 1 (“The evidence affirms sound economic theory, which predicts that prohibition of mutually beneficial exchanges is doomed to failure.”).

<sup>94</sup> Thornton, *supra* note 68, at 8-9.

<sup>95</sup> O’Hear, *supra* note 7, at 853.

<sup>96</sup> *Id.* at 873.

<sup>97</sup> *Id.* at 859.

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### A. O'Hear's Critique

Perhaps counter-intuitively, O'Hear argues that *carte blanche* state control could lead to less local autonomy than under the "Cooperative Federalist" regime.<sup>98</sup> This is so because much of the support for federal drug control goes directly to localities—*e.g.* monetary grants, referral for federal prosecution, and equitable sharing statutes that allow local enforcement to keep some of the proceeds of drug confiscations.<sup>99</sup> Local autonomy may be engendered due to federal prosecutorial incentives as well, where United States Attorneys are subject to political pressures and must address local needs.<sup>100</sup> At the very least, O'Hear argues that state regulatory control would not clearly do a better job of regulatory policymaking than the current regime by stating that, "[n]otwithstanding the benefits of decentralization, federal control may still be justified on the basis of 'Race to the Bottom' pressures or spillover effects."<sup>101</sup> He argues that dominant state regulatory authority may create a "Race to the Bottom" market failure wherein states will create continually relaxed marijuana regulation laws in an effort to garner tax revenues from legalized sale and distribution.<sup>102</sup>

The critique further predicts that "spillover effects" may undermine the workability of such a decentralization framework because states that relax their drug policy may create problematic negative externalities in "neighboring get-tough states."<sup>103</sup> O'Hear points out that a significant

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<sup>98</sup> *Id.* at 862.

<sup>99</sup> *Id.*

<sup>100</sup> See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 790 (1999).

<sup>101</sup> See O'Hear, *supra* note 7, at 866.

<sup>102</sup> See *id.* at 866-67.

<sup>103</sup> See *id.* at 867.



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part of the cost of marijuana lies in the risk and subterfuge involved in the illegal trafficking regime, which inflates the price.<sup>104</sup> Consequently, when states legalize the process, prices will deflate, attracting potential users in neighboring states—states that maintain the illegality of marijuana use, possession, and distribution.<sup>105</sup>

In response to the alleged failings of state regulatory dominance, O’Hear argues for implementation of his own “Competitive Alternative.” Though still grounded in a presumption of decentralized policymaking, O’Hear additionally focuses on reducing federal distortion of drug policy information, increasing local political control over federal drug enforcement decisions, and increasing local law enforcement accountability.<sup>106</sup>

### *B. Countering the Critique*

Despite O’Hear’s reasoned criticisms, state-based regulatory authority is in many ways hard to dispute. Moreover, hypothetical fears can be assuaged, and state-based authority validated, by analogy to the current alcohol regulation framework, which would take nothing more than repeal of the CSA as it relates to marijuana control. Further, the main argument for federalization<sup>107</sup>—and one

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See id.* at 873-74.

<sup>107</sup> Another argument for federal regulation in a given area is economies of scale in regulatory policy. Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211 (1977). While the DEA certainly centralizes the economies of interstate enforcement and drug trafficking, more than ninety-five percent of enforcement is done at the state and local level as it stands now. As such, the economies of scale argument is largely inapplicable in the Cooperative Federalism framework. Not to mention, the argument posited in this article would maintain federal enforcement of

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recognized by O’Hear<sup>108</sup>—often lies in an attempt to curtail negative externalities and potential “races to the bottom” among states.<sup>109</sup> It is unclear, however, that federal regulation would be the answer, even if these market failures existed. More relevant to this discussion is the uncertainty that state-based marijuana policy is likely to lead to the problems highlighted in O’Hear’s critique.

### 1. Federal Regulation May Not be the Answer to a Race to the Bottom for Marijuana Laws

As previously discussed, O’Hear points out the likelihood of a “Race to the Bottom,” and potential spillover effects resulting from the decentralization of drug policy.<sup>110</sup> A common solution to these state-based market failures is preemptive federal regulatory authority.<sup>111</sup> Picking up, however, on Richard Revesz’s work in the environmental market for laws, federal regulation is not always the quick fix to market failure that it is presumed to be.<sup>112</sup> The typical argument for federal authority is simple; where federal regulation preempts state policymaking in

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interstate trafficking and international crime, maintaining the existing economies of scale where they are utilized most effectively.

<sup>108</sup> See *supra* Part III. A.; O’Hear, *supra* note 7, at 866-67.

<sup>109</sup> The “Race to the Bottom” has even been utilized to justify overarching federal regulation on mobile capital. See Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1194 (1988). Preeminent legal scholars have even cited the “Race to the Bottom” as the impetus behind The New Deal. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 505 (1987).

<sup>110</sup> See O’Hear, *supra* note 7, at 866

<sup>111</sup> See, e.g., *id.*

<sup>112</sup> Outside the environmental realm, and quite applicable to the market for criminal laws, many commentators have simply noted that the federal government is a poor conduit for creating and maintaining efficient penal laws. See, e.g., Wayne A. Logan, *Crime, Criminals, and Competitive Crime Control*, 104 MICH. L. REV. 1733 (2006).

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the field, states will no longer be able to engage in an inefficient policy battle with negative social utility.<sup>113</sup> Revesz used federal authority in environmental policy to rebut the preemption rationale:

[F]ederal environmental standards can have adverse effects on other state programs. Such secondary effects must be considered in evaluating the desirability of federal environmental regulation. Most importantly, the presence of such effects suggests that federal regulation will not be able to eliminate the negative effects of interstate competition. Recall that the central tenet of race-to-the-bottom claims is that competition will lead to the reduction of social welfare; the assertion that states enact suboptimally lax environmental standards is simply a consequence of this more basic problem. In the face of federal environmental regulation, however, states will continue to compete for industry by adjusting the incentive structure of other state programs. Federal regulation thus will not solve the prisoner's dilemma.<sup>114</sup>

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<sup>113</sup> See Revesz, *supra* note 35, at 1211-12. But see Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996). It is also interesting to point out another claim about the necessity of federal law based on public choice theory: "state political process[es] systematically undervalue the benefits of environmental protection or overvalue the corresponding costs, whereas at the federal level the calculus is more accurate." See Revesz, *supra* note 35 at 1212. Revesz rebuts this claim by pointing out that rather than a failure in the market for industrial locational decisions, this rationale is really about failures in the political process and proper information. *Id.* at 1223-24.

<sup>114</sup> Revesz, *supra* note 35, at 1246.

