Has the Marijuana Classification Under the Controlled Substances Act Outlived Its Definition?

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I. INTRODUCTION

Under the Control Substances Act ("CSA"), marijuana is currently scheduled as an "I" drug.[1] In a classification of "V" schedules, "I" is considered the most dangerous because it is deemed to have a "high potential for abuse" and "no medical value."[2] It ranks alongside other substances such as heroin and phencyclidine ("PCP"), thereby signifying that the federal government considers marijuana more dangerous than cocaine (Schedule II) and Xanax (Schedule IV).[3] According to the CSA, any violation of a substance listed as a schedule "I" drug is subject to the harshest penalties.[4] Accordingly, using, manufacturing, importing, or distributing marijuana could result in various penalties.[5] Individuals involved in marijuana businesses can receive up to five years in prison and simple possession with no intent to distribute is a misdemeanor with fines ranging from $250,000 to $1 million,[6] or punishable by up to one year in prison and a minimum fine

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[1] 21 U.S.C. §812 (2018).

[2] *Id.*

[3] U.S. DRUG ENF'T ADMIN., *Drugs of Abuse, a DEA Res. Guide,* https://www.dea.gov/drug-scheduling (last visited May 17, 2020).

[4] *Id.*

[5] *Id.*

[6] *Id.*

of $1,000.[7]

Despite marijuana's classification under the CSA and its established corresponding penalties, with the exception of federally-controlled land,[8] the military, and other federally-related agencies,[9] the Attorney General's ("AG") offices under both the Obama Administration[10] and under the current Trump Administration,[11] have not sought to prosecute either states that have adopted marijuana laws, or businesses and individuals who sell or use marijuana in accordance with state marijuana regulations and laws.[12] Among several factors, the federal government's inclination to refrain from prosecuting under the CSA has opened the door and invited challenges against marijuana's current CSA classification.

Over the years, the National Organization for the Reform of Marijuana Laws ("NORML"),[13] which first challenged the CSA's classification of marijuana in 1974 as plaintiffs,[14] has brought the lion's share of cases objecting to marijuana's classification.[15] The classic arguments presented include challenging the classification on the basis that there is indeed

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[7] *Federal Marijuana Laws*, FINDLAW (Jan. 23, 2019), https://criminal.findlaw.com/criminal-charges/federal-marijuana-laws.html.

[8] *Federal Laws and Penalties,* NORML, https://norml.org/laws/federal-penalties-2/ (last visited July 15, 2020).

[9] *See e.g.,* A.G. Herrington, *Federal Aviation Administration Issues Advisory on Cannabis Policy for Pilots*, HIGH TIMES (June 18, 2019), https://hightimes.com/news/federal-aviation-administration-issues-advisory-cannabis-policy-pilots/; *see also* Angela Robinson, *Updating Drug Screen Protocols in Light of New Marijuana Laws*, OCCUPATIONAL HEALTH & SAFETY (Apr. 30, 2020), https://ohsonline.com/articles/2020/04/30/updating-drug-screen-protocols-in-light-of-new-marijuana-laws.aspx

[10] Memorandum from the U.S. Dep't of Just., Off. of Att'y General: To all United States Att'ys (Feb. 14, 2014), https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf [hereinafter Cole Memo]; Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just. To all United States Att'ys, Guidance Regarding Marijuana Enf't 3 (Aug. 29, 2013), https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf.

[11] Memorandum from the U.S. Dep't of Just., Off. of Att'y Gen. to all U.S. Att'ys, (Jan. 4, 2018), https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement; *Barr on Marijuana Laws: 'We can't Stay in the Current Situation,'* WASH. POST (Jan. 15, 2019), https://www.washingtonpost.com/video/politics/barr-on-marijuana-laws-we-cant-stay-in-the-current-situation/2019/01/15/6eae9fe7-68bb-4ee6-95bb-7937d732dca3_video.html.

[12] *Id.*

[13] *See generally* NORML, https://norml.org/ (last visited May 20, 2020).

[14] Nat'l Org. for the Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654, 654-55 (D.C.Cir. 1974).

[15] Nat'l Org. for the Reform of Marijuana Laws v. Drug Enf't Admin., 559 F.2d 735 (D.C. Cir. 1977); Nat'l Org. for the Reform of Marijuana Laws v. Drug Enf't Admin., No. 79–1660 (D.C. Cir. 1980); *see also* Alliance for Cannabis Therapeutics, v. Drug Enf't Admin., 930 F.2d 936 (D.C. Cir. 1991); U.S. v. Pickard, 100 F. Supp. 3d 981 (2015); *Washington v. Sessions,* 17 Civ. 5625 (AKH) (S.D.N.Y. 2018); *Judge Tosses Lawsuit Challenging Federal Marijuana Laws*, WASH. POST (Feb. 27, 2018),https://www.pressherald.com/2018/02/27/judge-tosses-lawsuit-challenging-federal-marijuana-laws/

evidence proving some medical benefits of marijuana and it is not as dangerous or as potentially abusive as heroin and PCP, two of its classification mates.[16] The typical defendants for such cases have been the AG's Office and the Drug Enforcement Administration ("DEA") on behalf of the federal government.[17]

Often, courts defer to Congress on the matter of CSA classifications under the theory that courts should not legislate from the bench.[18] Some courts have defended the current CSA classification by focusing on international treaties,[19] while some have concentrated on procedural issues such as exhausting administrative remedies arguments;[20] others, perhaps most commonly, have pointed to a lack of sufficient scientific evidence supporting marijuana's purported medical benefits.[21] However, as medical marijuana perceptions change, arguments regarding marijuana's medical benefits seem to be strengthening. For instance, courts have addressed this issue by acknowledging the growing number of states allowing medical marijuana and the growing science around marijuana's potential medical benefits.[22] Still, none have yet found that the current science meets the threshold of an actual medical benefit.[23]

Considering these several challenges, every case up through the 2019 *Barr* case has been unsuccessful.[24] The *Barr* case, however, was a departure from the usual arguments in that among the plaintiffs were actual individuals who alleged the current scheduling of marijuana poses a serious, life or death threat to their health.[25] It also deviated from other court challenges in that

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[16] U.S. DRUG ENF'T ADMIN., *supra* note 3.

[17] *Id.*

[18] Gonzales v. Raich, 545 U.S. 1, 2 (2005) (Congress may regulate the use and production of home-grown marijuana as this activity, taken in the aggregate, could rationally be seen as having a substantial economic effect on interstate commerce.).

[19] Nat'l Org. for Reform of Marijuana L. v. U.S. Dep't of State, 452 F. Supp. 1226, 1235 (D.D.C. 1978).

[20] Washington v. Barr, No. 18-859, 3 (2nd Cir. 2019), https://law.justia.com/cases/federal/appellate-courts/ca2/18-859/18-859-2019-05-30.html (dismissing, with prejudice, plaintiffs' complaint for failure to exhaust administrative remedies and, in the alternative, failure to state a claim.).

[21] Isbell v. State, 428 So. 2d 215, 217 (Ala. Crim. App. 1983) (While marijuana *may* be useful in the treatment of some medical conditions, it has not achieved *accepted* medical use or safety in its prescription and application.).

[22] *Id.*

[23] *Id.*

[24] Stephen Jiwanmall, *Medical Marijuana Case Prompts Push for Reform*, LEHIGH VALLEY PUB. MEDIA (Oct. 9, 2019), https://www.wlvt.org/blogs/lehigh/medical-marijuana-case-prompts-push-for-reform/.

[25] *See Barr*, No. 18-859, at 4–5.

the federal court of appeals held the case in abeyance. The court stated:

> [w]e agree with the District Court's ruling that, since Plaintiffs failed to exhaust their administrative remedies, we should not hear their suit at this time. In view of the unusual circumstances of this case, however, we retain jurisdiction in this panel for the sole purpose of promoting speedy administrative review.[26]

This position could indicate that courts may be more open to recognizing the potential medical benefits of marijuana, which is contrary to the classification's definition. However, in October 2020, the Supreme Court declined to hear the appeal on dismissal.[27] The newest challenge to the classification has been brought by scientists and veterans filed in May 2020.[28] The plaintiffs stated that the DEA's determination that there's a "lack of accepted safety for use of marijuana under medical supervision" is wrong because it "misconstrues the statute and is arbitrary, capricious, and contrary to law because the agency has improperly imported a clinical efficacy requirement."[29] They also argue that it is "'an unconstitutional delegation of legislative authority' that 'violates core separation of powers principles' by granting the attorney general authority to schedule drugs on his or her discretion based on an interpretation of international treaty obligations."[30] Even if it did meet the threshold, however, there is no guarantee this court would not still be hesitant to assume Congress' responsibilities by altering marijuana's scheduling, as such action could be perceived as legislating from the bench.

Recently, Congress, aware of the challenges for courts and the schism between state medical and recreational marijuana laws and marijuana's federal CSA classification, has presented many bills. The majority of these bills attempted to protect and defend legalizing marijuana, and have ranged from making marijuana's legality a matter of states' rights,[31] to full

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[26] *Id.* at 2.

[27] Order for Denial of Cert. (20A35), Arrana-Molina v. Barr, 592 U.S. (2020)

[28] Kyle Jaegar, *Scientists and Veterans File Lawsuits Challenging DEA's Marijuana Rescheduling Denials,* MARIJUANA MOMENT (May 28, 2020), https://www.marijuanamoment.net/scientists-and-veterans-file-lawsuit-challenging-deas-marijuana-rescheduling-denials/

[29] *Id.*

[30] *Id.*

[31] Strengthening the Tenth Amendment Through Entrusting States Act, H.R. 2093, 116th Cong. §2 (2019) (protecting states' rights to enact their own marijuana polices without federal interference.); *see also* Marijuana Opportunity Reinvestment and Expungement Act of 2019, H.R. 3884, 116th Cong. §2

legalization,[32] to rescheduling,[33] to de-scheduling, to banking and bankruptcy protections,[34] to veteran issues,[35] and more. Historically, Democrats have been more supportive of legalizing marijuana;[36] however, two recent bills have included bi-partisan sponsorship. One bill seeking to protect medical marijuana was sponsored by Congressmen Matt Gaetz (R-FL) and Steve Cohen (D-TN),[37] while the States Act included Senators Cory Gardner (R-CO) and Elizabeth Warren (D-MA).[38]

Additionally, the federal budgets from 2014[39] through 2019[40] included amendments ("rider(s)"), which legally prevent the Department of Justice ("DOJ") from using DOJ funds to prosecute medical marijuana in all of its related associations such as end users and dispensaries.[41] As long as states developed and enforced their own regulatory systems, the DOJ would "use [its] limited resources efficiently" by deferring prosecutorial measures to states.[42] As a result, the DOJ is constrained through these budget amendments from prosecuting offenders in states with medical marijuana laws that authorize the use, distribution, possession, or cultivation of medical

(2019) (allowing states to set their own polices by decriminalizing and descheduling cannabis. It also contains strong social equity provisions emphasizing restorative justice for communities most impacted by cannabis prohibition.).

[32] *See, e.g.,* Regulate Marijuana Like Alcohol Act, H.R. 420, 116th Cong. §201 (2019).

[33] Marijuana Opportunity Reinvestment and Expungement Act, *supra* note 31

[34] Secure and Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. § 10 (2019) (aimed at preventing federal regulators from punishing financial institutions for providing services to cannabis-related businesses operating in compliance with state laws.).

[35] The Compassionate Access, Research Expansion and Respect States (CARES) Act of 2019, H.R. 127, 116th Cong. (2019) (aimed at permitting states to implement medical cannabis programs without federal intervention. It would also allow physicians with the U.S. Department of Veterans Affairs to recommend cannabis to veterans.).

[36] *Political Issue: Marijuana,* HARV. KENNEDY SCH. INST. OF POL., https://iop.harvard.edu/survey/details/political-issue-marijuana (last visited May 19, 2020).

[37] The Compassionate Access, Research Expansion and Respect States (CARES) Act of 2019, H.R. 127, 116th Cong. (2019).

[38] *See generally Federal: Legislation to Protect State-Lawful Marijuana Businesses*, NORML, https://norml.org/act/federal-legislation-to-protect-state-lawful-marijuana-businesses/ (last visited May 19, 2020); *see also* Chloe Aiello, *Senators Gardner and Warren Release Bipartisan Marijuana Bill that Prioritizes State's Rights,* CNBC (Jun. 7, 2018 1:11 PM), https://www.cnbc.com/2018/06/07/senators-gardner-and-warren-release-bipartisan-marijuana-bill.html.

[39] Commerce, Justice, Science, and Related agencies Appropriations Act, H.R. 4660, 113th Cong. (2014).

[40] *Congress Extends State-Legal Medical Cannabis Programs' Protections Timing.* MARIJUANA BUS. DAILY. (Feb. 19, 2019), https://mjbizdaily.com/feds-extend-state-legal-medical-cannibs-programs-protections-2019

[41] Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 348, §538 (extending §538 through September 30, 2018).

