The Political Safeguards of Federalism, Revisited: 
the Case of Marijuana Legalization

by
David S. Schwartz
Professor of Law
University of Wisconsin Law School, United States

How does the U.S. constitutional system preserve “federalism” – the ongoing existence of states as semi-independent governmental units with residual sovereignty and autonomous policymaking capacity? A debate has emerged and re-emerged over the years about whether federalism is to be preserved judicially or politically. Advocates of judicial protection of federalism argue for some form of rigorous and non-deferential judicial review of federal legislation that arguably encroaches on state sovereignty. The opposing position argues that such active and rigorous judicial review is unnecessary (and counterproductive): the U.S. political process supplies all the protection of the states that the U.S. federal system requires. This latter argument, dubbed “the political safeguards of federalism,” has been variously formulated, sometimes emphasizing formal political structures outlined in the Constitution, sometimes emphasizing informal political structures, such as the role of political parties. This paper argues that proponents of the “political safeguards” theory have consistently overlooked an element of the U.S. political process that adds force to their theory. I argue that “electoral math” – the strategic and tactical decisions that presidential aspirants make to win critical swing state electoral votes in closely-contested presidential elections – can under certain conditions provide powerful protection to federalism.

These conditions are present in the current U.S. regulatory regime for marijuana. Marijuana legalization represents the most pointed federal-state policy conflict since racial desegregation. Allowed by 20 states, medical use of marijuana (and in two states, “recreational” use of marijuana) remains flatly prohibited by federal criminal law. Yet because many of these states are “battleground” or “swing” states whose electoral votes can tip a close presidential election, an incumbent president planning to seek reelection must tread carefully in enforcing federal criminal laws against marijuana. Hence, while little if any protection has emanated from Congress or the Supreme Court, the Obama administration has effectively permitted medical marijuana by dialing down enforcement of marijuana laws in these states. This record, I argue, provides strong evidence that presidential electoral politics can serve as a significant political safeguard of federalism. – even where judicial safeguards have failed.

I. CONSTITUTIONAL PROTECTION OF FEDERALISM: JUDICIAL OR POLITICAL?

Judicial review always comes down to a question of deference: to what extent will a court defer to, or rigorously second-guess, the policy choices of legislative bodies? The degree of deference adopted by the Supreme Court has varied over time and by subject. For example, in its modern jurisprudence, the Court applies strict, non-deferential,
judicial review of laws classifying by race or infringing free speech. But the Court applies deferential review to legislative classifications regulating economic matters. Laws reviewed non-deferentially are frequently struck down; laws reviewed deferentially, rarely so.

Constitutional doctrine reformulates the question of whether federalism will be protected judicially or politically by asking what the courts’ role should be in determining whether the regulated matter falls within the national legislative power. Under the theory of “enumerated powers,” the legislative jurisdiction of Congress is limited to those matters specifically articulated in the Constitution, while the states retain exclusive legislative jurisdiction over all other matters falling outside the reach of congressional power. The Supreme Court has always clearly maintained that, if the regulation at issue is within the legislative reach of Congress, the courts may not second-guess its wisdom or effectiveness – the latter question being purely political rather than judicial. As Chief Justice Marshall famously phrased the matter,

[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

But it should also be apparent that Marshall’s formulation is ambiguous on the definitional question of whether the “object” of the law is one “entrusted to the [national] government”: That question, too, may be reviewed deferentially or non-deferentially, and Marshall does not say which. The ambiguity inherent in this foundational Marshall opinion has played out throughout U.S. constitutional history.

A. The “Unsteady Path” of Judicial Review of Federalism

The Supreme Court’s federalism jurisprudence over the past century has charted “an unsteady path,” in the understated words of Justice O’Connor. This reference refers to a history of vacillation between non-deferential and deferential review of federalism “boundary” disputes.

The most significant line of doctrine has involved the Court’s interpretation of the scope of the Commerce Clause. During the so-called “Lochner era,” from the late 1880s to 1937, the Court struck down numerous federal laws aimed at regulating the national economy, taking the position that broad areas of economic endeavor – employment, manufacturing, mining, agriculture – were “local” in nature and subject to exclusive state legislative jurisdiction. Between 1937 and 1942, the Court famously reversed course,

1 New York v. United States
2 “The Congress shall have power…. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes[.]” Art. I, § 8, cl. 3.
3 See, e.g., E.C. Knight, Hammer, Schecter Poultry, Carter Coal.
adopting a highly deferential approach to national economic legislation. Under this approach, Congress could regulate any activity that, viewed in the aggregate, had a substantial affect on interstate commerce. This “substantial effects” test permits Congress to regulate not only major industries, but also very minor intra-state participants in interstate markets. Over the next five decades, the Court thus upheld the application of the federal Agricultural Adjustment Act to a farmer’s small wheat crop grown for home consumption and the application of the 1964 Civil Rights Act to a small roadside restaurant that refused to serve black patrons. The breadth of the substantial effects test greatly expanded the Court’s understanding of the legislative domain of Congress. But perhaps as important was the Court’s deference to Congress in the threshold decision of whether the test should apply: that is to say, the Court has typically deferred to Congress on the definitional questions of whether a local activity was part of an interstate market, and whether that activity in the aggregate substantially affected the interstate market, were matters for the reasonable discretion of Congress. So the law stood for nearly sixty years.

A less prominent line of doctrine was that applying the Tenth Amendment, which provides that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” Prior to 1937, the Court had viewed the Tenth Amendment as an independent limitation on the powers of Congress, barring regulation even of interstate commerce that unduly interfered with purportedly local legislative matters. The Court overruled this understanding of the Tenth Amendment in 1941, holding that “[the Tenth] amendment states but a truism that all is retained [by the states] which has not been surrendered.” At this point, the Tenth Amendment appeared to offer no protection to state autonomy against congressional encroachment.

However, the Court carved out a narrow, but significant exception to this view of the Tenth Amendment in 1976, in National League of Cities v. Usery. There, the Court reversed a merely eight-year-old precedent by holding that federal minimum wage laws could not be constitutionally applied to state and local government employees. The Court

---

4 Jones & Laughlin Steel, Darby, Wickard
5 Wickard, supra
6 Katzenback v. McClung
7 See Lopez (souter, dissenting); id., (Breyer, dissenting)
8 See, e.g., Hammer v. Dagenhart (striking down law prohibiting interstate shipment of child-made goods on ground that it unduly interfered with intrastate employment relations, in contravention of the Tenth Amendment).
9 United States v. Darby Lumber Co., 312, U.S. 100, __ (1941). The Court continued:

There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted.

10 426 U.S. 833 (1976)
reasoned that the Tenth Amendment prohibited Congress from regulating “the states as states,” and thus certain “traditional state functions” were immune from federal regulation. But National League of Cities was an unstable precedent sustained by a 5-4 majority with the fifth vote coming from an admittedly uncertain Justice Blackmun.\(^\text{12}\) Over the next few years, the Court created several exceptions to the National League of Cities exception – and the pendulum seemed to swing back toward Congressional power.\(^\text{13}\)

In its 1985 decision in Garcia v. San Antonio Metropolitan Transit Authority,\(^\text{14}\) the Court reversed itself for the second time in less than twenty years – a virtually unheard of step – and overruled National League of Cities. Again, the issue was whether the federal Fair Labor Standards Act applied to state and local employees, and this time the Court held that it did. Justice Blackmun, who switched sides to make the difference, wrote the 5-4 majority opinion concluding that “the attempt to draw the boundaries of state regulatory immunity in terms of ‘traditional governmental function’ is not only unworkable but is also inconsistent with established principles of federalism.”\(^\text{15}\) Of significance for the argument of this paper, the Garcia Court attempted to lay out a manifesto in support of deferential judicial review of limitations on the powers of Congress vis-à-vis the states. The opinion offered an extended argument that the political process, rather than rigorous judicial review, offered the primary safeguard for federalism. This argument will be developed further in the next section.

The Court’s forceful and detailed articulation in Garcia might well have resolved the controversy in favor of the argument that the political structures in the Constitution and political realities outside it will protect federalism better than non-deferential judicial review. But it didn’t. In Garcia itself, then-Justice Rehnquist warned that the Tenth Amendment principle of National League of Cities “will, I am confident, in time again command the support of a majority of this Court.” Rehnquist was partly correct. In 1991, the Court held that the federal Age Discrimination in Employment Act did not apply to prohibit states from imposing a mandatory retirement age on state judges.\(^\text{16}\) In 1992, the Court held that the Tenth Amendment prohibits Congress from

---

\(^\text{12}\) See id (Blackmun, J., concurring).

