
UC DAVIS LAW REVIEW

VOL. 51, NO. 5



JUNE 2018

Guns N' Ganja: How Federalism Criminalizes the Lawful Use of Marijuana

*Ira P. Robbins**

Federalism is a vital tenet of our Republic. Although federal law is the supreme law of the land, our Constitution recognizes the integral role that state law plays in the national scheme. Like any pharmaceutical drug that withstands rounds of clinical testing, state law functions as a laboratory in which Congress can evaluate and potentially adopt novel policies on a nation-wide basis. Most of the time, federal and state law exist harmoniously, complementing one another; other times, however, the two systems clash, striking a dissonant chord.

In the United States, state marijuana laws are currently on a crash course with federal marijuana law, exemplifying the discordant consequences our dual-system of laws sometimes generates. Eight states and the District of Columbia have legalized recreational marijuana use, yet under the Controlled Substances Act ("CSA") marijuana remains

* Copyright © 2018 Ira P. Robbins. Barnard T. Welsh Scholar and Professor of Law and Justice and Co-Director, Criminal Justice Practice and Policy Institute, American University, Washington College of Law. A.B. University of Pennsylvania; J.D. Harvard University. I am more than ordinarily grateful to my superb and indispensable research assistants — Jenn Howard, Hannah Kaplan, Desislava Kireva, Mark Levy, Lisa Southerland, and Morgan Tufarolo — whom I consider to be my colleagues and my friends, and to Dean Camille Nelson, for providing summer financial support.

illegal in the eyes of federal law. Mere confusion concerning the legality of marijuana is not the only consequence, however. One notable casualty ensuing from the battle of the mutually exclusive federal and state marijuana laws is the deprivation of rights belonging to the unsuspecting, average citizen.

The CSA establishes a schedule of drugs, and various federal regimes — such as entitlement programs and welfare benefits — impose compliance with the CSA as a necessary antecedent for conferral of those benefits. For example, although possessing a firearm is a fundamental right under the Second Amendment, citizens who wish to lawfully smoke marijuana can no longer avail themselves of this fundamental right. Section 922(g)(3) of the Gun Control Act prevents users of Schedule I drugs pursuant to the CSA — irrespective of state law — from possessing or owning a firearm. Marijuana, despite its lack of potential for addiction, plethora of medical benefits, and disconnect from violence, has always been a Schedule I drug — essentially deemed more addictive and dangerous than methamphetamine, a Schedule II drug. Unknowing, ordinary citizens are consequently caught in this legal black hole, contemplating how conduct can be both lawful and unlawful.

This Article proposes a simple solution to a complex problem: deschedule marijuana. The Article first surveys the past, observing that the Nixon Administration's placement of marijuana in Schedule I rang of racial undertones, and then examines the present, noting the majority of states that have legalized medicinal marijuana and the numerous anecdotal reports of its alleviating properties. Further, enforcing § 922(g)(3) against individuals who consume marijuana lawfully pursuant to state law simultaneously overreaches and under-reaches, failing to target the violent criminals that Congress initially sought to apprehend. Thus, the federal government's insistence on maintaining marijuana in Schedule I undermines principles of federalism and prevents law-abiding citizens from fully exercising their constitutional right to own a firearm.

TABLE OF CONTENTS

INTRODUCTION	1785
I. GUNS, GANJA, AND THE INTERACTION BETWEEN THE TWO	1788
A. Guns: The Constitutional Right to Own a Firearm	1789
B. Ganja: The Controlled Substances Act and Its National Scheme	1790
1. The Controlled Substances Act	1790
2. Marijuana as a Schedule I Drug.....	1793

2018]	<i>Guns N’ Ganja</i>	1785
	3. Federal and State Governments Cooperate to Effectively Regulate Substances with Potentially Harmful Effects.....	1796
	C. <i>The Federal and State Interplay of Marijuana: Section 922(g)(3)</i>	1801
	II. READY, AIM, FIRE: THE CLASSIFICATION OF MARIJUANA MISSES THE TARGET AND WOUNDS FEDERALISM.....	1807
	A. <i>Marijuana Does Not Belong in Schedule I</i>	1809
	1. Backward Looking: Marijuana Never Should Have Been Placed in Schedule I.....	1809
	2. Forward Looking: The Justifications for Marijuana’s Placement in Schedule I Are No Longer Compelling	1811
	B. <i>National Regulatory Scheme Is Not Necessary to Accomplish the Goals of § 922(g)(3)</i>	1813
	1. Prohibiting Legal Marijuana Users Under State Law from Owning Firearms Does Not Further Congress’s Objective to Keep Guns out of the Hands of Risky People.....	1814
	a. <i>Section 922(g)(3) Is Over-Inclusive</i>	1815
	b. <i>Section 922(g)(3) Is Under-Inclusive</i>	1818
	2. Accomplishing Congress’s Goal of Keeping Guns out of the Hands of “Dangerous People” Through Other Means	1819
	CONCLUSION.....	1822

INTRODUCTION

There are few things in life as momentous as a young couple purchasing their first home. Mary and Mike were fresh off their honeymoon and sought to embark on a long, prosperous life together in Denver, Colorado. Indeed, everything was picture-perfect for the couple until this new home began to feel like a house of cards.

On the night of the incident, Mary and Mike were out to dinner, celebrating life as they knew it. When they returned home, however, they were alarmed to find their front door slightly ajar. They peeked through the crack in the door and discovered their house in shambles. Upon further investigation, they realized that they had been burglarized — their most valuable possessions were gone.

In the weeks following the traumatic incident, Mike decided to purchase a firearm to protect his new family. He hoped that the firearm would provide safety and comfort in a world filled with senseless violence; but, rather than serve as a shield, his gun caused a

fatal wound. Mary and Mike occasionally smoked marijuana, which is legal in the state of Colorado but illegal under federal law. By purchasing the firearm, Mike consequently triggered a federal provision that implicates felonious criminal sanctions.

Section 922(g)(3) in Title 18 of the United States Code criminalizes the concurrent possession of a firearm and drugs. Although marijuana is now legal in eight states and the District of Columbia, marijuana remains illegal in the eyes of the federal government. Under the Controlled Substances Act (“CSA”), marijuana is a Schedule I drug.¹ The landmark Supreme Court case, *District of Columbia v. Heller*,² established that the Second Amendment protects the right to own a firearm.³ It necessarily follows that, for the government to pass a law restricting the possession of firearms, it must pass strict scrutiny. Accordingly, this conflict presents confusion for those that smoke recreational marijuana in states that have legalized it: in these states, violating federal law will result in revocation of federal benefits and even the right to own a firearm.

The Framers constructed the United States based upon federalism, a major principle of our nation. Federalism recognizes that federal law — that Congress enacts — is the supreme law of the land. However, it also delegates general police power to the states. This delegation serves a fundamental purpose, allowing each state to function quasi-independently and operate as a laboratory for lawmaking. Accordingly, states are free to enact legislation regarding anything from the legal age to operate a motor vehicle to physician-assisted suicide.

Federal law should respect states’ decisions to legalize marijuana because of the harsh ramifications for seemingly innocuous conduct — smoking marijuana in a state where it is legalized. In most of the states, the corresponding ballot initiatives to legalize marijuana were introduced by the people vis-à-vis referenda. Thus, this form of federal governmental intrusion undermines fundamental principles of federalism, effectively ignoring the will of the people.

Using a regulatory scheme similar to that of alcohol and tobacco to regulate marijuana sales not only respects the notion of federalism, but also provides a time-tested structure to regulate “harmful substances.” Several federal agencies control alcohol and tobacco and operate on a national level; these agencies, however, have counterparts on the state

¹ See 21 U.S.C. §§ 801-802 (2018).

² See *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

³ See *id.* at 628 (narrowing the application of the Second Amendment “to the home, where the need for defense of self, family, and property is most acute”).

level that regulate alcohol and tobacco in a way that is most suitable to each specific state. For example, taxes on alcohol and tobacco sales produce enormous revenue — in fact, tobacco is taxed federally and then each state may levy an additional tax without undermining the federal one. Notably, if a certain county or municipality within a state does not want to sell alcohol or tobacco, it may simply “opt out” of doing so. This concept is also applied to marijuana: many counties in Colorado have decided not to sell marijuana, even though doing so is legal throughout the state.⁴ The current cooperation between federal and state government in regulating alcohol and tobacco provides a useful blueprint for the regulation of the marijuana industry.

An examination of the history behind the placement of marijuana in Schedule I reveals its oversight. Not only did Congress myopically place marijuana in Schedule I, but by refusing to deschedule it, Congress also ignored contrary evidence relating to its medical benefits and low risk of addiction. First, during the Nixon Administration, considerations other than marijuana’s potential harmful effects marred the decision to place it in Schedule I. Particularly, racial animus motivated the decision, targeting minorities and charging non-violent individuals with felonies.⁵ Second, Congress is now disregarding compelling evidence showing that marijuana has substantial health benefits, such as treating chronic pain, glaucoma, and Alzheimer’s.⁶ Further, studies have shown that marijuana use does not typically coincide with violent tendencies.⁷ Consequently, § 922(g)(3) is *over-inclusive*, encompassing the casual marijuana user, and *under-inclusive*, failing to indict the “presumptively risky people” that are statistically more likely to be violent.⁸

This Article advocates for the descheduling of marijuana under the CSA. Marijuana users who own firearms face harsh consequences under federal law, even though their marijuana use is lawful under state law. Part I addresses three distinct topics. Sections I.A and I.B outline the underlying policy behind gun ownership and drug use, respectively. Those ideas then culminate in Section I.C, which discusses the interplay between federal and state marijuana laws. Specifically, this Part introduces the vehicle that will steer the analysis of the conflict’s resolution: § 922(g)(3). Section II.A then contends that marijuana does not belong in Schedule I: the reasons for its

⁴ See *infra* note 69 and accompanying text.

⁵ See *infra* notes 107–09 and accompanying text.

⁶ See *infra* notes 40, 117 and accompanying text.

⁷ See *infra* notes 107–08 and accompanying text.

⁸ *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983).

original placement were not compelling then, and the reasons for its continued placement are even less compelling now. Section II.B argues that § 922(g)(3) is both over- and under-inclusive; the current scheme fails to accomplish Congress's regulatory goals — keeping guns out of the hands of presumptively risky people. Finally, this Article concludes that the most effective way to effectuate the purpose of § 922(g)(3) while still respecting state sovereignty is by descheduling marijuana.

I. GUNS, GANJA, AND THE INTERACTION BETWEEN THE TWO

Federalism rises and falls on the fact that, although a national system of laws exists, the national system defers to each independent state sovereign to operate its own legislative, executive, and judicial branches. The concept of federalism has invited contentious debate since the Framers drafted the Constitution. Some contend that the national system depends on state autonomy, while others reduce state government to “mere ‘planets’ orbiting the federal ‘sun.’”⁹ It seems natural that, on many occasions, the federal and state systems must cooperate to establish a set of rules that regulates the conduct of citizens. Indeed, the lack of cooperation in some instances may create an ambiguous legal black hole, causing the legal status of certain conduct to enter a state of flux.

The efforts of eight states and the District of Columbia to legalize recreational marijuana created precisely that type of confusing legal black hole.¹⁰ The uncertainty stemming from the state legalization of marijuana and the federal criminalization of marijuana will not be resolved without cooperation between the federal and state governments. Accordingly, in the context of the Gun Control Act, an exploration of its components — guns, drugs, and the intersection of the two, § 922(g)(3) — is foundationally necessary.

⁹ Richard E. Levy & Stephen R. McAllister, *Defining the Roles of the National and State Governments in the American Federal System: A Symposium*, 45 U. KAN. L. REV. 971, 974-75 (1996) (discussing the history of federalism and detailing that some Framers, such as Alexander Hamilton and James Madison, argued that state autonomy was merely incidental to a national system of laws, but other Framers, such as Patrick Henry and George Mason, believed that “the preservation of state autonomy was critical”).

¹⁰ Up to the point of publication of this Article, Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington have all legalized recreational marijuana. See Alicia Wallace, *Where Is Weed Legal? Map of U.S. Marijuana Laws by State*, CANNABIST (Oct. 14, 2016, 12:59 PM), <http://www.thecannabist.co/2016/10/14/legal-marijuana-laws-by-state-map-united-states/62772>.

A. *Guns: The Constitutional Right to Own a Firearm*

Although the Second Amendment of the United States Constitution gives citizens a right to bear arms, that right is not absolute.¹¹ Throughout history, Congress and the Supreme Court have gradually shaped the contours of the Second Amendment by distinguishing its limitations.¹² In its first attempt to regulate gun purchases, Congress passed the National Firearms Act of 1934 (“NFA”), which imposed an excise tax on gun sales.¹³ Congress placed further limitations on gun purchasers and sellers by passing the Gun Control Act of 1968 (“GCA”).¹⁴ In an attempt to preserve Congress’s original legislative intent, the Supreme Court has interpreted the scope of the GCA broadly, increasing restrictions on gun dealers and owners.¹⁵ While strict regulations that impede or prevent gun ownership in the home receive the most stringent scrutiny,¹⁶ the Court has consistently allowed legislatures to place limits on the Second Amendment’s reach to certain individuals and products.¹⁷ Consequently, certain types of

¹¹ See U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

¹² See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (confining the application of the Second Amendment “to the home, where the need for defense of self, family, and property is most acute”).

¹³ 26 U.S.C. § 4181 (2018).

¹⁴ See 18 U.S.C. §§ 921-931 (2018) (expanding the gun dealer licensing and record keeping requirements, and placing specific limitations on the sale of handguns). In amending the GCA, Congress further limited the ability to lawfully purchase a gun to those who can pass a background check. See § 922(t) (establishing the federal background check system that implements various restrictions on gun purchases and that every individual who purchases from a licensed seller must pass); *National Instant Criminal Background Check System (NICS)*, FBI, <https://www.fbi.gov/services/cjis/nics> (last visited Apr. 4, 2018) (“Before ringing up the sale, cashiers call in a check to the FBI or to other designated agencies to ensure that each customer does not have a criminal record or isn’t otherwise ineligible to make a purchase.”).

¹⁵ See, e.g., *Beecham v. United States*, 511 U.S. 368, 374 (1994) (asserting that “federal law rather than state law controls the definition of what constitutes a conviction” that would prevent an individual from purchasing a gun); *Barrett v. United States*, 423 U.S. 212, 215 (1976) (stressing that § 922(h), which forbids convicted felons from purchasing a “firearm [if] at some time in its past [it] had traveled in interstate commerce,” imposes an additional limitation on convicted felons’ gun ownership).

¹⁶ See *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (applying strict scrutiny to and upholding a regulation that effectively impaired a law-abiding citizen’s ability to legally own a weapon).