[42] *Id.*

marijuana."[43]

However, the Trump administration has remained firm that even "clear and unambiguous compliance with state law . . . did not provide a legal defense in a federal prosecution for CSA crimes," and regardless of state law, those in violation of the CSA "remained subject to federal prosecution."[44] In 2019, President Trump conditionally and begrudgingly signed the newest rider.[45] This protection was addressed in United States v. McIntosh,[46] in which the Ninth Circuit Court of Appeals interpreted the amendment's language and held that defendants may seek to enjoin the expenditure of such funds on federal drug trafficking prosecutions involving individuals who engaged in conduct authorized by state medical marijuana laws and who fully complied with such laws.[47] The Ninth Circuit noted that such a restriction by Congress on the DOJ was subject to change in the future because "Congress could appropriate funds for such prosecutions tomorrow."[48] Apart from this congressional rider, the only proposed congressional bill with any potential for success was the Secure and Fair Enforcement Banking Act ("SAFE Act") of 2019, which addressed issues with marijuana and banking.[49] The SAFE Act passed in the House of Representatives in 2019,[50] but ultimately joined the graveyard of thwarted marijuana bills when it failed to gain the needed support in the Senate.[51] The Marijuana Opportunity Reinvestment and Expungement Act (MORE 2019), which would allow states to set their own polices by decriminalizing and de-scheduling cannabis, and contained strong social equity provisions emphasizing restorative justice for communities most impacted by cannabis prohibition, has passed the House and will probably move on to the

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[43] Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, 133 Stat. 13 §537 (2019).

[44] *See* Tom Angell, *Congress Protects Medical Marijuana from Jeff Sessions in New Federal Spending Bill*, FORBES (Mar. 21, 2018, 8:02 PM), https://www.forbes.com/sites/tomangell/2018/03/21/congress-protects-medical-marijuana-from-jeff-sessions-in-new-federal-spending-bill/#7247d9fb3575; RIKER DANZIG SCHERER HYLAND & PERRETTI LLP, *Rohrabacher-Blumenauer Amendment is Renewed Through September 2018*, LEXOLOGY (Apr. 3, 2018), https://www.lexology.com/library/detail.aspx?g=49575d57-77b9-4e1d-9e2e-15b9c9925878.

[45] *Budget of the U.S. Government,* USA.GOV, https://www.usa.gov/budget (last visited May 2019); Tom Angell, *Trump Says He Can Ignore Medical Marijuana Protections Passed by Congress*, FORBES (Dec. 21, 2019), https://www.forbes.com/sites/tomangell/2019/12/21/trump-says-he-can-ignore-medical-marijuana-protections-passed-by-congress/#dfd764256fa3.

[46] U.S. v. McIntosh, 833 F.3d 1163 (9th Cir. 2016).

[47] *Id.* at 1173, 1177.

[48] *Id.* at 1179.

[49] Secure and Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. § 10 (2019).

[50] *Id.*

[51] *Id.*

reconfigured newly elected Senate.[52]

Additionally, in January 2019, the WHO expressly recommended that cannabis be rescheduled and provided clarity to its treatment of cannabinoids, like CBD.[53] While the UN has delayed taking action on the recommendation, it begs the question of whether or not we are on the verge of global cannabis policy reform.

Despite these failed Congressional attempts, in 2018, Congress removed Hemp's Schedule "I" classification with the passage of the Hemp Farming Act of 2018.[54] The hemp plant is part of the cannabis family along with the marijuana plant, but contains minuscule levels of the active psychoactive ingredient called tetrahydrocannabinol ("THC"), which is found in marijuana in much higher levels.[55] This Act not only declassified hemp, it carved out an exception to marijuana's scheduling by permitting the manufacture and use of marijuana plants to produce cannabidiol ("CBD") so long as the active ingredient, tetrahydrocannabinol ("THC"), was kept below .03 nanograms.[56] In conjunction with this change comes nearly sixty-six percent public support for legalizing marijuana,[57] with roughly sixty-five percent of states having legalized marijuana for medical use, recreational use, or both.[58] This perfect storm, along with the somewhat contradictory guidance from Congress regarding marijuana's classification, further complicates marijuana's definition under the CSA.

The following factors, including the growing court cases; the lack of a legislative solution in the face of the barrage of failed congressional bills to reconcile the CSA classification with state marijuana laws; the Farm Act permitting the use of the marijuana plant for very low level THC uses such as CBD; the hemp rescheduling; the increased passage of state marijuana laws; the continuation of the congressional riders protecting medical

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[52] Alicia Wallace, *Cannabis Got a Big Win in Congress, but Legal Weed Isn't Around the Corner,* CNN.COM (Dec. 4, 2020 6:53 PM ET), https://www.cnn.com/2020/12/04/business/cannabis-more-act-house-vote/index.html

[53] Robert Hoban, *The World Health Organization Says Reschedule Cannabis: Will the UN Agree?,* FORBES (July 13, 2020 9:00 AM), https://www.forbes.com/sites/roberthoban/2020/07/13/the-world-health-organization-says-reschedule-cannabis-will-the-un-agree/#30c5a56f6eef.

[54] Hemp Farming Act of 2018, H.R. 5485, 115th Cong. (2018).

[55] *Hemp,* ENCYCLOPEDIA BRITANNICA (Aug. 6, 2019), https://www.britannica.com/plant/hemp.

[56] Hemp Farming Act of 2018, H.R. 5485, 115th Cong. (2018).

[57] Scott Gacek, *Gallop Poll: 1 in 8 US Adults Smoke Marijuana Regularly, Nearly Half Have Tried It*, THE DAILY CHRONIC (Aug. 8, 2019), http://www.thedailychronic.net/2016/60927/poll-1-in-8-us-adults-smoke-marijuana-regularly-nearly-half-have-tried-it/; *see also* Aaron Homer, *A Record High 60 Percent of Americans Support Legalizing Marijuana*, INQUISITR (Oct. 20, 2016), https://www.inquisitr.com/3618748/a-record-high-60-percent-of-americans-support-legalizing-marijuana/#4UUoUvXlm3a5rzPW.99.

[58] Homer, *supra* note 57.

marijuana users from DOJ prosecutions; the increased research indicating at least some medical benefit to marijuana and a lack of a high potential for abuse; the federal government's sporadic and sometimes irrational enforcement and prosecution under the CSA with regards to marijuana; and the level of support from the populace;, indicate that an evaluation of whether marijuana's classification has outlived its usefulness may be necessary. Moreover, the federal classification of marijuana as a Schedule "I" drug under the CSA may have become "invalid through its long and continued non-use"[59] under the legal doctrine of, and applicable caselaw rooted in, desuetude, which holds that a statute may be abrogated because of its long disuse.[60]

As a base analysis, this article presents a preliminary overview of the constitutional division of authority between federal and state government on the issue of marijuana. By using employment issues as an example, this article will review how this legal schism has caused a split of authority in the courts on the topic of marijuana use. It will also explore whether marijuana's classification as a "most dangerous drug" with "no currently accepted medical use" and a "high potential for abuse" is consistent with its CSA definition. It will then turn to review standard equal protection and due process arguments along with such arguments under the legal doctrine of desuetude. Finally, the article will conclude by addressing whether the shift in modern perceptions about marijuana outlives the CSA classification also based on desuetude.

II. CONSTITUTIONAL DIVISION OF AUTHORITY BETWEEN FEDERAL AND STATE GOVERNMENT

The legal and regulatory regime surrounding marijuana leads to inconsistent expectations, as state and federal laws conflict, often to the extreme.[61] On one hand, the federal power to regulate marijuana emanates from Congress' Commerce Clause power[62] and the Supremacy Clause.[63] As such, the Supreme Court has held that the legality of marijuana ultimately

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[59] *Desuetude Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/d/desuetude/ (last visited May 15, 2020).

[60] *Desuetude*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/desuetude (last visited July 14, 2020).

[61] ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 278 (2017); 21 U.S.C. § 812 (2018).

[62] U.S. CONST. art. I, § 8.

[63] U.S. CONST. art. VI, cl. 2.

rests with Congress' enumerated authority to regulate commerce.[64] Through the Commerce Clause, the federal government may regulate the "non-commercial intrastate possession and cultivation of marijuana."[65] Thus, because marijuana cultivation could be rationally related to having a substantial economic effect on interstate commerce, regulating its production is a valid exercise of Congress's Commerce Clause power.[66] Additionally, the Supremacy Clause of the U.S. Constitution[67] ordains federal law as supreme and, hence, as preempting state law when the two conflict.[68] This also implicates another constitutional constraint–preemption.[69] With the exception of the Farm Act legalizing low levels of THC from the marijuana plant as CBD, due to this constitutional framework, all other forms of marijuana are illegal under federal law.[70]

In accordance with its designated control over the matter, the federal government has maintained laws and regulations concerning marijuana in all things under its jurisdiction. For example, the federal government has impacted the legality of marijuana in a variety of federal settings including federal lands and parklands,[71] airports and aviation,[72] active military personnel,[73] military installations,[74] veterans,[75] all Department of Transportation ("DOT") matters,[76] all federal government employees'

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[64] *See* Gonzales v. Raich, 545 U.S. 1 (2005) (establishing that Congress may regulate the use and production of home-grown marijuana as this activity, taken in the aggregate, could rationally be seen as having a substantial economic effect on interstate commerce.).

[65] *Id.* at 32.

[66] Mikos, *supra* note 61, at 278. (The Necessary and Proper Clause may also play a role); *see Gonzales,* 545 U.S. at 34 (Scalia, J., concurring) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.").

[67] U.S. CONST. art. VI, cl. 2 (Article VI, Clause 2, of the U.S. Constitution is known as the Supremacy Clause because it provides that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." It means that the federal government, in exercising any of the powers enumerated in the Constitution, must prevail over a conflicting or inconsistent state exercise of power.)

[68] *Id.*

[69] U.S. CONST. amend. X.

[70] *Id.*

[71] 41 C.F.R. § 102-74.400 (2005) (Prohibits marijuana activity on all federal property).

[72] 14 C.F.R. § 121.15 (2015).

[73] A.R. 135-178, 12-1d (repealed); *see also* U.S. v. Gonzales, No. ACM S32386, 2017 WL 4004050, at *1 (A.F. Ct. Crim. App. Aug. 2, 2017).

[74] 10 U.S.C. §912a, art. 112 (2012).

[75] *See* DEP'T OF VETERANS AFFAIRS, VETERANS HEALTH ADMIN. DIRECTIVE 1315, *Access to VHA Clinical Programs for veterans Participating in State-Approved Marijuana Programs*, (Dec. 8, 2017), file:///Users/pica/Downloads/1315_D_2017-12-08.pdf.

[76] *DOT Says No to Marijuana*, GO BY TRUCK GLOBAL NEWS (Jan. 6, 2014), https://www.gobytrucknews.com/dot-says-no-to-marijuana/123.

marijuana zero tolerance policies,[77] and all immigration matters.[78] This federal treatment of marijuana reaches and extends even further with federal bankruptcy courts affording minimal protection to matters relating to the marijuana industry;[79] restrictions on federal housing accommodations and federal unemployment benefits;[80] federal laws prohibiting federally charted banks from engaging in transactions deriving from, or involving, the marijuana industry;[81] and sanctioning colleges receiving federal funding to deny protections for students who use medical marijuana.[82]

On the other hand, states' rights to regulate marijuana emanates from the Tenth Amendment of the Constitution.[83] The Tenth Amendment is the section of the Bill of Rights that extends any power that is not *explicitly* given to the federal government to the states.[84] It was included in the Bill of Rights to further define the balance of power between the federal government and the states. As the final amendment in the United States Constitution's original Bill of Rights, it was added to assure delegates that the federal government would not overstep the boundaries established in the Constitution.[85]

One may argue that this Tenth Amendment right under the U.S. Constitution does not give the federal government any authority to criminalize marijuana. The Tenth Amendment constrains Congress'

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[77] Memorandum from Katherine Archuleta, Dir. Of U.S. Off. of Pers. Mgmt., on Federal Laws and Policies Prohibiting Marijuana Use to the Heads of Exec. Dep'ts and Agencies, (May 26, 2015), https://chcoc.gov/content/federal-laws-and-policies-prohibiting-marijuana-use.

[78] U.S. DEP'T OF STATE, 9 FAM 302.4-(B)(2), CONTROLLED SUBSTANCE INCLUDES MARIJUANA, https://fam.state.gov/searchapps/viewer?format=html&query=marijuana&links=MARIJUANA&url=/FAM/09FAM/09FAM030204.html#M302_4_2_B_2.

[79] *In re* Way to Grow, Inc., No. 18-cv-3245-WJM, 2019 U.S. Dist. LEXIS 207846, at *14 (D. Colo. Sept. 18, 2019); *but see* Garvin v. Cook Invest., 922 F.3d 1031 (9th Cir. 2019) (The Bankruptcy Code does not require courts examine the terms of a plan to determine whether the plan at issue is unlawful, instead courts need only look to the proposal itself.).

[80] Memorandum from Helen R. Kanovsky, U.S. DEP'T OF HOUS. AND URBAN DEV., on Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing (Jan. 20, 2011), https://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm(012011).pdf.

[81] Kellie Pantekoek, *Can Marijuana Dispensaries Use Traditional Banks?*, FINDLAW, https://public.findlaw.com/cannabis-law/starting-a-cannabis-business/can-marijuana-dispensaries-use-traditional-banks-.html (last updated Apr. 21, 2020); James J. Black & Marc-Alain Galeazzi, *Cannabis Banking: Proceed with Caution,* ABA (Feb. 6, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/02/cannabis-banking/.

[82] Dave Collins, *She Was Expelled for Using Prescribed Medical Marijuana, Now She's Suing the College,* USA TODAY (Oct. 24, 2019), https://www.usatoday.com/story/news/education/2019/10/24/should-medical-marijuana-legal-college-campuses-some-say-no/4083245002/.

