States' Rights and Federal Wrongs: The Misguided Attempt to Label Marijuana Legalization Efforts as a "States' Rights" Issue

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ABSTRACT

Advocates for liberalization of the federal statutes outlawing cannabis have argued that the issue whether and how to regulate marijuana should be left to the states to decide. Yet, we do not allow states to decide whether to prohibit other controlled substances, such as heroin, and there is no good reason to put marijuana in a separate category. Since the Federal Food, Drug, and Cosmetic Act became law in 1938 the nation has authorized the Food and Drug Administration to decide which drugs to approve for therapeutic use. We do not make those decisions the subject of a referendum because the decision requires the expert scientific judgment of professionals in medicine and biochemistry, not the moral judgment of the populace. Congress should re-examine how federal law regulates marijuana, and Congress should be guided by the judgment of the FDA as to the costs and benefits of liberalizing marijuana use.

It is entertaining to see advocates for marijuana legalization frame their argument as a "states' rights" issue. Unfazed by (or, for younger advocates, unaware of) the connotation that the term has for people who lived through the 1950s and 1960s—Does anyone remember the "massive resistance" movement that opposed racially-integrated schools in the South?—various people have made the argument that states should be free to let their legislatures or citizens make that decision for themselves.[1] Backers point to the (numerous) medical and (far less

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1. *See, e.g.*, Theodore Kupfer, *Leave Marijuana Policy to the States*, NAT'L REV. (June 14, 2018, https://www.nationalreview.com/2018/06/marijuana-policy-should-be-left-to-states/ [https://perma.cc/9M4N-RU9S]; Bob Barr, *Stop Sessions' Anti-Pot Crusade—Let States Regulate Marijuana*, FOX NEWS (Feb. 9, 2018), http://www.foxnews.com/opinion/2018/02/09/stop-sessions-anti-pot-crusade-let-states-regulate-marijuana.html [https://perma.cc/7W9V-HLU7]; Melina Delkic, *Do Republicans Still Believe in States' Rights? Sessions's Marijuana Policy Is Ultimate Test*, NEWSWEEK (Jan. 6, 2018), http://www.newsweek.com/republicans-still-believe-states-rights-marijuana-policy-772611 [https://perma.cc/3T7V-VQZZ]; Peter Ferrara, *Federalism and Marijuana*, WASH. TIMES (Jan. 23, 2018), https://www.washingtontimes.com/news/2018/jan/23/why-the-states-must-decide-about-medical-marijuana/ [https://perma.cc/TQ5P-HPGU]; Conor Friedersdorf, *The Superiority of a States' Rights Approach to Marijuana*, ATLANTIC (Jan. 4, 2018), https://www.theatlantic.com/politics/archive/2018/01/the-

numerous) recreational marijuana initiatives that have become law in more than half of the states since 1996. A majority of states have spoken, the argument goes, and that does or should resolve the issue because states should be free to regulate this subject without federal interference.

There is a short answer to that argument. Ask states' rights advocates if they also believe that states have the right to legalize heroin use. They would likely say, "No. Heroin is different. Besides, no one would vote to legalize heroin use."[2] Arguing that marijuana is "different" from heroin is true but immaterial. If the states have the right to legalize the one (marijuana), it logically follows that they have the corresponding right to legalize the other (heroin). Even if marijuana were a unique drug because it is generally harmless—a contested claim—that is a definitional matter, not an argument from a states' rights perspective.[3] In truth, it is more an evasion than an answer. Yes, almost no one would support legalization of heroin, but that is irrelevant to the supposed "states' rights" principle involved.

