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## Unbundling Federalism: Colorado's Legalization of Marijuana and Federalism's Many Forms

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# UNBUNDLING FEDERALISM: COLORADO'S LEGALIZATION OF MARIJUANA AND FEDERALISM'S MANY FORMS

JESSICA BULMAN-POZEN\*

*This short Essay argues that various attributes we associate with federalism should not be deemed necessary components of federalism as a definitional or normative matter. Using Colorado's recent legalization of marijuana as a case study, it shows how two such attributes—an autonomous realm of state action and independent state officials with distinctive interests—can be pulled apart. State officials often further their interests and effectively oppose federal policy when they participate in the same statutory scheme as federal actors instead of operating in a separate, autonomous sphere. At the same time, state officials frequently rely on the autonomous lawmaking and executive powers of state governments to advance a decidedly national agenda, acting in cooperation with federal officials rather than independently of them. Unbundling federalism helps us get a purchase on these pervasive practices instead of dismissing them as not-federalism.*

## INTRODUCTION

As we convene in Colorado on the one-year anniversary of the state's legalization of marijuana, it seems only fitting to consider what this unfolding example may illuminate about American federalism in the early twenty-first century. On one account, a distinctive community—the western, libertarian

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people of Colorado—has used the State’s sovereign lawmaking capacity to stake out a position different from the federal government’s. And not just different—Colorado has picked a fight with Washington, D.C., by adopting a policy that conflicts with federal law and is overtly and deliberately oppositional. This account embraces the classic tropes of federalism: Sovereignty! Popular participation! Laboratories! Local community! State-federal contestation!<sup>1</sup>

On another account, however, something very different has occurred. National organizations and individuals across the country have advanced a national agenda in a state forum. Federal politicians and administrators have welcomed the state’s choice instead of opposing it. And Colorado’s legalization of marijuana is, as a practical matter, determining the content of federal drug law rather than standing beyond it. This account calls into question many of the classic tropes of federalism: Out-of-state actors shaping state politics? Intertwined state and federal authority? States as authors of federal law?

It may be tempting to choose between these stories and to proclaim American federalism either alive or dead, but there is truth in both accounts. It was the people of Colorado—not the people of Mississippi, or North Dakota, or the United States as a whole—who voted to legalize marijuana; and yet the vast majority of funds for the initiative came from outside the state.<sup>2</sup> State and federal law now take opposing positions on marijuana; and yet state and federal enforcement regimes are

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1. On some of these tropes, see, for example, DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 107–40 (1995); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425 (1987); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1260–61 (2009); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *COLUM. L. REV.* 1, 7 (1988); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 *TEX. L. REV.* 1, 53–63 (2004); and Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 *U. CHI. L. REV.* 1484 (1987) (book review).

2. See, e.g., John Ingold, *Colorado Marijuana-Legalization Amendment Spending Tops \$3 Million*, *DENVER POST*, Oct. 21, 2012, [http://www.denverpost.com/ci\\_21820068/colorado-marijuana-legalization-amendment-spending-tops-3-million](http://www.denverpost.com/ci_21820068/colorado-marijuana-legalization-amendment-spending-tops-3-million) (“[B]oth sides report receiving more financial support from outside the state than from inside it.”); *Amendment 64: Legalizing Marijuana: Ballot Measure Summary*, NAT’L INST. ON MONEY IN STATE POL., <http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=956> (last visited Mar. 5, 2014) (showing that committees in favor of the ballot initiative raised nearly \$3.5 million, of which more than \$3.2 million came from out-of-state sources).

so interwoven that state law shapes how federal law is carried out.<sup>3</sup> Colorado's sovereign lawmaking has catalyzed a fight about the United States' war on drugs; and yet this fight does not pit state against federal actors but instead one group of both state and federal actors against a different group of both state and federal actors.<sup>4</sup>

Recognizing that each account captures something about Colorado's legalization of marijuana suggests a deeper point about contemporary American federalism. Much state activity today strains our traditional definition of federalism as a system of coexisting state and federal governments, each with independent government officials and a sphere of autonomous authority untouched by the other.<sup>5</sup> Time and again, we see state and federal action occurring in overlapping, rather than separate, spheres. Time and again, we see state and federal officials using their respective authority to advance a single national agenda, rather than distinct state and federal agendas. Time and again, we see individuals across the country participating in the politics of states in which they do not reside. These practices need not, however, yield the conclusion

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3. See Memorandum from James M. Cole, Deputy Att'y Gen., to all United States Att'ys 2 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (“[T]he federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”). See generally Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783 (2004) (describing national drug policy as a cooperative federalism program involving federal reliance on state enforcement).