[83] U.S. CONST. amend. X.

[84] *Id.; see* U.S. v. Louisiana, 363 U.S. 1, 16, (1960).

[85] *Louisiana,* 363 U.S. at 16.

preemption and supremacy powers through its "anti-commandeering rule."[86] That is, Congress cannot compel states to use their resources to carry out its regulation schemes or to enforce a federal law.[87] To further this position by analogy, though the Constitution may automatically afford Congress the power to outlaw marijuana, it was necessary to amend the Constitution to give Congress the power to ban alcohol under the Eighteenth Amendment[88] and then repeal it under the Twenty-First Amendment.[89] Thus, under this reasoning, the question of whether the federal government forcing states to regulate marijuana is constitutional becomes relevant.

Notwithstanding the discrepancies between state and federal powers, and despite severe limitations placed at the federal level, states continue to bypass federal laws designed to prevent the widespread legal use of marijuana.[90] Notably, some states are conservative, legalizing only medical marijuana, while other states have adopted liberal approaches, encompassing recreational and medical uses.[91] This rift is best illustrated by court decisions in the areas of employment, with some courts upholding the federal position and some states eclipsing it.

A. The Division of Authority between States and the Federal Government has Created a Schism Amongst Courts

In 2017, a federal court addressed whether federal law preempted a Connecticut law, which precluded Connecticut employers from firing or refusing to hire someone because of medical marijuana use.92 The district court concluded that the state law was not preempted the federal statutes in question – the CSA, the American with Disabilities Act ("ADA"), or the Food, Drug, or Cosmetic act ("FDCA").[93] Furthermore, the court rejected the employer's contention that because it was required by federal law to comply with the federal Drug Free workplace Act ("DFWA"), it was prohibited from hiring or employing state-qualified medical marijuana

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[86] *Id.*

[87] *Id.*

[88] U.S. CONST. amend. XVIII (repealed 1933).

[89] U.S. CONST. amend. XXI.

[90] *State Marijuana Laws in 2018 Map*, GOVERNING.COM, https://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html (last updated June 25, 2019).

[91] *Id.*

[92] Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326, 330 (D. Conn. 2017); *see also,* Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181, at *19 (R.I. Super. Ct. 2017).

[93] *Noffsinger*, 273 F. Supp. 3d at 338.

users.[94] The court clarified that the DFWA was expressly inapplicable to an "employee who uses medical marijuana outside the workplace in accordance with a program approved by state law."[95]

This holding concentrates on the Connecticut law's provision aimed at protecting medical patients from discrimination in their workplaces. As such, the court avoided tackling whether the employee's marijuana use was legal under state or federal law. Other state courts including Massachusetts,[96] Arizona,[97] Delaware,[98] and Rhode Island[99] have included anti-discrimination provisions in their state medical marijuana statutes. These types of provisions enable courts to adjudicate matters based on statutory interpretation and not on the legality of marijuana use. Comparatively, the Oregon Supreme Court determined Oregon's medical marijuana statute was preempted by the CSA.[100] Unlike the Connecticut state law, Oregon's medical marijuana statute was silent with respect to employment discrimination.[101]

Thus, absent a veil of a statutory or other legal nuance, such as anti-discrimination provisions, courts pressed to decide issues directly involving marijuana seem to adhere to the federal government's fixed stance.[102] The Colorado Supreme Court held that a quadriplegic person who used medical marijuana in accordance with state law was not protected from being fired after testing positive on a drug test at work.[103] There, the court was compelled to resolve the issue of whether medical marijuana use was a "lawful activity."[104] In response, it explained that: the U.S. Department of Justice's announcement to forgo prosecuting certain medical marijuana patients in accordance with state law and that the 2014 appropriation bill prohibiting the Department of Justice from using funds appropriated under the act to prevent states from implementing medical marijuana laws, did not

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[94] *Id.* at 336.

[95] *Id.*

[96] Barbuto v. Advantage Sales & Mktg., 78 N.E.3d 37, 45 (Mass. 2017).

[97] Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 774 (D. Ariz. 2019).

[98] Chance v. Kraft Heinz Foods Co., No. K18C-01-056 NEP, 2018 WL 6655670, at *2 (Del. Super. Ct. 2018).

[99] Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181 at *17 (R.I. Super. Ct. 2017).

[100] Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 536 (Or. 2010) (Plaintiff was fired by his employer one week after disclosing his status as a state-law-authorized user of medical marijuana.).

[101] *Id.*

[102] Coats v. Dish Network, 350 P.3d 849, 852 (Colo. 2015).

[103] *Id.* at 850.

[104] *Id.*

make the defendant's use of medical marijuana lawful.[105] Ultimately, the court cited marijuana's status under the CSA and concluded that, even when used for medical purposes, marijuana use is still a federal criminal offense.[106]

As courts in different states apply marijuana's federal classification differently, while also eagerly using loopholes to avoid adjudicating the issue of marijuana, the results are unpredictable and incongruent. This is problematic because such inconsistent treatment could trigger other constitutional concerns under equal protection and due process and could fuel arguments to support nullifying the CSA definition itself.

III. MARIJUANA'S CSA CLASSIFICATION IS NOT CONSISTENT WITH ITS CSA DEFINITION

A. Federal and State Actions Contradict Marijuana's CSA Classification

A Schedule "I" drug under the CSA is defined as having no "currently accepted medical use" and a "high potential for abuse."[107] The inapplicability of this definition to marijuana has so far been unsuccessfully litigated over the years, yet still invites several arguments that weaken the reasoning in support of marijuana's classification. For example, there is the continued passage of state medical marijuana laws across the country including their stated qualifying medical conditions;[108] the continued expansion of qualifying conditions under those medical marijuana laws; and the passage of new state laws permitting the use of medical marijuana for opioid use disorder.[109] States' passages of marijuana laws are particularly overwhelming.

Over two-thirds of states have some type of medical marijuana law.[110] Each of these laws contain conditions that qualify a medical marijuana patient to use medical marijuana. The more common qualifying conditions include use for chronic pain; PTSD; Amyotrophic Lateral Sclerosis (ALS);

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[105] *Id.* at 852, n.2.

[106] *Id.* at 852–53.

[107] *Drug Schedules,* DEA, https://www.dea.gov/drug-scheduling (last visited Jan. 11, 2021).

[108] Arron Smith, *The U.S. Legal Marijuana Industry is Booming*, CNN (Jan. 31, 2018 4:30 PM), https://money.cnn.com/2018/01/31/news/marijuana-state-of-the-union/index.html.

[109] *See e.g.,* Steven Aliano, *New Jersey to Allow Medical Marijuana for Opioid Addiction Treatment*, PRACTICAL PAIN MANAGEMENT (June 17, 2020), https://www.practicalpainmanagement.com/treatments/pharmacological/new-jersey-allow-medical-marijuana-opioid-addiction-treatment

[110] *State-By-State Marijuana Policies*, THE NAT'L CANNABIS INDUS., https://thecannabisindustry.org/ncia-news-resources/state-by-state-policies/ (last visited May 16, 2020).

cancer; Crohn's disease; Glaucoma; HIV or AIDS; Hepatitis C; Multiple Sclerosis; Parkinson's disease; multiple sclerosis; cystic fibrosis; and typically other conditions as determined in writing by a qualifying patient's physician.[111] For example, Connecticut has one of the most extensive medical marijuana qualifying condition lists with over twenty-five qualifying conditions,[112] while Texas has one of the most limited qualifying conditions with only a limited low-THC law for epilepsy.[113] In New York, patients may use marijuana to treat qualifying conditions such as: cancer; HIV infection or AIDS; amyotrophic lateral sclerosis ("ALS"); Parkinson's disease, multiple sclerosis, epilepsy, inflammatory bowel disease, neuropathy, PTSD, and "[chronic pain (as defined by 10 NYCRR §1004.2(a)(8)(xi)) or any condition for which an opioid could be prescribed (provided precise underlying condition is expressly stated on the patient's certification.)"[114] Several states have amended their qualifying conditions over the years to become even more extensive.[115]

There is also a growing trend to permit physicians to prescribe medical marijuana for opioid use disorder.[116] New York,[117] Pennsylvania,[118]

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[111] *See* e.g. CONN. GEN. STAT. ANN. § 21a-408a, § 21a-408p (2012); R.I. GEN. LAWS ANN. §§ 21-28.6-4, 21-28.6-7 (2019); ME. REV. STAT. ANN. tit. 22 § 2421, §2423-E, §2426 (2009); ARIZ. REV. STAT. ANN. tit. 36, ch. 28.1, § 36-2802, § 36-2807, § 36-2813, § 362814 (2010); DEL. CODE ANN. tit. 16, ch. 49A, § 4902A, § 4904A, § 4905A, § 4907A, § 4921A (2020).

[112] See generally, *Medical Marijuana Qualifying Conditions by* State, MARIJUANA AND THE LAW https://www.marijuanaandthelaw.com/resources/medical-marijuana-qualifying-conditions-state/ [hereinafter Qualifying Conditions] (last accessed Jan. 11, 2021). *Qualification Requirements*, CT STATE DEP'T OF CONSUMER PROTECTION, https://portal.ct.gov/DCP/Medical-Marijuana-Program/Qualification-Requirements (last visited June 15, 2020).

[113] Alex Samuels, *Texas House Passes Second, More Limited Bill Expanding Access to Medical Cannabis*, TEXAS TRIBUNE (May 7, 2019 4:00 PM), https://www.texastribune.org/2019/05/07/texas-house-medical-cannabis-limited-expansion/.

[114] Qualifying Conditions, *supra* note 112.

[115] *Id.*

[116] *See e.g. New Jersey Joins States that Allow Medical Cannabis as Opioid Alternative,* MARIJUANA BUS. DAILY, (Jan. 24, 2019), https://mjbizdaily.com/new-jersey-adds-opioid-addiction-as-medical-cannabis-qualifying-condition/.

[117] *New York State Department of Health Announces Opioid Use to be Added as a Qualifying Condition for Medical Marijuana*, N.Y. State DEP'T OF HEALTH (June 18, 2018), https://www.health.ny.gov/press/releases/2018/2018-06-18_opioid_use.htm.

[118] Sam Wood, *Pa. Approves Sale of Marijuana 'Flower,' and Will Allow Cannabis to Treat Opioid Addiction*, THE PHILA. INQUIRER (Apr. 16, 2018), https://www.inquirer.com/philly/business/cannabis/marijuana-medical-flower-opioid-addiction-therapy-rachel-levine-cresco-terravida-20180416.html.

Illinois,[119] and Colorado[120] have all made this concession in one form or another over the last couple of years. At least eight states from Maine to California, along with Washington, D.C., recognize opioid dependency as a qualifying condition for medical marijuana use, either explicitly or within the bounds of significant medical conditions.[121] However, as of November 2019, and in keeping with the federal government's hold on federal agencies regarding marijuana, federal addiction treatment dollars remain off-limits for medical marijuana.[122] This new federal restriction applies to the federal government's two main grant programs for opioid treatment and an older grant program supporting state efforts to treat alcoholism and drug addiction.[123] The rule affects billions of dollars from the federal Substance Abuse and Mental Health Services Administration.[124]

On the federal front, the Food and Drug Administration ("FDA") took action to approve marijuana compounds or derivatives, such as marinol, cesamet, epidiolex, and to declassify both marijuana and hemp-based CBD, to be used as part of various medical treatments.[125] Then there is the DEA and the National Institutes of Health's ("NIH") willingness to loosen marijuana restrictions to facilitate additional research for medical marijuana. The federal government is enlarging research and studies on marijuana

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[119] Bill Lukitsch & Monique Garcia, *People with Opioid Prescriptions Could get Medical Marijuana Instead Under Illinois Senate Plan*, THE CHI. TRIBUNE (Apr. 27, 2018), https://www.chicagotribune.com/news/local/politics/ct-met-illinois-medical-marijuana-opiod-20180426-story.html; *Bill Status of SB0336*, ILL. GEN. ASSEMBLY (Aug. 8, 2018), http://www.ilga.gov/legislation/BillStatus.asp?GA=99&DocTypeID=SB&DocNum=336&GAID=14&SessionID=91&LegID=100276.

[120] Derek Maiolo, *Colorado Doctors Can Now Recommend Medical Marijuana in Place of Opioids,* SUMMIT DAILY (Aug. 25, 2019), https://www.summitdaily.com/news/colorado-doctors-can-now-recommend-medical-marijuana-in-place-of-opioids/.

[121] *See e.g.*, Morgan Lee, *New Mexico Adds Opioid Use to Qualifying Conditions for Medical Marijuana*, LAS CRUCES SUN NEWS (June 7, 2019, 5:50 PM), https://www.lcsun-news.com/story/news/local/new-mexico/2019/06/07/new-mexico-adds-opioid-use-condition-medical-marijuana/1377010001.

[122] Carla K. Johnson, *Federal Addiction Treatment Dollars Off-limits for Medical Marijuana*, PRESS HERALD (Nov. 22, 2019), https://www.pressherald.com/2019/11/22/federal-addiction-treatment-dollars-off-limits-for-medical-marijuana/.

