

5-1-2014

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### Recommended Citation

David S. Schwartz, *Presidential Politics as a Safeguard of Federalism: The Case of Marijuana Legalization*, 62 Buff. L. Rev. 599 (2014).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol62/iss3/3>

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# Presidential Politics as a Safeguard of Federalism: The Case of Marijuana Legalization

DAVID S. SCHWARTZ†

## INTRODUCTION

How does the United States constitutional system best preserve federalism? The debate over the so-called “political safeguards of federalism” asks whether federal courts can and should defer to the political process or instead apply non-deferential judicial review when confronting a claim that federal legislation has exceeded the enumerated powers of Congress.<sup>1</sup> With this debate now approaching its sixtieth year, its main lines of argument are well worn. Nevertheless, there are important aspects of the political

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1. The iconic exposition of this idea is Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). Influential developments and refinements of Wechsler’s ideas are found in JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 175, 171-259 (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 279 (2000). For leading examples of the argument against the political safeguards of federalism, see, for example, Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995); William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J. L. & PUB. POL’Y. 139 (1998); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

safeguards of federalism that have gone largely unrecognized or underappreciated and which, if analyzed more closely, could shed important new light on this decades-old debate. In this Article, I draw attention to two interrelated elements of political safeguards theory that warrant the scrutiny of constitutional scholars.

First, scholars on both sides of the political safeguards debate have underemphasized, if not ignored, the impact that presidential politics has in protecting the regulatory autonomy of states from undue encroachment by federal law. The main emphasis has instead always been placed on Congress, with further reference to political parties and only the vaguest of nods to the Electoral College. Yet as the chief executive with ultimate responsibility to enforce federal laws, the President is arguably positioned to have the most far-reaching impact on state regulatory autonomy of the three branches of the federal government. I argue that the political safeguards debate is radically incomplete without a robust account of the role of the President in protecting federalism.

Second, greater attention needs to be paid to questions of the responsiveness or sensitivity of federal governmental institutions to state autonomy. The debate on this issue has tended to fall into the error that Neil Komesar has identified as “single-institutional analysis,” when what is needed is *comparative* institutional analysis.<sup>2</sup> Specifically, scholars have debated political safeguards theory as if the question turned entirely on whether political structures make Congress sufficiently responsive to state autonomy, without seriously comparing that to how sensitive the courts are. A complete airing of the political safeguards debate requires *at least* a robust comparison of the relative institutional sensitivity to state autonomy of all three branches of the federal government.

This Article represents a step in that direction by undertaking that comparison with respect to a current

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2. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 6 (1994); NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 23 (2001).

federalism controversy: state marijuana legalization. This issue presents a momentous opportunity to make a case study of how the three branches of the federal government protect state regulatory autonomy.

Advocates of judicial protection argue that federal laws arguably encroaching on state sovereignty should be subject to rigorous and less- or non-deferential judicial review. 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 our federal system requires. This latter argument, dubbed “the political safeguards of federalism,”<sup>3</sup> 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. But proponents of the “political safeguards” theory have consistently overlooked an element of the political process that adds force to their theory. I argue that presidential electoral politics—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. Specifically, presidential electoral politics will tend to protect federalism when one or more key “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. Presidential aspirants or incumbent presidents thinking ahead to their own or their party successor’s election chances will shape their policies and issue positions with careful attention to the policy preferences of swing states.

These conditions are present in the current regulatory regime for marijuana. Marijuana legalization represents the most pointed federal-state policy conflict since racial desegregation. Allowed by twenty states,<sup>4</sup> medical use of

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3. Wechsler, *supra* note 1, at 543-46.

4. *Medical Use*, NAT’L ORG. FOR REFORM MARIJUANA LAWS (NORML), <http://norml.org/marijuana/medical> (last visited Mar. 22, 2014) [hereinafter *Medical Use*].

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 of state regulatory choice in this area 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. Meanwhile, Obama’s Republican rivals failed to make an issue of his Administration’s comparatively “soft-on-drugs” stance, signaling the abandonment of a presidential campaign strategy used consistently by Republicans for the past forty years. This record, I argue, provides strong evidence that presidential electoral politics can be far more sensitive to state regulatory autonomy interests than the courts and perhaps even than Congress.

#### 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 to laws classifying by race or infringing free speech.<sup>5</sup> But the Court applies deferential review to legislative classifications regulating economic matters.<sup>6</sup>

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5. *See, e.g.*, *Citizens United v. FEC*, 558 130 S. Ct. 876, 898 (2010) (applying strict scrutiny to laws regulating speech); *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) (applying strict scrutiny to racial classifications).

6. *See, e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) (reviewing economic regulations deferentially); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153-54 (1938) (same).

Laws reviewed non-deferentially are frequently struck down; laws reviewed deferentially, rarely so.<sup>7</sup>

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 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 degree 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.<sup>8</sup>

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.

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7. Compare, e.g., *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-15 (1993) (rational basis review "is a paradigm of judicial restraint"), with, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (Court has "frequently condemned" content discrimination in regulation of speech).

8. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

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.<sup>9</sup> Her phrase 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.<sup>10</sup> 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.<sup>11</sup> Between 1937 and 1942, the Court famously reversed course, 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 effect on interstate commerce.<sup>12</sup> This “substantial effects” test permits Congress to regulate not only major industries, but also very minor intrastate 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<sup>13</sup> and the

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9. *New York v. United States*, 505 U.S. 144, 160 (1992).

10. “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]” U.S. CONST. art. I, § 8, cl. 3.

11. *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918); *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895).

12. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942); *United States v. Darby*, 312 U.S. 100, 119 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

13. *Wickard*, 317 U.S. at 128-29.

application of the 1964 Civil Rights Act to a small roadside restaurant that refused to serve black patrons.<sup>14</sup>

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 had been satisfied. The Court 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. These were matters for the reasonable discretion of Congress.<sup>15</sup> So the law stood for nearly sixty years.

A less prominent line of doctrine applied 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."<sup>16</sup> 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.<sup>17</sup> 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."<sup>18</sup> At this point, the

14. *Katzenbach v. McClung*, 379 U.S. 294, 296-97, 304 (1964).

15. *See United States v. Lopez*, 514 U.S. 549, 603 (1995) (Souter, J., dissenting); *id.* at 616-17 (Breyer, J., dissenting).

16. U.S. CONST. amend. X.

17. *See, e.g., Hammer v. Dagenhart*, 247 U.S. 251, 273-74, 276 (1918) (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).

18. *United States v. Darby*, 312 U.S. 100, 123-24 (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 . . . .



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*.<sup>19</sup> There, the Court reversed a merely eight-year-old precedent<sup>20</sup> by holding that federal minimum wage laws could not be constitutionally applied to state and local government employees.<sup>21</sup> The Court reasoned that the Tenth Amendment prohibited Congress from regulating “the states as states,” and thus certain “traditional governmental functions” were immune from federal regulation.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

In its 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>25</sup> the Court reversed itself

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*Id.* at 124.

19. 426 U.S. 833 (1976).

20. *See* Maryland v. Wirtz, 392 U.S. 183, 187-88, 190-91 (1968) (holding that the federal Fair Labor Standards Act applied to state employees).

21. *Nat'l League of Cities*, 426 U.S. at 840.

22. *Id.* at 852, 855.

23. *See id.* at 834, 856 (Blackmun, J., concurring).

24. *See* EEOC v. Wyoming, 460 U.S. 226, 239 (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”); FERC v. Mississippi, 456 U.S. 742, 771 (1982) (upholding federal statute that required states to “consider” the enactment of various energy regulation standards because the law did not “compel the exercise of the State’s sovereign powers”); United Transp. Union v. Long Island R.R., 455 U.S. 678, 686-87 (1982) (applying federal Railway Labor Act to state operated railroad because railroad operation was not a traditional governmental function); Hodel v. Va. Surface Mining & Reclamation Ass’n 452 U.S. 264, 284-85, 288-89 (1981) (upholding federal environmental law against Tenth Amendment challenge because law did not impair state’s ability to perform traditional functions).

25. 469 U.S. 528 (1985).

for the second time in less than twenty years—a virtually unheard-of step—and overruled *National League of Cities*.<sup>26</sup> 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.<sup>27</sup> 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.”<sup>28</sup> Of significance for the argument of this Article, 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.<sup>29</sup> 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.”<sup>30</sup>

Rehnquist was partly correct. In 1991, the Court held that state sovereignty interests rooted in the Tenth Amendment mandated a limiting construction of the federal Age Discrimination in Employment Act such that the law would not prohibit states from imposing a mandatory

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26. *Id.* at 531.

27. *Id.* at 555-56.

28. *Id.* at 531.

29. *Id.* at 550-53.