\(^\text{13}\) See Hodel v. Virginia Surface Mining & Reclamation Assn.452 U.S. 264 (1981) (upholding federal environmental law against Tenth Amendment challenge because law did not impair state’s ability to perform traditional functions); United Transportation Union v. Long Island R. Co., 455 U.S. 678, 686-687 (1982) (applying federal Railway Labor Act to state operated railroad because railroad operation was not a traditional governmental function); Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982) (upholding federal statute that required states to “consider” the enactment of various energy regulation standards because he law did not “compel the exercise of the State’s sovereign powers”); EEOC v. Wyoming, 460 U.S. 226 (1983) (holding that the federal Age Discrimination in Employment Act applied to state employees because Act did not “directly impair[] the State[‘s] ability to structure [its] integral operations”).

\(^\text{14}\) 469 U.S. 528 (1985).

\(^\text{15}\) Id. at 530-31.

\(^\text{16}\) See Gregory v. Ashcroft (1991). This holding was based on a “quasi-constitutional rule” of statutory interpretation: the Court held that because such an application of the federal law would raise “constitutional doubts,” it would not so interpret the statute in the absence of a “clear statement” of an intent to regulate high-level state policy-making employees, such as judges.
“commandeering” state legislatures – ordering them to enact legislation to conform with federal policy, and in 1997 the Court extended this anti-commandeering rule to state executive officials. Finally, the Court since 1995 has gone beyond its re-revival of the Tenth Amendment to hold on three occasions that federal laws exceeded Congress’s power under the Commerce Clause. In 1995, the Court struck down a statute criminalizing gun possession in schools; in 2000, it struck down a federal damages remedy for victims of gender-motivated violence; and in 2012, the Court held that the “individual mandate” – a federal requirement on individuals to purchase health insurance that was the centerpiece of President Obama’s signature legislation, the Affordable Care Act – could not be sustained as an exercise of the commerce power.

It would be a mistake to view the developments since Garcia as a pendulum swing fully back to the non-deferential review of federalism boundaries characteristic of the pre-1937 era. The amplitude of the pendulum swing, if not becoming consistently smaller, is generally trending smaller. For example, the Tenth Amendment “revival” under National League of Cities was quite limited compared to pre-1937 doctrine, since it applied only to “traditional state governmental functions” rather than extending to all intrastate activity by private actors as well. And the “anti-commandeering” rule’s re-revival of National League of Cities is narrower still: it prohibits Congress from ordering state legislatures or executive officials to carry out federal policies, but it does not overrule Garcia. Under current doctrine, Congress can subject states to “generally applicable” laws and thus, for example, require states to pay their employees the federal minimum wage under the Fair Labor Standards Act.

Even the Commerce Clause decisions – despite their occasional high profile – are relatively modest compared to pre-1937 doctrine. The Court’s current doctrine holds that Congress can regulate any local economic activity that, taken in the aggregate, substantially affects interstate commerce. The Court’s recently-emphasized requirements that the activity be “economic” and that it be “activity” rather than “inactivity” still allow very broad legislative jurisdiction to Congress. Indeed, as recently as 2005, the Court upheld the application of the federal Controlled Substances Act to the backyard cultivation and possession of small amounts of medical marijuana that were legal under California law.

And yet the debate over the Court’s role can be significant in important and high-profile cases, as the recent “Obamacare” case illustrates. Although the individual mandate was upheld as an exercise of the congressional taxing power, the Court’s ruling...
that the mandate was not authorized as commerce regulation could have significant consequences by pushing Congress to rely on the tax system rather than direct regulation when addressing other free-rider problems in the national economy. And there remains a pronounced debate on the Court and in the legal academy about the degree of deference to be afforded to congressional judgments on whether the definitional criteria (“economic activity” and “substantial effects”) are met.

**B. The Political Safeguards of Federalism**

“The political safeguards of federalism” refers to a set of arguments that U.S. political processes, both those embedded in constitutional structures and extra-constitutional ones, sufficiently protect the states as independent and relatively autonomous governmental units, thereby making non-deferential judicial review of federal legislation unnecessary to safeguard federalism. Indeed, active judicial review in policing the boundaries of federalism is counterproductive, under this argument, because the courts are poorly positioned to accomplish this task. There is an absence of clear or principled constitutional limitations for the court to apply in specific cases, whereas Congress and the President are far more likely than the courts to be politically sensitive to state concerns when necessary to strike a balance between national versus local regulatory solutions.

The phrase is derived from an article of that name published by Professor Herbert Wechsler in 1954. Wechsler’s argument, as elaborated by more recent scholars, was embraced and forcefully articulated thirty years later by the Supreme Court in *Garcia*. The Court first candidly acknowledged “doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress’ Commerce Clause powers over the States merely by relying on a priori definitions of state sovereignty.” Moreover, “[w]ith rare exceptions, … the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace.” Therefore, the Court has “no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.” Instead,

the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself…. [which was] designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. They were given more direct influence in the Senate, where each State received equal

---


26 In addition to Wechsler’s article, the Court cited Jesse Choper, Judicial Review and the National Political Process 175-184 (1980), and D. Bruce La Pierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation, 60 Wash. U. L. Q. 779 (1982).

27 Id. at 548.
representation and each Senator was to be selected by the legislature of his State. The significance attached to the States’ equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State’s consent.28

The Court next argued that these political structures reflected the framers’ intent to protect federalism politically rather than judicially. The Court then proceeded to consider practical political safeguards29:

The effectiveness of the federal political process in preserving the States’ interests is apparent even today in the course of federal legislation. On the one hand, the States have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid. The federal role in assisting state and local governments is a longstanding one…. Moreover, at the same time that the States have exercised their influence to obtain federal support, they have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause….

The court concluded:

We realize that changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process.18 Nonetheless, against this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the “States as States” is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a “sacred province of state autonomy.”30

The political safeguards of federalism theory came under not inconsiderable academic criticism after Garcia.31 The gist of the argument is that the structures emphasized by Wechsler and the Garcia court – state representation in the Senate and the Electoral College, and state control over congressional districts and voting qualifications – simply do not function to protect state interests. The original design of state legislative roles in choosing senators and electors has been supplanted by direct election of senators and binding popular-vote selection of presidential electors. Moreover, as even Professor Larry Kramer – ultimately, a supporter of Wechsler’s argument – acknowledges, sensitivity of senators and congressmen to their home constituencies does not necessarily translate into

28 Id. at 550-51.
29 Id. at 552-53.
30 Id.
protectiveness of state institutions, insofar as home constituencies’ policy preferences could well accord with broad federal laws that preempt state law policy choices.

C. Kramer’s Revision of “Political Safeguards” and the Electoral College

The weaknesses of the political safeguards theory were persuasively addressed in a 2000 article by Kramer, who concluded that

Rather than the formal constitutional structures highlighted in Wechsler’s original analysis, federalism in the United States has been safeguarded by a complex system of informal political institutions…. The basic intuition of Wechsler’s pathbreaking article thus remains sound, even if the reasons for its vitality are not those offered by Professor Wechsler himself. 32

Wechsler’s basic insight was simple: despite seventeen years (as of 1954) of highly deferential judicial review of federalism limitations on congressional power, the continued existence of the states as autonomous political units remained strong; therefore, something other than judicial policing of those limits had to explain the phenomenon. Kramer developed this point further by arguing that the practical extent of judicial enforcement of federalism, even in its pre-1937 heyday, had been greatly exaggerated, implying that the non-judicial safeguards of state independence must necessarily be even stronger than otherwise. Kramer’s most significant addition to the “political safeguards of federalism” was to argue that the main protection of state autonomy is party politics. Large and decentralized, the two major political parties depend heavily on cooperation between the national and local levels. Even presidential campaigns rely to a great degree on local party organizations to perform door-to-door canvassing and get-out-the-vote efforts. State political offices and parties are also career incubators for those who seek national elective office. Aside from political party structures, state officials conduct extensive lobbying efforts at the federal level. Finally, many federal programs are entirely dependent on state bureaucracies for implementation. 33 With these specifics, Kramer persuasively elaborates on the more general insight expressed by Wechsler, that as a matter of U.S. political culture and traditions, the continued existence of autonomous state institutions is assumed and relied upon.