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Revesz simply points out that regulation and social welfare are not created in a vacuum. The government should, and does, regulate in a complex matrix of policies involving a number of different variables that all impact each other. To take one of the variables that suffers from market failure and impose a uniform federal standard upon it does not necessarily lead to increased social welfare on the whole. In essence, desirable regulation is too complex to achieve through piecemeal centralization; it is akin to plugging the dam with a federal forefinger while watching the wall fissure just out of reach. Unfortunately for federalism and state autonomy, the theoretical result from such an approach is complete centralization in the federal government.<sup>115</sup>

So what is to be made of the environmental-marijuana analogy? Revesz points to competing regulatory variables in the environmental arena, like workers' rights and corporate taxation, which are inevitably tied to industry location decisions.<sup>116</sup> Thus, when several variables play into corporate decision-making, one state-based regulatory change is unlikely to provide the incentives necessary to propagate a "Race to the Bottom."

A possible counterargument to the application of this analogy here may elucidate a number of distinctions in marijuana regulation. For example, political decisions in the environmental arena are often aimed at maintaining the status quo—keeping industry in place or simply combating more stringent environmental policies—while progressive marijuana regulation runs against the status quo. Thus, rather than Revesz's world of environmental regulations

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<sup>115</sup> *Id.* at 1247 ("The prisoner's dilemma will not be solved through federal environmental regulation alone, as the race-to-the-bottom argument posits. States will simply respond by competing over another variable. Thus, the only logical answer is to eliminate the possibility of any competition altogether. In essence, then, the race-to-the-bottom argument is an argument against federalism.").

<sup>116</sup> *Id.* at 1245-47.

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playing a small factor in business incentives, marijuana regulation may play out differently. To be sure, political inertia is undoubtedly an important consideration when confronting change. Here, however, it is less than certain that the pivotal “status quo” distinction makes a difference in the theoretical argument; or practically speaking, whether it creates a barrier at all. Rather, it seems that the anti-drug status quo is less of a political fallback and more of a public perception and interest group driver that would be balanced in a jurisdictional competition framework. In fact, it is more likely that the complexities of regulatory dynamics would be more robust in the market for marijuana than contemplated in Revesz’s critique of federal oversight in the environmental arena.

Comparing the market for marijuana laws to the environmental law patchwork, there are several apparent variables in a complex regulatory scheme that would play against a centralization argument. Simply speaking, one such variable lies in economic growth itself. Much like pollution, if a state is not allowed to provide for legal marijuana sales—and hence benefit from economic growth and taxes—the state may loosen standards in other areas to compensate. Further, drug tourism is not an unheard of phenomenon; it is seen internationally, as well as in states that allow for purchase without local citizenship.<sup>117</sup> Federalized drug prohibition could thus lead to overly lax enforcement in tourism related to other vice goods like gambling or prostitution. Furthermore, it is plausible that, given the extensive prison overpopulation and the overwhelming burden faced by enforcement authorities, policymakers will institute overly lenient penalties for non-

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<sup>117</sup> See Yaniv Belhassen, Carla Almeida Santos & Natan Uriely, *Cannabis Use in Tourism: A Sociological Perspective*, 26 LEISURE STUDIES 303-19 (2007); See also Avelardo Valdez & Stephen J. Sifaneck, *Drug Tourists and Drug Policy on the U.S.-Mexican Border: An Ethnographic Investigation of the Acquisition of Prescription Drugs*, 27 J. OF DRUG ISSUES 879-97 (1997).

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drug crimes or prosecutors may simply not enforce crimes to the extent of the law. In sum, just as Revesz argues that federal oversight is an unwise option for corrective regulation in the environmental arena, preemptive regulation in marijuana regulation is similarly disjunctive. Even if a “Race to the Bottom” does exist for marijuana laws, federal oversight may lead to inefficient regulation in other economic areas, especially tourism, in addition to penal laws and their enforcement.

### 2. It is Not Clear that Jurisdictional Competition for Marijuana Laws Will Lead to a Race to the Bottom Among States

The preceding discussion may be largely irrelevant, however, if marijuana policy is not conducive to “Race to the Bottom” or negative externality market failures. In fact, there are several reasons we would not expect to see these economic failures play out in the realm of marijuana policy.

In the criminal justice arena, scholars focus extensively on the effects of penalties on crime displacement and jurisdictional infighting that may lead to inefficient collective-action problems. This market failure contemplates peer jurisdictions “spending increasingly high resources on their criminal justice system[s] simply to deflect crime to their neighbors.”<sup>118</sup> Indeed, “in recent decades [states] have shown increasing awareness of the criminal justice policies of their sister states.”<sup>119</sup> Scholars utilizing this approach are apt to recognize the need for federal oversight to eliminate the state “race” to overly harsh criminal penalties.<sup>120</sup> As previously discussed, a similar argument has been heavily cited and remarked upon

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<sup>118</sup> Teichman, *supra* note 25, at 1835; *see also* Logan, *supra* note 112, at 1733 (arguing against a federal approach to criminal policymaking).

<sup>119</sup> Logan, *supra* note 112, at 1735.

<sup>120</sup> *Id.*

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in the environmental field; noting the argument for federal regulation to circumvent a state-industrial “Race to the Bottom” over pollution standards.<sup>121</sup> The clearly established “Race to the Bottom” argument in other areas can certainly be applied to criminal justice standards, wherein criminals are assumed to be rational actors and will commit crimes in the jurisdictions where the costs associated with illegal activity are the lowest.<sup>122</sup> When one state implements stricter criminal laws or penalties, it is posited that criminals will at least consider relocating to a jurisdiction with more lenient standards.<sup>123</sup> In the face of criminal displacement, recipient states that presumably do not want the social ills associated with more criminals among its populace will respond in-kind and institute even harsher penalties in an effort to displace the criminal population within its borders.<sup>124</sup> This established model, however, only reasonably applies to criminal activities with little to no societal benefits; for instance, violent crimes, sex crimes, and larceny.

In contrast, regardless of the negative effects of drug-use itself, a large proportion of the negative societal consequences of criminal drug activity are due to the nature of illicitness itself. To be sure, while drug use may lead to community costs in the form of increased health care outlays, rehabilitation, and reduced economic productivity,

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<sup>121</sup> See, e.g., Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 747 (1977); Stewart, *supra* note 107, at 1212 (“Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards.”). *But see* Revesz, *supra* note 35.

<sup>122</sup> See Teichman, *supra* note 25, at 1835.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

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the overwhelming demand for drugs creates an enormous underground market,<sup>125</sup> policed by drug dealers, street gangs, organized crime syndicates, and drug cartels. Whereas government-sanctioned markets are transparent and regulated, underground “shadow economies”<sup>126</sup> lead to regulation by the hand of distribution, the criminal underworld and organized crime syndicates. The end result is a drug trade that leads to overwhelming violence, not just in manufacturing countries, but also in developed countries, which fuel the demand for these illicit substances.<sup>127</sup>

On one hand, federal regulation of drug markets has led to remarkable societal consequences in the form of crime and violence. On the other hand, criminal justice theorists suggest a potential “Race to the Bottom,” leading to overly *harsh* criminal penalties. It is not clear, however, that a “Race to the Bottom” will occur in the marijuana market. Empirics and logic suggest a successful and societally beneficial market for drug legalization.<sup>128</sup> For

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<sup>125</sup> U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2010, U.N. Sales No. E.10.XI.13 (2010), available at <http://www.unodc.org/unodc/en/data-and-analysis/WDR-2010.html> (estimating the world drug economy to be near \$400 billion, ranking alongside oil and arms as the world’s largest traded goods).