It is easy to see why supporters of marijuana legalization make the "marijuana is different" argument. The relatively small number of marijuana receptors in the brainstem, which controls respiration, explains why there are no reported cases of people overdosing on cannabis and dying because they stopped breathing.[4] This differentiates marijuana from fentanyl, which does cause a cessation of respiration and is a major cause of the overdose deaths America has witnessed over the last few years.[5] With the nation focused on opioids like oxycodone, heroin, and fentanyl, marijuana's supporters hope that they can continue to avoid large-scale

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superior-morality-of-a-states-rights-approach-to-marijuana/549707/ [https://perma.cc/R2WW-T4RQ]; John Hudak, *Trump's 1st State of the Union: His Chance to Be a States' Rights President*, BROOKINGS INST. (Jan. 24, 2018), https://www.brookings.edu/blog/fixgov/2018/01/24/trumps-1st-sotu-his-chance-to-be-a-states-rights-president/ [https://perma.cc/Q952-ANWF]; Patrik Jonsson & Story Hinckley, *Battle Over Legal Marijuana: A Monumental Moment for States' Rights*, CHRISTIAN SCI. MONITOR (Jan. 19, 2018), https://www.csmonitor.com/USA/Justice/2018/0119/Battle-over-legal-marijuana-a-monumental-moment-for-states-rights [https://perma.cc/T5NX-PT9C]; Katie Reilly, *Chuck Schumer to Unveil Bill Decriminalizing Marijuana at the Federal Level*, TIME (Apr. 20, 2018), http://time.com/5247431/senator-chuck-schumer-marijuana-decriminalize-bill/; Michael Tanner, *Marijuana Policy Is Best Left up to the States*, NAT'L REV. (Feb. 28, 2017), https://www.nationalreview.com/2017/02/marijuana-policy-states-rights-issue/ [https://perma.cc/3XE5-S9HR]. There are even reports that President Donald Trump struck a deal with Colorado Senator Cory Gardner to support state efforts to legalize marijuana use. *See*, *e.g.*, Chloe Aiello, *Trump Strikes Deal with Colorado Senator on Legalized Marijuana*, CNBC (Apr. 13, 2018), https://www.cnbc.com/2018/04/13/trump-strikes-deal-colorado-senator-legalized-marijuana.html [https://perma.cc/V4DE-NV8K].

2. For an excellent (even if growing somewhat old) discussion of why heroin legalization is an unwise policy, see JOHN KAPLAN, THE HARDEST DRUG: HEROIN AND PUBLIC POLICY (1983).

3. *See* WAYNE HALL & ROSALIE RICCARDO PACULA, CANNABIS USE AND DEPENDENCE: PUBLIC HEALTH AND PUBLIC POLICY 3 (Reissue ed. 2010) (summarizing the "marijuana is unique" theory); Paul J. Larkin, Jr., *Introduction to a Debate–"Marijuana: Legalize, Decriminalize, or Leave the Status Quo in Place?,"* 23 BERKELEY J. CRIM. L. 73, 75–81 (2018) (summarizing harms from long-term marijuana use).

4. *See* LESLIE L. IVERSEN, THE SCIENCE OF MARIJUANA 56 (2008); JERROLD S. MEYER & LINDA F. QUENZER, PSYCHOPHARMACOLOGY: DRUGS, THE BRAIN, AND BEHAVIOR 405, 423 (2d ed. 2018).

5. *See* THE PRESIDENT'S COMM'N ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS, FINAL REPORT 16, 19, 23, 26–27, 29, 32 (2017).

criminal enforcement of federal law, as they have since California adopted the nation's first medical marijuana initiative in 1996. Of course, liberalization's supporters would likely concede that long-term use of marijuana has the potential to lead at least some people to become afflicted by amotivational syndrome and other mental health problems.[6] But no drug, they would argue, comes without some risks. Even the wonder drug aspirin could lead to stomach ulcers and Reye Syndrome. As for the alleged benefits: Regardless of who has the better scientific case—those arguing for reform and those defending the status quo—reformers have the better emotional pitch. Why? When the debate is largely between supporters' real-life anecdotes and opponents' scientific studies, the supporters usually win because people empathize with their family members, friends, and other human beings, not with data. Again, however, why should marijuana alone of all drugs be the subject of majority rule? Anecdotes do not answer that question.

