Preemption Up in Smoke: Should States Be Allowed a Voice in Scheduling Under the Controlled Substances Act?

Oliver J. Kim*

“You know, when people think about drugs, they’re just disgusted by it. They just want to lock them up, and throw away the key. But it’s more complex than that.”
—U.S. President Richard Nixon

Fifty years ago, a Democratic Congress and a Republican White House—led by a President who would face the threat of impeachment—produced notable laws addressing public health, worker safety, and environmental protections. One of the laws produced in that era, the Controlled Substances Act (CSA), has shaped drug policy and criminal justice over the last fifty years. Since its passage, Congress has moved the CSA away from its roots in public health and more toward punitive measures.

Today, because of our federalist system, the CSA poses a challenge to a policy decision that an increasing number of states have adopted but our federal government has not: the legalization of marijuana. In fact, the majority of states have legalized marijuana for medical purposes while a smaller number have done so for non-clinical purposes. But despite its apparent popularity with voters, Congress

* President, Center for Healthcare Values, and adjunct professor law, University of Pittsburgh School of Law. I would like to thank the Academy of Justice at the Arizona State University College of Law and the Drug Enforcement and Policy Center at the Ohio State University College of Law for allowing me to participate in the symposium. I would also like to thank Chelsea Cox, Tammy Kramer, and Lois Magner for their feedback.


3 David T. Courtwright, The Controlled Substances Act: how a “big tent” reform became a punitive drug law, 76 DRUG AND ALCOHOL DEPENDENCE 9, 10–11 (2004) (“Nixon declared the 1970s to be ‘a great age of reform of the institutions of American government’ and pressed for changes in any number of federal laws, those governing the draft, welfare system, tax code, revenue sharing, and economic opportunity programs being among the best-known examples.”) (citation omitted).

4 Id. at 10. This paper will use the terms adult or recreation to refer to legal marijuana use without a health professional’s prescription.

5 Andrew Daniller, Two thirds of Americans support marijuana legalization, PEW RES. CTR.
has not made a similar effort to amend the CSA to legalize marijuana. As states continue to move to adopt legalization, the conflict with federal law creates confusion in many important policy areas, including banking, taxation, and the practice of medicine. While states cannot nullify federal law to quell this confusion, their movement toward a specific policy goal can serve as a nudge for the federal government to adopt a similar objective.

The acrimony of our current political moment makes it hard to imagine that our divided government could provide much needed legal clarity by amending the CSA. But that conventional wisdom would be wrong. Congress has passed major legislation—not just once but several times in recent years under two very different presidential administrations—to substantively address civil and criminal drug policy. Perhaps such legislation signals a shift in political thinking on drug policy and criminalization that we have not seen in decades, harkening back to how the CSA initially balanced competing priorities in its approach to drug policy. At a minimum, these laws provide advocates with some guidance as well as recommendations for where there are policy gaps.

This Article will examine the political and process barriers that may stymie efforts to provide clarity and relief to the states that have taken steps to legalize the use of marijuana. First, the Article will provide a short historical overview of the CSA’s passage and the conflicting visions for its original purpose. Second, the Article will discuss states’ approaches to regulating marijuana and the conflicts with federal law due to the CSA. Third, the Article will highlight several recent federal laws that may bode well for amending the CSA and then finally make additional recommendations for change, rather than simply rescheduling marijuana under the CSA.


7 Patricia Zettler, Pharmaceutical Federalism, 92 Ind. L.J. 845, 850–51 (2017) (noting that “states may, nevertheless, find value in [state-based] drug regulation is because it may be a useful strategy for driving federal policy”); see also Amy Coney Barrett, Stare Decisis and Nonjudicial Actors, 83 Notre Dame L. Rev. 1147, 1157–60 (discussing how states have attempted to register disapproval of a federal court decision that limited states’ authority).

I. AN OVERVIEW OF FEDERAL CRIMINALIZATION OF MARIJUANA

American drug policy includes both the approval of drugs by the Food and Drug Administration (FDA) for patient use in the commercial marketplace and the use of the criminal code to restrict or even prohibit substances. The CSA initially contained both public health and interdiction approaches to drug control: when Congress debated it five decades ago, it intended the CSA to harmonize a hodgepodge of existing federal criminal laws on drug policy and to authorize public health approaches to drug control as a means of limiting demand.9 But in the intervening years, the CSA moved toward a harsher approach as political winds changed.10

A. The Foundation of the Controlled Substances Act

At the start of the twentieth century, the federal government started exercising increasing control over drug policy: either by allowing for the commercialization of substances that met a complex approval process or by criminalizing other substances as illegal for use or even possession.11 Under the commercial stream of federal drug policy, Congress passed a series of laws starting with the 1906 Pure Food and Drug Act12 to create a formal regulatory process to demonstrate whether a drug was safe and effective for human consumption.13 This line of statutes resulted in the creation of the FDA, which became seen as “a ‘gatekeeper’ to protect public health by using its regulatory authority over the drug approval process.”14 For instance, the FDA began regulating the use of addictive non-narcotic drugs after the medical community recognized that drugs such as “barbiturates were not addicting in the narcotic sense, but that they were habit forming and subject to improper use.”15

In a contemporaneous parallel stream of federalization, Congress used a different set of legal authorities to address the growing concern about the addictive nature of narcotics, ultimately leading to interdiction and criminalization.16 In its initial foray, Congress passed the Harrison Act17 under its tax authority in order to

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9 Courtwright, supra note 3, at 10.
10 Id.
11 Id.; see also infra note 19.
12 Food and Drug Act, P.L. 59-384 (1906).
13 Oliver J. Kim, Trying and Dying: Are Some Wishes at the End of Life Better Than Others?, 41 DALHOUSIE L.J. 94, 97 (Spring 2018).
14 Id.; see also Joseph F. Spillane, Debating the Controlled Substances Act, 76 DRUG AND ALCOHOL DEPENDENCE 17, 19 (2004) (discussing how federal law “created a class of drugs available only on a physician’s prescription, and gave the FDA authority to designate which drugs would be placed in that category”) (citation omitted).
15 Spillane, supra note 14.
16 Id. at 18.
regulate narcotics (defined as opioids and cocaine) and thus established the Treasury Department as an early regulator of these substances.\textsuperscript{18} This statute marked a substantial shift in regulatory policy, as the states had principally been the primary regulators of narcotics although without any uniformity.\textsuperscript{19}

The Treasury Department largely resisted adding additional non-narcotics to its responsibilities under its Federal Bureau of Narcotics.\textsuperscript{20} But the bureau’s influential director Harry Anslinger supported criminalizing marijuana, urging action at both the state and federal level.\textsuperscript{21} Consequently, Congress passed the Marijuana Tax Act in 1937, adding the only non-narcotic drug under the jurisdiction of the Treasury Department.\textsuperscript{22} The Boggs Act\textsuperscript{23} subsequently added criminal penalties, including mandatory minimum sentences, for possession and trafficking of marijuana and narcotics, and the federal government encouraged states to pass similar “mini-Boggs” legislation to standardize drug laws.\textsuperscript{24}

During the 1960s, “Congress’s habit of ad hoc legislation, sometimes based on the constitution’s taxing power and sometimes on its commerce power . . . produced a patchwork of enforcement agencies with different priorities and resources” instead of establishing a unified response to replace the parallel and confusing patchwork of state policies.\textsuperscript{25} Moreover, this ad hoc process failed to respond to community needs or changes in science, medicine, and public health: “[n]ew substances were being introduced into widespread use faster than research could develop and the traditional addiction model, which had been based on physical dependence, was not adequate.”\textsuperscript{26}

The CSA might have looked completely different if the Johnson administration formulated legislation in time for congressional consideration before the 1968 election.\textsuperscript{27} Instead, the incoming Nixon administration—with a decidedly harsher

\textsuperscript{18} Spillane, supra note 14, at 18.


\textsuperscript{20} Spillane, supra note 14, at 19.

\textsuperscript{21} Joseph F. Spillane & David B. Wolcott, \textit{A History of Modern American Criminal Justice} 233 (2013) (noting that Anslinger “presented marijuana as addictive, a gateway to more serious drugs like heroin, and a source of crime”); Ferraiolo, supra note 19, at 153–54.

\textsuperscript{22} \textit{Id.} Although the Marijuana Tax Act was framed as a tax law to quell Anslinger’s concerns about the constitutionality of regulating marijuana, it effectively banned the use of marijuana because the tax was prohibitively high. Ferraiolo, supra note 19, at 153–154; David Katner, \textit{Up in Smoke: Removing Marijuana from Schedule I}, 27 B.U. PUB. INT. L.J. 167, 173 (2018).

\textsuperscript{23} P.L. 82-255 (1951).

\textsuperscript{24} Spillane & Wolcott, supra note 21, at 234.

\textsuperscript{25} Courtwright, supra note 3, at 10.