<sup>126</sup> See Friedrich Schneider & Dominik Enste, *Hiding in the Shadows: The Growth of the Underground Economy*, 30 ECON. ISSUES 1 (2002).

<sup>127</sup> The Federal Bureau of Investigation has estimated that roughly five percent of United States murders are drug-related. U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ-149286, FACT SHEET: DRUG-RELATED CRIME (Sept. 1994) available at [bjs.ojp.usdoj.gov/content/pub/pdf/DRRC.PDF](http://bjs.ojp.usdoj.gov/content/pub/pdf/DRRC.PDF). Even more astoundingly, the violence fueled by Mexican drug cartels has been estimated to account for ninety percent of killings in Mexico. Traci Carl, *Progress in Mexico Drug War is Drenched in Blood*, ASSOCIATED PRESS, (Mar. 10, 2009, 6:28 PM), <http://msnbc.msn.com/id/29620369/ns/world-news-americas/t/progress-mexico-drug-war-blood-drenched/#.TpW6kHKyDaO>.

<sup>128</sup> As an example, Colorado alone generated 2.2 million dollars in tax revenue from marijuana sales directly, and another 2.2 million dollars from increased sales tax revenues. John Ingold, *Medical-Marijuana*



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example, in contrast to state exile of pedophiles and violent criminals, states stand to benefit from increased tax revenues,<sup>129</sup> less violent crime,<sup>130</sup> and significant economic growth by taking an already existing market aboveground.<sup>131</sup> In order for the “Race to the Bottom” theory to attach, there must be negative externalities sufficiently realized to incentivize states to change their laws in an attempt to remedy those externalities.

First, consider Teichman’s theory of overly strict regulation to effectively exile criminals from within a jurisdiction. This is hardly a far-fetched theory. Rather, state and local policies regarding ex-convicts have shown just such an effort to exile criminals through bussing and relocation efforts.<sup>132</sup> Taking the next step, altering penal laws to move criminals to other jurisdictions is also plausible. However, this theory’s application in the realm of marijuana laws is less than certain and seemingly far-

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*Sales Tax Nets \$2.2 Million for Colorado This Year*, DENVERPOST.COM (Nov. 23, 2010, 6:36 AM), [http://www.denverpost.com/news/marijuana/ci\\_16688199](http://www.denverpost.com/news/marijuana/ci_16688199). Colorado Springs, a city with under 500,000 residents, received \$380,000 in sales tax attributed to marijuana dispensaries. *Id.*

<sup>129</sup> See Ingold, *supra* note 128; *Projected Marijuana Tax Revenues*, CNN MONEY (last visited Nov. 1, 2011), [http://money.cnn.com/pf/features/lists/taxes\\_marijuana/table.html](http://money.cnn.com/pf/features/lists/taxes_marijuana/table.html) (citing JEFFREY MIRON, BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITIONS (June 2005), available at <http://www.prohibitioncosts.org/mironreport.html>).

<sup>130</sup> See U.S. DEP’T. OF JUSTICE, *supra* note 127.

<sup>131</sup> An independent financial analysis firm projected medical marijuana sales to reach 1.7 billion dollars in 2011. *The State of the Medical Marijuana Markets 2011: First Ever Investor-Grade Analysis Report of the Marijuana Marketplace in the United States*, FRESHNEWS.COM, (Mar. 24, 2011, 7:20 AM), <http://freshnews.com/news/470983/-the-state-medical-marijuana-markets-2011-first-ever-investor-grade-analysis-report-mar>. The report projects that medical marijuana sales will reach 8.9 billion dollars—nearly half the estimated illegal market for marijuana, if 20 more states allow its sale for medical use. *Id.*

<sup>132</sup> See Roger Roots, *When the Past is a Prison: The Hardening Plight of the American Ex-Convict*, 3 JUSTICE POL. J. 1 (2004).

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fetched. The negative externalities associated with criminal activities seemingly stem mostly from violence and economic losses through theft. Though addiction, medical problems, homelessness and vagrancy undoubtedly contribute to the attacks against legalization, these factors exist whether marijuana is legal or illegal, as we have seen for decades. But if a jurisdiction legalizes marijuana, the violent crime variable will presumably be eliminated as the market moves out of the hands of organized crime and into retail outlets.<sup>133</sup>

The more relevant question is whether marijuana use will increase with legalization; and if it does, whether the negative impacts of citizen use will outweigh the benefits, such that the jurisdiction will seek to move users outside its boundaries. Even assuming that most of the populace will begin to use, or even *abuse*, marijuana, it does not necessarily follow that there will be far-reaching negative public impacts. Though it is certainly possible that worker productivity may decrease, while accidents, DUIs, and addiction rehabilitation needs increase.

It is also necessary to consider moral stigma and negative externalities associated with inter-jurisdictional trafficking.<sup>134</sup> Policymakers must balance these negative implications with the possible benefits of taxation, reduced prison populations, increased citizen autonomy and happiness, and reduced violent crime through elimination of the drug underworld. In contrast to the unsavory criminal activities noted by Teichman, where the criminal element moves from one jurisdiction to another, unwanted by all, marijuana users and would-be distributors would bring both benefits and possible detriments to a jurisdiction, leaving

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<sup>133</sup> See Schneider & Enste, *supra* note 126, at 1.

<sup>134</sup> Assume that State A legalizes marijuana and State B maintains the status quo of illegal use, possession, and distribution. While citizens of State B could move to State A to reap the benefits of legal marijuana use, many will choose not to if the costs of transporting marijuana back to their home State remain low enough.

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state and local government to make the decisions jurisdictional competition theorists argue should be made by decentralized government in order to further efficient and innovative lawmaking.

Even if Teichman's "Race to the Bottom" for overregulation does not apply to the market for marijuana laws, an argument could be made that the opposite may be true—under-regulation incited by jurisdictions competing for tax revenues, drug tourism, and economic growth. But just as liquor laws faced the Teetotalers in the early 20th century, progressive drug policy faces a strong check through opposition in the religious right and parent advocacy groups, among many others. The marijuana policy battlefield offers a multitude of variables for policymakers to balance as they attempt to appease and attract a presumably mobile populace. As they have been in the federal regulatory framework, interest groups will be at the forefront of marijuana policymaking instituted by the states, with constituencies influenced by a variety of considerations including corporate, retail, and direct taxation; citizen autonomy and happiness; economic growth; and reduced crime and prison populations.<sup>135</sup>

