

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

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“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 Nixon¹

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),² 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.³

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.⁴ But despite its apparent popularity with voters,⁵ Congress

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¹ Interview with Egil “Bud” Krogh, Jr., *Frontline*, PBS SoCAL (2000), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/interviews/krogh.html> [<http://perma.cc/D4HH-XVCM>] (interviewing Krogh, the White House Deputy for Domestic Affairs under President Nixon, and his account of Nixon’s view on addiction).

² Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91—513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.) (2012 & Supp. V 2017).

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.⁶ 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.⁷

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.⁸ 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.

(Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [<https://perma.cc/F8N4-FAHD>].

⁶ Natalie Fertig, *Cannabis: The Essential Guide*, POLITICO PRO 10–11, 15, 17–20 (<https://www.politicopro.com/Cannabis/Cannabis-Essential-Guide-FULL-REPORT.pdf>) [<https://perma.cc/WLJ8-8YYV>].; Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How?*, 50 U.C. DAVIS L. REV. 617, 619–20 (2016).

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).

⁸ See Lee Rainie et al., *Trust and Distrust in America*, PEW RES. CTR. 1, 3 (2019), <http://www.people-press.org/2019/07/22/trust-and-distrust-in-america/> [<http://perma.cc/6XTZ-MSMJ>] (“Majorities believe the public's confidence in the U.S. government and in each other is shrinking, and most believe a shortage of trust in government and in other citizens makes it harder to solve some of the nation's key problems.”).

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

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.

¹⁷ Harrison Narcotics Tax Act, Pub. L. No. 63-223, 38 Stat. 785 (1914).

regulate narcotics (defined as opioids and cocaine) and thus established the Treasury Department as an early regulator of these substances.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.¹⁹

The Treasury Department largely resisted adding additional non-narcotics to its responsibilities under its Federal Bureau of Narcotics.²⁰ But the bureau's influential director Harry Anslinger supported criminalizing marijuana, urging action at both the state and federal level.²¹ Consequently, Congress passed the Marijuana Tax Act in 1937, adding the only non-narcotic drug under the jurisdiction of the Treasury Department.²² The Boggs Act²³ 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.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.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."²⁶

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

¹⁸ Spillane, *supra* note 14, at 18.

¹⁹ See Kathleen Ferraiolo, *From Killer Weed to Popular Medicine: The Evolution of American Drug Control Policy, 1937–2000*, 19 J. POL'Y HIST. 147, 150 (2007); see also Courtwright, *supra* note 3, at 10.

²⁰ Spillane, *supra* note 14, at 19.

²¹ Joseph F. Spillane & David B. Wolcott, *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.

²² *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, *Up in Smoke: Removing Marijuana from Schedule I*, 27 B.U. PUB. INT. L.J. 167, 173 (2018).

²³ P.L. 82-255 (1951).

²⁴ SPILLANE & WOLCOTT, *supra* note 21, at 234.

²⁵ Courtwright, *supra* note 3, at 10.

²⁶ Spillane, *supra* note 14, at 21.

²⁷ JOHN HUDAK, *Marijuana: A Short History*, 45–48., (The Brookings Institution, 1st ed. 2016).

view on drug policy²⁸ developed the initial proposals that ultimately became the CSA.²⁹ The Nixon administration believed drug abuse to be a priority issue because “the problem was getting out of hand.”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.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.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.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.”³⁴

Recognizing the need to compromise with the more liberal “establishment”³⁵ in Congress, President Nixon proposed a compromise between interdiction and public health approaches to drug control.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.”³⁷ Ultimately, Nixon’s proposal became the 1970 Comprehensive Drug Abuse Prevention and

²⁸ *Id.* at 49.

²⁹ Spillane, *supra* note 14, at 21.

³⁰ Courtwright, *supra* note 3, at 11.

³¹ *Id.*

³² *Id.* at 10.

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).

³⁴ Courtwright, *supra* note 3, at 12.

³⁵ *Id.* at 11.

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.”

³⁷ Courtwright, *supra* note 3, at 12.

Control Act,³⁸ which included the CSA as part of the effort to unify federal approaches to drug control.³⁹

Although the CSA had initially been passed with “something in it for everybody,”⁴⁰ it increasingly became pulled toward criminalization and away from public health.⁴¹ In the 1970s, middle-class parents became increasingly fearful of the seemingly growing acceptance of marijuana use among young people.⁴² These fears, however, accompanied prejudices as illicit drug use was associated with “minority subcultures—musicians, artists, urban African Americans, Hispanic laborers.”⁴³ Thus, the public feared not just that “white middle-class youth” were using illicit drugs⁴⁴ but that they were associating with “deviant” elements of society.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.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.⁴⁷

³⁸ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91–513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.) (2012 & Supp. V 2017).

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.”

⁴⁰ *Id.* at 13.

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

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.”

⁴³ SPILLANE & WOLCOTT, *supra* note 21, at 260.

⁴⁴ *Id.*

⁴⁵ Ferraiolo, *supra* note 19, at 156 and 161; *see also* Spillane & Wolcott, *supra* note 21, at 260.

⁴⁶ Courtwright, *supra* note 3, at 13.

⁴⁷ *Id.*; Katharine A. Neill, *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, *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.⁴⁸ When it passed the CSA, Congress expressly included certain substances within each schedule,⁴⁹ and it also empowered the Attorney General to reclassify a controlled substance to a lower schedule or completely remove the substance in question.⁵⁰ To be classified under Schedule I, the Drug Enforcement Administration (DEA) must find that the drug has a high potential for abuse,⁵¹ has no currently accepted medical use in treatment in the United States,⁵² and lacks “an accepted safety for use” under medical supervision.⁵³ Conversely, drugs under Schedules II through V have a “currently accepted medical use in treatment in the United States.”⁵⁴ As a political compromise,⁵⁵ 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.”⁵⁶

When Congress passed the CSA, it placed marijuana under Schedule I.⁵⁷ 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.*

⁴⁹ 21 U.S.C. § 812(c).

⁵⁰ 21 U.S.C.A. § 811(a) (2012 & Supp. V 2017).

⁵¹ 21 U.S.C. § 812(b)(1)(A) (2018); see also MARGARET BATTIN ET AL., *DRUGS AND JUSTICE* 56–59 (2008) (discussing the DEA’s authority if a new drug has “abuse potential”).

⁵² 21 U.S.C. § 812(b)(1)(B) (2018).

⁵³ 21 U.S.C. § 812(b)(1)(C) (2018).

⁵⁴ 21 U.S.C. § 812(b)(2)(B) (2018); 21 U.S.C. § 812(b)(3)(B) (2018); 21 U.S.C. § 812(b)(4)(B) (2018); 21 U.S.C. § 812(b)(5)(B) (2018).

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.⁵⁸ 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.”⁵⁹ Several petitioners have attempted to sue the DEA, but the courts have upheld the DEA’s denials.⁶⁰

Many of these challenges have rested on whether the DEA can appropriately claim that marijuana has no medical value.⁶¹ 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.⁶² 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).