That is not the only answer to the states' rights argument. It would be difficult for legalization's supporters to deny that states with medical or recreational marijuana programs (and in California, it would be difficult to distinguish the one from the other[7]) will serve as a source of marijuana for (at least) those nearby states that have decided against such programs. After all, if the price of marijuana in Colorado is sufficiently below its price in the border states of Nebraska, Kansas, or Oklahoma, cannabis entrepreneurs will have a strong profit incentive to transport the drug across state lines. Yet, preventing the interstate trafficking of an item that some states as well as the federal government deem contraband is a natural and legitimate job for the latter to handle. Even states' righters should agree with that point.

Atop that, the state marijuana legalization programs pose the risk of interfering with the nation's diplomatic policy. The Constitution grants the federal government a prerogative over foreign policy by expressly granting that authority to the president and the Senate[8] and by expressly forbidding the states from interfering in that field.[9] During the twentieth century the international community

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6. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 515 (5th ed. 2013) ("Chronic intake of marijuana can produce a lack of motivation that resembles persistent depressive disorder (dysthymia)."); Norman S. Miller et al., *Marijuana Addictive Disorders and DSM-5 Substance-Related Disorders*, J. ADDICTION RES. & THERAPY (2017), https://www.omicsonline.org/open-access/marijuana-addictive-disorders-and-dsm5-substancerelated-disorders-2155-6105-S11-013.pdf [https://perma.cc/85ET-7362].

7. *See* Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453, 510–12 & n.283 (2015). California made that inquiry unnecessary by legalizing adult recreational use in Proposition 64, the Adult Use of Marijuana Act, which took effect on January 1, 2018.

8. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . .").

9. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . ."); Arizona v. United States, 567 U.S. 387 (2012) (ruling that the states cannot interfere with the immigration laws and policies adopted by the federal government). In fact, the

developed several international agreements that require participating nations to outlaw the distribution of various controlled substances,[10] such as marijuana,[11] and the United States is a signatory to three of those agreements.[12] Congress has the authority to prohibit the cultivation and distribution of marijuana in furtherance of its treaty obligations.[13] The states, therefore, cannot disrupt federal policy through their own domestic legislation.[14] Yet, that is the effect of the new state marijuana laws. They put the United States at risk of giving the international community the impression that this nation no longer is interested in upholding its commitments to treat cannabis as contraband. Here, as elsewhere, the federal government is entitled to see the value in believing that "a promise is really something people kept, not just something they would say and then forget."[15] Because the state initiatives permitting private parties to grow or distribute marijuana could adversely affect the judgment of the world community regarding the reliability of the United States as a party to international agreements, those initiatives are invalid under federal law.

But the states' rights argument is flawed for an even deeper reason. For decades parties have debated the issue whether marijuana or one of its constituent compounds (called cannabinoids) has valuable medical uses.[16] Supporters of marijuana reform point to the testimony of various individuals who maintain that

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Constitution even bars Congress from delegating foreign policy-making authority to the states. *Compare* U.S. CONST. art. I, § 10, cl. 1 (quoted *supra*) *with id.* cl. 2 ("No State shall, *without the Consent of the Congress*, lay any Imposts or Duties on Imports or Exports . . . .") (emphasis added).

10. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, *amended by* 1972 Protocol, Mar. 25, 1972, 26 U.S.T. 1439; Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 164; *see* WILLIAM B. MCALLISTER, DRUG DIPLOMACY IN THE TWENTIETH CENTURY: AN INTERNATIONAL HISTORY (2000); William B. McAllister, *Conflicts of Interest in the International Drug Control System*, *in* DRUG CONTROL POLICY: ESSAYS IN HISTORICAL AND COMPARATIVE PERSPECTIVE 143, 152–62 (William O. Walker III ed., 1992).

11. *See* INT'L NARCOTICS CONTROL BD., UNITED NATIONS, LIST OF PSYCHOTROPIC SUBSTANCES UNDER INTERNATIONAL CONTROL 5 (28th ed. 2017); INT'L NARCOTICS CONTROL BD., UNITED NATIONS, UNITED NATIONS INFORMATION SERVICE (Mar. 14, 2013) ("Allowing for the recreational use of cannabis 'would be a violation of international law, namely the United Nations Convention on Narcotic Drugs of 1961 . . . . This was stressed by the President of the International Narcotics Control Board (INCB), Raymond Yans, here, today in a statement to the fifty-sixth session of the Commission on Narcotic Drugs as he made reference to the outcome of the November 2012 voting in the US states of Colorado and Washington in favour of initiatives which – if implemented – would allow for the recreational use of cannabis in these states.").