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<sup>135</sup> "No more than 25 percent of Americans arrested for drugs are involved in "trafficking," and almost all of those are petty, small-time dealers. The remaining 75 percent of the arrests are for simple possession, often for marijuana." BENJAMIN & MILLER, *supra* note 22, at 3. It should be noted that traditionally tough-on-crime states—also generally conservative—like "hang-em-high Texas," have led the way in drug sentencing reform in an effort to reduce the size of their prison populations. See *Right and Proper: With a Record of Being Tough on Crime, The Political Right Can Afford to Start Being Clever About It*, THE ECONOMIST, (May 26, 2011), <http://www.economist.com/node/18744617> (noting that the experimentation with alternative forms of punishment for drug crimes has emanated from the fact that "[m]ore people have been jailed for more crimes—particularly non-violent drug-related crimes—and kept there longer"). Texas, for instance, has instituted mandatory probation for first-time, low level

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Driving anti-marijuana legislation are various interest groups intent on entrenching the status quo. For example, the biggest contributors to Partnership for a Drug-Free America are the Prison Industrial Complex, Big Pharmaceutical, Big Tobacco, and the alcohol manufacturing industry.<sup>136</sup> If under-regulation is the concerning factor in a “Race to the Bottom” analysis, these major interest groups will play a strong role in combating increasingly lenient marijuana policy. Considering a “Race to the Bottom” may end in overly restrictive or overly lenient lawmaking depending on the interests, the aforementioned competing interests should be robust enough to avoid a “race” in either direction. Given the extent of politically salient variables in play, state autonomy in policymaking would seem particularly apt in the context of marijuana policy. Indeed, principles of federalism suggest that states be able to choose the laws most applicable to the characteristics of the jurisdiction “thereby giving mobile citizens many different regulatory regimes from which to choose when selecting a place to live.”<sup>137</sup>

Stepping outside the realm of theory, reality has similarly not played out the way an under-regulating “Race to the Bottom” would dictate. Only sixteen states<sup>138</sup> have made progressive marijuana regulation in the face of the

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offenders, and devoted more than \$200 million to drug treatment programs in lieu of traditional prison sentences. *Id.*

<sup>136</sup> The main contributors to Partnership for a Drug-Free America included Proctor and Gamble, Bristol-Myers Squibb, Johnson & Johnson, Merck, Philip Morris, RJ Reynolds, and Anheuser-Busch. *Partnership for a Drug Free America, Sources of Funding 1988-1991*, SCHAFFER LIBRARY OF DRUG POLICY, (Dec. 31, 1991), <http://www.druglibrary.org/schaffer/library/pdfa1.htm>.

<sup>137</sup> Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 481 (2004).

<sup>138</sup> See Nat’l Org. for the Reform of Marijuana Laws, *Medical Marijuana*, *supra* note 31 and accompanying text.

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current administration's tolerant Executive Order<sup>139</sup> and general federal reliance on state enforcement.<sup>140</sup> Though this article's proposed solution would remove the supposed federal barrier, possibly giving hesitant states the last push necessary to enter the "race" to legalization, a map of current drug laws indicates that the impetus for progressive marijuana laws is likely more strongly tied to geographical ideologies and preferences than fear of the federal government's stance on drug laws.<sup>141</sup> For instance, the most progressive laws tend to be on the West Coast: California, Nevada, Oregon, Washington, Hawaii, Alaska, Montana, and Colorado.<sup>142</sup> In contrast, southern "bible belt" states have the strictest stance on marijuana with essentially zero-tolerance laws in Texas, Louisiana, Alabama, South Carolina, Georgia, Florida, Arkansas, Oklahoma, and Tennessee.<sup>143</sup> While hardly conclusive evidence of ideological preference influencing marijuana policymaking, the religious, tobacco, and prison industrial interest groups' stranglehold over the Southeast may well keep states in this region from entertaining progressive legalization laws, even if the federal government leaves the picture. This is not surprising given that analogous alcohol bans in counties and municipalities lie almost exclusively in the Southeast.<sup>144</sup>

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<sup>139</sup> See Meyer & Glover, *Medical Marijuana Dispensaries Will no Longer be Prosecuted*, U.S. Attorney General Say, *supra* note 28.

<sup>140</sup> See Mikos, *supra* note 28 and accompanying text.

<sup>141</sup> Nat'l Org. for the Reform of Marijuana Laws, *Marijuana Law Reform in the United States: April 2010*, NORML.ORG, (last visited Nov. 1, 2011), <http://stash.norml.org/wp-content/uploads/medipot-states-2010-04.jpg>.

<sup>142</sup> *Id.*

<sup>143</sup> The sole outlier in this southeastern geographic area is Mississippi, which has decriminalized marijuana use and possession. *Id.*

<sup>144</sup> Gary Schulte et al., *Consideration of Driver Home County Prohibition and Alcohol-Related Vehicle Crashes*, 35 ACCIDENT ANALYSIS AND PREVENTION 641-48 (2003).

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Despite the uncertainty inherent in jurisdictional competition for marijuana laws, state autonomy seems to be the best alternative in an effort to achieve the greatest public welfare. In the absence of over-burdensome negative externalities and a race to overly strict or overly lax marijuana laws, the federal government's role should be limited to international traffic cop and interstate referee.

Even if the aforementioned market failures do exist in a competitive framework for marijuana regulation, it is wholly unclear that the federal government's role as uniform legislator is the proper solution where states have other regulatory avenues to exploit in an effort to establish economic growth and constituent appeasement. Even Teichman concedes that "the U[nited] S[tates] government has a dismal track record when it comes to criminal justice, very often manifesting an irrational 'tough on crime' attitude irrespective of legislative context."<sup>145</sup> Prohibition's catastrophic failure should give policymakers keen background insight into marijuana's current federal regulatory future, opening the door for state and local authority with the repeal of the CSA's prohibition on marijuana use, possession, and distribution.

### *C. The Competitive Alternative's Practical Concerns*

Though the market for marijuana policy likely includes the competing interests necessary to avoid the problems encountered in state-based market failures, O'Hear nonetheless makes several salient suggestions for creating an efficient model for decentralization of marijuana policy and enforcement, regardless of the federal government's ultimate policymaking role.

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<sup>145</sup> Logan, *supra* note 112, at 1745 (quoting Teichman, *supra* note 25, at 1874).

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The “Competitive Alternative” first highlights federal policies and practices that distort the political debate over drug policy, hampering state and local efforts that conflict with the federal “War on Drugs.”<sup>146</sup> Federal control inhibits state-based policy on a number of fronts. For instance, the federal marketing machine places an overwhelmingly negative spin on marijuana and progressive drug enforcement policy.<sup>147</sup> This federal message stifles alternatives to the current status quo, including decriminalization or medical marijuana programs.<sup>148</sup> In response, the “Competitive Alternative” posits that federal funds for advertising and marketing might be decentralized and turned over to the states to use at their discretion, or at the very least, with minimal federal funding conditions attached.<sup>149</sup>

In addition to revamping the federal media machine, O’Hear articulates a need for local oversight over federal enforcement.<sup>150</sup> This point harkens to the limited federal resources for drug policy implementation, yet acknowledges the overarching need for occasional federal enforcement and prosecution. O’Hear proposes a possible reform, requiring a local official, such as a District Attorney, to approve federal prosecutions within municipal boundaries so as to establish “systematic checks on federal enforcement discretion.”<sup>151</sup>

While O’Hear maintains some federal control, he does not discount the need for local policymaking and enforcement. The “Competitive Alternative” keenly looks to the incentives driving municipal actors who forge drug

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<sup>146</sup> O’Hear, *supra* note 7, at 875.