⁵⁸ Diane Hoffmann et al., *Will The FDA’s Approval Of Epidiolex Lead to Rescheduling Marijuana?*, HEALTH AFFAIRS: HEALTH AFFAIRS BLOG, July 12, 2018, <http://www.healthaffairs.org/doi/10.1377/hblog20180709.904289/full/> [<http://perma.cc/94UU-ZWF6>] (“The first petition (1972) took 22 years before a decision was issued; the second (1995) took six years; and a 2002 petition was not decided until 2011. The most recent petitions (2009 and 2011) were decided in 2016.”). For more on the failed petitions, see Rebecca Eisenberg & Deborah Leiderman, *Cannabis for Medical Use: FDA and DEA Regulation in the Hall of Mirrors*, 74 FOOD & DRUG L.J. 246, 256–61 (2019). In 2015, Congress set a deadline for DEA to act on scheduling recommendations for new drugs amendments to the CSA. 21 U.S.C. § 823(i)(2) (2018).

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

⁶⁰ *Ams. for Safe Access v. Drug Enf’t Admin.*, 706 F.3d 438, 439–41 (D.C. Cir. 2013); *All. for Cannabis Therapeutics v. Drug Enf’t Admin.*, 15 F.3d 1131, 1131–33 (D.C. Cir. 1994).

⁶¹ DRUG POLICY ALLIANCE, REMOVING MARIJUANA FROM THE SCHEDULE OF CONTROLLED SUBSTANCES 2 (2019), https://www.drugpolicy.org/sites/default/files/marijuana-scheduling_january_2019_0.pdf; Eisenberg & Leiderman, *supra* note xxx at 261 n.100–01.

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.⁶³ But the FDA has not approved marijuana itself “in plant form,” which the DEA relied upon in one of its denials.⁶⁴

Classifying a drug under Schedule I greatly restricts potential research that could demonstrate whether a controlled substance actually has medical use.⁶⁵ Although the CSA expanded medical research and addiction treatment at HHS,⁶⁶ 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.⁶⁷

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.⁶⁸ For example, when the CSA became law, the Nixon administration urged the states to adopt a Uniform Controlled Substances Act.⁶⁹ 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.⁷⁰ The first success was in California: after several legislative failures, advocates petitioned

⁶³ Hoffmann notes that at the time of its 2016 decisions, the FDA had approved three cannabinoid-containing drug products. Hoffman, *supra* note 58 (referring to Press Release, *DEA Announces Actions Related To Marijuana And Industrial Hemp*, Drug Enforcement Administration (Aug. 11, 2016), <https://www.dea.gov/press-releases/2016/08/11/dea-announces-actions-related-marijuana-and-industrial-hemp>).

⁶⁴ *Id.* (arguing that in its 2016 decision, the DEA’s assertion that “there were no marijuana products approved by the FDA nor under review at the FDA for any indication . . . suggests the DEA is referring to marijuana in plant form”); see also Eisenberg & Leiderman, *supra* note 61, at 261 (pointing out that the FDA “noted the absence of an approved NDA for cannabis (broadly defined) in recommending to DEA that it maintain cannabis in Schedule I”).

⁶⁵ Grace Wallack & John Hudak, *Marijuana Rescheduling: A Partial Prescription for Policy Change*, 14 OHIO ST. J. CRIM. L. 207, 208–12 (2016).

⁶⁶ Courtwright, *supra* note 3, at 11.

⁶⁷ See Spillane, *supra* note 14, at 22–23.

⁶⁸ SPILLANE & WOLCOTT, *supra* note 21, at 234–35.

⁶⁹ See *id.* (“Today, every U.S. state has passed this legislation [the Uniform Controlled Substances Act], ensuring that the federal government sets the terms of drug control.”).

⁷⁰ Ferraiolo, *supra* note 19, at 163.

for a popular referendum to legalize marijuana for medical purposes.⁷¹ Advocates focused on the widespread belief that marijuana could provide relief for those with illnesses such as AIDS and cancer.⁷² The passage—by a 55% to 44% margin—of Proposition 215 in 1996 marked the first time that a state legalized medical marijuana.⁷³ Subsequently, a majority of the states and the District of Columbia have legalized medical marijuana.⁷⁴

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 Colorado⁷⁵ and Washington⁷⁶ passed ballot initiatives, making the two states the first to legalize marijuana for adult-use purposes. Subsequently, Alaska,⁷⁷ California,⁷⁸ Illinois,⁷⁹

⁷¹ *Id.* at 163–65.

⁷² *Id.* at 167–68.

⁷³ Proposition 215, printed in Cal. Sec’y State, *California Ballot Pamphlet: General Election November 5, 1996*, at 58 (1996).

⁷⁴ *State Medical Marijuana Laws*, NCSL (Sept. 27, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<http://perma.cc/9CBM-CEPH>]. By the time this article sees print, the number of states will likely grow. Mona Zhang, *Marijuana legalization may hit 40 states. Now what?*, POLITICO (Jan. 1, 2020), <https://www.politico.com/news/2020/01/20/marijuana-legalization-federal-laws-100688>.

⁷⁵ COLO. CONST. amend. 64. A prior amendment, that would have decriminalized marijuana in 2006, had failed. *Colorado Votes In Favor Of Pot Legalization*, CBS DENVER (Nov. 6, 2012, 11:56 PM), <http://denver.cbslocal.com/2012/11/06/no-on-64-concedes-colorado-votes-in-favor-of-pot-legalization/> [<http://perma.cc/C3LH-FWN3>].

⁷⁶ Initiative Measure 502 (Wash. 2012).

⁷⁷ *A Summary of Measure 2, An Act to Tax and Regulate the Production, Sale, and Use of Marijuana*, MARIJUANA POL’Y PROJECT, <http://www.mpp.org/states/alaska/a-summary-of-measure-2-an-act-to-tax-and-regulate-the-production-sale-and-use-of-marijuana/> [<http://perma.cc/RJ7W-RDUP>] (discussing successful 2014 ballot measure).

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.

Maine,⁸⁰ Massachusetts,⁸¹ Michigan,⁸² Nevada,⁸³ Oregon,⁸⁴ and Vermont⁸⁵ adopted adult-use policies, often with the expectation of raising state revenues while hoping to reduce enforcement efforts.⁸⁶

In addition to the divergence between medical and recreational use of marijuana, the approach used in each state toward legalization—particularly for recreational use—has varied as well.⁸⁷ Although the issue seems popular with voters,⁸⁸ legalization for recreational use occurred in most states through ballot initiatives, not through the legislative process.⁸⁹ This difference is even starker in

⁸⁰ *Adult-use marijuana rules, finalized; sales on the horizon*, MARIJUANA POL'Y PROJECT (Aug. 27, 2019), <http://www.mpp.org/states/maine/> [<http://perma.cc/3W5U-S7HE>] (discussing successful 2016 ballot measure and the delays in implementation).

⁸¹ *As retail stores open across the state, regulators consider delivery, social consumption rules*, MARIJUANA POL'Y PROJECT (Aug. 12, 2019), <http://www.mpp.org/states/massachusetts/> [<http://perma.cc/69SH-HNA6>] (discussing successful 2012 ballot measure).

⁸² *Adult-use stores continue to open; expungement bill awaits Senate action*, MARIJUANA POL'Y PROJECT (July 22, 2019), <http://www.mpp.org/states/michigan/> [<http://perma.cc/NFE-QCBF>] (discussing successful 2018 ballot measure).

⁸³ *States increasingly looking to Nevada as a model*, MARIJUANA POL'Y PROJECT (Nov. 5, 2018), <http://www.mpp.org/states/nevada/> [<http://perma.cc/VY55-38YQ>] (discussing successful 2016 ballot measure).

