
Decriminalizing Cannabis

Jennifer D. Oliva

ABSTRACT. The United States has criminalized the manufacture, distribution, use, and possession of cannabis and its psychoactive components at the federal level since 1970. The states began to push back on national cannabis prohibition in the mid-1990s and, as a result, adult cannabis use is legal for various purposes in most of the states today. Ongoing federal cannabis criminalization, however, continues to threaten the viability of state legalization schemes. In response to forceful pleas for national reform, the federal government recently initiated rulemaking to reschedule cannabis—a rare Biden Administration reform that President Trump supported during his 2024 campaign. While the federal government’s proposed rescheduling scheme marks an improvement on national cannabis prohibition, it is woefully insufficient given the racist history of cannabis criminalization, the lack of evidence that justified the criminalization of cannabis in the first instance, and the widespread adoption of robust and complex state cannabis-legalization schemes over the last two decades. This Essay argues that the federal government should abandon its legally problematic rescheduling proposal and, instead, decriminalize and deregulate cannabis in a manner that ensures minimal interference with state cannabis legalization regimes and permits the states to implement their legalization schemes in ways that remedy the harmful and racist disparities wrought by cannabis prohibition.

INTRODUCTION

The United States has a long and complex legal relationship with the *Cannabis sativa* L. plant and its psychoactive components (cannabinoids).¹ From the colonial period until the late nineteenth century, cannabis was a valued and

1. See, e.g., Matt Shipman, *Is Hemp the Same Thing as Marijuana?*, N.C. STATE NEWS (Feb. 14, 2019), <https://news.ncsu.edu/2019/02/is-hemp-the-same-thing-as-marijuana> [<https://perma.cc/UL43-R2LY>] (explaining that “[h]emp and marijuana are, taxonomically speaking, the same plant; they are different names for the same genus (*Cannabis*) and species” and that their difference lies in the relative percentage of active delta-9 tetrahydrocannabinol (THC) contained in each plant).

widely cultivated industrial plant and cash crop.² Cannabis also proved symbolically important to the nation's Founding. The Pilgrims crossed the Atlantic Ocean with cannabis in tow, George Washington and Thomas Jefferson grew hemp,³ and it is popular American folklore that the Declaration of Independence and Constitution were written on hemp paper.⁴

Cannabis remained largely unregulated throughout the country until the early 1900s.⁵ The plant became subject to harsh federal regulation for the first time in 1937 on the heels of a successful nativist campaign to demonize cannabis.⁶ By 1970, Congress aggressively supported President Richard Nixon's "war on drugs" by, among other things, criminalizing the cultivation, manufacture, distribution, prescription, and possession of cannabis.⁷

A handful of states decriminalized cannabis in the 1970s, but most quickly reversed course.⁸ The American drug war escalated over the following two decades.⁹ California, which was among the first states to criminalize the plant in the early 1900s,¹⁰ became the first state to legalize medical cannabis in 1996.¹¹ Other states quickly followed California's lead; today, medical cannabis is legal in over three-fourths of the states, while adult recreational cannabis is lawful in approximately half of the states.

Initially, the federal government forcefully resisted state cannabis legalization. Due to a lack of federal resources and the ever-escalating popularity of cannabis legalization in the United States, the federal government ultimately accepted a tenuous *détente* with the cannabis-legalization states by refusing to

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2. RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 4 (1999).
 3. David R. Katner, *Up in Smoke: Removing Marijuana from Schedule I*, 27 B.U. PUB. INT. L.J. 167, 174 (2018).
 4. *Top Myths About the Constitution on Constitution Day*, NAT'L CONST. CTR. (Sept. 17, 2024), <https://constitutioncenter.org/blog/top-10-myths-about-the-constitution-on-constitution-day> [<https://perma.cc/3U7F-6T2Y>].
 5. See Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 793-94 (2019).
 6. See Wayne A. Logan, *Geography and Reasonable Suspicion in Auto Stops*, 48 N. KY. L. REV. 309, 312 (2021).
 7. See Vitiello, *supra* note 5, at 801-02.
 8. See Daniel G. Orenstein, *Federalism, Cannabis, and Public Health: Prohibition Is Wrong, but Raich Is Still Right*, 67 S.D. L. REV. 539, 545 (2022).
 9. See *id.*
 10. BONNIE & WHITEBREAD, *supra* note 2, at 41.
 11. Ryan Bort, Elisabeth Garber-Paul & Andrew Ward, *The United States of Weed*, ROLLING STONE (Apr. 18, 2023), <https://www.rollingstone.com/feature/cannabis-legalization-states-map-831885> [<https://perma.cc/4ADJ-RQE3>].

enforce cannabis criminalization in those jurisdictions as a matter of public policy. Most recently, in May 2024, the Biden Administration proposed a new rule that would reschedule cannabis from Schedule I to Schedule III of the Controlled Substances Act (CSA) and therefore render the cultivation, manufacture, distribution, prescription, and dispensation of the plant and its active components licit for medical use under certain circumstances.¹² That rule has not yet been finalized and its ultimate fate remains unknown given that President Donald J. Trump has expressed varying public views on cannabis legalization over time.¹³ Most recently, President Trump expressed support for the Biden Administration's proposed cannabis rescheduling reform and supported Florida's 2024 recreational cannabis ballot initiative.¹⁴

Assuming, for the sake of argument, that the current rescheduling proposal remains viable in the Trump Administration, it would mark a marginal improvement on federal cannabis prohibition. But this Essay argues that it is profoundly insufficient for at least three reasons. First, given the known safety and risk profiles of cannabis in 1970, it was unscientific—and, frankly, outrageous—for Congress to place cannabis on Schedule I and thereby regulate it more strictly than substances like cocaine and methamphetamine. Second, the recent rescheduling proposal does nothing to decriminalize recreational cannabis use. It thus perpetuates, rather than mitigates, cannabis criminalization's racist and nativist origins, as well as its longstanding and ongoing disparate impacts on Black and Brown Americans. Finally, the proposed rescheduling rule undermines federal-state comity given the massive uptick in state cannabis legalization over the last two decades. The proposed scheme largely leaves in place untenable federal-state conflict while creating additional, novel problems for legalization jurisdictions and cannabis businesses.

Simply stated, the cannabis rescheduling proposal is too little, too late. Instead, the federal government should decriminalize and deregulate cannabis. Part I of this Essay provides a brief history of cannabis regulation in the United States. It details the racist inception of the successful federal cannabis-prohibition campaign and the evolution of cannabis legalization at the state level over the prior two decades. Part II provides a detailed overview of the federal proposal to move cannabis from Schedule I to Schedule II of the CSA. Part III analyzes the positive legal implications of that federal proposal. Part IV examines the ongoing legal and regulatory obstacles that state cannabis businesses, medical-

12. Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 44597, 44597 (proposed May 21, 2024) (to be codified at 21 C.F.R. pt. 1308).

13. Dario Sabaghi, *What Can We Expect from Trump on Cannabis Reform?*, FORBES (Nov. 18, 2024, 6:00 AM EST), <https://www.forbes.com/sites/dariosabaghi/2024/11/18/what-can-we-expect-from-trump-on-cannabis-reform> [https://perma.cc/5WLR-P8JE].

14. *Id.*

cannabis patients, and adult recreational users will continue to face post-rescheduling. Part V concludes the Essay by contending that the federal government should go beyond rescheduling. Instead, it should decriminalize and de-regulate cannabis to minimize the myriad legal conflicts that its current proposal will exact on cannabis-legalization states and help close the door on our country's longstanding, racist drug war.

I. A SHORT HISTORY OF AMERICAN CANNABIS REGULATION

Cannabis played a significant role in America from the colonial period until the late nineteenth century.¹⁵ During that time, various American legislatures encouraged—while others mandated¹⁶—industrial hemp production to manufacture numerous products including textiles, cordage, and sailcloth.¹⁷ In addition, psychoactive cannabis components remained unregulated and served as popular ingredients in over-the-counter patent medicines until the early twentieth century.¹⁸

The Mexican Revolution (1910-1917) instigated an immigration surge that tripled the population of Mexican immigrants to the United States between 1910 and 1930.¹⁹ This change in national demographics motivated various antidrug campaigners and muckraking journalists to disseminate sensational racist propaganda associating cannabis with Mexican-Americans and demonizing its use.²⁰

15. See Katner, *supra* note 3, at 174.

16. Thor Benson, *The Real Reason Marijuana Is Illegal in the United States*, SALON (July 2, 2015, 3:15 PM EDT), https://www.salon.com/2015/07/02/the_real_reason_marijuana_is_illegal_in_the_united_states_partner [<https://perma.cc/5R59-KPMP>] (explaining that the Virginia Assembly mandated that farmers grow hemp in 1619).

17. See Samuel Moorin, *American Cannabis Regulation, the International Hemp Market, and Tariff Policy*, 43 HOUS. J. INT'L L. 207, 209 (2021); John Fike, *Industrial Hemp: Renewed Opportunities for an Ancient Crop*, 35 CRITICAL REVS. PLANT SCIS. 406, 406 (2016).

18. Mary Barna Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, and Implications for the Acute Care Setting*, 42 PHARM. & THERAPEUTICS 180, 180 (2017).

19. *A Growing Community*, LIBR. CONG., <https://www.loc.gov/classroom-materials/immigration/mexican/a-growing-community> [<https://perma.cc/ZPZ5-BXSU>].

20. See CLAYTON J. MOSHER & SCOTT AKINS, *IN THE WEEDS: DEMONIZATION, LEGALIZATION, AND THE EVOLUTION OF U.S. MARIJUANA POLICY* 33 (2019) (explaining that “[i]n numerous articles appearing in [William Randolph] Hearst-owned newspapers, marijuana use was associated with ‘foreigners’ . . . which exacerbated ‘anti-Mexican sentiment during the Great Depression, when many Anglos felt they were competing with brown-skinned migrants for scare jobs.” (quoting MARTIN A. LEE, *SMOKE SIGNALS* 51 (2012)); Olivia B. Waxman, *The Surprising Link Between U.S. Marijuana Law and the History of Immigration*, TIME (Apr. 20, 2019, 1:30 PM ET), <https://time.com/5572691/420-marijuana-mexican-immigration> [<https://perma.cc/6XUJ-ND3B>]; David F. Musto, *The Marihuana Tax Act of 1937*, 26

Widespread unemployment during the Great Depression increased public hostility toward Mexican-Americans and stoked fear of a “marijuana²¹ menace” — that is, a purported tidal wave of crime and violence perceived to be fueled by immigrant and working-class cannabis use.²² The dominant scholarly view is that public campaigns associating cannabis with race, class, and crime were successful in the movement to criminalize cannabis, even though there is little evidence that its use was prevalent among Mexican immigrants.²³ An alternative thesis is that cannabis prohibition was simply a byproduct of the Progressive Era temperance movement, which itself was rooted in anti-immigrant sentiment.²⁴ In any event, at least twenty-nine states had outlawed the plant by 1931.²⁵

In 1930, Harry Anslinger was appointed the inaugural director of the Federal Bureau of Narcotics (FBN), the predecessor agency to the Drug Enforcement Administration (DEA).²⁶ Prior to FBN, Anslinger worked at the Prohibition Bureau, a government agency that ultimately folded in 1933 with the passage of the Twenty-First Amendment. Determined to chart a different course for FBN,²⁷

ARCHIVES GEN. PSYCHIATRY 101, 102-04 (1972); see also, e.g., *Mexican Family Go Insane: Five Said to Have Been Stricken by Eating Marihuana*, N.Y. TIMES, July 6, 1927, at 10, 10 (reporting that “[a] widow and her four children have been driven insane by eating the Marihuana plant” and that “the mother will be insane for the rest of her life”).