Thorough and persuasive as Kramer’s treatment is, he gives surprisingly short shrift to presidential politics and the Electoral College as an additional element of the political safeguards of federalism. He devotes a cursory two paragraphs to the subject in an 80-plus page article, and dismissively concludes: “insofar as we are concerned with protecting the integrity and authority of state political institutions, it is hard to see that the Electoral College helps or matters much.” 34 Other scholars have similarly neglected presidential electoral politics and the Electoral College in debating the merits of the political safeguards of federalism. 35

32 Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 219 (2000).
33 Kramer, supra note __, at 279-87.
34 Kramer, supra note __, at 225.
35 Cites.
Kramer overlooks the potential of the Electoral College for safeguarding federalism by limiting his consideration of the issue to an evaluation of Wechsler’s flawed argument on this point. For Wechsler, the Electoral College embodied a protection of state institutional interests because, in the framer’s original design, electors were to be chosen by state legislatures and were therefore beholden to them. But unless the political safeguards argument were limited strictly to one of the framer’s original intent – which it manifestly is not – then Wechsler’s argument bears little relation to practical realities. As Kramer observed, “the emergence of the popular canvas and winner-take-all rules” by which electors are bound to vote for the candidate chosen by the majority or plurality of the state’s popular vote, eliminated any role the state legislatures may once have had in presidential selection – a point that was true for a century before Wechsler’s 1954 article.36

Kramer does acknowledge that the Electoral College “still affects presidential campaigns, of course, by forcing candidates to look for votes in enough states to win a majority of the electors.”37 But he fails to see how this might affect federalism because he assumes – wrongly – that presidential candidates will seek these votes only by advocating affirmative nationwide policies that will appeal to the voters in some majority coalition of states. Earlier in the article, Kramer makes what he deems an “enormously” important distinction between “geographically narrow interests” of the voters within a state, and “the governance prerogatives of state institutions.”38 As Kramer sensibly points out, federalism is not protected when Congress adopts a national regulatory regime simply because the regime may appeal to the geographically defined preferences of voters of some states but not others. Such a regime must be borne by the entire nation, whereas federalism is a means of “assuring that federal policymakers leave suitable decisions to be made in the first instance by state politicians in state institutions.”39

But the interests/institutions distinction is not nearly so clear-cut as Kramer suggests: the geographically narrow interests of state voters will often be embodied in the governance prerogatives of state institutions. Where the state voters make a salient policy choice – such as to legalize marijuana or recognize same-sex marriage, for example – a federal decision to leave the policy determination to the states will indeed protect federalism as he (correctly) defines it. As will be elaborated further below, the Obama Administration’s decision to dial back enforcement of the Controlled Substances Act against persons complying with state law is just such a federalism-protective policy. Thus, Kramer’s distinction between “interests” and “institutions” is only partially correct. It is more accurate to distinguish, not the motivation of the federal policy, but its preemptive impact: federal policies that preempt state law, even if intended to appeal to the voters of some states at the expense of others, tend to undermine state policy-making institutions; policies that preserve state law tend to protect those state institutions.

Both Wechsler and Kramer fail to see how a key feature of the Electoral College system can protect federalism. Both nod toward the requirement of an Electoral College

36 Kramer, supra note __, at 225.
37 Id.
38 Id., at 222.
39 Id.
majority, but neither give any thought to how it works in practice. The key feature is what contemporary commentators often call “electoral math,” by which they mean all the tactics and strategies used by a presidential campaign to win the 270th electoral vote. Kramer mistakenly dismisses the whole idea from the category of political safeguards of federalism by assuming that presidential aspirants will seek votes by appealing to state interests rather than state institutions. Both Wechsler and Kramer fail to consider that a president is elected, not by building some abstract coalition of states equaling or surpassing the required 270 electoral votes, but by winning vote majorities or pluralities in some specific grouping of 50 specific states with varying electoral votes – and varying policy choices. Put another way, neither Wechslser nor Kramer reflect on the concept of “battleground states” or on the fact that key battleground states may have salient policy choices that are on the national policy agenda in a particular election cycle.

II. MARIJUANA: STATE AND FEDERAL REGULATORY REGIMES

Since 1996, marijuana regulation has emerged as one of the most complex regulatory problems in the history of federalism, and a stark illustration of the challenges that can be raised by a federal regulatory. Under the federal Controlled Substances Act (CSA), possession or use of marijuana for any purpose is flatly prohibited. But as of 2012, the laws of 20 states plus the District of Columbia have enacted some form of legalization of marijuana – in most of these states, for medicinal uses only. These combination of a federal regime restricting personal liberty coupled with a number of pro-liberty regimes at the state level arguably has not been seen in the United States to this degree since the conflict between state personal liberty laws and the federal Fugitive Slave acts before the Civil War.

In addition to the federalism question, the subject of marijuana legalization raises a challenging question of separation of powers. The president’s duty to “take care that the laws be faithfully executed” both imposes an obligation to enforce the law and affords discretion in how and how much to enforce the law. President Obama undoubtedly, albeit somewhat equivocally, departed from the stated “zero tolerance” policy of his predecessor toward medical marijuana, adding another layer of complexity to the current regime of marijuana regulation.

A. State Marijuana Legalization

During the height of the “war on drugs” in the mid-1980s, marijuana possession and distribution was illegal in all 50 states. Since that time, twenty states and the District of Columbia have enacted laws that remove criminal penalties for the possession, use, and cultivation of marijuana for medical purposes. Two states, Colorado and Washington have recent passed ballot initiatives legalizing “recreational” use of marijuana.

---

40 21 U.S.C. § 801 et seq.
41 U.S. Const. art. 2, sec. 3.
42 MEDICAL USE, http://norml.org/marijuana/medical (last visited Dec. 17, 2012) [hereinafter MEDICAL USE]. Maryland’s law is more limited than other state laws: it provides an affirmative defense to criminal
In 1996, California voters approved the nation’s first – and one of its broadest – medical marijuana laws, with fifty-six percent of voters supporting Proposition 215. Voters continued to drive the initial push for medical marijuana laws, with four additional states joining California in 1998 and 1999. Hawaii’s legislature became the first body of state lawmakers to endorse medical marijuana in 2000. Since then, five states have passed medical marijuana laws via ballot initiatives and six states have passed laws through their legislatures.

Medical marijuana laws operate by shielding individuals and entities from arrest and state criminal drug prosecution under certain authorized conditions. These protections extend to patients, doctors, caregivers, and even dispensaries in some states. They do not legalize marijuana, but rather decriminalize the cultivation, possession, and distribution of marijuana for medical purposes. States with medical marijuana laws still prohibit the possession and distribution of marijuana outside or in excess of their medical marijuana regimes. Additionally, state medical marijuana laws do not provide immunity from prosecution under the federal Controlled Substances Act (CSA), which lists marijuana as a Class I controlled substance. However, citing limited prosecutorial resources, the U.S. Justice Department has prioritized targeting large-scale marijuana prosecution for possession of marijuana if an individual possesses less than one ounce of marijuana and was diagnosed with a debilitating medical condition by his or her regular physician. 


\[\text{MEDICAL USE, supra note 1 (follow hyperlinks for Alaska, Oregon, Washington, and Maine).}\]

\[\text{Id. (follow hyperlink for Hawaii).}\]


\[\text{See, e.g., Delaware Medical Marijuana Act, DEL. CODE ANN. tit. 16, § 4903A (2011).}\]

\[\text{Id.}\]

\[\text{Maryland is an exception because it only provides an affirmative defense to state criminal possession charges. There are no provisions in Maryland law allowing for physician prescriptions, caretakers, or specifying acceptable criteria for the cultivation of marijuana. See § 5-601(c)(3).}\]

\[\text{See, e.g., DEL. CODE ANN. tit. 16, § 4764.}\]


\[\text{Controlled Substances Act, 21 U.S.C. § 812 (2012). Class I controlled substances are characterized by three criteria: high potential for abuse, no currently accepted medical use in the United States, and lack of accepted safety for use under medical supervision.}\]
operations and directed U.S. attorneys not to prosecute individuals who are in “clear and unambiguous compliance” with state medical marijuana laws.\textsuperscript{54}

