



EMORY  
LAW

Emory Corporate Governance and Accountability  
Review

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Volume 4  
Issue 0 *Presidential Inauguration Issue*

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2017

## Marijuana on Trial: Who Decides?

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### Recommended Citation

William Nettles & Prasad Hurra, *Marijuana on Trial: Who Decides?*, 4 Emory Corp. Governance & Accountability Rev. 209 (2017).

Available at: <https://scholarlycommons.law.emory.edu/ecgar/vol4/iss0/20>

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## MARIJUANA ON TRIAL

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Marijuana is becoming more prevalent in communities and states all around the country. Marijuana dispensaries opened in Illinois in late 2015; medical marijuana became available in New York in February 2016; the First Church of Cannabis received approval to operate as a church the day after Indiana Governor Pence signed a new religious freedom law in 2015; and voters in Ohio just defeated (64% to 36%) an initiative that would have amended the state constitution to grant a monopoly on commercial cultivation of cannabis to a small group of investors.

The local regulatory issues connected with this burgeoning interest in cannabis legalization are similar to many of the zoning and planning issues that local government attorneys deal with on a regular basis: moratoria, distance restrictions, nuisance law, zoning definitions, licenses and permits, and sign regulations to name a few.<sup>1</sup>

The preemption issues, however, add a whole new layer of complexity. This article focuses on the uneasy dance between the federal government and those states that have legalized marijuana in some fashion—whether for medicinal purposes or recreational use—and the efforts by many local governments to regulate marijuana cultivation, processing, distribution, and sales despite the fact that it remains a federal crime.<sup>2</sup>

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<sup>1</sup> See Patricia E. Salkin & Zachary Kansler, *Medical Marijuana Zoned Out: Local Regulation Meets State Acceptance and Federal Quiet Acquiescence*, 16 DRAKE J. AGRIC. L. 295 (2011).

<sup>2</sup> See Robert A. Mikos, *Marijuana Localism*, 65 CASE W. L. REV. 719 (2015).

### ***The Background***

When Congress (not physicians) decided nearly half a century ago to classify marijuana (or “marihuana” as it was spelled in the law) as a Schedule I substance under the Controlled Substances Act (CSA),<sup>3</sup> they deemed it had “no currently accepted medical use” and belonged in the most dangerous class of drugs. According to Gallup polling at that time,<sup>4</sup> a mere 12% of Americans supported legalization of marijuana. The impact of this classification was immediate and serious for drug kingpins as well as small-time users who, for mere possession, now faced mandatory imprisonment and fines; forfeiture of vehicles; denial of federal benefits such as student loans, professional and commercial licenses; ineligibility to purchase or possess a firearm; and revocation of certain federal benefits such as public housing tenancy.<sup>5</sup> Today, possession of marijuana for any reason outside of limited research remains a federal crime<sup>6</sup>.

The criminal justice system was impacted as well. The ACLU reported that there were 8.2 million marijuana arrests between 2001 and 2010, of which 88% were for possession.<sup>7</sup> Although blacks and whites use marijuana at similar rates, blacks are nearly 4 times more likely to be arrested for marijuana. In Iowa, D.C., Minnesota, and Illinois, that disparity jumps to 7.5–8.5 times.<sup>8</sup>

The public’s attitude about marijuana has been shifting. While the approval rate hovered around 25% in the 1990s, by 2015 there was a clear majority (58%) of Americans in favor of legalizing marijuana for personal use. Support comes predominantly from young Americans, as well as Democrats and Independents.<sup>9</sup>

### ***The Tug of War***

Pushback against the federal CSA started with the people via the initiative process rather than state legislators. In 1996, California became the first state

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<sup>3</sup> 21 U.S.C. § 812(c) (2012) (FDA—Controlled Substances Act).

<sup>4</sup> Jeffrey M. Jones, *In U.S., 58% Back Legal Marijuana Use*, GALLUP (2015), available at <http://www.gallup.com/poll/186260/back-legal-marijuana.aspx>.