21. Legislators, government bureaucrats, reporters, and others have variously spelled the word “marijuana” as “marihuana” over the years due to the use of the latter spelling in the federal Marihuana Tax Act of 1937. See, e.g., Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551, 551; *Why Is Marijuana Sometimes Spelled with an “H” and Other Times Spelled with a “J”?*, MICH. CANNABIS REGUL. AGENCY, <https://www.michigan.gov/cra/faq/licensing-list/additional-new/why-is-marijuana-sometimes-spelled-with-an-h-and-other-times-spelled-with-a-j> [<https://perma.cc/TS6Z-F45H>].
22. Matthew Green, *Reefer Madness! The Twisted History of America’s Marijuana Laws*, KQED (Jan. 5, 2018), <https://www.kqed.org/lowdown/24153/reefer-madness-the-twisted-history-of-americas-weed-laws> [<https://perma.cc/E4KW-PV44>]. It is important to note that certain drug historians have rejected the thesis that hostility toward Mexican immigrants drove widespread cannabis prohibition in the United States in the decades following the Mexican Revolution. See, e.g., Isaac Campos, *Mexicans and the Origins of Marijuana Prohibition in the United States: A Reassessment*, 32 SOC. HIST. ALCOHOL & DRUGS 6, 7 (2018).
23. Waxman, *supra* note 20.
24. *Id.* at 14, 16.
25. Eric Schlosser, *Reefer Madness*, ATLANTIC (Aug. 1994), <https://www.theatlantic.com/magazine/archive/1994/08/reefer-madness/303476> [<https://perma.cc/F7UE-5XY2>].
26. Colin Moynihan, *An Exhibition Tells the Story of a Drug War Leader, but Not All of It*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/arts/design/Anslinger-drug-czar-exhibition.html> [<https://perma.cc/G4EF-8ZMW>].
27. Jennifer D. Oliva & Taleed El-Sabawi, *The “New” Drug War*, 110 VA. L. REV. 1103, 1116 (2024). The Prohibition Bureau was disbanded in 1933 following the repeal of national alcohol prohibition by the Twenty-First Amendment to the U.S. Constitution. See, e.g., *The Bureau and the Great Experiment*, FED. BUREAU INVESTIGATION (Jan. 24, 2020), <https://www.fbi.gov>

Anslinger advocated for federal cannabis criminalization with a twofold strategy: he falsely contended that cannabis use caused psychosis and violent episodes, and he repeatedly associated the use of cannabis with marginalized and racialized Americans.²⁸ Anslinger once infamously remarked:

There are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos, and entertainers. Their Satanic music, jazz and swing, results from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers, and others.²⁹

In other words, Anslinger unabashedly associated cannabis use with racialized minorities, foreigners, and “deviant” musicians, all of whom purportedly posed a violent threat to white women.³⁰ He also “helped popularize the use of ‘marijuana’ instead of the more common ‘cannabis,’ to tie the drug to anti-Mexican prejudice.”³¹

Persuaded by Anslinger’s propaganda, the federal government enacted the Marihuana Tax Act in 1937, which effectively criminalized the nonmedical use of cannabis.³² Congress formally declared cannabis illicit for cultivation, sale, distribution, and possession in 1970 by placing it on Schedule I of the CSA.³³ Although cannabis remains on Schedule I and, therefore, illegal under federal law,

[/news/stories/the-bureau-and-the-great-experiment-012420](https://perma.cc/SV5K-9WBH) [<https://perma.cc/SV5K-9WBH>].

28. Cydney Adams, *The Man Behind the Marijuana Ban for All the Wrong Reasons*, CBS NEWS (Nov. 17, 2016, 5:45 PM EST), <https://www.cbsnews.com/news/harry-anslinger-the-man-behind-the-marijuana-ban> [<https://perma.cc/Y5WB-7WQL>].
29. Robert Solomon, *Racism and Its Effect on Cannabis Research*, 5 CANNABIS CANNABINOID RSCH. 2, 3 (2020) (quoting Laura Smith, *How a Racist Hate-Monger Masterminded America’s War on Drugs*, TIMELINE (Feb. 28, 2018), <https://medium.com/timeline/harry-anslinger-racist-war-on-drugs-prison-industrial-complex-fb5cbc281189> [<https://perma.cc/G4UP-KMTE>]).
30. *See id.*
31. *Id.*
32. Adams, *supra* note 28; Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551, 551-56 *invalidated by* *Leary v. United States*, 395 U.S. 6, 52-54 (1969); *see also* Moniyhan, *supra* note 26 (explaining that Anslinger “lobbied successfully for the passage of an anti-marijuana law in 1937, testifying during Congressional hearings that a single marijuana cigarette could induce a ‘homicidal mania’”); *Gonzales v. Raich*, 545 U.S. 1, 11 (2005) (explaining that “while the Marihuana Tax Act did not declare the drug illegal *per se*, the onerous administrative requirements, the prohibitively expensive taxes, and the risks attendant on compliance practically curtailed the marijuana trade”).
33. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242, 1249 (1970) (codified as amended at 21 U.S.C. § 812(c)(10)).

there has been a significant cannabis legalization revolution afoot in the states since the mid-1990s.³⁴

California became the first state in the nation to legalize medical cannabis in 1996 when its voters enacted Proposition 215, otherwise known as the Compassionate Use Act.³⁵ California's medical-cannabis legalization scheme was met with immediate and ferocious pushback by the Clinton Administration.³⁶ That federal government response, however, seemed to do little more than encourage other states to legalize cannabis with crafty state regimes designed to deflect and avoid federal aggression.³⁷ Indeed, between 1996 and 2008, twelve states and the District of Columbia legalized medical cannabis.³⁸ Colorado and Washington became the first states to legalize adult recreational cannabis, both by voter initiatives that were successful in 2012.³⁹

The movement for medicinal- and recreational-cannabis legalization in the states has continued to expand at a breakneck pace. As this Essay goes to press, thirty-eight states, the District of Columbia, and three territories have legalized medicinal cannabis, while twenty-four states have sanctioned recreational adult cannabis use.⁴⁰ At least seventy-four percent of Americans currently reside in a jurisdiction where cannabis is legal for either medical or recreational use, and the American public now overwhelmingly supports cannabis legalization.⁴¹ A 2023

34. See David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power*, 35 CARDOZO L. REV. 567, 575 (2013). Although a handful of states successfully decriminalized cannabis in the 1970s, that movement ultimately petered out and, in fact, regressed. Indeed, “[p]rior to 1996, the laws of all fifty states made criminal offenses of marijuana possession and distribution, similar to federal law.” *Id.*

35. See *California's Cannabis Laws*, CAL. DEP'T CANNABIS CONTROL, <https://cannabis.ca.gov/cannabis-laws/laws-and-regulations> [<https://perma.cc/KV48-JB23>]; Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016, 9:10 AM EDT), <https://time.com/4298038/marijuana-history-in-america> [<https://perma.cc/AJ8E-4Q9Q>].

36. Robert Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1, 5 (2020).

37. *Id.* at 5-10.

38. *Id.* at 9-10.

39. See John Hudak & Philip A. Wallach, *Legal Marijuana: Comparing Washington and Colorado*, BROOKINGS INST. (July 8, 2014), <https://www.brookings.edu/articles/legal-marijuana-comparing-washington-and-colorado> [<https://perma.cc/T7LK-UMVX>].

40. Athena Chapekis & Sono Shah, *Most Americans Now Live in a Legal Marijuana State—and Most Have at Least One Dispensary in Their County*, PEW RSCH. CTR. (Feb. 29, 2024), <https://www.pewresearch.org/short-reads/2024/02/29/most-americans-now-live-in-a-legal-marijuana-state-and-most-have-at-least-one-dispensary-in-their-county> [<https://perma.cc/7UM5-MGQQ>]; *State Medical Cannabis Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/cannabis/about/state-medical-cannabis-laws.html> [<https://perma.cc/9XB8-V22W>].

41. Chapekis & Shah, *supra* note 40.

Gallup poll indicated that a record-high seventy percent of the American public supports legalization.⁴² Studies attribute this dramatic change in public support for cannabis legalization to several factors, including the “increase in the news media’s framing of cannabis as a medical issue.”⁴³ In addition, three states placed adult recreational cannabis legalization on the ballot in 2024: Florida,⁴⁴ North Dakota,⁴⁵ and South Dakota.⁴⁶ Nebraska voters also had the opportunity during the 2024 election to vote on medical cannabis legalization initiatives, both of which ultimately succeeded.⁴⁷

It is worth pointing out that state cannabis-legalization regimes have thrived and expanded since 2008 due to various reforms at the federal level, including guidance that proscribes federal prosecutors from enforcing federal criminal laws against individuals who comply with state cannabis laws.⁴⁸ Since 2014, Congress’s annual appropriations bill has included a policy rider that prohibits the Department of Justice (DOJ) from using federal funds to prevent states from promulgating or enforcing their medical-cannabis laws.⁴⁹ In addition, Congress

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42. Lydia Saad, *Grassroots Support for Legalizing Marijuana Hits Record 70%*, GALLUP (Nov. 8, 2023), <https://news.gallup.com/poll/514007/grassroots-support-legalizing-marijuana-hits-record.aspx> [https://perma.cc/M836-QSAE].
43. Jacob Felson, Amy Adamczyk & Christopher Thomas, *How and Why Have Attitudes About Cannabis Legalization Changed So Much?*, 78 SOC. SCI. RSCH. 12, 24 (2019).
44. *Florida Amendment 3, Marijuana Legalization Initiative (2024)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Amendment_3_Marijuana_Legalization_Initiative_\(2024\)](https://ballotpedia.org/Florida_Amendment_3_Marijuana_Legalization_Initiative_(2024)) [https://perma.cc/X8BP-3EGG].
45. *North Dakota Initiated Measure 5, Marijuana Legalization Initiative (2024)*, BALLOTPEDIA, [https://ballotpedia.org/North_Dakota_Initiated_Measure_5_Marijuana_Legalization_Initiative_\(2024\)](https://ballotpedia.org/North_Dakota_Initiated_Measure_5_Marijuana_Legalization_Initiative_(2024)) [https://perma.cc/KT2E-GEFC].
46. *South Dakota Initiated Measure 29, Marijuana Legalization Initiative (2024)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Initiated_Measure_29_Marijuana_Legalization_Initiative_\(2024\)](https://ballotpedia.org/South_Dakota_Initiated_Measure_29_Marijuana_Legalization_Initiative_(2024)) [https://perma.cc/5VDU-8GJ8].
47. *Marijuana and Drug Policy on the Ballot*, N.Y. TIMES (Dec. 3, 2024), <https://www.nytimes.com/interactive/2024/11/05/us/elections/results-marijuana.html> [https://perma.cc/3MEX-8SEF].
48. See Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Just., to Selected U.S. Att’ys (Oct. 19, 2009), <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> [https://perma.cc/DD7-X66N]; Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Just., to All U.S. Att’ys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/7V9K-4BBT]. Notably, these memoranda from the Obama Administration were revoked by then-President Donald J. Trump’s Attorney General Jefferson B. Sessions. See Memorandum from Jefferson B. Sessions III, Att’y Gen., U.S. Dep’t of Just., to All U.S. Att’ys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [https://perma.cc/VZF7-H8PD].
49. See Mikos, *supra* note 36, at 11; see also JOANNA R. LAMPE, CONG. RSCH. SERV., LSB11105, LEGAL CONSEQUENCES OF RESCHEDULING MARIJUANA 2 (May 1, 2024), <https://crsreports.congress>

narrowed the definition of Schedule I “marijuana” in 2018 by exempting hemp and cannabis products with low delta-9 tetrahydrocannabinol (THC) content from federal prohibition.⁵⁰ The law now defines Schedule I “marijuana” as botanical cannabis (*Cannabis sativa* L.) with THC content over 0.3%.⁵¹

Most recently, in May 2024, DEA published a proposed rule that would move cannabis from Schedule I to Schedule III of the CSA.⁵² Part II of this Essay presents a detailed description and critique of this cannabis-rescheduling proposal.