4. For instance, the Drug Enforcement Administration continues to insist that marijuana is properly criminalized, see THE DEA POSITION ON MARIJUANA (2013), available at [http://www.justice.gov/dea/docs/marijuana\\_position\\_2011.pdf](http://www.justice.gov/dea/docs/marijuana_position_2011.pdf), while some members of Congress have introduced bills in support of legalization, see, e.g., H.R. 499, 113th Cong. (2013); H.R. 1523, 113th Cong. (2013).

5. See, e.g., JENNA BEDNAR, THE ROBUST FEDERATION 18–19 (2009) (defining federalism in terms of geopolitical division of a federation into mutually exclusive states; independent bases of state and federal authority; and constitutionally declared sovereignty of both state and federal governments in at least one policy realm); WILLIAM H. RIKER, FEDERALISM 11 (1964) (“A constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee . . . of the autonomy of each government in its own sphere.”); Daniel Halberstam, *Federalism: A Critical Guide* 6, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1924939](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924939) (defining federalism in terms of “the coexistence within a compound polity of multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority”).

that we are living in a post-federalist era.<sup>6</sup>

Instead, we might think more seriously about *unbundling federalism*. Sometimes the various attributes we assign to states—in particular, an autonomous realm of action and officials who advance distinctive state interests—travel together and our traditional definitions of federalism fit comfortably. But often these attributes travel separately. State officials may assert their distinctive interests by operating within, rather than outside of, federal administrative schemes, for example, or they may rely on their autonomous lawmaking capacity to advance a national political platform. Unbundling federalism helps us get purchase on these pervasive practices instead of dismissing them as not-federalism.

Work in related areas underscores that unbundling can be a rewarding move.<sup>7</sup> It also underscores that “unbundling” can mean many things. Here, I use the term to indicate that a variety of attributes associated with federalism should not be deemed necessary components of federalism as a definitional or normative matter. Unbundling therefore prompts us to consider how American federalism may operate even in the absence of commonly assumed features. In this short Essay, I can only just begin to unbundle federalism, but I hope this might be a generative, or at least provocative, start.<sup>8</sup>

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6. For a strong variant of that argument, see MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM* (2008).

7. See Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079 (2013) (arguing that constitutionality should be thought of as a bundle of sticks rather than as a status with necessary conditions, and that no single attribute should be deemed either necessary or sufficient for conferring constitutional status on a rule); see also Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008) (exploring the possibility of a plural executive regime in which discrete authorities are parceled out among various directly elected executive officials); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148 (2013) (proposing that labor law should allow employees to organize politically without also organizing economically for collective bargaining purposes).

For works recognizing more than one variant of American federalism, see, for example, Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229 (1994); Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285 (2008); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011); and Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994).

8. For instance, while I here take states to be the relevant unit of federalism analysis, future work might unbundle federalism’s insistence on states. For a

In what follows, I pull apart two of the attributes most often ascribed to states: an autonomous sphere of action and independent officials with distinctive interests. State officials frequently further their particular interests and effectively oppose federal policy when they participate in the same statutory scheme as federal actors instead of operating in a separate, autonomous sphere. At the same time, state officials frequently rely on the autonomous legislative and executive powers of state governments to advance a decidedly national agenda, acting in cooperation with federal officials rather than independently of them. In each case, appreciating the contours of today's federalism requires us to distinguish an autonomous state sphere from independent state officials and to recognize that neither is a necessary attribute of American federalism. Once we unbundle this far, moreover, we can appreciate that both autonomy and independence are multifarious concepts and that today's federalism may involve varying degrees of each—or, to adapt the title of this symposium, our unbundling of federalism may need to run “all the way down.”

## I. INDEPENDENT INTERESTS WITHOUT AUTONOMOUS ACTION

Vast swaths of American federalism involve joint state-federal regulation rather than separate spheres of state and federal action. States implement federal law in areas ranging from social welfare programs like Medicaid, Social Security, and the Patient Protection and Affordable Care Act; to environmental programs like the Clean Air Act and the Clean Water Act; to a variety of other schemes, such as immigration, consumer protection, telecommunications, and financial regulation.<sup>9</sup> Even as the courts have blessed such cooperative

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sample of the burgeoning literature arguing that non-state units, especially cities, have strong claims to come within federalism's ambit, see Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Loren King, *Cities, Subsidiarity, and Federalism*, NOMOS LV: FEDERALISM AND SUBSIDIARITY (forthcoming June 2014); and Daniel Weinstock, *Cities and Federalism*, NOMOS LV: FEDERALISM AND SUBSIDIARITY (forthcoming June 2014). See generally Richard Briffault, “What About the ‘Ism?’” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994) (arguing that a normative rather than structural approach to federalism moves the focus away from states to local governments).