<sup>5</sup> University of Chicago, *Table A: Federal Penalties and Sanctions for Illegal Trafficking and Possession of a Controlled Substance*, COMMON SENSE (2013).

<sup>6</sup> 39 No. 6 Zoning and Planning Law Reports NL 1.

<sup>7</sup> *The War on Marijuana in Black and White—Billions of Dollars Wasted on Racially Biased Arrests*, ACLU (2013), available at <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> *Supra* note 4.

to allow the medicinal use of marijuana when voters approved Proposition 215, also known as the Compassionate Use Act (CUA).<sup>10</sup> It exempts patients and certain caregivers, who possess or cultivate marijuana for medical treatment recommended by a physician, from criminal laws which otherwise prohibit possession or cultivation of marijuana. In May of 2009, the U.S. Supreme Court declined to hear an appeal of a California state appellate ruling that upheld the CUA and the Medical Marijuana Program (MMP) against a federal preemption challenge, which was brought by two counties that did not want to comply with the MMP.<sup>11</sup> The California Supreme Court ruled that the legislative process that enacted the MMP could not be used to set more restrictive limits than those that had been approved by the voter-enacted CUA.<sup>12</sup> Today, 28 states, D.C., Guam, and Puerto Rico allow for comprehensive public medical marijuana and cannabis programs<sup>13</sup>.

Hawaii was the first state to legalize medical marijuana through the legislative process in 2010, but only allowed patients to grow their own. In 2015, the state legislature amended the law which has been called one of the most restrictive programs in the country.<sup>14</sup> In 2012, Colorado and Washington became the first states to legalize marijuana for recreational use. Alaska, Oregon, and D.C. followed in 2014. Colorado voters passed Amendment 64, and a year later, decided to tax the retail marijuana industry (15% excise tax earmarked for school construction projects and 10% sales tax). With cannabis sales expected to hit \$1 billion in 2015 in Colorado alone and revenues to the state reaching \$125 million, the program is gaining a lot of attention nationally, but not everyone is onboard. More than 150 cities in Colorado have passed ordinances banning the commercial sale of marijuana<sup>15</sup>.

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<sup>10</sup> Cal. Health & Safety Code § 11362.5 (2003) (“Medical use”).

<sup>11</sup> *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 81 Cal. Rptr. 3d 461 (4th Dist. 2008).

<sup>12</sup> *People v. Kelly*, 47 Cal. 4th 1008, 103 Cal. Rptr. 3d 733, 222 P.3d 186 (2010).

<sup>13</sup> 39 No. 6 Zoning and Planning Law Reports NL 1.

<sup>14</sup> Debra Borchart, *Top Pot State Hawaii Creates Strict Medical Marijuana Program*, FORBES (Jan. 29, 2016), <http://www.forbes.com/sites/debraborchart/2016/01/29/top-pot-state-hawaii-creates-strict-medical-marijuana-program/#139f7b74464d>. For example, dispensaries aren’t allowed to sell rolling papers or other paraphernalia that deviates from a medical patient approach. Edibles can’t be sold. Advertising is strictly prohibited. Product lines can’t be imported or exported to other Hawaiian Islands. License holders can operate two production centers and two dispensaries, but retail locations can’t be in the same location as a production facility. Each center is limited to 3,000 plants. What is unique about Hawaii is that grow centers aren’t allowed. Instead it will be grown on acreage where agricultural production is already approved, as long as it isn’t near a school or playground or a public housing project. Owners must be residents of Hawaii for 5 years or longer.

<sup>15</sup> 39 No. 6 Zoning and Planning Law Reports NL 1.