II. THE FEDERAL PROPOSAL TO MOVE CANNABIS FROM SCHEDULE I TO SCHEDULE III OF THE CSA

The CSA drug-scheduling regime has been characterized as, among other things, “overbearing, burdensome, and in some cases nonsensical,”⁵³ and “byzantine.”⁵⁴ The CSA authorizes the categorization of drugs, substances, and

.gov/product/pdf/LSB/LSB11105 [https://perma.cc/8HYM-BAQH] (describing the appropriations riders passed by Congress in each year since 2014); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 444-45 (“None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”); *United States v. Marin All. for Med. Marijuana*, 139 F. Supp. 3d 1039, 1047-48 (N.D. Cal. 2015) (recognizing that the appropriations riders constrain the Department of Justice).

50. Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4908 (codified as amended at 7 U.S.C. § 16390(1) (2018) and 21 U.S.C. § 802(16)(A) (2018)) (explaining that the terms “marihuana” and “marijuana” mean all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin); 21 U.S.C. § 802(16)(B) (2018) (enumerating exemptions from the federal definition of “marijuana”).
51. See 7 U.S.C. § 16390(1) (2018); see also Jerome H. Cerney & Ernest Small, *Industrial Hemp in North America: Production, Politics and Potential*, 58 AGRONOMY 1, 1-2 (2016) (explaining that “[c]lassification of *Cannabis* as either marijuana or industrial hemp is typically based on a threshold concentration of” THC).
52. Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 44597, 44597 (proposed May 21, 2024) (to be codified at 21 C.F.R. pt. 1308).
53. Joseph Hartunian, *Getting Back on Schedule: Fixing the Controlled Substances Act*, 12 ALB. GOV’T L. REV. 199, 200 (2019).
54. Alex Kreit, *Controlled Substances, Uncontrolled Law*, 6 ALB. GOV’T L. REV. 331, 333 (2013).

chemicals into one of five schedules (I-V) ranging from the most regulated (Schedule I) to the least regulated (Schedule V) controlled substances depending on their medicinal value, safety, and potential for “abuse.”⁵⁵ Congress created the initial schedules in 1970 by statute – the CSA.⁵⁶ Congress also delegated the ongoing scheduling and rescheduling of drugs and other controlled substances to DOJ – notably a law-enforcement agency lacking health expertise – in coordination with the Department of Health and Human Services (HHS).⁵⁷ DOJ, in turn, has delegated its scheduling and rescheduling functions to DEA,⁵⁸ while HHS has delegated significant scheduling-related functions to the Food and Drug Administration (FDA) and the HHS Assistant Secretary for Health.⁵⁹

The CSA defines Schedule I drugs as those that have “a high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and “a lack of accepted safety use . . . under medical supervision.”⁶⁰ In 1970, Congress placed cannabis on Schedule I along with drugs like heroin and lysergic acid diethylamide (LSD), where it has remained ever since.⁶¹ Like all Schedule I drugs, cannabis is illicit to manufacture, distribute, sell, prescribe, dispense, or possess in the United States.⁶² The CSA defines Schedule II-V drugs, on the other hand, as substances with a “currently acceptable medical use in treatment in the United States.”⁶³ As such, those drugs are licit for manufacture, distribution, prescription, sale, possession, and use *for medicinal purposes*, subject to

55. Controlled Substances Act, 21 U.S.C. § 812(b) (2018).

56. Rebecca S. Eisenberg & Deborah B. Leiderman, *Cannabis for Medical Use: FDA and DEA Regulations in the Hall of Mirrors*, 74 FOOD & DRUG L.J. 246, 252 (2019).

57. 21 U.S.C. § 811(a)-(b) (2018).

58. 21 C.F.R. § 0.100 (2024).

59. The Food and Drug Administration (FDA) acts as the lead agency within the Department of Health and Human Services (HHS) in carrying out the Secretary’s scheduling responsibilities under the Controlled Substances Act (CSA), with input from the National Institute of Drug Abuse (NIDA). Memorandum of Understanding with the National Institute on Drug Abuse, 50 Fed. Reg. 9518, 9519 (Mar. 8, 1985). The HHS Secretary also delegated to the HHS Assistant Secretary for Health “the authority to make domestic drug scheduling recommendations.” *Id.*

60. Controlled Substances Act, Pub. L. No. 91-513, § 202, 84 Stat. 1242, 1248-69 (1970).

61. 21 U.S.C. § 812(c) (2018) (listing heroin and lysergic acid diethylamide (LSD) under Schedule I); Nat’l Org. Reform of Marijuana L. (NORML) v. U.S. Drug Enf’t Admin., 559 F.2d 735, 737 (D.C. Cir. 1977); *see also* United States v. Oakland Cannabis Buyers’ Co-op, 532 U.S. 483, 492 (2011) (responding to appellees’ arguments that “the Attorney General did not place marijuana into schedule I” and that, instead, “Congress put it there”).

62. 21 U.S.C. §§ 841(a)(1), 823, 844(a) (2018); *see also* Gonzales v. Raich, 545 U.S. 1, 14 (2005) (summarizing the law regarding Schedule I drugs).

63. 21 U.S.C. § 812(b)(2)(B), (b)(3)(B), (b)(4)(B), (b)(5)(B) (2018).

varying CSA controls and compliance with the federal Food, Drug, and Cosmetics Act (FDCA).⁶⁴

America's broad federal cannabis prohibition is subject to a singular exception. The CSA permits researchers to obtain, possess, and use cannabis as part of a government-approved research project.⁶⁵ This exception is critical because, under the current federal scheduling regime, cannabis-legalization proponents must establish that the plant has legitimate medicinal value to convince DEA to move it to a less restrictive schedule.⁶⁶ Specifically, since 1992 DEA has taken the position that, to reschedule a Schedule I controlled substance like cannabis, one of two things must occur: (1) FDA must approve the substance for marketing in interstate commerce or (2) DEA must determine that the substance has a "currently accepted medical use (CAMU)."⁶⁷ FDA has not approved any nonsynthetic cannabis product for marketing in interstate commerce; thus, in practice, DEA must decide that cannabis has a CAMU to reschedule the plant and its active components.⁶⁸ According to DEA regulations, whether a controlled substance, like cannabis, has a CAMU hinges on five factors:

1. The drug's chemistry must be known and reproducible;
2. There must be adequate safety studies;
3. There must be adequate and well-controlled studies proving efficacy;
4. The drug must be accepted by qualified experts; and
5. The scientific evidence must be widely available.⁶⁹

64. 21 U.S.C. §§ 822(b); 823; 829 (2018); Food, Drug, and Cosmetic Act, 21 U.S.C. § 355(a) (2018).

65. 21 U.S.C. § 823(c), (g)(2) (2018).

66. 21 U.S.C. § 812(b)(2)(B), (b)(3)(B), (b)(4)(B), (b)(5)(B) (2018).

67. Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40552, 40552 (July 8, 2011) (explaining that "[m]arijuana lacks accepted safety for use under medical supervision" because "[a]t present, there are no U.S. Food and Drug Administration (FDA)-approved marijuana products, nor is marijuana under a New Drug Application (NDA) evaluation at the FDA for any indication"); Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499, 10503-06 (Mar. 26, 1992).

68. *Basis for the Recommendation to Reschedule Marijuana into Schedule III of the Controlled Substances Act*, DEP'T HEALTH & HUM. SERVS. 3 (Aug. 29, 2023), <https://www.regulations.gov/document/DEA-2024-0059-0006> [<https://perma.cc/S4W8-7SM3>] ("It is important to note that, to date, FDA has not approved a [new drug application] for a drug product containing botanical marijuana."). The FDA has, however, "approved one cannabis-derived drug product: Epidiolex (cannabidiol), and three synthetic cannabis-related drug products: Marinol (dronabinol), Syndros (dronabinol), and Cesamet (nabilone)." *FDA and Cannabis: Research and Drug Approval Process*, FDA (Feb. 24, 2023), <https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process> [<https://perma.cc/JS2D-6JBF>].

69. Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. at 10504-06.

Many cannabis researchers agree that it is effectively impossible for cannabis proponents to satisfy the five CAMU factors and persuade DEA to reschedule the substance.⁷⁰ For the fifty-plus years that cannabis has remained on Schedule I, numerous parties have attempted to force or cajole DEA to reschedule cannabis, through either administrative petitions or lawsuits, on the theory that cannabis has well-established medical uses.⁷¹ Such attempts, however, have been consistently rejected by DEA and, ultimately, by the federal courts with oversight over such agency decisions.⁷²

Those rejections are at least in part attributable to legal barriers that have prevented researchers from studying cannabis efficacy in a manner that would satisfy DEA's CAMU test.⁷³ To comply with international drug-control treaty obligations, Congress granted a single agency, the National Institute of Drug Abuse (NIDA), a monopoly over the legal manufacture and distribution of cannabis for research purposes in the United States.⁷⁴ NIDA, in turn, exclusively contracted with a single manufacturer—the National Center for Natural Products Research (NCNPR) at the University of Mississippi—to cultivate, produce, and distribute research-grade marijuana from 1968 to 2020.⁷⁵ Scientists have criticized the quality, potency, limited supply, and cost of obtaining cannabis

70. See, e.g., 66 Fed. Reg. 20038, 20038 (Apr. 18, 2001); 76 Fed. Reg. 40552, 40552 (July 8, 2011); 81 Fed. Reg. 53688, 53688 (Aug. 12, 2016); 81 Fed. Reg. 53767, 53767 (Aug. 12, 2016).

71. See generally Alexander W. Campbell, *The Medical Marijuana Catch-22: How the Federal Monopoly on Marijuana Research Unfairly Handicaps the Rescheduling Movement*, 41 AM. J.L. & MED. 190 (2015) (describing attempts to reschedule marijuana at the federal level).

72. Jason B. Talise, *Take the Gatekeepers to Court: How Marijuana Research Under a Biased Federal Monopoly Obstructs the Science-Based Path to Legalization*, 57 SW. L. REV. 449, 454 (2018) (explaining that “[t]hese attempts [to force the rescheduling of cannabis], however, have proven largely unfruitful as time and time again the [federal courts have] sided with the DEA and its staunch position against rescheduling marijuana”).

73. Sanjay Gupta, *Why I Changed My Mind on Weed*, CNN (Aug. 8, 2013, 8:44 PM EDT), <https://www.cnn.com/2013/08/08/health/gupta-changed-mind-marijuana> [<https://perma.cc/QWK5-WBTB>].

74. See, e.g., Craker, No. 05-16 at 4 (U.S. Drug Enf't Admin. Feb. 12, 2007); *NIDA's Role in Providing Cannabis for Research*, NAT'L INST. FOR DRUG ABUSE (Mar. 27, 2020), <https://nida.nih.gov/research/resources-grants-contracts/nidas-role-in-providing-cannabis-research> [<https://perma.cc/HH6L-45AF>]; see also Scott Bloomberg, Alexandra Harriman & Shane Pennington, *Re/Descheduling Marijuana Through Administrative Action*, 76 OKLA. L. REV. 517, 521 (2024) (explaining that “private litigants tried to compel anti-marijuana administrations to change the drug’s scheduling, and courts universally concluded that the administrations had discretion to keep marijuana on schedule I”).