¹⁷ See, e.g., *Kachalsky v. County of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) (subjecting a law that limited an individual’s ability to carry a firearm in public to

conduct permissibly narrow an individual's constitutional right to own or possess a firearm, one example being drug use.¹⁸

B. Ganja: The Controlled Substances Act and Its National Scheme

Federal and state governments have always played a role in regulating drug use in the United States. As the volume of drug use has increased, the role of the government has as well. As a result, Congress passed the Controlled Substances Act (“CSA”) in 1970, attempting to confront the effects of rampant, nation-wide drug use.¹⁹ The CSA established marijuana as a Schedule I drug based on its potential dangerous health effects and the Nixon Administration's view of minority groups that it assumed to be associated with the drug.²⁰ State governments, however, have taken a variety of approaches to regulating marijuana — some legalized it completely, some legalized it only for medical purposes, and some have not legalized it at all.²¹ Unlike how federal and state governments have cooperated to regulate alcohol, federal and state governments have not cooperated to regulate marijuana, which has resulted in many conflicting policies.

1. The Controlled Substances Act

Congress enacted the Controlled Substances Act (“CSA”)²² in 1970, creating a unified federal drug policy to combat the heightening drug epidemic.²³ The CSA prohibits the “importation, manufacture, distribution, and possession and improper use of controlled substances.”²⁴ Broadly stated, its purpose is to “maintain the health

intermediate scrutiny).

¹⁸ See, e.g., 18 U.S.C. § 922(g)(1) (barring felons from possessing firearms); § 922(g)(3) (barring drug users from possessing firearms); § 921(a)(33)(A) (preventing domestic violence misdemeanants from possessing firearms); see also *United States v. Carter*, 669 F.3d 411, 416-17 (4th Cir. 2012) (holding that a statute prohibiting drug users from possessing firearms was subject only to intermediate scrutiny rather than strict scrutiny because these users pose a safety threat to the public).

¹⁹ See generally 21 U.S.C. §§ 801-802 (2018).

²⁰ See *infra* notes 44–53 and accompanying text (detailing the reasons why marijuana was initially placed in Schedule I).

²¹ See *infra* notes 66–72 and accompanying text (surveying various state government approaches to the regulation of marijuana).

²² 21 U.S.C. §§ 801-802.

²³ See KENNETH BAUMGARTNER, CONTROLLED SUBSTANCES HANDBOOK (2015).

²⁴ 21 U.S.C. § 801(2).

and general welfare of the American people.”²⁵ The CSA seeks to bolster prevention, rehabilitation, and law enforcement efforts.²⁶

The CSA is comprised of five “schedules,” categorized by potential for abuse, current accepted medical use, and risk of psychological or physical dependence.²⁷ Schedule I is reserved for the most dangerous drugs for which “no currently accepted medical use in treatment” exists.²⁸ For example, Schedule I consists of hazardous substances such as heroin, acid, and gamma-hydroxybutyrate, a common date rape drug.²⁹ In comparison, substances in Schedules II and III currently have accepted medical uses, despite also having a high potential for abuse and risk of developing dependence.³⁰ For instance, drugs such as cocaine, methamphetamine, and anabolic steroids are included in Schedules II and III.³¹ Lastly, substances in Schedules IV and V not only have currently accepted medical uses, but they also have a lower potential for abuse and lower risk of developing dependence.³² These drugs are commonly found in medications like Ambien, Xanax, cough syrups, and decongestant antihistamines.³³

Although Congress compiled these initial schedules, either Congress or the U.S. Attorney General may add, remove, or transfer drugs from

²⁵ *Id.*

²⁶ H.R. REP. NO. 1444, at 4567 (1970) (purporting that the CSA was enacted to combat drug abuse in the United States “(1) through . . . drug abuse prevention and rehabilitation of users, (2) through providing more effective means for law enforcement aspects of drug abuse prevention and control, and (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs”).

²⁷ See 21 U.S.C. § 812(b)(1)-(5) (2018).

²⁸ *Id.* § 812 (b)(1) (requiring that Schedule I drugs (A) have a “high potential for abuse,” (B) have “no currently accepted medical use in treatment,” and (C) lack any “accepted safety for use”).

²⁹ 21 C.F.R. § 1308.11 (2018).

³⁰ 21 U.S.C. § 812(b)(2)-(3) (describing Schedule III drugs as those having a (A) potential for abuse less than the substances listed in Schedule I, (B) “currently accepted medical use,” and (C) moderate to severe risk of physical or psychological dependence).

³¹ 21 C.F.R. §§ 1308.12-.13 (2018).

³² 21 U.S.C. § 812(b)(4)-(5) (explaining that Schedule IV and V drugs have a (A) “low potential for abuse” relative to drugs listed in Schedules I, II, and III; (B) “currently accepted medical use”; and (C) “limited [potential for] physical . . . or psychological dependence”).

³³ See 21 C.F.R. § 1308.15 (2018) (listing substances that contain “[n]ot more than 200 milligrams of codeine per 100 milliliters or per 100 grams”); *Dihistine DH Liquid*, DRUGS.COM (June 3, 2015), <https://www.drugs.com/cdi/dihistine-dh-liquid.html> (identifying codeine as an active ingredient that treats the “common cold, flu, . . . hay fever, and other upper respiratory allergies”).

one schedule to another.³⁴ Congress must amend schedules through its legislative process, requiring bicameral assent; in contrast, the Attorney General can unilaterally accomplish the same through informal rulemaking.³⁵ Subsequently, the Attorney General delegated that authority to the Drug Enforcement Administration (“DEA”).³⁶ The CSA provides a list of factors to consider when determining whether to re- or de-schedule a substance, including potential for abuse, risk to public health, and risk of physical or psychological dependence.³⁷ Before amending any of the schedules, however, the Attorney General must collect data, gather scientific and medical evaluations, and solicit a recommendation from the Secretary of Health and Human Services concerning the substance under review.³⁸ In contrast to a lengthier legislative process, § 811 provides a quicker, more flexible alternative that can more properly emulate scientific advances.³⁹

³⁴ 21 U.S.C. § 811(a)(1)(A)-(B) (2018); see *United States v. Huerta*, 547 F.2d 545, 547 (10th Cir. 1977) (“We are convinced that the clear intent of Congress was that the schedules should remain as initially adopted until changed by action of the Attorney General.”).

³⁵ See *Olsen v. Holder*, 610 F. Supp. 2d 985, 992 (S.D. Iowa 2009) (“[T]he Attorney General ‘may by rule’ add drugs to a schedule or transfer a drug from one schedule to another if the Attorney General determines that the drug or substance has a potential for abuse and that the drug or substance otherwise meets the scheduling criteria under § 812(b).” (quoting § 811(a)(1)(A)-(B))).

³⁶ 28 C.F.R. § 0.100 (2017) (delegating the Attorney General’s authority to schedule drugs to the DEA); see *United States v. Gordon*, 580 F.2d 827, 840 (5th Cir. 1978) (finding that “delegation of the authority [from the Attorney General to the DEA] to schedule drugs is constitutionally permissible”); see also Douglas C. Throckmorton, *Re-Scheduling Prescription Hydrocodone Combination Drug Products: An Important Step Toward Controlling Misuse and Abuse*, FDA (Oct. 6, 2014), <http://blogs.fda.gov/fdavoices/index.php/2014/10/re-scheduling-prescription-hydrocodone-combination-drug-products-an-important-step-toward-controlling-misuse-and-abuse> (rescheduling hydrocodone combination products from Schedule III to Schedule II).

³⁷ 21 U.S.C. § 811(c) (“(1) Its actual or relative potential for abuse, (2) [s]cientific evidence of its pharmacological effect, if known, (3) [t]he state of current scientific knowledge regarding the drug or other substance, (4) [i]ts history and current pattern of abuse, (5) [t]he scope, duration, and significance of abuse, (6) [w]hat, if any, risk there is to the public health, (7) [i]ts psychic or physiological dependence liability, [and] (8) [w]hether the substance is an immediate precursor of a substance already controlled under this subchapter.”).

³⁸ *Id.* § 811(b).

³⁹ The CSA also provides interested parties with the opportunity to challenge an interim ruling on descheduling or rescheduling a substance. See *id.* § 811(j)(3).

2. Marijuana as a Schedule I Drug

Marijuana, one of the most widely used drugs in the world, has been used medicinally and recreationally as far back as 7,000 B.C.⁴⁰ Some patients and medical professionals report that marijuana alleviates pain and other symptoms associated with illnesses ranging from arthritis to cancer.⁴¹ Users typically smoke marijuana, although they can also ingest it in edible or liquid form.⁴² Despite its history, usage, and medical benefits, marijuana policies vary wildly around the world.⁴³

Scheduling marijuana sparked a contentious debate, commissioning a series of studies, reports, and expert recommendations. Congress placed marijuana in Schedule I initially, deferring to the executive branch to commission studies and ultimately determine its appropriate classification.⁴⁴ Although early findings were not conclusive enough to warrant reclassification,⁴⁵ subsequent reports de-emphasized the

⁴⁰ See Ethan B. Russo et al., *Phytochemical and Genetic Analyses of Ancient Cannabis from Central Asia*, 59 J. EXPERIMENTAL BOTANY 4171, 4177 (2008) (positing that “[ancient cultures] cultivated cannabis for pharmaceutical, psychoactive, or divinatory purposes”).

⁴¹ *THC, THCA, CBD, CBC, CBN: Medical Marijuana Composition, the Chemicals in Cannabis*, UNITED PATIENTS GRP. (Apr. 11, 2014), <https://unitedpatientsgroup.com/blog/2014/04/11/thc-thca-cbd-cbn-the-chemicals-in-cannabis> (listing medicinal benefits for ALS (Lou Gehrig’s disease), Alzheimer’s, anxiety, chemotherapy side effects, Crohn’s Disease, chronic pain, fibromyalgia, HIV-related peripheral neuropathy, HIV-related wasting, Huntington’s Disease, incontinence, insomnia, multiple sclerosis, pruritus, sleep apnea, Tourette Syndrome, muscle spasms, chronic Lupus, endometriosis, menstrual cramps, depression, Dravet syndrome, acne, ADD, Parkinson’s, schizophrenia, neurodegenerative diseases, glaucoma, diabetes, epilepsy, migraines, and stimulating bone growth).

⁴² See *id.*

⁴³ Compare Law No. 20000 art. 1, Febrero 16, 2005, DIARIO OFICIAL [D.O.] (Chile) (decriminalizing possession of marijuana in Chile), and *Decriminalization of Drug Use Act*, LAW LIBR. CONGRESS (Nov. 29, 2000), <https://www.loc.gov/law/help/decriminalization-of-narcotics/portugal.php#Law> (decriminalizing possession of marijuana for personal use in Portugal), with Misuse of Drugs Act 1971, c. 38 (Eng.) (establishing marijuana as a Class B drug in England, and criminalizing its possession). See generally Emma Brant, *Where in the World Can You Legally Smoke Cannabis?*, BBC (Oct. 30, 2014), <http://www.bbc.co.uk/newsbeat/article/29834450/where-in-the-world-can-you-legally-smoke-cannabis> (noting that marijuana is legal to possess in Ecuador, the Czech Republic, Peru, Uruguay, and Portugal but illegal in Costa Rica and the United Kingdom).

⁴⁴ Nat’l Org. for Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 135 (D.D.C. 1980) (“Unsure of marijuana’s effects, Congress placed marijuana in Schedule I, with its program of strict controls, until it could obtain more scientific information on the drug’s effects.”).

⁴⁵ See SEC’Y OF THE DEP’T OF HEALTH, EDUC., & WELFARE, MARIHUANA AND HEALTH:

harmful consequences of marijuana consumption.⁴⁶ In fact, in one legislative hearing, Dr. Stanley F. Yolles, former Director of the National Institute of Mental Health, refuted many of the misconceptions surrounding the dangers of marijuana.⁴⁷ Dr. Yolles concluded, for example, that “mari[j]uana does not cause physical addiction,” “less than 5% of chronic users . . . go on to heroin use,” and “mari[j]uana is not a narcotic except by statute.”⁴⁸ Accordingly, some supporters ultimately recommended decriminalizing the possession of marijuana;⁴⁹ nonetheless, marijuana remains a Schedule I substance.

Although fear of deficient information regarding its effects seemingly influenced the executive branch’s decision to place marijuana in Schedule I, racial undertones influenced it as well. While the Commission’s report was pending, President Nixon and his aides leveraged the criminalization of marijuana to harm specific minority

A REPORT TO THE CONGRESS 13-14 (1971) (concluding that more research is necessary to determine the long-term effects of marijuana). Not infrequently, the government will either place a drug in Schedule I, or retain it in Schedule I, if its long-term impact is inconclusive. *See, e.g.*, German Lopez, *The DEA Won’t Ban Kratom After All*, VOX (Oct. 12, 2016, 11:10 AM), <https://www.vox.com/2016/9/19/12941112/kratom-dea-ban> (placing kratom, an opioid painkiller, in Schedule I because there is “not enough evidence to legally allow widespread public consumption”). Precaution is often a primary motivation behind the placement of drugs in Schedule I. *See United States v. Pickard*, 100 F. Supp. 3d 981, 1008 (E.D. Cal. 2015) (rationalizing that a drug should remain in Schedule I if its effects are unknown); *see also* Lopez, *supra* (explaining that the DEA’s move was “largely an act of caution”).

⁴⁶ *See* SEC’Y OF THE DEP’T OF HEALTH, EDUC., & WELFARE, MARIHUANA AND HEALTH: FIFTH ANNUAL REPORT TO THE U.S. CONGRESS vii (1975) (declining to give marijuana a “clean bill of health,” but also refuting the “fear and irrationality” that characterize the public debate about the drug); THE NAT’L COMM’N ON MARIHUANA & DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 433 (1972) (advocating that “an absolute prohibition of possession” is inappropriate, misallocates law enforcement resources, and “contributes very little to the achievement of our social policy”); *see also* Gabriel G. Nahas & Albert Greenwood, *The First Report of the National Commission on Marihuana (1972): Signal of Misunderstanding or Exercise in Ambiguity*, 50 BULL. N.Y. ACAD. MED. 55, 55 (1974) (interpreting the reports on marijuana “as the first step toward elimination of all mari[j]uana laws”).

⁴⁷ H.R. REP. NO. 91-1444, at 4577-78 (1970); *see also* *Chronology of NIMH Directors*, NAT’L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/about/directors/index.shtml> (last visited Apr. 4, 2018) (indicating that Dr. Yolles was the director of NIMH from 1964 until 1970).

⁴⁸ H.R. REP. NO. 91-1444, at 4577-78 (explaining that marijuana use is not linked to violence and crime — in fact, Dr. Yolles testified that marijuana users “tend to be passive”).