The primary justification for medical marijuana laws is that marijuana may ease the pain and suffering of patients who cannot benefit from traditional pain reduction therapies. Some state laws require that patients try conventional medical therapy before they can obtain medical marijuana prescriptions,\textsuperscript{55} while others simply provide a list of pre-approved conditions for which medical marijuana can be prescribed.\textsuperscript{56} Alaska and Colorado strike a middle ground by limiting their pre-approved lists to instances when the prescribing physician believes medical marijuana will reasonably alleviate the condition for the specific patient receiving the prescription.\textsuperscript{57}

Some states authorize medical marijuana prescriptions for a large variety of medical conditions, while others exercise tighter control over its acceptable use. HIV/AIDS, glaucoma, cancer, multiple sclerosis, cachexia (wasting syndrome), nausea, severe or chronic pain, and seizure disorders are listed as pre-approved qualifying conditions in at least two-thirds of existing state laws.\textsuperscript{58} While HIV/AIDS diagnoses are discrete, conditions like nausea and chronic pain leave considerable room for physician discretion. Aside from these commonly pre-approved conditions, however, there is little agreement between the states regarding which conditions can be treated with medical marijuana.\textsuperscript{59} California’s list is the broadest, including migraines and a catch-all provision covering persistent symptoms that, if not alleviated, may cause serious harm to the patient’s safety or physical or mental health.\textsuperscript{60} California is the only state that gives physicians discretion to prescribe medical marijuana for conditions that are not enumerated under state law or regulations.\textsuperscript{61} At the other extreme, Montana revised its law in 2011 to add cumbersome

\textsuperscript{54} Ogden Memo, supra note 11, at 1-2. Despite the Justice Department’s insistence that its guidance remains in effect, several U.S. attorneys recently sent letters to governors in medical marijuana states warning that the state’s involvement in their medical marijuana regimes might open the state to legal liability under the CSA. See infra, note 43.

\textsuperscript{55} DEL. CODE ANN. tit. 16, § 4902A(3); Maine Medical Use of Marijuana Act, ME. REV. STAT. ANN. tit. 22, § 2422(2) (2011); New Jersey Compassionate Use Medical Marijuana Act, N.J. STAT. ANN. § 24:6I-3 (West 2011); VT. STAT. ANN. tit. 18, § 4472(4) (2011); Washington State Medical Use of Cannabis Act, WASH. REV. CODE ANN. § 69.51A.010(6) (West 2012).

\textsuperscript{56} See, e.g., CAL. HEALTH & SAFETY § 11362.7(h) (2012); HAW. REV. STAT. § 329-121 (2011); Michigan Medical Marihuana Act, MICH. COMP. LAWS ANN. § 333.26423(a) (West 2012).

\textsuperscript{57} ALASKA STAT. § 17.37.070(4) (2012); C.O. CONST. art. XVIII § 14(I)(a).

\textsuperscript{58} ALASKA STAT. § 17.37.070(4); Arizona Medical Marijuana Act, ARIZ. REV. STAT. ANN. §§ 36-2801(3), 2801.01 (2011); CAL. HEALTH & SAFETY § 11362.7(h); C.O. CONST. art. XVIII § 14(I)(a); D.C. CODE § 7-1671.01(17) (2012); DEL. CODE ANN. tit. 16, § 4902A(3); HAW. REV. STAT. § 329-121; ME. REV. STAT. ANN. tit. 22, § 2422(2); MICH. COMP. LAWS ANN. § 333.26423(a); Montana Marijuana Act, MONT. CODE ANN. § 50-46-302(2) (2011); N.J. STAT. ANN. § 24:6I-3; Lynn and Erin Compassionate Use Act, N.M. STAT. ANN. § 26-2B-3(B) (West 2011); NEV. REV. STAT. ANN. § 453A.050 (LexisNexis 2010); Oregon Medical Marijuana Act, OR. REV. STAT. ANN. § 475.302(3) (West 2011); Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, R. I. GEN. LAWS § 21-28.6-3(3) (2011); VT. STAT. ANN. tit. 18, § 4472(4); WASH. REV. CODE ANN. § 69.51A.010(6).

\textsuperscript{59} For example, New Jersey is the only state that names muscular dystrophy, § 24:6I-3, and post-traumatic stress disorder only appears in Delaware’s law, § 4902A(3).

\textsuperscript{60} § 11362.7(h).

\textsuperscript{61} Id.
new criteria to the definition of chronic pain, with the probable effect that fewer physicians will write prescriptions for this condition.\textsuperscript{62} Montana is the only state to require double verification for chronic pain prescriptions. These differences could be superficial, however, because all states except Vermont allow their state health agencies to authorize additional conditions as needed.\textsuperscript{63}

There are many commonalities between different states’ medical marijuana laws. All include a caregiver provision,\textsuperscript{64} which provides immunity from criminal prosecution to at least one designated caregiver per patient. Typically, caregivers can possess, obtain, dispense, and assist in the administration of medical marijuana.\textsuperscript{65} Most states, including Alaska\textsuperscript{66} and Arizona,\textsuperscript{67} limit the number of patients a caregiver can assist and require that the caregiver is a natural person. Rhode Island\textsuperscript{68} also allows medical marijuana dispensaries to serve in the caregiver role. Other common provisions among state laws include delegating administration of the law to the state health agency,\textsuperscript{69} establishing confidential, state-run patient registries,\textsuperscript{70} and requiring a written prescription from a physician.\textsuperscript{71} Essentially, these provisions rely on state employees and state-licensed physicians for the medical marijuana law to have any effect.

Policy contrasts between the states are evident in their limits on the possession of usable marijuana and the number of plants a patient or caregiver can cultivate,\textsuperscript{72} as well as whether the state offers reciprocity to visiting patients from other medical marijuana

\begin{footnotesize}

\textsuperscript{63} ALASKA STAT. § 17.37.010(a); ARIZ. REV. STAT. ANN. § 36-2801(5); CAL. HEALTH & SAFETY § 11362.7(d); C.O. CONST. art. XVIII § 14(II)(f); D.C. CODE § 7-1671.01(3); DEL. CODE ANN. tit. 16, § 4902A(5); HAW. REV. STAT. § 329-121; ME. REV. STAT. ANN. tit. 22, § 2422(8-A); MICH. COMP. LAWS ANN. § 333.26423(g); MONT. CODE ANN. § 50-46-307(7a), (10a); N.J. STAT. ANN. § 24:6I-3; N.M. STAT. ANN. § 26-2B-3(F); NEV. REV. STAT. ANN. § 453A.080(1); OR. REV. STAT. ANN. § 475.302(5); R.I. GEN. LAWS § 21-28.6-3(2), (9); VT. STAT. ANN. tit. 18, § 4472(11); WASH. REV. CODE ANN. § 69.51A.010(1).

\textsuperscript{64} See statutes cited supra note 22. As stated earlier, Maryland’s policy is an affirmative defense provision to a criminal statute, and it does not include a caregiver provision. See supra note 9.

\textsuperscript{65} See, e.g., D.C. CODE § 7-1671.01(3).

\textsuperscript{66} § 17.37.010(a), (d), (e).

\textsuperscript{67} § 36-2801(5).

\textsuperscript{68} § 21-28.6-3(2), (9).

\textsuperscript{69} See, e.g., C.O. CONST. art. XVIII, § 14; ME. REV. STAT. ANN. tit. 22, §§ 2421-2430; N.J. STAT. ANN. §§ 24:6I-1-16.

\textsuperscript{70} See, e.g., ALASKA STAT. § 17.37.01; DEL. CODE ANN. tit. 16, §§ 4908A-4912A, 4920A; MONT. CODE ANN. § 50-46-303.

\textsuperscript{71} See, e.g., NEV. REV. STAT. ANN. § 453A.170; R.I. GEN. LAWS § 21-28.6-3(14); VT. STAT. ANN. tit. 18, § 4473(b)(2).