<sup>147</sup> *See id.*

<sup>148</sup> *See id.*

<sup>149</sup> *Id.* at 875-76.

<sup>150</sup> *Id.* at 876.

<sup>151</sup> *Id.* at 877. Though the example does include a federal “safety valve” for cases involving interstate commerce or those that are accompanied by unnecessary risks of substantial jurisdictional spillover concerns. *Id.*

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policy at the ground level, and points to the need for increased accountability of local law enforcement authorities.<sup>152</sup> O’Hear cites the current dilemma over equitable sharing laws and the ability for local law enforcement to take property seized during drug transactions.<sup>153</sup> This scheme perversely incentivizes local law enforcement to over-enforce drug laws, while ignoring community preferences.<sup>154</sup> In response, the “Competitive Alternative” regime focuses on forfeiture law reform, redirecting the assets seized rather than simply eliminating equitable sharing laws.<sup>155</sup> Instead of pocketing forfeiture proceeds into local coffers, funds would be redirected to a state general fund, in which the state would have an incentive to redirect most of the funds back to the localities in an effort to reward enforcement, while maintaining a check on abuse of police authority.<sup>156</sup>

Theories abound as to the best policy mechanism for drug policy; ranging most clearly from the recognizable regulatory framework invoked by today’s federal paradigm, to the sovereign-based proposal espoused herein. What today’s federally supreme drug law regime lacks, however, is the ability to adapt to, or account for, state innovation in drug policy. In response, this article calls for a public-choice mechanism of basic decentralization, empowering states at the expense of federal oversight. This type of argument has its potential critics, namely in Michael

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<sup>152</sup> O’Hear, *supra* note 7, at 879.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*; see also David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679 (2003) (positing a similar argument). Note also that some states do already have these state general funds in place to direct equitable sharing forfeitures, but with federal involvement, local authorities can turn to the federal government who plays hand in hand with local forfeiture, possibly evading the checking measure sought by the fund redirection in the first instance.



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O’Hear and the “Competitive Alternative” model. Highlighting the danger of spillover effects or a potential “Race to the Bottom,” the “Competitive Alternative” calls for continued federal supremacy, with local control in the political and enforcement regimes, while systematically overhauling the federal media machine. In the end, there may be no perfect regulatory scheme, but if the past several decades of drug regulation have shown us anything, the United States fosters a vastly inefficient and over-budgeted federal drug regime imposed at the expense of state innovation. Recent state reforms have shown expansive state-based marijuana law reform and the federal government should respond in turn, ceding regulatory authority to the states and local governments.

### *D. The Give and Take – Putting the Competitive Alternative to Work*

“[W]ithin our system of government, state control stands not as an endpoint on the decentralization spectrum, but as a midpoint between federal and local control.”<sup>157</sup> Indeed, O’Hear argues that the same tenets justifying decentralization to the states support further reversion to local governments.<sup>158</sup> For example, citizen mobility is greater at the local level than across state lines and, rather than fifty state-level policy innovators, localities would provide tens of thousands of opportunities for experimentation.<sup>159</sup> O’Hear’s “Competitive Alternative” makes local authorities the gatekeepers to federal enforcement authority.<sup>160</sup> Further, disassembling the federal media machine and eliminating the misaligned forfeiture

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<sup>157</sup> O’Hear, *supra* note 7, at 860.

<sup>158</sup> *Id.* (citing Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 968 (1967)).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

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laws are central propositions of the “Competitive Alternative.”<sup>161</sup> While the previous section made the case for the “Constitutional Alternative,” supporting a strong decentralization framework, this section analyzes the applicability of O’Hear’s “Competitive Alternative” in an attempt to improve the state-based framework and respond to some of the likely shortcomings inherent in over-expansive decentralization.

### 1. Questioning the Localist Paradigm

The “Competitive Alternative” pushes strongly for extensive decentralization, past the state level and on to local authorities, while maintaining a co-extensive federal regime.<sup>162</sup> Local governments, however, lack the financial resources of states and have insufficient economies of scale to justify expensive enforcement mechanisms.<sup>163</sup> In addition, while it is easier for criminals to cross municipality lines, local enforcement jurisdiction only extends to local boundaries.<sup>164</sup> Most importantly, local governments rely on the state to provide an overarching criminal code and prison system.<sup>165</sup> In O’Hear’s defense, he does acknowledge these problems, and notes a possible solution of state funding, while allowing for local implementation at municipalities’ discretion.<sup>166</sup> O’Hear argues that municipal decentralization accounts for local implementation instead of the state in the same way it does for state authority vis-à-vis the federal government; essentially the argument is that if some decentralization is good, then more is better.<sup>167</sup> The consequences, however,

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<sup>161</sup> *Id.*

<sup>162</sup> O’Hear, *supra* note 7, at 861.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

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of policymaking authority may not affect local governments in the same way they do state governments. Indeed, citizen autonomy is undoubtedly benefited by even more localized policymaking, increasing the policy choices of United States citizens from fifty states to tens of thousands of counties or municipalities. But the ultimate answer may lie in the incentives already encountered by the entrenchment and proliferation of the federal “War on Drugs” in the first place; policymakers seek to gain political clout with their constituencies while paying for as little of the program as possible.<sup>168</sup> Just as federal legislators do not want to foot the bill for drug enforcement without the political windfall that comes with it, state legislators do not want to provide the implementation funds for policies that they may not agree with.

Given that the states currently enforce the majority of marijuana violations, implement and fund the penal institutions, and would be the main beneficiaries of state corporate, sales, and direct drug taxes, the lawmaking authority and implementation should remain with the states, rather than localities that do not have the means to implement their own policy choices. This is not to say that states could not relinquish exclusive control, leaving authority with the local government, just that they would not be forced to do so, as O’Hear seems to argue. Just as the Twenty-First Amendment places plenary control in the hands of the states, repeal of the CSA’s marijuana restrictions would leave authority and implementation solely to state discretion. While some states may pass policymaking authority down to localities, such an outcome would not be required, allowing state legislators to make the decision as to where state funds and the resulting political consequences go.

It is also unclear why O’Hear posits the need for local authorities to serve as gatekeepers to federal

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<sup>168</sup> See *supra* Part II. A.