75. *NIDA's Role in Providing Cannabis for Research*, *supra* note 74; Gabrielle Feliciani, *Cannabis Drug Development and the Controlled Substances Act*, 18 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 153, 173 (2023) (noting that NIDA “contracted exclusively with the University of Mississippi from 1968–2020, making it the only legal source of cannabis for research”).

exclusively from the NCNPR to conduct studies.⁷⁶ NIDA Director Nora Volkow even conceded to Congress in 2020 that the monopoly-source policy was ineffective.⁷⁷ DEA has also “acknowledge[d] that the quality and potency of the cannabis supplied by the University of Mississippi is not representative of the cannabis that people are consuming in the real world.”⁷⁸ The supply problem is significant: without access to “real world” cannabis, scientists simply cannot prove to DEA that “real world” cannabis satisfies the CAMU factors.⁷⁹ Yet, until very recently, the agency repeatedly refused to grant applications to alternate scientists and research institutions to cultivate and distribute marijuana for research purposes.⁸⁰

In 2016, DEA started to change course, releasing a policy statement intended to expand the number of research-grade cannabis manufacturers.⁸¹ DOJ took issue with various aspects of that proposal on the grounds that it was noncompliant with American international drug-control treaty obligations, which delayed DEA’s publication of its final proposed rule concerning expansive research-grade cannabis cultivation until December 18, 2020.⁸² That rule made DEA the single federal entity responsible for acquiring all research-grade cannabis and cannabis products.⁸³ DEA has approved eight cultivators of such products since

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76. See, e.g., Britt E. Erickson, *Cannabis Research Stalled by Federal Inaction*, CHEM. & ENG’G NEWS (June 29, 2020), <https://cen.acs.org/biological-chemistry/natural-products/Cannabis-research-stalled-federal-inaction/98/i25> [<https://perma.cc/2HGM-RNUE>]; Alicia Wallace, *Bad Weed Is Hurting Cannabis Research, Scientists Say. The DEA May Finally Fix That*, CNN (Aug. 27, 2019, 3:26 PM), <https://www.cnn.com/2019/08/27/business/cannabis-dea-research/index.html> [<https://perma.cc/7MNC-YHNJ>].
77. Danielle Keane, *NIDA Acknowledges Drawbacks to Monopoly on Marijuana Supply*, NORML (June 25, 2015), <https://norml.org/blog/2015/06/25/nida-acknowledges-drawbacks-to-monopoly-on-marijuana-supply> [<https://perma.cc/JX4W-JXAA>].
78. Erickson, *supra* note 76.
79. See COMM. ON THE HEALTH EFFECTS OF MARIJUANA, NAT’L INST. OF HEALTH, THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS 22, 378, 382-84 (Jan. 2017), https://www.ncbi.nlm.nih.gov/books/NBK423845/pdf/Bookshelf_NBK423845.pdf [<https://perma.cc/L7GP-4TG5>].
80. See, e.g., *Craker v. U.S. Drug Enf’t Admin.*, 714 F.3d 17, 19 (1st Cir. 2013) (affirming the Drug Enforcement Administration’s denial of an application from Professor Lyle E. Craker to cultivate cannabis for research purposes); Erickson, *supra* note 76.
81. Applications to Become Registered Under the Controlled Substances Act to Manufacture Marijuana to Supply Researchers in the United States, 81 Fed. Reg. 53846, 53846-48 (Aug. 12, 2016).
82. Controls to Enhance the Cultivation of Marijuana for Research in the United States, 85 Fed. Reg. 82333, 82334 (Dec. 18, 2020).
83. See John M. Purcell, Tija M. Passley & Joerg R. Leheste, *The Cannabidiol and Marijuana Research Expansion Act: Promotion of Scientific Knowledge to Prevent a National Health Crisis*, 14 LANCET REG’L HEALTH-AMS. art. no. 100325, at 6 (2022).

the new rule became effective in January 2021.⁸⁴ But concerns persist that the agency will continue to delay the review of cultivation registration applications, as well as “deny the applications of capable and experienced manufacturers who supplied state-legal dispensaries in the past” due to the agency’s consideration of an applicant’s engagement in “prior illegal conduct” in its approval process.⁸⁵

In addition to the sole-source problem, the acquisition of research-grade cannabis has long been hampered by the onerous and time-consuming process of obtaining the federal approvals required to study cannabis. Prior to 2022, for example, researchers were required to receive approval from four different federal agencies – FDA, NIDA, HHS, and DEA – before they were permitted to proceed with cannabis research studies.⁸⁶ In addition, NIDA has preferred to fund studies that investigate the potential harms of cannabis use at the expense of those designed to evaluate its medical efficacy.⁸⁷ In response to decades-long complaints from the scientific community, Congress implemented several purported “reforms” to streamline the federal cannabis-research approval processes in 2022 by enacting the Medical Marijuana and Cannabidiol Research Expansion Act (Research Expansion Act).⁸⁸ As critics have pointed out, however, the Research Expansion Act’s new rules are arguably harsher than the CSA cannabis-research restrictions that preceded them.⁸⁹ Cannabis-law expert Shane Pennington went so far as to call the Research Expansion Act “a counterproductive nightmare.”⁹⁰

The enactment of the Research Expansion Act was not the only controversial cannabis law-and-policy news in 2022. On October 6 of that year, President

84. Diversion Control Div., *Marihuana Growers Information: List of the DEA Approved Bulk Manufacturer Marihuana Growers*, U.S. DRUG ENF’T ADMIN., <https://www.deaiversion.usdoj.gov/drugreg/marihuana.html> [<https://perma.cc/LD65-GPC3>].

85. Purcell et al., *supra* note 83, at 6.

86. Alexander W. Campbell, *The Medical Marijuana Catch-22: How the Federal Monopoly on Marijuana Research Unfairly Handicaps the Rescheduling Movement*, 41 AM. J.L. & MED. 190, 200-02 (2015).

87. Gupta, *supra* note 73.

88. Medical Marijuana and Cannabidiol Research Expansion Act, Pub. L. No. 117-215, 136 Stat. 2257, 2258-65 (2022); *see also* JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10859, RECENT DEVELOPMENTS IN MARIJUANA LAW 4-5 (2022) (explaining that the statute “aims to ease requirements for research involving marijuana and . . . creates specialized, expedited procedures for DEA approval of marijuana research and manufacture of marijuana for research purposes”).

89. *See, e.g.*, Shane Pennington, *Turning Water into Weed and Other Absurdities*, ON DRUGS (July 26, 2022), <https://ondrugs.substack.com/p/turning-water-into-weed-and-other> [<https://perma.cc/VAM8-NHZ4>] (noting that the bill imposes DEA registration requirements for research on materials that are derivatives of marijuana, even if those compounds are not controlled substances).

90. *Id.*

Biden asked the Attorney General and the HHS Secretary to “initiate the administrative process to review expeditiously how marijuana is scheduled under federal law.”⁹¹ In response, HHS conducted a scientific and medical evaluation of cannabis consistent with the requirements of the CSA.⁹² On August 29, 2023, HHS Assistant Secretary of Health Admiral Rachel L. Levine, M.D., forwarded a cover letter and seventy-seven-page report to DEA Administrator Anne Milgram.⁹³ As a result of the report’s analysis, HHS recommended that DEA re-schedule cannabis from Schedule I to Schedule III.⁹⁴ In reaching that recommendation, HHS found that (1) cannabis has “a potential for abuse less than the drugs or other substances in Schedules I and II”; (2) cannabis has a CAMU in treatment in the United States; and (3) “[a]buse of marijuana may lead to moderate or low physical dependence or high psychological dependence.”⁹⁵

Notably, HHS jettisoned DEA’s five-factor CAMU test in favor of a new, two-part CAMU inquiry that “takes into account the current widespread medical use of marijuana under the supervision of licensed health care practitioners (HCPs) under state-authorized programs.”⁹⁶ Step one of the new HHS inquiry asks “whether there is widespread current experience with medical use of marijuana in the United States by licensed HCPs operating in accordance with implemented state-authorized programs, where such medical use is recognized by entities that regulate the practice of medicine under these state jurisdictions.”⁹⁷ Step two then examines “whether there exists some credible scientific support for at least one of the medical conditions for which the Part 1 test is satisfied.”⁹⁸ In sum, HHS abandoned the DEA’s demand for “adequate and well-controlled studies proving efficacy” in favor of real-world evidence.

HHS undertook the step-one evaluation and, among other things, determined that there was “widespread clinical experience associated with various medical conditions recognized by a substantial number of jurisdictions across

91. Statement on Marijuana Reform, 2022 Daily Comp. Pres. Doc. 882 (Oct. 6, 2022).

92. See generally *Basis for the Recommendation to Reschedule Marijuana into Schedule III of the Controlled Substances Act*, *supra* note 68, at 1 (explaining that the President’s request prompted the agency “to initiate a scientific and medical evaluation for botanical cannabis (*Cannabis sativa* L.) that is within the definition “marihuana” or “marijuana” in the federal Controlled Substances Act (CSA)”).

93. *Id.*

94. *Id.*

95. *Id.* at 62-65.

96. *Id.* at 2.

97. *Id.*

98. *Id.*

the United States.”⁹⁹ This conclusion was based on the fact that under the various state medical cannabis schemes, there are more than thirty thousand HCPs certified to recommend cannabis across forty-three American jurisdictions for more than six million registered patients and at least fifteen healthcare conditions.¹⁰⁰ HHS delegated step two of the new CAMU analysis – the determination of whether “there exists credible scientific support for the use of marijuana for at least one medical condition” that U.S. jurisdictions recognize – to FDA.¹⁰¹ FDA answered that query in the affirmative, contending that “for purposes of the drug scheduling criteria in [the CSA], marijuana has a currently accepted medical use in the United States for: anorexia related to a medical condition, nausea and vomiting (e.g., chemotherapy-induced), and pain.”¹⁰²

Perhaps skeptical of HHS’s decision to create a new CAMU test that abandoned the need for well-controlled studies and reluctant to defer to HHS’s re-scheduling recommendation and scientific conclusions, DEA responded to HHS’s rescheduling analysis and recommendation by seeking an opinion from DOJ’s Office of Legal Counsel (OLC).¹⁰³ DEA sought OLC’s response to three questions:

- (1) If a drug satisfies the two-part inquiry employed by HHS, does that establish a currently accepted medical use under the statute even if the drug has not been approved by FDA and even if the drug does not satisfy DEA’s five-part test?
- (2) To what extent do the “scientific and medical matters” referenced in 21 U.S.C. § 811(b), which are binding upon the Attorney General, include the Secretary’s evaluation of a drug’s currently accepted medical use or any scientific and medical considerations involved in that evaluation?
- (3) Does the CSA, including the requirement that the Attorney General control drugs “under the schedule he deems most appropriate to carry out” the United States’ “obligations under international treaties, conventions, or protocols in effect on October 27, 1970,” *id.* § 811(d)(1), require DEA to place marijuana in either Schedule I or Schedule II to comply

99. Memorandum from Rachel L. Levine, Assistant Sec’y for Health, to Comm’r, Food & Drug Admin. 6 (July 17, 2023), (on file with author).

100. *Id.* at 1.

101. *Id.* at 6.

102. *Id.* at 116.

103. Questions Related to the Potential Rescheduling of Marijuana, 48 Op. O.L.C., slip op. at 3-4 (Apr. 11, 2024), <https://www.regulations.gov/document/DEA-2024-0059-0004> [<https://perma.cc/3PAF-SQRT>].

with the Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407 (“Single Convention”)?¹⁰⁴

On April 11, 2024, OLC issued a responsive opinion.¹⁰⁵ On question one, it concluded that “DEA’s current approach to determining whether a drug has a CAMU is impermissibly narrow,” and, thus, that HHS’s two-part inquiry was sufficient to establish a CAMU “even if the drug has not been approved by FDA and would not satisfy DEA’s five-part test.”¹⁰⁶ On question two, OLC explained that HHS’s rescheduling recommendation does not bind DEA in its final rule-making determination.¹⁰⁷ It further noted that, although HHS’s scientific and medical determinations on cannabis are only binding on DEA until the initiation of formal rulemaking proceedings, they are nonetheless entitled to “significant deference” throughout the rescheduling process.¹⁰⁸ Finally, on question three, OLC determined that “neither the Single Convention nor the CSA requires DEA to place marijuana in Schedule I or Schedule II”; moving cannabis to Schedule III comports with both legal obligations.¹⁰⁹

Just over a month after OLC issued its decision, DEA published a notice of proposed rulemaking (NPRM) to reschedule cannabis from Schedule I to Schedule III.¹¹⁰ The NPRM approvingly cited HHS’s three-part rationale for moving cannabis to Schedule III: first, cannabis “has a potential for abuse less than drugs or other substances in schedules I and II”;¹¹¹ second, cannabis has a CAMU pursuant to HHS’s two-part test;¹¹² and third, “the abuse of marijuana may lead to moderate or low physical dependence, depending on frequency and degree of marijuana exposure.”¹¹³ In reaching each of those conclusions, however, DEA used legal limiting language. The agency emphasized that its concurrence with HHS was for the “purposes of initiation of these rulemaking proceedings,” and that the Attorney General “accords HHS’s scientific and medical determinations binding weight at this stage of the scheduling process.”¹¹⁴

104. *Id.* at 3-4.

