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# Playing Hot Pot-ato: Does Biden's Presidency Signal the End of Federal Marijuana Prohibition?

Sara Snowden\*

## I. INTRODUCTION

“Hot Potato is a very different game when the people playing are starving.”<sup>1</sup> In the context of federal marijuana legalization, various branches and agencies within the government have long engaged in a game of political hot potato—tossing responsibility for legalization off into the hands of someone (anyone) else. These evasive maneuvers are not victimless. As an overwhelming majority of states have taken actions to legalize or decriminalize marijuana, unsuspecting citizens have been caught in the crosshairs between conflicting state and federal laws.

Take for example David Doe,<sup>2</sup> a resident of Colorado,<sup>3</sup> who suffered many afflictions. Three years ago, he was diagnosed with an inoperable tumor which not only caused chronic pain but also epilepsy as well. To alleviate his symptoms, his oncologist prescribed medical marijuana. Faced with impending death, David packed his medical marijuana and drove to the neighboring state of Kansas<sup>4</sup> to visit family. Shortly after crossing into Kansas, David was arrested and charged with violating federal drug laws. David protested that he had a valid prescription and a medical marijuana card, but these defenses were unavailing. Though some states, like Colorado, have legalized marijuana for medical and recreational use, it remains illegal under federal law and, therefore, David was subject to federal criminal prosecution. David was a starving

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\*To Professor Jim Fleissner, thank you being a source of inspiration and guidance. To my family, thank you for your unwavering support.

1. PERSON (Paramount Pictures 2007).
2. David Doe is a fictional character created for illustrative purposes.
3. Medical and recreational marijuana is legal in Colorado.
4. Medical and recreational marijuana is illegal in Kansas.

victim of the federal government's hot potato approach to marijuana legalization.

Though David's story is fictional, the scenario is all too real. The United States currently operates in a cloud of uncertainty as it relates to conflicting federal and state marijuana drug laws. People living in states where marijuana has been legalized can easily find themselves guilty of a federal infraction because of the dissonance between the laws. This comment explores the origins of the federal marijuana prohibition; the evolution of marijuana laws and their enforcement; the role of the President and Attorney General; and potential solutions for concluding the federal prohibition. Specifically, this Comment proposes that the most realistic approach to federal legalization requires stair-stepped, modest legislation—a departure from the failed “full kitchen sink” bills of the past. The idea is that “slow and steady wins the race.” Because federal legalization of marijuana requires an act of Congress, any proposed legislation must be crafted to appeal to both houses as well as the Biden Administration.

## II. HISTORY OF THE CONTROLLED SUBSTANCES ACT

### A. *Controlled Substances Act Basics*

Despite the fact that many states have decriminalized marijuana<sup>5</sup> for medical or recreational use, marijuana remains an illegal substance under federal law.<sup>6</sup> The Controlled Substances Act (CSA),<sup>7</sup> enacted in 1970 in response to President Nixon's “War on Drugs,”<sup>8</sup> placed the control of marijuana under federal jurisdiction and established the statutory framework through which the federal government regulates the production, possession, and distribution of controlled substances.<sup>9</sup> Under the CSA, there are five schedules in which a substance may be

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5. Marijuana, often used as a synonym for “cannabis,” refers to the parts or products of the plant *Cannabis sativa* which contain substantial amounts of tetrahydrocannabinol (THC). THC is responsible for the effects marijuana has on a person's mental state. “Hemp” is derived from cannabis plants that contain little THC. Cannabis plants also contain cannabidiol (CBD). Collectively, THC and CBD are called “cannabinoids.” *Cannabis (Marijuana) and Cannabinoids: What You Need to Know*, NAT'L CTR. FOR COMPLEMENTARY AND INTEGRATIVE HEALTH (Nov. 2019), <https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know>.

6. See Controlled Substances Act, 21 U.S.C. § 811 (2015).

7. *Id.*; 21 U.S.C. § 812 (2018).

8. LISA N. SACCO, U.S. CONG. RESEARCH SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS (2014).

9. *Id.*

classified.<sup>10</sup> Schedule I is the most restrictive category, and Schedule V is the least.<sup>11</sup> Classifications into one of the five schedules are based on: (1) actual or relative potential for abuse; (2) known scientific evidence of pharmacological effects; (3) current scientific knowledge of the substance; (4) history and current pattern of abuse; (5) scope, duration, and significance of abuse; (6) risk to public health; (7) psychic or physiological dependence liability; and (8) whether the substance is an immediate precursor of another controlled substance.<sup>12</sup>

Schedule I controlled substances have no accepted medical uses, lack safety for use under medical supervision, and have a high potential for abuse.<sup>13</sup> In addition to marijuana, Schedule I also consists of drugs like heroin, lysergic acid diethylamide (LSD), and ecstasy.<sup>14</sup> Schedule II controlled substances are those which have an accepted medical use, but also have a high potential for abuse and addiction.<sup>15</sup> Examples of Schedule II substances include oxycodone, fentanyl, morphine, opium, codeine, hydrocodone, methamphetamine, and pentobarbital.<sup>16</sup> Schedule III substances, like Tylenol with Codeine, have medical uses and a lesser potential for abuse.<sup>17</sup> Schedule IV substances include drugs such as Xanax, Klonopin, Valium, and Ativan.<sup>18</sup> These are drugs that have a low potential for abuse relative to substances in Schedule III.<sup>19</sup> Finally, Schedule V substances are drugs with a low potential for abuse and contain limited quantities of certain narcotics such as Robitussin and Phenergan.<sup>20</sup> Therefore, drugs that are less harmful are likely to be classified as Schedule V controlled substances while drugs that are more harmful are likely to be classified as Schedule I or II controlled substances.

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10. 21 U.S.C. § 812(a) (2018).

11. 21 U.S.C. § 812(b) (2018).

12. 21 U.S.C. § 811(c) (2015).

13. 21 U.S.C. § 812(b)(1) (2018).

14. 21 C.F.R. § 1308.11 (2011); *Controlled Substance Schedules*, U.S. DEPT. OF JUSTICE DRUG ENFORCEMENT ADMIN. DIVERSION CONTROL DIVISION, <https://www.deadiversion.usdoj.gov/schedules/> (last visited Aug. 29, 2021).

15. *Controlled Substance Schedules*, U.S. DEPT. OF JUSTICE DRUG ENFORCEMENT ADMIN. DIVERSION CONTROL DIVISION, <https://www.deadiversion.usdoj.gov/schedules/> (last visited Aug. 29, 2021).

16. *Id.*; 21 C.F.R. § 1308.12 (2021).

17. *Controlled Substance Schedules*, U.S. DEPT. OF JUSTICE DRUG ENFORCEMENT ADMIN. DIVERSION CONTROL DIVISION, <https://www.deadiversion.usdoj.gov/schedules/> (last visited Aug. 29, 2021).

18. *Id.*

19. *Id.*

20. *Id.*

Federal and state authorities do not always agree on the medical utility and public health risks associated with marijuana. To illustrate, although thirty-six states have legalized the use of marijuana for medicinal purposes,<sup>21</sup> the Food and Drug Administration (FDA)—the agency with the federal authority to approve drugs for medical use—has not.<sup>22</sup> Consistent with the FDA’s position, marijuana therefore remains classified as a Schedule I controlled substance under the CSA.<sup>23</sup> Consequently, this legal dissonance has resulted in an uneasy truce between federal and state authorities, subject to change at the slightest political whim.

### *B. Constitutional Basis of Authority to Regulate Marijuana*

Federal emphasis on drug enforcement has ebbed and flowed with changes in presidential administrations. In 1963, President Kennedy’s Administration commissioned a report on curbing narcotic drug abuse which recommended increased national drug enforcement initiatives.<sup>24</sup> Building on this foundation, in 1968 “President Johnson fundamentally reorganized the federal drug control agencies” by merging them together into the Bureau of Narcotics and Dangerous Drugs.<sup>25</sup> Consequently, streamlining these agencies transferred federal oversight of drug enforcement from the Department of the Treasury to the Department of Justice (DOJ). Therefore, the basis of Congress’s constitutional authority shifted from the federal government’s taxation powers<sup>26</sup> to its power to regulate interstate commerce.<sup>27</sup>

The Supreme Court has held the Commerce Clause<sup>28</sup> not only grants the federal government the authority to regulate interstate but also intrastate activities affecting commerce.<sup>29</sup> “[E]ven if . . . [the] activity

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21. *State Medical Cannabis Laws*, NAT’L CONF. OF STATE LEGISLATURES, (Aug. 23, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

22. *Marijuana/Cannabis Drug Fact Sheet*, U.S. DEPT. OF JUSTICE DRUG ENFORCEMENT ADMIN., (April 2020), [https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020\\_0.pdf](https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020_0.pdf).

23. *Id.*

24. Exec. Order No. 11076, 27 Fed. Reg. 477 (Jan. 15, 1963); SACCO, *supra* note 8.

25. *Gonzalez v. Raich*, 545 U.S. 1, 12 (2005) (explaining President Johnson merged the Bureau of Narcotics, housed in the Department of the Treasury, with the Bureau of Drug Abuse and Control to create the Bureau of Narcotics and Dangerous Drugs).

26. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises . . .”).

27. SACCO, *supra* note 8.

28. U.S. CONST. art. I, § 8, cl. 3 (Congress has the power “[t]o regulate Commerce . . . among the several States . . .”).

29. *Perez v. United States*, 402 U.S. 146, 150 (1971).