9. See, e.g., 8 U.S.C. § 1357(g) (2006) (immigration); 33 U.S.C. §§ 1251–1387 (2006) (Clean Water Act); 42 U.S.C. § 1396a (2006) (Medicaid); 42 U.S.C. §§ 7401–7642 (2006) (Clean Air Act); 47 U.S.C. § 252(e)(5) (2006) (telecommunications);

federalism programs,<sup>10</sup> they have continued to describe the states as sovereigns operating in an autonomous realm.<sup>11</sup> In the recent healthcare case, for instance, the Chief Justice's controlling opinion insisted that "[t]he states are separate and independent sovereigns" while discussing Medicaid, a program in which states administer federal law, relying on federal funds and subject to federal superintendence.<sup>12</sup>

As scholars have noted, a vocabulary of separateness and autonomy is inapt when it comes to cooperative federalism. Rather than view "each jurisdiction as a separate entity that regulates in its own distinct sphere of authority without coordinating with the other," we can only wrap our heads around cooperative federalism programs if we accept that they entail "a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law."<sup>13</sup> To understand cooperative federalism, that is, we must engage in a project of unbundling—we must pull out of our usual federalism bundle the insistence on an autonomous state sphere. In cooperative federalism programs, there is no autonomous state sphere, only overlapping, intertwined state and federal domains.

The absence of a separate state domain does not mean states are powerless actors. Cooperative programs may facilitate "uncooperative federalism" as states use the power conferred on them by federal law to push back against federal

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Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1042(a)(2), 124 Stat. 1376, 2012–14 (2010) (codified at 12 U.S.C. § 5552) (financial regulation); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1101, 1311, 1321, 124 Stat. 119, 141–143, 173–179, 186 (2010) (to be codified at 42 U.S.C. §§ 18001, 18031, 18041) (healthcare).

10. As long as they elicit voluntary state participation. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.); *New York v. United States*, 505 U.S. 144, 167 (1992); *FERC v. Mississippi*, 456 U.S. 742, 764 (1982); *Hodel v. Va. Surface Mining Reclamation Ass'n*, 452 U.S. 264, 288 (1981).

11. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *New York*, 505 U.S. at 144.

12. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2603 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ).

13. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001); *see also, e.g.*, DANIEL J. ELAZAR, *AMERICAN FEDERALISM* (2d ed. 1972); MORTON GRODZINS, *THE AMERICAN SYSTEM* (1966); ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2012); Gluck, *supra* note 7; Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 PUBLIUS 15 (2001).

objectives.<sup>14</sup> To the extent they have distinctive interests,<sup>15</sup> then, states may advance those interests from within cooperative federalism schemes rather than solely from separate spheres of autonomous state action. When Arizona recently objected to federal immigration policy,<sup>16</sup> for example, its most successful opposition followed directly from the role Congress has given states in the federal scheme. Federal law contemplates that states will seek to determine the immigration status of individuals within their borders, and it requires the Department of Homeland Security to respond to such state inquiries.<sup>17</sup> Incorporating this provision into section 2 of its controversial law, Arizona seized on the assumed cooperation of state and federal officials to advance a decidedly uncooperative position.<sup>18</sup> Notably, section 2 was the only provision of the state law to survive a preemption challenge before the Supreme Court, suggesting that uncooperative federalism may be not only an effective way for states to further their independent interests but, at least in some cases, the only way.<sup>19</sup>

Indeed, in many areas in which the federal government is the dominant actor—and would likely exercise sole authority

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14. Bulman-Pozen & Gerken, *supra* note 1; *see also* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012) [hereinafter *Federalism as a Safeguard*] (considering how states administering cooperative federalism programs push back against the federal executive branch in particular); Gerken, *supra* note 8, at 35 (emphasizing the states’ “power of the servant”).

15. I am skeptical about the existence of distinctive state versus national interests, as the remainder of this Essay and some of my prior work suggest. *See, e.g.*, Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014). The point here, however, is that, to the extent these interests do exist, states may advance them not only through an autonomous sphere of action, but also through their role in federal statutory schemes.

16. *See generally* *Arizona v. United States*, 132 S. Ct. 2492 (2012) (considering a challenge to portions of Arizona’s S.B. 1070 immigration law).

17. *See* 8 U.S.C. § 1373 (2006).

18. Section 2 of Arizona’s law requires state officers to determine the immigration status of arrestees by verifying their status with the federal government, as 8 U.S.C. § 1373(c) contemplates. *Ariz. Rev. Stat. Ann.* § 11-1051(B) (2010). In back-to-back sentences in section 1 of the law, the state legislature declares its intent to be realizing “cooperative enforcement of federal immigration laws throughout all of Arizona” and, at the same time, ensuring that the public policy of Arizona (in contrast to the public policy of the United States) is “attrition through enforcement.” Support Our Law Enforcement and Safe Neighborhoods Act, § 1, ch. 113, 2010 *Ariz. Sess. Laws* 1070, as amended by Act of Apr. 30, 2010, ch. 211, 2010 *Ariz. Sess. Laws* 2162.