⁸⁴ *The Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act: A Summary of Measure 91*, MARIJUANA POL'Y PROJECT (last visited Oct. 9, 2019), <http://www.mpp.org/states/oregon/summary-of-oregons-measure-91/> [<http://perma.cc/R9FH-2AMD>] (discussing successful 2014 ballot measure).

⁸⁵ Vermont became the first state to decriminalize, by legislation, the adult-use of marijuana by decriminalizing possession and limited cultivation of cannabis by adults twenty-one and older. *Vermonters enjoy legal home-grown cannabis; bill to regulate retail sales passes Senate—House to take up bill in early 2020*, MARIJUANA POL'Y PROJECT (May 28, 2019), <http://www.mpp.org/states/vermont/> [<http://perma.cc/4MUY-9YSW>]. However, this state law did not set up a regulatory system for sales or production. Wilson Ring, *Vermont, New Hampshire Both Could Delay Marijuana Proposals*, CBS BOSTON (May 18, 2019, 2:35 PM), <http://boston.cbslocal.com/2019/05/18/vermont-new-hampshire-could-delay-recreational-marijuana-proposals/> [<http://perma.cc/9J78-GSB2>].

⁸⁶ Patrick O'Brien, *Medical Marijuana and Social Control: Escaping Criminalization and Embracing Medicalization*, 34 *DEVIANT 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).

⁸⁷ 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.").

⁸⁸ Hartig & Geiger, *supra* note 5.

⁸⁹ 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), http://ballotpedia.org/2018_North_Dakota_Measure_3, BALLOTPEDIA,

efforts around recreational marijuana. Of the states that have legalized recreational use, only Illinois⁹⁰ and Vermont⁹¹ have done so via the legislative process, with high-profile legislative failures in the politically liberal states of Connecticut,⁹² New Jersey,⁹³ New Mexico,⁹⁴ and New York.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.⁹⁶

B. Policy Conflicts in a Federalist System

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

[http://ballotpedia.org/North_Dakota_Measure_3, Marijuana_Legalization_and_Automatic_Expungement_Initiative_\(2018\)](http://ballotpedia.org/North_Dakota_Measure_3_Marijuana_Legalization_and_Automatic_Expungement_Initiative_(2018)) [<http://perma.cc/DY6Q-YXX2>].

⁹⁰ 410 ILL. COMP. STAT. ANN. 705 (West 2019).

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).

⁹² Ryan Holz, *Connecticut Joins Other Northeast States in Failing to Pass Recreational Marijuana Legislation in 2019*, JD SUPRA (June 14, 2019), <http://www.jdsupra.com/legalnews/connecticut-joins-other-northeast-97789/> [<http://perma.cc/QDY8-PTMD>].

⁹³ Ryan Hutchins et al., *Legal pot bill dead: New Jersey lawmakers to move ahead with 2020 referendum*, POLITICO (May 15, 2019, 11:57 AM), <http://www.politico.com/states/new-jersey/story/2019/05/15/marijuana-bill-dead-new-jersey-lawmakers-to-move-forward-with-referendum-1017330> [<http://perma.cc/5FCC-CLZ4>].

⁹⁴ N.M. Mut., *Recreational marijuana use in New Mexico could pass in 2020. Will your business be ready?*, ALBUQUERQUE BUS. FIRST (June 1, 2019), <http://www.bizjournals.com/albuquerque/news/2019/06/01/recreational-marijuana-use-in-new-mexico-could.html> [<http://perma.cc/Z675-NSWT>].

⁹⁵ Joseph Spector & Jon Campbell, *Why legalizing marijuana in New York failed, but decriminalizing it passed*, DEMOCRAT & CHRON. (June 21, 2019, 8:20 AM), <http://www.democratandchronicle.com/story/news/politics/albany/2019/06/21/why-legalizing-pot-new-york-failed-but-decriminalizing-passed/1521505001/> [<http://perma.cc/5Z6T-TUGE>].

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

⁹⁷ Michael Cole, Note, *Functional Preemption: An Explanation of How State Medicinal Marijuana Laws can Coexist with the Controlled Substances Act*, 16 MICH. ST. U. J. MED. & L. 557, 575 (2012) ("It can be confusing for the layperson to understand this lawyerly distinction between state and federal criminal laws and preemption.").

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.")

⁹⁹ *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008).

¹⁰⁰ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); Cole, *supra* note 97, at 562.

¹⁰¹ Erwin Chemerinsky et al, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 90–91 (2015).

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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰ Several high-profile members of the 116th Congress have introduced legislation on marijuana legalization,¹¹¹ but there has been little movement on these proposals in either the Democratic-controlled House or Republican-controlled Senate.¹¹²

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.”).

¹¹² See, e.g., Caitlyn Kim, *After Years of Stalemate, Federal Cannabis Legislation Finds Traction in Congress*, CPR (July 22, 2019), <http://www.cpr.org/2019/07/22/after-years-of-stalemate-federal-cannabis-legislation-finds-traction-in-congress/> [<http://perma.cc/EY8C-CPW5>]. The Marijuana Policy Project lists a dozen bills—with several having bipartisan support—in the current 116th Congress. See MARIJUANA POLICY PROJECT, *Several marijuana-related bills filed in new Congress*, (Sept. 25, 2019), <http://www.mpp.org/policy/federal/> [<http://perma.cc/5PR4-DUXJ>].

the 2016 Farm Bill, Congress amended the CSA to exclude “hemp” from the statutory definition of marijuana.¹¹³ 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.¹¹⁴

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,

¹¹³ Agriculture Improvement Act, Pub.L. 115-334, § 12619 (2018). For additional political context, see John Hudak, *The Farm Bill, hemp legalization and the status of CBD: An explainer*, BROOKINGS FIXGOV (Dec. 14, 2018), www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer.

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>].

Prospects for SAFE being passed into law seem unlikely. Kyle Jaeger, *Mitch McConnell And Other GOP Lawmakers Slam Marijuana Banking Provisions In Coronavirus Bill*, MARIJUANA MOMENT (May 14, 2020), <https://www.marijuanamoment.net/mitch-mcconnell-and-other-gop-lawmakers-slam-marijuana-banking-provisions-in-coronavirus-bill/> (discussing the Senate majority’s opposition to the House provision); Natalie Fertig, *Coronavirus spells doom for federal cannabis legislation*, POLITICO (May 12, 2020), <https://www.politico.com/news/2020/05/12/coronavirus-cannabis-legislation-252313> (noting little activity on many legislation related to cannabis, including the banking bill). Further, some advocates have raised concerns about addressing the financial issues of the marijuana industry without also addressing some of the systemic issues caused by the federal criminalization of marijuana. See Natalie Fertig et al., *Advocates ask Pelosi, Hoyer to press pause on cannabis banking*, POLITICO (Sept. 18, 2019, 5:47 AM), <http://www.politico.com/newsletters/morning-cannabis-preview/2019/09/18/advocates-ask-pelosi-hoyer-to-press-pause-on-cannabis-banking-478449> [<http://perma.cc/4JTP-FFH9>]; see also Letter from American Civil Liberties Union et al., to Nancy Pelosi, Speaker, U.S. H.R., and Steny Hoyer, Majority Leader, U.S. H.R. (Sept. 17, 2019), <http://www.politico.com/f/?id=0000016d-41d0-db25-a77d-5fd3acdc0000>. In 2020, the COVID-19 pandemic overwhelmed other advocacy issues, delaying debates over marijuana legalization. Kristine Owrain, *Reconsidering Pot’s ‘Teaspoon’ of Tax Revenue: Cannabis Weekly*, BLOOMBERG GOVERNMENT (Apr. 27, 2020) (noting that market analysts predict “there’s less than 25% odds that any [federal] cannabis legislation will be enacted into law this year”).

such as a patient growing a small amount of marijuana for personal consumption.¹¹⁵ To clarify its policy on marijuana prosecutions,¹¹⁶ the Obama administration issued guidance in 2013 to federal prosecutors to avoid prosecuting marijuana cases in states with a robust regulatory system for marijuana.¹¹⁷ 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 2014.¹¹⁸ So far, Congress has continued to include the same prohibition in the appropriations bill that funds the Justice Department.¹¹⁹

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.¹²⁰ 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.¹²¹ 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).