[is] local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . irrespective of whether such effect is” direct or indirect.<sup>30</sup> Hence, where criminal activity, even if purely local, has a substantial impact on interstate commerce, Congress may enact legislation against it.<sup>31</sup>

In *Gonzalez v. Raich*,<sup>32</sup> the Supreme Court upheld the federal government’s authority to act under the Commerce Clause to regulate locally cultivated marijuana for medicinal use by patients in California, even though the practice was permissible under state law.<sup>33</sup> The Court paralleled *Raich* with precedent, *Wickard v. Filburn*,<sup>34</sup> a case involving wheat grown for home consumption, and held Congress had the power to regulate local, noncommercial drug activity within the states because the manufacture and possession of marijuana posed a threat to a national market.<sup>35</sup> Furthermore, “the *de minimis* character of individual instances . . . is of no consequence.”<sup>36</sup> The primary purpose of the CSA was to control the supply and demand of controlled substances.<sup>37</sup> Exempting marijuana for home-consumption from federal control would have a substantial influence on national price and market conditions.<sup>38</sup> Given concerns about the dispersion of locally grown and consumed marijuana into illicit channels, the Court had “no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.”<sup>39</sup>

### C. Nixon’s War on Drugs: The Emergence of the CSA and DEA

Shortly after taking office in 1969, President Richard Nixon declared a national war on drugs, citing drug abuse as “America’s public enemy

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30. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding wheat grown wholly for home consumption was within the scope of the Commerce Clause and federal regulation because it supplied the need of the grower that would otherwise be satisfied by his purchases in the open market).

31. *Perez*, 402 U.S. at 154 (“Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce.”).

32. *Raich*, 545 U.S. at 1.

33. *Id.*

34. *Wickard*, 317 U.S. at 111.

35. *Raich*, 545 U.S. at 17–19.

36. *Id.* at 17.

37. *Id.* at 19.

38. *Id.*

39. *Id.* at 22.

number one.”<sup>40</sup> Constructive rather than literal,<sup>41</sup> this war sought to attack drug abuse through enhanced federal control and law enforcement initiatives.<sup>42</sup> As part of the war on drugs, Nixon pushed for the passage of comprehensive federal drug laws, increased federal funding for drug control agencies, and proposed strict measures such as mandatory prison sentencing for drug crimes.<sup>43</sup>

The result of Nixon’s initiatives was the birth of the CSA. “[E]nacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 . . . [the CSA] placed the control of select plants,” like marijuana, “under federal jurisdiction.”<sup>44</sup> Subsequently, Nixon also authorized the creation of the Drug Enforcement Administration (DEA)—a federal agency within the Department of Justice dedicated to enforcing the CSA.<sup>45</sup> Specifically, the single-mission of the DEA was

[T]o enforce the controlled substances laws and regulations of the United States and bring to the criminal and civil justice system . . . those organizations and principal members of organizations, involved in the growing, manufacture, or distribution of controlled substances appearing in or destined for illicit traffic in the United States . . . .<sup>46</sup>

Thus, the DEA was charged with coordinating all federal drug enforcement efforts with state and local authorities and had a significant impact in fighting the war on drugs.<sup>47</sup>

### III. FEDERAL ENFORCEMENT OF THE CSA AND MARIJUANA DRUG LAWS

As head of the DOJ and chief law enforcement officer of the federal government, the Attorney General (AG) oversees the DEA and bears ultimate responsibility for the enforcement of the CSA and related

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40. Richard Nixon, President of the United States, Remarks About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971).

41. *Garcia v. United States*, No. 2:04-CR-16-FTM29DNF, 2009 WL 2781740, at \*7 (M.D. Fla. Aug. 28, 2009) (“The ‘war on drugs’ metaphor . . . is not a literal war within the meaning of the Constitution.”).

42. Nixon, *supra* note 40.

43. Richard Nixon, President of the United States, Special Message to the Congress on Drug Abuse Prevention and Control (June 17, 1971).

44. SACCO, *supra* note 8.

45. Exec. Order No. 11727, 38 Fed. Reg. 18357 (July 6, 1973).

46. *Our Mission*, U.S. DEPT. OF JUSTICE DRUG ENFORCEMENT ADMIN., <https://www.dea.gov/who-we-are/about> (last visited Sept. 9, 2021).

47. SACCO, *supra* note 8.; *The DEA Years*, U.S. DEPT. OF JUSTICE DRUG ENFORCEMENT ADMIN., [https://www.dea.gov/sites/default/files/2021-04/1970-1975\\_p\\_30-39\\_0.pdf](https://www.dea.gov/sites/default/files/2021-04/1970-1975_p_30-39_0.pdf) (last visited Sept. 9, 2021).

policies.<sup>48</sup> Consequently, in concert with the Secretary of Health and Human Services (HHS), the AG has the authority to add, delete, or change the schedule of a drug or substance within the CSA.<sup>49</sup> In determining whether, and to what degree, a drug or substance should be controlled, the AG considers, *inter alia*, the actual or relative potential for abuse, scientific evidence of pharmacological effects, and risks to public health.<sup>50</sup>

Appointed by the President and confirmed by the Senate, the AG is a member of the President's Cabinet.<sup>51</sup> As one of the President's closest confidants, it is unsurprising that the AG's gusto toward enforcing the CSA against certain drugs, like marijuana, is closely tied to the prerogatives of the sitting President.

#### A. Reagan Administration and AG Meese: "Just Say No"

The Reagan Administration, which stressed the importance of vigorous enforcement of the CSA, is a prime example of how the President and AG have worked in concert to combat drug use.<sup>52</sup> The President and First Lady, Nancy Reagan, famously embarked on a nationwide "Just Say No" campaign to encourage Americans to "us[e] every opportunity to force the issue of not using drugs to the point of making others uncomfortable . . ." <sup>53</sup> Additionally, in his second term, President Reagan more than tripled federal spending for drug law enforcement to strengthen the power of then-Attorney General, Meese.<sup>54</sup>

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48. *Organization, Mission & Functions Manual: Attorney General, Deputy And Associate*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general#ag> (last visited Sept. 9, 2021) (in 1870, Congress's Act to Establish the Department of Justice established the Attorney General as head of the Department of Justice, giving the Attorney General control of all U.S. Attorneys).

49. 21 U.S.C. § 811(a) (2015). *But see* 21 U.S.C. § 811(b) (2015) ("The Attorney General shall, before initiating proceedings under subsection (a) to control a drug or other substance or to remove a drug or other substance entirely from the schedules . . . request from the Secretary [of HHS] a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled . . . [t]he recommendations of the Secretary to the Attorney General shall be binding on the Attorney General . . . and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance.").

50. 21 U.S.C. § 811(c).

51. *The Executive Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-executive-branch/> (last visited Sept. 9, 2021).

52. Ronald Reagan, President of the United States, Address to the Nation on the Campaign Against Drug Abuse (Sept. 14, 1986).

53. *Id.*

54. *Id.*



Predictably, Meese declared “drug law enforcement the number one priority of the Department of Justice.”<sup>55</sup> The emphasis shifted away from only restricting the supply of drugs to also attacking demand.<sup>56</sup> Between 1984 and 1985, the DOJ set new records for seizures of marijuana and subsequently saw nearly a 20% decrease in usage in the under-twenty-five age group.<sup>57</sup> By 1986, Meese orchestrated a 134% increase in the number of federal drug law convictions compared to 1980—the “kid-gloves” era of the Carter Administration.<sup>58</sup>

Meese was aided by Congress’s enactment of the Anti-Drug Abuse Act of 1986 (Anti-Drug Act)<sup>59</sup> which established set criminal penalties for simple possession of a controlled substance.<sup>60</sup> Emboldened by the Anti-Drug Act, Meese attacked the demand for the drugs by authorizing an exponential increase in drug consumers charged and subsequently convicted of possession.<sup>61</sup> Notably, these possession convictions were not isolated to “hard drugs” such as cocaine and heroin.<sup>62</sup> In fact, of all offenders convicted of simple possession in 1986, 78% were for possession of marijuana.<sup>63</sup> Therefore, this sharp increase in convictions for drug possession during the Reagan Administration was likely “caused by a heightened Federal attention to all drug cases and the rapid expansion of Federal resources for drug prosecutions, which may have resulted in fewer deferrals of simple possession cases to local prosecutors.”<sup>64</sup>

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55. Edwin Meese, Attorney General of the United States, The National Partnership to Prevent Drug and Alcohol Abuse Dinner (Oct. 10, 1985).

56. *Id.*

57. *Id.*

58. *Drug Law Violators*, U.S. DEPT. OF JUSTICE (June 1988), <https://bjs.ojp.gov/content/pub/pdf/dlv80-86.pdf>; Jimmy Carter, President of the United States, Drug Abuse Remarks on Transmitting a Message to the Congress (Aug. 2, 1977) (President Carter “supported change in law to end Federal criminal penalties for possession of up to one ounce of marijuana, leaving the States free to adopt whatever laws they wish concerning marijuana . . . Federal civil penalties should be continued as a deterrent to the possession and use of marijuana.”).

59. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 1986, 100 Stat. 3207.

60. *Id.*

61. *Drug Law Violators*, U.S. DEPT. OF JUSTICE (June 1988), <https://bjs.ojp.gov/content/pub/pdf/dlv80-86.pdf>.

62. *Id.*

63. *Id.*

64. *Id.*

*B. Recent Presidential Administrations: Obama v. Trump*

In the past decade, though the CSA remains the law of the land, zeal for the war on drugs has waned and the tide has turned against strict enforcement of the CSA, particularly as it relates to marijuana. Thus, given the lack of federal legislative response, recent presidents have leveraged the office of the AG to discourage federal attorneys from prosecuting defendants charged with violating federal marijuana laws. The Obama and Trump administrations provide the most recent illustrations of this legal finagling.