⁴⁹ *E.g.*, THE NAT’L COMM’N ON MARIHUANA & DRUG ABUSE, *supra* note 46, at 191 (advocating that “[p]ossession of mari[j]uana for personal use [should] no longer be an offense”).

communities that stereotypically used marijuana.⁵⁰ For instance, John Ehrlichman, one of Nixon's top aides, expounded on the issue:

We knew we couldn't make it illegal to be either against the war or blacks, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.⁵¹

Despite the Commission's ultimate recommendation, Nixon refused to legalize marijuana, specifically targeting its users.⁵² Consequently, Nixon's rigid stance not only shaped initial attitudes about marijuana, but permeated subsequent judicial decision-making as well.⁵³

Despite the controversy surrounding marijuana's placement in Schedule I, advocates have continually failed to successfully lobby the courts for change. Indeed, courts have upheld the placement of marijuana in Schedule I for two distinct reasons. First, the judiciary has deferred to Congress's intent to maintain the scheduling of

⁵⁰ See *id.* at 436 (“[S]ome police may use the mari[j]uana laws to arrest people they don't like for other reasons, whether it be their politics, their hairstyle[,] or their ethnic background.”); Larry Gabriel, *Joining the Fight*, DETROIT METRO TIMES (Aug. 10, 2011), <http://www.metrotimes.com/detroit/joining-the-fight/Content?oid=2148184> (describing the War on Drugs and the racist, flawed drug policies that targeted minorities); German Lopez, *Nixon Official: Real Reason for the Drug War Was to Criminalize Black People and Hippies*, VOX (Mar. 23, 2016, 6:05 PM), <http://www.vox.com/2016/3/22/11278760/war-on-drugs-racism-nixon> (characterizing the policy to criminalize marijuana as a “ploy to undermine Nixon's political opposition — meaning, black people and critics of the Vietnam War”).

⁵¹ Dan Baum, *Legalize It All*, HARPER'S MAG. (Apr. 2016), <http://harpers.org/archive/2016/04/legalize-it-all>.

⁵² Audio tape: Meeting with Richard Nixon and H.R. Haldeman, Oval Office Conversation No. 693-1 (Mar. 24, 1972, 3:02 PM–3:39 PM) [hereinafter Audio tape: No. 693-1] (“I . . . oppose the legalization of marijuana, and that includes the sale, its possession, and its use. . . . That is my position, despite what the commission has recommended.”)(on file with the Nixon Presidential Library); Audio tape: Meeting with Richard Nixon and H.R. Haldeman, Oval Office Conversation No. 568-4 (Sept. 9, 1971, 3:03 PM–3:34 PM) (“I have a strong firm convictions [sic] which I have expressed and which I won't change . . . about legalizing . . . [and] my attitude toward penalties on marijuana, is . . . very powerful. . . . [W]e're going to have a commission report, I said, [unintelligible] can be very clear, whatever it says, I'm against legalizing. . . . I'm against legalizing, period.”)(on file with the Nixon Presidential Library).

⁵³ See *infra* Section II.A (discussing challenges to the constitutionality of maintaining marijuana in Schedule I).

marijuana, as evidenced by both Congress's initial placement and reluctance to reclassify.⁵⁴ Second, a lack of consensus among experts about the potential medical benefits of marijuana has discouraged courts from deciding cases on unfounded policy grounds.⁵⁵ In theory, the gaps in federal policy pertaining to marijuana afford states the opportunity to regulate it themselves.⁵⁶

3. Federal and State Governments Cooperate to Effectively Regulate Substances with Potentially Harmful Effects

The CSA is not the only means of regulating potentially harmful commodities. As far back as the mid-1800s, the federal government has monitored the food and drug industries.⁵⁷ Specifically, Congress established the Food and Drug Administration ("FDA") and assigned it the task of overseeing medical devices, pharmaceuticals, and food products.⁵⁸ Furthermore, the Bureau of Alcohol, Tobacco, Firearms,

⁵⁴ See 21 U.S.C. § 812(c)(10) (2018) (stating that "unless specifically excepted or unless listed in another schedule," marijuana will remain a Schedule I drug); *United States v. Pickard*, 100 F. Supp. 3d 981, 1009 (E.D. Cal. 2015) (referring to constitutionality challenges of the Schedule I classification as "policy issues for Congress to revisit if it chooses"); see also *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (surmising Congress's intent from the plain language of the statute); *United States v. Burton*, 894 F.2d 188, 192 (6th Cir. 1990) (arguing that Congress should determine marijuana's schedule classification, not the courts); *United States v. Wables*, 731 F.2d 440, 450 (7th Cir. 1984) ("[T]he proper statutory classification of marijuana is an issue that is reserved to the judgment of Congress . . ."); *United States v. Middleton*, 690 F.2d 820, 823 (11th Cir. 1982) (rejecting defendant's argument that the court should reclassify marijuana because the court does not want to "interfere with the broad judicially-recognized prerogative of Congress").

⁵⁵ See, e.g., *United States v. Fogarty*, 692 F.2d 542, 548 (8th Cir. 1982) (explaining that the "ongoing vigorous dispute" over marijuana's medical benefits and psychological and physiological effects support its Schedule I classification); *United States v. Kiffer*, 477 F.2d 349, 353 (2d Cir. 1973) (declining to contravene the language in the CSA because "the present state of knowledge of the effects of mari[j]uana is still incomplete and marked by much disagreement and controversy"); *Pickard*, 100 F. Supp. 3d at 1008-09 (positing that continued disagreements "among reputable scientists and practitioners" concerning marijuana's effects suggest that "Congress could still rationally choose one side of the debate over the other"); *Kuromiya v. United States*, 37 F. Supp. 2d 717, 727 (E.D. Pa. 1999) ("The ongoing dispute regarding the safety and usefulness of marijuana, both as a medical aid and otherwise, supports the rationality of the Act.").

⁵⁶ See *infra* notes 64, 66-68, 74, and accompanying text (explaining that in reality, the GCA prevents states from exercising this opportunity).

⁵⁷ See Act of May 15, 1862, ch. 72, 12 Stat. 387 (codified as amended at 7 U.S.C. § 2201 (2018)) (delegating the U.S. Department of Agriculture authority to regulate drugs).

⁵⁸ Federal Food, Drug & Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040

and Explosives (“ATF”) implements enforcement policies governing harmful substances such as alcohol and tobacco;⁵⁹ whereas the Alcohol and Tobacco Tax and Trade Bureau (“TTB”), an extension of the U.S. Department of Treasury, oversees federal taxation.⁶⁰

In addition to federal regulation, state governments also retain a role in governing alcohol and tobacco. First, alcohol has been a primary source of state revenue since the legislature enacted the first liquor tax

(1938) (codified at 21 U.S.C. § 301 (2018)); John P. Swann, *FDA's Origin*, FDA <https://www.fda.gov/aboutfda/whatwedo/history/forgshistory/evolvingpowers/ucml24403.htm> (last visited Apr. 4, 2018) (discussing the purposes of the FDA). For example, the federal government imposes regulations on pharmaceutical drugs by mandating clinical trials for new drug applicants. See FDA Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296 (codified at 42 U.S.C. § 282(i) (2018)).

⁵⁹ See 6 U.S.C. § 531(c) (2018); *Alcohol, Tobacco, Firearms, and Explosives Bureau*, FED. REG., <https://www.federalregister.gov/agencies/alcohol-tobacco-firearms-and-explosives-bureau> (last visited Apr. 4, 2018) (explaining that the ATF “works, directly and through partnerships, to investigate and reduce violent crime involving firearms and explosives, acts of arson, and illegal trafficking of alcohol and tobacco products”); see also *Nat'l Org. for Reform of Marijuana Laws v. Bell*, 488 F. Supp. 123, 138 (D.D.C. 1980) (“The specific exemption of alcohol and tobacco from the provisions of the CSA reflects Congress’s view that other regulatory schemes are more appropriate for alcohol and tobacco.”).

⁶⁰ *About: Alcohol and Tobacco Tax and Trade Bureau*, U.S. DEP'T TREASURY, <https://www.treasury.gov/about/history/Pages/ttb.aspx> (last visited Apr. 4, 2018) (noting that the TTB “enforces and administers laws covering the production, distribution, and use of alcohol and tobacco products and collects excise taxes on alcohol, tobacco, firearms, and ammunition” in addition to creating and enforcing tax policies associated with the alcohol and tobacco industries). Taxes on alcohol vary depending on the type of alcohol; for example, different tax rates are implemented for beer, wine, and distilled spirits. *Tax and Fee Rates*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, https://www.ttb.gov/tax_audit/atftaxes.shtml (last updated Jan. 17, 2018). Tax rates for wine are also broken down further, with differing rates for wine with 14% alcohol or less, 14-21% alcohol, over 21-24% alcohol, and differing rates for naturally sparkling wine, artificially carbonated wine, and hard cider. *Id.* Tax rates for tobacco also differ depending on the type of tobacco products; small cigarettes, large cigarettes, small cigars, large cigars, pipe tobacco, chewing tobacco, snuff, and roll-your-own tobacco all have their own tax rates. *Id.* During fiscal year 2011, TTB collected \$24 billion in excise taxes and other revenues from the alcohol, tobacco, and firearms and ammunition industries. See ALCOHOL & TOBACCO TAX & TRADE BUREAU, *FY 2013: PRESIDENT'S BUDGET SUBMISSION 4* (2013), <https://www.treasury.gov/about/budget-performance/Documents/9%20-%20FY%202013%20TTB%20CJ.pdf>. Each year, the alcohol beverage industry in the United States “pays \$7.6 billion in federal excise taxes . . . and also provides a source of tax revenue for state and local governments.” *Id.* at 6. Additionally, in fiscal year 2011, “TTB tobacco excise tax collections reached \$15.5 billion as a result of the increased tax rate imposed by the Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA).” *Id.* at 7. Due to the increase in the price of tobacco products as a result of the increased tax rates, tax revenues on tobacco are expected to decline along with consumption, resulting in an increase in illicit trade. *Id.*

in 1791.⁶¹ After a short lull during the prohibition era, regulators reinvigorated the need to cede control to state governments.⁶² Each state now has at least one agency that oversees the taxation of alcohol.⁶³ Specifically, states and municipalities have the option to control, license, or, in some cases, completely ban distribution through their administrative agencies.⁶⁴ Moreover, states may also levy taxes on tobacco without undermining the federal government's \$1.01 blanket excise tax.⁶⁵ Therefore, alcohol and tobacco provide examples of when both federal and state regulatory arms cooperate to monitor a harmful substance.

Likewise, states that have legalized the recreational use of marijuana have adopted an approach mirroring that of alcohol and tobacco.⁶⁶

⁶¹ See MELISSA BIANCHI ET AL., *CTR. FOR SCI. IN THE PUB. INTEREST, STATE ALCOHOL TAXES & HEALTH: A CITIZEN'S ACTION GUIDE* 4 (1996).

⁶² *Historical Overview*, NAT'L ALCOHOL BEVERAGE CONTROL ASSOC., <http://www.nabca.org/history> (last visited Apr. 4, 2018) (recognizing that the United States is "too large and too diverse to accept a single standard of sobriety").

⁶³ See BIANCHI ET AL., *supra* note 61, at 7; see also Jared Walczak, *How High Are Beer Taxes in Your State?*, TAX FOUND. (June 7, 2017), <https://taxfoundation.org/beer-taxes-state> (listing the excise tax rate on beer in each state).

⁶⁴ See Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, in *SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY* 31, 33-34 (Carole J. Jurkiewicz & Murphy J. Painter eds., 2008). In control states, the government retains "management of distribution and retail" of alcohol, essentially creating a state-run monopoly. *Id.* at 13. In contrast, in license states, private entities obtain licenses from the government to distribute alcohol. *Id.* at 13-14. See generally Hunter Schwarz, *Where in the United States You Can't Purchase Alcohol*, WASH. POST (Sept. 2, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/02/where-in-the-united-states-you-cant-purchase-alcohol> (comparing the differences between counties that are "dry," "partially dry," and "wet" in their alcohol regulation).

⁶⁵ Ann Boonn, *State Cigarette Excise Tax Rates & Rankings*, CAMPAIGN FOR TOBACCO-FREE KIDS (Jan. 9, 2018), <https://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf> (identifying tobacco taxes as one of the most predictable sources of state revenue). State tax rates vary: Virginia taxes tobacco the least — at \$0.30 per pack — while New York taxes tobacco the most — at \$4.35 per pack. *Id.* Additionally, individual cities may choose to tax tobacco at an even higher rate than states. *Id.* (providing that Chicago imposes a \$6.16 excise tax, compared to Illinois, which imposes a \$1.98 excise tax).

⁶⁶ See Nicole Flatow, *Six Ways Colorado Will Regulate Marijuana Like Alcohol*, THINKPROGRESS (May 29, 2013, 1:00 PM), <http://thinkprogress.org/justice/2013/05/29/2070641/five-ways-colorado-will-regulate-marijuana-like-alcohol> (noting the similarities between the retail of marijuana and the retail of alcohol, such as limiting who may obtain a license to distribute marijuana, establishing state oversight and testing of marijuana, and implementing regulations to combat driving a motor vehicle while under the influence of marijuana); see also Benjamin M. Leff, *Tax Benefits of Government-Owned Marijuana Stores*, 50 UC DAVIS L. REV. 659, 664 (2016) (contending that "many states have experimented with state control of liquor sales,

The Colorado Constitution demonstrates this resemblance, even explicitly suggesting in one provision that “the use of marijuana should be . . . taxed in a manner similar to alcohol.”⁶⁷ First, at a local level, municipalities maintain the option to control, license, or completely ban the retail of marijuana.⁶⁸ For example, the distribution of marijuana is popular in the Denver metro area; however, 228 out of 321 municipalities in Colorado have “opted out” of marijuana commercialization.⁶⁹ Second, states have established government

but there are reasons to believe that marijuana may be significantly more suited to a state-controlled market than alcohol”).

⁶⁷ COLO. CONST. art. XVIII, § 16, cl. 1(a).