\textsuperscript{72} See infra notes 33-39. Some medical marijuana laws also include a provision that allows individuals who are prosecuted for exceeding their states’ allowable amount guidelines to argue medical necessity as an affirmative defense.
\end{footnotesize}
states. Alaska and Nevada allow authorized individuals to possess up to one ounce of usable marijuana. Eight other states and the District of Columbia present a median allowable range of between two to three usable ounces of marijuana. Oregon and Washington deviate significantly from the norm, each allowing authorized individuals to possess up to twenty-four usable ounces of marijuana. States also differ in how many plants they allow patients or caregivers to cultivate at any given time. Maryland, New Jersey, and the District of Columbia do not allow patients to grow their own marijuana. Delaware does not allow patients to grow marijuana unless they are located further than twenty-five miles from the nearest dispensary. Ten states allow authorized individuals to possess between two to six mature plants, while Washington allows up to fifteen plants.

A final, and important, point of difference between the states is whether or not they require the state to license medical marijuana dispensaries. At least eight states plus the District of Columbia have mandated government oversight of medical marijuana dispensaries. Three of these programs are currently operating, while others have yet to be implemented. State-licensed dispensaries are a more recent phenomenon in medical marijuana laws, and the U.S. Justice Department has responded to the trend by warning states that monitoring large-scale production and distribution of marijuana – in violation of the CSA – could trigger legal liability for state employees. In response to letters from U.S. Justice Department officials, governors in Delaware and Rhode Island announced they were suspending their state licensing programs indefinitely. In Delaware, where patients are only allowed to obtain marijuana from state-licensed facilities, this action effectively halted implementation of Delaware’s entire law.

---

73 Six states offer reciprocity while ten states and the District of Columbia do not extend protection from criminal liability to individuals licensed in other states. See generally MEDICAL USE, supra note 1 (follow hyperlinks for state pages).
74 MEDICAL USE, supra note 1 (follow hyperlinks for Alaska and Nevada).
75 Id. (follow hyperlinks for Colorado, Vermont, District of Columbia, New Jersey, Rhode Island, Arizona, Maine, Michigan, and Hawaii).
76 Id. (follow hyperlinks to Oregon and Washington).
77 Id. (follow hyperlinks to Maryland, New Jersey, and District of Columbia).
79 MEDICAL USE, supra note 1 (follow hyperlinks to Vermont, Alaska, Maine, Nevada, Hawaii, New Mexico, California, Oregon, Colorado, and Montana).
81 The D.C. law is unique because it explicitly allows dispensaries to be structured as for-profit business entities. § 7-1671.06(h).
83 Id.
84 Id.
85 Id.
Looking ahead, activity around medical marijuana laws seems likely to continue. Arizona, New Jersey, Vermont, and the District of Columbia need to determine how to implement provisions of their laws that call for state-licensed dispensaries in light of the U.S. Justice Department’s recent warnings. Additionally, national medical marijuana advocates have announced their support for legislative efforts in Illinois, Maryland, New Hampshire, and New York. Other states might also find themselves confronting the issue as the public and lawmakers continue to show interest in medical marijuana.

B. Federal Law and Policy on Marijuana

1. The Controlled Substances Act

The CSA lists marijuana as a “schedule I” drug on its system of drug regulation. The four schedules on the CSA purport to rank drugs by their levels of dangerousness, addictiveness, and medical utility. While drugs listed on schedules II through IV can be prescribed by physicians subject to certain restrictions, schedule I drugs are defined as those having “a high potential for abuse” and “no currently accepted medical use in treatment in the United States.” The CSA thus makes the manufacture, distribution, or possession of marijuana a criminal offense. Simple possession of small amounts of marijuana is a misdemeanor, and possession of larger amounts, possession with intent to distribute, distribution, or manufacture of marijuana are felonies carrying variously severe penalties.

Under the Supremacy Clause of the Constitution, Art. VI, sec. 2, federal laws are “the supreme law of the land,” and as a general matter trump state laws where the two come into conflict. Under this principle, known as federal “preemption” of state law, state laws cannot supersede federal laws, and in the particular case of marijuana, possession, use, or distribution of marijuana remains illegal throughout the United States from the vantage point of individuals, even where permissible under state law. State legalization of medical or recreational marijuana means that state authorities and courts will not arrest and prosecute marijuana cases to the extent legalized under state law. Yet these same activities remain subject to criminal sanctions by initiated by federal authorities in federal courts under the CSA.

For individuals whose concern is to obey all drug laws, then, state legalization does not change the marijuana regulatory regime. But for those whose concern is avoid criminal consequences, the impact of state legalization is quite practical. This is the result of the simple fact that federal law enforcement resources are quite small relative to those of the states. States employ nearly ten times as many law enforcement officers and

---

86 Id.
89 Id., §§ 823(f), 841(a)(1), 844(a). Federal law does allow schedule I drugs to be used as part of a Food and Drug Administration pre-approved research study. Id.
90 Id.
prosecutors as the federal government.\textsuperscript{91} Moreover, if the federal government systematically places a low priority on devoting investigative and prosecutorial resources to legalized marijuana, a state legalization regime can create an environment of de facto legalization. Something like this seems to be the case in states like Colorado, California, and Washington, at least for medical marijuana.

It should be noted that the Supreme Court has played no role whatsoever in safeguarding federalism on the marijuana legalization issue. It has decided two cases which might have limited the impact of the CSA on state marijuana legalization, and rejected the invitation to do so both times. In 2001, in \textit{United States v. Oakland Cannabis Buyers Cooperative},\textsuperscript{92} the Court upheld an injunction shutting down a California medical marijuana dispensary operating in accordance with California’s “compassionate use” law. The Court rejected that argument that the state policy could be accommodated by reading a “medical necessity” defense into the federal CSA. In 2005 in \textit{Gonzales v. Raich},\textsuperscript{93} the Court by a 6-3 majority rejected a plausible argument that the Commerce Clause could not sustain the application of the CSA to prohibit purely intrastate possession and distribution of medical marijuana that was legal under state law. The deciding votes were supplied by Justices Scalia and Kennedy, who split from their conservative pro-state-autonomy colleagues (Rehnquist, O’Connor, and Thomas); apparently, their aversion to marijuana legalization overcame their scruples against an expansive interpretation of the Commerce Clause that caused them to strike down two prior federal statutes, and that reasserted itself in their votes to strike down Obamacare in 2012.

To be sure, neither Congress nor the executive branch have taken formal steps to accommodate state policies legalizing medical marijuana. Congress can, but has not, amended the Controlled Substances Act either to remove marijuana from schedule I (drugs prohibited for all purposes) or to provide for waivers of federal enforcement in states where marijuana is legal. As for the executive branch, the CSA authorizes the Attorney General to follow specified procedures that would result in rescheduling marijuana from schedule I to a lesser schedule that would permit medical prescription of the drug; no attorney general has done so. But in contrast to the judicial safeguards of federalism, which can only operate through formal judicial acts, the political safeguards of federalism can operate informally. And that seems to have occurred in the case of state marijuana legalization.

\section*{2. The Obama Administration’s Policy}

As a presidential candidate in 2008, Barak Obama said that an Obama administration would stop DEA raids on providers of medical marijuana who were complying with state compassionate use laws.\textsuperscript{94} As President, Obama followed this policy – to a degree.

As a matter of constitutional law, the President’s duty to “take care the laws be faithfully executed” seems to preclude a power to disregard an act of Congress based on a

\begin{thebibliography}{9}
\bibitem{91} Cite.
\bibitem{92} 532 U.S. 483 (2001).
\bibitem{93} 545 U.S. 1 (2005).
\bibitem{94} Cite.
\end{thebibliography}
policy disagreement with the statute. On the other hand, the duty of the President to enforce a law he deems unconstitutional is a matter of some dispute. A credible argument was made in 2005 in 

*Gonzales v. Raich*, one that won the assent of three justices, that the commerce power could not sustain the application of the CSA to users, suppliers, and possessors of small amounts of marijuana grown intrastate and used in compliance with state medical marijuana law. While the majority rejected this argument, the President’s authority to reach his own conclusions about the constitutionality of a law, irrespective of the Supreme Court’s views, is also a matter in controversy. Even assuming President Obama would have disagreed with the *Raich* conclusion, staking out a stark constitutional position on the CSA as applied to medical marijuana, particularly one flouting a Supreme Court decision, is a politically risky move. Far safer ground for his stated policy is reliance on the virtually unreviewable discretion of the executive to make prosecutorial resource allocation decisions. The Obama administration’s policy, such as it was, was laid out in an October 19, 2009 memo from Deputy Attorney General David Ogden, entitled “Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana.”