¹¹⁷ Memorandum from James M. Cole, Deputy Att'y Gen. to U.S. Att'ys (Aug. 29, 2013). Attorney General Jeff Sessions subsequently reversed this guidance. *Infra* note 208.

¹¹⁸ Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113–235 (2015). (passing the amendment by a 219–189 vote on May 30, 2014, the House subsequently included it in Section 538 of Division B).

¹¹⁹ Cong. Research Serv., R44782, *The Marijuana Policy Gap and the Path Forward* 15 (2017). At the time of drafting this article, Congress had not yet passed appropriations bills for the next federal fiscal year. See Sarah Ferris and Heather Caygle, *Pandemic jumbles House agenda*, Politico (May 25, 2020), <https://www.politico.com/news/2020/05/25/coronavirus-house-agenda-273819> (noting that Congress had yet to act on “annual chores like crafting spending legislation” due to the COVID-19 pandemic and other issues).

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.¹²²

Given recent polling,¹²³ observers 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.¹²⁴

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.¹²⁵ Even more 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

note 7, at 850–51 (noting that states may pass “even ineffectual laws and regulations” in order to spur federal action).

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).

¹²² 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.marijuanamoment.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>.

¹²³ Hartig, & Geiger, *supra* note 5.

¹²⁴ See, e.g., Tom Angell, *Marijuana Won The Midterm Elections*, FORBES (Nov. 7, 2018, 11:10 AM), <http://www.forbes.com/sites/tomangell/2018/11/07/marijuana-won-the-midterm-elections/#453589c93a91> [<http://perma.cc/8W7F-BQFD>] (“[O]ne clear winner in the midterm elections was marijuana.”). *But see supra* note 89 (noting the failure of a referendum in North Dakota).

¹²⁵ Ferraiolo, *supra* note 19, at 171 (“Policy change in the states has not led to federal reform. Rather, two factors—the ballot initiative (which provided a means for public opinion to be heard and invoked) and policy entrepreneurs’ framing efforts (which emphasized a medical, compassionate image of marijuana and its users)—have allowed the coexistence of two different policy images and approaches.”).

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.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.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.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.¹²⁹ Further, white Evangelicals and Catholics were more likely to oppose legalization while “mainline” Protestants and unaffiliated individuals were more likely to support it.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%).¹³¹ Thus, Republican lawmakers may be less inclined to support marijuana legalization if their base supporters oppose such policies.¹³²

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).

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.”).

¹²⁸ *See, e.g.*, Warmbrodt, *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”).

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%).”).

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)).

¹³¹ SIENA COLL. RES. INST., *Voters on End of Session Agenda: ‘Yes’ on Marijuana (55–40%)*, (June 10, 2019), <http://scri.siena.edu/2019/06/10/voters-on-end-of-session-agenda-yes-on-marijuana-55-40/> [<http://perma.cc/8UFY-93BJ>].

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 legislation¹³⁴ 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 Act¹³⁶ (CARA) in 2016, and then the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act¹³⁷ 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

the House and Senate than Republicans,” and such Republican supporters tend to “have a history of being pro-states rights or come from states with medical or recreational cannabis”).

¹³³ *Id.* at 12.

¹³⁴ Right to Try Act, P.L. 115-176 (2018).

¹³⁵ Kim, *supra* note 13, at 102–06.

¹³⁶ Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114–198, 130 Stat. 695 (2016).

¹³⁷ Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L. No. 115–721, 132 Stat. 3894 (2016).

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.

state level.¹³⁹ “While Congress and the public have demanded greater regulatory authority during times of crises, 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.”¹⁴⁰ 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.¹⁴¹

Beginning with Colorado in 2014, a majority of states enacted right-to-try laws, which follow model legislation drafted by the libertarian Goldwater Institute.¹⁴² 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.”¹⁴³

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.¹⁴⁴ 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

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 “[a]dvanced 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.¹⁴⁵ Given these high hurdles, it is not clear if any patient actually has been aided by a state right-to-try law.¹⁴⁶

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.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹

But the overwhelming response in the states set the stage for a federal law to address any legal ambiguity.¹⁵⁰ 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 2017.¹⁵¹ Although the federal Right to Try law explicitly retained the compassionate-

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,¹⁵² 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.¹⁵³ Similarly, states' treatment of marijuana—particularly for medicinal purposes—parallels states' treatment of experimental drugs.¹⁵⁴ 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.¹⁵⁵

Marijuana legalization also shares another parallel with the right to try: both marijuana and experimental drugs lack a strong medical and scientific evidence base.¹⁵⁶ While the weight of scholarly research favors legalizing marijuana,¹⁵⁷ the actual medical research is not entirely conclusive, in large part because federal law makes such research extremely difficult to conduct.¹⁵⁸ 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.

sponsor, Senator Ron Johnson of Wisconsin, has had a long-standing interest in the right to try. *See Connecting Patients to New and Potential Life Saving Treatments: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2016), <http://www.hsgac.senate.gov/hearings/connecting-patients-to-new-and-potential-life-saving-treatments> (hosting a hearing on access to experimental drugs). Johnson used a procedural mechanism to hold up a reauthorization of the FDA's user fee program in order to pass his bill through the Senate. Sarah Karlin-Smith & Seung Min Kim, *Senate Approves 'Right-to-Try' Drug Bill*, POLITICO (Aug. 3, 2017), <http://www.politico.com/story/2017/08/03/senate-right-to-try-drug-bill-241293>.

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”).

¹⁵⁷ ROBERT HARDAWAY, MARIJUANA POLITICS: UNCOVERING THE TROUBLESOME HISTORY AND SOCIAL COSTS OF CRIMINALIZATION 3 (2018) (noting in researching his book, one scholar found “10 times more scholarly articles advocating marijuana legalization . . . than articles opposing them”).

¹⁵⁸ NAT'L ACAD. OF SCIENCES, ENGINEERING, AND MEDICINE, THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH 25–26 (2017). <https://www.nap.edu/read/24625/chapter/3>.