30. *Id.* at 580 (Rehnquist, J., dissenting).

retirement age on state judges.<sup>31</sup> In 1992, the Court held that the Tenth Amendment prohibits Congress from “commandeering” state legislatures—ordering them to enact legislation to conform with federal policy.<sup>32</sup> And in 1997, the Court extended this anti-commandeering rule to state executive officials.<sup>33</sup>

Further, the Court since 1995 has gone beyond its re-revival of the Tenth Amendment to hold on three occasions that federal laws exceeded Congress’ power under the Commerce Clause. In 1995, the Court struck down a statute criminalizing gun possession in schools;<sup>34</sup> and in 2000, it struck down a federal damages remedy for victims of gender-motivated violence.<sup>35</sup> Most recently, in 2012, the Court held that the “individual mandate” 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.<sup>36</sup> The individual mandate is a federal requirement that individuals obtain health insurance or else pay a penalty or tax with their returns to the Internal Revenue Service;<sup>37</sup> the provision is intended to force free riders on the nation’s health care system to internalize their costs.<sup>38</sup>

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31. *See* Gregory v. Ashcroft, 501 U.S. 452, 460-63 (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. *Id.* at 460-61.

32. *See* New York v. United States, 505 U.S. 144, 176 (1992).

33. *Printz v. United States*, 521 U.S. 898, 935 (1997).

34. *United States v. Lopez*, 514 U.S. 549, 551-52 (1995).

35. *United States v. Morrison*, 529 U.S. 598, 625-27 (2000).

36. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585-86 (2012). The law was ultimately upheld as an exercise of the taxing power. *See id.* at 2598.

37. *Id.* at 2580.

38. The uninsured were seen by Congress as a group comprising either users of free emergency room services to meet their medical needs or else health insurance “market timers” trying to remain out of the fee-paying risk pool while they are still young and relatively healthy. *See id.* at 2588-91.

Few if any judges or commentators have seriously argued (rhetorical flourishes aside) that the developments since *Garcia* constitute a broad pendulum swing all the way 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.<sup>39</sup>

Even the Commerce Clause decisions—despite their occasional high profile—are relatively modest compared to pre-1937 doctrine. The Court’s current doctrine continues to hold that Congress can regulate any local economic activity that, taken in the aggregate, substantially affects interstate commerce.<sup>40</sup> 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.<sup>41</sup>

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39. See *Reno v. Condon*, 528 U.S. 141 (2000); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Indeed, the *Reno* Court indicated that “generally applicability” may not necessarily be a constitutional requirement of federal regulation of state governmental activities, so long as Congress does not commandeer the state by regulating the state’s regulation of private parties. *Reno*, 528 U.S. 141.

40. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 19 (2005).

41. *Id.* at 9.

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" theory 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 according to this argument, because the courts are poorly positioned to accomplish this task. Proponents of this view argue that 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.<sup>42</sup>

The phrase "political safeguards of federalism" is derived from a short but highly-influential article of that name published by Professor Herbert Wechsler in 1954.<sup>43</sup> Wechsler argued that "the national political process in the

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42. See, e.g., CHOPER, *supra* note 1, at 175, 171-259 (1980); Kramer, *supra* note 1, at 279.

43. Wechsler, *supra* note 1.

United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.”<sup>44</sup> Wechsler pointed in particular to structural protections of states built into the composition of the political branches of the federal government: equal representation of the states in the Senate (protecting small states from national majorities); selection of Senators and presidential electors by state legislatures; and state control over federal election procedures.<sup>45</sup> These elements would keep both Congress and the President attentive to state concerns and make vigorous judicial review of federal-state legislative boundaries unnecessary. “Federal intervention as against the states is thus primarily a matter for congressional determination in our system,” according to Wechsler.<sup>46</sup> On the other hand, “[t]he prime function envisaged for judicial review—in relation to federalism—was the maintainance [sic] of national supremacy against nullification or usurpation by the individual states”—and not, significantly, the other way around.<sup>47</sup> “[T]he Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process . . . .”<sup>48</sup>

Wechsler’s argument, as elaborated by subsequent scholars, was embraced and forcefully articulated thirty years later by the Supreme Court in *Garcia*.<sup>49</sup> 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

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44. *Id.* at 558.

45. *Id.* at 546-50.

46. *Id.* at 559.

47. *Id.*

48. *Id.*

49. *See generally* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 n.11 (1985). In addition to Wechsler’s article, the Court cited *CHOPER*, *supra* note 1, 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). *Garcia*, 469 U.S. at 551 n.11.

merely by relying on *a priori* definitions of state sovereignty.”<sup>50</sup> 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.”<sup>51</sup> Therefore, the Court has “no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.”<sup>52</sup> Instead:

[T]he 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 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.<sup>53</sup>

The Court next argued that these political structures reflected the Framers’ intent to protect federalism politically rather than judicially.<sup>54</sup> The Court then proceeded to consider practical political safeguards:

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

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50. *Garcia*, 469 U.S. at 548.

51. *Id.* at 550.

52. *Id.*

53. *Id.* at 550-51 (footnotes omitted) (citations omitted).

54. *Id.* at 551-52.

been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause.<sup>55</sup>

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. 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.”<sup>56</sup>

The *Garcia* majority embraced this theory while considering a federal law regulating the states rather than strictly private activity, but the rationale applies to interpretation of the Commerce Clause generally. It has been so understood by Justices since *Garcia*.<sup>57</sup> At the same time, *Garcia*’s embrace of the theory has not embedded the political safeguards theory as doctrine. The majorities in *Lopez*, *Morrison*, and *National Federation of Independent Businesses* largely ignored the argument, and their legal conclusions—based as they are on non-deferential review—are necessarily incompatible with it.

The “political safeguards of federalism” theory came under some academic criticism after *Garcia*.<sup>58</sup> The gist of the critics’ 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

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55. *Id.* at 552-53 (footnote omitted) (citations omitted).

56. *Id.* at 554 (footnote omitted).

57. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 649-50 (2000) (Souter, J., dissenting).

58. *See, e.g.*, Calabresi, *supra* note 1; Marshall, *supra* note 1; Prakash & Yoo, *supra* note 1; Yoo, *supra* note 1.



not function to protect state interests. The Framers' original design in which state legislatures had substantial roles in choosing Senators and electors has been supplanted by direct election of Senators and binding popular-vote selection of presidential electors.<sup>59</sup> Moreover, as acknowledged even by Professor Larry Kramer—who ultimately supported Wechsler's argument—sensitivity of Senators and Congressmen to their home constituencies does not necessarily translate into protectiveness of state *institutions*, insofar as home constituencies' policy preferences could well accord with broad federal laws that preempt state law policy choices.<sup>60</sup>

C. *Kramer's Revision of "Political Safeguards" and the Electoral College*

These weaknesses of the political safeguards theory were persuasively addressed in a 2000 article by Professor Larry 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.<sup>61</sup>

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.<sup>62</sup> Kramer developed this point further. The practical extent and impact of judicial enforcement of federalism, even in its pre-1937 heyday, had been greatly exaggerated, according to Kramer. Therefore, the non-

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59. See Kramer, *supra* note 1, at 224-26.

60. See *id.* at 222-23.

61. *Id.* at 219.

62. See Wechsler, *supra* note 1, at 558-60.

judicial safeguards of state independence must necessarily be even stronger than otherwise.<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup>

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 eighty-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."<sup>66</sup>

Kramer overlooks the potential of the Electoral College for safeguarding federalism because he limits 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

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63. Kramer, *supra* note 1, at 290.

64. *See id.* at 283-84 & n.269.

65. *See id.* at 227; Wechsler, *supra* note 1, at 545.

66. Kramer, *supra* note 1, at 225-26.

chosen by state legislatures and were therefore beholden to them.<sup>67</sup> But unless the political safeguards argument were limited strictly to one of the Framers'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 canvass and winner-take-all rule,” 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.<sup>68</sup> 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.”<sup>69</sup> But he fails to see how this might affect federalism, since 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 and local *institutions*.”<sup>70</sup> 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.<sup>71</sup> 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.”<sup>72</sup>

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67. Wechsler, *supra* note 1, at 552-58.

68. Kramer, *supra* note 1, at 225; see Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 946 (1996) (winner-take-all system of Electoral College was predominant throughout the states by 1832).

69. Kramer, *supra* note 1, at 225.

70. *Id.* at 222.

71. *Id.*

72. *Id.*

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—to legalize marijuana or to recognize same-sex marriage, for example—a federal decision to leave the policy determination to the states will indeed protect federalism as Kramer (correctly) defines it. As will be elaborated further below, the Obama Administration’s decision to dial back enforcement of the Controlled Substances Act (CSA) 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 in the federalism context to distinguish between federal policies based on their preemptive impact rather than on the geographical scope of the interests that motivate them. 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, whatever their motivation, tend to protect those state institutions.

In the end, 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 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.<sup>73</sup> 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

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73. See, e.g., Nate Silver, *Whistling Past Bubba*, FIVETHIRTYEIGHT (Nov. 10, 2008), <http://www.fivethirtyeight.com/2008/11/whistling-past-bubba.html> (providing historical context for the geographical and electoral vote-based strategy of Barack Obama’s 2008 campaign).

equaling or surpassing the required 270 electoral votes, but by winning vote majorities or pluralities in some particular grouping of fifty specific states with varying electoral votes—and varying policy choices. Put another way, neither Wechsler 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.