105. *Id.*

106. *Id.* at 4.

107. *Id.*

108. *Id.*

109. *Id.*

110. Rescheduling of Marijuana, 89 Fed. Reg. 44597 (May 21, 2024).

111. *Id.* at 44616.

112. *Id.* at 44619.

113. *Id.*

114. *Id.* at 44616.

The consistent and careful deployment of these legal caveats throughout the NPRM is concerning for at least two reasons. First, as OLC determined and as DEA echoes in the NPRM, HHS's scientific and medical determinations are not binding on DEA during final rulemaking proceedings. Taken together, DEA's signals of disagreement with HHS's use of a new two-part test to determine CAMU, plus its five-decades-long staunch opposition to rescheduling cannabis, suggest the agency may walk back the breadth and scope of the NPRM in its final rule. As one group of legal experts explained:

The NPRM notably does not contain any express DEA endorsement of the proposed rescheduling, which suggests, at a minimum, tension between the views of DEA and those of DOJ and HHS. The NPRM, while technically issued by both DOJ and DEA, is signed only by Attorney General Merrick Garland and not by DEA Administrator Anne Milgram, even though the DEA Administrator usually signs rescheduling actions like this one. The NPRM also states that “*DEA has not yet made a determination as to its views of the appropriate schedule for marijuana (emphasis added).*”¹¹⁵

Second, DEA recently took a significant step that made it impossible for the agency to issue any final rescheduling rule prior to the general election in November 2024. On August 29, 2024, DEA scheduled a public hearing on its proposed rescheduling rule for December 2, 2024.¹¹⁶ It is entirely possible, therefore, that DEA will aim to alter course in its final rule or even fail to issue any such rule not only because it is no longer bound by HHS's findings, with which DEA has expressed considerable concern, but because a new Trump Administration DEA chief, who may be sympathetic to the agency's opposition to cannabis rescheduling, has gained control in 2025.¹¹⁷ On the other hand and as noted

115. Brett R. Friedman, Joshua Oyster, David Peloquin, Emily Fruchterman & Helen K. Ryan, *DOJ Proposes Rescheduling Marijuana, but the Outlook for Finalization Is Hazy*, ROPES & GRAY (May 29, 2024), <https://www.ropesgray.com/en/insights/alerts/2024/05/doj-proposes-rescheduling-marijuana-but-the-outlook-for-finalization-is-hazy> [<https://perma.cc/5XN9-UXSP>].

116. Rescheduling of Marijuana, 89 Fed. Reg. 70148, 70149 (Aug. 29, 2024).

117. It is difficult to represent confidently the presidential candidates' respective positions on cannabis legalization due to the conflicting positions they have taken on the issue over the years. See, e.g., Brian Slodysko, Michael R. Blood & Alan Suderman, *What Do Marijuana, the Death Penalty and Fracking Have in Common? Harris Shifted Positions on Them*, AP NEWS (Aug. 16, 2024), <https://apnews.com/article/harris-positions-flipflop-trump-marijuana-death-penalty-f35dbacc2137e6aebc214befd4503ff8> [<https://perma.cc/4VSU-LK9Q>]; Kyle Jaeger, *Biden vs. Trump on Marijuana: Where the Candidates Stand Heading into the 2024 Election*, MARIJUANA MOMENT (June 26, 2024), <https://www.marijuanamoment.net/biden-vs-trump-on-marijuana-where-the-candidates-stand-heading-into-the-2024-election> [<https://perma.cc/39QZ-L9RF>]. But see Patricia Mazzei & Michael Gold, *Trump Signals Support for Marijuana*

previously, President Trump publicly espoused views in favor of cannabis re-scheduling and state recreational cannabis legalization during his 2024 presidential campaign.¹¹⁸ The Trump Administration may even press for more aggressive cannabis-related reforms at the federal level.¹¹⁹

Finally, Congress could block the proposed cannabis-rescheduling reform.¹²⁰ Indeed, House Republicans – who continue to hold a majority in their chamber post-election – passed an appropriations bill in July 2024 that deprives DOJ of funding to reschedule cannabis.¹²¹ The next Part of this Essay nonetheless assumes that DEA will proceed to move cannabis to Schedule III in its final rule, consistent with the agency’s conclusions in its NPRM, and examines the legal and regulatory consequences of that potential outcome. Such an analysis is likely to prove useful even if DEA entirely abandons its current rescheduling proposal given the considerable momentum for cannabis reform in the United States.

Legalization in Florida, N.Y. TIMES (Aug. 31, 2024), <https://www.nytimes.com/2024/08/31/us/elections/trump-marijuana-legalization-florida.html> [https://perma.cc/Z2VR-ENPF]. Moreover, and to be fair to the DEA, they have historically been consistently resistant to down scheduling any controlled substance. Joseph Hartunian, *Getting Back on Schedule: Fixing the Controlled Substances Act*, 12 ALB. GOV’T L. REV. 199, 211-12 (2018) (explaining that “[s]ince the CSA was enacted into law in 1970, just thirteen substances have been removed from Schedule I into a less regulated classification, and only two since 1990”).

118. See, e.g., Sabaghi, *supra* note 13 (explaining that, during his 2024 campaign, Trump’s expressed support for reforming federal law by rescheduling cannabis from Schedule I to Schedule III of the CSA and ensuring banking access for cannabis businesses); Gram Slattery, *Donald Trump Says He Supports Legalizing Adult Marijuana Use in Florida*, REUTERS (Sept. 9, 2024, 1:10 PM EDT), <https://www.reuters.com/world/us/donald-trump-says-he-supports-legalizing-adult-marijuana-use-florida-2024-09-09> [https://perma.cc/K6BX-JKMG].

119. Noelle Skodzinski, *Trump Is In: Will Pro-Cannabis Reform Be In or Out*, CANNABIS BUS. TIMES (Nov. 22, 2024), <https://www.cannabisbusinesstimes.com/home/news/15708936/trump-is-in-will-procannabis-reform-be-in-or-out> [https://perma.cc/9P3R-MPAV].

120. See, e.g., Joseph Choi, *Republicans Lodge Last-Ditch Protest Against Marijuana Rescheduling*, HILL (Aug. 1, 2024, 6:00 AM ET), <https://thehill.com/homenews/administration/4802823-republicans-biden-marijuana-rescheduling> [https://perma.cc/Y2WC-KLHG].

121. Chris Roberts, *House Republicans Pass Budget Bill that Would Block Marijuana Rescheduling*, MJBIZDAILY (July 10, 2024), <https://mjbizdaily.com/house-republicans-pass-budget-bill-that-would-block-marijuana-rescheduling> [https://perma.cc/V2LQ-3VCC].

III. THE PROMISES OF THE FEDERAL PROPOSAL TO RESCHEDULE CANNABIS

The Biden Administration’s announcement that it would reschedule cannabis was portrayed as “historic.”¹²² That is an apt characterization of the proposed rescheduling rule in so far as it marks the first time since the 1970 enactment of the CSA that any federal government agency has conceded that cannabis has currently accepted medical uses.¹²³ As explained in more detail below, however, the proposal’s ultimate consequences are quite modest. That said, moving cannabis from Schedule I to Schedule III would provide a small number of concrete benefits to cannabis researchers, businesses, and patients.

First, the proposed rescheduling of cannabis may make it easier to study cannabinoids for medicinal efficacy and other scientific applications.¹²⁴ The CSA and its implementing regulations place considerably fewer research restrictions on Schedule III controlled substances than on Schedule I substances, generally, and on cannabis, more specifically.¹²⁵ As discussed above, scientists and research institutions have long advocated for federal reforms to enhance the study of cannabis safety and efficacy.¹²⁶

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122. See, e.g., Eileen Sullivan, *The U.S. Is Easing Marijuana Restrictions. Here’s How It Works*, N.Y. TIMES (May 16, 2024), <https://www.nytimes.com/2024/05/16/us/politics/marijuana-schedule-drug-biden.html> [<https://perma.cc/4GF5-L3PJ>] (explaining that “[t]he proposal . . . signals a significant shift in how the federal government views the substance”); Jeanine Santucci, Eduarado Cuevas & Michael Collins, *Biden Administration Plans to Drastically Change Federal Rules on Marijuana*, USA TODAY (Apr. 30, 2024), <https://www.usatoday.com/story/news/nation/2024/04/30/dea-reclassifies-marijuana-reports/72865632007> [<https://perma.cc/4KE5-F928>]; Julie Tsirkin & Monica Alba, *Biden Administration Plans to Reclassify Marijuana, Easing Restrictions Nationwide*, NBC NEWS (May 3, 2024, 9:42 AM ET), <https://www.nbcnews.com/politics/joe-biden/biden-administration-plans-reclassify-marijuana-easing-restrictions-na-rcna149424> [<https://perma.cc/RGJ9-XSB S>] (purporting that “[t]he Biden administration will take a historic step toward easing federal restrictions on cannabis”).
123. Brian Bushard, *Biden Says Marijuana Being Reclassified as Schedule III Drug*, FORBES (May 16, 2024, 1:19 PM EDT), <https://www.forbes.com/sites/brianbushard/2024/05/16/biden-says-marijuana-being-reclassified-as-schedule-iii-drug> [<https://perma.cc/64N9-9XTD>].
124. See, e.g., David Nutt, *Illegal Drugs Laws: Clearing a 50-Year-Old Obstacle to Research*, 13 PLOS BIOLOGY, art. no. 1, at 3-5 (2015).
125. LISA N. SACCO & HASSAN Z. SHEIKH, CONG. RSCH. SERV., IN12240, DEPARTMENT OF HEALTH AND HUMAN SERVICES RECOMMENDATION TO RESCHEDULE MARIJUANA: IMPLICATIONS FOR FEDERAL POLICY 3 (2023).
126. See, e.g., Janet E. Joy, Stanley J. Watson, Jr. & John A. Benson, Jr., *Marijuana and Medicine: Assessing the Science Base*, INST. OF MED. 151 (1999), https://usiraq.procon.org/source-files/IOM_Report.pdf [<https://perma.cc/27Q5-J762>] (explaining that “[o]n the basis of a legal analysis and widespread complaints from researchers and pharmaceutical executives, the Institute of Medicine (IOM, 1995) recommended changes in the CSA to eliminate the act’s

Instigated by state initiatives that legalized medical cannabis in the mid-1990s, the National Academies of Sciences Institute of Medicine (IOM) issued a call in 1999 for clinical trials funded by the National Institutes of Health (NIH) to evaluate the medicinal uses of cannabis.¹²⁷ A group of scientists attempted to assess the success of that call for research by evaluating the number of NIH-funded clinical trials that involved a Schedule I cannabinoid that took place between the IOM's 1999 call for such research and 2018.¹²⁸ Their findings were dismal. Specifically, they

identified only 2 registered, randomized clinical trials (RCTs): 1 for pain in spinal cord injuries . . . and 1 for reward deficiency in schizophrenia When criteria were broadened to include incomplete trials, 6 additional trials were identified; 2 on cannabis for pain in sickle cell disease and neuropathy . . . , 2 on individual differences in the subjective response to cannabis . . . , 1 on cannabis interactions with other drugs . . . , and 1 on the pharmacokinetics of cannabis . . . In sum, the IOM call almost 20 years ago led to only a handful of clinical trials with cannabis.¹²⁹

These results demonstrate the rate at which legal access to cannabis for medicinal purposes (which is available in thirty-eight states) has significantly outpaced evidence-based medical studies on cannabinoids.¹³⁰ This mismatch is unacceptable and unethical. Such ethical concerns were centered in a 2019 petition seeking a writ of mandamus to compel DEA to process the Scottsdale Research Institute's (SRI's) application to manufacture research-grade cannabis for use in clinical trials on veterans with treatment-resistant post-traumatic stress disorder (PTSD).¹³¹ That petition aptly noted:

Millions of Americans believe cannabis holds the key to ending their pain and suffering, making the need for clinical trials acute no matter the outcome of SRI's clinical trials. If those studies show that thirty-eight states (and counting), doctors, legislators, and the American public are all wrong – i.e., that cannabis lacks medical utility – then we must know this

barriers to undertaking clinical research and development of controlled substances; this position was supported in a later report on marijuana” (footnote omitted)).