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.¹⁵⁹ 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.”¹⁶⁰ 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.¹⁶¹ At the same time, the death rate due to overdoses tripled to 19.8

¹⁵⁹ Rachel Roubein, *Patient Groups Criticize ‘Right to Try’ Bill on Experimental Drugs*, THE HILL (Mar. 13, 2018, 12:05 PM), <https://thehill.com/policy/healthcare/378127-patient-groups-criticize-right-to-try-bill-on-experimental-drugs> (noting that more than 75 patient organizations wrote congressional leadership opposing right-to-try legislation); Andy Taylor & Alison Bateman-House, *Right to Try Misses the Real Issue. There is Another Solution*, THE HILL (Dec. 12, 2016), 4:50 PM, <https://thehill.com/blogs/congress-blog/healthcare/311259-right-to-try-misses-the-real-issue-there-is-another-solution> (discussing opposition in the patient and research community for ethical and scientific reasons).

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.¹⁶² Deaths due to opioid overdoses exceed automobile accidents in the United States.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.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,¹⁶⁵ leading to an increase in illicit opioid use and to diseases such as hepatitis C and HIV.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.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.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

http://www.cfr.org/backgrounder/us-opioid-epidemic?gclid=Cj0KCQjwjrvpBRC0ARIsAFrFuV9q18QVmo9U03Pa7jQAz6HUTRZwbFDNRotsevt-y1MMpnTzTGwY6toaAuF_EALw_wcB [<http://perma.cc/D4MH-FSMJ>] (last updated Sept. 17, 2019).

¹⁶² Holly Hedegaard et al., *Drug Overdose Deaths in the United States, 1999–2016*, 294 NAT'L CTR. FOR HEALTH STAT. 5 (2017), <http://www.cdc.gov/nchs/data/databriefs/db294.pdf> [<http://perma.cc/6JQU-XC7J>].

¹⁶³ Ken Kolosh, *Accidental Injury Becomes #3 Cause of Death in the U.S.*, NAT'L SAFETY COUNCIL (Jan. 22, 2018), <http://www.nsc.org/safety-first-blog/accidental-injury-becomes-3-cause-of-death-in-the-us-1> [<http://perma.cc/4VVS-QM7F>].

¹⁶⁴ Felter, *supra* note 161.

¹⁶⁵ *Opioid Overdose Crisis*, NATIONAL INSTITUTE ON DRUG ABUSE, (May 27, 2020),

¹⁶⁶ Felter, *supra* note 161.

¹⁶⁷ *Sensenbrenner, Scott, Marino, Bass, Joyce, Ryan Introduce Comprehensive Legislation to Combat Drug Addiction*, CONGRESSMAN BOBBY SCOTT (Dec. 10, 2014), <http://sensenbrenner.house.gov/2014/12/sensenbrenner-scott-marino-bass-joyce-ryan-introduce-comprehensive-legislation-to-combat-drug-addiction> (noting that the bill had been endorsed by 93 national organizations).

¹⁶⁸ Jeremiah Gardner & Robert Ashford, *CARA History & Breakdown*, HAZELDEN BETTY FORD FOUND. (July 11, 2016), <http://www.hazeldenbettyford.org/articles/gardner/cara-history-and-breakdown> [<http://perma.cc/Z53T-9SUS>].

reform, and overdose reversal.”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,¹⁷⁰ CARA also increased access points for community-based treatment,¹⁷¹ training for first responders,¹⁷² grants targeted at addiction treatment for pregnant and postpartum women,¹⁷³ and the types of health professionals who could prescribe medications to treat opioid misuse disorders.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,¹⁷⁵—and for states to establish prescription drug monitoring programs.¹⁷⁶ Third, CARA reformed processes at the Department of Veterans Affairs (VA) to address how the VA health system treats pain and prescribes opioids.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.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.¹⁷⁹

¹⁶⁹ *The Comprehensive Addiction and Recovery Act (CARA)*, CMTY. ANTI-DRUG COALS. OF AM., <http://www.cadca.org/comprehensive-addiction-and-recovery-act-cara> (last visited Oct. 3, 2020).

¹⁷⁰ *Id.* at §§ 103, 601.

¹⁷¹ *Id.* at §§ 107, 110.

¹⁷² *Id.* at § 202.

¹⁷³ *Id.* at §§ 501, 503.

¹⁷⁴ *Id.* at § 303.

¹⁷⁵ *Id.* at § 201.

¹⁷⁶ *Id.* at § 109.

¹⁷⁷ *Id.* at Title IX.

¹⁷⁸ See Devin Miller, *Opioids Bill Becomes Law; AAP Advances Key Priorities*, AAP NEWS (Nov. 20, 2018), <http://www.aapublications.org/news/2018/11/20/washington112018> [<http://perma.cc/NL9S-J2G9>].

¹⁷⁹ See Chris Riotta, *GOP Aims to Kill Obamacare Yet Again After Failing 70 Times*, NEWSWEEK: U.S. (July 29, 2017, 6:53 PM), <http://www.newsweek.com/gop-health-care-bill-repeal-and-replace-70-failed-attempts-643832> [<http://perma.cc/V43T-BL4C>] (noting that Trump called on Senate Republicans via Twitter to continue to push forward on repeal efforts).

SUPPORT faced some of the same criticisms related to sustainable funding as CARA did.¹⁸⁰ But whereas CARA seemed to have some logical themes in its legislative structure,¹⁸¹ some criticized SUPPORT as “scattershot compared with what is needed.”¹⁸² Some legislators expressed concern that the process for developing SUPPORT was “rushed,”¹⁸³ as the House considered many different proposals that were ultimately packaged into a single bill.¹⁸⁴ 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.¹⁸⁵ But by the 2018 midterm elections, sponsoring legislation aimed at the opioid epidemic seemed politically astute.¹⁸⁶ Although advocates criticized the legislation because

¹⁸⁰ See Abby Goodnough, *In Rare Bipartisan Accord, House and Senate Reach Compromise on Opioid Bill*, N.Y. TIMES, (Sept. 26, 2018), <http://www.nytimes.com/2018/09/26/health/opioid-bill-congress.html> [<http://perma.cc/H9PK-5JLB>] (quoting a researcher who stated, “Compared to how we responded to AIDS, it’s a failure,” but that Congress “didn’t want to spend, so they agreed on every second-tier issue they could.”). During the legislative debate, Ranking Member Rep. Pallone noted, “The reality is that meaningful policy in this space may cost money, and agreement on appropriate offsets that do not harm people—including the very people that we may be trying to help—is a critical component needed in order for me to support these bills moving forward.” See Frank Pallone, Jr., *Pallone’s Opening Remarks at Health Subcommittee Markup of Opioid Legislation*, HOUSE COMM. ON ENERGY & COM. (Apr. 25, 2018), <http://energycommerce.house.gov/newsroom/press-releases/pallone-s-opening-remarks-at-health-subcommittee-markup-of-opioid> [<http://perma.cc/XSL8-FUXF>].

¹⁸¹ CADCA, *supra* note 169.

¹⁸² Goodnough, *supra* note 180.

¹⁸³ Pallone, *supra* note 180 (Pallone noted that the committee was considering at least 63 bills in “the Chairman’s extremely hasty timeframe to pass opioid legislation.”).