Law enforcement officials from Colorado, Kansas, and Nebraska sued Colorado Governor Hickenlooper, arguing that Amendment 64 was invalid because it conflicts with federal law and international treaties.<sup>16</sup> The federal district court dismissed the case, ruling that the federal CSA does not create a private right of action. Then, Nebraska and Oklahoma tried to strike down Colorado's Amendment 64 in the U.S. Supreme Court. They argued that "the Constitution and federal anti-drug laws do not permit the development of a patchwork of state and local pro-drug policies and licensed distribution schemes throughout the country,"<sup>17</sup> but the U.S. Supreme Court denied certiorari in March 2016. Washington and Oregon filed an amicus brief on behalf of Colorado, highlighting the federalism issue.<sup>18</sup>

[T]his Court's original jurisdiction must be sensitive to federalism, which invites the States to explore new legal policies and address changes in society. Change emerges at different times in different States, and States are entitled to have different preferences. This critical value of federalism is particularly evident in the context of marijuana laws. Whatever preemption might flow from the Controlled Substances Act (CSA), it is clearly not a comprehensive marijuana policy. By its express terms, the CSA does not occupy the field.<sup>19</sup> As Nebraska and Oklahoma admit, the CSA does not prevent States from decriminalizing marijuana, and they claim no intent to attack medical marijuana statutes. Congress has not funded enforcement for a national marijuana prohibition, and both Congress and the executive branch have expressed a strong willingness to allow States to experiment with different marijuana policies. Given 'the actual state of things,'<sup>20</sup> the Court should allow these issues to percolate in the lower courts as States adopt new marijuana policies and act as the laboratories of democracy so aptly described by Justice Brandeis.<sup>21</sup>

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<sup>16</sup> Smith v. Hickenlooper, No. 15-cv-00462-WYD-NYW, 2016 WL 759163 (D. Colo. Feb. 26, 2016).

<sup>17</sup> Jack Healy, *Nebraska and Oklahoma Sue Colorado Over Marijuana Law*, N.Y. TIMES (Dec. 18, 2014).

<sup>18</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

<sup>19</sup> 21 U.S.C. § 903 (1970).

<sup>20</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 520 (1832).

<sup>21</sup> Amicus Brief of the States of Washington and Oregon in Support of Respondent, *States of Nebraska and Oklahoma v. State of Colorado*, 577 U.S. 11 (2015) (No. 22O144), available at <http://agportal-s3bucket.s3.amazonaws.com/Colorado%20Amicus%20Final.pdf>; see also *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting).

Recognizing the federal-state tension on the issue of marijuana legalization, the Obama Administration issued a memo to federal prosecutors in October 2009 encouraging them not to prosecute people who distribute marijuana for medical purposes in accordance with state law.<sup>22</sup> In light of the ballot initiatives proliferating around the country, this enforcement policy was updated in August 2013. The U.S. Attorney General “deferred the right to challenge these state legalization laws” and advised the states to focus their efforts on the federal government’s eight enforcement priorities: (1) prevent marijuana distribution to minors, (2) prevent revenue from marijuana going to criminal enterprises, (3) prevent diversion of marijuana from states where it is legal under state law to other states, (4) prevent state-authorized marijuana activity from being used as a cover or pretext for trafficking, (5) prevent violence and use of firearms in the cultivation and distribution of marijuana, (6) prevent drugged driving and the exacerbation of other adverse public health consequences, (7) prevent the growing of marijuana on public lands, and (8) prevent marijuana possession or use on federal property.<sup>23</sup>

The Obama Administration has allowed the states some leeway to regulate marijuana and encouraged the U.S. Supreme Court to dismiss the recent challenge to Colorado’s pot law—Amendment 64. Furthermore, the President favors lowering marijuana’s designation as a Schedule I substance, but wants Congress to make that change. A bipartisan group of 18 Congressmen said “pot’s Schedule I classification makes no sense,” but in December 2015, Congress stripped funding in the budget bill which would have allowed Virginia’s doctors to authorize medical marijuana use for patients.<sup>24</sup>

Members of Congress have introduced a plethora of proposals over the years to “fix” the marijuana conundrum between the CSA’s criminal liability and the states that have legalized marijuana in one form or another, but none

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<sup>22</sup> Deputy Attorney General Ogden, Memo on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), *available at* <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

<sup>23</sup> Deputy Attorney General Cole, Memo on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at* <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; *see also* Office of Public Affairs, *Justice Department Announces Update to Marijuana Enforcement Policy* (Aug. 29, 2013), *available at* <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>.