\textsuperscript{26} Spillane, supra note 14, at 21.

view on drug policy\textsuperscript{28} developed the initial proposals that ultimately became the CSA.\textsuperscript{29} The Nixon administration believed drug abuse to be a priority issue because “the problem was getting out of hand.”\textsuperscript{30} Nixon himself believed that drug misuse and addiction was a cause of crime, and he had campaigned on reducing the supply side of this equation.\textsuperscript{31} Thus, the administration had determined that the existing legal authorities were inadequate and needed to be replaced with a single modern law that would give the government the appropriate tools and flexibility in order to combat this problem.\textsuperscript{32}

Congress, however, viewed the country as facing “three very visible drug problems”: an increase in heroin use among those living in urban areas as well as among service members stationed in Vietnam, and with young people using marijuana and psychedelics.\textsuperscript{33} In general, Congress was wary of the federal approach to drug control: “the conventional liberal wisdom [was] that federal officials had botched the psychotropic drug problem while demonizing narcotic offenders and stonewalling maintenance experiments . . . Above all, the reformers thought that the old sanctions, especially those involving marijuana, were unfair and inflexible, and brought disrepute upon the control system.”\textsuperscript{34}

Recognizing the need to compromise with the more liberal “establishment”\textsuperscript{35} in Congress, President Nixon proposed a compromise between interdiction and public health approaches to drug control.\textsuperscript{36} Notably, key officials in the administration agreed with some of Congress’s assessment and believed “that the new guidelines [under the CSA] would make the system fairer and more workable, while preserving moral distinctions among casual users, addicts, and organized criminal traffickers, with the heaviest sentences reserved for the latter.”\textsuperscript{37} Ultimately, Nixon’s proposal became the 1970 Comprehensive Drug Abuse Prevention and

\begin{footnotes}
\footnote{28 Id. at 49.}
\footnote{29 Spillane, supra note 14, at 21.}
\footnote{30 Courtwright, supra note 3, at 11.}
\footnote{31 Id.}
\footnote{32 Id. at 10.}
\footnote{33 Jerome H. Jaffe, One Bite of the Apple: Establishing the Special Action Office for Drug Abuse Prevention, 43, 45 in One Hundred Years of Heroin (David Musto, eds. 2002).}
\footnote{34 Courtwright, supra note 3, at 12.}
\footnote{35 Id. at 11.}
\footnote{36 Id. President Nixon’s proposal in July 1969 was a “10-point action plan”: “points 1–5 dealt with supply control. Points 6–10 emphasized education, research, rehabilitation, training, and communication.”}
\footnote{37 Courtwright, supra note 3, at 12.}
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Control Act,\textsuperscript{38} which included the CSA as part of the effort to unify federal approaches to drug control.\textsuperscript{39}

Although the CSA had initially been passed with “something in it for everybody,”\textsuperscript{40} it increasingly became pulled toward criminalization and away from public health.\textsuperscript{41} In the 1970s, middle-class parents became increasingly fearful of the seemingly growing acceptance of marijuana use among young people.\textsuperscript{42} These fears, however, accompanied prejudices as illicit drug use was associated with “minority subcultures—musicians, artists, urban African Americans, Hispanic laborers.”\textsuperscript{43} Thus, the public feared not just that “white middle-class youth” were using illicit drugs\textsuperscript{44} but that they were associating with “deviant” elements of society.\textsuperscript{45} Concerned about the harms of marijuana—in terms of both physical harm and social harms—and its possible gateway effect to harsher drugs, organized groups of parents successfully lobbied for tougher criminal sanctions and “zero tolerance” laws, rather than pushing for harm-reduction approaches.\textsuperscript{46} Subsequently, as certain controlled substances became cheaper and easier to produce, the government increased its law enforcement efforts, and subsequent legislation reversed the CSA’s sentencing reforms.\textsuperscript{47}


\textsuperscript{39} Courtwright, supra note 3, at 11. “The legislation itself reflected this multi-front approach. The CSA was part (Titles II and III) of . . . the Comprehensive Drug Abuse Prevention and Control Act of 1970. Title I provided authority and money for the Department of Health, Education, and Welfare (HEW) to mount additional prevention and treatment efforts through community mental health centers and public health service hospitals. It authorized the National Institute of Mental Health to increase research and training. It protected the privacy rights of subjects under the care of approved researchers. All of these were unmistakably public-health initiatives, part of the same legislation as the CSA.”

\textsuperscript{40} Id. at 13.

\textsuperscript{41} Hudak, supra note 27, at 75–77, 81–83. While there were some efforts at public health, \textit{id.} at 73, its educational efforts have been criticized as failures, \textit{id.} at 80–81.

\textsuperscript{42} Courtwright, supra note 3 at 11. While seemingly concerned about the societal costs of potentially losing a generation to drug abuse, Nixon also stoked parents’ fears as a political device by arguing, “It is doubtful that an American parent can send a son or daughter to college today without exposing the young man or woman to drug abuse.”

\textsuperscript{43} SPILLANE & WOLCOTT, supra note 21, at 260.

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} Ferraiolo, supra note 19, at 156 and 161; see also Spillane & Wolcott, supra note 21, at 260.

\textsuperscript{46} Courtwright, supra note 3, at 13.

\textsuperscript{47} \textit{Id.;} Katharine A. Neill, \textit{Tough on Drugs: Law and Order Dominance and the Neglect of Public Health in U.S. Drug Policy}, 6 WORLD MED. & HEALTH POL’y 375, 382–83 (2014); see also Shon Hopwood, \textit{The Effort to Reform the Federal Criminal Justice System}, 128 Yale L.J. Forum 791, 797 (Feb. 25, 2019) (noting that “[f]or the past three decades, federal criminal justice legislation has mostly been a one-way ratchet towards overcriminalization, longer sentences, and mostly expanding federal prison populations.”)
B. The CSA’s treatment of drugs: Scheduling

The heart of the CSA is its scheduling of controlled substances, which determines how criminal penalties are assessed. The CSA establishes a regulatory scheme for classifying drugs under a five-tiered schedule: drugs under Schedule I have the most restrictions and are considered to have no medical value, while drugs under Schedule V have the least restrictions. When it passed the CSA, Congress expressly included certain substances within each schedule, and it also empowered the Attorney General to reclassify a controlled substance to a lower schedule or completely remove the substance in question. To be classified under Schedule I, the Drug Enforcement Administration (DEA) must find that the drug has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and lacks “an accepted safety for use” under medical supervision. Conversely, drugs under Schedules II through V have a “currently accepted medical use in treatment in the United States.” As a political compromise, the Department of Health and Human Services (HHS) or “any interested party” can also petition the Justice Department to add, reclassify, or remove a drug from the schedule, just as the Attorney General could on “his own motion.”

When Congress passed the CSA, it placed marijuana under Schedule I. Since then, advocates have filed five petitions to call for it to be rescheduled—all

48 For a useful summary with examples of drugs falling under each of the five Schedules, see Elizabeth Hartney, Controlled Drugs in the Controlled Substance Act, VERYWELLMIND (Sept. 29, 2019), http://www.verywellmind.com/what-are-controlled-drugs-22310 [http://perma.cc/HC5N-MCX6]. Drug schedules are different from the five classes of drugs—narcotics, depressants, stimulants, hallucinogens, and anabolic steroids—that fall under the CSA. Id.


55 Spillane, supra note 14, at 22.

56 21 U.S.C. § 811(a) (2015). See also 21 U.S.C. § 811(c) (2015) (explaining that when making this determination, the DEA must consider eight factors laid out in the CSA: “(1) Its actual or relative potential for abuse. (2) Scientific evidence of its pharmacological effect, if known. (3) The state of current scientific knowledge regarding the drug or other substance. (4) Its history and current pattern of abuse. (5) The scope, duration, and significance of abuse. (6) What, if any, risk there is to the public health. (7) Its psychic or physiological dependence liability. (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.”).

57 21 U.S.C. § 812(c) (2018) (listing marijuana (under its prior spelling of “marihuana”) under Schedule I at (c)(10)). As another participant in the symposium has noted, it is not clear why Congress
unsuccessful—and often the DEA took a lengthy amount of time to issue a decision. The DEA has laid out a five-part test to determine whether a substance, such as marijuana, has an accepted medical use: “the drug’s chemistry is not known and reproducible; there are no adequate safety studies; there are no adequate and well-controlled studies proving efficacy; the drug is not accepted by qualified experts; and the scientific evidence is not widely available.” Several petitioners have attempted to sue the DEA, but the courts have upheld the DEA’s denials.

Many of these challenges have rested on whether the DEA can appropriately claim that marijuana has no medical value. Some commentators have noted that the FDA has approved new drug applications for purified and synthetic versions of products that are present in marijuana for particular medical indications. These approvals would suggest that there is a medical use for marijuana, thus contradicting initially included marijuana on Schedule I. Melanie Reid, *Goodbye Marijuana Schedule I—Welcome to a Post-Legalization World*, 18 OHIO ST. J. CRIM. L. 169, 175 (noting that the scant legislative history suggests the placement was temporary until additional recommendations could be made); see also Battin, supra note 51, at 157–58 (questioning why “marijuana, to which no fatalities have been directly attributed, a Schedule I drug, while tobacco and alcohol are not scheduled at all.”). But see Jonathan Caulkins et al., *Marijuana Legalization* 91–93 (2d ed. 2016) (arguing that the Schedules should be read as “two big bins, one for those with no currently accepted medical use (Schedule I) and another for those that are currently used as medicine (Schedules II–V)” and noting there is no other place to put substances with “medium or medium-high” risk of abuse other than Schedule I).