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enforcement authority<sup>169</sup> as opposed to a purely state-based mechanism, removing the need for federal enforcement in intrastate marijuana policy. While the local-federal cooperative would put more power in the hands of local authorities, the “Competitive Alternative” uses a roundabout mechanism for empowering local politicians, while still supporting federal entrenchment. Indeed, rather than bolstering extensive bureaucracy and the resulting squabble between state and federal officials—not to mention the looming threat of federal bullying of local District Attorneys—an alternative would be for states and local governments to maintain concurrent enforcement authority, keeping the federal government out of intrastate marijuana issues.<sup>170</sup>

In sum, O’Hear’s localized enforcement regimes seem less responsive to the shortcomings of state-based regulatory authority, and more to amending some pitfalls in the federally dominated regulatory model. For instance, O’Hear argues for localization on one hand in making local law enforcement accountable to the local community, yet his framework notes that “local police would become answerable not only to federal law enforcement authorities, but also to local leaders who stand outside the law enforcement establishment.”<sup>171</sup> Rather than decentralization and the workability of a state-local dichotomy in incentivizing efficient enforcement allocation, the “Competitive Alternative” seemingly adapts the current federal framework by instituting a more localized federal regime, appeasing decentralization advocates while tiptoeing around the status quo.

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<sup>169</sup> O’Hear, *supra* note 7, at 860.

<sup>170</sup> This is not to say, however, that the federal government would not maintain an enforcement agency, like the DEA, to oversee interstate and international trafficking, or to enforce at the behest of the states as the need arises.

<sup>171</sup> O’Hear, *supra* note 7, at 880.

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### 2. Learning From the Competitive Alternative

The “Competitive Alternative” does, however, make a good point about the perverse incentives generated by current forfeiture laws and articulates a very workable idea in the form of redirection to a state general fund.<sup>172</sup> Because municipal actors respond to drug policies at the ground level, forfeiture and sharing laws incentivize local enforcement personnel to over-enforce drug laws in an effort to boost local coffers with the proceeds from drug busts. Rather than redirecting all *enforcement* to the state, O’Hear smartly recognizes the ability to redirect *assets* to the state level.<sup>173</sup>

The “Competitive Alternative” also cogently points to the problems inherent in the federal framing of the drug issue to the American public.<sup>174</sup> The federal propaganda machine and its “War on Drugs” distorts the issues surrounding marijuana legislation and pits reform groups against politicians responding to the federal anti-drug stance. O’Hear sensibly argues for federal advertising funding to be directed instead to state marketing budgets or to Congressional spending bills.<sup>175</sup> The importance of this directive, however, may be limited under a “Constitutional Alternative” framework, as the federal government plays such a limited role in marijuana enforcement that continued federal advertising spending would be unlikely. Unlike the alcohol regulatory context, however, there are still many other drugs that would fall under the guise of the CSA, maintaining the federal government’s incentive to continue its campaign against illegal drugs. Thus, it does appear that some control over the federal media machine is necessary, and directing at least a portion of its funds as it relates to

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<sup>172</sup> See *supra* Part III. C.

<sup>173</sup> O’Hear, *supra* note 7, at 870.

<sup>174</sup> See *id.* at 875.

<sup>175</sup> See *id.* at 875-76.

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marijuana is imperative. In addition, stipulations as to the federal content and the overarching “War on Drugs” message would be essential to fostering state innovation and adoption of progressive marijuana policies.

Ultimately, O’Hear’s “Competitive Alternative” argument, while putting forth strong ideas for specific reforms, is seemingly unresponsive to any purported shortcomings of state-based regulatory authority. Instead of elucidating the decentralization regime he purports to stand behind, O’Hear makes adjustments to much of the federally entrenched framework we see in place today, without accounting for the reality, and necessity of, state innovation and competition in the market for marijuana. Nonetheless, O’Hear makes cogent points about the federal role in enforcement, incentives, and media content. Accordingly, this article recognizes the need to adopt reformed forfeiture laws, asset redirection, and redistributed government media funding so as to properly set the stage for state-based jurisdiction over marijuana laws.

### **IV. A Final Concern Raised by Decentralization: The “Race to Nowhere”**

The previous Part set out to raise, and refute, some of the most salient concerns surrounding state consolidation of marijuana policy. Among the most prominent arguments against divergent state-based policymaking is the “Race to the Bottom” effect garnered by individualized competition for (or against) an identifiable social policy repercussion. As discussed previously, the variety of interests inherent in the market for marijuana do not lend it to a race to overly stringent or lenient regulation and increasingly inefficient outcomes inherent in one-upping neighboring states. Interestingly though, is the possibility not for a “Race to the Bottom,” but simply to one extreme or the other, giving a jurisdiction an all-or-nothing choice, legalization or a complete ban. This Part will first explain a previously

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undeveloped theory of market failure and inefficiency in state policymaking. The following section will outline the assumptions necessary for this market failure to come to fruition, ultimately concluding that the marijuana marketplace is not conducive to establishing a “Race to Nowhere.”

### *A. The “Race to Nowhere”*

This hypothetical “Race to Nowhere” can best be envisioned through a basic example. Take, for instance, a state (State A) that chooses to maintain the status quo, keeping marijuana use, possession, and distribution illegal; presumably incentivizing users and illegal distributors to leave the jurisdiction. In contrast, another state (State B) legalizes and taxes marijuana, garnering the benefit of reduced crime and increased tax revenues. Both states will get what they want from their policy choices. But there still may be a middle jurisdiction; lest we forget, there are more than two options for marijuana regulation. For instance, a third state (State C) may simply decriminalize marijuana (make possession and use legal, but not distribution or trafficking) or institute misdemeanor possession laws, attracting users who no longer face criminal penalties. But in a regulatory framework where State A disincentivizes users and State B eliminates the market for criminal distribution, the organized criminal aspect of marijuana distribution will be faced with one option to stay in business—State C. All the marijuana users will be in State B or State C and the market for illegal distribution will be curbed in State B by legalized retail outlets.

Given this dilemma, a centrist state will reap few benefits of decriminalization, while attracting much of the unwanted criminal activity displaced by the other states. In this situation, centrist states may enter their own race, but not to the bottom or the top; rather to full legalization or

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illegalization in an effort to avoid the criminal element entrenched in illegal drug distribution.

### *B. Undercutting the Assumptions Necessary to Effectuate a “Race to Nowhere”*

Clearly, the aforementioned result is not optimal for a state that, all else being equal, chooses decriminalization, medical marijuana, or drug treatment programs over full legalization or a complete ban. Policymakers faced with an all or nothing choice will opt for the lesser of two evils, whatever that choice might be, but inefficient regardless. This hypothetical, however, rests on several assumptions, none of which can be fully realized in a world of bundled laws and complex regulatory frameworks. For the “Race to Nowhere” to occur there must be citizen mobility, full information, and unrealized benefits from the centrist choice.

First, consider the ability and willingness of citizens to move from one jurisdiction to another based on the marijuana policies within the state. With more than fourteen million marijuana users in the United States, this is hardly a trifling variable.<sup>176</sup> But of those fourteen million users, it is entirely unclear how many would choose to move based on the legality of their marijuana use when all they have ever known is a complete ban. Moreover, it is questionable how many would choose to relocate at the expense of families, jobs, and geographic ties. Assuming that many users choose to remain in a total-ban jurisdiction, State A, criminal distributors would have a market in both State A and State C, the intermediate, decriminalized, jurisdiction. Given this counterargument to full mobility, we can expect a viable criminal distribution market spread across both abolitionist and intermediate jurisdictions. One

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<sup>176</sup> *Overview of Drug Use in the United States*, INFOPLEASE.COM, (last visited Nov. 1, 2011) <http://www.infoplease.com/ipa/A0880105.html>.