While reaffirming the Justice Department’s “commitment to the enforcement of the Controlled Substances Act in all States,” the Ogden memo suggested that “[t]he Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources.” Noting federal prosecutors are “vested with … the broadest discretion in the exercise of [their authority over criminal matters]” the memo stated:

> The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department’s efforts against narcotics and dangerous drugs, and the Department’s investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department.

After listing several factors indicative of non-compliance with state laws, such as threats of violence or distribution to minors, the memo backtracked a bit:

---

95 See Walter L. Dellinger, Opinion of the Office of Legal Counsel, Presidential Authority to Decline to Execute Unconstitutional Statutes (1994).

96 See id.; see also President Andrew Jackson’s Message in Support of his Veto of the Re-charter of the Bank of the United States, July 10, 1832.


Of course, no State can authorize violations of federal law…. This guidance regarding resource allocation does not “legalize” marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights…. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law. Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.

Your offices should continue to review marijuana cases for prosecution on a case-by-case basis….

To be sure, this policy guidance creates a complicated picture due to the variation in state laws. For example, while Colorado and California laws, for example, authorized the operation of medical marijuana sales by storefront dispensaries, Oregon law permitted possession and use of medical marijuana, but not sales. Accordingly, the Oregon U.S. Attorneys office issued cease and desist letters to dispensaries in that state.99

In 2011, medical marijuana advocates began observing an increase in investigations, raids and prosecutions of medical marijuana distributors in various states, charging President Obama with backtracking on the Ogden memo and “betrayal” of his 2008 campaign promise. By 2012, some advocates claimed that the number of medical marijuana prosecutions exceeded the level of prosecutorial activity that took place under the Bush administration, notwithstanding the latter’s purported “zero tolerance” policy. President Obama responded to questions about this in an April 2012 interview in Rolling Stone magazine:

Here's what's up: What I specifically said was that we were not going to prioritize prosecutions of persons who are using medical marijuana. I never made a commitment that somehow we were going to give carte blanche to large-scale producers and operators of marijuana — and the reason is, because it's against federal law. I can't nullify congressional law. I can't ask the Justice Department to say, 'Ignore completely a federal law that's on the books.' What I can say is, 'Use your prosecutorial discretion and properly prioritize your resources to go after things that are really doing folks damage.' As a consequence, there haven't been prosecutions of users of marijuana for medical purposes.

The only tension that's come up — and this gets hyped up a lot — is a murky area where you have large-scale, commercial operations that may supply medical marijuana users, but in some cases may also be supplying recreational users. In that situation, we put the Justice Department in a very difficult place if we're telling them, 'This is supposed to be against the law, but we want you to turn the other way.' That's not something we're going to do….100

---

99 Cite
100 Rolling Stone magazine, May 10, 2012.
Nevertheless, storefront medical marijuana dispensaries have continued to operate in large numbers in Colorado, which provides the most detailed regulatory scheme.

In the aftermath of the 2012 election, however, the Obama administration may be returning to its more low key enforcement approach. After issuing policy statements before the election stating flat-out opposition to recreational marijuana legalization initiatives, President Obama recently stated in an interview that even recreational marijuana will not be a prosecutorial priority in states where it is legal.

III. MARIJUANA LEGALIZATION AND PRESIDENTIAL POLITICS

Two trends in U.S. politics have emerged since the end of the 1990s that are central to my argument that presidential politics filtered through the Electoral College can be a significant political safeguard of federalism. Starting in 1996, states began enacting laws legalizing marijuana, first for medicinal purposes, and more recently, for recreational purposes. In that same time frame, the past four presidential election cycles have produced closer elections with a well-identified list of “swing” or “battleground” states.

A. Marijuana States and the Electoral College

My thesis is that the Electoral College will tend to protect federalism when a grouping of “swing states” has a salient policy preference that is inconsistent with a well-supported national policy alternative, where the next presidential race is expected to be close. By “swing states,” I mean those states that are potentially important difference-makers in a close election. A premise of my argument is that any tendency of “electoral math” to protect federalism will be most pronounced in close elections; where presidential campaigns (or incumbent presidents thinking ahead to re-election) expect a landslide, it is far less likely that they will tailor their actions or messages to particular states.

The electoral importance of the medical marijuana states is readily apparent from an analysis of their Electoral College characteristics, presented in Table 1. (See spreadsheet appended to this draft.) As noted above, twenty states plus the District of Columbia (which casts three electoral votes) have legalized medical marijuana, and two of these states have recently legalized “recreational” marijuana as well. Together, these states accounted for 187 to 190 electoral votes in the last four election cycles. As indicated by the blue and red shading, these states are overwhelmingly Democratic in their voting, accounting for between 154 and 173 electoral votes in the Democratic column.

101 Cites

102 The table lists the 20 states and DC, the year each adopted its medical marijuana legalization regime, and its Electoral vote count in each cycle. The 2000 electoral vote totals are based on the 1990 census; the 20004 and 2008 totals are based on the 2000 census; and the 2012 totals are based on the 2010 census. The next group of columns (Dif-year) shows the popular vote differential for the state in each election cycle, color-coded to reflect which party won (red-Republican, blue-Democrat). The next four columns indicate whether the state meets one of the four measures of Electoral College significance. See next two paragraphs of text.
On closer analysis, however, the great majority of these states should be viewed as swing states. I propose four measures to suggest that a state is a swing state, or would be perceived to be one by a presidential campaign under the electoral demographic trends since 2000. The first borrows Nate Silver’s definition of a “tipping point” state (NS-TP). Silver defines a tipping point state as one likely to provide the 270th (i.e., the winning) electoral vote in a given election. To Silver this is the most salient measure of a state’s electoral importance in a given cycle, and is measured, not by the closeness of the vote in the state, but by the closeness of the popular vote differential in that state to the popular vote differential in the national mean. Table 1 identifies the tipping point states from the 2012 election.

The three remaining metrics each attempt to measure whether a state might be viewed as “within reach” by a contemporary presidential campaign. “W/in 12” identifies those states whose popular vote was within 12 places of the national mean popular vote in the 2012 election. (The number 12 was chosen because it approximates a quartile of the fifty states.) “Flip” signifies that the state has “flipped,” that is, voted for each party at least once within the past four election cycles; a presidential campaign is likely to believe that such a state could be flipped back in the next election. “<10” means that the popular vote differential in that state was less than 10% at least one time in the past four election cycles. A political campaign might view such a state as winnable. For example, in 2012 the Obama campaign initially viewed Arizona as winnable – based apparently on this measure coupled with increasing participation of Hispanic voters – despite that fact that the Democrats carried the state only once since 1948 (in 1996, when a major third party candidate drew a decisive number of votes away from the Republican).

Thirteen states on this list meet at least one of these measures of a swing state and eight states meet at least two measures. In contrast, only 12 non-marijuana states meet one or more of these criteria for “swing states.” Perhaps of even greater contemporary electoral significance is a short list of three marijuana states: Colorado, New Mexico, and Nevada. These three states, accounting for a total rising from 17 to 22 electoral votes, each meet at least three swing state criteria. All three flipped between 2000 and 2012. In 2000, Nevada could have tipped the election to Al Gore even without Florida; George W. Bush won Nevada by less than 3.5%. In 2004, Bush won all three by margins of less than 5%; the three together could have swung the election to John Kerry. In a close electoral contest, a presidential campaign flouts these states’ policy preferences at his peril.

While California is not one of the thirteen swing states, and has voted Democratic in every election since 1988, it is too big an electoral prize for the Republicans simply to write it off. It had been solidly Republican from 1952 to 1988, and was almost competitive in 2000 and 2004. Moreover, if the GOP changes strategy to aggressively court Hispanic voters, it could become competitive again.

---

103 See Nate Silver, “FiveThirtyEight,” weblog at http://fivethirtyeight.blogs.nytimes.com
104 These are: Florida, Indiana, Iowa, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, Virginia, West Virginia and Wisconsin.
105 Seven non-marijuana states flipped in the same time frame: Florida, Indiana, Iowa, New Hampshire, North Carolina, Ohio and Virginia.
Conceivably, Colorado alone could drive a presidential campaign to tread softly on the marijuana legalization issue. Colorado, as an early adopter of medical marijuana legalization (2000) and as one of the first two states to legalize recreational marijuana (2012), is arguably the most salient marijuana state, and certainly the most salient marijuana state in electoral math. Colorado, which flipped from the Republican to Democratic column in 2008 and 2012, meets all four swing state criteria. Although President Obama won the state by just over 5% in 2012, the pre-election polling showed the state to be extremely close through most of the race. Moreover, Colorado was the tipping point state in both the 2008 and 2012 elections, providing the 270th electoral vote to Obama each time. In other words, in each of the past two election cycles, the most likely Republican path to victory had to travel through Colorado.