59 Denial of Petition To Initiate Proceedings To Reschedule Marijuana, 81 FED. REG. 53688 (proposed Aug. 12, 2016).


62 Eisenberg & Leiderman, supra note 61, at 255 (discussing FDA approval of drug products with synthetic THC and an approved cannabidiol, all of which have been removed from Schedule I).
its placement on Schedule I. But the FDA has not approved marijuana itself “in plant form,” which the DEA relied upon in one of its denials.

Classifying a drug under Schedule I greatly restricts potential research that could demonstrate whether a controlled substance actually has medical use. Although the CSA expanded medical research and addiction treatment at HHS, Congress also gave greater control to the Justice Department—not to HHS—to approve research using Schedule I controlled substances under the rationale of preventing the inappropriate diversion of such drugs during clinical trials.

II. DIVERGENCE BETWEEN STATES AND THE FEDERAL GOVERNMENT ON MARIJUANA POLICY

In our federalist system, the federal government cannot dictate states’ criminal laws, but it often plays a leadership role in influencing and standardizing them. For example, when the CSA became law, the Nixon administration urged the states to adopt a Uniform Controlled Substances Act. This section will explore how at the midpoint of the CSA’s fifty-year history, states began to deviate from the CSA’s treatment of marijuana and the consequences of that policy divide.

A. State Efforts to Legalize Marijuana

As other options for changes proved unsuccessful, advocates for marijuana reform turned to popular referendums as a way to bypass resistant legislatures. The first success was in California: after several legislative failures, advocates petitioned...
for a popular referendum to legalize marijuana for medical purposes. Advocates focused on the widespread belief that marijuana could provide relief for those with illnesses such as AIDS and cancer. The passage—by a 55% to 44% margin—of Proposition 215 in 1996 marked the first time that a state legalized medical marijuana. Subsequently, a majority of the states and the District of Columbia have legalized medical marijuana.

Building on these successes, advocates have turned toward legalizing marijuana for recreational, or “adult,” use, and time will tell if this movement is as successful as efforts to allow for medical marijuana. In 2012, voters in Colorado and Washington passed ballot initiatives, making the two states the first to legalize marijuana for adult-use purposes. Subsequently, Alaska, California, Illinois,

71 Id. at 163–65.
72 Id. at 167–68.
76 Initiative Measure 502 (Wash. 2012).
78 CAL. CIV. CODE § 1550.5(a)(3) (West 2019) (explaining that AUMA, under the initiative Prop. 64, was enacted into the state legislature).
79 410 ILL. COMP. STAT. ANN. 705 (West 2019). Illinois is the first state to approve legal sales through the state legislature rather than a ballot measure.
Modernizing marijuana laws in the United States—In search of a feasible federal policy approach

In search of a feasible federal policy approach


28. Patrick O’Brien, Medical Marijuana and Social Control: Escaping Criminalization and Embracing Medicalization, 34 DEVANT BEHAV. 423, 425 (“Policymakers have anticipated that a shift away from the criminalization of marijuana . . . would reduce the costs and problems caused by drug prohibition[,]”); see also Fertig, supra note 6, at 6 (displaying states marijuana sales in 2017); Kamin, supra note 6, at 654–55 (noting that the marijuana market—“estimated to be worth $40 billion annually”—is largely untaxed and operated illegally).

29. Ferraiolo, supra note 19, at 149 (“The growing willingness of policy entrepreneurs to invoke the initiative process may heighten political conflict between federal and state institutions and actors with divergent policy priorities.”).

30. Hartig & Geiger, supra note 5.

31. A referendum, however, failed in North Dakota that would have legalized marijuana for adult use and expunged prior offenses automatically. North Dakota Measure 3, Marijuana Legalization and Automatic Expungement Initiative (2018), BALLotpedia,
efforts around recreational marijuana. Of the states that have legalized recreational use, only Illinois\textsuperscript{90} and Vermont\textsuperscript{91} have done so via the legislative process, with high-profile legislative failures in the politically liberal states of Connecticut,\textsuperscript{92} New Jersey,\textsuperscript{93} New Mexico,\textsuperscript{94} and New York.\textsuperscript{95} While some opposition focused on oft-cited concerns about criminal activity, other political concerns included the impact on low-income communities and whether these communities would see the economic benefits of legalization.\textsuperscript{96}

B. Policy Conflicts in a Federalist System

Given how state laws are changing on the treatment of marijuana, there is

\textsuperscript{90} 410 ILL. COMP. STAT. ANN. 705 (West 2019).

\textsuperscript{91} Ring, supra note 85 (discussing how Vermont had decriminalized recreational use of marijuana but had not yet passed a scheme for regulating such use).


\textsuperscript{96} Vivian Wang, Final Push to Legalize Pot Fails in New York, N.Y. TIMES (June 19, 2019), http://www.nytimes.com/2019/06/19/nyregion/marijuana-legalization-ny.html?module=inline [http://perma.cc/6GWS-L8QK] (finding that suburban state senators might not have voted for the bill); Nick Corasaniti, Effort to Legalize Marijuana in New Jersey Collapses, N.Y. TIMES (Mar. 25, 2019), http://www.nytimes.com/2019/03/25/nyregion/new-jersey-marijuana.html [http://perma.cc/Z2TL-K38D] (noting that lawmakers were concerned about the public health impact on minority communities and "challenges faced by other states that have legalized cannabis, including how to keep the drug away from teenagers and prevent people from driving under its influence."); Vivian Wang & Jeffery C. Mays, Black Lawmakers to Block Legalized Marijuana in N.Y. if Their Communities Don’t Benefit, N.Y. TIMES (Mar. 11, 2019), http://www.nytimes.com/2019/03/11/nyregion/marijuana-legalization-african-americans.html?action=click&module=RelatedLInks&pgtype=Article [http://perma.cc/B6MZ-CKQD] (noting that black legislators in New York would withhold support for an adult-use legislation bill unless they were "assured that some of that money will go toward job training programs, and that minority entrepreneurs will receive licenses to cultivate or sell the marijuana.").
understandable confusion about its legality because of its still-unchanged treatment under the CSA.97 When state and federal laws conflict, courts must determine whether federal law can coexist with or overrides the state law under the Supremacy Clause.98 Congress can preempt states’ laws either expressly or implicitly depending on the text of the statute and the extent of federal activity in the sector.99 Courts, however, assume “that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”100

But the conflict between the CSA and state marijuana laws is not a simple preemption analysis.101 The CSA explicitly states that it does not preempt state law “unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.”102 Such a provision makes logical sense because an act can be legal under state law while illegal under federal law or vice versa.103

Further, the federal government cannot compel the states to adopt or enforce federal law without violating the Tenth Amendment.104 While the federal government may still criminalize marijuana, it relies on the states to enforce criminal penalties: “of the nearly 900,000 marijuana arrests in 2012, arrests made at the state and local level dwarfed those made by federal officials by a ratio of 109 to 1.”105 If the federal government wants to deter an action—such as marijuana use—but is in disagreement with the states, “the proper response . . . is to ratchet up the federal regulatory regime, not to commandeer that of the state.”106

98 U.S. CONST. Article VI, Clause 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
102 21 U.S.C.A. § 903(1970); see Chemerinsky, supra note 101, at 105–06 (discussing Section 903 as requiring something more than “mere speculation about a hypothetical conflict”).
103 Gonzales v. Raich, 545 U.S. 1, 2 (2005); Zettler, supra note 7, at 862.
104 Chemerinsky, supra note 101, at 111 (“Just as the federal government cannot command the state to create a law criminalizing conduct, neither can it command the state to leave current state laws on the books.” (footnotes omitted)).
105 Id. at 84 (“After the CSA’s passage, marijuana was prohibited in all fifty states. In fact, state marijuana laws provide the basis for nearly every marijuana arrest in the country.”).
106 Id. at 112 (quoting Conant v. Walters, 309 F.3d 629, 646 (9th Cir. 2002)).
Many of the issues raised in this situation are due to indirect conflicts, not direct conflicts, that are outside a preemption analysis. In other words, the conflict is not the immediate criminal act; rather, it is the subsequent consequences arising from an act that is legal according to one level of government (the states) but illegal to the other (the federal government). If the federal government determines that anyone who has committed a federal crime is ineligible for a federal benefit, that is not a “conflict” that the states can resolve. Thus, the conflicts arise due to the civil—not punitive—consequences of carrying out an act that is illegal federally. Because those providing and those using marijuana are violating federal law, they may risk losing their access to financial, accounting, legal, and other services because these service providers could be seen as aiding and abetting an unlawful act in the eyes of the federal government. Just as the federal government cannot force states to adopt similar punitive policies toward the use of marijuana, states’ legalization of marijuana use cannot prevent the federal government from making the political decision to use such a violation of federal law as a disqualifier for federal benefits.

C. Modest Federal Efforts to Resolve State-Federal Conflicts

In contrast to tremendous state activity following the California ballot initiative, less change has occurred at the federal level since the CSA passed fifty years ago. Several high-profile members of the 116th Congress have introduced legislation on marijuana legalization, but there has been little movement on these proposals in either the Democratic-controlled House or Republican-controlled Senate.