[123] *Id.*

[124] *Id.*

[125] *FDA and Cannabis: Research and Drug Approval Process,* U.S. FOOD AND DRUG ADMIN., https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process#:~:text=To%20date,%20the%20FDA%20has%20not%20approved%20a,products:%20Marinol%20(dronabinol),%20Syndros%20(dronabinol),%20and%20Cesamet%20(nabilone) (last visited Jan. 12, 2021)

through its agencies, and even directly.[126] The "number of active researchers registered with DEA to conduct research with marijuana, marijuana extracts, and marijuana derivatives – [went] from 377 in January 2017 to 595 in March 2020."[127]

In 2016, there was some speculation that the DEA was going to change marijuana's classification under the CSA; however, instead it sought to expand research by increasing the number of licensed growers from a single producer at the University of Mississippi.[128] In March 2020, the DEA further extended opportunities for scientific and medical research on marijuana in the United States through new regulations.[129] "The new regulations enable the DEA to evaluate each of the thirty-seven then pending applications to grow marijuana for research under the applicable legal standard and conform the overall program to relevant laws."[130] In 2019, the University of Georgia ("UGA") promulgated a study on Medical Marijuana's Impact on Chronic Pain.[131] The research project was funded by a $3.5 million grant from the National Institute on Drug Abuse ("NIDA"), a branch of the NIH.[132] The National Center for Biotechnology Information ("NCBI"), under the auspices of NIH, also conducted clinical trials for pain conditions, which indicated promising treatments.[133]

B. Scientific Evidence Raises Legitimate Concerns as to the Validity of Marijuana's CSA Classification

The notion that because marijuana is a toxic plant it should be highly scrutinized is spurious. Many medicines commonly used by humans are

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[126] Press Release, Drug Enf't Admin., *DEA Proposes Process to Expand Marijuana Research in the United States,* (Mar. 20, 2020), https://www.dea.gov/press-releases/2020/03/20/dea-proposes-process-expand-marijuana-research-united-states.

[127] *Id.*

[128] *Id.*

[129] Controls to Enhance the Cultivation of Marijuana for Research in the United States, 85 Fed. Reg. 16292 (proposed Mar. 23, 2020) (to be codified at 21 C.F.R. pt. 1301, 1318).

[130] *DEA Proposes Process to Expand Marijuana Research in the United States, supra* note 126.

[131] Caroline Paczkowski, *Researchers to Study Medical Cannabis and Chronic Pain,* UGA TODAY (Oct. 8, 2019), https://news.uga.edu/researchers-to-study-medical-cannabis-and-chronic-pain/.

[132] *Id.*

[133] Jorge Manzanares, *Role of the Cannabinoid System in Pain Control and Therapeutic Implications for the Management of Acute and Chronic Pain Episodes*, 4 CURRENT NEUROPHARMACOLOGY 239, 252 (2006).

plant-based. These include the common drugs aspirin,[134] digoxin,[135] quinine,[136] opium,[137] and digitalis.[138] There is also a mounting number of studies supporting the use of marijuana for various diseases and ailments that are typically dependent upon the targeted disease or illness. There are thousands of studies and plentiful literature supporting the medical benefits of medical marijuana dating as far back as the 1840s.[139] The studies suggest that marijuana can be an effective treatment for conditions such as cancer,[140] pain, neurologic disorders, glaucoma, and nausea.[141] The National Academies of Science, Engineering, and Medicine worked together to create a comprehensive report for the current state of evidence regarding what is known about the health effects of cannabis and cannabis derived products.[142] Their extensive findings set forth the medical benefits and potential harms of using marijuana.[143]

Numerous scientific findings and publications also assert that medical marijuana may be harmful.[144] For example, marijuana has been found to be

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[134] ALAN JONES, CHEMISTRY: AN INTRODUCTION FOR MEDICAL AND HEALTH SCIENCES 5 (2005); *see also* ENRIQUE RAVINA, THE EVOLUTION OF DRUG DISCOVERY: FROM TRADITIONAL MEDICINES TO MODERN DRUGS 24 (2011).

[135] *Digoxin,* DRUGS.COM, https://www.drugs.com/monograph/digoxin.html (last visited July 14, 2020).

[136] *Quinine sulfate,* DRUGS.COM, https://www.drugs.com/mtm/quinine.html (last visited Dec. 30, 2020).

[137] *Opium*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/science/opium (last visited July 14, 2020).

[138] *Digitalis,* DRUGS.COM, https://www.drugs.com/npp/digitalis.html (last updated Oct. 31, 2019).

[139] Sanjay Gupta, *Why I Changed My Mind on Weed*, CNN (Aug. 8, 2013), https://www.cnn.com/2013/08/08/health/gupta-changed-mind-marijuana/.

[140] Michele Moreau et al., *Flavonoid Derivative of Cannabis Demonstrates Therapeutic Potential in Preclinical Models of Metastatic Pancreatic Cancer*, FRONT. ONCOLOGY (July 23, 2019), https://www.frontiersin.org/articles/10.3389/fonc.2019.00660/full; *Marijuana and Cancer*, AM. CANCER SOC'Y, https://www.cancer.org/treatment/treatments-and-side-effects/complementary-and-alternative-medicine/marijuana-and-cancer.html (last updated Aug. 4, 2020).

[141] *See* W. J. Maule, *Medical Uses of Marijuana (Cannabis Sativa): Fact or Fallacy?*, 72 BRIT. J. OF BIOMEDICAL SCI. 85 (2015).

[142] NAT'L ACAD. OF SCI., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH (2016); Ryan Scinta et al., *Evidence for Medicinal Use of Cannabis*, PHYSIOPEDIA, https://www.physiopedia.com/Evidence_for_Medicinal_Use_of_Cannabis (last visited June 15, 2020).

[143] NAT'L ACAD. OF SCI., *supra* note 142.

[144] *See generally National Library of Medicine*, PUBMED.GOV, https://pubmed.ncbi.nlm.nih.gov/?term=medical%20marijuana&page=5 (last visited July 14, 2020).

harmful to mental health[145] and to contribute to heart issues.[146] It is generally accepted that prolonged and consistent marijuana use produces side effects including, "relaxation, appetite stimulation, heightened sensation, increased heart rate, impairment of short-term memory and learning, and […] paranoia or psychosis."[147] Chronic cannabis use, especially among young people, has also led to altered brain development, cognitive impairment, chronic bronchitis, and increased risk of psychosis health disorders like schizophrenia and depression.[148] Yet, it is useful to note, much of this information is gleaned from limited clinical trial data and anecdotal studies of recreational marijuana users.[149] Notwithstanding the need for additional research to facilitate more precise conclusions, marijuana does pose some risk for abuse. According to Columbia's Mailman School of Public Health, illicit marijuana use and marijuana use disorders increased "at a greater rate in states that passed marijuana laws than in other states."[150] Permissive attitudes, stemming from legalizing marijuana, could potentially lead to addiction and pose unforeseen consequences for public and mental health.[151]

The possibilities are more concerning when examining youth populations.[152] The American College of Pediatricians found that marijuana

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[145] *What Is Marijuana?,* NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/publications/drugfacts/marijuana#:~:text=Long-term%20marijuana%20use%20has%20been%20linked%20to%20mental,symptoms%20such%20as%20hallucinations,%20paranoia,%20and%20disorganized%20thinking (last visited Jan. 12, 2021).

[146] *See generally The Truth About Marijuana,* FOUND. FOR A DRUG FREE WORLD, https://www.drugfreeworld.org/drugfacts/marijuana/short-and-long-term-effects.html (last visited June 15, 2020).

[147] Susan R.B. Weiss, et. al, *Building Smart Cannabis Policy from the Science Up,* 42 Int'l J. of Drug Policy 39 (2017).

[148] Helen Shen, *Cannabis and the adolescent brain,* PNAS (Jan. 7, 2020), https://www.pnas.org/content/117/1/7, *see also DEA Supports Expanding Cannabis Research, but Timing Uncertain*, MARIJUANA BUS. DAILY, (Aug. 26, 2019), https://mjbizdaily.com/dea-supports-expanding-cannabis-research-but-timing-uncertain/; *see also* Jeff Smith, *US House Panel Calls for Stepped-up Marijuana Research, which Could Prove Critical to Federal Reform,* MARIJUANA BUS. DAILY, (Jan. 15, 2019) https://mjbizdaily.com/us-house-panel-calls-for-stepped-up-marijuan-research-which-could-prove-critical-to-federal-reform.

[149] *Starting Age of Marijuana Use May Have Long-Term Effects on Brain Development,* CTR. FOR BRAIN HEALTH AT UNI. OF TX. AT DALLAS, https://brainhealth.utdallas.edu/starting-age-of-marijuana-use-may-have-long-term-effects-on-brain-developme/ (last visited Jan. 12, 2021).

[150] Donald Hagler, *Do Medical Marijuana Laws Promote Illicit Cannabis Use and Disorder*? COLUM. MAILMAN SCH. OF PUB. HEALTH (Apr. 26, 2017), https://www.mailman.columbia.edu/public-health-now/news/do-medical-marijuana-laws-promote-illicit-cannabis-use-and-disorder.

[151] Joel Hilliker, *Marijuana Legalization—What Are the Effects?,* THE TRUMPET (Nov. 17, 2017), https://www.thetrumpet.com/16516-marijuana-legalization-what-are-the-effects.

[152] Donald Hagler, *Marijuana Use: Detrimental to Youth*, AM. COLL. OF PEDIATRICIANS (Apr. 2018), https://www.acpeds.org/the-college-speaks/position-statements/effect-of-marijuana-legalization-on-risky-behavior/marijuana-use-detrimental-to-youth.

is addictive and has adverse effects upon "the adolescent brain, is a risk for both cardio-respiratory disease and testicular cancer, and is associated with both psychiatric illness and negative social outcomes."[153] As marijuana becomes more commercialized, high-potency strains replace traditional herbal forms of marijuana.[154] High levels of potency can damage the brain's ability to function and pose even graver harms for adolescent brain development.[155] Some studies indicate that youth marijuana use increased in states where recreational marijuana as legal.[156] Colorado experienced a twelve percent increase in the three-year average since legalizing recreational marijuana.[157] Conversely, eleven separate studies dating back to 1991 using data from 4 large-scale U.S. surveys found no significant changes, increases, or decreases occurred in adolescent use following enactment of medical marijuana laws.[158]

According to Dr. Sanja Gupta, an American neurosurgeon, " . . . 6% of the current U.S. marijuana studies investigate the benefits of medical marijuana. The rest are designed to investigate harm that imbalance paints a highly distorted picture."[159] He goes on to admit that he " . . . mistakenly believed the DEA's listed marijuana as a schedule "I" substance was based upon of sound scientific proof."[160] Surely, he believed, there must have been "quality reasoning as to why marijuana is in the category of the most dangerous drugs that have 'no accepted medicinal use and a high potential for abuse.'"[161] However, he eventually realized the science to support that claim did not exist, and now he asserts that "when it comes to marijuana neither of those things are true."[162] In fact, he goes on to affirm, marijuana "does not have a high potential for abuse, and there are very legitimate

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[153] *Id.*

[154] *See* ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA STRATEGIC INTEL. UNIT, *The Legalization of Marijuana in Colorado: The Impact,* HIDTA 1, 132 (2017), https://www.rmhidta.org/html/FINAL%202017%20Legalization%20of%20Marijuana%20in@20Colorado%20The%20Impact.pdf.

[155] *Id.* at 147, 152.

[156] *Id.*

[157] *Id.* at 33.

[158] Aaron Sarvet, *Study Debunks Claim that Medical Marijuana Laws Have Increased Recreational Use of Marijuana Among U.S. Teens*, COLUM. MAILMAN SCH. OF PUB. HEALTH (Feb. 22, 2018), https://www.mailman.columbia.edu/public-health-now/news/study-debunks-claim-medical-marijuana-laws-have-increased-recreational-use-marijuana-among-us-teens (Studies included Monitoring the Future; National Longitudinal Survey of Youth; National Survey on Drug Use and Health; and Youth Risk Behavior Survey.).

[159] Gupta, *supra* note 139.

[160] *Id.*

[161] *Id.*

[162] *Id.*

medical applications."[163] Assuming *arguendo* that marijuana is found to have only limited medical benefit, this still presents a conflict with the CSA's definition, which states that there is *no* "currently accepted medical use," not limited beneficial use.

With regard to the second factor for marijuana's CSA classification, a "high potential for abuse," there has been mixed evidenced-based conclusions. According to the NIH:

> [m]arijuana use can lead to the development of problem use, known as a marijuana use disorder, which takes the form of addiction in severe cases. Recent data suggest that 30% of those who use marijuana may have some degree of marijuana use disorder. People who begin using marijuana before the age of 18 are four to seven times more likely to develop a marijuana use disorder than adults.[164]

A 1944 research project by the New York Academy of Science found "marijuana did not lead to significant addiction in the medical sense of the word. They also did not find any evidence marijuana led to morphine, heroin, or cocaine addiction."[165] Yet the accepted consensus seems to be that, ". . . [w]hile estimates vary, marijuana leads to dependence in around 9 to 10% of its adult users." [166] By comparison, "cocaine, *a Schedule ["II"] substance*, 'with less abuse potential than [S]chedule ["I"] drugs,' hooks 20% of those who use it."[167] Meanwhile, around 25% of heroin users become addicted.[168] In 2018, another study also concluded marijuana is not a gateway drug to heroin, cocaine, or other substances.[169]

If whether one can die from an overdose of a drug were included in the criteria for whether a drug is "most dangerous" and should therefore be classified as a Schedule "I" drug under the CSA, heroine, a Schedule "I" drug and cocaine a Schedule "II" drug, would probably be best placed as the

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[163] *Id.*

[164] *Marijuana Research Report: Is Marijuana Addictive?*, NAT'L INST. ON DRUG ABUSE (July 2020), https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-addictive.