D. *Recent Developments in the Political Safeguards Debate*

More recent scholarship examining the question of political versus judicial safeguards of federalism has extended the analysis in greater detail to the executive branch—though without considering presidential electoral politics. Jessica Bulman-Pozen and Heather Gerken, for example, have argued that the political safeguards debate is largely irrelevant in a world where federal legislative power is virtually all-encompassing; the real safeguards of federalism stem not from efforts to protect state “sovereignty,” but rather from states’ ability to interpret or resist federal policies in implementing cooperative federalism programs.<sup>74</sup> One can argue over whether this description of federal-state relations accurately captures situations like drug criminalization, where federal and state governments have enacted parallel regimes rather than a regulatory regime that was vertically integrated by design. By focusing on state resistance and the federal government’s inability to control it as the primary determinant of federalism, Bulman-Pozen and Gerken’s account understates the degree to which the political system might place direct influence on the federal executive to refrain from engaging in preemptive federal regulation.

In a recent article, Robert Mikos focuses specifically on the example of state marijuana legalization against a backdrop of the CSA’s zero-tolerance policy.<sup>75</sup> Mikos argues

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74. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1282-83 (2009).

75. Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5 (2013).

that under-enforcement of federal law can create leeway for state policy experimentation.<sup>76</sup> Federal under-enforcement is a “political safeguard” because it stems from structural factors operating within the political branches, primarily resource allocation constraints. In the marijuana legalization context, these constraints include limited money to put agents on the ground and prosecute large numbers of cases, as well as limited political support for raising medical marijuana to a higher rank in the list of federal enforcement priorities. Mikos’s account raises a critical point, but overlooks another one. Under-enforcement in his account is a side effect of federal resource constraints combined with a generalized sensitivity to nationwide public opinion. But Mikos does not adequately consider how conscious policy decisions about enforcement priorities—decisions emanating from the President or top officials—might themselves drive under-enforcement of the federal marijuana prohibition. The Obama Administration’s conscious policy statements and positions on marijuana legalization suggest that the marijuana legalization story has more to do with the President’s political responsiveness to state autonomy on this issue than the resource constraint story gives credit for.

## 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. This issue starkly illustrates the challenges that can be raised by a federal regulatory regime that contradicts state laws. Under the federal Controlled Substances Act (CSA),<sup>77</sup> possession or use of marijuana for any purpose is flatly prohibited. But as of early 2014, the laws of twenty states plus the District of Columbia have enacted some form of legalization of marijuana—in most of these states for medicinal uses only.<sup>78</sup> The combination of a

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76. *See id.* at 5-9.

77. 21 U.S.C. §§ 801-904 (2012).

78. *Medical Use*, *supra* note 4 (follow hyperlinks for Alaska, Arizona, California, Colorado, District of Columbia, Maine, Massachusetts, Michigan, Montana, Nevada, and Oregon) (ballot initiatives); *id.* (follow hyperlinks for

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.<sup>79</sup>

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"<sup>80</sup> 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 near "zero tolerance" policy of his predecessor toward medical marijuana, adding another layer of complexity to the current regime of marijuana regulation.<sup>81</sup>

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Connecticut, Delaware, Hawaii, Illinois, Maryland, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, and Washington) (legislative acts).

79. See, e.g., Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 *FORDHAM L. REV.* 153, 197-98 (2004) (describing federalism conflict between state personal liberty and federal fugitive slave laws).

80. U.S. Const. art. II, § 3.

81. The Bush Administration adopted something like an official "zero tolerance" policy toward medical marijuana dispensaries by prosecuting dispensaries irrespective of their compliance with state law. In contrast, the Obama Administration focused enforcement efforts on dispensaries that were out of compliance with state law. See, e.g., *In First 100 Days, Obama Flips Bush Admin's Policies*, ABC NEWS (Apr. 29, 2009), <http://abcnews.go.com/Politics/Obama100days/story?id=7042171>. Apparently, federal authorities in the Bush years did not fully press criminal enforcement efforts against individual medical marijuana users. See Stuart S. Taylor, Jr., *Marijuana Policy and Presidential Leadership: How to Avoid a Federal-State Train Wreck*, GOVERNANCE STUD. BROOKINGS, Apr. 2013, at 20-21, [http://www.brookings.edu/~media/research/files/papers/2013/04/11%20marijuana%20legalization%20taylor/marijuana%20policy%20and%20presidential%20leadership\\_v27.pdf](http://www.brookings.edu/~media/research/files/papers/2013/04/11%20marijuana%20legalization%20taylor/marijuana%20policy%20and%20presidential%20leadership_v27.pdf). The *Raich* case, in which federal authorities raided the home of a medical marijuana user to destroy a small number of plants and then litigated the issue to the Supreme Court, demonstrated the Bush Administration's interest in publicizing, at least symbolically, something like a zero tolerance policy toward medical marijuana.

A. *State Marijuana Legalization*

Prior to 1996, the laws of all fifty states made criminal offenses of marijuana possession and distribution, similar to federal law.<sup>82</sup> But starting with California's enactment of its Compassionate Use Act by referendum in 1996, 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.<sup>83</sup> Two of these states, Colorado and Washington, have legalized "recreational" marijuana, but impose state controls akin to the more restrictive state laws regulating sale of alcoholic beverages.<sup>84</sup> These laws include both statutes and

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82. See *Gonzales v. Raich*, 545 U.S. 1, 5 ("In 1913, California was one of the first States to prohibit the sale and possession of marijuana, and [in 1996], California became the first State to authorize limited use of the drug for medicinal purposes."); *Our History*, MARIJUANA POL'Y PROJECT, <http://www.mpp.org/about/history.html> (last visited Mar. 23, 2014) (prior to 1995, medical marijuana was illegal in all 50 states).

83. See *Medical Use*, *supra* note 4. Maryland's law is more limited than other state laws: it provides an affirmative defense to criminal 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. See MD. CODE ANN., CRIM. LAW § 5-601(c)(3)(iii) (West 2012).

84. Colorado and Washington have treated the regulation of marijuana similarly to how states regulate alcohol. Colorado's Constitution was amended to allow for the "use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol." COLO. CONST. art. XVIII, § 16. Colorado's constitution goes on to say "marijuana should be regulated in a manner similar to alcohol." *Id.*; see also COLO. REV. STAT. § 18-18-406 (2013). In Washington, the Washington State Liquor Control Board will oversee the enforcement of the enacted marijuana regulations. WASH. REV. CODE §§ 46.61.502, 69.50.360-366, 413, 435 (2012). Both state laws have restrictions on age to use and buy marijuana as well as driving while under the influence of marijuana and public use restrictions. See *Colorado Laws & Penalties*, NORML, <http://norml.org/laws/item/colorado-penalties> (last visited Feb. 15, 2014); *Washington Laws & Penalties*, NORML, <http://norml.org/laws/item/washington-penalties-2> (last visited Feb. 15, 2014); see also *Colorado and Washington's New Approaches to Marijuana Policy, An Overview of Each State's Framework for Regulating Marijuana Similarly to Alcohol*, MARIJUANA POL'Y PROJECT, <http://www.mpp.org/assets/pdfs/library/COWAGrid.pdf> (last visited Mar. 19, 2014).



constitutional provisions and were enacted by state ballot initiatives or the states' legislative processes.<sup>85</sup>

State medical marijuana laws shield patients, doctors, caregivers, and (in some states) even dispensaries from arrest and state criminal drug prosecution under certain authorized conditions.<sup>86</sup> The state laws vary in details, such as the amounts that can be lawfully possessed, the health conditions that qualify for medical marijuana use, the required role of physicians, and other matters.<sup>87</sup> Other common provisions among state laws include delegating administration of the law to the state health agency,<sup>88</sup> establishing confidential, state-run patient registries,<sup>89</sup> and requiring a written prescription from a physician.<sup>90</sup> Several

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85. *Medical Use*, *supra* note 4 (follow hyperlinks for Arizona, District of Columbia, California, Colorado, Michigan, Montana, and Nevada) (ballot initiatives); *id.* (follow hyperlinks for Delaware, Hawaii, Maryland, New Jersey, New Mexico, Rhode Island, and Vermont) (legislative acts).

86. *See, e.g.*, Delaware Medical Marijuana Act, DEL. CODE ANN. tit. 16, § 4903A (West 2013).