¹⁸⁴ Proponents grouped SUPPORT’s provisions into “four buckets: advancing treatment and recovery initiatives, improving prevention, protecting our communities, and bolstering efforts to fight deadly illicit synthetic drugs such as fentanyl.” Greg Walden, *Thanks to Congress, We’re Making Real Progress in the Opioid Crisis*, WASH. EXAMINER (June 22, 2019, 12:00 AM), <http://www.washingtonexaminer.com/opinion/op-eds/thanks-to-congress-were-making-real-progress-in-the-opioid-crisis> [<http://perma.cc/T4CE-GTCV>] (writing, in an editorial, an overview of SUPPORT). But see Katie Zezima & Colby Itkowitz, *Flailing on Fentanyl*, WASH. POST (Sept. 20, 2019), http://www.washingtonpost.com/graphics/2019/investigations/fentanyl-epidemic-congress/?wpisrc=al_news_alert-politics--alert-national&wpmk=1 [<http://perma.cc/X9JK-DWT4>] (discussing congressional failures to recognize the increasing dangers of the synthetic opioid fentanyl).

¹⁸⁵ Pallone, *supra* note 180 (“These forced time constraints mean that some bills suffer from lack of technical assistance from our federal agencies or a CBO analysis. Additionally, and equally important, stakeholders have not had the opportunity to adequately evaluate these bills or weigh in on their impact.”).

¹⁸⁶ See Brianna Ehley & Jennifer Haberkorn, *Tough Reelection? Sponsor an Opioid Bill*, POLITICO (June 16, 2018, 6:37 AM), <http://www.politico.com/story/2018/06/16/lawmakers-opioid-bills-midterms-624926> [<http://perma.cc/URD8-XG5H>]; see also Zezima & Itkowitz, *supra* note 184 (interviewing the House Republican sponsor of bill to increase sentencing minimums for trafficking fentanyl about his belief that the bill was not considered because, “[a]s a Republican from a reliably

these bills failed to provide sustainable funding for needed services,¹⁸⁷ politicians viewed introducing these unfunded opioid-related bills as being responsive to a pressing societal concern while being fiscally responsible.¹⁸⁸

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. It 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.¹⁸⁹ The Centers for Disease Control and Prevention (CDC) found that victims of opioid overdoses were overwhelmingly white, tended to be male, and middle-aged.¹⁹⁰ Four of the five most affected states—West Virginia, New Hampshire, Kentucky, and Ohio¹⁹¹—are rural and tend to lean Republican or be politically competitive.¹⁹² Many Americans, particularly in rural communities, supported a government response as necessary to stem the tide of opioid misuse.¹⁹³ 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.¹⁹⁴ As the electorate shifts though, incoming policymakers will need to

red district who wasn't going to face a difficult path to reelection, he didn't need a legislative success to tout on the campaign trail.”).

¹⁸⁷ Brianna Ehley, *Congress' Latest Opioid Bill Won't Solve the Crisis*, POLITICO (Sept. 17, 2018, 7:28 PM), <http://www.politico.com/story/2018/09/17/congress-opioids-crisis-illegal-drugs-792373> [<http://perma.cc/3SQY-R9H2>] (“Public health experts and first responders say the massive bipartisan legislation . . . takes some important steps toward better access to treatment but lacks the urgency, breadth and steady long-term funding required to quell the emergency . . .”).

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.

¹⁹⁰ Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445, 1448, 1450 tbls.1 & 2 (2016).

¹⁹¹ *See id.* at 1447 fig.1.

¹⁹² *See* Paul Chisholm, *Analysis Finds Geographic Overlap in Opioid Use and Trump Support in 2016*, NPR (June 23, 2018, 8:02 AM), <http://www.npr.org/sections/health-shots/2018/06/23/622692550/analysis-finds-geographic-overlap-in-opioid-use-and-trump-support-in-2016> [<http://perma.cc/U86H-NGKS>].

¹⁹³ Danielle Kurtzleben, *Poll: Rural Americans Rattled by Opioid Epidemic; Many Want Government Help*, NPR (Oct. 17, 2018, 5:01 AM), <http://www.npr.org/2018/10/17/656515170/poll-rural-americans-rattled-by-opioid-epidemic-many-want-government-help> [<http://perma.cc/XEV2-SUEE>].

¹⁹⁴ 162 CONG. REC. H2372 (daily ed. May 13, 2016) (statement of Rep. Jackson Lee) (noting

confront why they addressed the harms that opioids posed on one constituency while failing to address how marijuana criminalization imposed harms on another.¹⁹⁵

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,¹⁹⁶ Congress reversed course in the 1980s.¹⁹⁷ Mandatory minimum sentences are most severe for trafficking drugs listed on Schedules I and II, with marijuana falling into Schedule I.¹⁹⁸

In recent years, policymakers—even conservative ones—have taken on criminal-justice issues such as sentencing reform,¹⁹⁹ and the electorate’s response has often been positive, rather than seeing such changes negatively as a “soft on crime” position.²⁰⁰ If the politics are shifting on criminal justice issues, these shifts

that many of those who turned to crack cocaine were incarcerated rather than offered treatment); see *supra* notes 190–193.

¹⁹⁵ See *Infra* to Section IV-A.

¹⁹⁶ See *supra* notes 23–47.

¹⁹⁷ *Mandatory Minimum Sentencing of Federal Drug Offenses*, *supra* note 108, at 2–3.

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

¹⁹⁹ Timothy Williams & Thomas Kaplan, *The Criminal Justice Debate Has Changed Drastically. Here’s Why.*, N.Y. TIMES (Aug. 20, 2019), <http://www.nytimes.com/2019/08/20/us/politics/criminal-justice-reform-sanders-warren.html> [<http://perma.cc/N56G-Q7MD>] (discussing how previously “radical” ideas were being debated as part of the Democratic presidential nomination campaign due to “a seismic shift in how the American public views criminal justice issues”). Additionally, several reforms have occurred at the state level, such as restoring voting rights in purple states, like Virginia and Florida. See *id.* (discussing a California initiative limiting the use of deadly force); see also Victoria Shineman, *Florida Restores Voting Rights to 1.5 Million Citizens, Which Might Also Decrease Crime*, CONVERSATION (Nov. 7, 2018, 2:05 AM), <http://theconversation.com/florida-restores-voting-rights-to-1-5-million-citizens-which-might-also-decrease-crime-106528>.

²⁰⁰ See *Poll Shows Americans Overwhelmingly Support Prison, Sentencing Reforms*, S. COMM. ON JUD. (Aug. 23, 2018), www.judiciary.senate.gov/press/rep/releases/poll-shows-americans-overwhelmingly-support-prison-sentencing-reforms [<http://perma.cc/DKC5-UG8C>]; see also *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <http://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<http://perma.cc/GT7R-87DR>]. However, attitudes toward criminal justice and sentencing reforms have a partisan bent. See John Gramlich, *Voters’ Perception of Crime Continue to Conflict With Reality*, PEW RES. CTR. (Nov. 16, 2016), <http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality> [<http://perma.cc/AXG3-J4AB>] (“Almost eight-in-ten voters who supported President-elect Donald

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

Like marijuana legalization, sentencing reform had been enacted in several states before federal policymakers decided to debate the issue.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.²⁰⁴ These efforts seemed doomed after the 2016 elections ushered in a more conservative government that seemed less supportive of sentencing reform²⁰⁵: for instance, President Trump campaigned on²⁰⁶—and continues to call for²⁰⁷—hardline “law and order” policies

Trump (78%) said this, as did 37% of backers of Democrat Hillary Clinton” and believed that crime worsened between 2008 and 2016, although “U.S. violent crime and property crime rates fell 19% and 23%, respectively,” from 2008 to 2015); *see also Little Partisan Agreement on the Pressing Problems Facing the U.S.*, PEW RES. CTR. (Oct. 15, 2018), <http://www.people-press.org/2018/10/15/little-partisan-agreement-on-the-pressing-problems-facing-the-u-s> [<http://perma.cc/LX2A-GW9A>] (noting that while Democrats and Republicans shared similar views on whether “violent crime (49% of Republicans, 47% of Democrats) and drug addiction (67% of Republicans, 64% of Democrats)” were priority issues before the 2018 elections, “71% of Democratic voters say the way racial and ethnic minorities are treated by the criminal justice system is a very big problem for the country, compared with just 10% of Republican voters.”).