⁶⁸ See, e.g., *id.* § 16, cl. 5(f) (“A locality may prohibit the operation of marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana stores through the enactment of an ordinance or through an initiated or referred measure.”); Measure 91 (Or. 2014) (approving the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, § 60 (Or. 2014)) (“The governing body of a city or a county . . . shall order an election on the question whether the operation of licensed premises shall be prohibited in the city or county.”). Note that while the process to legalize marijuana varies by state, all states do require a number of checks on any proposal before an initiative appears on a general election ballot. For example, in Colorado, the proponent of a constitutional amendment must submit it to the legislative council for a public review and comment hearing, receive a threshold number of valid signatures, and achieve a majority of the vote on a general election ballot. See *Statement of Sufficiency: Proposed Initiative 2011–2012 #30*, COLO. DEP’T ST. (Feb. 27, 2012), <http://www.sos.state.co.us/pubs/elections/Initiatives/ballot/Statements/2012/SufficiencyProp30.pdf>. Amendment 64 — which proposed to legalize marijuana — received 90,466 initial signatures and passed the general election ballot in 2012 upon receiving just over 55% of the vote. See *Colorado Marijuana Legalization Initiative: Amendment 64*, BALLOTPEdia, [https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative,_Amendment_64_\(2012\)](https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative,_Amendment_64_(2012)) (last visited Apr. 4, 2018). Washington enacts a similar procedure but requires fewer signatures. See *Filing Initiatives and Referenda in Washington State*, WASH. SECRETARY ST., https://www.sos.wa.gov/_assets/elections/initiatives/initiative%20and%20referenda%20handbook%202017%20.pdf (last visited Apr. 4, 2018). Ballot Initiative 502, legalizing marijuana in Washington, also passed by just over 55% of the vote in 2012. See *Washington Marijuana Legalization and Regulation, Initiative 502*, BALLOTPEdia, [https://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation,_Initiative_502_\(2012\)](https://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation,_Initiative_502_(2012)) (last visited Apr. 4, 2018). For more details on how recreational marijuana has become legal in Oregon, Alaska, California, Massachusetts, and the District of Columbia, see generally *History of Marijuana on the Ballot*, BALLOTPEdia, https://ballotpedia.org/History_of_marijuana_on_the_ballot (last visited Apr. 4, 2018).

⁶⁹ See John Aguilar, *Marijuana Gap Divides Colorado Towns that Sell Pot, Those that Don’t*, DENVER POST (Jan. 1, 2016, 1:52 PM), <http://www.denverpost.com/2016/01/01/marijuana-gap-divides-colorado-towns-that-sell-pot-those-that-dont> (describing the tension between “communities friendly to the sale of recreational marijuana” and communities that are “totally pot-shop-free” as a “David-and-Goliath dynamic”); Clarissa Cooper, *Colorado Profits, but Still Divided on Legal Weed*, CTR. FOR PUB. INTEGRITY (Aug. 16, 2015, 5:00 AM), <https://www.publicintegrity.org/2015/08/16/>

agencies to regulate and enforce the retail and consumption of marijuana.⁷⁰ Third, states have promulgated tax schemes administering how much to excise and whom the proceeds should benefit.⁷¹ In fact, substantial state revenue from marijuana taxes has poured into states like Colorado, which has allocated about \$40

17841/colorado-profits-still-divided-legal-weed; see also *Amendment 64 Allows for the Local Governments to Regulate the Marijuana Industry*, SMART COLO., <http://smartcolorado.org/city-county-status> (last visited Apr. 4, 2018) (listing, by county, the jurisdictions within Colorado and whether each permits or prohibits the sale of marijuana). Compare Rosemary McClure, *Exploring Colorado's Cannabis Tourism Scene in Denver*, L.A. TIMES (Sept. 26, 2016, 6:30 AM), <http://www.latimes.com/travel/la-tr-colorado-20160824-snap-story.html> (providing that tourists can sign up for culinary classes in which marijuana is the main ingredient), with *Colorado Towns Opting out of Retail Marijuana Sales, with Good Reasons*, GAZETTE (Aug. 11, 2013, 1:25 PM), <http://gazette.com/colorado-towns-opting-out-of-retail-marijuana-sales-with-good-reasons/article/1504705> (forecasting that “potential markets for over-the-counter pot sales . . . are quickly dwindling”). Furthermore, one municipality in particular, North Bonnevill, Washington, has elected to retain control over its retail of marijuana, creating the first government-owned marijuana shop in the country. Evan Bush, *Here's a First: Tiny Town Will Open Its Own Pot Shop*, SEATTLE TIMES (Mar. 5, 2015, 7:45 PM), <http://www.seattletimes.com/seattle-news/heres-a-first-tiny-town-will-open-its-own-pot-shop>; see also Leff, *supra* note 66, at 661 (contending that governments electing to retain control of marijuana dispensaries “solve[] the federal income tax problem faced by [private] marijuana sellers” and avoid the conflict posed between federal and state tax provisions).

⁷⁰ See, e.g., *About the OLCC*, OR. LIQUOR CONTROL COMM'N, http://www.oregon.gov/olcc/Pages/about_us.aspx (last visited Apr. 4, 2018) (explaining that the “Oregon Liquor Control Commission (OLCC) is the agency responsible for regulating the sale and service of alcoholic beverages in Oregon by administering the state’s Liquor Control Act and regulating the sale of recreational marijuana”); *FAQs on Taxes*, WASH. ST. LIQUOR & CANNABIS BOARD, <http://www.liq.wa.gov/mj2015/faqs-on-taxes> (last visited Apr. 4, 2018) (describing the Washington State Liquor and Cannabis Board’s influence on taxes and the questions typically asked by the public); *Marijuana Enforcement*, COLO. DEP’T REVENUE, <https://www.colorado.gov/pacific/enforcement/marijuanaenforcement> (last visited Apr. 4, 2018) (designating the “Marijuana Enforcement Division” of the Colorado Department of Revenue to administer and enforce medical and retail marijuana laws and regulation).

⁷¹ See COLO. CONST. art. XVIII, § 16, cl. 5(d) (directing an “excise tax to be levied upon marijuana sold or otherwise transferred by a marijuana cultivation facility to a marijuana product manufacturing facility”); WASH. REV. CODE § 69.50.535 (2018) (detailing the allocation of revenue from the marijuana excise tax to measures such as a youth drug prevention, research, and public education program voted into law from Washington Initiative Measure No. 502, § 27). Oregon established a separate Oregon Marijuana Account, which receives the marijuana taxes that the Department of Revenue collects and distributes a specific percentage of funds to other accounts such as the Common School Fund, Mental Health Alcoholism and Drug Services Account, and the State Police Account. H.B. 2041, 78th Leg. Assemb. (Or. 2015).

million of its \$79 million in marijuana tax revenue to constructing new schools and funding youth programs.⁷² Despite reported medical benefits and the enormous revenue that the taxation of marijuana on the state level generates, marijuana remains a Schedule I drug in the eyes of the federal government.

C. *The Federal and State Interplay of Marijuana: Section 922(g)(3)*

The clash between state decriminalization and continued federal criminalization of marijuana has presented a variety of issues that arise when federal agencies enforce its marijuana policy in states that have legalized the drug.⁷³ In some instances, lawful marijuana use under state law may disqualify individuals from certain rights or benefits under federal law.⁷⁴ For example, the U.S. Department of Housing and

⁷² Cooper, *supra* note 69; Molly Jackson, *Colorado to Send Extra Marijuana Revenue to Schools*, CHRISTIAN SCI. MONITOR (Nov. 9, 2015), <http://www.csmonitor.com/USA/Education/2015/1109/Colorado-to-send-extra-marijuana-revenue-to-schools> (praising state policy that apportioned “\$40 million . . . to school construction, \$2.5 million to drug education, and another \$2 million to other youth programs”). Breaking down the 27.9% marijuana tax in Colorado, the aggregate is comprised of 2.9% state Colorado sales tax, “10% marijuana sales tax,” and “15% excise tax on the average market rate of retail marijuana.” See Robert W. Wood, *Marijuana Tax up in Smoke? Don't Worry, Feds Plot 50% Tax*, FORBES (Feb. 16, 2015, 1:25 AM), <http://www.forbes.com/sites/robertwood/2015/02/16/marijuana-tax-up-in-smoke-dont-worry-feds-plot-50-tax/2/#745a89375797>. Washington's Office of Financial Management has predicted that the state's marijuana tax will bring in more than \$1 billion in the four years beginning in July 2015. See Kate Smith, *Washington Expects Pot Sales Tax Revenue Surge to \$1 Billion*, BLOOMBERG (Oct. 23, 2015, 7:50 AM), <http://www.bloomberg.com/news/articles/2015-10-23/washington-expects-pot-sales-tax-revenue-surge-to-1-billion>. “In its first full year of sales, from July 1, 2015 to June 30, 2016, Washington state collected \$62 million in marijuana excise taxes, \$10 million in state sales taxes, \$1.3 million in state [business and occupation] taxes, and \$3.6 million in local sales taxes . . .” See Joseph Bishop-Henchman & Morgan Scarboro, *Marijuana Legalization and Taxes: Lessons for Other States from Colorado and Washington*, TAX FOUND. (May 12, 2016), <https://taxfoundation.org/marijuana-taxes-lessons-colorado-washington>. Similarly, Oregon experienced a surge in tax revenue; the state began taxing marijuana sales on February 1, 2016, and reported \$3.48 million in tax revenue from February 1 to March 4, with 40% going to education efforts. See Julia Zorthian, *Oregon Just Made \$3.48 Million from Marijuana*, TIME (Mar. 17, 2016), <http://time.com/4263411/oregon-marijuana-tax-revenue>.

⁷³ For purposes of this Article, “lawful” and “unlawful” marijuana use is defined according to the law of a particular jurisdiction. For instance, in Colorado, “lawful” marijuana use includes both medicinal and recreational use. However, in Florida, “lawful” marijuana use only includes medicinal use.

⁷⁴ See, e.g., 42 U.S.C. § 13661(a), (b)(1), (c)(1) (2018) (allowing the owners of federal public housing to deny tenancy to individuals who were previously evicted for drug-related criminal activity, who are currently using controlled substances, or

Urban Development (“HUD”) requires landlords to evict any federally assisted tenant who is using marijuana, “even if [marijuana use] is permitted under state law.”⁷⁵ Therefore, federal agencies inconsistently interpret and enforce the CSA, struggling to reconcile the conflict posed between state and federal law pertaining to marijuana.

The GCA provides another wearisome example of the conflict between the lawful use of marijuana under state law and unlawful use under federal law. The GCA prohibits any person who is an “unlawful user of or addicted to any controlled substance,” as defined by the CSA, from possessing “any firearm or ammunition.”⁷⁶ Because the

whose household members were involved in any drug-related criminal activity); 49 C.F.R. § 40.151(e)-(g) (2017) (disallowing medical marijuana as “a legitimate medical explanation” for a federal transportation employee’s positive drug test result); see also COLO. REV. STAT. § 24-34-402.5(1) (2018) (stating that discharging an employee based on “lawful” outside-of-work activities is discriminatory and illegal); *Coats v. Dish Network, LLC*, 350 P.3d 849, 850 (Colo. 2015) (clarifying that “an activity such as medical marijuana use that is unlawful under federal law is not a ‘lawful’ activity under section 24–34–402.5”). Moreover, because federal regulators penalize financial institutions that partner with lawful marijuana dispensaries, it is difficult for marijuana dispensaries to deposit their earnings into federally insured banks. See Sophie Quinton, *Why Marijuana Businesses Still Can’t Get Bank Accounts*, PEW CHARITABLE TRUSTS (Mar. 22, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/22/why-marijuana-businesses-still-cant-get-bank-accounts> (identifying that many lawful state marijuana dispensaries cannot open bank accounts because “federal law prohibits banks and credit unions from taking marijuana money”). Critics argue that the lack of access to bank accounts incites violence; dispensaries, storing much of their cash in-house or in warehouses, are targets for criminals. See David Migoya, *Effort to Open Banking System to Legal Marijuana Businesses Stalls in U.S. House*, DENVER POST (June 22, 2016, 2:13 PM), <http://www.denverpost.com/2016/06/22/colorado-marijuana-banking-system-stalls-senate-house> (referring to an armed robbery in a dispensary as “an example [of] why the marijuana industry needs banking [reform]”).

⁷⁵ See 42 U.S.C. § 13662(a) (2018) (“[A]n owner of federally assisted housing . . . [may] terminate the tenancy or assistance for any household with a member . . . whose illegal use . . . of a controlled substance . . . is determined by the public housing agency or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.”); Memorandum from Benjamin T. Metcalf, Deputy Assistant Sec’y for Multifamily Hous. Programs, U.S. Dep’t of Hous. & Urban Dev. on Use of Marijuana in Multifamily Assisted Properties (Dec. 29, 2014) (requiring that owners of federally assisted housing “deny admission to . . . [any individual] determined to be illegally using a controlled substance (e.g., marijuana)”). Alternatively, in other certain circumstances, lawful marijuana use under state law may not disqualify individuals entitled to benefits under federal law. See, e.g., Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 249, 129 Stat. 2332, 2332-33 (asserting that the funds given to the Department of Veterans Affairs can be used in a way that would “interfere with the ability of a veteran to participate in a State-approved medical marijuana program”).

⁷⁶ 18 U.S.C. § 922(g)(3) (2018).

CSA places marijuana in Schedule I, the GCA bars marijuana users from possessing firearms or ammunition.⁷⁷ After states began legalizing recreational marijuana, the U.S. Department of Justice (“DOJ”) issued a memorandum in an effort to prevent any confusion and evinced its intention to continue prosecuting individuals under § 922(g)(3).⁷⁸ Accordingly, individuals who lawfully possess marijuana under state law are “unlawful users” under the GCA, thereby forfeiting their right to possess a firearm.

Legislative history often clarifies ambiguous terms in a statute; however, the legislative history of the GCA sheds no such light on the meaning of an “unlawful user.”⁷⁹ Congress’s goal in enacting the GCA is seemingly broad: it sought to “fight against crime and violence” without “discourag[ing] or eliminat[ing] the private ownership or use of firearms by law-abiding citizens.”⁸⁰ The only guidance Congress furnished was its intention to “make it a little harder for drug addicts, muggers, deranged individuals, and other criminal elements to procure handguns.”⁸¹ In fact, the Supreme Court has inferred from the legislative history that Congress’s goal was to simply “keep firearms out of the hands of ‘presumptively risky people.’”⁸²

⁷⁷ See *id.*; Controlled Substances Act, 21 U.S.C. § 802 (2018) (defining a “controlled substance” as a substance “included in [S]chedule I, II, III, IV, or V”).

⁷⁸ See § 922(g)(3) (criminalizing concurrent possession of drugs and a firearm). Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice on Guidance Regarding Marijuana Enforcement to All United States Attorneys (Aug. 29, 2013) (advising all United States Attorneys to continue following the CSA and disregard any state laws to the contrary, regarding marijuana in particular). On April 5, 2017, Attorney General Jeff Sessions reemphasized this goal, indicating that the Trump administration will “undertake a review of existing policies in the areas of charging, sentencing, and marijuana to ensure consistency with the Department’s overall strategy on reducing violent crime” Memorandum from Jeff Sessions, Attorney Gen., U.S. Dep’t of Justice on Update on the Task Force on Crime Reduction and Public Safety to All Heads of Department Components and United States Attorneys (Apr. 5, 2017).

⁷⁹ *United States v. Ocegueda*, 564 F.2d 1363, 1365 (9th Cir. 1977) (“Neither [§] 922([g])(3) nor its legislative history provides a definition of ‘unlawful user.’”).