<sup>24</sup> Bryant Jordan, *House Strips Medical Marijuana Provision from VA Legislation*, MILITARY.COM (Dec. 17, 2016), <http://www.military.com/daily-news/2015/12/17/house-strips-medical-marijuana-provision-from-va-legislation.html>.

have passed.<sup>25</sup> In 2014, Congress approved an omnibus spending bill that included a rider prohibiting the Justice Department (which includes the Drug Enforcement Administration) from using funds to “prevent” states from “implementing” their medical marijuana laws. In December of 2015, the same rider, sponsored by Reps. Dana Rohrabacher (R-Ca.) and Sam Farr (D-Ca.), was passed, but the conundrum goes on as the Justice Department continues to prosecute people who grow, possess, or distribute medical marijuana in compliance with state law. Apparently, the Justice Department interprets “prevent” and “implement” differently than members of Congress did when they passed the rider.<sup>26</sup>

The most recent bill was introduced in November 2015 by Senator Bernie Sanders—S. 2237—the Ending Federal Marijuana Prohibition Act—to remove marijuana from the federal list of Schedule I drugs, and to allow states to decide whether to ban or legalize marijuana without interference from the federal government.<sup>27</sup> Senator Sanders has tied the issue of marijuana legalization to criminal justice reform.<sup>28</sup> Shortly after its introduction, the New York Times editorial board urged the President and Congress to . . .

seriously consider the kind of legislation that Mr. Sanders has proposed. . . . If Congress is unwilling to act, Mr. Obama should move on his own by ordering the Attorney General to request a study by the Secretary of Health and Human Services, which is needed if the administration is to remove the drug from Schedule I on its own.<sup>29</sup>

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<sup>25</sup> See Todd Garvey & Brian T. Yeh, *State Legalization of Recreational Marijuana: Selected Legal Issues*, CONG. RES. SER. (Jan. 13, 2014), available at <https://fas.org/sgp/crs/misc/R43034.pdf> (including H.R. 499 (Ending Federal Marijuana Prohibition Act of 2013); H.R. 501 (Marijuana Tax Equity Act of 2013); H.R. 689 (States’ Medical Marijuana Patient Protection Act); H.R. 710 (Truth in Trials Act); H.R. 784 (States’ Medical Marijuana Property Rights Protection Act); H.R. 964 (Respect States’ and Citizens’ Rights Act of 2013); H.R. 1523 (Respect State Marijuana Laws Act of 2013); H.R. 1635 (National Commission on Federal Marijuana Policy Act of 2013); and H.R. 2652 (Marijuana Businesses Access to Banking Act of 2013)).

<sup>26</sup> See Jacob Sullum, *Congress Did Not Legalize Medical Marijuana*, FORBES (Dec. 31, 2015), <http://www.forbes.com/sites/jacobsullum/2015/12/31/congress-did-not-legalize-medical-marijuana/#559939d9715c>.

<sup>27</sup> Rebecca Kaplan, *Bernie Sanders Introduces Bill to End Federal Ban on Pot*, CBS NEWS (Nov. 5, 2015), <http://www.cbsnews.com/news/bernie-sanders-introduces-bill-to-end-federal-ban-marijuana>.

<sup>28</sup> *Id.*

<sup>29</sup> *The Push for Legal Marijuana Spreads*, Editorial, N.Y. TIMES (Nov. 5, 2015), [http://www.nytimes.com/2015/11/06/opinion/the-push-for-legal-marijuana-spreads.html?\\_r=0](http://www.nytimes.com/2015/11/06/opinion/the-push-for-legal-marijuana-spreads.html?_r=0).