[165] Gupta, *supra* note 139.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] Michael Roberts, *Marijuana Isn't Gateway Drug to Heroin, Cocaine, Other Substances, Study Finds,* WESTWORD (June 25, 2018), https://www.westword.com/news/marijuana-isnt-gateway-drug-to-heroin-cocaine-other-substances-study-finds-10448451.

most dangerous of drugs, entitling them both to a Schedule "I" drug classification. While "extreme discomfort" can be associated with a marijuana overdose, according to the CDC, a marijuana overdose is not fatal.[170] In fact, some studies found that providing broader access to medical marijuana may have the potential benefit of reducing abuse of highly addictive, potentially lethal painkillers.[171] Again under the definition of the classification, it requires a *high* potential for abuse, not *any potential* for abuse.

III. EQUAL PROTECTION ARGUMENTS

Selective enforcement and prosecution based on differing state marijuana laws, enforcement and prosecution based on federal verses state land, and inconsistent enforcement and prosecution within a state with protective marijuana laws, may constitute unequal treatment between states and disparate treatment within the same state. Equal protection requires the government treat people the same absent compelling justification.[172] Selective prosecution occurs in violation of the equal protection component of the Fifth Amendment's Due Process Clause, "when the decision to prosecute a particular criminal is 'based upon an unjustifiable factor such as race, religion, or another arbitrary classification.'"[173] The burden to establish a claim of selective prosecution is high.[174]

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[170] *Is it Possible to "Overdose" or have a "Bad Reaction" to Marijuana?,* CDC, https://www.cdc.gov/marijuana/faqs/overdose-bad-reaction.html (last visited June 15, 2020); *but see* Olaf H. Drummer et al., *Cannabis as a Cause of Death: A Review*, FORENSIC SCI. INT'L 298, 301–06 (2019).

[171] David Powel et al., *Do Medical Marijuana Laws Reduce Addictions and Deaths Related to Pain Killers?,* (Nat'l Bureau of Econ. Rsch., Working Paper No. 10.3386/w21345, 2015), https://www.nber.org/papers/w21345

[172] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

[173] Wayte v. U.S., 470 U.S. 598, 608 (1985); *see also* Abby Haglage, *Black People Are 9 Times More Likely to Be Arrested for Marijuana Possession in These States, ACLU Says,* YAHOO LIFE (Apr. 24, 2020), https://www.yahoo.com/lifestyle/black-people-9-times-more-likely-arrested-marijuana-possession-these-states-aclu-160324961.html ("The American Civil Liberties Union released a groundbreaking report in 2013 showing that Black people were 3.7 times more likely to be arrested for marijuana possession than whites."); Zachary Nelson, *If It Looks Like a Duck: Equal Protection, Selective Prosecution, and Geographic Differences in the Federal Prosecution of Marijuana Crimes Under the Controlled Substances Act,* 23 Lewis & Clark L. Rev. 1007, 1025 (2019) ("The necessary contextual focus of the evidence establishing discriminatory effect remains an open question. Regarding the necessary evidence, the Court noted that such 'raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*.'"); *see also* U. S. v. Bass*,* 536 U.S. 862 (2002) (*per curiam*).

[174] United States v. Armstrong, 517 U.S. 456 (1996).

A. Selective Enforcement & Prosecutions Based Upon State

Selective enforcement differs from selective prosecution in that law enforcement is the official enforcing the law when they decide to cite or arrest someone for a violation, whereby a prosecutor is the official deciding whether to prosecute the citation and arrest. While the instances and facts surrounding the citation, arrest, and the prosecution may differ, the elements for selective enforcement and selective prosecution are "essentially the same."[175] Selective prosecution as an equal protection claim was addressed by the Supreme Court in *Wayte v. United States,* where the Court found selective prosecution claims may appropriately be judged according to ordinary equal protection standards. These standards require the petitioner to show both that the passive enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose.[176] In *United States v. Armstrong* the court phrased it another way, explaining that "[i]order to prove a selective-prosecution claim, the claimant must demonstrate that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose."[177] As commentator Zachary Nelson writes, "to establish discriminatory effect, a claimant must prove that similarly situated persons were treated differently."[178]

Applying and enforcing the CSA as a federal law prohibiting marijuana sales or use against a citizen in one state without any marijuana laws, while allowing citizens of another to sell and use marijuana in states where marijuana laws exist, could be considered a respective benefit or burden to the citizen of the first state. This raises potential equal protection geographical issues based on whether a state has passed a marijuana law. To illustrate, a person driving from the state of Illinois, where marijuana is both recreationally and medically legal, to the neighboring state of Indiana, which has no recreational marijuana law and a very limited use of medical marijuana, would face selective enforcement and prosecution issues. This citizen would be treated differently depending on which side of the state line they were on and potentially burdened with enforcement or prosecution. The reverse order, from Indiana to Illinois, would instead confer a benefit to the citizen by the lack of enforcement or prosecution.

However, these inequities do not automatically render a law

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[175] U.S. v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006); *see also U.S. v. James,* 257 F.3d 1173, 1179 (10th Cir. 2001) (applying selective prosecution standards to selective enforcement claim).

[176] *Wayte*, 470 U.S. at 608–11.

[177] *Armstrong,* 517 U.S. at 457.

[178] Nelson, *supra* note 173, at 1026

unconstitutional.[179] Under the Fourteenth Amendment, which is applied to the federal government via the reverse incorporation of that guarantee into the Fifth Amendment's Due Process Clause,[180] if a law creates a burden or benefit based on a classification, then the law may be unconstitutional.[181] A court must review the law under the appropriate degree of scrutiny, that is, the level of skepticism the court holds as to the motive and purpose underlying a government action. Heightened scrutiny applies "when the law's classification burdens a suspect or quasi-suspect class or … when the classification "unconstitutionally burdens a fundamental right."[182] Laws that do not fall under those categories are subject to a very deferential standard known as "rational basis."[183] If a law is rationally related to a legitimate government interest, then the law will pass this lower level of scrutiny. So long as courts are convinced that any set of conceivable facts could be rationally related to the government's interest, the law is constitutional. [184]

In the *Davis* case the defendant, living in Missouri, a state without marijuana protective laws, argued the DOJ should be enjoined from prosecuting him for possession under the CSA because individuals in the states where marijuana was legalized were not prosecuted for similar conduct when they were found to be in compliance with their state law.[185] The court stated the CSA and its corresponding appropriation acts (riders) are neutral laws.[186] As such, it claimed there was no disparate

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[179] *Armstrong*, 517 U.S. at 465 (applying a "similarly situated" standard to selective prosecution claim based on alleged racial discrimination); *Wayte*, 470 U.S. at 605–07 (affirming the court of appeals' denial of the defendant's selective prosecution claim for failing to establish that "others similarly situated generally had not been prosecuted for conduct similar to" theirs.).

[180] *Wayte*, 470 U.S. at 608 n.9 (1985) ("Although the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component." (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

[181] *Id.* at 608.

[182] Nelson, *supra* note 173, at 1019–20; *see also* Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 308 (2013) (noting that suspect classes include race, ethnicity, and nationality); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 325 (1976) (Marshall, J., dissenting) (noting that quasi-suspect classes include sex and bastardy); *Marijuana Arrests & Punishments*, ACLU, https://www.aclu.org/other/marijuana-arrests-punishments (last visited June 14, 2020).

[183] *Id.*

[184] Jarrett Dieterle, *Differing Levels of Scrutiny for Economic Regulations: "Anything Goes" Rational Basis v. Rational "With Bite,"* FEDERALIST SOC'Y (Apr. 26, 2017), https://fedsoc.org/commentary/fedsoc-blog/differing-levels-of-scrutiny-for-economic-regulations-anything-goes-rational-basis-v-rational-basis-with-bite.

[185] United States v. Davis, No. 4:16CR495 CDP/NCC, 2017 WL 2703863, at *1-2 (E.D. Mo. May 24, 2017).

[186] *Id.* at *3.

treatment between courts.[187] The court further expounded by stating that even if it found unequal treatment under the law, defendant's failure to claim he was prosecuted "arbitrarily," or "based on his membership in a suspect class," fell short of a prima facie case for violating equal protection.[188]

Given that the court concluded that the laws were neutral and the defendant failed to prove that the laws were discriminatory in purpose or effect, the court denied the claim that marijuana's classification under the CSA and its corresponding enforcement violated equal protection. It held the claim lacked merit because the CSA and the rider both "have a rational basis that furthers a legitimate governmental end."[189] In support of the holding, the court cited *United States v. White*.[190] "This reliance is problematic because: (1) *White* dealt only with a selective prosecution claim based on the Cole Memo and did not involve the rider; and (2) it did not identify that either the CSA or the rider were rationally related to a legitimate governmental end."[191]

The rider as an argument for non-enforcement and prosecution under the CSA was addressed in *United States v. Gilmore,*[192] where the defendants argued that because of the continued renewal of the rider, "[c]ongress's intention is "plain:" "to the extent that" [defendants'] actions were "in compliance with California law," Section 538 "forbids the Department of Justice from enforcing" the Controlled Substance Act against [them]...".[193] This argument however was not advanced in the Defendants' Motion to Dismiss and was precluded from going before a jury as it was deemed a matter of law.[194] Although not addressed by the court in *Gilmore*, the continued rider as an argument that the federal government does not have an intention of prosecuting those associated with medical marijuana sales and use is further enhanced as it was again signed into law through 2019.

Another court has addressed whether the 2014 rider protecting medical marijuana from the DOJ creates a selective enforcement violative of equal

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[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] U. S. v. White, No. 12-cr-03045-BCW, 2016 WL 4473803 (W.D. Mo. Aug. 23, 2016).

[191] Nelson, *supra* note 173, at 1046; *but see* Drummer, *supra* note 170, at 298–306.

[192] U.S. v. Gilmore, No. 2-13-cr-00300-GEB, 2016 WL 74033, at *103 (E.D. Cal. 2016).

[193] *Id.* at *2.

[194] *Id.* ("[T]he legal effect of § 538 on the enforcement action taken by this prosecution is not a jury question, but instead is a legal question which defendants should have raised (if they wanted to advance this argument), but did not raise, in a motion to dismiss the indictment. Indeed, it makes no sense for the jury to hear and weigh legal arguments on the effect of Congress' passage of § 538 as the jury is not an arbiter of the law, and the Court should bar the defendants from mentioning or arguing § 538's effect on this case.").

protection. The *McIntosh* case involved consolidated cases challenging prosecutions based on the rider argument. It established the "*McIntosh Hearing*": the objective is to determine a defendant's compliance with the pertinent medical marijuana state law as a condition to seeking the protection from prosecution by the DOJ on the basis of the rider.[195] The unequal application of criminal liability for CSA violations has yet to reach the Supreme Court for consideration.[196] ". . . [T]he Supreme Court declined certiorari . . . the petition . . . did not focus on equal protection or selective prosecution claims but argued that the *McIntosh* 'strict compliance' standard,[197] as applied narrowly by courts, itself, violated several constitutional provisions."

In addition to the continuation of the rider, in 2018, the Farm Act removed hemp from the marijuana classification and permitted the use of the marijuana plant for very low-level THC.[198] This low-level of THC is currently being used in CBD products across the country[199] and raises the question of why the marijuana plant use, which is the subject of the CSA, is not permissible in one instance but is in another. Given the federal legislature passed the riders and the Act with bipartisan support and President Trump signed both, the government's intentions of enforcing marijuana's classification under the CSA are further eroded.

Additionally, the 2013 Cole Memorandum was prepared by Obama's Attorney General James Cole and stated that, "…so long as a marijuana business complied with state law, it would not be subject to federal prosecution unless it violated one of the Cole Memorandum priorities.[200]" The Cole Memo argument by itself, as a selective enforcement and

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[195] U.S. v. McIntosh, 833 F. 3d 1163, 1178 (9th Cir. 2016).

[196] Nelson, *supra* note 173, at 1048; *see also McIntosh*, 833 F.3d at 1163; Gloor v. U.S., 139 S. Ct. 348 (2018).

[197] *McIntosh*, 833 F.3d at 1163.

[198] Juliegrace Brufke, *House Passes $867 Billion Farm Bill, Sending it to Trump*, THE HILL (Dec. 12, 2018), https://thehill.com/homenews/house/420990-house-passes-867-billion-farm-bill-sending-it-to-trump; *see also President Donald J. Trump Is Improving American Agriculture Programs*, WHITE HOUSE FACT SHEET (Dec. 20, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-is-improving-american-agriculture-programs/.

[199] Joan Oleck, "*There Is an Active Discussion of CBD Happening Across the Country," Says a New Report. And That Spells Opportunity,* FORBES (May 28, 2020), https://www.forbes.com/sites/joanoleck/2020/05/28/there-is-an-active-discussion-of-cbd-happening-across-the-country-says-a-new-report-and-that-spells-opportunity/#329dae6036f0.