Congressional action on marijuana reform has been modest. For example, in

107 Fertig, supra note 6.
108 Fertig, supra note 6, at 9–11, 15–20; see generally Chemerinsky, supra note 101, at Section II; Charles Doyle, Cong. Research Serv., R45074, Mandatory Minimum Sentencing of Federal Drug Offenses 12–13 (2018) (discussing how those who assist criminal sales may be subject to penalties).
109 Chemerinsky, supra note 104, at 79.
110 When a majority of states adopt a similar position—even if that position is in contrast to federal law—it can provide political cover for federal policymakers to amend federal law to be consistent with the states. Kim, supra note 13, at 94 (noting how state right-to-try laws helped usher a change to federal regulations around access to experimental drugs).
111 Justin Strekal, 4/20: Will Congress advance marijuana legislation in 2019? THE HILL (Apr. 20, 2019), https://thehill.com/opinion/civil-rights/439806-4-20-will-congress-advance-marijuana-legislation-in-2019 (“As of this writing, members of Congress have introduced five separate bills to end the federal prohibition of marijuana. In addition, there are also more than half a dozen bills pending before Congress that seek to restrain the federal enforcement of cannabis prohibition in states that have reformed their marijuana laws.”).
the 2016 Farm Bill, Congress amended the CSA to exclude “hemp” from the statutory definition of marijuana. In this year of the CSA’s fiftieth anniversary, Congress looked poised to consider adopting a “safe harbor” for financial institutions to do business with state-licensed marijuana companies and businesses that support them.

Congress has intervened in the area of federal enforcement of the CSA. Given the supremacy of federal law, the Supreme Court has held that state legalization does not prohibit federal enforcement of the CSA, even on wholly intrastate activities.


114 Kamin, supra note 6, at 620 (“In addition, anyone conspiring with or aiding and abetting those violating federal law are equally liable for a violation of federal law. This includes, at least in principle, anyone leasing space to marijuana businesses, working for or contracting with them, or providing basic services such as accounting, banking, financial, and legal services.”) (footnotes omitted). The House passed the Secure And Fair Enforcement (SAFE) Banking Act, H.R. 1595, 116th Cong. (2019), and included this bill language in a coronavirus-relief package, Section 110606, H.R. 6800, 116th Cong. (2020). In 2019, Senator Mike Crapo, the chairman of the Senate Banking Committee, planned to consider similar legislation, but no action has been taken. Zachary Warmbrodt, Crapo plans landmark cannabis banking vote, POLITICO (Sept. 13, 2019, 5:02 AM), http://www.politico.com/story/2019/09/13/crapo-cannabis-banking-vote-1729925 [http://perma.cc/5GHD-J7NM] (noting the committee chairman’s interest “because of questions surrounding transactions with other businesses, like plumbers and hardware stores, that provide services to the marijuana industry”). Interestingly, Crapo represents a state that does not allow for either medical or recreational marijuana. MARIJUANA POLICY PROJECT, 2020 medical marijuana ballot petition approved for circulation, (Aug. 15, 2019), http://www.mpp.org/states/idaho/ [http://perma.cc/8KMU-8G2T].
such as a patient growing a small amount of marijuana for personal consumption. To clarify its policy on marijuana prosecutions, the Obama administration issued guidance in 2013 to federal prosecutors to avoid prosecuting marijuana cases in states with a robust regulatory system for marijuana. Congress initially rejected an amendment to prohibit the Justice Department from prosecuting those involved in state medical marijuana initiatives, but the amendment’s sponsor successfully included it in an appropriations bill for the first time in 2014. So far, Congress has continued to include the same prohibition in the appropriations bill that funds the Justice Department.

III. LEARNING FROM OTHER MOVEMENTS

Despite this widening divide between state and federal treatment of marijuana, federal policymakers have done little to bridge this policy gap. But the states and advocates could look at other recently passed laws that demonstrate an interest in reforming drug policy, in some cases spurred by states’ collective action. The following section discusses how these recent laws are illustrative of potential paths to amending the CSA’s treatment of marijuana.

A. Political Realism: Is Congress Ready to Legalize?

Given the federalism challenges, Congress is the appropriate actor to address the conflict between state and federal policy regarding marijuana. With the

115 Gonzales v. Raich, 545 U.S. 1, 2 (2005).
116 Kamin, supra note 6, at 628–30 (discussing initial inconsistencies in the Obama Justice Department toward prosecution of marijuana cases).
120 Collective state action may be the catalyst for change at the federal level. See Kim, supra note 13, at 102 (discussing how, after a majority of states passed language authorizing a “right to try” experimental drugs, Congress entered into the policy space to pass a federal version of such a “right”).
121 Wallack & Hudak, supra note Error! Bookmark not defined., at 208 (noting it is false to argue “that the President can reschedule marijuana with a stroke of the pen”); see also Zettler, supra
public’s attitude toward drug policy and criminal justice seemingly changing, the disparate state landscape on marijuana, and successful popular referendums (for at least medical, if not recreational, purposes), it would seem that the time would be ripe for Congress to respond by amending the CSA, particularly in the Democratic-controlled House.\footnote{Note 7, at 850–51 (noting that states may pass “even ineffectual laws and regulations” in order to spur federal action).}

Given recent polling,\footnote{Observer might assume that the public is ahead of policymakers in being ready to advance marijuana legalization. The issue polls well with the general public, and when presented as a ballot measure—and thus bypassing the politicians—legalization efforts have generally, but not always, been successful.\footnote{Note 124, even telling, several states with progressive political environments have failed to pass legislation to legalize marijuana, suggesting that there still remain many barriers based on law, policy, politics, and law, policy, politics, and}

But there are important caveats to this political assumption. First, ballot measures are not available in all states or at the federal level and also may fail to address some of the complex, historical issues related to equity that might be better handled through legislation.\footnote{Indeed, a key committee chairman claimed that marijuana legalization would be one of the first items on the majority’s agenda at the start of the new Congress. Kyle Jaeger, House Will Vote To End Federal Marijuana Prohibition Within ‘Weeks,’ Key Chairman Says, MARIJUANA MOMENT (Mar. 27, 2019), http://www.marijuannamoment.net/house-will-vote-to-end-federal-marijuana-prohibition-within-weeks-key-chairman-says/ [http://perma.cc/BC3L-Z8PR]. (Interviewing House Rules Chairman, Jim McGovern, who predicted a vote on legislation to grant states an exemption from the CSA “in a relatively short time, within the next several weeks”). A month later, the then-ranking member of the House Judiciary Committee complained of the lack of progress on the issue. Tom Angell, Top GOP Congressman Presses Democratic Majority To Pass Marijuana Bill, FORBES (Apr. 4, 2019), http://www.forbes.com/sites/tomangell/2019/04/04/top-gop-congressman-presses-democratic-majority-to-pass-marijuana-bill/#1ef04b88faa9.}

And of course, advocates would need to go through Congress for a legislative solution as there is no federal equivalent to the state ballot initiatives. Ferraiolo, supra note 19, at 171 (noting the importance of ballot initiatives to provide “a means for public opinion to be heard and invoked” in the absence of legislative activity).


equity that remain unresolved. For example, some of these high-profile failures may not have been solely about whether to legalize marijuana for adult use.\textsuperscript{126} Rather, some legislators may have withheld their votes because of the failure to address complex issues such as whether the communities that have been most devastated by the legacy of the CSA should be able to share in the economic benefits that legal sales might bring.\textsuperscript{127}

Second, while polling finds general support, a closer look reveals differences based on partisan identification and religious affiliation that make it less likely that Republican legislators would support legalization efforts.\textsuperscript{128} For instance, a 2018 Pew poll found that, while the general public supported legalization 62\% to 34\%, Republican voters were far less likely to support it than Democrats or even independents who generally leaned in favor of Republican policies.\textsuperscript{129} Further, white Evangelicals and Catholics were more likely to oppose legalization while “mainline” Protestants and unaffiliated individuals were more likely to support it.\textsuperscript{130} Similarly, a poll in New York, shortly after the legalization effort failed, found that, while a majority of the public (55\% to 40\%) supported such a policy, most Republican voters opposed it (40\% to 53\%).\textsuperscript{131} Thus, Republican lawmakers may be less inclined to support marijuana legalization if their base supporters oppose such policies.\textsuperscript{132}

\begin{addendum}
\item[126] Supra note 93 (noting related issues around the expungement of prior felonies, changes to the existing medical marijuana program, and political infighting hampered legislative efforts in New Jersey).
\item[127] Wang & Mays, supra note 96 (noting a disagreement between legislators and the New York governor over how to invest any revenue derived from recreational sales with one legislator arguing, “I’m not willing to create a market that will allow existing wealthy people to gain wealth and leave out the people that I represent.”).
\item[128] See, e.g., Warmbrot, supra note Error! Bookmark not defined. (noting that Banking Committee Chairman Crapo is open to considering legislation allowing banks to work with marijuana businesses, but does not support amending the CSA to legalize marijuana); Fertig, supra note 6, at 4 (“Republican lawmakers who . . . come from states with medical or recreational cannabis are the best bet for cannabis allies”).
\item[129] Hartig & Geiger, supra note 5 (“Republicans are divided, with 45\% in favor of legalizing marijuana and 51\% opposed. Still, the share of Republicans saying marijuana should be legal has increased from 39\% in 2015. Independents who lean toward the Republican Party are far more likely than Republicans to favor marijuana legalization (59\% vs. 45\%).”).
\item[130] Id. (surveying Evangelicals (52\% opposed, 43\% support), Catholics (44\% opposed, 52\% support), white mainline Protestants (31\% opposed, 64\% support), unaffiliated (19\% opposed, 79\% support)).
\item[132] Fertig, supra note 6, at 4 (noting that “more Democrats support cannabis legislation in both
B. Recent Laws as Signs of Change