19. *See Arizona*, 132 S. Ct. at 2492.



were state and federal action deemed mutually exclusive—states have relied on their administrative role to challenge federal policy. From state resistance to the USA PATRIOT Act and federal environmental policy to state reshaping of federal welfare policy and the No Child Left Behind Act, examples abound of states acting uncooperatively in cooperative federalism schemes.<sup>20</sup>

That states exercise power in cooperative federalism schemes is, in many ways, no surprise. It is a federalism-based spin on the principal-agent problem familiar to many areas of the law—and a spin that suggests a possible normative upside to the classic problem.<sup>21</sup> The slack in the system allows states to advance their positions, and to challenge federal policy, even while they are legally subordinate actors. Because the federal government depends on the states to achieve its objectives, states are able to prioritize within, push back against, and even subvert federal law.<sup>22</sup> Closely related, states have the power to set the agenda through their implementation choices, and this forces federal actors to engage with states in a reactive posture rather than always having the power of inertia on their side.<sup>23</sup> As insiders to the federal scheme, states also possess knowledge and connections that facilitate their challenges to federal policy.<sup>24</sup> Even while they are insiders in important respects, however, states remain outside the federal apparatus in others. Most notably, state officials enjoy an independent power base: their constituencies are state voters or other state officials, not federal officials.<sup>25</sup>

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20. See Bulman-Pozen & Gerken, *supra* note 1, at 1274–82.

21. See *id.* at 1262–64; Gerken, *supra* note 8, at 65–68. Regarding uncooperative federalism as an attractive phenomenon depends on privileging federalism values of state contestation and dissent. If one is focused on a different set of concerns, say good policy outcomes, uncooperative federalism may look just like any other principal-agent problem.

22. See Bulman-Pozen & Gerken, *supra* note 1, at 1266–68; *cf.* John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995) (discussing federal reliance on accumulated state institutional competence and expertise); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994) (arguing that the federal government's reliance on the states “guarantees state officials a voice in the process”); Weiser, *supra* note 13, at 671 (noting that states “exercise considerable discretion” in cooperative federalism schemes and that federal reliance on state implementation makes the states “very influential in practice”).

23. See Bulman-Pozen & Gerken, *supra* note 1, at 1287.

24. See *id.* at 1268–70.

25. See *id.* at 1270–71. While many state officials who implement federal

Uncooperative federalism thus underscores that state independence and state autonomy need not travel together. It is the fact that state officials are independent of federal officials that facilitates, and often motivates, their opposition to federal policy. When state voters have different interests from the national electorate, state officials may advance these distinct interests. But these state officials are opposing federal policy as they carry out federal law, rather than opposing federal policy from outside of a federal scheme. Taking uncooperative federalism seriously requires us to remove autonomy from federalism's bundle and to recognize that federalism may involve independence without autonomy.

## II. AUTONOMOUS ACTION WITHOUT INDEPENDENT INTERESTS

If contemporary federalism sometimes involves state independence without a realm of autonomy, so too does it sometimes involve state autonomy without independent state and federal officials. Uncooperative federalism suggests that states may advance their distinctive agendas from within federal schemes. Other aspects of our federalism, meanwhile, reveal that state and federal officials may use their autonomous legislative and executive authorities to advance a single agenda. State autonomy becomes a vehicle for furthering a particular view of national policy, not for ensuring state-federal separateness.

Let me be clear about the kind of state independence I am focusing on here. I have spoken of state and federal officials enjoying separate bases of power, and I do not mean to challenge that structural independence. Independently elected or appointed officials may be an irreducible core of federalism—or at least a feature that I am not prepared to jettison in these few pages. But conceptions of independent state and federal officials tend to assume that these independent electoral bases yield state and federal officials who are independent in a deeper sense—who have distinctive interests, commitments, and agendas. It is this stronger form of state-federal independence I mean to put under the microscope here.

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programs are bureaucrats, others are state politicians. It is state politicians who tend to generate the most vociferous opposition to federal policy, as the examples in the text suggest.

Many aspects of contemporary American politics and culture pose a challenge to the idea of independent state actors with distinctive interests standing apart from federal officials and one another.<sup>26</sup> New technologies have made it ever easier to communicate, travel, and organize across state lines. Doctrinal developments with respect to the Privileges and Immunities and dormant Commerce Clauses and the First Amendment have rendered state borders more porous.<sup>27</sup> Partisan politics has made the entire country a single battleground for partisan struggle. For these and other reasons, state officials often have commitments and agendas indistinguishable from their federal counterparts. And state and federal officials frequently work together, either directly or through various political organizations and ideological networks, to achieve their ends.