12. *See* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, by the Drug Enforcement Administration (DEA), Dep't of Justice. 81 Fed. Reg. 53767-01, 2016 WL 4240243 (Aug. 12, 2016).

13. *See* Gonzales v. Raich 545 U.S. 1 (2005) (ruling that Congress has the authority under the Commerce Clause of the United States Constitution to prohibit the interstate distribution of, and the intrastate cultivation of, marijuana).

14. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

15. The Judds, *Grandpa (Tell Me 'Bout the Good Ol' Days)* (1986).

16. *See* Larkin, *supra* note 7, at 461–63.

only by using marijuana can they fend off the harmful sequelae of horrific diseases (for example, multiple sclerosis), the frightening consequences of slightly less ferocious maladies (for example, glaucoma-induced blindness), or the baleful conditions accompanying some maladies (for example, AIDS wasting) that themselves can force some to make an earlier-than-anticipated trip across the River Styx. Opponents argue that there has been little or no scientific proof that marijuana cures those ailments or ameliorates their adverse effects. They also maintain that there is no medical support for the belief that marijuana or any other palliative can be smoked without incurring health risks. Supporters reply that potential long-term harms matter nil to someone with a definite short-term life expectancy, and that the reason for the lack of any scientifically-valid study proving marijuana's therapeutic value is that the government has barred researchers from studying marijuana's usefulness to avoid undermining the drug's Schedule I classification, a classic Catch-22 scenario. Neither side has persuaded the other to give up, although over the last two decades marijuana's advocates have persuaded a majority of voters in a majority of states to lift some of their state's sanctions on the drug.[17]

What no participant in that debate has done, however, is claim that the medical benefits of marijuana should be subject to a plebiscite. It is one thing to try to persuade voters that your position will make the world a better place by—fill in the blank: alleviating suffering, providing employment for people in a new industry, letting people "tune in, turn on, and drop out" without suffering a hangover tomorrow, and so forth—and will harm no one other than the individual who chooses to use marijuana. Lifting the criminal sanctions imposed on marijuana cultivation, distribution, and possession, the argument goes, does no more than leave each person free to decide whether to pursue an activity that, like skydiving, is not for everyone but won't harm anyone else.[18] That is how democracy works. Advocates for a cause try to cobble together a majority of voters by offering enough different rationales that 51 percent of the voters endorse the advocates' preferred choice even if the majority does not agree on a particular rationale.

We do not, however, make scientific decisions in the same manner that we elect politicians: by ballot. Federal law has flatly or effectively prohibited the cultivation, processing, and distribution of marijuana since the Marijuana Tax Act of 1937.[19] That date is significant because the following year Congress passed the

17. *See* Linley Sanders, *Marijuana Legalization 2018: Which States Might Consider Cannabis Laws this Year?*, NEWSWEEK (Jan. 2, 2018), http://www.newsweek.com/marijuana-legalization-2018-which-states-will-consider-cannabis-laws-year-755282 [https://perma.cc/NNP8-WLCM]; Samuel Stebbins et al., *Pot Initiatives: Predicting the Next 15 States to Legalize Marijuana*, USA TODAY (Jan. 5, 2018), https://www.usatoday.com/story/money/2017/11/14/pot-initiatives-predicting-next-15-states-legalize-marijuana/860502001/ [https://perma.cc/59YD-H3SQ].

18. Yes, a skydiver could fall onto someone, but let's put that possibility aside for argument's sake.

19. Ch. 553, 50 Stat. 551 (1937), *held unconstitutional by* Leary v. United States, 395 U.S. 6 (1969), *and repealed by* the Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1101(b)(3), Pub. L. No. 91-513, 84 Stat. 1236, 1292 (1970).