The Obama Administration's position was that the government must take federal drug enforcement seriously.<sup>65</sup> Like Reagan, Obama postulated that the key to eliminating the drugs was to reduce the demand which would, in turn, allow the government to focus its limited resources more effectively on interdiction.<sup>66</sup> Obama underscored that the "decisions that are made by the Justice Department or the FBI about prosecuting drug kingpins versus somebody with some small amount in terms of possession . . . are made based on how [the federal government] can [] best enforce the laws that are on the books."<sup>67</sup>

In October 2009, Obama's Deputy Attorney General,<sup>68</sup> David W. Ogden, issued a memorandum (Ogden Memo) to all United States attorneys stating that investigations and prosecutions related to the CSA should only be focused on core federal enforcement priorities.<sup>69</sup> Per the Ogden Memo, the DOJ's main objective was "[t]he prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks."<sup>70</sup> To conserve precious resources, federal prosecutors were expressly discouraged from exercising discretion to prosecute individual users in states that had enacted laws authorizing the use of medical

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65. Barack Obama, President of the United States, Interview with Regional Reporters (March 11, 2009).

66. *Id.*

67. Barack Obama, President of the United States, Remarks at an MTV/BET Town Hall Meeting (Oct. 14, 2010).

68. *Office of the Deputy Attorney General*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/dag> (last visited Oct. 14, 2021) ("The Deputy Attorney General advises and assists the Attorney General in formulating and implementing the Department's policies and programs.").

69. David W. Ogden, Deputy Attorney General of the United States, Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

70. *Id.*

marijuana.<sup>71</sup> The caveat, however, was that even in states that legalized marijuana, “prosecution of commercial enterprises that unlawfully market[ed] and s[old] marijuana for profit continue[d] to be an enforcement priority of the [DOJ].”<sup>72</sup>

Despite this clear warning from the DOJ, many jurisdictions brazenly interpreted the Ogden Memo as granting *carte blanche* “to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers” with “revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants” for purported medical purposes.<sup>73</sup> In 2011, Deputy Attorney General, James M. Cole, responded with stern follow-up guidance (Cole Memo I) to United States attorneys clarifying Obama’s position.<sup>74</sup> Accordingly, the Administration made clear: (1) no state could authorize violations of federal law; (2) marijuana is a dangerous drug; and (3) distribution and sale of marijuana is a serious crime.<sup>75</sup> Further, Obama reiterated that the Ogden Memo would not shield commercial producers and distributors of marijuana from federal prosecution, “even where those activities purport to comply with state law.”<sup>76</sup> Lastly, the Administration cautioned, “[t]hose who engage in transactions involving the proceeds of such activity” could be prosecuted under “federal money laundering statutes and other federal financial laws.”<sup>77</sup> Cole Memo I served as a reminder that though the federal government was willing to look the other way in terms of individual marijuana users, commercial and large-scale producers remained fair game.

With relaxed federal guidelines in place, more states began legalizing the use, sale, and production of recreational and medicinal marijuana within state borders. In 2013, the Obama Administration responded to this chorus of state initiatives by issuing a more pragmatic

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71. *Id.* (“[P]rosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen . . . in clear and unambiguous compliance with existing state law . . . is unlikely to be an efficient use of limited federal resources.”).

72. *Id.*

73. James M. Cole, Deputy Attorney General, Memorandum for United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

memorandum (Cole Memo II).<sup>78</sup> Whereas previous guidance encouraged federal prosecution of large-scale, for-profit, commercial producers and distributors of marijuana, Cole Memo II expressly provided that “in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of [the] marijuana operation alone.”<sup>79</sup> Acknowledging the about-face, the Obama Administration maintained it was “committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way.”<sup>80</sup> To accomplish this, the DOJ relied on states and local agencies to address lower-level, localized marijuana activity by implementing strong and effective regulatory enforcement systems.<sup>81</sup> Meanwhile, the Obama Administration focused its resources on eight guiding priorities:

- [1] Preventing the distribution of marijuana to minors;
- [2] Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- [3] Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- [4] Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- [5] Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- [6] Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- [7] Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- [8] Preventing marijuana possession or use on federal property.<sup>82</sup>

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78. James M. Cole, Deputy Attorney General, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

As a result, the Obama Administration's new standard for whether a commercial marijuana enterprise triggered federal prosecution turned on whether the conduct at issue implicated one of the eight listed federal enforcement priorities—not the size or profitability of the enterprise itself.<sup>83</sup>

Lastly, in a 2014 show of power, the Obama Administration took aim at financial institutions that offered services to marijuana-related business, even in states that had legalized marijuana (Cole Memo III).<sup>84</sup> Specifically, the Administration emphasized that because federal money laundering statutes<sup>85</sup> and the Bank Secrecy Act (BSA)<sup>86</sup> remained in effect, “financial institutions that conduct transactions with money generated by marijuana-related conduct” were subject to criminal liability.<sup>87</sup> The BSA is a legislative framework that requires U.S. financial institutions to assist U.S. government agencies by keeping records and reporting certain customer activity that could signify money laundering, tax evasion, or other criminal activities.<sup>88</sup> Thus, as Cole Memo III made clear, “if the financial institution or individual is willfully blind” to a customer’s marijuana-related violation of the CSA by, “for example, failing to conduct appropriate due diligence of the customers’ activities,” criminal prosecution against the financial institution “might be appropriate.”<sup>89</sup>

Though Obama sought to focus finite federal resources on the “big fish” that implicated one of his eight guiding priorities and left the

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83. *Id.*

84. James M. Cole, Deputy Attorney General, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), <https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%2014%20%282%29.pdf>.

85. 18 U.S.C. § 1956 (2016); 18 U.S.C. § 1957 (2012); 18 U.S.C. § 1960 (2006).

86. 31 U.S.C. § 5311 (2021).

The Currency and Foreign Transactions Reporting Act of 1970 (which legislative framework is commonly referred to as the “Bank Secrecy Act” or “BSA”) requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering. Specifically, the act requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding \$10,000 (daily aggregate amount), and to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities.

*FinCEN's Mandate From Congress*, FINANCIAL CRIMES ENFORCEMENT NETWORK, <https://www.fincen.gov/resources/fincens-mandate-congress> (last visited Oct. 14, 2021).

87. Cole, *supra* note 84.

88. FINANCIAL CRIMES ENFORCEMENT NETWORK, *supra* note 86.

89. Cole, *supra* note 84.

“small fish” and individual marijuana users to discretion of local law enforcement, the Administration refused to completely relinquish control to state and local authorities. Through thinly veiled threats, like those in the Cole III memo, the Obama Administration left the possibility of federal enforcement open, even in states that legalized marijuana, if it felt the state lacked “a clear and robust regulatory scheme.”<sup>90</sup>

While the Obama-era guidance appeared to suspend criminal sanctions for some marijuana users and producers, the Trump Administration rolled the clock back to pre-Obama enforcement initiatives. Accordingly, in 2018, the Trump Administration, by and through AG Jeff Sessions, rescinded all Obama-era guidance on marijuana enforcement.<sup>91</sup> In doing so, the new Administration sought a “return to the rule of law.”<sup>92</sup> Specifically, President Trump indicated that in passing the CSA and not thereafter reforming it, Congress’s determination “that marijuana is a dangerous drug and that marijuana activity is a serious crime” remained unchanged.<sup>93</sup> Therefore, under the Trump Administration *any* violation of the CSA would once again serve as a basis for federal criminal prosecution.<sup>94</sup>

Unlike the Obama Administration, Trump did not provide a list of specific DOJ priorities, interference of which would trigger federal enforcement of the CSA.<sup>95</sup> Rather, Trump referenced the broad idea that “federal prosecutors deciding which cases to prosecute [should] weigh all relevant considerations” including “the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.”<sup>96</sup> Given these embedded principals of federal prosecution, Sessions declared the “previous nationwide guidance specific to marijuana enforcement [was] unnecessary.”<sup>97</sup> Thus, Trump’s “return to the rule of law” effectively ended the truce drawn between federal and state governments on marijuana enforcement acquired during the Obama Administration.

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90. *Id.*

91. Jefferson B. Sessions, Attorney General, Memorandum for All United States Attorneys: Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

92. *Justice Department Issues Memo on Marijuana Enforcement*, U.S. DEPT. OF JUSTICE (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>.

93. Sessions, *supra* note 91.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

## IV. FEDERALISM AND STATES' RIGHTS

A. *Dual Sovereignty and the CSA*

The United States is a dual-sovereign system, splitting power between the federal and state governments. Though the United States Constitution provides that federal law is the “supreme Law of the Land,”<sup>98</sup> the Tenth Amendment grants “[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States . . . .”<sup>99</sup> For example, pertinent to marijuana, states have an independent core police power which includes the authority to define criminal law and protect the health, safety, and welfare of their citizens.<sup>100</sup> Thus, one of the chief virtues of this bifurcated governing scheme is that states “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>101</sup>

Whether, and to what extent, federal law preempts state law is a matter of Congressional intent. Regarding marijuana laws, 21 U.S.C. § 903 expressly states Congress intended that the CSA only preempt state law if there was “a positive conflict” between the CSA and state law such “that the two [could not] consistently stand together.”<sup>102</sup> Accordingly, for state marijuana laws to be invalidated by the CSA, the conflict between the laws must make it “impossible for a private party to comply with both state and federal requirements.”<sup>103</sup>

Specifically, conflict preemption occurs where compliance with state law *requires* violation of federal law.<sup>104</sup> There is a subtle, distinct, but powerful difference between state laws that *require* violation of federal law and those that merely *allow* for conduct that is otherwise illegal under federal law.<sup>105</sup> Though the federal government is free to enforce its own marijuana laws, the Tenth Amendment’s “anticommandeering rule” prohibits the requirement that states must enact legislation or take other action to enforce those federal laws.<sup>106</sup>

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98. U.S. CONST. art. VI, cl. 2.