Forbes<sup>30</sup> and others predicted that 2016 would be a very good year for proponents of marijuana legalization. Marijuana might also be a good investment. The revenues from the medical marijuana industry in 2015 accounted for about \$4.4 billion, and the growth rate for recreational marijuana was even steeper—up 184% from the previous year to \$998 million in 2015. Fortune magazine published a rosy projection of \$6.7 billion in 2016 from the recreational marijuana industry.<sup>31</sup> There is even a cannabis investor network to connect investors with companies and businesses in the cannabis industry.

Other federal issues, however, can make the cannabis industry a challenging one: banking and postal regulations, for example. Banks are risk adverse and will not open accounts for marijuana businesses that are legal under state law but might not be under federal law, forcing those businesses to deal in cash. In 2014, the U.S. Department of Justice and the Financial Crimes Enforcement Network, a bureau of the U.S. Department of the Treasury, gave the green light to banks to offer financial services to marijuana businesses operating consistently with state laws,<sup>32</sup> but that assurance was not satisfactory for a federal district court judge in Denver who dismissed a case brought by a Colorado-chartered credit union formed to serve marijuana-related businesses. The credit union wanted a mandatory injunction directing the Federal Reserve Bank to grant it a “master account,” but the court concluded it could not exercise its equitable authority to issue a mandatory injunction that would facilitate criminal activity.<sup>33</sup>

The Oregon Legislature is trying to address the banking issue at the state level. It passed a bill (HB 4094) in February of 2016, which is expected to be signed by the Governor, that protects Oregon banks that provide financial services to state-regulated marijuana businesses. Oregon will be the first state to remove all criminal penalties for banks and credit unions that work with cannabis businesses operating within state law. However, the U.S. Postal Service is creating another wrinkle. In response to a letter from Oregon’s Congressional delegation asking the service to clarify its position, in

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<sup>30</sup> Debra Borchart, *2016 Will Be Marijuana’s Big Year*, FORBES (Dec. 28, 2015), <http://www.forbes.com/sites/debraborchart/2015/12/28/2016-will-be-marijuanas-big-year/#77f0a70d2c80>.

<sup>31</sup> Tom Huddleston, Jr., *Legal Marijuana Sales Could Hit \$6.7 Billion in 2016*, FORTUNE (Feb. 1, 2016), <http://fortune.com/2016/02/01/marijuana-sales-legal>.

<sup>32</sup> David Migoya & Allison Sherry, *Banks given the go-ahead on working with marijuana businesses*, DENVER POST (Feb. 14, 2014), <http://www.denverpost.com/2014/02/14/banks-given-the-go-ahead-on-working-with-marijuana-businesses>.

<sup>33</sup> *Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*, 154 F. Supp. 3d 1185 (D. Colo. 2016).



November of 2015, the U.S. Postal Service announced that “it’s illegal to mail materials containing advertising for marijuana products, even in states that have legalized the federally controlled substance.”<sup>34</sup>

Certainly, the federalism issues regarding marijuana are heating up, as the various states join the marijuana bandwagon with little or no guidance from Congress. The potential revenues are too great, and public opinion is leading the parade.

There were many ballot initiatives proposed to address a wide spectrum of issues related to marijuana. According to Ballotpedia.org<sup>35</sup>, as many as 53 marijuana measures were brought forward in 17 states this year, although many did not qualify for the November ballot.<sup>36</sup> The Drug Prohibition Initiative, I-176, which was not placed on a ballot, was an initiated state statute proposed for the Montana ballot.<sup>37</sup> The measure would have classified drugs that are unlawful under federal regulations as illegal under Montana law. The State Cannabis Freedom Reform Act, also not placed on a ballot, was an initiated state statute proposed for the Washington ballot on November 8, 2016.<sup>38</sup> That measure would have removed certain cannabis-related activities from application of the CSA. Similarly, a second initiative in Washington State, the Marijuana Prohibition Initiative, would have prohibited the production, processing, and sale of cannabis in residentially zoned neighborhoods.<sup>39</sup>