127. Kent E. Hutchison, L. Cinnamon Bidwell, Jarrod M. Ellingson & Angela D. Bryan, *Cannabis and Health Research: Rapid Progress Requires Innovative Research Designs*, 22 VALUE IN HEALTH 1289, 1289 (2019).

128. See generally *id.* (describing their methodology for this assessment and discussing the results).

129. *Id.* at 1289-90.

130. *Id.* at 1290.

131. Petition for Writ of Mandamus at 1-3, *In re Scottsdale Rsch. Inst., LLC*, No. 19-1120 (D.C. Cir. June 11, 2019).

now. Those using cannabis to treat conditions like PTSD may be jeopardizing their health and welfare. But in the more likely alternative – i.e., SRI’s studies prove that cannabis has medical value – DEA’s delay inexcusably deprives combat veterans and others of a treatment option necessary to ease their pain. Either way, more delay is unconscionable.¹³²

Simply stated, given the widespread legality and use of cannabis for medicinal purposes in the states today, the federal government’s ongoing obstacles to evidence-based cannabis research are unjustifiable and health-harming.

The good news is that cannabis rescheduling would eliminate the general CSA Schedule I obstacles to effective cannabis research to the extent that the less-restrictive Schedule III registrant rules become applicable to cannabis post-scheduling. The bad news is that the CSA, as amended by the 2022 Research Expansion Act, applies additional, restrictive rules that are specific to cannabis research and, therefore, do not apply to any other Schedule I or Schedule III controlled substances.¹³³ Consequently, cannabis rescheduling, standing alone, would not alter the application of those restrictive research rules to cannabis. Instead, Congress would need to enact new legislation that repeals those cannabis-specific research rules in the CSA to permit cannabis research to comport with the laws that apply to all other Schedule III substances.

Relatedly, cannabis rescheduling would likely make it easier for pharmaceutical manufacturers to submit drugs with active cannabinoids to FDA for approval. FDA’s new drug-approval process is undoubtedly challenging, resource-intensive, time-consuming, and expensive for any new active substance.¹³⁴ But it is far more difficult for a Schedule I substance, which is defined by federal law as having “no currently accepted medical use in treatment in the United States” as well as “a lack of accepted safety for use . . . under medical supervision.”¹³⁵ Therefore, while cannabis would remain a controlled substance subject to the CSA and the FDCA under federal law, the proposed rule acknowledges that cannabis has a CAMU and, therefore, creates a more plausible pathway for the legal manufacture, distribution, and prescription of cannabinoids for medical use.

Finally, adoption of the proposed rescheduling rule would make it possible for cannabis businesses to take federal tax deductions. IRS Code Section 280E currently prohibits the deduction of ordinary business expenses for anyone engaged in “any trade or business . . . [that] consists of trafficking in [Schedule I or II] controlled substances . . . which is prohibited by Federal law,” which, of

^{132.} *Id.* at 33.

^{133.} 21 U.S.C. § 823(g)(2)(B) (2018).

^{134.} Eisenberg & Leiderman, *supra* note 56, at 261-68.

^{135.} 21 U.S.C. § 812(b)(1)(B)-(C) (2018).

course, includes all American cannabis companies that are legally operating under state law.¹³⁶ Section 280E has had such a negative impact on American cannabis and cannabis-associated businesses that one critic has characterized the law, which was enacted in 1982 to punish illegal drug traffickers, as “a dagger at the throat of the entire legal cannabis industry.”¹³⁷ The important financial implications of escaping the clutches of Section 280E were evident when several cannabis-affiliated stocks soared on national indices upon the announcement of the Biden Administration’s rescheduling proposal.¹³⁸

To be certain, these benefits of cannabis rescheduling are welcome reforms for cannabis businesses, researchers, manufacturers, distributors, dispensers, and patients. But they nonetheless continue the federal government’s over-restriction of cannabis given its safety and efficacy profile while falling woefully short of harmonizing federal and state cannabis law. Worse yet, they promise to perpetuate the unjust and inequitable federal policy of recreational adult-use cannabis prohibition and criminalization that was divorced from science and driven by racism and nativism at inception. The next Part explains the punitive and problematic federal cannabis laws and regulations that would remain in place post-rescheduling and exposes their many negative consequences.

IV. THE LIMITATIONS OF THE FEDERAL PROPOSAL TO RESCHEDULE CANNABIS

The benefits of moving cannabis from Schedule I to Schedule III are considerably more modest than might be immediately obvious to the average American not steeped in the complexity of federal controlled substances and prescription-drug regulation. The most significant limitation of the federal government’s proposed rescheduling rule is, however, straightforward: rescheduling cannabis does nothing to mitigate or remedy the anti-immigrant and race-based motivations of federal and state cannabis prohibition and the resulting inequities for Black and Brown Americans. Black Americans, for example, are almost four times as likely to face arrest as their white counterparts for simple cannabis

¹³⁶. I.R.C. § 280E (2018).

¹³⁷. German Lopez, *The Federal Government Is Taxing Marijuana Businesses to Death*, VOX (May 11, 2015, 3:35 PM EDT), <https://www.vox.com/2014/11/17/7210705/marijuana-legalization-280E> [<https://perma.cc/F52C-ZKCC>].

¹³⁸. Bushard, *supra* note 123; Antonio Penqueño IV, *Cannabis Stocks Spike Following Reports Marijuana Will Be Classified as Less Dangerous Drug*, FORBES (Apr. 30, 2024), <https://www.forbes.com/sites/antoniopequenoiv/2024/04/30/cannabis-stocks-spike-following-reports-marijuana-will-be-reclassified-as-less-dangerous-drug> [<https://perma.cc/Y8XT-RK83>].

possession despite the documented similarity of cannabis use across both groups.¹³⁹ “Consequently, they disproportionately experience the many adverse penalties—such as legal fees, time in court and carceral facilities, stigma, and reduced opportunities for employment, housing, and education—related to criminal legal system involvement for drug offenses.”¹⁴⁰ As one pair of researchers explained it, the CSA’s federal cannabis prohibition “effectively repackaged the explicitly racist [Marihuana Tax Act] as a new policy, . . . which produced the same punitive outcomes in the name of public safety.”¹⁴¹

This characterization of federal cannabis prohibition is bolstered by a 2016 interview with John Ehrlichman, who served as a high-level political aide to Richard Nixon.¹⁴² When queried about the Nixonian War on Drugs, Ehrlichman stated:

You want to know what this was really all about? . . . The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.¹⁴³

The proposed rescheduling rule also does nothing to change the CSA’s criminal prohibition on the manufacture, distribution, and dispensation of *any* controlled substance for recreational purposes.¹⁴⁴ Because the CSA does not tolerate the nonmedical use of controlled substances,¹⁴⁵ recreational adult-use cannabis cultivation, manufacture, distribution, dispensing, and possession will remain

139. See Guangzhen Wu, Katherine A. Durante & Heather C. Melton, *Pipe Dreams: Cannabis Legalization and the Persistence of Racial Disparities in Jail Incarceration*, 94 J. CRIM. JUST. 102230, 102230 (2024) (noting that Black Americans “consume [cannabis] at similar rates as their White counterparts”).

140. *Id.* (citation omitted).

141. Barrett Wallace Montgomery & Jane Allen, *Cannabis Policy in the 21st Century: Mandating an Equitable Future and Shedding the Racist Past*, 45 CLINICAL THERAPEUTICS 541, 545 (2023).

142. Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER’S MAG. (Apr. 1, 2016), <https://harpers.org/archive/2016/04/legalize-it-all> [<https://perma.cc/6TRF-Z5A6>].

143. *Id.*

144. 21 U.S.C. § 841(a), 844(a) (2018).

145. Robert A. Mikos, *Observations on 25 Years of Cannabis Law Reforms and Their Implications for the Psychedelic Renaissance in the United States*, 18 ANN. REV. L. & SOC. SCI. 155, 158 (2022); Alex Kreit, *Controlled Substances, Uncontrolled Law*, 6 ALB. GOV’T L. REV. 332, 333 (2013).

federal crimes subject to lengthy terms of incarceration and other significant penalties post-rescheduling.¹⁴⁶ For example, pursuant to the CSA's so-called "crack house" provision, anyone who "make[s] available for use, with or without compensation" any property "for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance" is subject to a prison term of up to twenty years and a fine of up to \$500,000.¹⁴⁷ Any entity that violates the "crack house" statute, such as a landlord who rents property to a state-sanctioned recreational cannabis business, is subject to a fine of up to \$2 million.¹⁴⁸

Under federal law, it is a felony punishable by up to fifteen years of incarceration for any person "who is an unlawful user of or addicted to any controlled substance" to own or possess a firearm.¹⁴⁹ A "controlled substance" is defined by the CSA.¹⁵⁰ While a CSA-compliant medicinal user of a Schedule III controlled substance might be exempt from this statute, a recreational adult cannabis user in a cannabis-legalization state would likely still be subject to this federal firearms restriction post-rescheduling, unless that statute is declared unconstitutional.¹⁵¹ Notably, there is a split in the federal courts regarding whether this firearms restriction remains constitutional as applied to cannabis users in legalization states in light of the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*.¹⁵²

The proposed rescheduling rule also fails to immunize medical-cannabis businesses from either the considerable demands that attend to Schedule III controlled-substance registrants under the CSA or the arduous procedures and requirements that apply to FDA's "new drug" approval scheme under the FDCA.¹⁵³ The CSA requires Schedule III controlled-substance manufacturers, distributors, prescribers, and dispensers, for example, to obtain DEA registrations, subject themselves to DEA oversight, and comport with the statute's reporting, labeling, packaging, and other security requirements.¹⁵⁴ None of the state medical

146. 21 U.S.C. § 841(b) (2018).

147. 21 U.S.C. § 856(a) (2018).

148. *Id.* at § 856(b).

149. 18 U.S.C. § 922(g)(3) (2018); *id.* at § 924(a)(8).

150. 18 U.S.C. § 922(g)(3) (2018).

151. *Id.*; see also Aaron Edward Brown, *In the Weeds: Firearm Ownership, Cannabis, and the Hemp Exception*, 80 BENCH & BAR MINN. 28, 29-30 (2023) (explaining that so long as any particular use of cannabis (e.g., medicinal or recreational) remains unlawful under federal law, the federal firearms prohibition at 18 U.S.C. § 922(g)(3) will apply to that particular use of cannabis).

152. 597 U.S. 1 (2022); see Brown, *supra* note 151, at 30-31.

153. 21 U.S.C. § 321(p)(1) (2018).