99. U.S. CONST. amend. X.

100. *See* *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993).

101. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

102. 21 U.S.C. § 903 (1970).

103. *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472, 480 (2013).

104. *Id.*

105. *See* *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (acknowledging that states “may choose to legalize an activity that federal law prohibits, such as the sale of marijuana”).

106. *Murphy v. National Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1476–77. (2018).

It is noteworthy that the federal government has not alleged the CSA preempts any state law that legalizes or regulates marijuana. In fact, every year since 2015, Congress has specifically attached a rider to the DOJ's annual appropriations bill that stipulates, "[n]one of the funds made available under this Act to the Department of Justice may be used with respect to [the states and U.S. territories] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."<sup>107</sup> Along that vein, discussed *supra*, recent DOJ guidance issued by the Obama Administration similarly embraced a policy of non-interference in states that legalized marijuana.<sup>108</sup> Nonetheless, the DOJ has also explicitly cautioned that, despite its passive stance on marijuana enforcement, the DOJ retains full authority to enforce federal laws relating to marijuana, regardless of state law.<sup>109</sup> The discordant and noncommittal messages from the federal government have shrouded the field with apprehension and uncertainty.

In June 2021, Justice Clarence Thomas, one of the Supreme Court's most conservative voices, sharply criticized the federal government's inconsistent, laissez-faire approach to marijuana prohibition.<sup>110</sup> Indeed, Justice Thomas lamented, "[o]nce comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary."<sup>111</sup>

Additionally, Justice Thomas called into question the viability of *Gonzalez v. Raich*, the Court's premier precedent on the local use and cultivation of marijuana within a state.<sup>112</sup> In 2005, the *Raich* majority, to which Thomas dissented, held that Congress's power to regulate interstate commerce subsequently authorized the federal government to prohibit the intrastate use and growth of marijuana.<sup>113</sup> The Court explained that because Congress had enacted comprehensive legislation to entirely prohibit the possession or use of marijuana, permitting

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107. *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2237 (2021); Consolidated Appropriations Act, 2020, H.R. 1158, 116th Cong. (2019); Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. (2020), <https://www.govinfo.gov/content/pkg/BILLS-116hr133enr/pdf/BILLS-116hr133enr.pdf>.

108. See *Ogden*, *supra* note 69; *Cole*, *supra* note 73; *Cole*, *supra* note 78; *Cole*, *supra* note 84.

109. *Cole*, *supra* note 78.

110. *Standing Akimbo, LLC*, 141 S. Ct. at 2237–38.

111. *Id.* at 2236–37.

112. *Id.* at 2238.

113. *Id.* at 2236.



exemptions for local use would undermine the comprehensive regime.<sup>114</sup> Therefore, the Court held that “[p]rohibiting any *intrastate* use was . . . ‘necessary and proper’ to avoid a ‘gaping hole’ in Congress’ ‘closed regulatory system.’”<sup>115</sup>

In the 2021 *Standing Akimbo, LLC v. United States*<sup>116</sup> opinion, Justice Thomas highlighted the ways in which the federal government’s policies following *Raich* greatly undermined the Court’s reasoning.<sup>117</sup> Referencing the DOJ memorandums “against intruding on state legalization schemes or prosecuting certain individuals who comply with state law,” as well as Congress’s prohibition on using DOJ funds to prevent states medical marijuana laws, Justice Thomas concluded that “one can certainly understand why an ordinary person might think that the Federal Government has retreated from its once-absolute ban on marijuana.”<sup>118</sup> In concluding his opinion, Justice Thomas remarked that since the federal government is demonstratively “content to allow States to act ‘as laboratories[,]’” it no longer has the “authority to intrude on ‘the States’ core police powers.”<sup>119</sup> Therefore, at least from the likely purview of the Supreme Court, “[a] prohibition on *intrastate* use or cultivation of marijuana may no longer be necessary or proper.”<sup>120</sup>

#### *B. State Legalization of Marijuana*

The battle-cry for legalization and access to marijuana has been sounded. Pioneering the effort, California became the first state to legalize medical marijuana in 1996.<sup>121</sup> Moving forward, in 2012, Colorado and Washington became the first states to approve recreational marijuana.<sup>122</sup> The trend has since taken off. As of May 2021, thirty-six states and four territories have legalized marijuana for

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114. *Id.*

115. *Id.* (citing *Raich*, 545 U.S. at 22–29) (emphasis added).

116. *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2236 (2021).

117. *Id.* at 2236–37.

118. *Id.* at 2237–38.

119. *Id.* at 2238.

120. *Id.* (first emphasis added).

121. Jeremy Berke, Shayanne Gal, and Yeji Jesse Lee, *Marijuana legalization is sweeping the US. See every state where cannabis is legal.*, BUSINESS INSIDER (July 9, 2021, 9:20 AM), <https://www.businessinsider.com/legal-marijuana-states-2018-1#california-3>.

122. Michael Hartman, *Cannabis Overview*, NAT’L CONFERENCE OF STATE LEGISLATURES (July 6, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

medicinal purposes.<sup>123</sup> Furthermore, as of November 2021, eighteen states, two territories, and the District of Columbia have enacted legislation for recreational marijuana.<sup>124</sup> Five of the states that legalized recreational marijuana did so in 2021.<sup>125</sup> Moreover, eleven states allow for the use of “low THC, high cannabidiol (CBD) products.”<sup>126</sup> Only Idaho, Nebraska, and Kansas continue to have a complete prohibition on marijuana.<sup>127</sup>

In addition to near-universal legalization efforts amongst the states, beginning with the District of Columbia in 2014, some states have also implemented initiatives to decriminalize marijuana.<sup>128</sup> Thus, in twenty-seven states and the District of Columbia, “small, personal-consumption amounts of marijuana are a civil or local infraction, not a state crime.”<sup>129</sup> Finally, over the past decade, at least sixteen states have reduced criminal penalties for marijuana convictions.<sup>130</sup> Therefore, while the federal CSA remains unchanged, the states clearly see value in providing statutorily-sound legal access to marijuana and have wielded their sovereign authority to do so.

## V. PROBLEMS ASSOCIATED WITH THE FAILURE TO FEDERALLY LEGALIZE MARIJUANA

### A. Wasted Prosecutorial Resources

Federal drug interdiction is a massive endeavor that requires significant resources to investigate, arrest, and prosecute each defendant. To illustrate, for fiscal year 2022, the Biden Administration has requested more than \$41 billion in the National Drug Control Budget to be aimed at supply and demand reduction.<sup>131</sup> However, despite ongoing federal initiatives to curtail the drug trade, “[s]ince the enactment of the CSA, drug cases have either been the highest or second highest category of criminal cases filed by U.S. Attorneys.”<sup>132</sup>

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123. *State Medical Cannabis Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (Aug. 23, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Hartman, *supra* note 122.

129. *Id.*

130. *Id.*

131. *National Drug Control Budget*, OFFICE OF NAT’L DRUG CONTROL POLICY (May 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/05/National-Drug-Control-Budget-FY-2022-Funding-Highlights.pdf>.

132. SACCO, *supra* note 8.

Unsurprisingly, drug offenses also account for the highest number of criminal appeals filed by or against the United States.<sup>133</sup>

Increased federal funding to stymie marijuana trafficking and use has not proved effective. The government has consistently annually increased spending on drug control initiatives.<sup>134</sup> However, only recently have the number of marijuana trafficking and possession cases noticeably declined—falling by 14.1% and 66.9% respectively.<sup>135</sup>

The decreasing trend in federal marijuana drug cases most likely originated from the Obama-era DOJ memorandums and subsequent state-level legislation legalizing marijuana—not increased federal spending on drug control. From 2009 to 2013, the AG publicized the DOJ's intent to focus its limited resources elsewhere and let states police local cultivation and use of marijuana.<sup>136</sup> Despite this scale-back, the federal government continues to spend tens of millions of dollars each year prosecuting marijuana drug cases.<sup>137</sup> If the federal government is content to forego prosecuting marijuana drug cases in those states that have to some extent legalized the drug—and given the trend of decreasing prosecutions, it appears true—it is arguably a tremendous waste of federal resources to continue prosecuting some, but not all, marijuana cases.

#### *B. Conflicts with Other Federal Rules and Regulations*

Citizens of states that legalized marijuana have become trapped in a web of other, non-CSA federal violations. For example, as the Obama-era Cole III Memo stressed, regardless of permissive state marijuana laws, banks and other financial institutions remain heavily regulated by the federal government's Bank Secrecy Act (BSA).<sup>138</sup> This means “any contact with money that can be traced back to state marijuana operations could be considered money laundering and expose

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133. *Id.*

134. OFFICE OF NAT'L DRUG CONTROL POLICY *supra* note 131 (explaining that in 2018, \$33.2 million was spent on national drug control initiatives; in 2019, that figure was \$36.8 million; in 2020, it was \$39.6 million; and in 2021, the federal government allocated \$40.3 million to drug control).

135. *Overview of Federal Criminal Cases*, U. S. SENTENCING COMMISSION (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf) (As reported in 2018, “[d]rug possession cases decreased over two-thirds (66.9%) since fiscal year 2014 . . . . Drug trafficking offenses fell by 14.1 percent in the past five years . . . .”)