⁸⁰ Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1213-14; see also Lynn Murtha & Suzanne L. Smith, “An Ounce of Prevention . . .”: *Restriction Versus Proaction in American Gun Violence Policies*, 10 ST. JOHN’S J. LEGAL COMMENT. 205, 211, 220 (1994) (purporting that the GCA “represented a major effort on the part of the federal government to curb growing use of firearms in violent crimes,” but doubting whether it has “any effect on reducing existing crime”).

⁸¹ 132 CONG. REC. H1689-03 (1986).

⁸² *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111 n.6 (1983); see also *Barrett v. United States*, 423 U.S. 212, 218 (1976) (deducing that the GCA “sought broadly to keep firearms away from the persons Congress classified as potentially

Legislative history is equally unhelpful in reconciling the conflict between state legalization and federal prohibition of marijuana consumption. Courts have noted the absence of any guidance from Congress, presumably illuminating Congress's failure to anticipate such a conflict.⁸³ The only instructive guidance must be deduced from subsequent amendments to the GCA. As originally enacted in 1968, the GCA did not mention marijuana or the potential interplay between the possession of a firearm and the lawful consumption of marijuana.⁸⁴ In October of 1968, however, Congress amended the GCA to expand its scope and specifically capture users of marijuana — but no other drug — in its dragnet.⁸⁵ Finally, in 1986, Congress again amended the GCA to reflect its current iteration: Congress removed any mention of marijuana and ambiguously prohibited any “unlawful user of or addicted to any controlled substance” from possessing “any firearm or ammunition.”⁸⁶ Confusion has since spread, causing courts, legal scholars, and citizens to struggle to understand the law and the breadth of law enforcement's prosecutorial discretion.⁸⁷

The ambiguity in the GCA and Congress's failure to clarify it forced lower courts to fashion a judicial test to determine the GCA's prosecutorial scope. In an attempt to clarify the scope of the GCA and

irresponsible and dangerous”). Notwithstanding the Supreme Court's interpretation, lower courts have expressed confusion and frustration with the ambiguous language of the statute. *See* *United States v. Freitas*, 59 M.J. 755, 757 (N.M. Ct. Crim. App. 2004) (criticizing the opacity of the statute and noting that “[w]e are left only with the vague statement in the Senate Report that Congress intended to keep guns out of the hands of those who have criminal backgrounds”); *Willis v. Winters*, 253 P.3d 1058, 1065 (Cal. 2011) (explaining that the GCA was designed “to keep firearms out of the hands of ‘presumptively risky people’”).

⁸³ *James v. City of Costa Mesa*, 684 F.3d 825, 833 (9th Cir. 2012) (“There is not one word in the statute or in the legislative history suggesting that Congress sought to exclude from the definition of illegal drug use the use of a controlled substance that was lawful under state law but unlawful and unauthorized under federal law.”).

⁸⁴ *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 922(f), 82 Stat. 197, 231 (prohibiting “any person who is under indictment or who has been convicted [of a felony]” from possessing any firearm or ammunition).

⁸⁵ *See* Gun Control Act of 1968, Pub. L. No. 90-618, § 922(g), 82 Stat. 1213, 1221 (codified at 18 U.S.C. § 922(g)(3) (2018)) (prohibiting any “unlawful user of or addicted to mari[j]uana” from possessing any firearm or ammunition).

⁸⁶ Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 452 (1986) (codified at 18 U.S.C. § 922(g)(3)).

⁸⁷ *See* Melissa Heelan Stanzione, *Marijuana Today: A Mixed Bag*, BLOOMBERG (Sept. 14, 2016), <https://www.bna.com/marijuana-today-mixed-b57982076978> (noting the confusion that the conflict between marijuana policies of the federal government and the states caused, but suggesting that a “growing acceptance of marijuana will eventually resolve all the mixed messages”).

define “unlawful user,” courts confined their focus on two factors: (1) the regularity of the drug use, and (2) the contemporaneous possession of the drug and firearm.⁸⁸ The judiciary’s test is tautological, however. While the test seeks to define unlawful *user*, it fails to expressly include unlawful *use* in its analysis;⁸⁹ courts solely focus on the “judicially created temporal nexus” between gun possession and drug use.⁹⁰ By conflating an element of the analysis with the analysis itself, courts omit the integral factor of unlawful use.⁹¹ Therefore, the test is more aptly characterized as (1) the unlawful possession or use of a drug, pursuant to the CSA; (2) the regularity of the drug use; and (3) the contemporaneous possession of the drug and a firearm.

Even assuming the drug at issue is “unlawful” under the CSA, the judicially created test fails to implicate three types of risky individuals. First, the test permits an individual to simultaneously consume methamphetamine and operate a firearm, so long as he is merely an occasional user of methamphetamine. Although the methamphetamine user is consuming a dangerous, mind-altering substance, he does not use the drug with “regularity.” Second, the test permits an individual who regularly consumes methamphetamine to

⁸⁸ See *United States v. Augustin*, 376 F.3d 135, 139 (3d Cir. 2004) (“[T]o be an unlawful user, one needed to have engaged in regular use over a period of time proximate to or contemporaneous with the possession of the firearm.”); *United States v. Purdy*, 264 F.3d 809, 812-13 (9th Cir. 2001) (“[T]o sustain a conviction under § 922(g)(3), the government must prove . . . that the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his . . . possession of a firearm.”).

⁸⁹ See *Purdy*, 264 F.3d at 811 (noting that “the term ‘unlawful user’ was not defined in the statute or its legislative history,” and analyzing only the contemporaneousness and regularity of the defendant’s drug use).

⁹⁰ *United States v. Turnbull*, 349 F.3d 558, 561 (8th Cir. 2003).

⁹¹ There are two problems with the judicially created test. First, the test created confusion in the judiciary: the test pays mere lip service to “unlawful use” and focuses on regularity and contemporaneousness to eliminate any ambiguities, yet this definition accomplishes anything but clarity. See, e.g., *United States v. Patterson*, 431 F.3d 832, 835 (5th Cir. 2005) (rejecting defendant’s contention that § 922(g)(3) violates the Second Amendment and is vague and overbroad); *Purdy*, 264 F.3d at 812 (rejecting a void-for-vagueness challenge to § 922(g)(3) where defendant’s “drug use was sufficiently consistent, ‘prolonged,’ and close in time to his gun possession to put him on notice that he qualified as an unlawful user of drugs”). Indeed, it defines “unlawful use” as regular drug use and contemporaneousness — essentially as helpful as defining a “dog” as a creature with fur. Second, the test fails to prosecute dangerous criminals: the scope of the test fails to include dangerous individuals, such as a cartel member trafficking heroin, as long as he does not make a “regular” habit out of it. See *infra* Section II.B.

operate a firearm, so long as he does not consume methamphetamine on the day he operates the firearm. Undoubtedly, an individual who consistently consumes methamphetamine is the type of person predisposed to dangerous behavior, but he may operate a firearm so long as he is not under the influence at that moment. Lastly, the test permits an individual who frequently traffics methamphetamine to operate a firearm so long as he does not consume that methamphetamine. As illustrated, the test's prosecutorial scope is very narrow; it implicates only an individual who regularly consumes drugs, is currently under the influence of that drug, and simultaneously possesses a firearm.

Challengers have argued that § 922(g)(3) is unconstitutional on various grounds. First, while a statute that restricts gun use naturally implicates the Second Amendment, courts have consistently held that § 922(g)(3) does not violate an individual's right to bear arms.⁹² Second, defendants have contended that the criminal statute is unconstitutionally vague because it fails to define the criminal offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"; courts have regularly rejected this argument, however.⁹³ Third, in response to various Supremacy Clause challenges, courts have disagreed on whether the CSA preempts state legalization of marijuana.⁹⁴ The Supremacy Clause

⁹² See *United States v. Carter*, 750 F.3d 462, 470 (4th Cir. 2014) (holding that "§ 922(g)(3) proportionally advances the government's legitimate goal of preventing gun violence and is therefore constitutional under the Second Amendment"); *United States v. Dugan*, 657 F.3d 998, 999-1000 (9th Cir. 2011) (upholding § 922(g)(3) against a Second Amendment challenge because Congress may constitutionally prohibit illegal drug users from possessing firearms); *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010) (finding that Congress acted constitutionally when it enacted § 922(g)(3) because "prohibiting illegal drug users from firearm possession . . . is substantially related to the important governmental interest in preventing violent crime").

⁹³ *Patterson*, 431 F.3d at 836 (quoting *United States v. Gray*, 96 F.3d 769, 776 (5th Cir. 1996)); see also *Turnbull*, 349 F.3d at 561 (rejecting a void-for-vagueness challenge to § 922(g)(3) where defendant's "drug use was sufficiently consistent, 'prolonged,' and close in time to his gun possession to put him on notice that he qualified as an unlawful user of drugs"); *United States v. Edwards*, 182 F.3d 333, 335-36 (5th Cir. 1999) (finding that the application of § 922(g)(3) was constitutional because an ordinary person would understand that the defendant's actions — being in possession of marijuana three different times when confronted by police, being in possession of cocaine, and admitting use of marijuana, while possessing a firearm — establish him as an unlawful user of a controlled substance while in possession of a firearm).

⁹⁴ Compare *Cipollone v. Liggett Grp. Inc.*, 505 U.S. 504, 516 (1992) (reaffirming

states that federal law generally supersedes state law, but the CSA also has an explicit preemption clause limiting Congress's authority to preclude state action in this area.⁹⁵ Lastly, the law has been challenged pursuant to the Tenth Amendment Anti-Commandeering Clause, which prohibits the federal government from compelling state actors to enforce federal laws in certain situations; however, these challenges have only been minimally successful.⁹⁶

II. READY, AIM, FIRE: THE CLASSIFICATION OF MARIJUANA MISSES THE TARGET AND WOUNDS FEDERALISM

Unsurprisingly, the decriminalization of recreational marijuana by state governments along with the reassurance of its criminality by the

that even if a state law authorizes the use of marijuana, the state law is “without effect” if it conflicts with federal law), *and* *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 123 (D.D.C. 2001) (confirming that taking measures to enforce the CSA is within lawful federal government authority regardless of any conflicting state law), *with* *Kirby v. County of Fresno*, 195 Cal. Rptr. 3d 815, 831 (Cal. Ct. App. 2015) (deciding that “it is possible for local law enforcement agencies and officers to comply with their obligation not to arrest persons with valid [medical marijuana] identification cards and comply with the CSA” and that “the [CSA] does not require local law enforcement officers to arrest persons who possess or cultivate marijuana”), *and* *Willis v. Winters*, 253 P.3d 1058, 1068 (Or. 2011) (en banc) (holding that state law enforcement officers cannot refuse to issue a concealed handgun license to an individual simply because he used medical marijuana in violation of federal law but in compliance with state law).

⁹⁵ See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding”); 21 U.S.C. § 903 (2018) (asserting that Congress does not intend to preempt any relevant 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”); see also TODD GARVEY, CONG. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE & FEDERAL LAWS 9 (2012) (explaining that a conflict between the CSA and a state law only exists when “it is ‘physically impossible’ to comply with both the state and federal law,” or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”); *infra* note 137 (explaining that despite a preemption argument, federal and state marijuana laws can in fact coexist, but clarifying that the discussion becomes entirely moot if the federal government deschedules marijuana).

⁹⁶ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); see *Printz v. United States*, 521 U.S. 898, 935 (1997) (deeming portions of the GCA amendments requiring interim immediate background checks unconstitutional); see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (detailing that a general presumption against federal preemption is raised when a law restrains the “historic police powers of States”).

federal government has elicited mass confusion. The national conversation surrounding marijuana, whether involving laymen or legal scholars, raises the same question: is marijuana actually legal? Indeed, uncertainty has now spread across the country, affecting states, like California and Massachusetts, that just recently legalized recreational marijuana.⁹⁷ Notwithstanding the opportunity for constitutional scholars to sift through principles of federalism, the resolution requires a practical solution; the federal government, by continuing to prosecute individuals with related violations, may eliminate federal entitlements from millions of unsuspecting American citizens who legally smoke marijuana in a state that endorses its consumption.⁹⁸

Individuals who lawfully smoke marijuana risk losing their right to own a firearm or federal entitlements, such as federal housing subsidies, because marijuana is classified as a Schedule I drug.⁹⁹ This continued classification is inappropriate, however. President Nixon placed marijuana in Schedule I, ignoring expert recommendations advocating for reclassification, and instead relied upon racially prejudiced motivations.¹⁰⁰ Additionally, justifying marijuana's

⁹⁷ See Ben Gilbert, *4 States Just Voted to Make Marijuana Completely Legal — Here's What We Know*, BUS. INSIDER (Nov. 9, 2016, 8:52 AM), <http://www.businessinsider.com/marijuana-states-legalized-weed-2016-11/#1-massachusetts-1> (reporting that, in addition to California and Massachusetts, Nevada and Maine also completely legalized recreational marijuana — meaning its use, sale, and consumption).

⁹⁸ Cf. *Medical Marijuana Patient Numbers*, MARIJUANA POL'Y PROJECT (Feb. 26, 2018), <https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers> (estimating that 2,254,782 “state-legal patients” consume medical marijuana in the United States). Although polls vary on the number of actual users in the states that have legalized recreational marijuana, the sales numbers provide a better picture. In 2015, the state of Colorado sold \$996.2 million in legal medical and recreational marijuana. Tom Huddleston, Jr., *Colorado's Legal Marijuana Industry Is Worth \$1 Billion*, FORTUNE (Feb. 11, 2016, 10:19 AM), <http://fortune.com/2016/02/11/marijuana-billion-dollars-colorado>. Pundits predict that Colorado, which has collected millions of dollars in tax revenue already, will surpass the \$1 billion mark in sales in 2016. *Id.* Moreover, some research predicts that sales in the United States could approach \$22 billion in sales by 2020. *Id.* Clearly, the conflict involving state legality and federal illegality will only be exacerbated as more states choose to legalize marijuana consumption.

⁹⁹ See, e.g., *Colorado: Marijuana-Federal Implications*, COLORADO.GOV, <https://www.colorado.gov/pacific/marijuana/federal-implications> (last visited Apr. 4, 2018).

¹⁰⁰ See Lopez, *supra* note 50 (“The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.” (quoting John Ehrlichman)).

continued placement in Schedule I remains difficult when an abundance of research demonstrates its various medical benefits and defies a misperception that marijuana causes violent behavior.¹⁰¹ Further, a nationwide regulatory scheme is unnecessary to fulfill Congress's initial intent for § 922(g)(3): to prevent presumptively dangerous people from possessing firearms. Section 922(g)(3) is over-inclusive because it targets lawful marijuana users without violent tendencies; it is under-inclusive because it fails to target riskier, more violent individuals. Maintaining marijuana in Schedule I also effectively silences any state input regarding its regulation. Consequently, there are other, more effective ways to regulate marijuana — for example, mimicking the regulatory schemes of alcohol and tobacco — that would avoid the conflict with § 922(g)(3) altogether.