154. See, e.g., 21 U.S.C. §§ 822, 823(e)-(f), 825, 827, 832 (2018); 21 C.F.R. § 1304.33 (2017).

or recreational dispensaries currently comply with these significant requirements.¹⁵⁵

FDA, meanwhile, has publicly taken the position that it “requires a cannabis product (hemp-derived or otherwise) that’s marketed with a claim of therapeutic benefit to be approved . . . for its intended use before it may be introduced into interstate commerce” and that “it is unlawful to introduce food containing added [cannabidiol (CBD)], or the psychoactive compound THC, into interstate commerce, or to market CBD or THC products as dietary supplements.”¹⁵⁶ Moreover, and as a group of legal experts recently explained, “[w]hile the FDA has historically taken a hands-off approach to marijuana-related enforcement with certain exceptions for egregious therapeutic claims—it remains to be seen whether rescheduling marijuana to [S]chedule III might encourage the agency to change its stance.”¹⁵⁷

This is a fair point given that FDA has more aggressively regulated CBD and other qualifying “hemp” products since 2018, when Congress descheduled those products by enacting the Farm Bill.¹⁵⁸ FDA’s recently publicized position is that its regulatory authority over food and dietary supplements is insufficient concerning CBD products, given their risks.¹⁵⁹ As such, the agency has requested that Congress create “a new regulatory pathway” for CBD “that balances individuals’ desire for access to CBD products with the regulatory oversight to manage risks.”¹⁶⁰

155. See, e.g., Jennifer Peltz & Lindsay Whitehurst, *What Marijuana Reclassification Means for the United States*, AP NEWS (May 1, 2024, 11:19 AM), <https://apnews.com/article/marijuana-reclassification-biden-garland-dea-3c9478472e124c7aaa9b934270bod450> [<https://perma.cc/DA39-9G2N>] (explaining that it is “unlikely” that any of the state-licensed medical or cannabis dispensaries “would meet the federal production, record-keeping, prescribing and other requirements for Schedule III drugs”).

156. Statement, Scott Gottlieb, Comm’r, Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb, M.D., on New Steps to Advance Agency’s Continued Evaluation of Potential Regulatory Pathways for Cannabis-Containing and Cannabis-Derived Products (Apr. 2, 2019), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-steps-advance-agencys-continued-evaluation> [<https://perma.cc/67TY-WDDE>].

157. Friedman et al., *supra* note 115.

158. See John Hudak, *The Farm Bill, Hemp Legalization and the Status of CBD: An Explainer*, BROOKINGS INST. (Dec. 14, 2018), <https://www.brookings.edu/articles/the-farm-bill-hemp-and-cbd-explainer> [<https://perma.cc/XS7-RD4Q>].

159. Janet Woodcock, *FDA Concludes that Existing Regulatory Frameworks for Foods and Supplements Are Not Appropriate for Cannabidiol, Will Work with Congress on a New Way Forward*, FDA (Jan. 26, 2023), <https://www.fda.gov/news-events/press-announcements/fda-concludes-existing-regulatory-frameworks-foods-and-supplements-are-not-appropriate-cannabidiol> [<https://perma.cc/9RBC-AE8R>].

160. *Id.*

A pair of FDA law scholars wrote an article explaining the expansive regulatory authority that would attend to cannabis under multiple potential FDCA pathways even if Congress or DEA descheduled the botanical plant and its cannabinoids and, thereby, removed those products from CSA oversight.¹⁶¹ Among other things, they correctly claimed that—even assuming cannabis descheduling—all cannabinoid products would be regulated as “new drugs” under the FDCA and, therefore, would be subject to “a rigorous research program proving the product’s safety and effectiveness before the product can be launched in the market.”¹⁶² The authors further pointed out, again correctly, that “[t]here is no reasonable pathway forward for conventional foods containing or comprising cannabis constituents” to the extent that those products travel in interstate commerce.¹⁶³ They concluded by enumerating the numerous obstacles to market that descheduled interstate cannabis products would face under the FDCA’s dietary-supplements pathway.¹⁶⁴

The proposed rescheduling rule would also do little to alleviate the banking-related woes of cannabis businesses. The American banking industry has long been reticent to open accounts for or provide loans or other services to state-authorized cannabis businesses due to a panoply of federal laws.¹⁶⁵ Those laws include the criminal provisions of the CSA that make it illegal to cultivate, manufacture, distribute, and dispense of cannabis, as well as the general federal criminal laws regarding accomplice liability.¹⁶⁶ They further include a whole host of federal banking laws and regulations, including, among other things, the Money Laundering Control Act and Bank Secrecy Act.¹⁶⁷

This collection of federal laws has made the financial operation of state cannabis businesses particularly dangerous (because such businesses are forced to conduct their transactions in cash and, thus, develop considerable security procedures to manage large cash stockpiles) and difficult (due to lack of easy access

161. Sean M. O’Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 AM. U. L. REV. 823, 833 (2019).

162. *Id.* at 906.

163. *Id.*

164. *Id.*

165. See Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RESV. L. REV. 597, 600 (2015) (“It is well documented that marijuana-related entities in states where marijuana is legal have difficulty obtaining banking services. . . . When the marijuana industry asks federal and state financial institutions why they will not provide banking services, the institutions point to federal law.”).

166. 18 U.S.C. § 371 (2018); 18 U.S.C. § 2 (2018); see also Hill, *supra* note 165, at 607–08 (describing federal criminal prohibitions on “conduct beyond directly handling marijuana”).

167. Hill, *supra* note 165, at 610–30 (summarizing the numerous federal banking laws and regulations that impede state cannabis business access to banking services).

to capital).¹⁶⁸ Unfortunately, and as the American Bankers Association (ABA) acknowledges, the proposed rescheduling rule would not mitigate the impact of these laws on state-authorized cannabis businesses. Recreational-cannabis businesses at all stages of business operations—from cultivation, to manufacture, to distribution, to sale—will continue to remain illegal at the federal level and thus will face continued difficulty in accessing traditional financial services.¹⁶⁹ Both banking-law experts and the ABA have been clear that legislative action is needed to ensure cannabis businesses meaningful access to banking services and, thus, have implored Congress to enact the SAFER Banking Act.¹⁷⁰

These federal-state legal conflicts are but a glimpse into the numerous legal problems that state cannabis businesses, patients, and adult recreational users are likely to face should the new cannabis rule become effective as drafted. This is primarily for two reasons. First, and most important, cannabis will remain illegal under federal law under numerous circumstances in which its cultivation, manufacture, distribution, dispensation, possession, and use are currently legal under state law. Second, even where such cultivation, manufacture, distribution, dispensation, possession, and use become theoretically legal under federal law due to rescheduling, those activities will be subject to significant federal regulation under the CSA and FDCA. As a result, and as discussed in Part V, the federal government’s proposal to reschedule cannabis from Schedule I to Schedule III is insufficient under the circumstances.

V. MOVING BEYOND CANNABIS RESCHEDULING: A CALL FOR FEDERAL DECRIMINALIZATION AND DEREGULATION

As noted above, the Biden Administration’s cannabis-rescheduling proposal was applauded by various cannabis businesses, researchers, and lawyers. One cannabis attorney went so far as to characterize the proposal as “paradigm-shifting” and “very exciting . . . big . . . news.”¹⁷¹ I respectfully disagree. The proposed federal rescheduling rule may have been a cause for some minor celebration decades ago, but due to massive uptake in state cannabis legalization and the corresponding development of state regulatory infrastructure over the last

^{168.} *Id.* at 600-01.

^{169.} Rob Nichols, *ABA Statement: SAFER Banking Act Still Needed, Even if Administration Moves to Reclassify Cannabis*, AM. BANKERS ASS’N (Apr. 30, 2024), <https://www.aba.com/about-us/press-room/press-releases/safer-banking-act-still-needed-even-if-administration-moves-to-reclassify-cannabis> [<https://perma.cc/W879-GF65>].

^{170.} *Id.*; see also Hill, *supra* note 165, at 644-46 (evaluating possible legislative solutions at the federal level).

^{171.} Peltz & Whitehurst, *supra* note 155.

twenty years, rescheduling is simply insufficient at this stage of the cannabis game.

The regulated American commercial cannabis industry is expected to add \$112.4 billion to the United States economy in 2024 – an increase of twelve percent over 2023.¹⁷² The states and territories that have enacted cannabis-legalization regimes are the sole source of this ever-increasing boon to the American economy.¹⁷³ It is these legalization states that have spent countless resource-intensive hours creating internal legal schemes – standing up oversight agencies, issuing quality and control laws and regulations, and publishing state cannabis business licensure requirements – to regulate their commercial-cannabis industries.¹⁷⁴ The federal government, meanwhile, has issued conflicting federal guidance while creating and maintaining significant legal and regulatory obstacles that often frustrate the legalization states’ ability to efficiently operate their cannabis regulatory regimes.

While the federal government has exercised cannabis enforcement discretion for nearly twenty years, all but a dozen states have set up cannabis-legalization regimes. Additional states look to expand cannabis legalization this year.¹⁷⁵ Under these circumstances, it is counterproductive for the federal government to disrupt these state regulatory regimes by rescheduling cannabis to Schedule III and nothing more. As explained in Part IV, federal rescheduling ensures significant, ongoing, and potentially novel federal-state conflicts – ranging from compliance with CSA Schedule III and the FDCA to federal banking laws – that the states and their respective cannabis industries will have to navigate to stay out of federal trouble. On the other hand, federal-state harmonization concerning

172. Andrew Long, *MJBiz Factbook: Marijuana Industry Will Add \$112.4 Billion to US Economy in 2024*, MJBIZDAILY (Apr. 27, 2024), <https://mjbizdaily.com/marijuana-industry-will-add-112-4-billion-to-us-economy-in-2024-mjbiz-factbook> [https://perma.cc/FE79-CVRQ].

173. *Id.* (explaining that the article’s financial projections pertain to “regulated marijuana sales,” which, of course, are limited to the states and territories that have legalized cannabis).

174. Jean Smith-Gonnell & Carmen Williams, *Advising a Cannabis-Related Business: The Importance of Attorneys in Navigating the Marijuana Regulatory Framework and Licensing Scheme*, TROUTMAN PEPPER (May 29, 2024), <https://www.regulatoryoversight.com/2024/05/advising-a-cannabis-related-business-the-importance-of-attorneys-in-navigating-the-marijuana-regulatory-framework-and-licensing-scheme> [https://perma.cc/9H26-V3U5] (“Regardless of the jurisdiction, cannabis and its derivatives remain highly regulated and thoroughly scrutinized by legislatures and associated regulatory agencies tasked with implementing and intense regulatory systems.”); *see also generally* Lucy Xialou Wang & Nicholas J. Wilson, *U.S. State Approaches to Cannabis Licensing*, 106 INT’L J. DRUG POL’Y 103775 (2022) (explaining the complex maze of state cannabis regulatory schemes and noting that all states that have legalized cannabis have created state-specific regulatory agencies and heterogeneous licensing regimes).

175. Eric Sandy, Melissa Schiller & Tony Lange, *11 States that Could Legalize Cannabis in 2024*, CANNABIS BUS. TIMES (Jan. 22, 2024), <https://www.cannabisbusinesstimes.com/news/states-that-may-legalize-cannabis-in-2024> [https://perma.cc/VZQ6-D2N9].

cannabis can be achieved if, instead of rescheduling cannabis, the federal government decriminalizes and deregulates cannabis and, thus, leaves cannabis-oversight authority to the experts, which are undoubtedly the states.