Based on the foregoing, it seems likely that presidential campaigns would think long and hard before taking an unequivocal stance in favor of a blanket nationwide marijuana prohibition. A policy of leaving the question of marijuana to the states could easily be perceived by presidential aspirants as a safer course that avoids the risk of alienating critical numbers of voters in key swing states. The next section suggests that something like this is indeed occurring.

B. Drug Policy and Presidential Campaigns

How did the campaigns treat the marijuana issue? The short answer is that the both campaigns came out seemingly opposed to recreational marijuana legalization, and that the positions on medical marijuana were equivocal, with opposition to medical marijuana appearing marginally stronger from the Republican side. But the vagaries of political messaging and presidential politics might require looking beyond the express policy statements of the campaigns and the actions of the Obama Justice Department to consider their nuances.

A thorough understanding of the Republican Party’s rather tepid and equivocal statements disapproving medical marijuana requires placing it in historical context. Against the backdrop of Republican presidential campaign rhetoric on crime and drugs, the Romney and McCain campaigns’ approach were strikingly low key.

For nine presidential election cycles in the 32 years from 1968 to 2000, crime, drugs, and race, and the linkages between the three, have been a staple of Republican Party strategy. Based on this history, one might expect a Republican presidential campaign to exploit what would in prior elections have been a golden opportunity to recreate the linkage between crime, drugs, and race: a black President who, with his black Attorney General, has declined to vigorously enforce the Controlled Substances Act against medical marijuana states. The fact that the Romney campaign failed to do this – and that

106 In both 2008 and 2012, the states with larger Democratic margins of victory than Colorado totaled only 263 electoral votes. In 2012, for instance, had the national popular vote been tied, and the state margins all trended in the same direction, Romney would have won Virginia, Ohio and Florida for 266 electoral votes, and Obama could not have won without Colorado’s 9 electoral votes. See Nate Silver, “As Nation and Parties Change, Republicans Are at an Electoral College Disadvantage,” FiveThirtyEight, Nov. 8, 2012, http://fivethirtyeight.blogs.nytimes.com/2012/11/08/as-nation-and-parties-change-republicans-are-at-an-electoral-college-disadvantage/.
the McCain campaign similarly failed to try this strategy when candidate Obama had made statements promising a low-key approach toward medical marijuana – cries out for explanation. That explanation is undoubtedly the result of several factors beyond the scope of this paper – a growing perception that a racial appeal to white voters will no longer suffice to produce an electoral college majority, perhaps. The question for this paper is whether, in addition to other causal factors, “electoral math” has weighed in favor of supporting state autonomy on this issue.

It is now a well-established historical understanding that the Nixon campaign of 1968 set out to undermine the Democratic “New Deal coalition” that had largely held together for the nine previous election cycles. He did so by pursuing his so-called “southern strategy,” to peel away the eleven states of the “old South” (the former Confederacy) from the Democratic electoral column. He was largely successful. Because the Republicans’ historical traditions and need to appeal broadly throughout the north precluded them from attacking the Democrats overtly for their support of the civil rights legislation of the Johnson administration, they instead sought to appeal to racist and race-conscious white voters through a subterranean linkage of race and crime. It is telling that, whereas the Republican Party platform during Nixon’s unsuccessful 1960 campaign did not even mention the word “crime,” the 1968 platform, and Nixon’s campaign messages, made crime control a centerpiece.

Since 1968, crime featured as a major element in every Republican presidential campaign for the next 32 years. The linkage with race has sometimes been quite overt: the infamous “Willie Horton” ad run by the George H. W. Bush campaign against Michael Dukakis in 1988 told of a murder committed by a parolee released during Dukakis’s governorship illustrated by lurid images of the dark-skinned Horton.

Illegal drugs have been a major element of the Republican party’s “war on crime” since 1968. As part of its crime control agenda in the 1968 presidential race, the Republican party platform promised “a vigorous nation-wide drive against trafficking in narcotics and dangerous drugs, including special emphasis on the first steps toward addiction: the use of marijuana and such drugs as LSD.” In nine of the ten presidential election years from 1968 to 2004, the Republican platform devoted language of significant quantity and vehemence to combating illegal drugs, attacking Democrats as permissive on drug policies and, typically, soft on crime more generally. The 1972 Republican Platform focused great attention on “the twin evils of crime and drug abuse,” and decried “The permissiveness of the 1960’s [which] left no legacy more insidious than drug abuse…. We pledge the most intensive law enforcement war ever waged. We are determined to drive the pushers of dangerous drugs from the streets, schools and neighborhoods of America.”

107 In every election from 1932 to 1964, the Democratic presidential candidate won at least six of the eleven states of the former Confederacy. (From 1932-1944, Franklin Roosevelt won all eleven of those states each time.)

108 Democratic Candidate Hubert Humphrey won only one of those states, Texas. The remaining ten states divided evenly between Nixon and third party anti-civil rights candidate George Wallace.

109 Cites ___

110 1968 Republican Platform.

111 1972 Republican Platform.
during Gerald Ford’s campaign 1976, the Republican platform in Reagan’s two presidential campaigns renewed the “war on drugs”:

In recent years, a murderous epidemic of drug abuse has swept our country. Mr. Carter, through his policies and his personnel, has demonstrated little interest in stopping its ravages. Republicans consider drug abuse an intolerable threat to our society, especially to the young. We pledge a government that will take seriously its responsibility to curb illegal drug traffic.

In 1984, the Republican platform “reaffirm[ed] that the eradication of illegal drug traffic is a top national priority.” The platform during George H. W. Bush’s campaign in 1988 touted the Reagan administration’s policies for having “fought to reverse crime rates and launched the nation’s first all-out war on drug abuse,” devoting two lengthy sections to the drug issue (“Drug-Free America” and “Combatting Narcotics: Defending Our Children”). The 1992 platform argued that “narcotics drives street crime” and reaffirmed that “the Republican Party is committed to a drug-free America. During the last twelve years, we have radically reversed the Democrats’ attitude of tolerance toward narcotics[.]” Drug and crime planks continued to appear in the 1996, 2000 and 2004 platforms in which, each time, the GOP assailed the what it deemed to be the under-enforcement of anti-drug laws during the Clinton administration.

112 The single reference to drugs in that year’s platform advocated mandatory minimum sentences for “exceptionally serious crimes, such as trafficking in hard drugs, kidnapping and aircraft hijacking[.]” 1976 Republican Platform.

113 1980 Republican Platform.

114 The 1996 platform is instructive. In a section labeled “Getting Tough on Crime,” the GOP platform charged that

During Bill Clinton’s tenure, America has become a more fearful place, especially for the elderly and for women and children. Violent crime has turned our homes into prisons, our streets and schoolyards into battlegrounds. It devours half a trillion dollars every year. Unfortunately, far worse could be coming in the near future….

This is, in part the legacy of liberalism - in the old Democrat Congress, in the Clinton Department of Justice, and in the courts, where judges appointed by Democrat presidents continue their assault against the rights of law-abiding Americans. For too long government policy has been controlled by criminals and their defense lawyers. Democrat Congresses cared more about rights of criminals than safety for Americans….

…Only Republican resolve can prepare our nation to deal with the four deadly threats facing us in the early years of the 21st Century: violent crime, drugs, terrorism, and international organized crime.