87. Some state laws require that patients try conventional medical therapy before they can obtain medical marijuana prescriptions, e.g., Maine Medical Use of Marijuana Act, ME. REV. STAT. ANN. tit. 22, § 2422(2)(B) (West Supp. 2013); Washington State Medical Use of Cannabis Act, WASH. REV. CODE § 69.51A.010(6)(b)-(f) (2012), while others simply provide a list of pre-approved conditions for which medical marijuana can be prescribed. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11362.7(h) (West 2007); HAW. REV. STAT. § 329-121 (2010). Some states authorize medical marijuana prescriptions for a large variety of medical conditions, while others exercise tighter control over its acceptable use. *Compare* CAL. HEALTH & SAFETY CODE § 11362.7(h) (West 2007) (broad list plus catchall provision), *with* MONT. CODE ANN. § 50-46-302(2)(c) (2013) (limiting conditions to those involving chronic pain). *See also* ALASKA STAT. §§ 17.37.010(a), (d), (e) (2012); ARIZ. REV. STAT. ANN. § 36-2801(5) (2013) (caregiver provisions); *Medical Use*, *supra* note 4 (follow hyperlinks to Vermont, Alaska, Maine, Nevada, Hawaii, New Mexico, California, Oregon, Colorado, and Montana) (regulating permissible amounts of marijuana in possession).

88. *See, e.g.*, COLO. CONST. art. XVIII, § 14; ME. REV. STAT. tit. 22, §§ 2421-2430 (West Supp. 2013); N.J. STAT. ANN. §§ 24:6I-1, 24:6I-16 (West Supp. 2013).

89. *See, e.g.*, ALASKA STAT. § 17.37.01 (2012); DEL. CODE ANN. tit. 16, §§ 4908A-4912A, 4920A (West 2013); MONT. CODE ANN. § 50-46-303 (2013).

90. *See, e.g.*, NEV. REV. STAT. § 453A.170 (2009); R.I. GEN. LAWS § 21-28.6-3(15) (Supp. 2013); VT. STAT. ANN. tit. 18, § 4473(b)(2) (2012).

states have mandated government oversight of medical marijuana dispensaries.<sup>91</sup>

### 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.<sup>92</sup> The four schedules in the CSA purport to rank drugs by their levels of dangerousness, addictiveness, and medical utility.<sup>93</sup> 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.”<sup>94</sup> The CSA thus makes the manufacture, distribution, or possession of marijuana a criminal offense.<sup>95</sup> 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.<sup>96</sup>

Under the Supremacy Clause of the Constitution, Article VI, Clause 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. In the particular case of marijuana regulation, the possession, use, or distribution of marijuana remains illegal throughout the United States from the vantage point of individuals, even where permissible under

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91. See *Delaware: Federal Threats Halt Efforts to Implement State’s Medicinal Cannabis Law*, NORML (Feb. 16, 2012), <http://norml.org/news/2012/02/16/delaware-federal-threats-halt-efforts-to-implement-state-s-medicinal-cannabis-law>.

92. 21 U.S.C. § 812(c) Schedule I(c) (2012) (Tetrahydrocannabinols).

93. § 812(b) (2012).

94. § 812(b)(1)(A)-(B) (2012).

95. §§ 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. § 823(f).

96. §§ 841-844.

state law.<sup>97</sup> 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.<sup>98</sup> Yet these same activities remain subject to criminal sanctions 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 arrest and prosecution, the practical impact of state legalization is quite significant. This is the result of the simple fact that federal law enforcement resources are quite small relative to those of the states.<sup>99</sup> 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.<sup>100</sup>

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97. §§ 841-844 (2012).

98. See David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 576, 581-90 (2013).

99. There are at present approximately 120,000 federal law enforcement agents in the United States, compared to 765,000 at the state level. *Federal Law Enforcement Officers, 2008*, BUREAU JUST. STAT. (June 2012), <http://www.bjs.gov/content/pub/pdf/fleo08.pdf>. (“In September 2008, federal agencies employed approximately 120,000 full-time law enforcement officers who were authorized to make arrests and carry firearms in the United States.”); *Census of State and Local Law Enforcement Agencies, 2008*, BUREAU JUST. STAT. (July 2011), <http://bjs.gov/index.cfm?ty=pbdetail&iid=2216> (“State and local law enforcement agencies employed about 1,133,000 persons on a full-time basis in 2008, including 765,000 sworn personnel.”). Professor Mikos reports that “only 1 percent of the roughly 800,000 marijuana cases generated every year are handled by federal authorities.” Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1424 & n.10 (2009) (citing FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES (2007)).

100. See Matt Ferner, *Amendment 64 Passes: Colorado Legalizes Marijuana for Recreational Use*, HUFFINGTON POST (Nov. 20, 2012, 12:45 PM), [http://www.huffingtonpost.com/2012/11/06/amendment-64-passes-in-co\\_n\\_2079899.html](http://www.huffingtonpost.com/2012/11/06/amendment-64-passes-in-co_n_2079899.html); Jacob Sullum, *If Medical Marijuana in California Is De Facto Legalization, Why Not Make it Official?*, FORBES (Nov. 18, 2013, 11:35 AM),

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;<sup>101</sup> 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.

2. *The Obama Administration's Policy.* As a presidential candidate in 2008, Barack Obama said that an Obama Administration would stop DEA raids on providers of medical marijuana who were complying with state compassionate use laws.<sup>102</sup> 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" would seem to preclude a power to disregard an act of Congress based on a 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.<sup>103</sup> A credible

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<http://www.forbes.com/sites/jacobsullum/2013/11/18/if-medical-marijuana-in-california-is-de-facto-legalization-why-not-make-it-official>.

101. 21 U.S.C. § 811(a)(1)-(2).

102. John Tierney, *Obama to Stop Raids on Marijuana Clinics*, N.Y. TIMES (May 14, 2008), <http://tierneylab.blogs.nytimes.com/2008/05/14/obama-to-stop-raids-on-marijuana-clinics>.

103. *Compare* President Andrew Jackson, *Veto Message, July 10, 1832*, in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 576 (James D. Richardson ed., 1897) (supporting Jackson's veto of the Recharter of the Bank of the United States); *and* Memorandum from Walter Dellinger, Assistant Attorney General, on Presidential Authority to Decline to Execute Unconstitutional Statutes to The Honorable Abner J. Mikva, Counsel to the President (Nov. 2, 1994), *available at* <http://www.justice.gov/olc/nonexecut.htm>

argument was made in 2005 in *Gonzales v. Raich* 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. The fact that three Justices agreed with that argument might well have leant credibility to a presidential claim that the CSA was not constitutional as applied to medical marijuana.<sup>104</sup> Nevertheless, 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, would have been a politically risky move.

Far safer ground for his stated policy was reliance on the virtually unreviewable discretion of the executive to make prosecutorial resource allocation decisions.<sup>105</sup> The Obama Administration's policy in this regard was initially 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."<sup>106</sup> 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

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(noting that issue raises "difficult questions" but concluding that "there are circumstances" where the President has such authority), *with Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), *withdrawn in part en banc*, 893 F.2d 205 (9th Cir. 1989) ("The executive branch's attempt to arrogate to itself the power of judicial review is a paradigmatic violation of our system of separation of powers and checks and balances."); *and* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 729-30 (3d ed. 2000) (concluding the same and citing *Lear Siegler* case).

104. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., Rehnquist, J., and Thomas, J., dissenting).

105. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws.").

106. The Department of Justice, *Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, JUST. BLOG (Oct. 19, 2009), <http://blogs.justice.gov/main/archives/192>.

efficient and rational use of its limited investigative and prosecutorial resources.”<sup>107</sup> 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.<sup>108</sup>

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:

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,

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107. *Id.*

108. *Id.*

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 . . . .<sup>109</sup>

To be sure, this policy guidance creates a complicated picture due to the variation in state laws. For example, while Colorado and California laws 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. Attorney's office issued cease and desist letters to dispensaries in that state.<sup>110</sup>

In 2011, medical marijuana advocates began publicizing what they claimed to be a notable 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.<sup>111</sup> 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 near "zero tolerance" policy.<sup>112</sup> President Obama responded to questions about this in an April 2012 interview in *Rolling Stone* magazine:

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109. *Id.*

110. See Dwight C. Holton, U.S. Attorney, District of Oregon, *Notice to Owners, Operators and Landlords of Oregon Marijuana Dispensaries* (June 3, 2011), <http://www.calmca.org/wp-content/uploads/2011/06/OregonDOJwarnsPotAdvocates.pdf>.

111. See, e.g., Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 16-18 (2013); William Yardley, *New Federal Crackdown Confounds States that Allow Medical Marijuana*, N.Y. TIMES, May 8, 2011, at A13; *Feds Under Obama Appear Tougher On Medical Marijuana, Disappointing Voters*, FOX NEWS (Apr. 27, 2012), <http://www.foxnews.com/politics/2012/04/26/obama-still-unclear-on-medical-marijuana>.

112. See, e.g., Tim Dickinson, *Obama's War on Pot*, ROLLING STONE, Mar. 1, 2012, at 32, 32-35; see also *supra* note 81 and accompanying text.