136. See Ogden, *supra* note 69; Cole, *supra* note 73; Cole, *supra* note 78; Cole, *supra* note 84.

137. OFFICE OF NAT'L DRUG CONTROL POLICY *supra* note 131.

138. 31 U.S.C. § 5311; Cole, *supra* note 84.

a bank to significant legal, operational and regulatory risk.”<sup>139</sup> The impact is profound considering the marijuana industry involves not only growers and retailers, but also a wide array of vendors, suppliers, landlords, employees, and a host of other individuals indirectly tied to the marijuana industry.<sup>140</sup> Though most banks refuse to service marijuana-related businesses, these indirect connections to marijuana revenues are near impossible for banks to identify and avoid, therefore exposing banks to substantial legal risks.<sup>141</sup>

As the American Bankers Association has lamented, “[t]he rift between federal and state law has left banks trapped between their mission to serve the financial needs of their local communities and the threat of federal enforcement action.”<sup>142</sup> Unable to obtain bank accounts, loans, credit cards, or other financial services, the marijuana industry must be cash-based, which presents significant safety risks. “But, if marijuana-related businesses, in recognition of this, hire armed guards for protection, the owners and the guards might run afoul of a federal law that imposes harsh penalties for using a firearm in furtherance of a ‘drug trafficking crime.’”<sup>143</sup>

Additionally, any marijuana user who also happens to own a gun, or even a bullet, can be convicted of a federal felony offense.<sup>144</sup> Enforced by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), 18 U.S.C. § 922(g)(3)<sup>145</sup> prohibits any person “who is an unlawful user of . . . any controlled substance,” as defined by the CSA, from shipping, transporting, receiving, or possessing firearms or ammunition.<sup>146</sup> This holds true for medical or recreational use, regardless of state law. As the ATF stated, “[m]arijuana is listed in the Controlled Substances Act as a Schedule I controlled substance, and there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes”

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139. *Cannabis Banking: Bridging the Gap between State and Federal Law*, AMERICAN BANKERS ASSOC., <https://www.aba.com/advocacy/our-issues/cannabis> (last visited Oct. 17, 2021).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Standing Akimbo, LLC*, 414 S. Ct. at 2238.

144. *Id.*; Arthur Herbert, Asst. Director Enforcement Programs and Services, U.S. DEPT. OF JUSTICE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, Open Letter to All Federal Firearms Licensees (Sept. 21, 2011), <https://www.atf.gov/file/60211/download>.

145. 18 U.S.C. § 922(g)(3).

146. *Id.*

because “the Federal government does not recognize marijuana as a medicine.”<sup>147</sup>

Furthermore, marijuana-related businesses operating in compliance with state law frequently encounter disparaging treatment in the Internal Revenue Code (Tax Code).<sup>148</sup> As the petitioners in *Standing Akimbo, LLC* discovered, the Tax Code allows most businesses to calculate taxable income by deducting the cost of goods sold and “all the ordinary and necessary expenses paid or incurred during [a] taxable year in carrying on any trade or business.”<sup>149</sup> However, the Tax Code expressly prohibits tax deductions for expenditures made “in carrying on any trade or business” that “consists of trafficking in controlled substances . . . which is prohibited by Federal law or the law of any State in which such trade or business is conducted.”<sup>150</sup> Therefore, unlike other business, a marijuana-based business which is “in the red after it pays its workers and keeps the lights on might nonetheless owe substantial federal income tax[es].”<sup>151</sup>

The “parade of horrors” seems endless. Otherwise law-abiding citizens can easily find themselves ensnared in the inconsistent application of federal marijuana laws and fall prey to a false sense of security complying with state laws. Indeed, “the Government’s willingness to often look the other way on marijuana is more episodic than coherent,”<sup>152</sup> leaving banks, businesses, patients, and other ordinary people trapped in the middle.

## VII. BRIDGING THE DIVIDE: ANALYSIS OF PROPOSED SOLUTIONS

### A. *Reclassification of Marijuana Outside of Schedule I*

The discussion on the continued dissonance between state and federal law begins with the FDA.<sup>153</sup> Although forty-seven states have, to varying degrees, legalized marijuana for medicinal purposes, it remains a Schedule I substance under the CSA.<sup>154</sup> By definition, Schedule I substances have no accepted medical uses identified by the FDA and

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147. Herbert, *supra* note 144.

148. *Standing Akimbo, LLC*, 141 S. Ct. at 2237–38.

149. *Id.*; 26 U.S.C. § 162(a) (2021).

150. 26 U.S.C. § 280E (1982).

151. *Standing Akimbo, LLC*, 141 S. Ct. at 2238.

152. *Id.*

153. U.S. DEPT. OF JUSTICE DRUG ENFORCEMENT ADMIN., *supra* note 22.

154. *Id.*

pose risks to public health.<sup>155</sup> Despite the fact that the overwhelming majority of states have identified medical applications, and even though no deaths from marijuana overdose have ever been reported, “the FDA has not approved a marketing application for any marijuana product for any clinical indication.”<sup>156</sup> Unless and until the FDA does so, marijuana will likely remain a Schedule I drug, prohibited by the CSA.<sup>157</sup>

Likewise, the AG, often acting at the behest of the President, and the HHS, hold the key to reclassifying marijuana as something less than a Schedule I controlled substance.<sup>158</sup> The HHS, in partnership with the FDA, DEA, and other federal agencies, has the authority to commission scientific and medical evaluations of marijuana.<sup>159</sup> Based on the results, the HHS can issue binding recommendations to the AG, including whether marijuana should be controlled at all.<sup>160</sup>

In 2020, the DOJ publicized the success of the DEA’s partnership with the HHS and the Office of National Drug Control Policy (ONDCP) in researching the medical utility of marijuana’s chemical components.<sup>161</sup> In addition to securing the FDA’s approval of Epidiolex, a marijuana extract used to treat childhood epilepsy, the DEA also increased the amount of marijuana available for research by 575% between 2017 and 2020.<sup>162</sup> The increased marijuana supply resulted in a 155% increase in the number of marijuana researchers registered with the DEA.<sup>163</sup> Currently, over 70% of the DEA’s Schedule I researchers are dedicated to marijuana, marijuana extracts, and marijuana derivatives.<sup>164</sup>

The DEA expressed its commitment, “consistent with the CSA, to assisting the health care needs of patients and supporting research involving marijuana.”<sup>165</sup> Based on the DEA’s testimony, it is clear the DOJ and HHS recognize the intense social, political, and economic pressures to obtain FDA approval and reclassify marijuana as

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155. 21 U.S.C. § 812(b)(1); U.S. DEPT. OF JUSTICE DRUG ENFORCEMENT ADMIN., *supra* note 22.

156. U.S. DEPT. OF JUSTICE DRUG ENFORCEMENT ADMIN., *supra* note 22.

157. *Id.*

158. 21 U.S.C. § 811(a); *but see* 21 U.S.C. § 811(b).

159. *Id.*; U.S. DEPT. OF JUSTICE DRUG ENFORCEMENT ADMIN., *supra* note 22.

160. 21 U.S.C. § 811(b).

161. *Cannabis Policy—For the New Decade*, Before the Subcomm. on Health of the H. Energy and Commerce Comm., 116th Cong. (2020) (statement of Matthew J. Strait, Senior Policy Advisor, U.S. Dept. of Justice, Diversion Control Division).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

something other than a Schedule I controlled substance. However, tossing the hot potato, the DOJ reiterated the importance of first obtaining FDA approval for marijuana use to ensure “that only safe and effective drugs are approved to be available in the United States.”<sup>166</sup>

*B. Supreme Court May Overturn Its Precedent*

**1. Scope of Authority and Limits of the Supreme Court**

Article III § 1 of the Constitution<sup>167</sup> sets forth “[t]he judicial Power of the United States, shall be vested in one supreme Court,”<sup>168</sup> having the authority over “all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States.”<sup>169</sup> Furthermore, “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”<sup>170</sup> Lastly, where the constitutionality of a law is at issue, “the [C]onstitution is superior to any ordinary act of the legislature; the [C]onstitution, and not such ordinary act, must govern the case to which they both apply.”<sup>171</sup>

As defined by the Constitution, the Supreme Court has jurisdiction and power of review over cases relating to the constitutionality of federal laws, as well as executive actions.<sup>172</sup> As such, the Supreme Court has the authority to declare acts of the legislative or executive branch illegal, null, and void.<sup>173</sup> This power of judicial review is unusual in that nine unelected judges can strike down the democratic laws of the people. To prevent overstepping its bounds and upsetting the balance of powers, the court adopted the political question doctrine.<sup>174</sup> Accordingly, the court will refrain from hearing cases where there is no legal question to decide or where the issue is best left to the legislative process.<sup>175</sup>

Finally, in interpreting the law, the Supreme Court has recognized that the Constitution is not static, but rather it is a living, evolving

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166. *Id.*

167. U.S. CONST. art. III § 1.

168. *Id.*

169. U.S. CONST. art. III § 2, cl. 1.

170. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

171. *Id.* at 178.

172. U.S. CONST. art. III § 2, cl. 1.

173. *Id.*

174. *Baker v. Carr*, 369 U.S. 186, 210–11 (1962).

175. *Id.*

document.<sup>176</sup> Therefore, the court is entitled to interpret the Constitution in light of modern-day society rather than being confined to the archaic textual reading.<sup>177</sup> It is this philosophy of modernized meanings that has enabled the court to evolve its logic and, sometimes, overturn its own precedent.