Federal Food, Drug, and Cosmetics Act of 1938 (FDCA).[20] The FDCA prohibited the distribution in interstate commerce of "adulterated" foods and drugs. The act also empowered and directed the Commissioner of Food and Drugs to examine both products to be sure that they were safe for interstate distribution. In 1962, Congress also prohibited the distribution of new drugs unless and until the Commissioner has found that they are not only "safe," but also "effective."[21] Ever since, Americans have entrusted the decision whether a particular new drug can be sold throughout the nation to experts at the Food and Drug Administration (FDA). Congress has reaffirmed that judgment on numerous occasions: in 1997, when it passed the Food and Drug Modernization Act of 1997;[22] in 2007, when it enacted the Food and Drug Administration Amendments Act of 2007;[23] in 2012, when it passed the Food and Drug Administration Safety and Innovation Act;[24] and in other years as well. In fact, Congress implicitly but clearly reiterated its judgment every time that it passed an appropriations law underwriting the work of the Commissioner of Food and Drugs and his colleagues at the FDA.[25]

In sum, for a half-century-plus Congress has reiterated its judgment that the FDA should be responsible for deciding whether drugs are safe and effective—the FDA, not Congress, not the states, not the public. The nation must agree with that decision because there has been no outcry to break up the FDA like the one heard some years ago to "break up the Yankees"[26] (or more recently the New England Patriots). At some point, we should admit that the members of Congress—and the public—actually believe that the FDA should decide which drugs are safe and effective, not the states.

We would reach the same conclusion even if we threw out all of that history and started over from scratch. We do not decide by referendum which antibacterial, antiviral, or antifungal drugs should be sold. In fact, no one would seriously offer such a proposal. Why? Perhaps that is because no one wants medical decisions to be made in that manner. Or perhaps that is because the people who would make the argument, and the people whom those advocates hope would be persuaded by it, deep down inside know that it simply will not fly and do not want it to fly. Moreover, the consequences of endorsing that argument pose questions that are mighty difficult to answer. For example, which of the following drugs that were prohibited or recalled by the FDA do we want to leave to a public vote

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20. The Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938).

21. The Drug Efficacy Amendment (Kefauver Harris Amendment), Pub. L. No. 87-781, 76 Stat. 780 (1962).

22. The Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296 (1997).

23. The Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, 121 Stat. 823 (2007).

24. The Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, 126 Stat. 993 (2012).

25. *See* TVA v. Hill, 437 U.S. 153, 189–91 (1978) (noting that, when passing an appropriations bill, Congress ordinarily assumes that the underlying substantive law will remain unchanged).

26. *See* DAMN YANKEES (Warner Bros. 1958).

as to whether they should still be distributed nationwide: Diethylstilbestrol? Laetrile? Quaalude? Vioxx? And how do we choose which ones that the FDA can review and which ones go onto the ballot? Ask the members of the "States' Rights" clan which drugs construction workers, bus drivers, and welfare recipients should have the right to approve or veto and you're not likely to see many hands go up.

But there is one more possibility to consider. Occasionally, states will enact legislation permitting individuals to engage in an activity prohibited by federal law as a way of demonstrating public support for a change in the latter. The state law does not serve as a grant of immunity from federal law; the Article VI Supremacy Clause does not permit states to nullify the federal controlled substances laws.[27] Instead, the state law serves as a plea or brief to Congress signaling that one or more states firmly believe that a change in federal law is necessary. That may explain the passage of several state statutes known as "Right to Try" laws—that is, legislation that would grant terminally ill patients the opportunity to use experimental drugs, drugs that have been shown to be safe, but not yet proven to be effective under the Food and Drug Administration's drug approval regimen.[28] State "Right to Try" laws have a powerful humanitarian appeal. Recognizing that someone in extremis will grasp for any hope that a new drug will extend his life, states have sought to ensure that state criminal and tort law does not create a barrier denying a person access to a drug that might cure his disease or prolong his life. The problem, of course, is that pharmaceutical companies will not distribute unapproved drugs in violation of federal law for fear of scuttling investments in the millions or billions of dollars, so a treating physician cannot obtain and prescribe those drugs simply because a state would like to see that happen. The state laws serve only the symbolic purpose of signaling the states' interest in seeing the federal government modify the federal drug approval procedure so that the dying can obtain drugs that might or might not be therapeutic, but at least will do the patient no additional harm. Or so the argument goes.[29]