Although this dynamic extends more broadly, it is clearest with respect to partisan politics. State and federal political actors today use both state and federal governments to articulate, stage, and amplify competition between the Democratic and Republican parties.<sup>28</sup> Because today's parties are more ideologically cohesive and polarized than in the past—and because this is true at both the federal and state levels—states are critical sites of national partisan competition. Rather than independent state officials advancing state interests against national interests, state and federal officials together advance a set of ultimately national interests.<sup>29</sup>

Two points about such “partisan federalism” bear emphasis here. First, while I have suggested that state and

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26. See, e.g., JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS 69–72 (2005); ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 16–26 (2009); cf. PING REN, U.S. CENSUS BUREAU, LIFETIME MOBILITY IN THE UNITED STATES: 2010, at 4 tbl. 2 (2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-07.pdf> (showing that more than half of Americans age twenty-five and older do not live in their state of birth).

27. See, e.g., *Pope v. Illinois*, 481 U.S. 497 (1987) (holding that whether material is obscene must be evaluated under a reasonable person standard rather than a community-specific standard); *Supreme Court v. Piper*, 470 U.S. 274 (1985) (holding that a state rule limiting bar admission to state residents violated the Privileges and Immunities Clause); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (holding that a state law banning use of waste disposal sites for waste originating in other states violated the dormant Commerce Clause).

28. Bulman-Pozen, *Partisan Federalism*, *supra* note 15.

29. *Id.*

federal officials alike advance national interests, partisanship means that there is not one single national agenda. Instead, there are competing interests and policy positions. We do, therefore, witness competition between certain state and federal actors, but this competition is not motivated by their state and federal roles; it is motivated by partisan commitments. Democratic officials in Massachusetts may challenge a federal Republican administration, while Republican officials in Texas may challenge a federal Democratic administration, but this opposition follows from partisanship, not from individuals' state versus federal office as such. Indeed, the Massachusetts Democrats will be supported by Democrats within the federal government (and opposed by Republican officials in other states), while the Texas Republicans will be supported by Republicans within the federal government (and opposed by Democratic officials in other states).<sup>30</sup>

Second, states are important sites of national partisan competition. While there are always both Democratic and Republican politicians in the federal government, the minority party has a limited set of tools with which to oppose the majority, particularly when it comes to affirmatively advancing an agenda rather than engaging in obstructionism. States have a different set of tools. Most notably, states have their own legislative and executive powers and may rely on their regulatory autonomy to advance policies different from those favored by the party in power in Washington, D.C. When congressional Democrats could not advance climate change or stem cell legislation during George W. Bush's presidency, for instance, Democratic states passed laws furthering the Democratic agenda.<sup>31</sup> When congressional Republicans could

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30. State officials may also be opposed by other officials within their states along partisan lines. Consider, for instance, the fights between Democratic governors and Republican attorneys general, and Republican governors and Democratic attorneys general, about whether to challenge Obamacare. See Kevin Sack, *In Partisan Battle, Governors Clash with Attorneys General over Lawsuits*, N.Y. TIMES, Mar. 28, 2010, <http://www.nytimes.com/2010/03/28/us/politics/28govs.html>.

31. See, e.g., JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., RL33812, CLIMATE CHANGE: ACTION BY STATES TO ADDRESS GREENHOUSE GAS EMISSIONS (2008) (describing laws passed by Democratic legislatures in California, Hawaii, and New Jersey to reduce greenhouse gas emissions, and actions by twelve other Democratic state legislatures to adopt California's emissions standards); *Stem Cell Research*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/>

not defund Planned Parenthood or pass voter ID laws during Barack Obama's presidency, Republican states passed laws furthering the Republican agenda.<sup>32</sup> On partisan lines, state officials also make claims that the federal government is encroaching on state sovereignty and that certain matters should be left to the states. During the Supreme Court's two most recent terms, for example, Republican states challenged Obamacare on this ground,<sup>33</sup> while Democratic states challenged the Defense of Marriage Act (DOMA).<sup>34</sup>

In these and many other instances, we see the significance of state autonomy even in the absence of state-federal independence. State officials are not carrying out a distinctive state mandate, but rather a national partisan agenda, and they are supported by federal officials and national groups. Members of Congress joined states in their challenges to Obamacare and DOMA, for instance, and national networks like the American Legislative Exchange Council have drafted a variety of state laws.<sup>35</sup> There is, here, no meaningful independence of state and federal actors; the relevant fault line is not state-federal, but Democratic-Republican. Yet state autonomy is a critical tool for state and federal actors alike. As state autonomy becomes a vehicle for furthering partisan commitments, rather than for shoring up state-federal separateness, both state and federal actors look to the states as critical actors in national politics.<sup>36</sup>

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research/health/embryonic-and-fetal-research-laws.aspx (last updated Jan. 2008) (describing laws passed principally by Democratic state legislatures between 2004 and 2008 to encourage and fund embryonic stem cell research).