## 2. Evolution of the Supreme Court's Commerce Clause Interpretation

Discussed *supra*, Congress's power to regulate interstate commerce via the Commerce Clause<sup>178</sup> also grants the federal government the authority "to prohibit the local cultivation and use of marijuana."<sup>179</sup> However, the Court's definition of "commerce" has been altered over the course of time. In 1824, the Supreme Court defined "commerce" to broadly include all activities associated with facilitating trade.<sup>180</sup> Between 1895 and 1937, the Supreme Court narrowed the scope of the commerce power to exclude activities of production, manufacturing, and mining.<sup>181</sup>

Yet, between 1937 and the 1990s, the Supreme Court once again expanded the definition of "commerce." During this time, the court adopted the philosophy:

[T]he power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement"; to adopt measures "to promote its growth and insure its safety"; "to foster, protect, control and restrain." That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it."<sup>182</sup>

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176. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428–29 (1934) ("These put it beyond question that the [constitutional] prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula . . . [b]ut to assign . . . a literal purport, and to exact from them a rigid literal fulfilment, could not have been the intent of the [C]onstitution. It is repelled by a hundred examples.").

177. *See id.*

178. U.S. CONST. art. 1 § 8, cl. 3 (The Congress shall have power "[t]o regulate Commerce . . . among the several States . . .").

179. *Raich*, 545 U.S. at 1.

180. *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824).

181. *United States v. E.C. Knight*, 156 U.S. 1, 14 (1894) (manufacturing is not commerce); *Carter v. Carter Coal Co.*, 298 U.S. 238, 302–03 (1936) (mining is not commerce); *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) (production is not commerce).

182. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937).



Resting on this logic, not one law was struck down as an excessive exercise of the commerce power from 1937 until 1995.<sup>183</sup>

In deciding the 1995 case of *U.S. v. Lopez*,<sup>184</sup> the court once again narrowed the field and identified three categories of activity Congress may regulate under its commerce power: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities that have a substantial relation to interstate commerce.<sup>185</sup> Referencing the third category, the court explained that where *intrastate* “economic activity substantially affects *interstate* commerce, legislation regulating that activity will be sustained.”<sup>186</sup> Thus, if the local activity is commercial or economic and if, aggregate activity of all local individuals engaged in the activity could substantially impact the national market, Congress has the authority to regulate the local activity.<sup>187</sup>

The Supreme Court’s fluctuating views on the scope and depth of the commerce power is a prime example of how our understanding of the Constitution has morphed since its creation. The *Lopez* ruling set the tone for the current understanding of the scope of the commerce power.

However, there have been recent signals that the Supreme Court might once again alter its position on which *intrastate* activities fall under the authority of the commerce power—a change that could have sweeping implications for federal marijuana laws.<sup>188</sup>

### 3. Overturning *Gonzalez v. Raich*

Justice Thomas’ recent criticisms of *Gonzalez v. Raich*, have been viewed as a sign that the Supreme Court may overturn *Raich* and proclaim once-and-for-all that Congress’s power to regulate interstate commerce does not authorize the federal prohibition on local cultivation and use of marijuana.<sup>189</sup> This has been seen as a beacon of hope to advocates of marijuana legalization and states’ rights that should the appropriate case come before it, the Supreme Court is likely to once

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183. See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (striking down the state’s Gun Free Zone Act of 1990 because the presence of a gun near a school did not substantially affect interstate commerce).

184. *United States v. Lopez*, 514 U.S. 549, 549 (1995).

185. *Id.* at 558–59.

186. *Id.* at 560 (internal emphasis added).

187. *Id.* at 561.

188. See *Standing Akimbo, LLC*, 141 S. Ct. at 2236–37.

189. *Id.* at 2238.

again narrow the scope of the commerce power in favor of stronger Tenth Amendment rights.<sup>190</sup>

Notably, the composition of the Court has changed drastically since *Raich* was decided. The only remaining Justices from that Court are liberal Justice Breyer (who voted in the majority) and conservative Justice Thomas (who wrote in dissent).<sup>191</sup> Though the Justices do not represent political parties, they are commonly characterized based on known stances, historical decisions, and affiliations.<sup>192</sup> Today, Justices Breyer, Kagan, and Sotomayor make up the liberal wing of the Court; and Chief Justice Roberts and Justices Alito, Gorsuch, and Thomas comprise the conservative majority.<sup>193</sup>

However, when *Raich* was decided, the Court was liberal leaning with Justices Stevens, Souter, Ginsburg, Breyer, and Kennedy joining the majority while Conservative Justices O'Connor, Rehnquist, and Thomas dissented.<sup>194</sup> Interestingly, the swing vote in *Raich* was Justice Scalia, who was typically conservative, but concurred in the judgment, citing the Necessary and Proper Clause,<sup>195</sup> rather than the commerce power, as the basis for his opinion.<sup>196</sup>

Given that there is a majority of conservative voices on the Court, it seems likely that if *Raich* were heard today, the Court may rule in favor of limiting federal authority to regulate the intrastate cultivation and use of marijuana in favor of state's rights. However, excitement should be tempered when reading Justice Thomas' favorable opinion in *Standing Akimbo, LLC*.<sup>197</sup> Though he clearly expressed that "[a] prohibition on intrastate use or cultivation of marijuana may no longer

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190. Will Yakowicz, *Supreme Court Justice Thomas Calling Federal Cannabis Prohibition 'Contradictory And Unstable' Signals Legalization Is Near*, FORBES (June 29, 2021), <https://www.forbes.com/sites/willyakowicz/2021/06/29/supreme-court-justice-thomas-calling-federal-cannabis-prohibition-contradictory-and-unstable-signals-legalization-is-near/?sh=519cd3a25321>.

191. *Raich*, 545 at 5; *About the Court: Current Members*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 17, 2021).

192. *Supreme Court of the United States*, BALLOTPEdia, [https://ballotpedia.org/Supreme\\_Court\\_of\\_the\\_United\\_States](https://ballotpedia.org/Supreme_Court_of_the_United_States) (last visited Oct. 17, 2021); ON THE ISSUES, [https://court.ontheissues.org/Clarence\\_Thomas.htm#Drugs](https://court.ontheissues.org/Clarence_Thomas.htm#Drugs) (last visited Oct. 17, 2021).

193. *Id.*

194. *Raich*, 545 U.S. at 5.

195. U.S. CONST. art. I § 8, cl. 18 (The Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

196. *Raich*, 545 U.S. at 5.

197. 141 S. Ct. at 2238.

be necessary *or* proper,” he issued similar sentiments in his *Raich* dissent.<sup>198</sup> Therefore, his position is hardly new or evolved. What has changed, however, is the composition of the Court, which is now decidedly conservative and, therefore, more amiable to limiting federal authority in favor of states’ rights.

On the other hand, though the Supreme Court could, upon granting certiorari on a new case, overturn *Raich*, because of its general policy to avoid political issues, it is somewhat unlikely that a Supreme Court ruling will ultimately end the federal prohibition on marijuana. Punting the potato back to the legislature, the *Raich* Court noted:

[T]he presence of another avenue of relief . . . [.]the [CSA,] authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters . . . may one day be heard in the halls of Congress.<sup>199</sup>

### C. Legislative Action

The Constitution set forth that “[a]ll legislative Powers . . . shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”<sup>200</sup> Accordingly, the 117th Congress, serving from 2021–2022, is empowered to reform federal marijuana legislation.<sup>201</sup> This is all the more realistic considering that, though tight, Democrats of the 117th Congress have the majority.<sup>202</sup> This unique control of both chambers clears a path for President Joe Biden, also a Democrat, to sign such legislation into law.

#### 1. Proposed Federal Legislation

Recently, several bills have been introduced to Congress, aiming to end the federal prohibition on marijuana. The Marijuana Opportunity, Reinvestment, and Expungement Act of 2020 (MORE Act of 2020)<sup>203</sup> was passed by the House of Representatives, marking the first time a

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198. *Id.* at 2238; *Raich*, 545 U.S. at 46 (“Today’s decision allows Congress to regulate intrastate activity without check . . .”).

199. *Raich*, 545 U.S. at 33.

200. U.S. CONST. art. I § 1.

201. JENNIFER E. MANNING, U.S. CONG. RESEARCH SERV., R46705, MEMBERSHIP OF THE 117TH CONGRESS: A PROFILE (2022).

202. *Id.* (explaining that as of January 3, 2022, in the House of Representatives, there are 225 Democrats, 214 Republicans, and 2 vacant seats. In the Senate, there are 50 Republicans, 48 Democrats, and 2 Independents who caucus with the Democrats; Vice President, Kamala Harris, a Democrat, is the swing vote in the Senate).

203. MORE Act of 2020, H.R. 3884, 116th Cong. (2020).

chamber of Congress ever voted to end the prohibition.<sup>204</sup> Though the MORE Act of 2020 died on the vine and failed to pass in the Senate, the historic legislation would have decriminalized marijuana, removed it from the list of scheduled substances under the CSA, and eliminated criminal penalties for the manufacture, distribution, and possession of marijuana.<sup>205</sup> However, because Democrats won control of both chambers in 2021, Representative Jerrold Nadler (D-NY) reintroduced the MORE Act (MORE Act of 2021)<sup>206</sup> banking on the increased odds of its passage.<sup>207</sup>

Additionally, though it failed to pass in the 116th and 117th sessions of Congress, future companion bills will likely incorporate portions of the Strengthening the Tenth Amendment Through Entrusting States Act (STATES Act).<sup>208</sup> Though it did not legalize marijuana, the act proposed a federal recognition of states' police powers in states that had done so. The STATES Act exempted citizens of those states from federal enforcement when acting in compliance with state law.<sup>209</sup> Specifically, the measure proposed the elimination of regulatory controls and administrative, civil, and criminal penalties under the CSA for marijuana-related activities that complied with state law.<sup>210</sup>

Furthermore, the Cannabis Administration and Opportunity Act (CAOA) is currently in-the-works.<sup>211</sup> In July 2021, Senate Majority Leader Chuck Schumer became “the first majority leader to say it is time to end the Federal prohibition on marijuana” and vowed to “push [the] issue forward and make it a priority for the Senate.”<sup>212</sup> Per the discussion draft, CAOAs aims to remove cannabis from the federal list of controlled substances and empower states to implement their own

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204. *Id.*; *House Passes Historic Cannabis Reform Legislation*, U.S. CONGRESSMAN EARL BLUMENAUER (Dec. 4, 2020), <https://blumenauer.house.gov/media-center/press-releases/house-passes-historic-cannabis-reform-legislation>.