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part of the hypothetical should remain true, however, in that the criminal element would remain displaced in State B, where distribution is legal, because the criminal distribution chain would be overwhelmed by regulated retail sales.

Unlike mobility, full information is more likely to come to fruition in this hypothetical. With the overwhelming use of the Internet and the salience of the marijuana policy debate, both consumers and distributors are likely fully aware of the relevant policies in place. On the demand side, any consumer making a decision to move jurisdictions based on the marijuana policy is undoubtedly informed of the law when making such a decision. Even if not making a mobility decision based on another jurisdiction's marijuana laws, it seems likely that a drug user, accustomed to illicit substance use and avoiding enforcement, will be aware of current policy and upcoming changes to policy. On the supply side, just as we would expect a businessman to know the regulations and laws that apply to the business, drug dealers or legal dispensaries will know the law, how to avoid or comply with it, and surely be abreast of changes in policy. The true uncertainty in full information is more likely to be through the lens of the policymaker. A legislator faced with battling interest groups may be more informed on highly specific issues and less apprised of the indirect criminal costs associated with marijuana distribution and displacement from other jurisdictions.

The costs and benefits of proposed intermediate policy is probably most difficult to project and account for in a hypothetical "Race to Nowhere." For such a race to occur, the hypothetical assumes that the benefits associated with a centrist marijuana policy choice would be outweighed by criminal activity within its borders based on the policy actions of State A and State B. However, given uncertain citizen mobility and possible criminal disbursement between State C and State B, the costs

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associated with such a choice may be limited. Further, state policymakers may not have full information on the consequences of their decisions relative to increased criminal distributor influx into the jurisdiction. Moreover, even if these two factors are fully realized, legislators may find that the benefits of an intermediate policy outweigh the costs of any criminal influx. For instance, reduced enforcement costs on minor possession may be redistributed to enforcement on distributors and trafficking or simply used for drug treatment. The intermediate policy itself may be focused on public health, instituting drug courts, or rehabilitation,<sup>177</sup> rather than turning a blind eye to addiction as many abolitionist states do, or simply promoting use as a legalization state does.

The “Race to Nowhere” is likely not a foregone conclusion, albeit relying on several assumptions that are almost impossible to predict. Focusing on the analogy to alcohol regulation leads to the conclusion that the race is at least plausible, though limited. While states are free to implement their own alcohol policies, none has kept alcohol completely illegal; some states, however, maintained prohibition for several years following enactment of the Twenty-First Amendment.<sup>178</sup> But some states do allow counties and municipalities to enact their own alcohol restrictions, and many have done so, opting for complete bans within county lines; restricted alcohol sales on certain days of the week; or requiring distribution through government suppliers.<sup>179</sup> While some of these limitations are less than a complete ban, and clearly not full legalization, neither are they akin to decriminalization where one side of the economic chain, consumption, is legalized and the other side, distribution, is criminal. Centrist alcohol ordinances, such as Sunday sales and

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<sup>177</sup> See O’Hear, *supra* note 7, and accompanying text.

<sup>178</sup> BENJAMIN & MILLER, *supra* note 22, at 190.

<sup>179</sup> *Id.*

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government distribution, would not be expected to garner a bootlegging criminal element. Criminals are unlikely to move to take advantage of a one-day black market or to attempt to circumvent government distribution when consumers can easily accommodate the law and still consume alcohol. Liquor law regulation in this context has not progressed toward decriminalization or substance abuse programs in lieu of criminal punishment. Rather, alcohol policies reflect complete bans or legalization with retail restrictions. The alcohol analogy, though not perfectly aligned to marijuana regulation, seems to support a “Race to Nowhere.”

Even if a “Race to Nowhere” exists, the cure is not federal regulation. The Prohibition and its aftermath tells us that much. Beyond the alcohol regulatory analogy, the past generations of over-enforcement; billions of dollars of federal taxpayer money; seeming absence of a “Race to the Bottom” or substantial negative externalities; exceedingly high violent crime rates associated with illicit drugs; and unclear federal enforcement policy lead to the conclusion that decentralization is the best regulatory stance for marijuana laws.

### IV. Conclusion

Currently, more than 24.8 million people are eligible to receive medical marijuana licenses under state laws, and approximately 730,000 people actually do.<sup>180</sup> Medical marijuana markets exist in seven states: California, Colorado, Michigan, Montana, Oregon, Washington and New Mexico and five more will open this year in Arizona, Maine, New Jersey, Rhode Island and the District of

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<sup>180</sup> Teresa Novellino, *Will Pot Sell Better Than Sex?*, PORTFOLIO.COM, (Mar. 23, 2011), <http://www.portfolio.com/views/blogs/heavy-doses/2011/03/23/medical-marijuana-market-to-total-1-7-billion-in-2011-report-says>.

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Columbia.<sup>181</sup> Economically speaking, the marijuana marketplace is projected to more than double within the next five years.<sup>182</sup> Outside of the capitalist retail market for marijuana, the question remains whether there is a viable market for innovative state laws. As addressed in Part II.A.-B., the federal regime over marijuana laws is hampering innovation and efficient policymaking, leaving overly harsh federal laws that go largely unenforced in practice and by Executive Order. State legislators and enforcement authorities are left in the dark, and United States citizens are faced with an unclear state-federal dichotomy by which distribution may be illegal but consumption is decriminalized. Even more striking, dispensary operators may be legally licensed by the state and yet subject to federal enforcement for violation of the Controlled Substances Act.<sup>183</sup> Even outside the lack of clarity and poor suitability of federal authority, we should expect a fairly robust “market” for marijuana laws where there are competing interests, an informed and reactive populace, and a primed state-to-state competition for economic growth and citizenry.<sup>184</sup> Further, as discussed in Part III.B, there does not seem to be reason to expect marijuana policies to be ill-suited for efficient competition, by promoting a “Race to the Bottom”<sup>185</sup> through imperfect

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<sup>181</sup> *Id.* Note that of the sixteen states enacting progressive marijuana laws, not all support medical marijuana licensing.

<sup>182</sup> *Id.*

<sup>183</sup> MARIJUANA USA (CNBC television broadcast Dec. 8, 2010).

<sup>184</sup> See generally Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL'Y 212 (2005) (arguing against Mark Roe's characterization of a vertical competitive dynamic prompted by federal oversight and the threat of preemption).