32. See, e.g., AMS. UNITED FOR LIFE, DEFENDING LIFE 2012, at 37–39 (2012) (discussing laws passed by six Republican state legislatures to defund Planned Parenthood); *Voter Identification Requirements*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx#Legislation> (last updated Oct. 17, 2013) (describing state voter ID laws passed especially by Republican state legislatures).

33. See Robert N. Weiner, *Much Ado: The Potential Impact of the Supreme Court Decision Upholding the Affordable Care Act*, in *THE HEALTH CARE CASE 69* (Nathaniel Persily et al. eds., 2013).

34. See Response of the Commonwealth of Massachusetts in Support of Certiorari at 16, Bipartisan Legal Advisory Grp. of the U.S. House of Representatives v. Gill, Nos. 12-13, 12-15 (U.S. July 20, 2012); Brief on the Merits for New York as Amici Curiae Supporting Respondent at 2, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

35. See generally Bulman-Pozen, *supra* note 15, at 1096–1108.

36. Individuals throughout the country also look to the states. As I elaborate in *Partisan Federalism*, partisanship leads individuals to identify with and feel loyal to the states: Americans may identify with the states not because they

There is much more that could be said about this dynamic, but let me just note one implication for the long-running debate about whether federalism is adequately protected by the political process or whether judicial review is necessary.<sup>37</sup> Our leading account of the political safeguards of federalism argues that state politicians will seek to protect state institutional prerogatives and that federal officials will defer to these wishes because of the ties that bind them to state officials.<sup>38</sup> If we take politics seriously, however, it is not clear why even state, let alone federal, officials will seek to protect state autonomy rather than to achieve particular substantive ends; indeed, examples abound of state officials welcoming federal “encroachment.”<sup>39</sup> But if we take politics seriously, it also becomes clear why some state and some federal officials champion state autonomy—theirs is the party out of power in Washington, D.C. It is not that they object to federal power as such, but that they object to the partisan ends of a particular federal administration.<sup>40</sup> On this logic, the political safeguards of federalism become bound up in the separation of powers and intra-branch dynamics at the federal level.<sup>41</sup> The key safeguard

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represent something essentially different from the nation, but rather because they represent competing Democratic and Republican visions of the national will. And such state-based identification is thus particularly important when one’s party is out of power in Washington, D.C. *See id.* at 1108–22.

37. *Compare, e.g.,* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (recognizing political safeguards of federalism), JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (same), and 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) (same), *with* New York v. United States, 505 U.S. 144 (1992) (insisting on judicial review), United States v. Lopez, 514 U.S. 549 (1995) (same), Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995) (same), and John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) (same).

38. *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 282 (2000).

39. For instance, the same states that challenged Obamacare as an intrusion on state sovereignty supported DOMA as a valid exercise of federal power, while those states that challenged DOMA as an intrusion on state sovereignty supported Obamacare as a valid exercise of federal power.

40. *Cf.* George A. Krause & Ann Bowman, *Adverse Selection, Political Parties, and Policy Delegation in the American Federal System*, 21 J.L. ECON. & ORG. 359, 363 (2005) (“[A]s partisan congruence among national level political institutions increases, the incentive to shift power to subnational counterparts decreases . . .”).

41. *Cf.* Bulman-Pozen, *Federalism as a Safeguard*, *supra* note 14 (considering how states affect the balance of power across the branches of the federal

of federalism is not the universal relationship between state and federal politicians, but rather the role of the minority party within the federal government and its ability to advance state autonomy. While this change in emphasis does not resolve the political safeguards debate, it does suggest a different set of questions to be asking.

### III. INTERROGATING AUTONOMOUS ACTION AND INDEPENDENT INTERESTS

Neither autonomy nor independence is a unitary concept, as the discussion so far has undoubtedly indicated. Even if we bracket different ways to understand each term—a heterogeneity I cannot begin to do justice to in this brief Essay—and take autonomy to refer to a sphere of state action and independence to refer to state officials' distinctive interests, it remains the case that neither autonomy nor independence should be understood as an on-off switch. State actors may enjoy varying degrees of autonomy and independence from their federal counterparts. A project of unbundling federalism therefore suggests that we might not only pull apart autonomy and independence but also appreciate varying degrees of autonomy and independence that may underlie state action. Just as we may recognize federalism when states advance independent interests without an autonomous realm of action and when they use their autonomous lawmaking and executive powers to advance national interests, so too may we recognize federalism when states act with partial but not complete autonomy and independence.

