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POLITICO Pro Q&A: ‘Marijuana Federalism’ editor Jonathan Adler

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Jonathan Adler is among the most high-profile legal commentators in the country. The Case Western Reserve University law professor is a regular contributor to conservative publications including the [National Review](#) and [The Volokh Conspiracy](#), and his arguments have helped shape challenges to health and environmental laws.

Adler is also the editor of a new volume of essays, “[Marijuana Federalism: Uncle Sam and Mary Jane](#),” that explores the extraordinary conflict between state and federal laws when it comes to marijuana policy.

The book looks at how public perceptions of marijuana have rapidly shifted in recent years, what’s happened in states that have fully legalized cannabis and the challenges created by the lack of access to banking for marijuana companies in state-legal markets. Among the contributors are the Brookings Institution’s John Hudak and Christine Stenglein, Vanderbilt University law professor Robert Mikos and Harvard University economist Jeffrey Miron.

The Cato Institute is hosting a [virtual forum](#) Thursday featuring Adler and Hudak to discuss the book. Case Western is holding a [similar event](#) on Tuesday.

The following interview has been edited for length and clarity.

What prompted you to put together this collection of essays about marijuana?

Adler: When Colorado and Washington first decided to allow recreational use of marijuana, I thought that it was important that there be consideration of the distinct federalism questions that relate to marijuana policy and that we move beyond simple debates about — “Do you legalize? Do you not legalize?” — and focus on the particular legal and policy questions that arise when you have different levels of government pursuing different policies. We did a conference here at Case Western on that question, and then it seemed that these issues still needed further fleshing out.

Are there other precedents in American history where federal law has been so at odds with state law?

Adler: Not in recent history. Certainly, when you look at immigration policy — [there's] the sanctuary city movement, for example. Now it's different in the sense that that movement is not simply based on a different policy preference, but in fact based on an overt desire to resist federal policy. You can go back further in history and look at the Fugitive Slave Act, where states affirmatively sought to try and get in the way. But this is distinct from those examples. It's not that states are trying to get in the way of or resist or obstruct federal policy so much as they are trying to pursue a separate policy. And the reality on the ground is that the federal government can't really advance its policy position unless it has some degree of cooperation from states.

The coronavirus pandemic has highlighted differences between state and federal approaches to marijuana. Almost all states are allowing marijuana businesses to remain open, and in many cases declaring them essential services. But those businesses are completely shut out of the federal relief packages because of federal illegality. What do you make of that?

Adler: It just brings into stark relief something that already is the case: Many states treat marijuana dispensaries as legitimate businesses and federal law does not. That has implications for tax policy. That has implications for the availability of banking services to these businesses. It has an affect on the ability of lawyers to provide legal services. This is just a particularly acute or stark example of the fact that the federal prohibition on marijuana makes marijuana businesses illegitimate for a wide range of purposes.

You say in the book that there's a need for Congress to take action to address this conflict between state and federal law. [What are the chances] of that happening?

Adler: I'm an academic out in the Midwest. My political prognostication skills — I always knew they were weak — but definitely the last couple of years would have more than confirmed that. So I don't know what the prospect is. I do know that there is bipartisan support for addressing this conflict.

We benefit a lot from allowing different states to try different policy approaches. This is a policy area where it's not simply, "Legalize, don't legalize." How [do] you deal with controlling access to children. How do you deal with preventing the black market? How do you deal with interstate trafficking? How do you deal with advertising? How do you deal with addiction issues?

We have a chapter in the book that goes into the empirical evidence to date of what's happened from legalizing marijuana, focused primarily on Colorado and Washington. Thus far, the effects of marijuana legalization in those jurisdictions have been less than everyone predicted. All these wondrous effects that proponents predicted seem to have been overstated. The disastrous effects that opponents predicted were overstated. But this data is preliminary.

Former Attorney General Jeff Sessions repealed the Cole memorandum in 2018, which directed federal prosecutors not to enforce marijuana prohibition in states with legal markets. Do you see any practical difference in federal marijuana policy under the Trump administration versus the Obama administration?

Adler: It's made very little difference. The federal government doesn't have the resources to go around and deal with every person that's selling or distributing marijuana. We knew that was true; it's still true. The Obama administration thought there was some value in taking that threat off the table. In most U.S. attorneys' offices around the country, that's what they were doing anyway, and that's what they're still doing.

Attorney General Bill Barr has said that the Justice Department has little interest in pursuing prosecutions in these jurisdictions. And while he has said that he does not support marijuana legalization, he does think that legislation is necessary to deal with the federal-state conflict. Just from the standpoint of basic rule of law, the current landscape is not good. It's not good whether you like marijuana legalization or you oppose marijuana legalization, and there are ways of fixing it that don't require the federal government to legalize marijuana nationwide. Barr has expressed these concerns, which I think is positive, and I think it's more positive than reissuing something like the Cole memo. Because, insofar as we have problems here — and we do — Congress has to be the entity that fixes them.

Do you see any way of going back to where we were [on marijuana policy] prior to 2012 when Colorado and Washington became the first states to adopt full legalization?

Adler: The trend has been very powerful toward greater support of legalization. There's certainly reason to believe that a lot of support for medical marijuana is effectively de facto support for broader decriminalization, if not outright legalization. Whether or not that changes is a function of what we see on the ground, and what the experience of the states that have made these changes ends up being.

I'm someone that's sympathetic to marijuana legalization. I also have two teenage daughters and I am aware of the research suggesting that marijuana does affect youth brain development, and that concerns me. Is it possible to allow adults to use this substance responsibly in a way that doesn't threaten children, that doesn't create other health risks? I'm inclined to think the answer is yes. But I'm sure that some of the devil is in the details. If my intuitions about what we will see over time are correct, then I don't think there's any going back. But should things emerge that suggest that this is a problem, or it's a problem if done in a particular way, then I think the fact that we're doing it on a state-by-state basis will facilitate states learning from each other.