Although our current political gridlock seems worse than even the environment fifty years ago that produced the CSA, policymakers from opposing political philosophies have come together to pass legislation on drug access, substance abuse, and criminal justice in recent years.\(^{133}\) For instance, Congress passed legislation\(^{134}\) that seemingly allows greater patient access to drugs still in the experimental process and not yet approved by the FDA—legislation that was inspired by overwhelming endorsement by the states.\(^{135}\) Additionally, Congress actually passed legislation focused on the country’s opioid epidemic, not once, but twice: the Comprehensive Addiction and Recovery Act\(^{136}\) (CARA) in 2016, and then the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act\(^{137}\) in 2018. The relative ease by which Congress passed these bills, as well as the more-difficult passage of the criminal justice reform bill, the First Step Act,\(^{138}\) might signal a policy shift and a change in political attitudes toward drug policy and criminalization that harkens back to the original compromises in the CSA in its approach to drug policy. The question is whether this shift is enough to consider amending the CSA regarding its treatment of marijuana.

1. The Right to Try: An Example of How States Can Influence Federal Drug Policy

In an area of drug policy that may be instructive, the so-called “right to try,” which provides a pathway for terminally ill patients to request experimental drugs not yet approved by the FDA, moved federally due in large part to actions at the

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\(^{133}\) Id. at 12.


\(^{135}\) Kim, supra note 13, at 102–06.


\(^{138}\) First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194 (2018). Although initial versions of this bill used the acronym FIRST STEP (which stood for “Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person”), this paper will use the short title contained in the final version that passed into law.
“While Congress and the public have demanded greater regulatory authority during times of crisis, the pendulum has swung toward deregulation when stakeholders and policymakers feel that the FDA’s process has slowed or even blocked access to life-saving medicine.”

Similar to advocates for legalizing marijuana, right-to-try advocates tried and failed to obtain administrative, legislative, and judicial relief at the federal level and instead turned to states for policy change.

Beginning with Colorado in 2014, a majority of states enacted right-to-try laws, which follow model legislation drafted by the libertarian Goldwater Institute. One draft of the Goldwater model legislation is explicitly critical of the FDA drug approval process: “The use of available investigational drugs, biological products, and devices is a decision that should be made by the patient with a terminal disease in consultation with his or her physician not a decision to be made by the government.”

The states’ laws contained several structural flaws that make effectuating the right to try difficult. The model right-to-try legislation explicitly does not mandate drug makers to actually provide the experimental drug. Even if the company does agree to supply the patient with the drug, the company can charge the patient for all costs associated with the experimental drug, and the legislation explicitly states the patient’s insurer is not required to cover any costs associated with the experimental drug.

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139 Kim, supra note 13, at 102–06.
140 Id. at 97–98.
141 Id. at 98–108.
142 GOLDWATER INST., Right to Try Model Legislation, https://respectfulinsolence.com/wp-content/uploads/2014/10/GoldwaterInstituteRighttoTryModel.pdf, [hereinafter “Model Legislation”]. Note that there have been prior attempts to legislate greater access to experimental drugs. Susan Okie, Access before Approval — A Right to Take Experimental Drugs? 355 NEW ENG. J. MED. 437, 439 (2006), (discussing a 2005 U.S. Senate bill that would allow terminally ill to obtain any drug that had gone through the first phase of clinical trials). Under the model legislation, patients are only eligible for this statutory-created “right” if they meet certain criteria: the patient must be suffering from an “advanced illness . . . that, without life-sustaining procedures, will soon result in death;” have consulted with a physician and considered all other options currently approved by the FDA; have been given a prescription or a recommendation from a physician for an experimental drug; and have given written informed consent to take the experimental drug. Model Legislation, supra at section 1. The model does allow the drug maker to charge for any costs associated with the production of the experimental drug. Id. at Section 2. The FDA also limits what a drug maker can charge for experimental drugs in a clinical trial. 21 C.F.R. § 312.8 (2009). Lastly, the model provides immunity for health professionals from the relevant licensing boards for recommending, prescribing, or administering the experimental drug. Model Legislation, supra at section 5.
143 CHRISTINA CORIERI, GOLDWATER INST. “Everyone Deserves the Right to Try: Empowering the Terminally Ill to Take Control of their Treatment,” 266 (11 February 2014) (proposing legislative findings for a bill).
144 Model Legislation, supra note 142, at Section 2.
drug. Given these high hurdles, it is not clear if any patient actually has been aided by a state right-to-try law.

Second, a state statute can accomplish only so much in an area as heavily regulated by the federal government as the drug approval and marketing process. Where the federal government and the states may disagree on the legality of marijuana without a dispute over federal preemption, there is less certainty about whether state right-to-try laws are preempted by the FDA as its regulatory powers over commercial sales of prescription drugs are quite extensive. Prior to a federal law being enacted, proponents would argue that state right-to-try laws complemented, rather than conflicted with, the FDA process and thus were not preempted.

But the overwhelming response in the states set the stage for a federal law to address any legal ambiguity. The same political forces that influenced efforts at the state level have moved Congress to pressure the FDA to revise its compassionate-use policy and to pass a bill that created a federal right to try in 2017. Although the federal Right to Try law explicitly retained the compassionate-use

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145 Id. at sections 2–3 and 7.
146 NYU Langone Health Working Group on Compassionate Use and Pre-Approval Access, Statement from the NYU Langone Health Working Group on Compassionate Use and Pre-Approval Access, https://med.nyu.edu/pophealth/sites/default/files/pophealth/CUPA%20statement%20031518.pdf (Mar. 15, 2018) (noting that right-to-try proponents could only identify one example of a physician using a state law to treat patients; however, the product being used was made available by the existing FDA process); see also Kim, supra note 13, at 11 n.56 (referring to an earlier statement by the NYU Langone Health Working Group on Compassionate Use and Pre-Approval Access that “[t]o the best of our knowledge, no patients have been spared from death by right to try laws.”).
147 Caitlyn Martin, Questioning the “Right” in State Right to Try Laws: Assessing the Legality and Effectiveness of These Laws, 77 Ohio St. L.J. 159, 178–81 (2016) (discussing express and implied preemption of state laws particularly in the context of regulating drugs); see also PLIVA v Mensing, 564 U.S. 604, 611–24 (2011) (finding that federal regulations on generic drug labelling preempted a state tort claim). There are examples, however, of state regulatory efforts (often in the area of product liability or medical practice) that challenge the conventional wisdom of federal preemption in this area. Zettler, supra note 7, at 861–88 (discussing different state regulatory schemes, including the right to try, that were justified under traditional state powers of regulating product liability and the practice of medicine).
148 Kim, supra note 13, at 103–04.
149 Martin, supra note 147, at 182–83 (“Right to Try laws, however, remove safeguards governing the accessibility of drugs by circumventing the FDA altogether.”); Ellen Black, State ‘Right to Try’ Acts: A Good Start, but a Federal Act is Necessary, 45 Sw. L. Rev. 719, 743 (2016) (“As many legal scholars have argued, it appears likely that the right to try acts are impliedly preempted by the FDA regulations.”).
150 Black, supra note 149, at 751–52; see also Barrett, supra note 7 (discussing how states can signal disapproval of federal decisions in areas where they are prevented from legislating).
151 Right to Try Act, S. 204, 115th Cong. (2017) [hereinafter “S. 204”]. The legislation’s
use process, it created a new national process for patients to request access from a drug maker directly without seeking FDA approval.

The potential conflict between states’ drug policies and federal law is an obvious shared policy challenge between the right to try and marijuana legalization. While the initial state laws on the right to try could not change the federal drug approval process and may have been on questionable legal and policy grounds, they provided a successful foundation for political pressure on Congress to enact a statutory change. Similarly, states’ treatment of marijuana—particularly for medicinal purposes—parallels states’ treatment of experimental drugs. And similar to the patient stories used to support the right to try, marijuana advocates effectively used the stories of patients with cancer and AIDS to sway voters during the early ballot initiatives.

Marijuana legalization also shares another parallel with the right to try: both marijuana and experimental drugs lack a strong medical and scientific evidence base. While the weight of scholarly research favors legalizing marijuana, the actual medical research is not entirely conclusive, in large part because federal law makes such research extremely difficult to conduct. With the right to try, there is a similar challenge since the drugs are experimental—obviously, not enough is known about them and, hence, the need for clinical trials to study their effectiveness.