To illustrate this point, let me return to where I began, with Colorado's recent Amendment 64 legalizing marijuana. As I have noted, it is tempting to understand this development in

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government); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001) (arguing that the separation of powers protects state autonomy by limiting the number and kinds of federal laws that may displace state law). Making federal law difficult to enact does not necessarily protect state autonomy, as Clark argues; it privileges the legal status quo and may thus operate to further federal authority. See Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601 (2008). But the minority party may seek not only to obstruct federal lawmaking but also to advance state autonomy, for example by insisting on a federal law's narrow preemptive effect.

one of two quite different ways.<sup>42</sup> On one account, Amendment 64 epitomizes both independent and autonomous state action: a distinctive community with independent interests seized on the state's autonomous lawmaking capacity to take a position that contradicts the federal government's. On another account, however, Amendment 64 epitomizes the absence of state independence and autonomy: national organizations and individuals outside the state bankrolled the initiative, which should be understood as merely an expressive act in light of the federal Controlled Substances Act's continued criminalization of marijuana. Unbundling federalism, and recognizing that both independence and autonomy admit of degrees, reveals that Colorado's decision is neither a vindication of our traditional bundled conception of federalism nor a sign of federalism's demise. It is instead a partially independent, partially autonomous state act.

Start with the question of independent state officials. The case for independence is in some respects especially strong: the state actors involved were not elected officials but rather the people themselves. Because Colorado adopted its legalization policy through a ballot initiative, it sidestepped key national influences on state action, such as party politics.<sup>43</sup> If state officials may lack distinctive state interests because of their close connections to federal officials and national networks, the same is not true when it is the state's people making the legislative choice. And, of course, it was the residents of Colorado, not of neighboring Kansas, or Utah, or the United

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42. See *supra* notes 1–4 and accompanying text.

43. While the legalization of marijuana appears to have an emerging partisan valence—nearly twice as many Democrats as Republicans support legalization, and more Democratic than Republican officials in both state and federal governments have warmed to the cause, see, e.g., Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP (Oct. 22, 2013), <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>—it is not a partisan issue. Neither the national Democratic nor the national Republican party supports legalization, and even in Colorado, the Democratic Governor opposed the state legalization initiative. See John Ingold, *Colorado Gov. John Hickenlooper Opposes Marijuana-Legalization Measure*, DENVER POST, Sept. 13, 2012, [http://www.denverpost.com/ci\\_21530165/colorado-gov-john-hickenlooper-opposes-marijuana-legalization-measure](http://www.denverpost.com/ci_21530165/colorado-gov-john-hickenlooper-opposes-marijuana-legalization-measure). The use of a ballot initiative thus reflected direct democracy's earliest aspirations—to create a channel for politics beyond partisanship. See, e.g., THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 46–48 (1989) (quoting Nathan Cree as stating in 1892 that direct democracy was intended “to break the crushing and stifling power of our great party machines”).



States as a whole, who voted in favor of legalization.

At the same time, we cannot fully understand Amendment 64 without attending to its national dimensions. For many years now, a variety of national organizations have turned to state ballot initiatives to push for the legalization of marijuana. In Colorado, the vast majority of funds for Amendment 64 (as well as funds opposing it) came from outside the state, as Americans nationwide saw the state's choice as a bellwether for national change.<sup>44</sup> Staff from national organizations also joined the campaign in support of Amendment 64.<sup>45</sup> As this suggests, the state initiative did not advance an interest particular to Coloradans; rather, it advanced an interest shared by many Americans. Across the country, individuals and groups both in favor of and opposed to legalization of marijuana have recognized the state contest not as a local matter with import only for the people of Colorado, but as a national contest with significance for the entire country.

They are right to do so. Colorado's legalization of marijuana does not only—in a states-as-laboratories sense<sup>46</sup>—generate a model for other states and perhaps the federal government to consider. It also has immediate implications for national policy because of the relationship between state and federal schemes. Here we come to the question of state autonomy. As with independence, a degree of state autonomy clearly attended Amendment 64. The states and the federal government each have their own criminal laws; when state officials make an arrest for marijuana distribution or possession, they do so as a matter of state law, not in order to carry out a federal statute. Colorado's decision to legalize marijuana was therefore, in an important sense, an exercise of state autonomy. The state relied on its separate lawmaking powers and criminal code to enact a policy different from the federal government's.

Yet casting state and federal drug law as separate misses much about the operation of these laws. The federal

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44. See sources cited *supra* note 2.

45. Compare, e.g., John Ingold, *Colorado Marijuana Activists Buttoned Down to Win Legalization Measure*, DENVER POST, Nov. 11, 2012, [http://www.denverpost.com/ci\\_21973903/colorado-marijuana-activists-buttoned-down-win-legalization-measure](http://www.denverpost.com/ci_21973903/colorado-marijuana-activists-buttoned-down-win-legalization-measure), with Staff, NAT'L CANNABIS INDUSTR. ASS'N, <http://thecannabisindustry.org/staffs/staff> (last visited Feb. 23, 2014).