A. *Marijuana Does Not Belong in Schedule I*

Although courts have consistently upheld the Schedule I classification of marijuana, vigorous debate persists within law and medicine as to whether the classification remains appropriate. First, transcripts from President Nixon's administration evinced a racially driven motive for originally placing marijuana in Schedule I. Despite numerous reports rebutting marijuana's harmful effects, the administration ignored any recommendations to reclassify. Second, current data also suggests potential benefits of marijuana prompting twenty-eight independent sovereigns — twenty-seven states and the District of Columbia — to undergo the extensive process of amending their states' laws to legalize marijuana. Accordingly, not only was the initial placement of marijuana in Schedule I misguided, but its continued classification also has no compelling justifications.

1. Backward Looking: Marijuana Never Should Have Been Placed in Schedule I

To influence new legislation, marijuana advocates all over the country have been protesting marijuana's Schedule I classification;¹⁰²

¹⁰¹ See *infra* note 136 and accompanying text (discussing the untenable correlation between marijuana use and violence).

¹⁰² See, e.g., Nick Buffo, *Protesters Push for Legalizing Marijuana at Annual Festival*, WKOW 27 (Oct. 17, 2016, 11:48 PM), <http://www.wkow.com/story/33299621/2016/10/Sunday/protesters-push-for-legalizing-marijuana-at-annual-festival> (detailing a protest for legalization in Madison, Wisconsin at the "46th annual Madison Hemp Festival"); Bailey Cline, *Protesters Gather in Dunn Meadow for Legalization Rally*, IND.

however, this contentious debate began over forty years ago. During the floor debates for the 1970 Comprehensive Drug Abuse Prevention and Control Act, Congress was considering the appropriate schedule classification for marijuana.¹⁰³ Dr. Stanley F. Yolles testified to Congress that marijuana does not cause many of the dangerous psychotropic and physical effects that some had feared.¹⁰⁴ In addition to Dr. Yolles' testimony, Congress commissioned a report, seeking a recommendation for the appropriate scheduling of marijuana.¹⁰⁵ Although the commission did not recommend broad legalization, it also did not recommend classifying marijuana in Schedule I.¹⁰⁶

The Commission's recommendation to decriminalize possession of marijuana, coupled with the Senate's legislative bills to legalize it, flies in the face of the Nixon Administration's ultimate placement of marijuana in Schedule I.¹⁰⁷ President Nixon sacrificed the integrity of the presidency to exploit his authority under the CSA and advance a policy cloaked in bigotry.¹⁰⁸ President Nixon's advisor, John

DAILY STUDENT (Oct. 30, 2016, 8:49 PM), <http://www.idsnews.com/article/2016/10/marijuana-legalization-rally-held-in-dunn-meadow> (describing a protest in Bloomington, Indiana, where supporters gathered around 4:20 PM to voice their support for legalization); Erika Ferrando, *Issue 7 Supporters Protest in Front of Ark. Supreme Court*, THV11 (Oct. 28, 2016, 6:25 PM), <http://www.thv11.com/news/local/issue-7-supporters-protest-in-front-of-ark-supreme-court/343985288> (reporting on a protest for the legalization of medical marijuana in Little Rock, Arkansas, after officials removed the potential amendment from the upcoming election ballot).

¹⁰³ See H.R. REP. NO. 91-1444, at 4577-80 (1970).

¹⁰⁴ See *id.* at 4578 (1970) (advocating that "marijuana does not cause physical addiction"); see also *supra* note 48 and accompanying text.

¹⁰⁵ See generally THE NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, *supra* note 46, at 6.

¹⁰⁶ See *id.* ("[W]e recommend only a decriminalization of possession of marijuana for personal use on both the State and Federal levels.").

¹⁰⁷ THE NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, *supra* note 46, at 6 (recommending that "[p]ossession of marijuana for personal use would no longer be an offense"); Nahas & Greenwood, *supra* note 46, at 55 (contending that "legislation [had] already been introduced in both houses of Congress" that even went "beyond the commission's recommendations").

¹⁰⁸ See *supra* note 52 and accompanying text (interviewing President Nixon's top aide, John Ehrlichman, and expounding on the administration's intention to criminalize marijuana to "disrupt" African American communities); see also Michael H. Tonry, *Marihuana: A Signal of Misunderstanding*, By National Commission on Marihuana and Drug Abuse, 82 YALE L.J. 1736, 1743 (1973) (suggesting that "President Nixon's forewarning that he would pay no heed to a recommendation favoring legalization no doubt inhibited [the commission]"); Audio tape: Meeting with Richard Nixon and H.R. Haldeman, Oval Office Conversation No. 505-4 (May 26, 1971, 10:03 AM–11:35 AM) ("You know it's a funny thing, every one of the bastards that are out for legalizing marijuana is Jewish. What the Christ is the matter with the Jews, Bob, what is the matter with them?"). Not only did President Nixon make disparaging

Ehrlichman, later admitted that the administration's drug policies were closely connected to his prejudice against certain minority groups.¹⁰⁹ Accordingly, marijuana's initial placement in Schedule I was motivated by racial animus, and the placement's principal syndicate deliberately ignored the recommendation of medical professionals and a congressional commission.

2. Forward Looking: The Justifications for Marijuana's Placement in Schedule I Are No Longer Compelling

Although Congress initially classified marijuana as a Schedule I drug, its continued classification in the most restrictive schedule has no compelling justifications. Schedule I is reserved only for drugs that have a high potential for abuse and no accepted medical use;¹¹⁰ however, current data exonerates marijuana from this inaccurate label.¹¹¹ Indeed, empirical studies refute many of the prevailing myths about marijuana, demonstrating that marijuana does not foster dependence or the potential for abuse.¹¹² Although the federal

statements about minority groups that typically used marijuana, but his Oval Office conversations demonstrate that he also sought to improperly influence the commission's findings and recommendations. See Audio tape: No. 693-1, *supra* note 52 ("I... oppose the legalization of marijuana, and that includes the sale, its possession, and its use. . . . That is my position, despite what the commission has recommended.").

¹⁰⁹ Lopez, *supra* note 50 ("The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities." (quoting John Ehrlichman)).

¹¹⁰ See *supra* notes 28–33 and accompanying text (discussing the requisites of each schedule in the CSA).

¹¹¹ Philip M. Boffey, Editorial, *What Science Says About Marijuana*, N.Y. TIMES (July 30, 2014), http://www.nytimes.com/2014/07/31/opinion/what-science-says-about-marijuana.html?_r=0 (emphasizing "the vast gap between antiquated federal law enforcement policies and the clear consensus of science that marijuana is far less harmful to human health than most other banned drugs and is less dangerous than the highly addictive but perfectly legal substances known as alcohol and tobacco").

¹¹² See, e.g., Conant v. McCaffrey, 172 F.R.D. 681, 694 n.5 (N.D. Cal. 1997) ("It is unreasonable to believe that use of medical marijuana . . . will create a significant drug problem."); Igor Grant et al., *Medical Marijuana: Clearing Away the Smoke*, 6 OPEN NEUROLOGY J. 18, 24 (2012) (contending that although marijuana may have some potential for abuse, it is more accurate to place it in Schedule III, with other drugs that have significantly higher potential for abuse). Studies have dispelled many of the myths surrounding marijuana and confirmed that marijuana is neither a narcotic nor addictive, and, is not generally a gateway drug to more dangerous drugs. See Nat'l Org. for Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 129 (D.D.C. 1980) (citing

government asserts that marijuana has no current accepted medical benefit, paradoxically, twenty-seven states and the District of Columbia have legalized either recreational or medical marijuana.¹¹³ Surely, these incongruous views on marijuana can be reconciled in empirical and anecdotal evidence rather than unsubstantiated speculation.¹¹⁴

In addition to empirical evidence, anecdotal evidence also supports the descheduling of marijuana. Marijuana shares few attributes with the other drugs listed in Schedule I.¹¹⁵ For instance, marijuana and heroin are both in Schedule I, yet heroin is a highly addictive drug that causes overdose at an alarmingly high rate.¹¹⁶ Furthermore, marijuana's medical benefits are well-established and far-reaching: patients use it to help treat conditions ranging from anxiety and

LESTER GRINSPOON, *MARIJUANA RECONSIDERED: THE MOST THOROUGH EVALUATION OF THE BENEFITS & DANGERS OF CANNABIS* 230-322 (2d ed. 1977)) (asserting that marijuana causes neither aggressive behavior nor insanity); see also GLEN HANSON ET AL., *DRUGS AND SOCIETY* 387 (6th ed. 2000) (noting that factors such as personality and social environment are much more important factors for determining whether a person will move on to harder drugs).

¹¹³ *State Marijuana Laws in 2018 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last visited Apr. 4, 2018).

¹¹⁴ See generally Grant et al., *supra* note 112, at 18-19 (detailing studies that indicate that marijuana helps stimulate appetite in patients with anorexia, cancer, or HIV/AIDS and generally helps alleviate nausea and chronic pain). A series of clinical trials has demonstrated that cannabis significantly reduces pain intensity: individuals suffering from chronic pain reported that their pain intensity decreased by 34-40% when they consumed marijuana as compared to a 17-20% decrease while using a placebo. *Id.* at 19. Furthermore, 52% of the participants reported at least a 30% decrease in their overall pain when they used cannabis, which is particularly significant because a 30% "decrease in pain intensity is generally associated with reports of improved life quality." *Id.*

¹¹⁵ Congress has placed marijuana on par with drugs such as heroin and acid, whereas cocaine and meth remain in Schedule II. See 21 C.F.R. § 1308.11 (2018); see also *United States v. Kiffer*, 477 F.2d 349, 356 (2d Cir. 1973) ("It is apparently true that there is little or no basis for concluding that mari[j]uana is as dangerous a substance as some of the other drugs included in Schedule I."); Boffey, *supra* note 111 ("Marijuana isn't addictive in the same sense as heroin, from which withdrawal is an agonizing, physical ordeal.").

¹¹⁶ Compare Lindsey Cook, *The Heroin Epidemic, in 9 Graphs*, U.S. NEWS (Aug. 19, 2015, 1:28 PM), <http://www.usnews.com/news/blogs/data-mine/2015/08/19/the-heroin-epidemic-in-9-graphs> (reporting that heroin-related deaths increased by 286% between 2002 and 2013 and that in 2013 approximately 200 in 100,000 people were addicted to heroin, a number that doubled since 2002), with Kim Bellware, *Here's How Many People Fatally Overdosed on Marijuana Last Year*, HUFFPOST (Dec. 28, 2015, 4:08 PM), http://www.huffingtonpost.com/entry/marijuana-deaths-2014_us_56816417e4b06fa68880a217 (describing a CDC report which states that there have been no deaths from marijuana overdoses).

insomnia to Alzheimer's and cancer.¹¹⁷ Therefore, by examining past rationales and assessing modern empirical research, no persuasive justifications exist for marijuana's continued placement in Schedule I.

B. *National Regulatory Scheme Is Not Necessary to Accomplish the Goals of § 922(g)(3)*

Including marijuana in Schedule I renders it impossible for states to establish a more permissive regulatory scheme than the one contemplated by Congress in the CSA. In doing so, Congress effectuated a broad, national scheme and imposed a one-size-fits-all standard. The CSA, however, fails to achieve Congress's drug enforcement priorities because lawful marijuana users are not the "presumptively risky people" that § 922(g)(3) sought to target. Aside from failing to further Congress's gun control objective, this overly broad paradigm also fails to account for state interests and severely limits a state's ability to serve as a laboratory for novel statutory experiments, such as the legalization of recreational marijuana.

¹¹⁷ See Jen Christensen, *10 Diseases Where Medical Marijuana Could Have Impact*, CNN (Apr. 16, 2015, 12:11 PM), <http://www.cnn.com/2015/04/15/health/marijuana-medical-advances> (contending that medical marijuana may be used to help treat multiple sclerosis, arthritis, and asthma); Jennifer Welsh & Kevin Loria, *23 Health Benefits of Marijuana*, BUS. INSIDER (Apr. 20, 2014, 3:03 PM), <http://www.businessinsider.com/health-benefits-of-medical-marijuana-2014-4/#it-can-be-used-to-treat-glaucoma-1> (discussing how marijuana can help treat glaucoma, epileptic seizures, and hepatitis C). In fact, scientists studying cancer have found that Cannabidiol, one of the chemical compounds in marijuana, may help prevent cells from multiplying in certain aggressive cancers. Robin Wilkey, *Marijuana and Cancer: Scientists Find Cancer Compound Stops Metastasis in Aggressive Cancers*, HUFFPOST (Sept. 9, 2012, 5:07 PM), http://www.huffingtonpost.com/2012/09/19/marijuana-and-cancer_n_1898208.html. However, some anecdotal evidence from Colorado shows the other side of marijuana usage — health issues in newborns and teenagers as well as difficulty combating driving while under the influence of marijuana. A doctor in Pueblo, Colorado, which is home to more than ninety pot growing facilities, reports seeing an increased number of infants being born with THC in their systems. Jonathan LaPook, *60 Minutes: The Pot Vote* (CBS television broadcast Oct. 30, 2016), <http://www.cbsnews.com/news/60-minutes-five-states-to-vote-on-recreational-pot>. He explains that exposure to marijuana in utero may lead to developmental and behavioral problems in early childhood. *Id.* Further, the amount of teenagers seeking medical attention following marijuana use has increased. *Id.* Because the brain is not fully developed until approximately the mid-twenties, teenagers who are heavy marijuana users (approximately four to five times a week) are more likely to have damage in areas of the brain connected to cognitive functions, including memory, attention, and ability to make decisions. *Id.* Finally, there is no field sobriety test for marijuana that is the equivalent of the breathalyzer for alcohol. *Id.* Although police are experimenting with a "roadside oral swab test," combating driving while under the influence of marijuana remains a concern for law enforcement. *Id.*

Specifically, the current method for regulating alcohol and tobacco on a national and state level is not only indicative of the ability of the federal and state governments to govern cohesively and achieve a shared goal, but it also provides a blueprint for how marijuana should be governed. Mimicking the alcohol and tobacco regulatory scheme in the marijuana context is possible under § 922(g)(3) and marijuana's current placement in Schedule I.

1. Prohibiting Legal Marijuana Users Under State Law from Owning Firearms Does Not Further Congress's Objective to Keep Guns out of the Hands of Risky People

In passing the GCA, Congress sought to “keep firearms out of the hands of presumptively risky people” — specifically, dangerous drug users.¹¹⁸ But, in doing so, the GCA cast its net too wide, improperly reeling in lawful marijuana users. Indeed, although the statute prohibits an “unlawful [drug] user” from possessing a firearm, references to “lawful” or “unlawful” drug users are notably absent from an investigation of the GCA's legislative history.¹¹⁹

Congress's initial goal was to decrease crime and improve public safety by preventing dangerous people from possessing firearms.¹²⁰ Congress emphasized, however, that it did not intend to restrict gun ownership or to keep guns away from law-abiding citizens.¹²¹ Such a broad finding of the legislative history naturally leaves the lawful marijuana user in a precarious position.