<sup>185</sup> See generally William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L. J. 663 (1974) (arguing that Delaware corporate law promotes a “Race to the Bottom” due to the cozy relationship between the judiciary, legislature, and Delaware Bar, leading to minimal shareholder protections and poor relations between

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information, negative externalities, or power inequalities between suppliers and consumers of laws.<sup>186</sup> In addition, federalization as a remedy to an unclear problem stifles innovation and experimentation, replacing jurisdictional competition with regulatory oversight and unwavering rules.<sup>187</sup> Most simply, a given legal system would prefer state laws if the “market” has the ability to produce efficient laws and will not inflict market failures leading to overly stringent or lax regulation.<sup>188</sup> In the market for marijuana laws, one would expect to encounter less need for consistency, uniformity, and correction of market failure because jurisdictional “markets” in the drug trade will presumably be transparent and consumers will have relatively full information, while states will have appropriate incentives to optimize laws.<sup>189</sup>

The legalization, decriminalization, and medicalization of marijuana undoubtedly comprise a story

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shareholders and corporate managers). *But see* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEG. STUD. 251 (1977) (arguing against Cary’s theory of a “Race to the Bottom” to the extent that corporate managers respond not just to law, but to market pressures—in particular product markets, corporate control, and capital markets—and these pressures direct managers to provide efficient shareholder protections to the extent they produce profits through the securities exchanges).

<sup>186</sup> ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 33-36 (2009).

<sup>187</sup> Robert B. Ahdieh, *From “Federalization” to “Mixed Governance” in Corporate Law: A Defense of Sarbanes-Oxley*, 53 BUFF. L. REV. 721, 736-37 (2005) (“State corporate law permits state regulators to pursue new legal technologies they deem likely to offer competitive advantage. If they are right, such innovations can be expected to take hold, both in the state of innovation and among its competitors. If undesirable, they can promptly be discarded. Even if flawed rules persist, they do minimum harm. Universally applicable federal rules, by contrast, stifle experimentation and innovation—the hallmarks of an efficient market.”).

<sup>188</sup> *See generally id.*

<sup>189</sup> *See* Thorton, *supra* note 68 and accompanying text.

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in its early chapters. As states continue to adopt progressive marijuana laws, the legal marijuana industry continues to grow, and the executive branch ignores the strictures of the CSA, the structure of marijuana policy will begin to crystallize. Until then, United States citizens are at a crossroads of conflicting state and federal law and are waiting to see how the policymaking game will play out. Interest groups and lobbyists are no strangers to this game, pitting Big Tobacco, Big Pharma, the Prison Industrial Complex, and the Religious Right against a progressive populace and state legislators looking to fill their recession-ragged coffers while cutting back on drug-induced violence.

The federal regulatory regime and the politically motivated and maintained “War on Drugs” costs American taxpayers billions of dollars a year in a seemingly fruitless attempt to rid the American populace of the social and moral hazards of drug use. Yet the social ills of marijuana use stem almost entirely from its illicitness,<sup>190</sup> inducing violent organized crime but causing fewer deaths each year than alcohol<sup>191</sup> or tobacco use;<sup>192</sup> marijuana’s addiction rate

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<sup>190</sup> In fact, commentators on the international organized crime syndicate have opined, “that as long as drugs that people want to consume are prohibited, and therefore provided by criminals, driving the trade out of one bloodstained area will only push it into some other godforsaken place. But unless and until drugs are legalized, that is the best Central America can hope to do.” See *The Drug War Hits Central America*, *supra* note 45.

<sup>191</sup> See *By the Numbers: Deaths Caused by Alcohol*, SCIENTIFIC AMERICAN (December 1996). Alcohol causes more than 100,000 deaths a year. *Id.* While cannabis use is not documented according to indirect death rates, there are no documented direct deaths due to marijuana use. *Id.* *Facts on Cannabis and Alcohol*, SAFERCHOICE.ORG, (last visited Nov. 2, 2011), <http://www.saferchoice.org/content/view/24/53/> (noting that marijuana is less detrimental than tobacco in terms of long term use, aggressive behavior and violence, domestic attacks, sexual assault, and reckless behavior); *Visualizing the Guardian Datablog: “Deadliest Drugs,”* INFORMATION IS

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is also a mere pittance compared to nicotine addiction.<sup>193</sup> The United States system of federalism is premised on extensive state autonomy, leading to experimentation and innovation in policymaking, concurrent with the citizenry's ability to choose the laws they want applied by locating in a jurisdiction with the bundle of laws they find most appealing. In accordance with this paradigm, we have already seen the bulwark of progressive marijuana laws enacted on the West Coast,<sup>194</sup> and almost no innovation in the Southeast, seemingly in line with population ideologies in those respective locales.<sup>195</sup>

Cutting the federal government entirely out of marijuana regulation and enforcement is neither plausible, nor advisable. The drug trade is too international to limit federal involvement and states rely on federal enforcement where distribution and trafficking crosses state lines. Economies of scale also empower the federal government to utilize powerful resources in an effort to keep pace with well-funded drug syndicates. Further, federal legislators have too much at stake in the drug debate to let it go

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BEAUTIFUL.NET, (Nov. 6, 2009), <http://www.informationisbeautiful.net/2009/visualising-the-guardian-datablog/>.

<sup>192</sup> See U.N. W.H.O., *Report on the Global Tobacco Epidemic, 2009: Implementing Smoke-Free Environments*, World Health Organization (2009), available at [whqlibdoc.who.int/publications/2009/9789241563918\\_eng\\_full.pdf](http://whqlibdoc.who.int/publications/2009/9789241563918_eng_full.pdf) (noting that tobacco is responsible for approximately five million deaths a year worldwide).

<sup>193</sup> See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, U.S. ATT'Y GEN., *The Health Consequences of Smoking: Nicotine Addiction: A Report of the Surgeon General*, (1988), available at <http://profiles.nlm.nih.gov/NN/B/B/Z/D/>; Bill Urell, *Am I Stupid, Or is This List of the 18 Most Addictive Drugs All Mixed Up?*, ADDICTION RECOVERY BASICS.COM, (last visited Nov. 2, 2011), <http://addictionrecoverybasics.com/am-i-stupid-or-is-this-list-of-the-18-most-addictive-drugs-all-mixed-up/> (noting that marijuana falls thirteenth on the list of eighteen most addictive substances, while nicotine lies first).

<sup>194</sup> See Nat'l Org. for the Reform of Marijuana Laws, *supra* note 141 and accompanying text.

<sup>195</sup> See *id.*; see also note 143 and accompanying text.

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entirely. As seen in the alcohol regulatory scheme, we can expect to see Congress utilize its spending power to incentivize states to act in accordance with federal objectives.<sup>196</sup> That being said, two central arguments from the “Competitive Alternative” give informed guidance to Congress, arguing to reign back on forfeiture laws and simultaneously cut spending on federal media campaigns against marijuana use.<sup>197</sup>

Ultimately, it seems the marijuana train has left the station and has the momentum necessary to establish its legitimacy in the United States. The million-dollar question then is how it will be regulated. From the standpoint of history and logic, state authority is the best vehicle for public welfare, citizen autonomy, and efficient regulation.

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<sup>196</sup> See 23 U.S.C. § 158 (2006).

<sup>197</sup> See *supra* Part III.D.2.



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