The Medical Marijuana Legalization, State Question 778, never made it to a ballot, but was a constitutional amendment proposed for the Oklahoma ballot.<sup>40</sup> The measure would have legalized medical marijuana under the prescription of a board-certified physician. Marijuana would have been reclassified as an herbal drug and regulated by the Oklahoma State Department of Health.<sup>41</sup> The Nevada Marijuana Legalization Initiative was on the November 2016 ballot and was approved (54.47% in favor). It will legalize one ounce or less of marijuana for recreational use by people who are at least

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<sup>34</sup> Gloria Wozniacka, *US Postal Service Says Mailing Marijuana Ads Is Illegal*, BIG STORY (Dec. 17, 2015), <http://bigstory.ap.org/article/07e277a1cf2849cea98051921fe5544a/us-postal-service-says-mailing-marijuana-ads-illegal>.

<sup>35</sup> See generally, Ballotpedia.org, (last visited Jan. 8, 2017), [https://ballotpedia.org/Main\\_Page](https://ballotpedia.org/Main_Page).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

21 years old. The initiative taxes marijuana sales and allocates the revenue to education.

The Missouri Marijuana Legalization Initiative did not appear on the November 8, 2016 ballot, but if approved, it would have given people 21 years of age or older the right to produce, sell, distribute and consume marijuana and the right to manufacture goods from hemp. Numerous versions of this petition competed for the ballot.

The Abrogate Cannabis Prohibition Amendment was not on the ballot in Michigan. The measure would have allowed for the personal, medicinal, agricultural, recreational, commercial, and industrial use of marijuana. It would have abrogated all prohibitions of cannabis and would not have imposed an excise tax or allow for any regulation to reduce usage. Children would not have been permitted to use marijuana with parental or legal guardian approval. Of the six measures proposed in Florida, only one qualified for the ballot this year.

The Florida Right to Medical Marijuana Initiative, also known as Amendment 2, was approved (71.32% in favor), legalizing medical marijuana for individuals with debilitating medical conditions, as determined by a licensed state physician. California voters tried but failed to legalize recreational pot at the ballot box in 2010. They had their chance again in 2016. California Proposition 64, referred to colloquially as the “Adult Use of Marijuana Act” (approved, 57.13% in favor), made it legal for individuals to grow and use marijuana for personal use.

### ***Just How Local Should “Local” Be?***

“Who should control marijuana policy in the United States—Congress, the States, or local governments?” asks Professor Robert Mikos from Vanderbilt University Law School.<sup>42</sup> States have “scored an impressive and surprising victory,” but now the challenge that must be addressed is how far to let local control carry marijuana policy within the states.<sup>43</sup> And in at least 12 states that have legalized marijuana, communities have passed bans on marijuana dispensaries.<sup>44</sup> Even in liberal Colorado, which led the country in legalizing recreational marijuana, more than 150 municipalities have passed ordinances

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<sup>42</sup> See Mikos, *supra* note 2.

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

<sup>44</sup> *Id.*

banning the commercial sale of marijuana.<sup>45</sup> Then again, many other communities that support legalization of marijuana are passing “idiosyncratic rules” about location, size, hours of operation, signage, security, etc.<sup>46</sup> Very often, the states that have legalized marijuana in one form or another have failed to give much guidance to local governments, resulting in litigation.

Professor Mikos notes that there is one big difference between localism (communities asserting their control over marijuana policy and regulations) and federalism: States have far greater influence over localities than the federal government has over the states, and Mikos makes compelling arguments for the states to “keep marijuana localism at bay.”<sup>47</sup>

### ***Conclusion***

Marijuana has generated a lot of heat and it is only a matter of time before more states join the Marijuana brigade. The people are leading the charge, voting to legalize marijuana in many states even though Congress itself has not yet acted. At the local level, communities are divided about the issue; and they are searching for local solutions. Regardless of their stand on the issue, this debate will only grow from hereon.

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*