The analogy between state marijuana legalization provisions and state "Right to Try" legislation is flawed, however, because the distribution system for each drug is materially different from the other. Pharmaceutical firms manufacture and distribute (for example) anti-cancer drugs, and they do so only as permitted by federal law. Those drugs cannot be grown in the woods or someone's home; marijuana can be and has been. Marijuana is also sold openly in stores in states such as Colorado and Washington; bootleg versions of cisplatin are not. Those conclusions should put the kibosh on this aspect of the "states' rights" argument.

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27. *See* U.S. CONST. art. VI, cl. 2.

28. *See* Sam Adriance, *Fighting for the "Right to Try" Unapproved Drugs: Law as Persuasion*, 124 YALE L.J. FORUM 148 (2014).

29. *See* DARCY OLSEN, THE RIGHT TO TRY: HOW THE FEDERAL GOVERNMENT PREVENTS AMERICANS FROM GETTING THE LIFE-SAVING TREATMENTS THEY NEED (2015).

Of course, it could be that supporters of marijuana liberalization—who usually bat from the left—make the "states' rights" argument, not to persuade, but to skewer liberalization's opponents—who usually bat from the right—over the latter's frequent reliance on "federalism" as a justification for allowing multiple solutions to a public policy debate. "If different states should be allowed to decide whether to permit gay marriage," the argument would go, "why shouldn't different states be allowed to decide whether to permit medical or recreational marijuana use?" The goal is to label liberalization's opponents as hypocrites.

The problem with an argument from hypocrisy, however, is that, while it impugns the moral character of the target, it does not prove that the advocate's position is meritorious. An unsound policy is still unsound even if some of its opponents are hypocrites. Moreover, the question whether gay marriage should be permitted is a matter of law or social policy;[30] the question whether marijuana is a "safe and effective" drug is a matter of science.[31] Since 1962, the nation has decided to trust the FDA with the responsibility to resolve any debate, either within or beyond the scientific community, over a drug's safety and efficacy. That decision is entitled to no less respect today than it was 56 years ago.

Part of the reason why we see the "states' rights" claim stems from the nature of twenty-first century public discourse.[32] Policy issues often involve complex problems that demand complicated explanations and require intricate solutions. The average person does not have the time to read or hear, let alone learn and understand, what he needs to know in order to make an independent judgment about the merits of an issue. Moreover, for many people today instantaneous education—like immediate success—does not happen quickly enough. The advocates on each side of an issue know this. The result is that discourse proceeds at a simplistic level as each side's argument degenerates into sound bites and catchy slogans normally seen only in commercial product advertising campaigns.

The debate over marijuana's legalization exemplifies that sound-bite phenomenon. Congress placed marijuana in Schedule I of the Controlled Substances Act,[33] a category reserved for drugs that are unhelpful and dangerous.[34] Many people think that the classification is wrongheaded, while others disagree.[35] It seems silly, however, to act as if there is no federal law on the books and decide the issue by tallying up the number of states pro and con on the issue. Were any other subject matter at stake—that is, were the question one involving

30. That is, it was prior to Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

31. This is the standard new drugs must pass in order to receive FDA approval. *See* 21 U.S.C. § 351–52 (banning adulterated or misbranded drugs from interstate commerce); *id.* § 355 (establishing procedures for FDA approval of a "new" drug).

32. *See* MARK H. MOORE & D.C. GERSTEIN, ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 6 (1981).

33. 21 U.S.C. § 812(c) (Schedule I)(c)(10) (2012).

34. *See* 21 U.S.C. § 812(a)(1)(A)–(C) (providing that a drug may be placed in Schedule I only if the drug or has a high potential for abuse, it has no currently accepted medical use in treatment, and there is a lack of accepted safety for use of the drug even under medical supervision).