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.<sup>113</sup>

It is important, however, to see through the political rhetoric of both President Obama and the marijuana legalization advocates. Both had an incentive to exaggerate the extent of CSA enforcement: the legalization advocates in hopes of shaming the President into a posture of increased permissiveness, and the President to continue walking a tightrope between courting marijuana legalization proponents and avoiding “soft-on-crime” attacks on his flank. What may be lost underneath the rhetoric is the subtlety of the Administration's enforcement approach that has relied heavily on “cease and desist” or “threat letters.”<sup>114</sup> If the intent of federal authorities were to maximize the deterrent effect of the CSA, the best approach would be to make random unannounced raids on dispensaries in the hope of scaring off those not actually raided. But a policy of sending a warning before making a raid has an anti-deterrent effect: it creates a safe harbor, in essence

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113. Jann S. Wenner, *Ready for the Fight*, ROLLING STONE, May 10, 2012, at 42, 42-49.

114. See, e.g., Bob Young, *DEA: Warning Letters to 11 Pot Dispensaries Don't Signal War on State Law*, SEATTLE TIMES (May 2, 2013, 5:54 AM), [http://seattletimes.com/html/localnews/2020902577\\_potdispensariesxml.html](http://seattletimes.com/html/localnews/2020902577_potdispensariesxml.html).



signaling marijuana distributors that they will not be raided if they have not received a threat letter. The policy allowed storefront medical marijuana dispensaries to continue to operate in large numbers in Colorado,<sup>115</sup> which provides the most detailed regulatory scheme.<sup>116</sup>

In the aftermath of the 2012 election, moreover, the Obama Administration seems to have returned to a more overtly low-key enforcement approach. Most notably, the policy of the 2009 Ogden memo was extended in late August 2013 to the “recreational use” laws recently enacted in Washington and Colorado. In a Memorandum for all U.S. Attorneys, the Justice Department expressed its “commit[ment] to using its limited investigative and prosecutorial resources to address the most significant threats” posed by distribution of marijuana by gangs or cartels, while leaving “lower-level or localized activity” to state and local law enforcement under state drug laws.<sup>117</sup>

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115. See John Ingold, *Colorado Medical-Marijuana Business Have Declined by 40 Percent*, DENVER POST (Mar. 3, 2013, 12:01 AM), [http://www.denverpost.com/ci\\_22706453/colorado-medical-marijuana-businesses-have-declined](http://www.denverpost.com/ci_22706453/colorado-medical-marijuana-businesses-have-declined). For a detailed history of the change in federal enforcement policy towards medical marijuana, see *Federal Enforcement Policy De-Prioritizing Medical Marijuana: Statements from Pres. Obama, His Spokesman, and the Justice Department*, MARIJUANA POLY PROJECT (Mar. 2013), <http://www.mpp.org/assets/pdfs/library/Federal-Enforcement-Policy-De-Prioritizing-Medical-Marijuana.pdf>.

116. For Colorado’s rules regarding the licensing, regulations, and sale of recreational marijuana, see COLO. CODE REGS. § 212-2 (2013), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%a2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251857416241&ssbinary=true>.

117. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice, on Guidance Regarding Marijuana Related Financial Crimes to All United States Attorneys (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. Federal priorities were expressly identified as:

Preventing the distribution of marijuana to minors; Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; Preventing the diversion of marijuana from states where it is legal under state law in some form to other states; Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; Preventing violence and the use of firearms in the cultivation and distribution of marijuana; Preventing drugged driving and the exacerbation of other

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.<sup>118</sup>

The memo goes on to assert that the policy guidance is not a legal defense to any marijuana prosecution nor a limit on the authority of the federal government to enforce the CSA fully; instead, the memo states that it is merely a guide to prosecutorial discretion and that U.S. Attorneys should review potential prosecutions on a case-by-case basis.<sup>119</sup>

### 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. As noted, states began enacting laws legalizing marijuana first for medicinal purposes, and more recently for recreational purposes, beginning in 1996. In that same time frame, the past four presidential election cycles have produced closer

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adverse public health consequences associated with marijuana use; Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public land; and Preventing marijuana possession or use on federal property.

*Id.*

118. *Id.*

119. *Id.*

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—at least 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. 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. Table 1 lists the twenty states and D.C., the year each adopted its medical marijuana legalization regime, and its electoral vote count in each cycle. Together, these states accounted for 187 to 190 electoral votes in the last four election cycles.<sup>120</sup> The next group of columns shows the popular vote differential for the state in each election cycle. Dark gray shading indicates that Republican, and light gray shading indicates that Democratic candidates won the state. As indicated by the shading, these states are overwhelmingly Democratic in

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120. The 2000 electoral vote totals are based on the 1990 census; the 2004 and 2008 totals are based on the 2000 census; and the 2012 totals are based on the 2010 census. See *Congressional Apportionment*, CENSUS.GOV (Nov. 2011), [http://www.census.gov/population/apportionment/data/2010\\_apportionment\\_results.html](http://www.census.gov/population/apportionment/data/2010_apportionment_results.html). For all electoral data and presidential election results, see DAVE LEIP'S ATLAS U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS> (last visited Mar. 23, 2014).

their voting, accounting for between 155 and 174 electoral votes in the Democratic column.

State	Year MJ Legal	Electoral Votes			Margin of Victory by %			
		'00	'04, '08	'12	'00	'04	'08	'12
Alaska	1998	3	3	3	31	26	22	14
Arizona	2010	8	10	11	6	10	8	9
California	1996	54	55	55	12	10	24	23
Colorado	2000	8	9	9	8	5	9	5
Connecticut	2012	8	7	7	17	10	22	17
Delaware	2011	2*	3	3	13	8	25	19
Dist. Columbia	2010	3	3	3	76	80	86	84
Hawaii	1998	4	4	4	18	9	45	43
Maine	1999	4	4	4	5	9	17	15
Maryland	2003	10	10	10	16	13	25	26
Massachusetts	2012	12	12	11	27	25	26	23
Michigan	2008	18	17	16	5	3	16	9
Montana	2004	3	3	3	25	21	2	14
Nevada	2000	4	5	6	4	3	12	7
New Jersey	2010	15	15	14	16	7	16	18
New Mexico	2007	5	5	5	0	1	15	10
Oregon	1998	7	7	7	0	4	16	12
Rhode Island	2006	4	4	4	29	21	28	27
Vermont	2004	3	3	3	10	20	37	36
Washington	1998	11	11	12	6	7	17	15
Total		186	190	190				
Total Rep.		26	35, 16	17				
Total Dem.		160	155, 174	173				

\* One electoral vote withheld in abstention.

**Table 1: Electoral Votes and Presidential Victory Margins in (Medical) Marijuana Legalization States**

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. These are indicated in Table 2. The first borrows Nate Silver's

definition of a “tipping point” state (NS-TP).<sup>121</sup> Silver defines a tipping point state as one likely to provide the 270th (i.e., the winning) electoral vote in a given election.<sup>122</sup> To Silver, this is the most salient measure of a state’s electoral importance in a given cycle, and it 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.<sup>123</sup> Table 2 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 margin was within twelve places of the national mean popular vote margin in the 2012 election. (The number twelve was chosen because it approximates a quartile of the fifty states).<sup>124</sup> “Flip” signifies that the state has “flipped,” that is, has produced an electoral majority 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 ten percent 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,

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121. See, e.g., Nate Silver, *Arizona is (Probably) Not a Swing State*, FIVETHIRTYEIGHT (Apr. 27, 2012, 7:56 AM), [http://fivethirtyeight.blogs.nytimes.com/2012/04/27/arizona-is-probably-not-a-swing-state/?\\_php=true&\\_type=blogs&\\_r=0](http://fivethirtyeight.blogs.nytimes.com/2012/04/27/arizona-is-probably-not-a-swing-state/?_php=true&_type=blogs&_r=0).

122. See *id.*

123. See *id.*

124. Nate Silver, *As Nation and Party Change, Republicans are at an Electoral Disadvantage*, FIVETHIRTYEIGHT (Nov. 8, 2012, 4:15 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/11/08/as-nation-and-parties-change-republicans-are-at-an-electoral-college-disadvantage> (discrepancies between Silver and Leip’s popular vote margins reflect refined data available after the Silver article’s publication).

when a major third party candidate drew a decisive number of votes away from the Republican).<sup>125</sup>

Thirteen of these marijuana legalization states meet at least one of these measures of a swing state and nine states meet at least two measures. In contrast, *only twelve non-marijuana states meet one or more of these criteria for "swing states."*<sup>126</sup> 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 seventeen to twenty electoral votes, each meet four swing state criteria. All three flipped between 2000 and 2012.<sup>127</sup> In 2000, Nevada could have tipped the election to Al Gore even without Florida; George W. Bush won Nevada that year by 3.55 percent. In 2004, Bush won all three by margins of less than 5 percent; 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 its peril.