152 S. 204, supra note 151, at § 3(4) (stating that the Johnson bill “is consistent with, and will act as an alternative pathway alongside, existing expanded access policies”).

153 Kim, supra note 13, at 102–08.

154 Zettler, supra note 7, at 879 (noting that “state medical marijuana laws represent an attempt to permit access to medicine outside of the FDA approval process”).

155 The parallel of course begins to diverge when marijuana use becomes recreational rather than helping those who are ill and in pain. See supra notes 70–74.

156 Zettler, supra note 7, at 878 (noting “the paucity of high-quality data supporting many medical uses of marijuana”).


Because of this uncertainty, many ethicists, scientists, former regulatory officials, and even patient and consumer groups raised policy and ethical concerns about the creation of a federal right to try. Additionally, ethicists and health professionals argue that right-to-try laws create false expectations for patients, especially since patients may not realize even under right-to-try laws, “[d]rug companies don’t have to give them the medicine, and insurance companies don’t have to pay for it.”

Such concerns, though, did not stop Congress from passing a federal right to try.

2. The Opioid Response: A Return to Public Health Approaches Toward Addiction Policy

Another stream of federal drug policy—including how we respond to those misusing controlled substances—is our country’s response to the opioid epidemic. Over the last twenty years, Americans’ use of opioids has increased dramatically: the sales of prescription opioids nearly quadrupled since 1999 due to several potential causes. At the same time, the death rate due to overdoses tripled to 19.8


160 Carrie Feibel, Patients Demand The ‘Right To Try’ Experimental Drugs, But Costs Can Be Steep, NPR SHOTS (Mar. 3, 2017, 2:17 PM), www.npr.org/sections/health-shots/2017/03/03/517796956/patients-demand-the-right-to-try-experimental-drugs-but-costs-can-be-steep; NYU LANGONE HEALTH WORKING GROUP ON COMPASSIONATE USE AND PRE-APPROVAL ACCESS, supra note 146 (“Right to try does nothing to increase affordability of experimental medicines: in fact, the legislation specifically states that insurers do not have to pay for investigational medical products.”). S. 204 § 2(b) references FDA regulations, 21 CFR § 312(d)(1), that allow a drug maker to recover “direct costs” for supplying an experimental drug. S. 204, supra note 151; 21 C.F.R. § 312.8(d)(1).

Patients seeking aid through the right to try are in a very different situation than those in clinical trials, which may provide statutory protections and contractual guarantees. Affordable Care Act (ACA), 42 U.S.C.S. § 300gg-8 (2010); Insurance Coverage and Clinical Trials, NAT’L CANCER INST. (Feb. 6, 2020), https://www.cancer.gov/about-cancer/treatment/clinical-trials/paying-insurance (require insurers to cover routine costs such as physician and hospital visits for patients in clinical trials.). Some states have similar insurance mandates. Kelly Johnson, Payers Still Denying Coverage Despite Clinical Trial Mandate, ONCLIVE (Mar. 29, 2016), http://www.onclive.com/publications/oncology-business-news/2016/april-2016/payers-still-denying-coverage-despite-clinical-trial-mandate?p=2. Other costs—such as procedures, tests, and therapies specifically related to the clinical trial—generally are covered by the drug maker or the sponsor of the clinical trial. Id. Some providers, however, have argued insurers are not following this mandate. Christine Mackay et al, Insurance Denials for Cancer Clinical Trial Participation After the Affordable Care Act Mandate, 123 CANCER 2893 (2017).

161 Claire Felter, The U.S. Opioid Epidemic, COUNCIL ON FOREIGN REL.,
per 100,000 individuals, with nearly two-thirds of these deaths involving either prescription or illegal opioids.\textsuperscript{162} Deaths due to opioid overdoses exceed automobile accidents in the United States.\textsuperscript{163} The opioid epidemic’s toll on the American public’s health is so extensive that it is linked to a decline in the country’s life expectancy.\textsuperscript{164} In addition to the loss of life, the opioid epidemic has had other public health consequences: nearly two million Americans have a prescription opioid use disorder,\textsuperscript{165} leading to an increase in illicit opioid use and to diseases such as hepatitis C and HIV.\textsuperscript{166}

Because CARA was introduced just before the 2014 midterm elections, there was little chance that it would pass into law. However, advocates responded positively to the legislators’ interest and began to plan for its passage in the next Congress.\textsuperscript{167} Tragically, “the dramatic increase in opioid-related overdose deaths in virtually every Congressional district in America” created momentum to pass the bill and address an issue that had changed from a regional concern to a national epidemic.\textsuperscript{168} When CARA was signed into law on July 22, 2016, only months before the federal election, advocates hailed it as the “first major federal addiction legislation in 40 years and the most comprehensive effort undertaken to address the opioid epidemic, encompassing all six pillars necessary for such a coordinated response—prevention, treatment, recovery, law enforcement, criminal justice


\textsuperscript{164} Felter, \textit{supra} note 161.

\textsuperscript{165} \textit{Opioid Overdose Crisis, NATIONAL INSTITUTE ON DRUG ABUSE}, (May 27, 2020)

\textsuperscript{166} Felter, \textit{supra} note 161.


reform, and overdose reversal.\textsuperscript{169}

CARA mirrored some of the original promises of the CSA. First, CARA contained numerous public-health approaches to combating the opioid epidemic. In addition to a general grant program for community-based organizations,\textsuperscript{170} CARA also increased access points for community-based treatment,\textsuperscript{171} training for first responders,\textsuperscript{172} grants targeted at addiction treatment for pregnant and postpartum women,\textsuperscript{173} and the types of health professionals who could prescribe medications to treat opioid misuse disorders.\textsuperscript{174} Second, CARA contained several grants aimed at improving law enforcement responses—including for state, local, and tribal law enforcement to pursue innovative approaches to policing,\textsuperscript{175}—and for states to establish prescription drug monitoring programs.\textsuperscript{176} Third, CARA reformed processes at the Department of Veterans Affairs (VA) to address how the VA health system treats pain and prescribes opioids.\textsuperscript{177}

A little over two years after CARA’s passage, Congress revisited the opioid epidemic, passing SUPPORT and sending it to President Trump for signature.\textsuperscript{178} Although the opioid epidemic was still raging, a cynic might question whether a second bill was needed so quickly or whether SUPPORT was meant to give Republicans a healthcare achievement prior to the 2018 midterm elections. Prior to the passage of SUPPORT, Congressional Republicans had spent a year attempting to repeal the ACA but failed to send legislation to President Trump for signature.\textsuperscript{179}

\begin{thebibliography}{99}
  \bibitem{170} Id. at §§ 103, 601.
  \bibitem{171} Id. at §§ 107, 110.
  \bibitem{172} Id. at § 202.
  \bibitem{173} Id. at §§ 501, 503.
  \bibitem{174} Id. at § 303.
  \bibitem{175} Id. at § 201.
  \bibitem{176} Id. at § 109.
  \bibitem{177} Id. at Title IX.
\end{thebibliography}
SUPPORT faced some of the same criticisms related to sustainable funding as CARA did. But whereas CARA seemed to have some logical themes in its legislative structure, some criticized SUPPORT as “scattershot compared with what is needed.” Some legislators expressed concern that the process for developing SUPPORT was “rushed,” as the House considered many different proposals that were ultimately packaged into a single bill. House Energy and Commerce then-Ranking Member Frank Pallone worried that many of the bills that would ultimately be packaged as SUPPORT lacked meaningful review. But by the 2018 midterm elections, sponsoring legislation aimed at the opioid epidemic seemed politically astute. Although advocates criticized the legislation because...
these bills failed to provide sustainable funding for needed services, politicians viewed introducing these unfunded opioid-related bills as being responsive to a pressing societal concern while being fiscally responsible.

The opioid debate demonstrates that Congress is willing to tackle tough questions regarding how to respond to addiction, but despite its name, CARA is not a comprehensive approach to substance use disorders. I t and SUPPORT left open larger questions on an overall approach to drug policy. How Congress responded to the opioid epidemic versus its prior responses to drug abuse raises questions about racial equity, an issue of importance in the marijuana debate. The Centers for Disease Control and Prevention (CDC) found that victims of opioid overdoses were overwhelmingly white, tended to be male, and middle-aged. Four of the five most affected states—West Virginia, New Hampshire, Kentucky, and Ohio—are rural and tend to lean Republican or be politically competitive. Many Americans, particularly in rural communities, supported a government response as necessary to stem the tide of opioid misuse. Thus, in addition to the moral and public-health reasons for the response to the epidemic, the majority party in Congress had a political incentive to respond to this drug epidemic differently than prior federal responses. As the electorate shifts though, incoming policymakers will need to

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188 Ehley & Haberkorn, supra note 186 (“Republican supporters of the bills say the extended time on the floor reflects how seriously the House takes the opioid issue. Most of the bills sponsored by vulnerable lawmakers are not controversial, in part because they don’t designate new spending.”).