205. *H.R. 3884 (116th): MORE Act of 2020*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr3884/summary> (last visited Oct. 17, 2021).

206. MORE Act of 2021, H.R. 3617, 117th Cong. (2021).

207. *H.R. 3617: MORE Act of 2021*, GOVTRACK, <https://www.govtrack.us/congress/bills/117/hr3617> (last visited Oct. 17, 2021).

208. STATES Act, S. 3032, 115th Cong. (2018); STATES Act, S. 1028, 116th Cong. (2019).

209. *Id.*

210. *Id.*

211. SENATORS CORY BOOKER, RON WYDEN, AND CHUCK SCHUMER, CANNABIS ADMIN. & OPPORTUNITY ACT DISCUSSION DRAFT (2021); 167 CONG. REC. S4912 (daily ed. July 15, 2021) (statement of Sen. Chuck Schumer).

212. 167 CONG. REC. S4912 (daily ed. July 15, 2021) (statement of Sen. Chuck Schumer).

cannabis laws.<sup>213</sup> In addition, CAO A includes restorative measures to expunge federal non-violent marijuana crimes and allow those currently incarcerated in federal prison for non-violent marijuana crimes to petition a court for resentencing.<sup>214</sup> As the draft pointed out, “more than 90 percent of Americans believe cannabis should be legal for either adult or medical use.”<sup>215</sup> The purpose of CAO A is to ensure Americans will not be barred from services like public housing or federal financial aid, or that businesses will not be barred from access to bank accounts and loans for using marijuana in states where it is allowed.<sup>216</sup> “The legislation preserves the integrity of state cannabis laws and provides a path for responsible federal regulation of the cannabis industry” similar to alcohol and tobacco.<sup>217</sup>

Though similar bills have been introduced and failed in the past, there has never been a more opportune time to present legislation to end the federal prohibition on marijuana. The majority of states have embraced legalization, and the majority of Americans believe marijuana should be legal. In addition, the House of Representatives, Senate, and Presidency enjoy a Democrat majority. There has never been a better time than now to end the federal prohibition once and for all.

## 2. Alcohol and Tobacco: Models for Success

As the CAO A points out, the government is not new to legalizing and regulating a previously illegal substance.<sup>218</sup> Using alcohol and tobacco as examples, the federal government has demonstrated its capacity to regulate the sale and possession of marijuana “in a way that balances individual liberty with public health and safety.”<sup>219</sup> It is noteworthy that, like marijuana, tobacco and alcohol have no known medical utilities and are equally addictive. However, unlike marijuana, these substances are not classified under the CSA. Despite alcohol and tobacco being legal on a federal level, states have the authority to prohibit or regulate sales within its borders.<sup>220</sup> For its part, the federal law lays down some hard-and-fast ground rules—like minimum age requirements.<sup>221</sup>

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213. CANNABIS ADMIN. & OPPORTUNITY ACT DISCUSSION DRAFT, *supra* note 211.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

Not only is federal legalization of marijuana feasible, but it is also the most pragmatic solution to the failed war on drugs. Colloquially called “the modern-day prohibition,” society largely supports legalization and sees federal enforcement as an overstep of authority. Judging by the mixed signals received from the AG, DOJ, IRS, and other federal agencies, it seems as though the federal government may have tired of the war as well. The CAO A correctly asserts that the government already has a roadmap on how to proceed forward with legalization. It must simply follow the path forged by the legalization and regulation of tobacco and alcohol.

#### *D. POTUS: The Biden Administration*

The president does not have the unilateral authority to legalize marijuana. This was highlighted during the 2020 presidential race when some candidates—namely Senator Bernie Sanders and Senator Elizabeth Warren—raised eyebrows with impossible promises to legalize marijuana through executive action.<sup>222</sup> In particular, Sanders promised to “[l]egalize marijuana in the first 100 days [of being POTUS] with executive action.”<sup>223</sup> He later amended this timetable declaring, “[o]n my first day in office through executive order we will legalize marijuana in every state in this country.”<sup>224</sup> For her part, Elizabeth Warren also vowed to, “[u]se the president’s executive authority.”<sup>225</sup> Specifically, Warren asserted, “[i]f Congress refuses to take action supported by the majority of the American people, there’s still a lot a president can do all on her own. I will act decisively on legalization starting on day one.”<sup>226</sup> These candidates, however, failed to understand the limitations of presidential authority to tread in legislative waters.

#### **1. POTUS’s Actual Authority**

The President cannot legalize marijuana, especially for recreational use, via executive action based on the very language of the CSA itself.<sup>227</sup>

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222. See *Legalizing Marijuana*, BERNIE SANDERS CAMPAIGN WEBSITE, <https://berniesanders.com/issues/legalizing-marijuana/> (last visited Oct. 2, 2021); *A Just and Equitable Cannabis Industry*, ELIZABETH WARREN CAMPAIGN WEBSITE, <https://elizabethwarren.com/plans/cannabis> (last visited Oct. 2, 2021).

223. BERNIE SANDERS CAMPAIGN WEBSITE, *supra* note 222.

224. Tom Angell, *Bernie Sanders Pledges Legal Marijuana in All 50 States on Day One as President*, FORBES (Feb. 1, 2020), <https://www.forbes.com/sites/tomangell/2020/02/01/bernie-sanders-pledges-legal-marijuana-in-all-50-states-on-day-one-as-president/?sh=7c1c24ba1c16>.

225. ELIZABETH WARREN CAMPAIGN WEBSITE, *supra* note 222.

226. *Id.*

227. See 21 U.S.C. § 811.

In drafting the CSA, Congress delegated oversight authority to the AG and required the AG to comply with international treaties when making all scheduling decisions under the CSA.<sup>228</sup> Consequently, because the United States is party to international treaties that oblige member nations to ban recreational use of all drugs, the AG is does not have the authority—even if pressed by the President—to declassify marijuana as a controlled substance.<sup>229</sup> Indeed, the International Narcotics Control Board, which monitors treaty compliance for the United Nations has already warned that the “legalization of non-medical cannabis use” contravenes “international drug control treaties.”<sup>230</sup> Therefore the AG, and by extension, the President, lack the authority to de-schedule marijuana.

On the other hand, following in Obama’s footsteps, the President can, by way of the AG, issue a policy of non-enforcement of federal law in states that have legalized the drug. Discussed *supra*, though this strategy does not legalize marijuana, it removes the threat of federal criminal prosecution in those states. As contemplated by Senator Warren, the reinstatement of “the Obama administration’s guidance on deferring to state policy on marijuana enforcement” would at least “prevent uncertainty in the states while legalization is pending at the federal level.”<sup>231</sup> Therefore, even though the CSA tied the President’s hands to legalize marijuana by executive order, the President can buy the states some time while awaiting Congressional action.

## 2. Biden’s Views on Marijuana

President Biden does not support marijuana legalization.<sup>232</sup> He does, however, support the decriminalization of marijuana.<sup>233</sup> In other words,

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228. 21 U.S.C. § 811(a); 21 U.S.C. § 811(d)(1) (2015) (“If control is required by United States obligations under international treaties, conventions, or other protocols in effect on [October 27, 1970], the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations . . .”).

229. *The International Drug Control Conventions*, U.N. NATIONS OFFICE ON DRUGS AND CRIME (Nov. 2013), [https://www.unodc.org/documents/commissions/CND/Int\\_Drug\\_Control\\_Conventions/Ebook/The\\_International\\_Drug\\_Control\\_Conventions\\_E.pdf](https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf).

230. INT’L NARCOTICS CONTROL BD., 2018 ANNUAL REPORT (March 5, 2019), [https://www.incb.org/documents/Publications/AnnualReports/AR2018/Annual\\_Report\\_Chapters/03\\_Chapter\\_I\\_Annual\\_Report\\_2018\\_E\\_.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2018/Annual_Report_Chapters/03_Chapter_I_Annual_Report_2018_E_.pdf).

231. ELIZABETH WARREN CAMPAIGN WEBSITE, *supra* note 222 (internal emphasis omitted).

232. *Psaki: Biden unmoved on marijuana legalization despite Schumer legislation*, POLITICO (July 14, 2021), <https://www.politico.com/news/2021/07/14/biden-marijuana-legalization-499642>.

while Biden does not think marijuana should be legal, he does not believe offenders should be jailed for using it.<sup>234</sup> In fact, President Biden campaigned on the promise that not only would he “decriminalize the use of cannabis,” he also pledged to, “automatically expunge all cannabis use convictions[] and end incarceration for drug use alone.”<sup>235</sup> This, however, comes as little consolation to Biden’s fellow Democrats in Congress advancing legislation to end the federal prohibition on marijuana entirely—namely, the aforementioned MORE Act of 2021, CAO A, and STATES Act.<sup>236</sup>

Whether President Biden would sign the MORE Act of 2021, CAO A, or similar legislation remains unclear. Ironically, Kamala Harris, Biden’s Vice President, sponsored the predecessor to MORE Act of 2021—the MORE Act of 2019.<sup>237</sup> Even so, it appears this may be an issue on which the two diverge. When prompted for a comment on whether Biden favored the recently proposed bills for marijuana legalization, White House Press Secretary, Jen Psaki, stated, “. . . nothing has changed. There’s no . . . endorsements of legislation to report . . .”<sup>238</sup> Psaki’s comments signal that Biden remains unmoved from his position that decriminalization is acceptable, but legalization is not. A prudent Congress would be wise to take note of Biden’s position and tailor pending legislation to suit his palate.