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125. See Adam Nagourney, *Obama Camp, Seeing Shift, Bets on Long Shot in Arizona*, N.Y. TIMES (Apr. 15, 2012), <http://www.nytimes.com/2012/04/16/us/politics/obama-campaign-turns-attention-on-arizona.html?pagewanted=all>.

126. These are: Florida, Indiana, Iowa, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, Virginia, West Virginia, and Wisconsin.

127. Seven non-marijuana states flipped in the same time frame: Florida, Indiana, Iowa, New Hampshire, North Carolina, Ohio, and Virginia.

State	Year MJ Legal	Electoral Votes			NS- TP	W/in 12	Flip	<10
		'00	'04, '08	'12				
Alaska	1998	3	3	3		x		
Arizona	2010	8	10	11		x	x	
California	1996	54	55	55				
Colorado	2000	8	9	9	x	x	x	
Connecticut	2012	8	7	7				
Delaware	2011	3	3	3			x	
Dist. Columbia	2010	2*	3	3			x	
Hawaii	1998	4	4	4			x	
Maine	1999	4	4	4		x	x	
Maryland	2003	10	10	10				
Massachusetts	2012	12	12	11				
Michigan	2008	18	17	16	x	x	x	
Montana	2004	3	3	3		x	x	
Nevada	2000	4	5	6	x	x	x	
New Jersey	2010	15	15	14			x	
New Mexico	2007	5	5	5	x	x	x	
Oregon	1998	7	7	7	x	x	x	
Rhode Island	2006	4	4	4				
Vermont	2004	3	3	3				
Washington	1998	11	11	12		x	x	

\* One electoral vote withheld in abstention.

**Table 2: Marijuana Legalization States Meeting One or More Swing State Criteria**

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.

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 flipped from the Republican to Democratic column in 2008 and 2012, and it meets all four swing state criteria. Although President Obama won the state by just over five percent 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.<sup>128</sup> This means that, 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 has indeed been occurring.

#### B. *Drug Policy and Presidential Campaigns*

How have recent presidential campaigns treated the marijuana issue? In 2012, both major party campaigns came out seemingly opposed to recreational marijuana legalization, and their 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

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128. 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 nine electoral votes. See Nate Silver, *As Nation and Parties Change, Republicans Are at an Electoral College Disadvantage*, FIVETHIRTYEIGHT (Nov. 8, 2012, 4:15 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/11/08/as-nation-and-parties-change-republicans-are-at-an-electoral-college-disadvantage>.



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 2008 and 2012 campaigns of John McCain and Mitt Romney adopted a strikingly low-key approach.

For nine presidential election cycles in the thirty-two years from 1968 to 2000, crime, drugs, 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, declined to vigorously enforce the Controlled Substances Act against medical marijuana states. The fact that the Romney campaign declined to do this—and that the McCain campaign similarly declined to try this strategy when candidate Obama had made statements promising a low-key approach toward medical marijuana—cries out for explanation. A complete explanation undoubtedly includes several factors beyond the scope of this Article—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 Article 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.<sup>129</sup> He did so by pursuing his so-called “southern strategy,” to peel away the

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129. 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). *See, e.g.*, 1 CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 754-63 (John L. Moore, Jon P. Preimesberger, & David R. Tarr eds., 4th ed. 2001).

eleven states of the “old South” (the former Confederacy) from the Democratic electoral column.<sup>130</sup> He was largely successful.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup>

After 1968, crime featured as a major element in every Republican presidential campaign for the next thirty-two 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 black parolee released during Dukakis’ governorship illustrated by lurid images of the dark-skinned Horton.<sup>134</sup>

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-

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130. See, e.g., DAN T. CARTER, *FROM GEORGE WALLACE TO NEWT GINGRICH: RACE IN THE CONSERVATIVE COUNTERREVOLUTION, 1963-1994*, at 27-29 (1996).

131. 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.

132. See, e.g., EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2002); CARTER, *supra* note 130; James Boyd, *Nixon’s Southern Strategy ‘It’s All in the Charts,’* N.Y. TIMES, May 17, 1970, at 25, 105-11.

133. Compare *Republican Platform 1960*, in 2 NATIONAL PARTY PLATFORMS 604-21 (Donald B. Johnson ed., 1978), with *Republican Platform 1968*, in 2 NATIONAL PARTY PLATFORMS, *supra*, at 748-63.

134. See JACK W. GERMOND & JULES WITCOVER, *WHOSE BROAD STRIPES AND BRIGHT STARS?: THE TRIVIAL PURSUIT OF PRESIDENCY*, 1988, at 10-12, 357-58, 410-11, 422-23 (1989); Morgan Whittaker, *The Legacy of the Willie Horton Ad Lives On, 25 Years Later*, MSNBC.COM (Oct. 28, 2013, 10:14 AM), <http://www.msnbc.com/msnbc/the-legacy-the-willie-horton-ad-lives>.

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.”<sup>135</sup> In nine of the ten presidential election years from 1968 to 2004, the Republican platform devoted language of significant quantity and vehemence to combatting illegal drugs, attacking Democrats as permissive on drug policies in particular and soft on crime more generally. The 1972 Republican Platform focused great attention on “the twin evils of crime and drug abuse,” and decried “[t]he 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.”<sup>136</sup> After an uncharacteristically mild year on the topic during Gerald Ford’s campaign in 1976,<sup>137</sup> 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.<sup>138</sup>

In 1984, the Republican platform “reaffirm[ed] that the eradication of illegal drug traffic is a top national

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135. *Republican Platform 1968*, in 2 NATIONAL PARTY PLATFORMS, *supra* note 133, at 748-63.

136. *Republican Platform 1972*, in 2 NATIONAL PARTY PLATFORMS, *supra* note 133, at 851-86.

137. 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[.]” *Republican Platform 1976*, in NATIONAL PARTY PLATFORM, *supra* note 133, at 965-94.

138. *Republican Party Platform of 1980, July 15, 1980*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25844> (last visited Feb. 28, 2014).

priority.”<sup>139</sup> 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”).<sup>140</sup> The 1992 platform argued that “[n]arcotics drives street crime” and reaffirmed that “[t]he 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[.]”<sup>141</sup> Drug and crime planks continued to appear in the 1996, 2000, and 2004 platforms in which, each time, the GOP assailed what it deemed to be the under-enforcement of anti-drug laws during the Clinton Administration.<sup>142</sup>

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139. *Republican Party Platform of 1984, August 20, 1984*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=25845> (last visited Feb. 28, 2014).

140. *Republican Party Platform of 1988, August 16, 1988*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=25846> (last visited Feb. 28, 2014).

141. *Republican Party Platform of 1992, August 17, 1992*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25847> (last visited Feb. 28, 2014).

142. 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.

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.<sup>143</sup> 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.”<sup>144</sup>

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*Republican Party Platform of 1996, August 12, 1996*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25848> (last visited Feb. 28, 2014).

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.

*Republican Party Platform of 2000, July 31, 2000*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25849> (last visited Feb. 28, 2014).

“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.” *Republican Party Platform of 2004, August 30, 2004*, AM. PRESIDENCY PROJECT, <http://www.presidence.ucsb.edu/ws/?pid=25850> (last visited Feb. 28, 2014).

143. ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 20-21 (2003).

144. *Republican Platform 1968*, in 2 NATIONAL PARTY PLATFORMS, *supra* note 133, at 748, 751.

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.”<sup>145</sup> The 1984 Republican platform espousing Ronald Reagan’s re-election bid touted the Reagan Administration’s “aggressive Marijuana Eradication and Suppression Program” (1984).<sup>146</sup> 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.”<sup>147</sup> 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.<sup>148</sup>

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.<sup>149</sup>

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145. *Republican Platform 1972*, in 2 NATIONAL PARTY PLATFORMS, *supra* note 133, at 851, 870.

146. *Republican Party Platform of 1984, August 20, 1984*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=25845> (last visited Feb. 28, 2014).

147. *Republican Party Platform of 1992, August 17, 1992*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25847> (last visited Feb. 28, 2014).

148. *Republican Party Platform of 1996, August 12, 1996*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25848> (last visited Feb. 28, 2014).

149. *Id.*

Significantly, this platform was written for the election in which 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.<sup>150</sup> Clinton won the state by a 13% margin, though he received a smaller percentage of the total vote than that in favor of the medical marijuana initiative (51% compared to nearly 56%).<sup>151</sup>

The Republican platforms began to show a marked change around 2000. That year, the attack on the Clinton drug policies was couched in terms of protection of children and schools rather than as a war on crime.<sup>152</sup> 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.<sup>153</sup> In 2008 and 2012, the Republican platforms no longer linked the “war on drugs” to a domestic crime

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150. See Bill Jones, California Secretary of State, *Statement of Vote*, Nov. 5, 1996, at i, 3, 42, <http://www.sos.ca.gov/elections/sov/1996-general/sov-complete.pdf>.