²⁰¹ See Ames Grawert and Tim Lau, *How the FIRST STEP Act Became Law- and What Happens Next*, BRENNAN CENTER (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> (noting that a potential next step to federal sentencing reforms passed in 2018 would be “eliminat[ing] incarceration for lower-level crimes, such as minor marijuana trafficking”).

²⁰² O’Brien, *supra* note 86, at 438–40; *see also* Meagan Nettles, *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, *supra* note 93 (discussing the New Jersey debate over state expungement of marijuana-related crimes).

²⁰³ Nettles, *supra* note 202, at 308–310; Miriam S. Gohara, *Keep on Keeping On: Maintaining Momentum for Criminal Justice Reform During the Trump Era*, 14 STAN. J. C.R. & C.L. 1, 6–8 (2018).

²⁰⁴ See Antonio Ginatta, *Dispatches: Strange Bedfellows for US Criminal Justice Reform*, HUM. RIGHTS WATCH (Oct. 1, 2015, 5:09 PM), <http://www.hrw.org/news/2015/10/01/dispatches-strange-bedfellows-us-criminal-justice-reform> [<http://perma.cc/YM94-AR8L>].

²⁰⁵ Hopwood, *supra* note 47, at 797.

²⁰⁶ Carl Hulse, *Why the Senate Couldn’t Pass a Crime Bill Both Parties Backed*, NY TIMES (Sept. 16, 2016), <http://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html> (noting that Trump’s 2016 campaign included “warnings of a United States at risk from sinister forces, even though violent crime is low compared with past decades”).

²⁰⁷ Christina Wilkie, *Trump Praises ‘Stop and Frisk,’ Calls For Tougher Policing Tactics*, CNBC (Oct. 8, 2018, 4:06 PM), <http://www.cnbc.com/2018/10/08/trump-praises-stop-and-frisk-calls-for-tougher-policing-tactics.html> [<http://perma.cc/7J96-DYTW>]. In relation to the opioid epidemic, Trump seemingly called for the death penalty for drug trafficking. Ayesha Rascoe, *How Trump Went*

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

An unusual coalition of disparate interests, however, was able to sustain the momentum for criminal justice reforms.²⁰⁹ These key discrete constituencies in the unusual political coalition provided the political cover necessary to overcome the “law and order” resistance²¹⁰ against the modest reforms in the bipartisan First Step Act.²¹¹ Trump’s eventual embrace of First Step helped overcome some Senate Republicans’ reservations of supporting it.²¹² Even so, First Step passed only in the

From ‘Tough on Crime’ To ‘Second Chance’ For Felons, NPR MORNING EDITION (Dec. 17, 2018, 5:00 AM), <http://www.npr.org/2018/12/17/676771335/how-trump-went-from-tough-on-crime-to-second-chance-for-felons> [<http://perma.cc/T82Z-HRK5>] (quoting President Trump as suggesting “at some point, we’ll get very smart as a nation and give them the ultimate punishment”).

²⁰⁸ Jordan Waldrep, *What Replacing Jeff Sessions As AG Means For Marijuana Legalization*, FORBES (Nov. 13, 2018, 8:28 AM), <http://www.forbes.com/sites/jordanwaldrep/2018/11/13/what-replacing-jeff-sessions-as-ag-means-for-marijuana-legalization/#1a138ae0103f> [<http://perma.cc/2DAG-7J2K>]. Most notably, during his tenure, Attorney General Jeff Sessions reversed the so-called Cole memo, which was guidance issued under the Obama Administration that permitted U.S. Attorneys to focus resources away from marijuana prosecutions in states where its use was permitted. See U.S. DEP’T OF JUSTICE, *Justice Department Issues Memo on Marijuana Enforcement* (Jan. 4, 2018), <http://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> (noting rescission of prior guidance on prosecuting marijuana felonies).

²⁰⁹ Ray Suarez, *Trump’s Push For Prison Reform, On Point*, WBUR (May 21, 2018), <http://www.wbur.org/onpoint/2018/05/21/trump-prison-reform> [<http://perma.cc/HW4H-3PSQ>].

²¹⁰ Osita Nwanevu, *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, *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, *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.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/>. But see Bill Keller, *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”).

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

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,²¹³ in part because the legislative debate over the bill was very divisive among the Republican majority and exposed different schisms within conservative philosophy.²¹⁴

First Step represents a series of compromises, again paralleling some of the compromises between the Nixon Administration and the Democratic Congress over the CSA.²¹⁵ Marijuana reformers can point to First Step to demonstrate that, just as Congress was able to pass the CSA’s sentencing reforms,²¹⁶ there is a majority in Congress willing to take a critical look at our criminalization policies.²¹⁷ 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.²¹⁸ More critically, First Step would not have passed had it made its sentencing reforms retroactive.²¹⁹ 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>.

²¹³ Burgess Everett & Elana Schor, *Criminal Justice Reform Bill Still Alive As McConnell Deliberates*, POLITICO (Nov. 29, 2018, 5:12 PM), <http://www.politico.com/story/2018/11/29/congress-criminal-justice-reform-senate-mcconnell-1032469>.

²¹⁴ Burgess Everett & Elana Schor, *Cotton Wields Sex Offender report to Tank Prisons Bill*, POLITICO (Nov. 26, 2018, 1:26 PM), <http://www.politico.com/story/2018/11/26/tom-cotton-criminal-justice-reform-senate-republicans-trump-1015149>. Given the limited window for debate on the Senate floor, Senate leaders are generally reluctant to bring up bills that divide their caucus and could delay other competing legislative priorities. Andrew Kragie, *Mitch McConnell Appears to Be Killing Bipartisan Sentencing Reform*, THE ATLANTIC (Dec. 9, 2018), <https://www.theatlantic.com/politics/archive/2018/12/mcconnell-will-not-move-bipartisan-sentencing-bill/577684/> (predicting that FIRST STEP would garner “25 to 30 Republican votes” in the Senate—or about half the GOP caucus at the time—meaning that the legislation “extremely divisive” according to Senate Majority Leader Mitch McConnell).

²¹⁵ See *supra* Part I-A.

²¹⁶ Courtwright, *supra* note 3, at 12.

²¹⁷ Hopwood, *supra* note 47, at 795 (describing First Step’s passage as “almost miraculous[]”).

²¹⁸ See *supra* notes 211–214.

²¹⁹ 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.²²⁰ 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.²²¹

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.²²² 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

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

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.”).