Likewise, in 2000 and 2004, the G.W. Bush campaign assailed “the glamorizing of drugs” and the Clinton administration policies:

…The other part of the team — a president engaged in the fight against crime — has been ineffective for the last eight years. To the contrary, sixteen hard-core terrorists were granted clemency, sending the wrong signal to others who would use terror against the American people. The administration started out by slashing the nation’s funding for drug interdiction and overseas operations against the narcotics cartel. It finishes by presiding over the near collapse of drug policy. [2000]

After witnessing eight years of Presidential inaction on the war against drugs during the prior Administration, we applaud President Bush for his steady commitment to reducing drug use among teens. The Administration recently exceeded its two-year goal of reducing drug use among young people. [2004]
Marijuana criminalization was an important element of the Republican wars on crime and drugs. As noted above, marijuana was classified as a Schedule I controlled substance under the 1970 Controlled Substances Act, signed into law by President Nixon, making its possession and distribution for any purpose a federal crime. The linkage of marijuana, crime and race dated back to at least the 1930s. At that time, a nationwide campaign to criminalize marijuana which led to the passage of the Marijuana Tax Act at the federal level and various state law prohibitions, stressed the connection between marijuana and the purportedly “dissolute” lifestyles and jazz music of the African American community. The Republican platforms expressly or impliedly mentioned marijuana in most years from 1968 to 2000. The opening salvo in the Republican “war on drugs” in 1968 promised “a vigorous nation-wide drive against trafficking in narcotics and dangerous drugs, including special emphasis on the first steps toward addiction the use of marijuana and such drugs as LSD.” In 1972, the last time marijuana decriminalization and legalization were on the national policy agenda, the Republican platform asserted “We firmly oppose efforts to make drugs easily available. We equally oppose the legalization of marijuana. We intend to solve problems, not create bigger ones by legalizing drugs of unknown physical impact.” The Reagan administration touted its “aggressive Marijuana Eradication and Suppression Program” (1984). The platform during President Bush’s 1992 re-election campaign plainly had marijuana in mind when it stated: “We oppose legalizing or decriminalizing drugs. That is a morally abhorrent idea, the last vestige of an ill-conceived philosophy that counseled the legitimacy of permissiveness.” The platform during Bob Dole’s 1996 campaign, seeking perhaps to make hay of Bill Clinton’s admission to having once tried marijuana, said:

The verdict is in on Bill Clinton’s moral leadership: after 11 years of steady decline, the use of marijuana among teens doubled in the two years after 1992. At the same time, the use of cocaine and methamphetamines dramatically increased.

That shocks but should not surprise. For in the war on drugs - an essential component of the fight against crime - today’s Democratic Party has been a conscientious objector. Nowhere is the discrepancy between Bill Clinton’s rhetoric and his actions more apparent. Mr. Clinton’s personal record has been a betrayal of the nation’s trust, sending the worst possible signal to the nation’s youth.

Significantly, this platform was written when the first referendum initiative to legalize medical marijuana was on the ballot in California due for a vote on the same day as the general election. Clinton won the state by a 13% margin, though receiving a smaller percentage of the total vote than that in favor of the medical marijuana initiative (51% compared to 56%).

The Republican platforms began to show a marked change around 2000. That year, the attack on the Clinton drug policies is couched in terms of protection of children and schools rather than as a war on crime. Undoubtedly falling crime rates were perceived
as making crime a less fruitful campaign issue than in past years. In 2004, the “war on drugs” was mentioned only in the context of its purported impact on reducing illegal drug use among teens. In 2008 and 2012, the Republican platforms no longer linked the “war on drugs” to a domestic crime problem, but rather linked it to international terrorism and illegal immigration. As the 2008 platform put matters, “In an era of porous borders, the war on drugs and the war on terror have become a single enterprise.”

The Republican party’s downplaying of marijuana, particularly in the 2008 and 2012 election campaigns, is striking. In the last three presidential campaign cycles, the Republican platforms have not even mentioned the word “marijuana” or proxy code words like “legalization” or “decriminalization,” despite having done so in seven of the nine party platforms from 1968 to 2000.\(^{117}\) What is more, attacking Democrats as soft on crime and drugs was consistent Republican campaign fodder from 1968 to 2000. Indeed, in 1996 and 2000, Republican platforms explicitly linked purportedly permissive drug policies with increased marijuana use.

On the whole, in light of this history, it would have been natural for Republican presidential candidates in 2008 and especially 2012 to attack candidate and President Obama as “soft on drugs, soft on crime.” The fact that Obama and his Attorney General Eric Holder, are both African American, would seem to lend itself to exploitation of the age-old – if heinous – Republican strategy of linking drugs, crime, and race. That this was not done is a phenomenon suggesting a major policy shift that warrants explanation.

What did the Republican candidates say during the 2012 presidential race? In 20 Republican party primary debates, marijuana was referenced exactly once, when dark-horse libertarian candidate Ron Paul came out in favor of medical marijuana; none of his opponents touched the issue.\(^{118}\) Otherwise, the Republican candidates stayed on the GOP message, making their very few references to illegal drugs in the context of immigration and national security.\(^{119}\)

In the general election campaign, marijuana was not discussed in any of the four presidential or vice presidential debates; undoubtedly, the question would have been raised had either party been making a campaign issue of it.\(^{120}\) Romney, far from attacking

---

\(^{117}\) The word “marijuana” has appeared in only one Democratic platform, in 1984, during Walter Mondale’s campaign to unseat Ronald Reagan, whose “war on drugs” was enjoying the height of its popularity.

\(^{118}\) November 22nd, 2011, Washington D.C. debate.


\(^{120}\) The last time “marijuana” was mentioned in a presidential or vice presidential debate was by Bob Dole, who spoke of rising marijuana use in 1996.
the Obama administration for going easy on medical marijuana, made clear that he would rather not discuss the issue of marijuana legalization at all. When asked by a reporter to comment on Colorado’s marijuana legalization initiative during a campaign stop in that state, Romney “was visibly taken aback” and evaded the question by saying “Aren’t there issues of significance that you’d like to talk about?”121 Romney’s position was reluctantly stated, somewhat equivocally, and often through proxies and campaign spokespersons rather than by him directly. For example, when Romney’s running mate Paul Ryan stated, in response to a reporter’s question, that medical marijuana legalization should be left to the states rather than the federal government, it was a campaign spokesperson – and not Romney – who “corrected” the record by asserting that the Romney campaign opposed medical marijuana legalization.122 It was highly likely that Ryan’s statement was not a gaffe, but was designed to send a calculatedly mixed signal.

The Obama administration’s position on enforcing the CSA in medical marijuana states has been equivocal, and the increased prosecutorial activity in the run-up to the election could be interpreted as evidence against the “Colorado” thesis argued in this paper. But the reality may be more complicated. It is certainly plausible to interpret the Obama record as taking steps toward placating the pro-marijuana vote in swing states, while at the same time guarding his flank against the kind of “soft on drugs, soft on crime” attacks made by Republicans in the past. And President Obama’s recent statement softening the administration’s previous hard line stance toward state recreational legalization may well reflect solicitude toward Colorado and other swing states in anticipation of his Democratic successors’ 2016 presidential race.

CONCLUSION

The decades-old debate over whether federalism is best protected by judicial or political processes – and hence, over whether the Supreme Court should apply a deferential approach to questions regarding the scope of national legislative jurisdiction – has become prominent again. Although it upheld “Obamacare” as an exercise of the taxing power, a majority of the Court held that a key element of the national health law fell outside Congress’s commerce power, raising significant questions for future economic legislation. This debate over the “political safeguards of federalism” has, up to now, virtually ignored the impact of the Electoral College and “electoral math” as an important element strengthening the argument that political processes protect the policymaking autonomy of the states.

The example of state marijuana legalization offers strong evidence supporting the notion that presidential politics can safeguard federalism under certain conditions. The medical marijuana example illustrates what those conditions are. Where a salient state policy choice is in tension with the prevailing national policy and is centered in electorally significant swing states, presidential aspirants anticipating a reasonably close election (not a landslide) are likely to stake out positions deferential to state policy

122 Cites
autonomy. The presidential aspirant might be an out-of-power candidate seeking the office for the first time, or an incumbent seeking re-election. The policies may be reflected in campaign statements or in actions taken by the re-election-conscious incumbent. The statements and actions may be equivocal. But, in the case of marijuana legalization, the 2012 presidential campaign reflected an environment in which state policy choices were given considerable latitude: neither party expressed unequivocal opposition to medical marijuana legalization, nor did either party make opposition to recreational marijuana legalization a focal point issue.

It might thus be said that presidential electoral politics can be a significant factor in safeguarding federalism. To the extent that presidential electoral politics affect presidential policies, the marijuana example illustrates how even a low-key approach to enforcement of federal law can go a long way toward creating a space for state policy autonomy. And on the marijuana legalization issue in particular, presidential electoral politics seems to have done far more to preserve state policy autonomy than judicial review has.