151. *Id.*

152. The platform stated:

The entire nation has suffered from the administration's virtual surrender in the war against drugs, but children in poor communities have paid the highest price in the threat of addiction and the daily reality of violence. Drug kingpins have turned entire neighborhoods into wastelands and ruined uncounted lives with their poison. The statistics are shocking. Since 1992, among 10th graders, overall drug use has increased 55 percent, marijuana and hashish use has risen 91 percent, heroin use has gone up 92 percent, and cocaine use has soared 133 percent. Not surprisingly, teen attitudes toward drug abuse have veered sharply away from disapproval. With abundant supplies in their deadly arsenal, drug traffickers are targeting younger children, as well as rural kids.

Still, there is no substitute for presidential leadership, whether internationally or here at home, where America's families cry out for safe, drug-free schools.

*Republican Party Platform of 2000, July 31, 2000*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25849> (last visited Feb. 28, 2013).

153. *Republican Party Platform of 2004, August 30, 2004*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25850> (last visited Feb. 28, 2014).

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.”<sup>154</sup>

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.<sup>155</sup> 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.<sup>156</sup>

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 twenty Republican Party primary

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154. *2008 Republican Party Platform, September 1, 2008*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=78545> (last visited Feb. 28, 2014).

155. 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. *See Democratic Party Platform of 1984, July 16, 1984*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29608> (last visited Feb. 28, 2014).

156. *See Republican Party Platform of 1996, August 12, 1996*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25848> (last visited Feb. 28, 2014); *Republican Party Platform of 2000, July 31, 2000*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25849> (last visited Feb. 28, 2014).



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.<sup>157</sup> Otherwise, the Republican candidates stayed on what appears to have been the GOP message, making their very few references to illegal drugs in the context of immigration and national security.<sup>158</sup>

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 major campaign issue of it.<sup>159</sup> Mitt Romney, far from attacking 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?"<sup>160</sup> Romney's position was reluctantly stated, somewhat equivocally, and often through proxies and campaign spokespersons rather than by himself directly. For example, when Romney's running mate Paul Ryan stated, in response to a reporter's question, that medical marijuana legalization

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157. *Republican Candidates Debate in Washington, DC, November 22, 2011*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=97332> (last visited Mar. 24, 2014).

158. See generally *Presidential Debates 1960-2012*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/debates.php> (last visited Mar. 24, 2014). The one exception was Ron Paul, who spoke of the disproportionate rate of incarceration of African Americans for drug crimes. *Republican Candidates Debate in Myrtle Beach, South Carolina, January 16, 2012*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=98929> (last visited Mar. 24, 2014).

159. 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. See *Presidential Debate in San Diego, October 16, 1996*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=52115> (last visited Mar. 24, 2014).

160. Kristen Wyatt, *Colorado Pot Vote Could Affect Obama-Romney Race*, ASSOCIATED PRESS (June 5, 2012, 3:33 AM), [bigstory.ap.org/article/colo-vote-pot-could-affect-obama-romney-race](http://bigstory.ap.org/article/colo-vote-pot-could-affect-obama-romney-race).

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.<sup>161</sup> 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 perhaps be entered in the ledger as evidence against the “Colorado” thesis argued in this Article. 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 the Cole memo’s distinct softening of the Administration’s previous hard line stance toward state recreational legalization may well reflect solicitude toward Colorado and other swing states in anticipation of Obama’s Democratic successors’ 2016 presidential race.

#### IV. POLITICAL SAFEGUARDS AND PRESIDENTIAL POLITICS

The previous two Sections provide a striking illustration of how a President, responsive to electoral politics, will have both the incentive and the ability to be responsive to state policy choices—at least if those policy choices are salient and localized in at least some electorally important states. It remains to be considered how presidential politics, as a political safeguard of federalism, relates to the traditional framework in which political safeguards are congressionally-focused and the only alternative is judicial safeguards in the form of non-deferential judicial review.

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161. Daniel Politi, *Paul Ryan: States Have the Right to Legalize Medical Marijuana*, SLATE.COM (Sept. 8, 2012, 1:37 PM), [http://www.slate.com/blogs/the\\_slatest/2012/09/08/paul\\_ryan\\_says\\_medical\\_marijuana\\_legalization\\_is\\_up\\_to\\_states.html](http://www.slate.com/blogs/the_slatest/2012/09/08/paul_ryan_says_medical_marijuana_legalization_is_up_to_states.html).

To date, the political safeguards of federalism debate has under-emphasized the question of the relative sensitivity of the three branches of government to state autonomy interests. Here, I do not purport to complete this task but simply to begin it: continuing to focus on state marijuana legalization as an example, I will offer some thoughts about the kinds of questions that need to be answered if the political safeguards of federalism debate is to go forward in any constructive way.

Any account of safeguards of federalism will be incomplete and distorted unless it takes adequate account of the post-New Deal regulatory environment.<sup>162</sup> In this environment, federal regulatory jurisdiction is nearly coextensive with that of the states, and federal regulations occupy broad swaths of our regulated lives. In this environment, the idea that constitutional barriers will protect state autonomy by blocking federal attempts to enter legislative fields is at best an incomplete picture and at worst, quaint.

A more complete and up-to-date set of questions asks what the three branches of government can do to roll back, or limit the preemptive effect of, existing federal legislation. Courts can strike down federal laws or else interpret them in ways that leave policy-making latitude for states. Congress can repeal laws or amend them. The President can enforce them. In this Section, I argue that the President may well be in the best position of the three branches to protect federalism, at least in some circumstances. As will be seen, in the instance of marijuana legalization, the President may well have the greatest sensitivity of the three branches to state political aspirations and may have the most flexibility in crafting responsive measures. We will look at each of the three branches in turn.

#### A. *The Courts*

In this Article, I do not purport to argue that judicial review has no, or little, role in safeguarding federalism. But proponents of judicial safeguards of federalism would do

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162. See, e.g., Bulman-Pozen & Gerkin, *supra* note 74, at 1282-83.

well to consider how well-positioned courts in fact are to do so.

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 *United States v. Oakland Cannabis Buyers' Cooperative*, the Court upheld an injunction shutting down a California medical marijuana dispensary operating in accordance with California's "compassionate use" law.<sup>163</sup> The Court rejected the argument that the state policy could be accommodated by reading a "medical necessity" defense into the federal CSA.<sup>164</sup> In 2005 in *Gonzales v. Raich*, 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.<sup>165</sup> 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 had caused them to strike down two prior federal statutes and that reasserted itself in their votes to strike down Obamacare in 2012.<sup>166</sup> As far as the Supreme Court seems to be concerned, Congress has plenary power over drug policy in the United States.

Perhaps it is unsurprising that the Court has done nothing for state policy autonomy in this area. The blunt instrument of striking down laws as exceeding the legislative power of Congress is available in very few cases in the absence of a drastic revision of judicial philosophy

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163. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486-89, 498-99 (2001).

164. *Id.* at 490.

165. *Gonzales v. Raich*, 545 U.S. 1, 8-9 (2005).

166. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2642-47 (2012) (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting).

regarding the Commerce Clause and other powers of Congress. This post-New Deal judicial philosophy is made up in part of a constitutional notion of deference to legislative choices, and in part on the related ideas that economics infuses most social problems, and that most social problems are plausibly—and perhaps presumptively—viewed as national. In this regulatory environment, localism results from a devolutionary policy-making approach consciously chosen at the center rather than a fixed decision embedded in the constitution. These ideas are virtually indisputable, and since disputing them is more of a political choice than a legal theory, constitutional law has little to say on the matter.

In theory, the Court could develop a more refined set of doctrinal tools by using statutory interpretation to safeguard federalism. In *Raich*, the Court could easily have held that the CSA did not intend to pre-empt state law experiments with marijuana legalization. Existing “clear statement” rules would have provided one obvious avenue.<sup>167</sup> While it might have stretched a point to apply these presumptions to the CSA, it would not have stretched credulity close to the breaking point. The advantage of these approaches is precisely that they do not invoke judicial review. As statutory interpretation techniques, they are subject to Congressional override. They are thus more deferential and better suited to more frequent use than the more radical step of striking down laws.<sup>168</sup>

The fact is that the Court has been loath to adhere to a strict and consistent application of federalism-protective, clear statement rules, especially when it comes to applying the presumption against preemption,<sup>169</sup> and it is worth thinking about why. Perhaps a good-faith effort to balance federal and state power makes the Court reluctant to use the clear statement rules in a systematic way to promote

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167. See Schwartz, *supra* note 98, at 626-28.

168. See *id.* at 633-34; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 35, 101, 126 (2004).

169. See Schwartz, *supra* note 98, at 606; Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 258, 307-10 (2011).

state policymaking autonomy on the ground that, as a practical matter, they are not much more deferential to Congress than judicial review. But it is also worth noting that a strong—that is, uniform or blanket—application of these doctrines would be more protective of state autonomy, but at a cost: not only to the application of federal power but to judicial policy discretion. The more federalism-protective doctrines of statutory interpretation are applied on a “case-by-case” basis, the more discretion the Justices have to indulge a substantive policy preference for the particular state or federal law at issue.