In fact, federal cannabis rescheduling would constitute a woefully inadequate reform from a social-justice perspective even if the states had not forged ahead with cannabis legalization and regulation over the prior two decades. This is because rescheduling does nothing to make amends for our country’s half-century-long, racist drug war that was largely driven by national cannabis prohibition, that fueled mass incarceration, and that has had disproportionate negative impacts on minoritized and racialized Americans.¹⁷⁶ As noted above, despite similar cannabis-use rates among white Americans and those racialized as Black, Black Americans are more than four times as likely to be arrested for cannabis offenses than their white counterparts.¹⁷⁷ Worse yet, as publicized in a 2020 report, not only are Black Americans more likely to be arrested for cannabis possession than white Americans *in every single state in the country*, but in various states, Black Americans “were up to six, eight, or almost 10 times more likely to be arrested” for possession than their white neighbors.¹⁷⁸ It is also worth noting that the racial disparities attributable to cannabis prohibition extend well beyond the criminal legal system. The myriad collateral consequences that attend to a drug arrest—which include housing discrimination, public-benefits deprivation, family separation, deportation, disenfranchisement, driver’s license revocation, and long-term surveillance—are severe and may last a lifetime.¹⁷⁹

In addition, the expert consensus is and was that cannabis should have never been scheduled as a controlled substance in the first place, given that its medicinal promise and low risk profile relative to other legal and illegal substances were well known by 1970, when the CSA was enacted. In 1892, the British government

176. See, e.g., John Hudak, *Marijuana’s Racist History Shows the Need for Comprehensive Drug Reform*, BROOKINGS INST. (June 23, 2020), <https://www.brookings.edu/articles/marijuanas-racist-history-shows-the-need-for-comprehensive-drug-reform> [https://perma.cc/AQ7P-XGZ4]; see also *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU (Apr. 17, 2020), <https://www.aclu.org/news/criminal-law-reform/a-tale-of-two-countries-racially-targeted-arrests-in-the-era-of-marijuana-reform> [https://perma.cc/B4NE-GYG9] (explaining that cannabis arrests make up 43 percent of all drug arrests in the United States and “[t]he vast majority of these arrests—nine out of 10—are for possession”).

177. Hudak, *supra* note 176; *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, *supra* note 176.

178. *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU 8 (2020), https://assets.aclu.org/live/uploads/publications/marijuanareport_03232021.pdf [https://perma.cc/YZH6-F4V9].

179. Sam McCann, *How “Collateral Consequences” Keep People Trapped in the Legal System*, VERA INST. JUST. (Nov. 29, 2023), <https://www.vera.org/news/how-collateral-consequences-keep-people-trapped-in-the-legal-system> [https://perma.cc/F9A5-T8QB].

created the Indian Hemp Drugs Commission, which was tasked in response to “temperance crusaders” to study cannabis use in India.¹⁸⁰ The Commission published its findings in an extensive, nine-volume report issued in 1894.¹⁸¹ It found that cannabis prohibition was “neither necessary nor expedient” given its relative harmlessness and that cannabis criminalization would result in users switching to more dangerous substances.¹⁸² In reaching those conclusions, the Commission explained that “the weight of the evidence is to the effect that moderation in the use of hemp drugs is not injurious.”¹⁸³

An 1894 article published by a physician in the *Journal of Medical Science*¹⁸⁴ and two separate studies commissioned in Panama in 1925 and 1933 reached the same results.¹⁸⁵ The 1925 Panama study specifically noted that “there is no evidence that [cannabis] as grown [in Panama] is a ‘habit-forming drug’ in the sense in which that term is applied to alcohol, opium, cocaine, etc., or that it has any appreciably deleterious influence on the individuals using it.”¹⁸⁶ In a similar vein, during the congressional debate over the 1937 Marihuana Tax Act, Dr. William C. Woodward, who served as legislative counsel to the American Medical Association and opposed the bill, wrote a letter to the Senate Finance Committee in which he stated:

There is no evidence . . . that the medicinal use of . . . cannabis and its preparations and derivatives . . . has caused or is causing cannabis addiction. . . . Since the medicinal use of cannabis has not caused and is not causing addiction, the prevention of the use of the drug for medicinal purposes can accomplish no good end whatsoever. How far it may serve to deprive the public of the benefits of a drug that on further research may prove to be of substantial value, it is impossible to foresee.¹⁸⁷

180. Mosher & Akins, *supra* note 20, at 28.

181. Ronen Shamir & Daphna Hacker, *Colonialism’s Civilizing Mission: The Case of the Indian Hemp Drug Commission*, 26 L. & SOC. INQ. 435, 437 (2001).

182. *Id.* at 438.

183. MOSHER & AKINS, *supra* note 20, at 28 (quoting INDIAN HEMP DRUG COMMISSION, REPORT 1:186 (1894)).

184. J.H. Tull Walsh, *Hemp Drugs and Insanity*, 40 J. MED. SCI. 21, 23 (1894) (“Judging from the effects of even large doses of the tincture of *cannabis (sativa) indica* used in medical practice for various complaints, it would seem that a moderate use of hemp drugs may be beneficial under certain conditions; at any rate, such moderate use cannot be harmful.”).

185. MOSHER & AKINS, *supra* note 20, at 30-31.

186. *Id.* at 31.

187. MARK EDDY, CONG. RSCH. SERV., RL33221, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 2 (2010) (quoting Dr. Woodward’s letter).

Between the enactment of the Marijuana Tax Act in 1937 and the enactment of the CSA in 1970, several additional studies on cannabis's safety and potential for misuse were published, including by the famous La Guardia Committee on Marihauna and President John F. Kennedy's Advisory Commission on Narcotics and Drug Use, that reached conclusions similar to the Indian Hemp Drug Commission and Panama studies.¹⁸⁸ For example, the 1944 La Guardia Committee report determined that “there is not true addiction in the medical sense associated with marijuana” and “there is no proof that major crimes are associated with the practice of smoking marijuana.”¹⁸⁹ That report also debunked and rejected the “gateway drug” theory, which contends that cannabis use necessarily leads to experimentation with more dangerous substances over time.¹⁹⁰

None of these consistent scientific findings concerning cannabis safety, misuse, and potential medicinal applications contained in government-commissioned and funded reports, however, dissuaded American drug warriors from placing cannabis on Schedule I of the CSA in 1970. Worse yet, none of the numerous post-1970 reports and studies, centered around the same cannabis issues and replicating the findings of the pre-1970 studies, including the Nixon-appointed Shafer Commission report, swayed either Congress or DEA to either deschedule or decriminalize cannabis.¹⁹¹ Like the majority of its predecessors, a recent 2024 study concerning cannabis safety concluded that the risk and harms of naturally occurring cannabinoids are “substantially lower than those posed by many illegal and legal substances . . . including tobacco and alcohol.”¹⁹² Yet alcohol and nicotine have never been deemed controlled substances nor subject to any regulation whatsoever under the CSA.¹⁹³ There is simply no excuse for the federal government to continue to use its most stringent authority to regulate cannabis when it has chosen to regulate a much more dangerous drug—alcohol—with a considerably lighter touch.

It is also worth highlighting that the public comments responsive to the proposed federal rescheduling rule prove that there is widespread agreement that DEA's proposal does not go far enough under the circumstances. Between May 21, 2024, when the proposed rule was published, and July 22, 2024, which marked

188. See MOSHER & AKINS, *supra* note 20, at 35-44.

189. *Id.* at 36.

190. *Id.*

191. See *id.* at 50-69 (surveying cannabis reports and studies after 1970).

192. David J. Heal, Jane Gosden & Sharon L. Smith, *A Critical Assessment of the Abuse, Dependence and Associated Safety Risks of Naturally Occurring and Synthetic Cannabinoids*, 15 FRONTIERS IN PSYCH. 1, 1 (2024).

193. 21 U.S.C. § 802(6) (2018) (expressly exempting alcohol and tobacco from the definition of “controlled substance” in the CSA); Matthew B. Hodroff, *The Controlled Substances Act: Time to Reevaluate Marijuana*, 36 WHITTIER L. REV. 117, 124 (2014).

the close of the proposed rule's public comment period,¹⁹⁴ DEA received more than forty-three thousand comments.¹⁹⁵ The Drug Policy Alliance analyzed those comments and found that *nearly seventy percent* argued in favor of much more expansive federal reforms that would either deschedule, decriminalize, or legalize cannabis.¹⁹⁶

Finally, it may be riskier from a legal perspective for the executive branch to pursue cannabis rescheduling through the administrative rulemaking process than for Congress to enact legislation that explicitly decriminalizes and deregulates cannabis. Even assuming DEA eventually publishes a final rescheduling rule similar or identical to its proposed rule, that rule and the agency's rulemaking process would be vulnerable to challenge by cannabis prohibitionists. The Supreme Court's recent ruling in *Loper Bright Enterprises v. Raimondo*,¹⁹⁷ which overruled the longstanding application of judicial deference to an agency's reasonable interpretation of ambiguous statutes under the *Chevron* doctrine, may serve as a boon to challengers aiming to strike down a final rescheduling rule. Moreover, as at least one national drug-policy expert has suggested, the Supreme Court might overrule *Gonzales v. Raich*¹⁹⁸ and thereby strike down national cannabis criminalization on federalism grounds, given the Court's changed composition and the dramatic uptick in cannabis legalization in the states across the partisan divide.¹⁹⁹

CONCLUSION

The federal proposal to reschedule cannabis from Schedule I to Schedule III of the CSA marks a minor improvement on national cannabis prohibition because it would likely provide cannabis businesses with federal tax relief and may

194. Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 44597, 44597 (proposed May 21, 2024) (to be codified at 21 C.F.R. pt. 1308).

195. See *Schedules of Controlled Substances: Rescheduling of Marijuana*, U.S. DRUG ENF'T ADMIN., <https://www.regulations.gov/document/DEA-2024-0059-0001> [<https://perma.cc/4LMU-P95T>].

196. *Nearly 70% of Public Comments on Rescheduling Proposal Support Federal Marijuana Decriminalization, New Analysis Shows*, DRUG POL'Y ALL. (July 23, 2024), <https://drugpolicy.org/news/nearly-70-of-public-comments-on-rescheduling-proposal-support-federal-marijuana-decriminalization-new-analysis-shows> [<https://perma.cc/6JHB-X65Q>].

197. 603 U.S. 369, 394-96 (2024).

198. 545 U.S. 1, 9 (2005).

199. Douglas A. Berman, *After Big (Red) Marijuana Reforms, Is It Time for Raich 2.0 Challenges to Federal Marijuana Prohibition?*, MARIJUANA L., POL'Y & REFORM (Nov. 4, 2020), https://lawprofessors.typepad.com/marijuana_law/2020/11/after-big-red-marijuana-reforms-is-it-time-for-a-raich-20-challenge-to-federal-marijuana-prohibition.html [<https://perma.cc/TUK9-DZUQ>].

lead to some improvements in evidence-based cannabis research. The move to Schedule III may also enhance the possibility that pharmaceutical companies pursue – and the FDA approves – cannabinoid products as “new drugs.” But it is too little, too late. Given the racist history of cannabis criminalization, the ongoing racial disparities attributable to federal cannabis prohibition, the lack of any evidence whatsoever that supported the placement of cannabis on Schedule I in 1970, and the widespread adoption of robust and complex state cannabis-legalization schemes over the last two decades, rescheduling is simply not enough now. As this Essay has explained, cannabis should have never been scheduled in the first place, and ongoing federal scheduling ensures the persistence and potential development of numerous federal-state conflicts while doing nothing to resolve the disproportionate harms that federal cannabis criminalization has inflicted on minoritized and racialized Americans. Social-justice remediation and federal-state harmonization demand that the federal government go beyond rescheduling. Instead, the federal government should decriminalize and deregulate cannabis in a manner that ensures minimal interference with state cannabis-legalization regimes and permits the states to implement their legalization schemes in ways that remedy the harmful and racist disparities wrought by cannabis prohibition.

Professor of Law and Val Nolan Faculty Fellow, Indiana University Maurer School of Law; Research Scholar, Addiction & Public Policy, O’Neill Institute for National and Global Health Law, Georgetown University Law Center; Senior Scholar, UCSF/UC Law Consortium on Law, Science & Health Policy, University of California College of the Law, San Francisco.