35. *See* Larkin, *supra* note 3 (summarizing the debate).

employment discrimination law, securities law, telecommunications law, and so forth—and were there a federal statute designed to address the issue, no one would claim that the states can by force of numbers erase the federal law from consideration. We do not let states opt out of the Clean Water Act,[36] the Endangered Species Act,[37] the Internal Revenue Code,[38] or other economic regulations.[39] Yet, in the debate over medical or recreational marijuana, opponents of the federal law assume without explaining that the Controlled Substances Act is different.

Perhaps, Congress should amend the federal controlled substances laws. Congress should certainly revisit the subject. California adopted the first medical marijuana regime in 1996. Other states have followed with their own medical marijuana laws. States like Colorado and Washington even went a step further by permitting recreational marijuana use under state law. Since 1996, however, neither President Bill Clinton, George W. Bush, nor Barack Obama attempted to halt those state programs or force Congress to address the problem. Each one passed the buck to his successor. They and Congress put us at risk of seeing the type of "federal-state train wreck" that some commentators foresaw several years ago.[40] A strong argument therefore could be made that it is time for Congress to reconsider this issue. In fact, Attorney General Jeff Sessions apparently wants to force Congress to act because in January 2018 he repealed policies adopted by the Department of Justice during the Obama presidency that took a hands-off approach to the new state marijuana laws.[41]

If Congress chooses to readdress marijuana's status under federal law, it should hear from the Commissioner of Food and Drugs because it is the FDA that Congress believes should make decisions like this one. Of course, only Congress can revise the federal controlled substances laws, so ultimately only Congress can change the legal status of marijuana under federal law. But it would be foolish not to hear from the FDA Commissioner before doing so or before deciding to leave the law where it now stands. In fact, a sensible approach would be for

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36. The Federal Water Pollution Control Act Amendments of 1992, Pub. L. No. 92-500, 86 Stat. 816 (1972).

37. The Endangered Species Act of 1970, Pub. L. No. 93-205, 87 Stat. 884 (1970).

38. The Internal Revenue Code of 1986, 26 U.S.C. § 1 et seq. (2012) (as amended by H.R. 1, 115th Cong. (2017)).

39. *See* Gonzales v. Raich, 545 U.S. 1 (2005) (ruling that Congress has the power under the Commerce Clause to prohibit the cultivation of marijuana at home for personal, noncommercial use); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (rejecting a Tenth Amendment challenge to the application of the Fair Labor Standards Act, 29 U.S.C. § 203 (2012), to state and local employees). To date, no one has argued that allowing state and local employees access to marijuana is an "essential governmental function"—which is a shame, because the entertainment value of watching the claim be litigated would be worth the price of admission.

40. *See* Stuart Taylor, Jr., *Marijuana Policy and Presidential Leadership: How to Avoid a Federal-State Train Wreck*, BROOKINGS INST., GOVERNANCE STUDIES (Apr. 2013).

41. *See* Paul J. Larkin, Jr., *The Proper Way to Reconsider Federal Marijuana Policy*, THE HERITAGE FOUND., ISSUE BRIEF No. 4806 (Jan. 8, 2018), http://www.heritage.org/sites/default/files/2018-01/IB4806.pdf [https://perma.cc/64QA-5LFK].

Congress to leave to the FDA Commissioner the responsibility to decide whether cannabis and its constituents are a "safe and effective" drug or a permissible food additive.[42]

Whatever its ultimate decision might be, Congress should decide. And when it does, any claim about states' rights should be recognized as being what it is: more a slogan than an argument.

42. *See* Paul J. Larkin, Jr., *Marijuana Edibles and "Gummy Bears"* , 66 BUFFALO L. REV. 313, 344–81 (2018); Paul J. Larkin, Jr., *On Marijuana, Let the Food and Drug Administration Make the Decisions*, FOX NEWS (Apr. 24, 2018), http://www.foxnews.com/opinion/2018/04/24/on-marijuana-let-food-and-drug-administration-make-decisions.print.html# [https://perma.cc/CF4R-RXLQ].