¹¹⁸ *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111 n.6 (1983).

¹¹⁹ See generally 28 U.S.C. § 921(a) (2018) (failing to define “lawful” and “unlawful” drug users, or to distinguish between the two).

¹²⁰ See *Barrett v. United States*, 423 U.S. 212, 218 (1976) (articulating that the structure of the GCA reaffirms that dangerous persons “are comprehensively barred by the [GCA] from acquiring firearms by any means”); see also 132 CONG. REC. H1696 (1986) (“Let us represent that civilized society in this House and vote for the safety of our police officers, our public officials, and every other citizen who fears that someday he or she may be looking down the barrel of a handgun.”); 114 CONG. REC. 21784 (1968) (“[W]e are convinced that a strengthened system can significantly contribute to reducing the danger of crime in the United States. No one can dispute the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses, from buying, owning, or possessing firearms.”).

¹²¹ *Rich v. United States*, 383 F. Supp. 797, 799 (S.D. Ohio 1974) (reiterating that “[t]he provisions of the Gun Control Act of 1968 were not designed to deprive every citizen access to firearms”); 131 CONG. REC. S9101 (1985) (maintaining that Congress does not want to burden “the private ownership or use of firearms by law-abiding citizens for lawful purposes”).

Nevertheless, delving deeper into § 922(g)(3) and its purpose reveals that Congress did not intend to punish the lawful marijuana user for possession of a firearm; similarly, the statute fails to capture Congress's intended targets — users of other substances who should not possess a weapon.¹²² First, a statutory interpretation of § 922(g)(3) and an investigation of the empirical studies on marijuana, which demonstrate that marijuana does not lead to violent behavior, expose that § 922(g)(3) over-extends to lawful marijuana users. Furthermore, the judicially created test improperly focuses all of its attention on the temporal nexus of the unlawful drug use, while failing to identify the boundaries of “unlawful” use. Conversely, the GCA also fails to penalize individuals that pose a greater threat from drug use and gun possession — in other words, it fails to include other, more dangerous predictors for violence. Therefore, § 922(g)(3) is both over-inclusive and under-inclusive.

a. Section 922(g)(3) Is Over-Inclusive

First, § 922(g)(3) is over-inclusive, improperly catching in its dragnet lawful marijuana users. Indeed, lawful marijuana users are not the “presumptively risky people” that Congress sought to punish.¹²³ Although a statutory construction demonstrates that an “unlawful” user according to the GCA should not include the lawful marijuana user,¹²⁴ one need not unnecessarily befall to such an abstract, textual

¹²² Of course, this Article neither advocates nor condones possession of a firearm while the user is under the influence of marijuana. On the contrary, this Article focuses on the rights of the *sober*, lawful marijuana user.

¹²³ See *supra* note 117 (illustrating the positive effects of marijuana).

¹²⁴ A statutory interpretation exercise would begin by analyzing the plain meaning of the phrase “unlawful user.” See *United States v. Mo. Pac. R.R.*, 278 U.S. 269, 278 (1929) (establishing that “where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended”). See *generally Plain-Meaning Rule*, BLACK'S LAW DICTIONARY (8th ed. 2004) (defining the plain meaning rule as the “rule that if a writing . . . appears to be unambiguous on its face, its meaning must be determined from the writing itself without resort to any extrinsic evidence”). The common meaning of the word “user” in this context includes anyone who uses controlled substances. However, Congress chose to modify the word “user” with the word “unlawful,” so the term “unlawful user” should be analyzed as a unit. See *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) (“If the statutory language is plain, the Court must enforce it according to its terms. But oftentimes the meaning — or ambiguity — of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words ‘in their context and with a view to their place in the overall statutory scheme.’”). The term “unlawful user” is defined as “not

inquiry. A survey of modern empirical studies and an examination of the judicially created test exhibit the overreach of § 922(g)(3).

Although the GCA seeks to prevent violent individuals from possessing firearms, empirical studies demonstrate that marijuana users are not necessarily violent people. Not only did research from President Nixon's 1970 commission dispel many of the myths associated with marijuana,¹²⁵ but current research also vindicates marijuana use.¹²⁶ In fact, doctors in twenty-seven states and the District of Columbia prescribe medical marijuana to suffering patients.¹²⁷ Research has demonstrated that marijuana is not a gateway

authorized by law; illegal" or "criminally punishable." *Unlawful*, BLACK'S LAW DICTIONARY, *supra*. The plain meaning analysis seems to reveal that the phrase "unlawful user" should not describe lawful marijuana users in any particular state that has chosen to legalize marijuana use. Nonetheless, if a plain meaning analysis is deemed not particularly persuasive or helpful, courts will apply the rule of lenity and construe an ambiguous statute to resolve the ambiguity in favor of the defendant. See *United States v. Santos*, 553 U.S. 507, 514 (2008) (asserting that "no citizen should be held accountable for a violation of a statute whose commands are uncertain"). The rule of lenity may be appropriate to apply to "unlawful user," and if it is, any disputes over whether criminal defendants qualify as unlawful marijuana users under the statute should be resolved in favor of those individuals.

¹²⁵ See *supra* notes 44–49 and accompanying text (discussing Presidential commissions' findings that dismissed common misperceptions about marijuana and its users). Indeed, the commission ultimately recommended to decriminalize marijuana. See THE NAT'L COMM'N ON MARIJUANA & DRUG ABUSE, *supra* note 46 (advocating that "[p]ossession of mari[j]uana for personal use [should] no longer be an offense").

¹²⁶ See, e.g., Trevor Bennett et al., *The Statistical Association Between Drug Misuse and Crime: A Meta-Analysis*, 13 AGGRESSION & VIOLENT BEHAV. 107, 117 (2008) (comparing the "odds of offending" between crack users, 6 times greater, and marijuana users, only 1.5 times greater); Michael K. Ostrowsky, *Does Marijuana Use Lead to Aggression and Violent Behavior?*, 41 J. DRUG EDUC. 369, 381 (2011) (suggesting that most studies "provide rather weak evidence for the suggestion that marijuana use directly leads to violent behavior" because they fail to account for confounding variables); Jennifer M. Reingle et al., *The Relationship Between Marijuana Use and Intimate Partner Violence in a Nationally Representative, Longitudinal Sample*, 27 J. INTERPERSONAL VIOLENCE 1562, 1572 (2012) (indicating that studies may be skewed because "legislation legalizing marijuana use" may increase access to marijuana use and, "therefore, increase the harm associated with marijuana use (e.g., domestic violence, chronic diseases, and unintentional injuries)").

¹²⁷ See *supra* note 117 and accompanying text (conferring the medical benefits of marijuana, such as alleviating nausea and pain for cancer and HIV/AIDS patients). Moreover, Arkansas, Florida, and North Dakota recently passed voter initiatives to legalize marijuana. See Christopher Ingraham, *Marijuana Wins Big on Election Night*, WASH. POST (Nov. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/08/medical-marijuana-sails-to-victory-in-florida>. Now, twenty-nine states and the District of Columbia have legalized medical marijuana. 29 *Legal Medical Marijuana States and DC*, PROCON.ORG, <https://medicalmarijuana.procon.org/view.resource.php?>

drug to other, more dangerous drugs.¹²⁸ By targeting marijuana users in order to keep firearms away from “presumptively risky people,” the statute fails to include other indicators of violence that are stronger than marijuana consumption. For instance, some studies reveal that those who consume alcohol are much more likely to be violent than those who consume marijuana.¹²⁹ Therefore, lawful marijuana users are not the “presumptively risky people” whom Congress sought to disenfranchise.

Moreover, the judicially created test unnecessarily focuses on the wrong temporal nexus. Rather than emphasize the contemporaneousness of drug use and firearm possession, the test condemns the regularity of drug use and firearm possession.¹³⁰ Although courts typically focus on just two factors — regularity and contemporaneousness — the test is more aptly characterized as three factors: (1) the unlawful possession or use of a drug, pursuant to the CSA; (2) the regularity of the drug use; and (3) the contemporaneous possession of the drug and a firearm.¹³¹ Emphasizing the regularity of drug use, however, fails to accomplish Congress’s initial goal of the GCA. Indeed, the judicially created test penalizes any individual who lawfully consumes marijuana, as long as he or she “regularly” uses it.

resourceID=000881 (last visited Apr. 4, 2018).

¹²⁸ See Nat’l Org. for Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 129 (D.D.C. 1980) (citing GRINSPOON, *supra* note 112, at 230-322 (2d ed. 1977)) (asserting that marijuana causes neither aggressive behavior nor insanity); see also HANSON ET AL., *supra* note 112, at 387 (noting that factors such as personality and social environment are much more important factors for determining whether a person will move on to harder drugs).

¹²⁹ See Evelyn H. Wei et al., *Teasing Apart the Developmental Associations Between Alcohol and Marijuana Use and Violence*, 20 J. CONTEMP. CRIM. JUST. 166, 168, 175 (2004) (contending that “aggressive acts were more often related to self-reported acute alcohol use than to marijuana use,” and finding that “participants who had ever engaged in violence, 93.1% had ever used alcohol, 88.5% had ever used alcohol frequently, 85.1% had ever smoked marijuana, and 78.2% had ever smoked marijuana frequently”); see also Todd M. Moore & Gregory L. Stuart, *A Review of the Literature on Marijuana and Interpersonal Violence*, 10 AGGRESSION & VIOLENT BEHAV. 171, 184 (2003) (speculating that the relationship between alcohol use and violence is complicated, and listing over ten factors, such as “Witnessing Parental Violence” and “Family History of Substance Use”).

¹³⁰ Recall that courts use this common law test to determine the scope of “unlawful user” according to the GCA. See *supra* notes 88–91.

¹³¹ *United States v. Patterson*, 431 F.3d 832, 838-39 (5th Cir. 2005) (surveying recent case law and concluding that “cases interpreting § 922(g)(3) typically discuss two concepts: contemporaneousness and regularity”); see *supra* notes 88–91 (discussing the courts’ use of the factors and advancing a simpler notation of the judicially created test for “unlawful use”).

Even if the user waits a week between drug use and firearm possession, he or she still commits a felony. The test inappropriately targets the wrong cohort.¹³²

Rather than penalize the lawful marijuana user, courts should adjust their test to capture the appropriate cohort and advance the goals of § 922(g)(3). The test should criminalize two distinct types of conduct: (1) the ordinary drug user that possesses a firearm while under the influence of drugs, and (2) the drug trafficker that is wielding a firearm to further his illegal operation. Because the current test focuses on regularity, it fails to prevent these dangerous conditions. Ostensibly, an individual who consumes a harmful, illicit drug and then operates a firearm may escape indictment, as long as he or she does not partake regularly in the illicit drug. Thus, the judicially created test mistakenly extends its prosecutorial reach to the lawful marijuana user, over-including them in § 922(g)(3)'s grasp.

b. Section 922(g)(3) Is Under-Inclusive

Second, by failing to capture the dangerous individuals engaged in drug use and violence, § 922(g)(3) is inadequately under-inclusive. Congress's initial intent in passing the GCA undisputedly was to keep guns away from especially dangerous or violent people.¹³³ In only prohibiting individuals who use "controlled substances" from possessing firearms,¹³⁴ Congress excluded those who use other dangerous substances that are effective predictors for violence, such as alcohol. Studies have continuously shown that alcohol use and violence are intrinsically linked.¹³⁵ Experts reach the opposite

¹³² In essence, this Article equates the lawful marijuana user with the generally law-abiding citizen.

¹³³ *Dickerson v. New Banner Inst. Inc.*, 460 U.S. 103, 111 n.6 (1983); *see supra* notes 80–82 and accompanying text (identifying that the purpose of the GCA is to deny dangerous people the ability to possess a firearm). While some aspects of the GCA legislative history remain ambiguous — namely, the definition of "unlawful user" — the portions describing Congress's broad goals behind the legislation are clear. *See* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1213-14 (asserting that the GCA is not intended "to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens").

¹³⁴ *See* Controlled Substances Act, 21 U.S.C. § 802 (2018) (indicating that a "controlled substance" is a substance "included in [S]chedule I, II, III, IV, or V"; alcohol is not included in this list).

¹³⁵ *See, e.g.,* Wei et al., *supra* note 129 (finding that "aggressive acts were more often related to self-reported acute alcohol use than to marijuana use" and that "of participants who had ever engaged in violence, 93.1% had ever used alcohol, 88.5% had ever used alcohol frequently, 85.1% had ever smoked marijuana, and 78.2% had ever smoked marijuana frequently").

conclusion for marijuana users, however, failing to identify a direct connection between violence and marijuana use.¹³⁶ Congress therefore sacrificed the opportunity to keep guns away from alcohol users — who are more likely to become violent — only to unfairly punish lawful marijuana users.

2. Accomplishing Congress's Goal of Keeping Guns out of the Hands of "Dangerous People" Through Other Means

Maintaining marijuana in Schedule I effectuates an inappropriate national standard to regulate marijuana, thereby muting any possible expression the states could voice on the matter. The federal government should have a role in regulating marijuana, partnering with states to establish a scheme that accommodates all interests. Regulatory schemes for alcohol and tobacco provide a useful model to show how such coordination can further the goals of Congress without unnecessarily impeding on a state's rights.¹³⁷ This type of

¹³⁶ A variety of empirical studies have demonstrated that marijuana is not an automatic predictor for violent tendencies. *See, e.g.*, Bennett et al., *supra* note 126 (finding that the correlation between using marijuana and committing violent offenses is far less significant than for other scheduled drugs); Moore & Stuart, *supra* note 129, at 183 (highlighting the complex relationship between marijuana use and violence by observing that "many violent individuals abstain from using marijuana and many marijuana users do not engage in violent behavior").

¹³⁷ Despite any preemption arguments to the contrary, conflicting federal and state marijuana laws can coexist without frustrating the purpose of the GCA. The Supremacy Clause of the Constitution governs situations in which federal and state laws conflict. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."). Nonetheless, federalism allows states "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006); *see* *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (asserting that state police powers should not be preempted unless "that is the clear and manifest purpose of Congress"). Affording states broad authority promotes innovation and the potential for states to serve as smaller experimental vehicles for new ideas. Federal legislation can supersede state legislation vis-à-vis field preemption or obstacle preemption. Courts typically find field preemption when the federal legislative scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The CSA explicitly denies any intent to engage in field preemption. *See* 21 U.S.C. § 903 (2018) ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field to the exclusion of any State law . . . unless there is a positive conflict . . . so that the two [provisions] cannot consistently stand together."). However, courts will find obstacle preemption when compliance with both federal and state law is impossible, or where the state law "stands as an obstacle

framework would facilitate state laboratories to advance novel policies to the benefit of the entire nation.¹³⁸ As a result, the federal government and the states legalizing recreational marijuana can cooperate by mirroring this paradigm.