189 Supra note 96.


191 See id. at 1447 fig.1.


194 162 CONG. REC. H2372 (daily ed. May 13, 2016) (statement of Rep. Jackson Lee) (noting...
C. The First Step Act: Political Willingness to Address Criminal Justice Reform

As aforementioned, the CSA has moved steadily away from its public health roots and more toward a focus on criminal punishments, and changing this focus seems like a notable hurdle for marijuana legalization to overcome. Although the CSA originally eliminated nearly all of the existing mandatory minimum sentences for drug crimes,\(^\text{196}\) Congress reversed course in the 1980s.\(^\text{197}\) Mandatory minimum sentences are most severe for trafficking drugs listed on Schedules I and II, with marijuana falling into Schedule I.\(^\text{198}\)

In recent years, policymakers—even conservative ones—have taken on criminal-justice issues such as sentencing reform,\(^\text{199}\) and the electorate’s response has often been positive, rather than seeing such changes negatively as a “soft on crime” position.\(^\text{200}\) If the politics are shifting on criminal justice issues, these shifts confront why they addressed the harms that opioids posed on one constituency while failing to address how marijuana criminalization imposed harms on another.\(^\text{195}\)

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195 See Infra to Section IV-A.

196 See supra notes 23–47.


198 Id. at 9–10 (discussing the mandatory minimums for violating 21 U.S.C. § 841(a)).


could signal a willingness to engage in meaningful change for the treatment of marijuana.\textsuperscript{201} Legalizing marijuana and regulating its sales could eliminate many low-level drug crimes.\textsuperscript{202}

Like marijuana legalization, sentencing reform had been enacted in several states before federal policymakers decided to debate the issue.\textsuperscript{203} In 2015, sentencing reform at the federal level took shape when a key Republican, Senate Judiciary Chairman Chuck Grassley, agreed to pursue bipartisan reforms.\textsuperscript{204} These efforts seemed doomed after the 2016 elections ushered in a more conservative government that seemed less supportive of sentencing reform\textsuperscript{205}: for instance, President Trump campaigned on\textsuperscript{206}—and continues to call for\textsuperscript{207}—hardline “law and order” policies

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\textsuperscript{202} O’Brien, \textit{supra} note 86, at 438–40; see also Meagan Nettles, \textit{The Sobering Failure of America’s “War on Drugs”: Free the P.O.W.s}, 55 Cal. W.L. Rev. 275, 294 n.125 (2018) (discussing a harsh sentence for marijuana); Hutchins, \textit{supra} note 93 (discussing the New Jersey debate over state expungement of marijuana-related crimes).


\textsuperscript{205} Hopwood, \textit{supra} note 47, at 797.


and selected a conservative nominee for Attorney General who was well known for his opposition to marijuana legalization and similar policy changes.\textsuperscript{208}

An unusual coalition of disparate interests, however, was able to sustain the momentum for criminal justice reforms.\textsuperscript{209} These key discrete constituencies in the unusual political coalition provided the political cover necessary to overcome the “law and order” resistance\textsuperscript{210} against the modest reforms in the bipartisan First Step Act.\textsuperscript{211} Trump’s eventual embrace of First Step helped overcome some Senate Republicans’ reservations of supporting it.\textsuperscript{212} Even so, First Step passed only in the

\textit{From ‘Tough on Crime’ To ‘Second Chance’ For Felons, NPR MORNING EDITION} (Dec. 17, 2018, 5:00 AM), http://www.npr.org/2018/12/17/67671335/how-trump-went-from-tough-on-crime-to-second-chance-for-felons [http://perma.cc/T8Z2-HRK5] (quoting President Trump as suggesting “at some point, we’ll get very smart as a nation and give them the ultimate punishment”).


\textsuperscript{210} Osita Nwanevu, \textit{The Improbable Success of a Criminal-Justice-Reform Bill Under Trump}, NEW YORKER (Dec. 17, 2018), http://www.newyorker.com/news/news-desk/the-improbable-success-of-a-criminal-justice-reform-bill-under-trump (“The significant buy-in from the right is the culmination of years of effort from a cadre of libertarian-leaning conservatives, like the anti-tax zealot Grover Norquist, and evangelicals, such as Chuck Colson, the founder of the Christian nonprofit organization Prison Fellowship, who have worked to convince others that the prison system has become too costly, punitive, and government-empowering.”). Arthur Rizer & Lars Trautman, \textit{The Conservative Case for Criminal Justice Reform}, THE GUARDIAN (Aug. 5, 2018, 6:00 PM), http://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform (arguing why “conservatives must go back to the principles of liberty and dignity that first defined their party,” and apply “these principles to criminal justice reform”). Key influential conservatives were moved by the massive costs for maintaining a vast prison system with seemingly little effect on crime rates, Spillane & Wolcott, \textit{supra} note 21, at 279 (noting “the high social costs of mass incarceration”), as well as an increasing policy presence—particularly by the federal government—that threatened individual liberties. See Criminal Justice Reform, CHARLES KOCH INST., http://www.charleskoch institute.org/issue-areas/criminal-justice-policing-reform/. But see Bill Keller, \textit{How Criminal Justice Reform Died}, VICE (Sept. 28, 2016), http://www.vice.com/en_us/article/yvewn7/how-criminal-justice-reform-died-bill-keller (arguing that the “spectacular mustering of bipartisan solidarity at a time of political polarization and paralysis . . . was not nearly as muscular as it seemed”).

\textsuperscript{211} For an overview of the First Step Act, see \textit{The First Step Act of 2018: An Overview}, Congressional Research Service (March 4, 2019).

\textsuperscript{212} Trump’s son-in-law, Jared Kushner, whose father had served time in federal prison, is often
“lame duck” session following the 2018 midterm elections, in part because the legislative debate over the bill was very divisive among the Republican majority and exposed different schisms within conservative philosophy.

First Step represents a series of compromises, again paralleling some of the compromises between the Nixon Administration and the Democratic Congress over the CSA. Marijuana reformers can point to First Step to demonstrate that, just as Congress was able to pass the CSA’s sentencing reforms, there is a majority in Congress willing to take a critical look at our criminalization policies. But marijuana reform advocates should also heed warnings from First Step’s difficult passage: despite Trump’s endorsement and a coalition including conservative interests, many conservative legislators opposed sentencing reform. More critically, First Step would not have passed had it made its sentencing reforms retroactive. For those who believe that marijuana reform must include equitable remedies for those individuals and communities who have borne the brunt of the CSA’s treatment of marijuana, this issue could be a difficult barrier.

IV. BEYOND AMENDING THE CSA: STATE DEBATES REVEAL OTHER KEY ISSUES

As discussed in the prior section, there are recent legislative accomplishments credited for pushing Trump to support First Step. Rascoe, supra note 207. Trump’s embrace of First Step has led subsequently to strange confrontations over credit for its passage. See Jacey Fortin, Trump Insults Chrissy Teigen and John Legend, and They Fire Back, N.Y. TIMES (Sept. 9, 2019), http://www.nytimes.com/2019/09/09/us/chrissy-teigen-trump-twitter.html.


See supra Part I-A.

Courtwright, supra note 3, at 12.

Hopwood, supra note 47, at 795 (describing First Step’s passage as “almost miraculous[]”).

See supra notes 211–214.

Hopwood, supra note 47, at 811.
that suggest that Congress may be ready to revisit the CSA and its fifty-year treatment of marijuana as a Schedule I drug. While some advocates may hope that a future administration could reschedule marijuana, it is not an easy solution, nor would such a regulatory move address all the complex issues surrounding a change in marijuana’s status under federal law. The following section builds on a legislative approach by identifying several—but not exhaustive—items that could be included in a reform effort. As brought to light in part by state efforts, there are underlying questions of equity, state differences, and ways to prevent future policy conflicts that lawmakers ought to consider. Supposing that some federal reform—even incremental reform—could amend the CSA, it is worth asking what sorts of reform that proponents—advocates, providers, and states with regulatory programs—should ask for beyond rescheduling marijuana.

A. Creating Equity by Recognizing Communities Hurt by the CSA

The prior two sections raised some fundamental questions about the legacy of the CSA and our country’s approach to the opioid epidemic and entrenched resistance to reforming marijuana policy. The same issues continue to repeat themselves: there is a segment of society that is uncomfortable with the criminalization of drug use and addiction, just as there is a segment of society that associates drug use with criminal elements and deviant behavior. Moreover, there is a long history of attributing those criminal elements to the poor, minorities, and the youth, and this history parallels the move to amend the CSA towards a law enforcement approach rather than a public health approach.