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.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.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.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.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.²²⁷

²²³ Nicholas Eberstadt, *Our Miserable 21st Century*, COMMENTARY (Feb. 2017), <http://www.commentarymagazine.com/articles/our-miserable-21st-century>. [<http://perma.cc/DJ25-XQSH>]. *But see* German Lopez, *Why the Opioid Epidemic May Have Fueled America's Murder Spike*, VOX (Feb. 6, 2018, 10:30 AM), <http://www.vox.com/policy-and-politics/2018/2/6/16934054/opioid-epidemic-murder-violent-crime> [<http://perma.cc/PR6G-4JMB>] (noting that as the opioid epidemic shifts from prescription drug misuse to use of illicit drugs, such as heroin, it may be related to an increase in the murder rate because of violence associated with illegal drug trafficking).

²²⁴ *Supra* notes 93 and 95.

²²⁵ *Supra* notes 125–127 and 194.

²²⁶ J.B. Wogan, *For This Pot Guy, States Are His Biggest Customers*, GOVERNING (Aug. 2017), <http://www.governing.com/topics/mgmt/gov-marijuana-colorado-andrew-freedman-states-regulation.html> [<http://perma.cc/H5WT-C29T>] (“[A]fter voters approve a marijuana measure, officials look for advice from the few places with some experience in taxing and regulating legal marijuana” with Colorado “field[ing] calls from more than 25 states asking for guidance.”).

²²⁷ *Nearly 100 Conclusions on the Health Effects of Marijuana and Cannabis-Derived Products Presented in New Report*, NAT'L ACAD. SCI. (Jan. 12, 2017), <http://www8.nationalacademies.org/>

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.²²⁸ Approval of these applications stalled under then-Attorney General Jeff Sessions,²²⁹ but Attorney General William Barr since has announced that the DEA has resumed reviewing the applications.²³⁰ Some hope that other parts of the federal government are taking actions that suggest they might be more receptive to marijuana research.²³¹ Additionally, bipartisan legislation has been released that would reform the research process while maintaining marijuana's current place on the CSA schedule.²³²

Such research could be useful in validating prior studies, helping consumers,²³³ 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:

onpinews/newsitem.aspx?RecordID=24625 [http://perma.cc/2BHG-LCX2].

²²⁸ *Applications To Become Registered Under the Controlled Substances Act To Manufacture Marijuana To Supply Researchers in the United States*, DRUG ENFORCEMENT ADMINISTRATION, 81 Fed. Reg. 53846 (Aug. 12, 2016).

²²⁹ See Jeffrey Miron, *Jeff Sessions Stonewalls Permission for Medical Marijuana Research*, CATO INST. (July 12, 2018, 11:30 AM), <http://www.cato.org/blog/jeff-sessions-stonewalls-permission-medical-marijuana-research> [http://perma.cc/3WSK-33UL].

²³⁰ Sara B. Somerset, *The DEA Is Rewriting Obama's Federal Cannabis Regulations*, FORBES (Aug. 28, 2019, 2:53 PM), <http://www.forbes.com/sites/sarabrittany Somerset/2019/08/28/the-dea-has-rewritten-obamas-federal-cannabis-regulations/#6d7701553dae> [http://perma.cc/9TG3-MAVM] (noting the difficulties in qualifying because manufacturers that already process marijuana in state-licensed arrangements cannot become federally qualified producers).

²³¹ Compare Hoffmann, *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.”).

²³² *Feinstein, Grassley, Schatz Introduce Bill to Expand Cannabidiol, Marijuana Research*, OFFICE OF SENATOR DIANNE FEINSTEIN (June 27, 2019), <https://www.feinstein.senate.gov/public/index.cfm/2019/6/feinstein-grassley-schatz-introduce-bill-to-expand-cannabidiol-marijuana-research> [https://perma.cc/8C7K-LSC4].

²³³ See, e.g., Bridget Small, *Serious Health Claims for CBD Products Need Proof*, FED. TRADE COMMISSION CONSUMER INFO. (Sept. 10, 2019), http://www.consumer.ftc.gov/blog/2019/09/serious-health-claims-cbd-products-need-proof?utm_source=govdelivery [http://perma.cc/5BT9-3CCB] (issuing a warning against three companies for making health claims about products containing cannabidiol (CBD), a chemical compound derived from the cannabis plant).

[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

²³⁴ Marcus A. Bachhuber et al., *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999–2010*, 174 JAMA INTERNAL MED. 1668 (2014).

²³⁵ Brittany Flaherty, *Legalizing Medical Cannabis Reduces Opioid Overdose Deaths? Not so Fast, New Study Says*, STAT (June 10, 2019), <http://www.statnews.com/2019/06/10/legalizing-medical-marijuana-opioid-overdose-deaths/> [<http://perma.cc/552B-YDZ3>] (quoting a researcher in Australia that the 2014 study has “been cited in my own country as compelling evidence that medical cannabis reduces opioid overdose deaths”).

²³⁶ Kenneth Finn, *Why Marijuana Will Not Fix the Opioid Epidemic*, 115 MO. MED. 191, 193 (2018), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC6140166/pdf/ms115_p0191.pdf [<http://perma.cc/CF29-GYFL>].

²³⁷ Kevin P. Hill & Andrew J. Saxon, *The Role of Cannabis Legalization in the Opioid Crisis*, 178 JAMA INTERNAL MED. 679, 680 (2018).

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,²³⁸ but now there is a patchwork approach given the wide variation between states on whether to legalize marijuana use and for what purposes.²³⁹ 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.²⁴⁰

Commentators have suggested creating such an opt-out mechanism or waiver from the CSA to allow for "cooperative federalism" for marijuana.²⁴¹ 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.²⁴² "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."²⁴³ 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.²⁴⁴

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.²⁴⁵ 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).

²⁴⁵ ANDREW WINSTON, LIBRARY OF CONGRESS, INTERSTATE COMPACTS IN THE UNITED STATES, at 2–3 (2018).

baseline or preempting a field.²⁴⁶ 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.²⁴⁷ These compacts become effective only when a minimum number of states agree to adopt them by enacting enabling legislation.²⁴⁸ 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.²⁴⁹

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.²⁵⁰

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.²⁵¹ Much could change in this anniversary year if the election produces a very different administration and Congress.²⁵² Yet even with

²⁴⁶ CRADY DE GOLIAN, COUNCIL OF STATE GOV'TS, INTERSTATE COMPACTS AND THE FEDERAL GOVERNMENT, at 1 (Mar. 2014) ("Interstate compacts often are viewed as a way for states to work cooperatively to avoid federal inter-vention or a federally mandated solution."), http://knowledgecenter.csg.org/kc/system/files/CR_Interstate%20Compacts%20and%20the%20Federal%20Government.pdf.

²⁴⁷ Mark Andriola, *Telemedicine and Legal Distrupction*, 13 HEALTH L. & POL'Y BRIEF 1, 19–20 (2019); Blake T. Maresh, *The Interstate Medical Licensure Compact: Making the Business Case*, J. Med. Reg. 8, 16–19 (2014).

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).

²⁵⁰ U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472–78 (1978) (articulating when an interstate compact requires congressional approval under the Compact Clause of the Constitution).

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.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.

19, 2019, 7:15 AM), <http://www.politico.com/story/2019/05/19/democrats-marijuana-legalization-1331710> [<http://perma.cc/DNA9-4NW7>] (noting that the overwhelming majority of candidates for the Democratic presidential nomination, as of July 1, 2019, support some sort of legalization process).

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 O'ram, *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).