[200] Tom Firestone, *The Sessions Memorandum: Two Years Later,* BAKER MCKENZIE (Jan. 6, 2020), http://globalcannabiscompliance.bakermckenzie.com/2020/01/06/the-sessions-memorandum-two-years-later (paraphrasing the Cole Memo, *supra* note 10, at 3).

prosecution argument, has failed in all federal court cases,[201] though one court, by way of dicta, demonstrated some concern about the potential for unequal enforcement of marijuana laws. However, this court was reviewing a supervised release issue and not a dismissal of the case based on selective enforcement.[202]

While recent courts have held that the Cole Memo and its impact on the federal prosecution of marijuana CSA violations do not amount to selective prosecution and do not violate equal protection,[203] the fact that the government has continued with the Cole Memo principles for over seven years may strengthen the argument that the non-enforcement of the CSA is the rule rather than the exception. For example, the Trump Justice Department largely adheres to the Obama Administration's enforcement priorities and Attorney General Barr at his confirmation suggested that he would not prosecute state-compliant marijuana activity.[204]

Although the Trump administration issued a memo directing all U.S. Attorneys to "enforce the laws enacted by Congress and follow well-established principles when pursuing prosecutions related to marijuana activities,"[205] thus essentially overturning all previous DOJ policies pertaining to prosecutorial discretion in enforcing CSA violations,[206] thus far no Attorney General in any state has increased enforcement of the CSA beyond the scope of the Cole Memorandum[207] and the U.S. Attorneys'

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[201] *See e.g.*, *Wayte,* 470 U.S. at 610.

[202] *United States v. Guess*, 216 F. Supp. 3d 689, 695 (E.D. Va. 2016).

[203] Nelson, *supra* note 173, at 1027, 1048; U.S. v. White, No. 12-cr-03045-BCW, 2016 WL 4473803, at *4 (W.D. Mo. Aug. 23, 2016); U. S. v. Nguyen, No. 2:15-cr-234-JAM, 2016 WL 3743143, at *1 (E.D. Cal. July 13, 2016); U. S. v. Apicelli, No. 14-cr-012-JD, 2016 WL 50436, at *15 (D.N.H. Jan. 4, 2016); U.S. v. Pickard, 100 F. Supp. 3d 981, 1009–11 (E.D. Cal. 2015); U.S. v. Vawter, No. 6:13-cr-03123-MDH, 2014 WL 5438382, at *8 (W.D. Mo. Oct.24, 2014); U.S. v. Taylor, No. 1:14-CR-67, 2014 WL 12676320, at *3 (W.D. Mich. Sept. 8, 2014); U.S. v. Heying, No. 14-CR-30 (JRT/SER), 2014 WL 5286153, at *12 (D. Minn. Aug. 15, 2014); U.S. v. Keller, No. 12-20083-41-KHV, 2014 WL 12695942, at *2 (D. Kan. Mar. 24, 2014). Similar challenges based on the Ogden Memo also failed. *See e.g.,* U. S. v. Canori, 737 F.3d 181, 185 (2d Cir. 2013); James v. City of Costa Mesa, 700 F.3d 394, 405 (9th Cir. 2012).

[204] Brandi Kellam, *Trump's Attorney General Nominee May Shift Policy on Marijuana Enforcement*, CBS NEWS (Jan. 18, 2019), https://www.cbsnews.com/news/william-barr-on-marijuana-legalization-attorney-general-nominee/?_sm_au_=iVV0HqSRVMkH5qnqKkM6NKsW8f6TG.

[205] *Justice Department Issues Memo on Marijuana Enforcement,* U.S. DEP'T OF JUST. (Jan. 4, 2018), https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement.

[206] Laura Jarrett, *Sessions Nixes Obama-Era Rules Leaving States Alone that Legalize Pot*, CNN (Jan. 4, 2018, 5:44 PM), https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html.

[207] Peter S. Murphy, *State Officials and U.S. Attorneys Respond to Sessions Move to Rescind Cole Memo*, ECKERT SEAMANS (Jan. 17, 2018), https://www.eckertseamans.com/stay-informed/blogs/controlled-substance/state-officials-and-u-s-attorneys-respond-to-sessions-move-to-rescind-cole-memo.

Office for the District of Colorado took the position that its non-enforcement would remain essentially unchanged.[208]

B. Selective Enforcement & Prosecution Based Upon Federal v. State Land

While state-legal cannabis industries have enjoyed some degree of protection from federal interference, if conducted on federal land, they are subject to punishment under the CSA.[209] Whether marijuana possession or use occurs on state verses federal land within the same state also raises equal protection issues. For example, someone driving into Yellowstone National Park, which is federal land, with possession of a medical marijuana card and medical marijuana, would not be prosecuted for possession on the state road, but, would be subject to enforcement and prosecution once they enter the park on a federal road. In 2018, a U.S. Appeals Court stated laws discouraging the DOJ from prosecuting some medical marijuana users and dispensaries (under the rider) did not apply to operations on federal land.[210] In 2012, three men were charged with violating the CSA after being caught with 118 cannabis plants in El Dorado County, California.[211] The men claimed they were growing medical marijuana, which under California law is "completely legal."[212] However, the court noted that because the land was actually federally-owned and controlled by the Bureau of Land Management, the men were criminally liable under the CSA.[213] The Ninth Circuit upheld the ruling noting, "[n]othing in California law purports to authorize the cultivation of marijuana on federal land."[214] Similarly, as recently as March 2020, a federal court in Nevada prosecuted three men for cultivating marijuana in the Humboldt-Toiyabe National Forest.[215]

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[208] Jarrett, *supra* note 206.

[209] Bob Egelko, *Court Rules Protections for California Pot Suppliers Don't Cover Federal Land,* S.F. CHRON. *(*April 5, 2018*),* https://www.sfchronicle.com/news/article/Court-rules-protections-for-California-pot-12810541.php?src=hp_totn.

[210] *Appeals Court Limits Scope of Law Barring Pot Prosecutions,* U.S. NEWS (April 5, 2018), https://www.usnews.com/news/best-states/california/articles/2018-04-05/appeals-court-limits-scope-of-law-barring-pot-prosecutions?int=undefined-rec.

[211] Chris Moore, *Federal Court Rules That Cannabis Protections Do Not Apply to Federal Land,* MERRYJANE (Apr. 6, 2018), https://merryjane.com/news/californias-solution-to-fighting-the-illicit-weed-market-hire-more-cops?folded=true.

[212] U.S. v. Gilmore, 886 F.3d 1288 (9th Cir. 2018).

[213] *Id.*

[214] *Id.*

[215] *Two California Men Sentenced to Prison for Large-Scale Marijuana Grow Operation on Federal Land*, U.S. DEP'T OF JUST. (March 6, 2020), https://www.justice.gov/usao-nv/pr/two-california-men-sentenced-prison-large-scale-marijuana-grow-operation-federal-land.

Meanwhile, other marijuana users are legally endowed with the protection of Nevada law for their recreational and medical uses.[216]

C. Selective Enforcement and Prosecutions on State Land in the Same State

Although courts have upheld convictions based on the Supremacy Clause and preemption, dissimilar treatment for the same offense on state land in the same state under the theory of equal protection selective enforcement and prosecution has not yet been addressed. The selective enforcement and prosecution are even more egregious when the federal government picks and chooses to enforce or prosecute under the CSA classification in a state that *does* have marijuana laws. For example, between 2009-2012, in California

> . . . the Justice Department . . . conducted more than 170 aggressive SWAT-style raids in nine medical marijuana states, resulting in at least 61 federal indictments… also seized property from landlords who rent space to growers, threatening them with prosecution, and authorities have even considered taking action against newspapers selling ad space to dispensaries.[217]

In this instance one citizen may incur a burden while another may not.

These inconsistent federal marijuana "raids" under the CSA in a state that has protective marijuana laws are arbitrary and therefore have no rational basis. While again, the existence of the CSA may have a rational basis, short of non-compliance with a state medical marijuana law or regulation, there seems to be little or no rationale for enforcing and prosecuting one citizen legally engaged in a medical marijuana business as opposed to another within the same state. The case for a rational basis for the CSA classification seems greatly diminished in this instance and additionally raises a due process arbitrary and capricious argument as will be discussed below.

D. Equal Protection Arguments Under Desuetude

"'Desuetude' is "the obscure doctrine by which a legislative enactment

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[216] LAS VEGAS DEFENSE GROUP, *A Guide to Marijuana Laws in Law Vegas, Nevada,* SHOUSE L. (July 20, 2020), https://www.shouselaw.com/nv/defense/laws/marijuana/

[217] Lucia Graves, *Nancy Pelosi: Medical Marijuana Busts by Feds of 'Strong Concern',* HUFFPOST (May 3, 2012), https://www.huffpost.com/entry/nancy-pelosi-medical-marijuana_n_1474854.

is judicially abrogated following a long period of nonenforcement."[218] The doctrine "is primarily rooted in eliminating laws which due to a lack of enforcement have essentially become obsolete or serve no modern purpose."[219] Traditionally, and mostly to no avail, desuetude has been raised as a defense to the sudden enforcement of a statute with a long history of nonuse. Several cases across the country have attempted to use the desuetude doctrine as a defense to a criminal violation of a statutory scheme that was not enforced or enforced sporadically.[220]

The ACLU states "…because police lack the resources to enforce drug laws *{including those laws in violation under the CSA}* against all 17 million regular marijuana users, the prohibition of so commonplace an activity invites selective law enforcement. Similarly, the vast number of marijuana arrests also invites selective prosecution.[221] Simply put, the current situation around enforcing marijuana's legality extends deference to prosecutors in deciding which marijuana violations or crimes they will prosecute. The federal or state legislature may enact a criminal statute, as it did under the CSA, but the prosecutor may decide not to charge or indict under said statute. "When the state retains crimes that go largely unenforced and gives prosecutors . . . the power to decide which violators (if any) to charge," prosecutors become legislators.[222] As such, the desuetude doctrine severely mitigates the potential for prosecutorial abuse by placing the authority to make executive decisions into the hands of the courts.

Courts have acknowledged selective enforcement of a destuetudinal statute, that is a statute that has been long not used, may raise equal protection problems.[223] In some situations a desuetudinal statute triggers selective enforcement, which in turn, raises equal protection concerns.[224] This could be the case with marijuana legislation because the federal government's role does not explicitly and uniformly outlaw marijuana, and has to a certain extent accommodated state marijuana laws in the face of CSA restrictions. The ensuing result and consequences are that the federal

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[218] Note, *Desuetude,* 119 HARV. L. REV. 2209 (2006).

[219] U.S. v. Morrison, 596 F. Supp. 2d 661, 702 (E.D.N.Y. 2009) (citing *Desuetude, supra* note 215); *see also* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, not Powers*, 119 HARV. L. REV. 2212 (2006).

[220] *See e.g.*, Hill v. Smith, 70 (Iowa 1840), 1840 WL 2834 at *7; *see also e.g.,* Pearson v. Int'l Distillery, 34 N.W. 1, 5–6 (Iowa 1887).

[221] *Marijuana Arrests & Punishments*, ACLU, https://www.aclu.org/other/marijuana-arrests-punishments (last visited July 14, 2020).

[222] William J. Stuntz, *Substance, Process, and the Civil-Criminal Line,* 7 J. CONTEMP. LEGAL ISSUES 1, 24 (1996).

[223] Elliott, 266 F. Supp. at 326.

[224] *Id.*

government sporadically enforces the CSA.

Some courts do not recognize the doctrine as a legal defense, others permit the defense within strict parameters, and still others frame it within the context of due process or equal protection arguments. For example, in *Hill v. Smith, Morris*[225] an Iowa court, "pronounce[d] it contrary to the spirit of that Anglo-Saxon liberty . . . to revive, without notice, an obsolete statute."[226] The court reasoned that resuscitating a law after a "long disuse and a contrary policy had induced a reasonable belief that it was no longer in force."[227] Thus, the court invalidated the law on the basis of the law being desuetude.[228]

Though, this finding was later overruled by *Pearson v. Int'l Distillery*,[229] in 1992, a West Virginia court recognized the desuetude doctrine as a valid defense in *Committee on Legal Ethics v. Printz*.[230] In 1967 in *United States v. Elliott*,[231] "a judge in the Southern District of New York suggested that *desuetude* might be a winning defense if framed in terms of a due process or equal protection challenge to an obsolete law."[232] However, since the reasoning explained in *Elliott* and the holding in *Printz*, no federal court has invalidated a criminal statute on *desuetude* grounds. Yet, additional courts have addressed this legal doctrine.

In *U.S. v. Jones*,[233] the court, quoting *Elliot,*[234] stated, "[a]lthough originally a civil law doctrine, courts have acknowledged that a desuetudinal

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[225] *Smith*, 70 (Iowa 1840), 1840 WL 2834 at *7.

[226] *Id.* at 79.

[227] *Id.*

[228] *Id.*

[229] *Pearson*, 34 N.W. at 5–6 (A statute cannot lose its force by nonuser, unless such nonuser be accompanied by the enactment of irreconcilable statutes.).

[230] Comm., on Legal Ethics v. Printz, 416 S.E.2d 720, 727 (W. Va. 1992).

[231] *Elliott*, 266 F. Supp. at 318.