The manner in which the state and federal governments regulate alcohol and tobacco would be a particularly effective model for regulating marijuana, furthering federal goals while simultaneously allowing states to exercise their own judgment. For instance, although the federal government taxes the sale of alcohol and tobacco, states may levy their own, additional excise taxes on alcohol and tobacco.¹³⁹ Three states — Colorado, Oregon, and Washington — have already collected huge excises from state marijuana taxes, which have funded state law enforcement, education, education campaigns on marijuana safety, and other state initiatives.¹⁴⁰ For example, dispensaries in

to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). That being said, a state’s decision to legalize marijuana does not present an obstacle to Congress’s intent to keep guns away from “presumptively risky people” because marijuana users are not inherently dangerous. *See supra* Section II.B.1 and accompanying text (explaining how the GCA is both over- and under-inclusive, failing to accomplish Congress’s goal to target individuals with presumptively violent tendencies). If the government deschedules marijuana as per the recommendation of this Article, however, the preemption discussion is moot, thereby limiting the value of a full discussion here. On preemption and marijuana laws, see generally Lea Brilmayer, *A General Theory of Preemption: With Comments on State Decriminalization of Marijuana*, 58 B.C. L. REV. 895 (2017).

¹³⁸ Indeed, our federal structure endows the states with the responsibility and opportunity to tailor their legislation to specific needs and model novel, progressive policies. Hindsight provides other states the option to choose these progressive policies à la carte with confidence in their ultimate result from the pioneer states’ lessons learned. *See Whalen v. Roe*, 429 U.S. 589, 591 n.20 (1977) (“Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); *see also Bambu Sales, Inc. v. Gibson*, 474 F. Supp. 1297, 1301 (D.N.J. 1979) (contending that “[q]uestions . . . of preemption . . . are essentially questions of local and State law rather than of federal law”).

¹³⁹ *See supra* note 60 and accompanying text (describing the taxation of alcohol and tobacco products at the federal level).

¹⁴⁰ *See supra* notes 71–72 and accompanying text (providing a breakdown of how the three states are investing their marijuana tax revenue). For example, Oregon delineated the allocation of the marijuana tax revenue as follows: 40% for Common School Fund; 20% for Mental Health, Alcoholism, and Drug Services Account (Or. Rev. Stat. § 430.380 (2018)); 15% for State Police; 10% for cities’ law enforcement; 10% for counties’ local law enforcement; and 5% for Oregon Health Authority for alcohol and drug abuse prevention, early intervention, and treatment services. H.B. 2041, 78th Leg. Assemb. (Or. 2015). Specifically, in Washington, marijuana retailers

Colorado sold \$996.2 million worth of medical and recreational marijuana in 2015.¹⁴¹ This system would permit states to exercise their judgment on how best to address health and public safety concerns surrounding marijuana use. Rather than depend on an ambiguous federal statute, states could use this tax revenue stream to fund state programs intended to keep guns out of the hands of risky individuals. Mirroring the taxation structure of alcohol and tobacco would provide states the opportunity to impose excise taxes on marijuana and appropriately allocate the revenue toward programs specifically tailored toward their needs.

Rather than acquiescing to federal prohibition, states should control distribution of marijuana within their boundaries.¹⁴² Delegating to the states and allowing them to opt in or opt out of marijuana's legalization as they choose allows them to closely monitor marijuana. Colorado has already amended its state constitution to provide a retail scheme for marijuana that is similar to that of alcohol; state and local governments decide what limits to impose on the drug's distribution instead of deferring to government restrictions.¹⁴³ Section 922(g)(3) imports the CSA's prohibition of marijuana that essentially prevents states from imposing their own distribution, retail, or regulatory schemes because the drug is classified in Schedule I. In theory,

have sold more than \$275 million in marijuana and marijuana-related products, and Washington's Office of Financial Management budget estimates that marijuana sales tax will bring in more than \$1 billion in the next four years. See Jareen Imam, *Pot Money Changing Hearts in Washington*, CNN (July 11, 2015, 11:21 AM), <http://www.cnn.com/2015/07/10/us/washington-marijuana-70-million-tax-dollars>; Kate Smith, *supra* note 72. Although Alaska has yet to begin taxing marijuana, the Department of Revenue Tax Division predicts \$12 million in tax revenue, and the State plans to appropriate \$3 million to recidivism reduction in 2017 and \$6 million in subsequent years. See Laurel Andrews, *Here's Where Half of the Revenue from Alaska's Legal Pot Will Go*, ALASKA DISPATCH NEWS (July 14, 2016), <http://www.adn.com/alaska-marijuana/2016/07/12/heres-where-half-of-the-revenue-from-alaskas-legal-pot-will-go> (explaining that Alaska's planned marijuana excise tax works in tandem with the new criminal reform bill aimed at reducing the prison population and associated costs, by providing funds to further this goal).

¹⁴¹ Tom Huddleston, Jr., *Colorado's Legal Marijuana Industry Is Worth More than \$1 Billion*, FORTUNE (Feb. 11, 2016, 10:19 AM), <http://fortune.com/2016/02/11/marijuana-billion-dollars-colorado> (predicting that total U.S. medical and recreational marijuana sales could reach \$22 billion by 2020).

¹⁴² See *supra* note 64 and accompanying text (discussing states' alcohol distribution schemes, including "dry" and "wet" counties, which are specifically mandated by each state).

¹⁴³ See *supra* notes 66–68 and accompanying text (detailing Colorado's marijuana regulation scheme).

Colorado may apply its own retail scheme to marijuana, but doing so would ignore federal law.¹⁴⁴

CONCLUSION

Pursuant to its enumerated powers in the Constitution, Congress may legislate federal law applicable to U.S. territories and states; however, federalism — a bedrock principle of the Republic — ensures that states retain the power to legislate areas outside the scope of Congress's enumerated powers.¹⁴⁵ Respecting state sovereignty provides an important function in our country: it allows states to serve as laboratories, “try[ing] novel social and economic experiments without the risk to the rest of the country.”¹⁴⁶ The Framers intentionally designed our bicameral Congress to operate slowly and require bipartisan consent to pass laws. To reduce political risk and speed up its efficiency, Congress may look to imitate successful state laws. However, if the federal government interferes with state legislatures' ability to experiment with new policy, the value of federalism is all but lost.

Recreational marijuana presents precisely the type of federal and state government conflict that the Framers sought to avoid; the federal government's insistence on retaining marijuana in Schedule I threatens to render state legislatures impotent. Federal law — which criminalizes marijuana pursuant to the Controlled Substances Act — and state law — which decriminalizes marijuana pursuant to legislative actions by eight states and the District of Columbia — clash, causing confusion and uncertainty. This inconsistency between lawmakers created a conflict, and in recent times, § 922(g)(3) has served as its battleground.

Section 922(g)(3) essentially prevents an individual from exercising the constitutional right to possess a firearm while also lawfully smoking recreational marijuana, leaving him or her in the center of a confrontation between federal and state government. The consequences of this conflict implicate citizens engaging in seemingly

¹⁴⁴ See *supra* note 74 and accompanying text (explaining that because of the criminality still attached to marijuana due to the Schedule I drug classification, federal law will not allow banks or credit unions to take “marijuana money” from dispensaries, leaving them with no adequate way to safeguard their proceeds other than letting the money pile up in warehouses).

¹⁴⁵ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹⁴⁶ *Whalen v. Roe*, 429 U.S. 589, 591 n.20 (1977); see also *supra* note 138 and accompanying text (describing the state laboratory theory).

innocuous conduct, such as Mike and Mary from Colorado, instead of more dangerous individuals whom Congress sought to target when passing § 922(g)(3). Penalizing the firearm owner that occasionally uses marijuana — instead of the firearm owner that continually abuses alcohol, for example — is counterintuitive given the plethora of research showing that marijuana users are not violent, especially compared to alcohol users. The contradictory juxtaposition of whom § 922(g)(3) sought to target versus whom it actually targets reveals the over- and under-inclusive reach of the statute.

This failure in § 922(g)(3) demonstrates that a national regulatory scheme is not actually necessary to accomplish Congress's goals. In its current form, the system is both too broad — punishing lawful, nonviolent marijuana users — and too narrow — neglecting to punish potentially violent alcohol users. Section 922(g)(3), therefore, fails in preventing “presumptively risky people” from owning firearms — as it purports to do — precisely because lawful marijuana users are not “presumptively risky” at all. The GCA also effectively eliminates a states' right to allow its citizens who possess firearms to fully participate in lawful marijuana use without valid rationale. Allowing states to regulate marijuana use — similar to how states currently regulate alcohol and tobacco — is a better option that more adequately fosters the concepts of federalism. Because of § 922(g)(3)'s reach, applying this type of regulatory scheme is not possible as long as marijuana remains a Schedule I drug.

Removing marijuana from its current Schedule I position would, in one fell swoop, alleviate, if not completely remove, the problems that have resulted from placing marijuana in a category with the most dangerous drugs.¹⁴⁷ Marijuana shares few characteristics with the other dangerous drugs listed in Schedule I such as heroin and LSD. The original placement of marijuana in Schedule I was driven mostly by racial animus, rather than a legitimate belief that marijuana warranted its Schedule I label. The motive for placing marijuana in Schedule I is clear: President Nixon and his aides are on record revealing their plan to punish conduct that would implicate

¹⁴⁷ Anticipating this solution, two members of the House of Representatives introduced a bipartisan bill to remove marijuana from the CSA in April 2017. See Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Cong. (2017) (proposing to “limit the application of Federal laws to the distribution and consumption of mari[j]uana” by removing the drug from the CSA). See generally Erwin Chemerinsky, *Introduction: Marijuana Laws and Federalism*, 58 B.C. L. REV. 857, 861 (2017) (“If Congress passed a law legalizing possessing small amounts of marijuana and preempted states from prohibiting this, the federalism issues would be solved.”).

minorities. Just as marijuana's initial placement in Schedule I was unfounded, its continued placement in the same schedule as heroin and ecstasy is unjustified. For a drug to be placed in Schedule I, it must lack accepted medical benefits and carry a high potential for abuse. However, ample research suggests that marijuana has many medical benefits, ranging from chronic pain relief to controlling epileptic seizures, and that it does not have a high rate of addiction. An unwarranted consequence of marijuana's placement in Schedule I is that lawful marijuana users lose their constitutional right to own a firearm, providing yet another reason that descheduling marijuana is a necessary step in maintaining the federalist principles that this country embraces.

Descheduling marijuana is not only appropriate, but also logical considering how many states have legalized medical and recreational marijuana. An individual's lawful marijuana use on the state level may lead to significant problems on the federal level. Aside from not being able to own or possess a firearm pursuant to § 922(g)(3), an individual's lawful marijuana use jeopardizes benefits such as subsidized government housing, and social security. Moreover, the CSA prohibits research regarding any of the Schedule I drugs. In effect, this provision grants the government the opportunity to shield its cursory scheduling decisions without showing its rationale. Although the Executive Branch, under President Obama, removed this barrier to permit research for marijuana in August 2016,¹⁴⁸ the current administration's hostility toward marijuana and other new drugs may set a precedent to ban potentially beneficial drugs in a knee-jerk reaction without any research.¹⁴⁹ For example, the federal government is seriously considering placing kratom, an herbal drug used to fight opioid addiction, in Schedule I because the government simply does

¹⁴⁸ Catherine Saint Louis & Matt Apuzzo, *Obama Administration Set to Remove Barrier to Marijuana Research*, N.Y. TIMES (Aug. 10, 2016), https://www.nytimes.com/2016/08/11/science/obama-administration-set-to-remove-barrier-to-marijuana-research.html?_r=0 (providing that before the action it was nearly "impossible" to find marijuana for research purposes, but now the "Obama administration is planning to remove a major roadblock to marijuana research . . . potentially spurring broad scientific study of a drug that is being used to treat dozens of diseases in states across the nation").

¹⁴⁹ See Hayley Miller, *Jeff Sessions Warns of an America with 'Marijuana Sold at Every Corner Grocery Store'*, HUFFPOST (Feb. 28, 2017, 12:34 PM), http://www.huffingtonpost.com/entry/jeff-sessions-warns-america-marijuana-grocery-store_us_58b58d8de4b0a8a9b7863d93? (describing Attorney General Jeff Sessions as "a longtime opponent of marijuana use" and quoting Sessions as commenting that "we don't need to be legalizing marijuana").

not know enough about the drug.¹⁵⁰ Rather than reflexively placing potentially life-saving drugs in Schedule I, the federal government should allow access to these drugs for research purposes.

Marijuana should never have been placed in Schedule I and its continued placement in Schedule I has no justification. Research shows that marijuana is neither addictive nor harmful, and does not lead to violent tendencies in its users. Furthermore, marijuana has many medical benefits that help individuals cope with illnesses. Several states have recognized the benefits of marijuana and legalized the drug, which subsequently puts the citizens of those states in an unfortunate conundrum — by smoking marijuana, citizens engage in conduct that is legal on the state level but illegal on the federal level.

The interplay between guns and marijuana in § 922(g)(3) essentially precludes individuals from exercising their constitutional right to own a firearm — and deprives individuals from other statutory benefits such as welfare — by simply following lawful regulations in states that permit recreational marijuana. If the government deschedules marijuana — rather than continue to punish individuals that Congress never actually sought to target with § 922(g)(3) — it may apply the same regulatory scheme that is currently used for alcohol and tobacco sales, resulting in potentially enormous tax revenue. With nothing to lose other than antiquated notions about marijuana that the Nixon Administration instilled, descheduling marijuana is a necessary, logical solution to a problem that has permeated the lives of citizens merely engaging in conduct that is lawful in their state. Depriving citizens of constitutional rights is rarely appropriate, and the tension between federal and state sovereigns begs for resolution.

¹⁵⁰ See Paul Fassa, *Kratom: Why Is the FDA Banning This Herb that Helps Break Addiction to Opioid Drug Addicts?*, HEALTH IMPACT NEWS (Sept. 12, 2016), <https://healthimpactnews.com/2016/kratom-why-is-the-fda-banning-this-herb-that-helps-break-addiction-to-opioid-drug-addicts> (reporting that the “DEA has announced plans to post another harmless plant as [S]chedule I”); Nick Wing, *Some Say Kratom Is a Solution to Opioid Addiction. Not If Drug Warriors Ban It First*, HUFFPOST (Mar. 3, 2016, 8:38 AM), http://www.huffingtonpost.com/entry/kratom-ban-drug-policy_us_56c38a87e4b0c3c55052ee3f (revealing various news stories where kratom has helped those suffering from either pain or drug addiction).