Both in terms of structure and inclination, the courts may not be the best-positioned of the three branches to protect federalism. To the extent that the judicial safeguards of federalism require imposing constitutional limits on Congressional power, the Court’s opportunity to do so rarely arises. And the Court is disinclined to make more than occasional use of clear statement rules to protect federalism, possibly because the Justices’ own ability to influence substantive policy would be weakened by tying their hands in that way.

#### B. *Congress*

In theory, Congress is thought to be the most politically sensitive of the three branches to state autonomy. Proponents of the political safeguards theory have pointed to state representation in Congress, the connection of national legislators to state party organizations, and the presence of state and local governmental lobbying organizations, among other factors.<sup>170</sup> Proponents have also pointed to the enduring tradition of localism rooted in popular sentiment: the widespread belief that many problems are best handled at subnational levels of government.<sup>171</sup> And national politicians have long recognized the advantages of ducking politically volatile

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170. See *supra* Parts I.B-I.C.

171. See, e.g., Kramer, *supra* note 1, at 220; Wechsler, *supra* note 1, at 546.

questions by contending that they are issues “for the states.”<sup>172</sup>

Without denigrating any of these factors, it is worth pointing to certain countervailing ones illustrated by the marijuana legalization problem. Congress has two potential ways to safeguard federalism where an existing law preempts state policy choices: it can repeal the law or amend it. Marijuana legalization does not depend on repeal of the CSA, and various possible amendments could give room to states to experiment with legalization laws. Most obviously, Congress could create some sort of exemption from the CSA for persons in compliance with state marijuana laws. A narrower approach—one that would not acknowledge state permission for recreational use—would be to move marijuana from the CSA’s schedule I (illegal for all purposes) to a lesser schedule, thereby permitting medical use of marijuana along the other lines of other controlled medications.

No matter what, Congress must legislate in order to respond to state marijuana legalization initiatives. The “veto gates” and barriers to federal lawmaking observed by Bradford Clark—constitutional and otherwise—may well protect federalism where no federal regulation is already in place.<sup>173</sup> But they have just the opposite effect where there is a federal law, such as the CSA. On top of the veto gates in general, the CSA is subject to the phenomenon that criminal statutes are notorious legislative ratchets—much easier to enact than to repeal.<sup>174</sup> Any politician seeking to roll back a criminal law risks being labeled “soft on crime” at the next election.

Virtually all participants in the political safeguards debate—whether proponents like Wechsler or Kramer,

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172. See José D. Villalobos, *Issue Evasion*, in 1 ENCYCLOPEDIA OF U.S. CAMPAIGNS, ELECTIONS AND ELECTORAL BEHAVIOR 334, 334-35 (Kenneth F. Warren ed., 2008).

173. Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1681 (2008).

174. Schwartz, *supra* note 98, at 573 & n.14; see, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 545-47 (2001).

critics like Yoo or Calabresi, revisionists like Clark, or the justices themselves—have assumed that federalism safeguards, whatever they may be, must necessarily and only operate as a *check against* federal legislation that encroaches on state prerogatives. As Wechsler put it, the political safeguards are “intrinsicly well adapted to *retarding or restraining new intrusions* by the center on the domain of the states.”<sup>175</sup> They uniformly overlook situations such as that presented by the CSA, where Congress has already acted to preempt the states, so that further federal legislation is needed to make room for states to effectuate their own policies. In such instances, the Constitution’s congressional structures do comparatively little to *undo old intrusions*.

Considering how often federalism debaters quote Brandeis’s “states as laboratories of experimentation in social policy,”<sup>176</sup> the oversight is surprising. Brandeis envisions a policy experiment undertaken by “a single courageous state.”<sup>177</sup> But no matter how responsive that state’s congressional delegation is to state policy preferences, that single state’s delegation will be very far from commanding a legislative majority. Where a federal statute commands widespread national support, it is hard to imagine Congress responding favorably to the wishes of a single, a few, or even a sizable plurality of “courageous states” seeking to experiment. As has been well documented, Congress has already ignored numerous appeals from experimenting states to modify the CSA’s flat-out ban on marijuana. Congress may not choose to respond favorably to state marijuana legalization initiatives until a broad national consensus supports such a response, particularly given the need for individual members of Congress for cover from a “soft on crime” label. At that point, a policy shift by Congress would constitute an exceedingly watered-down instance of a political safeguard of federalism.

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175. Wechsler, *supra* note 1, at 558 (emphasis added).

176. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

177. *Id.*



*C. The President*

I do not contend that the President necessarily and always is the best positioned of the three branches to protect federalism as a structural matter or in practice. In the case of marijuana legalization, however, events have clearly shown the President to be the most politically sensitive to the policy initiatives of a minority of states and the best-positioned to craft a flexible response.

As we have seen, the policy preference of a relatively small number of electoral swing states has commanded the attention of both political parties. It appears to have motivated the incumbent administration to markedly alter its enforcement practices in deference to state legalization experiments. And it appears to have caused the Republican Party to back away from its traditional “tough on crime” posture, as its platforms and candidates have opted to avoid the marijuana legalization question as much as possible—thereby giving the Obama Administration more latitude to play to the interests and preferences of the marijuana legalization states.

It might be argued in response that twenty marijuana legalization states add up to a broad national trend rather than a scattered state-level policy preference. But two points weigh against such a counterargument. First, it seems unlikely that the Republicans would have abandoned their historical “red meat” issue had marijuana legalization been localized in safe-Democratic states. At the same time, the Democrats might well have determined they could count on winning states like Maryland, Massachusetts, and Vermont even if the Obama Administration had taken a tougher enforcement line on marijuana legalization. In other words, what decisively influenced the presidential campaigns on the marijuana issue was most likely the policy preference of a relatively small subset of thirteen or fewer swing states. It is entirely plausible that presidential politics would have taken the same approach to marijuana legalization if that had been limited to a single state—Colorado. It is thus fair to say that the presidential politics has shown a high degree of sensitivity to autonomous state policy choices in this area.

Looking at how a sitting President can respond to such political signals, what we see is significant flexibility filtered through a seemingly limited category of prosecutorial discretion. It is no secret that the on-the-ground enforcement of the law has a tremendous impact on a law's ability to influence behavior. Robert Mikos has argued that executive branch under-enforcement of a federal regulation can be protective of federalism where, as here, full enforcement of the criminal prohibition requires a significant commitment of resources in the form of law enforcement agents and prosecutors.<sup>178</sup> While Mikos's point is no doubt correct as far as it goes, it does not fully capture the reality of the Obama Administration's approach to marijuana legalization. Nor does his argument fully appreciate the significant difference between under-enforcement as an epiphenomenon of resource constraints (Mikos's description) and under-enforcement stemming from a conscious, announced policy choice. For one thing, a conscious, announced policy by the Executive Branch allows the President to reap a political benefit from voters that mere under-enforcement does not. For another thing, the deterrent effect of the law will differ in the two situations: more people are likely to be deterred by the law on the books than will be deterred when told expressly that the law will not be enforced.

In theory, the interpretive and enforcement discretion of the Executive Branch gives it a range of options for accommodating state policies that contradict the letter of federal law, constrained by the President's duty to "take care that the laws be faithfully executed." The Obama Administration has not chosen to follow the statutorily authorized path of removing marijuana from schedule I.<sup>179</sup> The Justice Department has stopped short, though not far

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178. Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 *DENV. U. L. REV.* 997, 1004-09 (2012).

179. The failure of the administration to pursue this avenue illustrates a significant limits placed on Congressional options. Congress can try to safeguard federalism by statutory provisions giving the executive branch discretion to grant a waiver, but this may simply fob off the safeguard of federalism to the Executive Branch.

short, of announcing a formal waiver of the CSA to accommodate state legalization laws. By couching the policy determination in terms of prosecutorial discretion, the Obama Administration avoids judicial review of the action<sup>180</sup> while minimizing the political risk inherent in a more formal shift in the governing law or in a charge that the President is not enforcing the law in good faith. The prosecutorial discretion/enforcement priorities approach is thus more flexible than the formal legal avenues available to the other branches, because it can achieve far-reaching practical effects while minimizing political backlash.

#### 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’ 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 presidential electoral politics 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

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180. *See* *United States v. Armstrong*, 517 U.S. 456, 464-70 (1996) (prosecutorial discretion not judicially reviewable absent a well-supported claim of race discrimination). Moreover, it is doubtful whether anyone would have standing to raise a claim of the President’s failure to enforce the CSA. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-78 (1992) (no standing to pursue generalized grievance stemming from non-enforcement of federal law); *see also* *Dalton v. Specter*, 511 U.S. 462, 469-79 (1994) (no Administrative Procedure Act review of presidential decisions).

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 autonomy. The presidential aspirant might be an out-of-power candidate seeking the office for the first time or an incumbent seeking re-election or seeking to protect the election chances of his party's choice of successor. 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.