[232] *See id.* at 325–26. (There have been other federal court discussions of desuetude.). *See* Cent. Nat'l Bank of Mattoon v. U.S. Dep't of Treasury, 912 F.2d 897, 906 (7th Cir. 1990) (Posner, J.) (leaving open the propriety of a desuetude defense while ruling against the litigant on the issue); U.S. v. Jones, 347 F. Supp. 2d 626, 628–29 (E.D. Wis. 2004) (assuming validity of desuetude doctrine but denying its applicability to the case at hand); U. S. v. Moon Lake Elec. *Ass'n*, 45 F. Supp. 2d 1070, 1083 (D. Colo. 1999) (discussing the doctrinal requirements of the defense); *see also* Poe v. Ullman, 367 U.S. 497, 502 (1961) (implying that a Connecticut birth control statute had been reduced by nonuse to "dead words of . . . written text"); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (Invalidating a municipal laundry regulation that was only enforced as against Chinese immigrants. Had city authorities not arrested the Chinese laundry owners just a few years after passing the laundry ordinance at issue, the law would otherwise have fallen into complete desuetude with the passage of time; aside from its unconstitutional application against the Chinese, the statute does not seem to have been used at all.).

[233] *Jones,* 347 F. Supp. 2d at 628.

[234] *Elliott*, 266 F. Supp. at 326.

statute could present 'serious problems of fair notice' in a criminal case."[235] A desuetudinal statute also contains the potential for abuse that rests in any over-broad administrative discretion; its selective enforcement raises equal protection problems." [236] For instance, in *United States v. Morrison,*[237] the government filed an indictment charging the defendant, a cigarette on-reservation retailer, with eleven counts of racketeering.[238] Racketeering Acts Four through Eighty of the indictment alleged that Morrison, ''knowingly and intentionally sold and distributed contraband cigarettes TTT lacking valid New York State tax stamps, in violation of Title 18, United States Code, Sections 2342(a) and 2; 18 U.S.C. § 2342(a) is part of the Contraband Cigarettes Trafficking Act (''CCTA''), 18 U.S.C. §§ 2341 et seq."[239] Among many arguments, the defendant contended the state, by not enforcing the tax statute, could not bring an indictment under that statutory scheme.[240]

The Court found New York's failure "to enforce its tax laws [was] not due to neglect; rather, it [was] due in large part to the ability of Native Americans to thwart enforcement."[241] The court explained that previous attempts to enforce the tax law precipitated civil unrest and legislative frustration.[242] Moreover, the Court explained this was not a case where a "statute's obsolescence [was] indicative of a shift in public morality.''[243] In fact, the Court highlighted, "there [was] nothing to indicate any shift in public opinion as presumably the public would not be receptive to a scheme that permit[ed] Native Americans to evade taxes in such a large-scale fashion."[244] Accordingly, the court determined that "to the extent the doctrine of desuetude breathes any life in this Circuit, it d[id] not apply to the instant prosecution."[245] As such, the Court concluded that "the failure of the executive branch to enforce the law [did not] undermine the viability of a statute duly enacted by the legislature."[246]

In a more recent case in 2017, *Jamgotchian v. State Horse Racing*

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[235] *Jones,* 347 F. Supp. 2d at 628.

[236] *Elliot,* 266 F. Supp. at 326.

[237] U.S. v. Morrison, 596 F. Supp. 2d 661 (E.D.N.Y. 2009).

[238] *Id.* at 668.

[239] *Id.* at 669.

[240] *Id.* at 695.

[241] *Id.* at 703.

[242] *Id.*

[243] *Desuetude, supra* note 215.

[244] *Morrison*, 596 F. Supp. 2d at 703.

[245] *Id.*

[246] *Id.* at 683.

Commission,[247] plaintiffs argued that Horse Racing Rule 163.255 should be invalidated because defendants had not enforced it.[248] This was particularly a concern in criminal prosecutions, as prosecution for a previously unenforced crime raised questions of fair notice and due process. The court decided not to address the validity of the doctrine " . . . because, even if desuetude [w]a s still a viable legal theory [it found] that it would not apply to the present matter."[249] The court explained that, Rule 163.255 was not in a "state of nonuse" simply because defendant never imposed penalties on violators.[250]

Indeed, the defendants continued to issue waivers under the Rule, indicating the law was still in effect.[251] The court also addressed the fairness and equal protection concerns underlying the doctrine and determined they were not present in that case. That is, plaintiffs were "not unaware of the Rule and unexpectedly faced with penalties as a result."[252] In fact, the court pointed out, plaintiffs, "possessed enough awareness of the Rule to request a waiver."[253] The court further explained that since the Rule had not been selectively enforced, equal protection concerns were not at issue.[254] In sum, the court concluded the desuetude doctrine did not apply to the facts, and thus, declined to abrogate Rule 163.255.

To illustrate this, Professor Cass Sunstein, of Harvard Law School, among other professors, suggests that desuetude was in play in *Lawrence v. Texas*,[255] in which the Supreme Court invalidated a homosexual sodomy statute that had never before been enforced against consenting adults acting in private."[256] There, the Court struck down the unenforced Texas statute not on the basis of desuetude but instead on substantive due process grounds.[257] Nevertheless, "[t]he pro-desuetude camp has not enjoyed much success, based on the separation powers argument that the courts should not usurp the power of the legislature. [258] In fact, some commentators have opined that

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[247] Jamgotchian v. State Horse Racing Commission, 269 F.Supp.3d 604 (M.D. Pa. 2017).

[248] *Id.*at 618.

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] Lawrence v. Texas, 539 U.S. 558 (2003).

[256] *Desuetude, supra* note 215. *See also* Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 30 (2003).

[257] *See* Sunstein, *supra* note 256.

[258] *Desuetude, supra* note 218, at 2218.

the "legislature has a monopoly on the creation of criminal statutes, so only the legislature can repeal them.[259] On the other hand, the best argument in favor of desuetude might also be the simplest. In the words of one commentator, "it is part of the intelligent cooperation the courts owe the legislature to relieve it from the burden of seeking out and repealing statutes that clearly serve no modern purpose." [260]

Historically, courts have bypassed the desuetude doctrine all together, however, a judge in the Southern District of New York, suggested that desuetude might be a winning defense if framed in terms of a due process or equal protection challenge to an obsolete law."[261] Additionally, in *Committee on Legal Ethics v. Printz* in 1992, West Virginia recognized desuetude as a valid defense.[262] There, the Supreme Court of Appeals of West Virginia described a three-part inquiry for determining whether to abrogate a *desuete* penal statute: "(1) the crime in question must be malum prohibitum (wrong or prohibited); (2) there must be open, notorious, and pervasive violation of the statute for a long period; (3) and there must be a conspicuous policy of nonenforcement."[263] The non-enforcement and inconsistent enforcement of the marijuana classification under the CSA is based upon the fact that, teetering a very delicate balance of power, or in some cases, disregarding it altogether, states have passed marijuana laws and have developed their own frameworks for the marijuana industry in violation of the CSA. This rift calls into question whether the federal classification of marijuana is useless under the doctrine of desuetude.

Applying desuetude factors as set forth in the West Virginia *Printz* case above, if the defendants in both the California and Nevada cases would have made a desuetude argument, they could have possibly passed the three-part inquiry to abrogate the CSA statutory classification. Although the first factor that the crime in question must be *malum prohibitum* is questionable because the CSA can be characterized as either *malum prohibitum* or *malum in se* under the definition that a *malum in se* offense is "naturally evil as adjudged by the sense of a civilized community," whereas a *malum prohibitum* offense is wrong only because a statute makes it so.[264] The CSA classification of marijuana is clearly a statutory animal, but some may argue that marijuana itself is "evil."

With respect to factor two, there must be open, notorious, and pervasive

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[259] *Id.* at 220.

[260] *Id.* at 2229.

[261] *See Cent. Nat'l Bank of Mattoon*, 912 F.2d at; *Jones*, 347 F. Supp. 2d at 628-29; *Moon Lake Elec. Ass'n*, 45 F. Supp. 2d at 1083; *Yick Wo,* 118 U.S. at 374.

[262] *Printz,* 416 S.E.2d at 727.

[263] *Id.* at 726–27.

[264] State v. Horton, 51 S.E. 945, 946 (N.C. 1905).

violation of the statute for a long period. The first medical marijuana law passed in California in 1996, twenty-four years ago, and has to date never been subject to governmental estoppel under the CSA. A defendant would likely encounter a challenge with the third factor: that is, whether there is a conspicuous policy of nonenforcement. While the non-enforcement of the CSA may be conspicuous, there is an inconsistent approach and policy to that non-enforcement. The Executive Branch has certainly not totally failed to enforce the CSA. The DOJ's choice to prioritize certain types of prosecutions unequivocally does not mean that some types of marijuana use are now legal under the CSA, nor that the DOJ has now abandoned its enforcement position. Rather, courts have held "prosecutors are permitted discretion as to which crimes to charge and which sentences to seek."[265]

All things considered, if a court were to apply the *Printz* factors where a defendant defends against a criminal charge under the CSA for possession of marijuana on the basis of desuetude, they may have a fighting chance especially if the jurisdiction of the case were in West Virginia; the *Printz* precedent may apply.

IV. DUE PROCESS SELECTIVE ENFORCEMENT AND PROSECUTION

The due process doctrine is found in the Fifth and Fourteenth Amendments to the United States Constitution and encompasses both substantive and procedural arguments.[266] The Supreme Court has held that a person making a selective-prosecution claim must establish two elements: "[1] the federal prosecutorial policy had a discriminatory effect and [2] it was motivated by a discriminatory purpose." [267] Laws that neither burden a fundamental right nor target a suspect or quasi-suspect class are subject to rational basis review.[268] The best case to advance a lack of a rational basis on the selective enforcement and prosecution argument is when there are "raids" on some businesses or individuals in a legal marijuana state, while others in the same state have not been raided. This inconsistent approach has a discriminatory effect with some business or individuals subject to the CSA while others are not.

We can only speculate on the basis and motivation for this inconsistency. What was it that made law enforcement raid one business as opposed to another, when both are conducting the same business? Was it

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[265] *James,* 700 F.3d at 405.

[266] *Id.*

[267] *Armstrong,* 517 U.S. at 465, 116 S.Ct. 1480.

[268] Timothy Snowball, *All Rights Were Created Equal*, PAC. LEGAL FOUND. (Mar. 27, 2018), https://pacificlegal.org/all-rights-were-created-equal/.

just an exercise to assert the CSA? Was there something about the person or persons or business being raided? To establish the discriminatory purpose prong for a selective enforcement and prosecution claim, more facts need to be elucidated. But it should be noted that the Supreme Court recently acknowledged that, "[g]iven the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny."[269]

Yet what if the raid is directed to a medical marijuana user or dispensary that supplies a medical marijuana user? Historically, courts have applied a "rational basis with a bite" analysis in cases involving sexual orientation classifications.[270] If persons legitimately using *medical* marijuana are considered disabled, should they also receive a heightened rational basis analysis? To this point, Justices Marshall and Blackmun indicated acceptance for a heightened review of some state action on the basis of disability; noting that "…it should not be considered futile to believe that some universe of people with disabilities should find greater protection in a progressive vision of the Constitution."[271] Furthermore, in the *Garrett*[272] dissent, Justice Breyer (joined by Justices Souter, Ginsburg, and Stevens) demonstrated amenability to a more nuanced consideration of the constitutional dimension of state discrimination on the basis of disability.[273] Also, several state supreme courts have demonstrated a "willingness to raise the standard of review for certain disability considerations."[274] The argument for medical marijuana users as a disabled population is bolstered as more courts protect employees who use medical marijuana under disability and discrimination statutes[275] and allow medical marijuana as a treatment for worker's compensation injuries.[276]

There is also the added argument that states with medical marijuana laws have determined medical marijuana users have a variety of medical conditions that may be disabling. This is evidenced by the fact that medical marijuana laws are fashioned to include a variety of medical qualifying conditions. Some of these conditions, like Tourette's Syndrome, epilepsy, and multiple sclerosis, are considered disabling.

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[269] Trump v. Haw., 138 S. Ct. 2392, 2420 (2018).

[270] Romer v. Evans, 517 U.S. 620, 640 (1996).

[271] *Id.*

[272] Bd. of Trs. of the Univ. of Ala. v. Garret, 531 U.S. 356 (2001) (Breyer, J., dissenting).

[273] *Id.*

[274] Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 559 (2014).

[275] *Id.*

[276] *Id.*

A. Substantive Due Process

While the CSA marijuana classification itself may have a rational basis for its existence–for example, to protect citizens from a perceived potentially dangerous drug–what is the rational basis for inconsistently applying the CSA? With the exception of the rider mandate barring the DOJ from using federal funds to enforce the CSA against medical marijuana use, possession, and sales, one conceivable rational basis for the differing approaches to CSA enforcement and prosecution between states may be based on the government's power of prosecutorial discretion under the Cole Memo priorities. Additionally, this Memo, irrespective of its machinations through the Sessions and Barr approaches, which did not truly rescind it, has not been found to violate equal protection "because everyone in the nation could be prosecuted . . . the Cole Memo's non-binding nature on federal prosecutors was a core reason for its constitutionality."[277]

Another rational basis may be the mere differences between federal and state laws. The federal law prohibits marijuana use, sale, and possession while some states permit those things within their regulatory schemes. This argument may be specious as the threshold question should be, whether the federal government is enforcing and prosecuting the CSA marijuana classification *in toto* or not, not whether the CSA itself is rational. Further, the federal government continually and inconsistently surrenders power to state governments by sporadic non-enforcement. To this end, the federal government maintains its supremacy in one instance, but not in another. This begs the question of whether the CSA classification really means anything legal at all.[278] That is, the federal government, by its action and inaction, is essentially voiding marijuana's CSA classification by sometimes waiving its supremacy and preemption constructs to enforce the CSA and other times ceding its supremacy and preemption to states' rights under the Tenth Amendment.