A combination of proposed measures could provide the foot-in-the-door necessary to disentangle the federal government from marijuana enforcement altogether. For example, in line with Biden’s views, the MORE Act of 2021 proposed decriminalization of marijuana.<sup>239</sup> Similarly favorable to Biden’s position, the CAO A would expunge federal non-violent marijuana crimes.<sup>240</sup> Finally, the cornerstone of the STATES Act proffered a federal recognition of states’ police powers and the elimination of federal penalties for marijuana-related activities that complied with state law.<sup>241</sup> Accordingly, the STATES Act aligns with the stance held by the Obama

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233. *Id.*; Joseph R. Biden, 2020 Democratic Presidential Candidate, Campaign Press Release - Fact Sheet: Trump Has Failed Black Americans (Aug. 27, 2020).

234. *Id.*

235. Biden, 2020 *supra* note 233.

236. POLITICO, *supra* note 232.

237. MORE Act of 2019, S. 2227, 116th Cong. (2019).

238. POLITICO, *supra* note 232.

239. MORE Act of 2021, H.R. 3617, 117th Cong. (2021).

240. CANNABIS ADMIN. & OPPORTUNITY ACT DISCUSSION DRAFT, *supra* note 211; 167 CONG. REC. S4912 (daily ed. July 15, 2021) (statement of Sen. Chuck Schumer).

241. STATES Act, S. 3032, 115th Cong. (2018); STATES Act, S. 1028, 116th Cong. (2019).



Administration—in which Biden served as Vice President—that adopted a hands-off approach and left marijuana law enforcement up to the states.<sup>242</sup> In fact, Biden has previously indicated he “believe[s] states should be able to make their own decisions about recreational [marijuana] use.”<sup>243</sup> Based on these comments and his alliance with Obama, it is likely Biden would support permanently transitioning authority to govern and police marijuana to the states.<sup>244</sup>

Conversely, Biden is extremely unlikely endorse any legislation that explicitly or implicitly legalizes marijuana. Notably, the MORE Act of 2021 and CAO A both include provisions seeking to remove marijuana from the CSA—ending the federal enforcement and prohibition of the drug.<sup>245</sup> Similarly, Biden is unlikely to endorse the elimination of federal criminal penalties for the *manufacture and distribution* of marijuana as proposed in the MORE Act of 2021 and CAO A.<sup>246</sup> Though Biden has expressly stated marijuana *users* should not be imprisoned, he has never embraced legalizing the drug.<sup>247</sup> Therefore, it is by no means a stretch to draw the inference that Biden would not sign legislation aimed at eliminating federal penalties for the manufacture and distribution of marijuana.

### 3. Task for Legislators: Make Biden an Offer He Can’t Refuse

Because Democrats currently hold a majority in the legislative and executive branches, slim though it may be, there is no time like the present to draft a bill legalizing marijuana that caters to the more conservative members of Congress and simultaneously appeals to Biden. As elected officials, politicians must necessarily concern themselves with the will of their constituents. The good news for Biden and legislators is that “Americans are more likely now than at any point in the past five decades to support the legalization of marijuana in

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242. See Ogden, *supra* note 69; See also Cole, *supra* note 73; See also Cole, *supra* note 78.

243. *Combating the Climate Crisis and Pursuing Environmental Justice*, BIDEN-SANDERS UNITY TASK FORCE (Aug. 2020), <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>.

244. See Ogden, *supra* note 69; See also Cole, *supra* note 73; See also Cole, *supra* note 78.

245. See POLITICO, *supra* note 232.; MORE Act of 2021, H.R. 3617, 117th Cong. (2021); CANNABIS ADMIN. & OPPORTUNITY ACT DISCUSSION DRAFT, *supra* note 211.

246. MORE Act of 2021, H.R. 3617, 117th Cong. (2021); See also CANNABIS ADMIN. & OPPORTUNITY ACT DISCUSSION DRAFT, *supra* note 211 (analogizing marijuana production and sale to the production and distribution of alcohol and tobacco).

247. POLITICO, *supra* note 232.

the U.S.”<sup>248</sup> In fact, according to a 2019 Gallup poll, 68% of U.S. adults support the measure.<sup>249</sup> What’s more, “70% of U.S. adults now consider smoking marijuana to be morally acceptable.”<sup>250</sup> A discerning Congress would strike while the iron is hot.

That marijuana is now socially and morally acceptable to most Americans is a stark contrast to views held during the majority of Biden’s political career. When Gallup first measured the public’s views of marijuana legalization in 1969, one year after Biden graduated law school, only 12% of Americans backed it.<sup>251</sup> Biden went on to become Delaware’s longest-serving senator between 1973–2009.<sup>252</sup> Throughout the majority of his time in the Senate, less than 30% of Americans supported marijuana legalization.<sup>253</sup>

Because Biden was reared in an era that largely opposed marijuana legalization, legislators should take a stair-stepped approach, rather than an all-out offensive approach, when drafting proposals. Though legislators want to put on a show for constituents to demonstrate they are fighting for initiatives important to their home-states, those constituents would be far better served if the legislators were actually successful in having a legalization measure passed. Therefore, the best approach is to merge those portions of proposed legislation that are likely to garner support with Biden and more conservative members of Congress and remove those portions that are unlikely to meet final approval. Combining the MORE Act of 2021’s decriminalization of cannabis with the CAO’s expungement of federal non-violent marijuana crimes and eliminating federal penalties for marijuana-related activities that comply with state law from the STATES Act would generate a powerful and passable piece of legislation. Compromise is key and a foot in the door now would pave the way for future legislation to fully repeal the federal prohibition on marijuana. If Congress lays the foundation, taking into consideration Biden’s static position on the legalization of marijuana, Biden is likely to acquiesce.

In the end, if Congress fails to percolate passable marijuana legislation up to Biden’s desk, Biden is likely to reinstate the former hands-off guidance to prevent the DOJ from federally prosecuting CSA

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248. *Support for Legal Marijuana Inches Up to New High of 68%*, GALLUP (Nov. 9, 2020), <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx?version=print>.

249. *Id.*

250. *Id.* (internal emphasis omitted).

251. *Id.*

252. *Joe Biden*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Joe-Biden> (last visited Oct. 18, 2021).

253. GALLUP, *supra* note 248.

offenders. In fact, this is almost a given. Not only did Biden serve in the Obama Administration responsible for these policies, but Biden himself has stood for the proposition that “[t]he Justice Department should not launch federal prosecutions of conduct that is legal at the state level.”<sup>254</sup>

Though Biden could, and likely will, issue a moratorium on federal prosecution for CSA violations involving marijuana, this de facto legalization is not an adequate substitute for the actual removal of the federal prohibition through legislative action. For example, the President cannot, through the AG and DOJ, prevent private parties from using the federal prohibition from suing state-licensed marijuana businesses under the federal civil RICO statute to recover treble damages. Nor can the President order the Federal Reserve to alter its policies and provide marijuana businesses access to federal payment systems. Likewise, the President cannot lift any of the civil sanctions imposed by other federal agencies such as the Internal Revenue Service which, as in *Standing Akimbo, LLC*, imposes punitive accounting rules against state-licensed marijuana businesses.

In sum, legislators have a rare opportunity to peel back the decades-long prohibition on marijuana. In addition to holding the hot potato, Democrats hold a majority in the legislative branch; the executive office is held by a Democratic president; and two-thirds of the American public support marijuana legalization. If legislators carefully tailor a bill designed to decriminalize marijuana, expunge non-criminal marijuana records, and strengthen states’ rights by eliminating federal penalties for marijuana-related activities that comply with state law, there has never been a higher likelihood of success. True, these measures do not culminate to a full end of federal prohibition of marijuana, but it is a good start. Just as Rome was not built in a day, prohibition will not end in one sweeping piece of legislation.

## VII. CONCLUSION

In the past, the government has engaged in a political game of “hot potato” concerning the federal prohibition of marijuana. No one group wants to tackle the dissonance that has arisen between federal and state law. As a result, the hot potato has passed time and again. Because it is a political question, the Supreme Court is not the appropriate venue to resolve the issue. Moreover, without the help of Congress, the President is also powerless to enact permanent changes to federal drug laws. The only viable solution lies with Congress.

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254. BIDEN-SANDERS UNITY TASK FORCE, *supra* note 243.

There has never been a more favorable atmosphere for the legislature to pass laws ending the federal prohibition of marijuana. The Democrat party occupies the majority of the House, Senate, and White House. Two-thirds of Americans approve the legalization of marijuana. Thirty-six states and four territories have legalized marijuana for medicinal purposes. Eighteen states, two territories, and the District of Columbia have legalized recreational marijuana, and only three states prohibit marijuana outright.

In addition, there are several bills pending before Congress to end the federal prohibition. Rather than attempt, and likely fail, to pass radical “full kitchen sink” bills seeking full legalization of medicinal and recreational marijuana, and a host of other wish-list items, a wise Congress would temper expectations and merge portions of existing bills that are most likely to garner wide support. It is vital for Congress to take heed of Biden’s stated, and somewhat conservative positions, and draft a hybrid bill accordingly. Though the outcome might not encompass every “ask,” it is highly likely Biden would approve a measure that decriminalizes marijuana, expunges non-violent marijuana-related crimes, and increases states’ rights to pass meaningful laws without fear of federal intervention. The federal government cannot continue to ignore the problem or wait for someone else to act. No more hot potato.