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

government has long relied on state enforcement of state law as a means of enforcing federal law. In practice, that is, federal drug law looks a lot like cooperative federalism: with 99 percent of arrests for marijuana made by state officials, the federal government can rely on state enforcement of state law to achieve federal objectives.<sup>47</sup> Until it can't. Colorado's challenge to federal law has force precisely insofar as state and federal law are not separate but rather part of a single system. If state law truly stood apart from federal law, federal law would fill the void left by the state's initiative, rendering the state law merely expressive. But enforcement realities severely complicate, even if they do not altogether foreclose, this possibility. Colorado's initiative affects federal law because it is effectively a decision to opt out of a cooperative federalism scheme. Ultimately, it exemplifies partial autonomy: Colorado voters relied on the state's lawmaking authority, but their decision has real bite only because state law is intertwined with federal law.

Amendment 64 is accordingly best understood as a partially independent, partially autonomous state act. A nationwide movement, with a distinctive but not state-specific interest, has generated policy change in a state forum. State-federal overlap, and in particular federal reliance on state enforcement, gives the state law most of its force. The "in-betweenness" of Colorado's action highlights a broader point about contemporary American federalism: in critical respects, national political conflict plays out in the states, with states functioning as discrete sites of national governance for Americans at large.<sup>48</sup> In fifty fora, interests that lack a grip on Washington, D.C., are able to translate their political commitments into reality, and state action influences the federal government in turn. Although understanding the states as national actors poses a challenge to traditional, bundled conceptions of federalism, it is often the best way to make

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47. See O'Hear, *supra* note 3, at 806; Karen O'Keefe, *State Medical Marijuana Implementation and Federal Policy*, 16 J. HEALTH CARE L. & POL'Y 39, 45 (2013); see also *Conant v. Walters*, 309 F.3d 629, 645 n.10 (9th Cir. 2002) (Kozinski, J., concurring) ("[F]ederal officials . . . explained that federal drug policies rely heavily on the states' enforcement of their own drug laws to achieve federal objectives.").

48. See generally Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920 (2014).

sense of states' significance.

Indeed, while it is too soon to say what will come of Colorado's legalization of marijuana, we seem to be witnessing a sort of "reverse preemption"—the displacement of federal law by state law<sup>49</sup>—rather than the preemption of state law by federal law.<sup>50</sup> Shortly after Amendment 64 was adopted, commentators began to question whether the federal government would attack Colorado's law on preemption grounds—and whether, if it did so, it would be checked by the prohibition on commandeering.<sup>51</sup> Less noted in the legal hubbub about whether the federal government might succeed in an attempt to crack down on Colorado was why it might not be in its interest to do so. Even bracketing a possible public backlash, officials within the federal government have a variety of different views about the criminal status of marijuana, and Colorado's actions created the opportunity for a debate to occur inside the federal government. They also gave federal officials more options, by putting "deference to state law" on the table and thereby lending federal officials a lower-stakes way to side with legalization.<sup>52</sup> Because the state's initiative forced the federal government to make *some* decision about how to respond, it overcame perhaps the most powerful force on the side of criminalization: inertia. With support from certain actors within the federal government, then, Colorado is reshaping federal as well as state drug policy, and Americans

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49. *Cf.* McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (2012) (allowing state law to trump the Federal Arbitration Act when state law bars the arbitration of insurance disputes); Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 37, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) ("To be sure, Congress may choose to borrow state-law definitions as a matter of cooperative federalism . . . . But the notion that Congress is somehow constitutionally required to do so—that state law can 'reverse preempt' contrary federal statutes in this area, and eliminate what otherwise would be the legitimate federal interest in uniform federal legal rules of nationwide applicability—is wholly unprecedented and foreign to our constitutional tradition.").

50. *Cf.* Cole, *supra* note 3 (recognizing state legalization efforts and suggesting that the federal government will not devote resources to enforcing the federal prohibition on marijuana beyond particular priorities, such as fighting criminal gangs and cartels).

51. *See, e.g.*, Robert A. Mikos, *On the Limits of Federal Supremacy: When States Relax (or Abandon) Marijuana Bans*, POLICY ANALYSIS, CATO INST. (Dec. 12, 2012), <http://www.cato.org/sites/cato.org/files/pubs/pdf/PA714.pdf>; *cf.* Conant, 309 F.3d at 646 (Kozinski, J., concurring) (adopting an anti-commandeering argument).

52. *See* Bulman-Pozen, *supra* note 15, at 1129–30.

throughout the country are invested in this experiment, as Colorado extends the arena for national governance beyond Washington, D.C. While only time will reveal the effects of Colorado's initiative on the United States' war on drugs, it already underscores the need to think more flexibly about contemporary federalism.