The counter argument is that, "because the federal government has authority to determine the insufficiency of a state's regulatory or enforcement systems, it is inaccurate to portray the federal government as deferring to state authority rather than simply wielding traditional prosecutorial discretion."[279] Nevertheless, the best substantive due process argument arises when the federal government picks and chooses to raid a marijuana enterprise under the CSA classification in a state that *does* have marijuana laws in place. Unless a rational basis for this uneven approach is

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[277] Nelson, *supra* note 173, at 1049.

[278] *See* 41 C.F.R. § 102–74.400.

[279] Nelson, *supra* note 173, at 1015, n.43.

advanced, it may be deemed arbitrary and capricious. Take for example two neighboring medical marijuana dispensaries that are equivalent in all respects. Law enforcement, without any known reason, decides to raid one of the dispensaries but not the other. The absence of a rational connection between the facts found and the choice made to raid conveys a notion of abuse of power.[280]

B. Due Process Void for Vagueness Under Desuetude

Under the Fifth and Fourteenth Amendments of the U.S. Constitution, void for vagueness is a construct "that requires criminal laws to state explicitly and definitely what conduct is punishable."[281] Laws that do not give adequate notice to a potential defendant of the offense charged may also fall under due process doctrine.[282] The void for vagueness doctrine requires a penal statute to define the criminal offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited."[283] Moreover, the criminal offense must be clear to avoid encouraging "arbitrary and discriminatory enforcement."[284]

However, in a U.S. Court of Appeals case, *not* on the basis of desuetude, the court held that a defendant's use and possession of marijuana, though illegal, outweighed the harm caused by him violating the law against cultivating marijuana.[285] The court reasoned that there was no other alternative to treat his glaucoma and thus, the necessity defense was valid.[286] The availability of the medical necessity defense may further subvert the CSA with regards to marijuana.[287] The CSA in its statutory language does not permit this or any other exception and the courts seem to be starting to

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[280] *Arbitrary and Capricious Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/a/arbitrary-and-capricious/ (last visited July 15, 2020).

[281] *Vagueness Doctrine*, CORNELL L. SCH., https://www.law.cornell.edu/wex/vagueness_doctrine (last visited June 15, 2019); *see also* Note, *The Void-For-Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67 (1960).

[282] *The Void-For-Vagueness Doctrine in the Supreme Court, supra* note 281.

[283] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[284] *U.S. v. Zachariah*, No. SA-16-CR-694-XR, 2018 WL 3017362, at *1 (W.D. Tex. June 15, 2018).

[285] U.S. v. Randall, D.C., Crim. No. 65923-75 (D.C. Super. Ct. Nov. 24, 1976), https://www.casebriefs.com/blog/law/marijuana-law/marijuana-law-keyed-to-mikos/the-regulation-of-marijuana-users-in-prohibition-regimes/united-states-v-randall/.

[286] *Id.*

[287] *But see* U.S. v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001), (no medical necessity defense exists for the illegal distribution of marijuana because the Controlled Substances Act). For an extensive review of the medical necessity defense in marijuana cases; *see* Jay M. Zitter, Annotation, *Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws,* 50 A.L.R. 6th 353 (2009).

carve out exceptions to the legislative act. Along with the sparse case law, several legal commentators have taken some interesting positions on the desuetude doctrine. One stated "a penal enactment which is linguistically clear, but has been notoriously ignored by both its administrators and the community for an unduly extended period, imparts no more notice of its proscriptions than a statute which is phrased in vague terms."[288] This position makes the case for a due process argument on the basis of "void for vagueness."

While the CSA clearly defines punishment for a marijuana-related offense, varying laws at the state level could produce confusion as to whether conduct involving marijuana is prohibited. The Court in in *Jamgotchian* acknowledged particular concern in criminal prosecutions relating to adequate fair notice and due process.[289] Although the court decided not to address the validity of the doctrine ". . . because, even if desuetude is still a viable legal theory," it determined "it would not apply to the present matter," it did not nullify the potential due process argument under desuetude.[290] Under this concept, potential defendants may argue both state and federal statutes may or may not result in prosecutions and are also dependent on how a court views marijuana in the context of federal law versus state law. Consequently, these inconsistencies fail to give proper due process notice to the ordinary person**.**

C. Modern Times Outlive the Classification Under Desuetude

In *Morrison*, in response to an indictment charging defendant, a cigarette on-reservation retailer, with eleven counts of racketeering, the defendant contended the state's failure to enforce a cigarette tax statute precluded it from brining an indictment under that statutory scheme.[291] The Court rejected defendant's argument, stating there was no evidence indicating a "shift in public opinion" and that presumably, the public would condemn a scheme that permitted defendant and others similarly situated to evade taxes on a large scale.[292] Based on the reasoning set forth in the *Morrison* desuetude case, a shift in public opinion supports an argument for voiding the CSA marijuana classification based on desuetude.

The clearest and strongest basis for rendering marijuana's federal

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[288] NORMAN J. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 34:6 at 44 (7th ed. 2019) (quoting Arthur Bonfield, *The Abrogation of Penal Statutes by Nonenforcement,* 49 IOWA L. REV. 389, 416 (1964)).

[289] *Jamgotchian,* 269 F. Supp. 3d at 604.

[290] *Id.* at 618.

[291] *Morrison,* 596 F. Supp. 2d at 683.

[292] *Id.* at 703.

classification desuetude rests with the significant shift in public opinion; court rulings protecting medical marijuana users inside and outside the employment setting and congressional support for protecting and legalizing marijuana.[293] This is evidenced by: (1) the passage of permissive marijuana laws in thirty-three states; (2) support from more than two-thirds of the general population for legalizing marijuana – reflecting the highest percentage of support since the late 1960s;[294] (3) several court cases, in state and federal courts permitting the use of medical marijuana;[295] (4) the fact that courts are reluctant to condemn marijuana for medical purposes; (5) the federal government's often permissive approaches towards prosecuting marijuana offenses by virtue of the sustained Cole Memo principles and the continuing riders; and (6) albeit unsuccessful, the Congressional attempts to modify and protect marijuana legalization. Together, these contributing factors could be interpreted as a reflection of a shift in public opinion and morality. This is unlike *Morrison*, where there was not an extensive rationale to not enforce the pertinent law.

In response to growing public approval, states continue to forge their own paths toward legal marijuana use. This is not very alarming, considering marijuana is not the only mind-altering substance that governments have carefully controlled. Alcohol, while once illegal, is now a commonly used substance that the government regulates to mitigate the effects of its abuse.[296] Even with government restrictions, alcohol remains the "third leading cause of preventable death in the United States," suggesting its potential for abuse.[297] Nevertheless, the federal government has accepted the risks of alcohol, which allowed societal demands to prevail.

The removal of the CSA marijuana definition, whether a complete removal from the CSA or a rescheduling to a less dangerous drug classification, may be seen as creating new problems among an emerging generation that we, as a society, may not be equipped to address. Notably however, states with medical and/or recreational marijuana are permitted to introduce legislative safeguards, to warn consumers and protect adolescents.[298] For example, in California, you must be eighteen years or

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[293] Homer, *supra* note 57.

[294] Gacek, *supra note* at 57.

[295] Lewis A. Grossman, *Life, Liberty, (and the Pursuit of Happiness): Medical Marijuana Regulation in Historical Context*, 74 FOOD & DRUG L.J. 280, 283–84 (2019).

[296] *Id.*

[297] *Alcohol Facts and Statistics*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/alcohol-facts-and-statistics (last visited May 15, 2020).

[298] *State-by-State Marijuana Policies, supra* note 110.

older and have a qualifying condition for medical marijuana or be over the age of twenty-one for recreational marijuana.[299] These examples demonstrate some of the many ways that, in spite of marijuana's potential for abuse, state legislatures are attempting to strike a balance between legal marijuana use, its conceivable medicinal benefits, public demand, and its risks for abuse. States have accepted marijuana's widespread use and have attempted to cope with the reality of its existence within our society. This reality sets forth a clear argument for declassification based on a shift in modern perceptions about marijuana.

Nonetheless, when an argument rooted in the principles of the desuetude doctrine seems to be substantial, courts have opted to nullify the law on alternate grounds. In *Lawrence v. Texas* the Supreme Court invalidated a homosexual sodomy statute that had never before been enforced against consenting adults acting in private.[300] In that case, the Court struck down the unenforced Texas statute not on a theory of *desuetude* but instead on substantive due process grounds.[301] There, even though the sodomy law at issue had never been enforced, and thus, under the theory, was eligible to be rendered desuetude, the court focused on the due process implications.

Additionally, early decisions recognizing the doctrine have been overturned. For example, in *Hill v. Smith, Morris*[302] an Iowa court stated, "[w]e pronounce it contrary to the spirit of that Anglo-Saxon liberty which we inherit, to revive, without notice, an obsolete statute, one in relation to which long disuse and a contrary policy had induced a reasonable belief that it was no longer in force."[303], but this position and finding was later overruled by *Pearson v. Int'l Distillery*.[304] There, the court distinguished the case in *Hill v. Smith, Morris*, explaining that an old statute was inoperative and repealed by other irreconcilable statutes and "by the establishment of an opposite legislative policy."[305] As such, the court explained, " a statute cannot lose its force by nonuser, unless such nonuser be accompanied by the enactment of irreconcilable statutes."[306] Even if the passage and promulgation of state marijuana statutes and federal government riders are enough to argue "irreconcilable" statutes or opposite legislative policy, the Supreme Court increased the reluctance to void a statute on the basis of it

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[299] *Id.*

[300] *Desuetude, supra* note 218, at 2212. *See* Sunstein, *supra* note 256.

[301] *See* Sunstein, *supra* note 256.

[302] *Smith* 70 (Iowa 1840), 1840 WL 2834 at *7 (Iowa Terr.); *Pearson*, 34 N.W. at 5–6.

[303] *Smith,* 1840 WL 2834 at* 7.

[304] *Pearson,* 34 N.W. at 5–6.

[305] *Smith,* 1840 WL 2834 at *7.

[306] Dist. of D.C. v. Thompson, 346 U.S. 100 (1953).

being *desuetude*, by affirming that the "failure of the executive branch to enforce a law does not result in its modification or repeal."[307]

V. CONCLUSION

Notwithstanding potential constitutional arguments on whether the subject of marijuana should be governed by the federal government or by the states, the legitimate science alluding to *some* potential benefits from medical marijuana, the lack of science concluding that there is not a *high* potential for abuse with marijuana use, and the relationship to the definition of other drugs contained within the CSA classifications brings into question whether the CSA definition of a Schedule "I" drug truly applies to marijuana. Using parts of the marijuana plant for CBD also raises definitional issues.

The continuation of the passage of state marijuana laws coupled with the lack of enforcement of the CSA under executive policies throughout the Obama and Trump Administrations, and, the continued riders barring the DOJ from prosecuting medical marijuana matters, weakens the supremacy and preemption arguments that form the basis for enforcing the CSA with regards to marijuana.

With Congress unable to reach a legislative solution, marijuana's CSA classification continues to be diluted by piecemeal enforcement and prosecution under the CSA. Standard equal protection and due process arguments are beginning to emerge, especially when enforcement can be characterized as arbitrary and citizens are not duly notified, thereby inviting confusion about the potential enforcement under the CSA. The change regarding marijuana public opinion and morality, also bring forward additional arguments based on the legal doctrine of desuetude.

An examination of case law on the matter of equal protection, due process and desuetude demonstrates that courts are mostly not willing to directly address the utility of marijuana's CSA classification. There are, however, some novel and limited arguments available under the desuetude doctrine, including strong arguments for reevaluating the merits of the law to conform with current social, science, and practical trends.

The inaction by the federal government to reclassify marijuana under the CSA and the inability of the Congress to do so, leave the courts with varying and contrary positions regarding medical marijuana use inside and outside of the workplace. Law enforcement, prosecutors, and the courts are all reluctant to change the classification claiming that it would constitute a fiat and would instead be better left to Congress. Many cases have come before the courts over the years asking to overturn the CSA classification of

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307 *Id.*

marijuana to no avail. Perhaps courts should start addressing this growing issue, rather than doing nothing out of fear of legislating from the bench. Is it not the courts that are the last arbiter between the executive and legislative branch?[308]

Courts have previously alluded to rendering laws desuetude in response to a "shift in public morality."[309] An early Harvard Law Review study makes the case succinctly:

> in the face of overwhelming indication that those necessities had changed since its enactment, they *[the courts]* might well apply the modern policy instead of that of the earlier statute. More pragmatically, justification for such departure might be found in the view that it is part of the intelligent cooperation the courts we the legislature to relieve it from the burden of seeking out and repealing statutes that clearly serve no modern purpose.[310]

Now that the Democrats control the Senate and the House, the MORE ACT has a better chance of being passed, which would absolve the courts from taking any action on this issue. If the Act does not pass and we are left with this quagmire, perhaps it is time for courts to apply modern marijuana policies to an outdated federal law.

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[308] *Judicial Branch*, HISTORY (Aug. 21, 2018), https://www.history.com/topics/us-government/judicial-branch.

[309] *Morrison*, 596 F. Supp. 2d at 703.

[310] *Judicial Abrogation of the Obsolete Statute: A Comparative Study*, 64 HARV. L. REV. 1181, 1184 (1951).