In this light, CARA and SUPPORT seem like an aberration, not a change in course, because the policy response is due to the public face of those who were initially affected by the opioid epidemic: an older, whiter, and male demographic. Additionally, many of these individuals became addicted not by choice but because of failures in our healthcare system. Adding to this sympathy, some conservative commentators wrote:

America’s nationwide opioid epidemic has not been accompanied by a nationwide crime wave (excepting of course the apparent explosion of illicit heroin use). Just the opposite: As best can be told, national

\[\text{\textsuperscript{220}}\] Spillane, supra note 14, at 23 (“[T]wo general and competing models emerge—the ‘deviance’ and ‘victimization’ models of drug abuse.”).

\[\text{\textsuperscript{221}}\] Neill, supra note 47, at 377 (“To the extent that drug offenders are perceived negatively, undeserving of assistance, and deserving of punishment, drug policies are likely to reflect and perpetuate these sentiments. Insofar as the population identified with drug use overlaps with other populations—racial minorities and the poor—who are already viewed as threatening to social order, then punitive policies can appear justified.”).

\[\text{\textsuperscript{222}}\] Rudd, supra note 190, at 1450 tbl.2.
victimization rates for violent crimes and property crimes have both reportedly dropped by about two-thirds over the past two decades.\textsuperscript{223}

Issues of equity will need to be addressed in order to see meaningful reform. The failure to deal with the consequences of fifty years of prosecutions aimed at minority communities caused high profile failures to pass legislation in New York and New Jersey.\textsuperscript{224} Equity means more than reversing prior convictions but also investing revenue raised from marijuana sales into the communities most damaged by the legacy of the CSA.\textsuperscript{225}

B. Building Evidence for Policy Changes

Another issue is that policy decisions around marijuana are often being made without strong scientific evidence because of how the CSA classifies marijuana as a Schedule I drug. States are looking at other states’ experiences with marijuana legalization to learn about best practices and unforeseen issues.\textsuperscript{226} But while the economics of legalization are becoming better understood, the CSA restricts medical research, limiting the ability of consumers, patients, and providers to have adequate knowledge of newly available products. The National Academy of Medicine (NAM) noted in a literature review that

the growing acceptance, accessibility, and use of cannabis and its derivatives have raised important public health concerns. Moreover, the lack of any aggregated knowledge of cannabis-related health effects has led to uncertainty about what, if any, are the harms or benefits from its use . . . As laws and policies continue to change, research must also.\textsuperscript{227}


\textsuperscript{224} \textit{Supra} notes 93 and 95.

\textsuperscript{225} \textit{Supra} notes 125–127 and 194.


Efforts to expand medical research are slowly moving forward in response to the NAM concern. In 2016, the DEA called for applications from marijuana growers to become licensed medical researchers. Approval of these applications stalled under then-Attorney General Jeff Sessions, but Attorney General William Barr since has announced that the DEA has resumed reviewing the applications. Some hope that other parts of the federal government are taking actions that suggest they might be more receptive to marijuana research. Additionally, bipartisan legislation has been released that would reform the research process while maintaining marijuana’s current place on the CSA schedule.

Such research could be useful in validating prior studies, helping consumers, and making informed policy decisions—especially policymakers looking to amend marijuana policy as a means of addressing the opioid epidemic. For instance, in 2014, researchers found that:

231 Compare Hoffman, supra note 58 (“[T]he first time that the FDA has found the marijuana plant, in this case an extract, has an accepted medical use.”), with Jerome Adams, Marijuana Use & the Developing Brain, HHS (Aug. 29, 2019), http://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html [http://perma.cc/74LM-CNWN] (“Science-based messaging campaigns and targeted prevention programming are urgently needed to ensure that risks are clearly communicated and amplified by local, state, and national organizations.”).
[s]tates with medical cannabis laws had a 24.8% lower mean annual opioid overdose mortality rate . . . compared with states without medical cannabis laws. Examination of the association between medical cannabis laws and opioid analgesic overdose mortality in each year after implementation of the law showed that such laws were associated with a lower rate of overdose mortality that generally strengthened over time . . . 234

The study became widely used in justifying legalization not only domestically but even internationally.235 Others, though, argue that “marijuana is a companion drug rather than substitution drug and that marijuana use may be contributing to the opioid epidemic rather than improving it”—something that could be worrisome if ultimately correct.236 Thus, reflecting the 2017 NAM position, some researchers worried that:

For many reasons, ranging from significant barriers to research on cannabis and cannabinoids to impatience, cannabis policy has raced ahead of cannabis science in the United States. For science to guide policy, funding the aforementioned studies must be a priority at the federal and state level. Many companies and states (via taxes) are profiting from the cannabis industry while failing to support research at the level necessary to advance the science. This situation has to change to get definitive answers on the possible role for cannabis in the opioid crisis, as well as the other potential harms and benefits of legalizing cannabis.237

C. Anticipating Future State-Federal Conflicts

While it may be hard to imagine the regulatory and criminal fields as complicated between states and federal laws as they are today over marijuana as they might be over another substance in the future, perhaps we should think more broadly about federalism under the CSA. What if states had a larger say in the CSA


scheduling beyond just being another party that can petition the DEA to reschedule a drug?

Further, simply legalizing marijuana may not be in all states’ interests as they consider their domestic needs. First, most states have legalized marijuana for medicinal, not recreational, purposes. Having a federal policy was intended to provide uniformity to how the country treated interdiction broadly, but now there is a patchwork approach given the wide variation between states on whether to legalize marijuana use and for what purposes. Second, states intending to reap economic benefits from new growers and local consumption may be disappointed if their domestic markets are overrun by out-of-state competitors, particularly from states over-producing marijuana well beyond the needs of their own residents.

Commentators have suggested creating such an opt-out mechanism or waiver from the CSA to allow for “cooperative federalism” for marijuana. Such waivers would allow states to remain fully under the terms of the CSA whereas others could opt out of having the CSA criminalize activity within their borders. “Thus, businesses and individuals complying with state marijuana laws would be free not just from the threat of federal prosecution, but from the ancillary consequences of federal prohibition as well.” States’ ability to opt out of the CSA could be conditioned on adopting an advanced regulatory regime on controlled substances similar to the minimum requirements suggested by the Justice Department’s memorandum under the Obama Administration.

A similar model would be to allow states to enter into interstate compacts, which are binding agreements between states to treat an activity according to a uniform standard and abide by certain minimum criteria. States also have used compacts to lessen the federal government’s interest in establishing a national

238 Supra notes 16–34.
239 Supra Section II, Parts A-B.
240 Fertig, supra note 6, at 5 (noting that Oregon has passed a law that would trigger legal interstate trade if the CSA is amended while Colorado is seeking to erect more barriers to interstate trade to protect its domestic growers).
241 Kamin, supra note 6, at 644–646; Chemerinsky, supra note 101, at 120–22.
242 Kamin, supra note 6, at 645.
243 Id.
244 Supra note 208 (discussing Attorney General Sessions’s reversal of the prior administration’s policy on prosecuting marijuana cases).
baseline or preemption of a field. For instance, state licensing boards for health professionals introduced compacts that would allow health professionals to apply for reciprocity to practice in all states agreeing to the compact. These compacts become effective only when a minimum number of states agree to adopt them by enacting enabling legislation. In part, licensing boards adopted these policies to avoid federal legislation that would have preempted state licensing law in order to spur adoption of telehealth across state lines.

Similarly, if states moved in a similar direction on other drug policies in the future as they have done in regards to marijuana, one could see how they would want to not only waive out of federal criminalization of an activity within their borders but also to ensure such activities do not foreclose their citizens from federal benefits. But rather than return to the patchwork of regulation prior to the CSA, the federal government could authorize waivers only if certain criteria were met. Alternatively, the federal government could condition waiving the CSA only if a certain number of states agreed, like a compact. States could also use such agreements to limit the supply of out-of-state product and, in such a scenario, with congressional approval.

V. CONCLUSION

Looking forward to predict the next stage of the CSA, it’s important to remember that in this statute’s fifty-year-old treatment of marijuana, the first divergent state policy—California’s Proposition 215—did not occur until the midpoint of the CSA’s history. Much could change in this anniversary year if the election produces a very different administration and Congress. Yet even with


248 Winston, supra note 245, at 6 (noting that compacts may contain “conditions precedent to the compact entering into force, e.g., approval by a specified number of states’ legislatures.”).

249 Maresh, supra note 247, at 14–16 (noting that medical boards were facing increasing political pressure as advocates of telemedicine criticized them as being opponents of technological changes).


251 See supra note 73.

252 See Paul Demko et al., How Democrats are failing on legalized marijuana, POLITICO (May
political changes, it is possible that efforts to amend the CSA could be overshadowed by other events.\textsuperscript{253}

Could reform efforts take another 25 or more years before being successful at the federal level? The aforementioned recent efforts around drug policy—including thinking about addiction, criminal justice, and drug access—suggest that there is an emerging foundation for advocates to build from to amend the CSA successfully. But advocates should recognize from these efforts that even if change seems inevitable due to the speed of states’ policy changes, the immediate federal-policy horizon may look quite different and be resistant to change.

\textsuperscript{253} See supra notes 112 and 114 (discussing how even the current politically-liberal House has not taken up to reform federal marijuana policy beyond the SAFE Banking Act). Similar to how the Johnson administration was unable to reform drug policy laws due to other events, supra note 27, the administration and Congress that takes offices following the 2020 election, are likely to be dealing with other issues first. Compare Owram, supra note 114 (discussing how federal and some state legislation have stalled due to the COVID-19 pandemic while several states may continue to pursue marijuana legislation for revenue generation) with How COVID-19 Is Affecting Marijuana Legislation Efforts Across the US, MARIJUANA BUSINESS DAILY (Apr. 15, 2020), https://mjbizdaily.com/how-covid-19-is-affecting-marijuana-legalization-in-united-states/ (discussing how efforts in states have been delayed by the 2020 COVID-19 pandemic).