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Federalism, Cannabis, and Public Health: Prohibition is Wrong, but Raich is Still Right

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FEDERALISM, CANNABIS, AND PUBLIC HEALTH: PROHIBITION IS WRONG, BUT *RAICH* IS STILL RIGHT

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Federal cannabis prohibition is deeply flawed, and much has changed since the U.S. Supreme Court's landmark 2005 decision in Gonzales v. Raich *upholding federal authority to regulate intrastate cannabis activity. Justice Clarence Thomas recently questioned* Raich*'s continued legitimacy, criticizing the current "half-in, half-out" federal approach and citing post-*Raich *developments as eroding the case's justification for a broad reach of Commerce Clause authority. Specifically, Justice Thomas cited the proliferation of state cannabis legalization, Department of Justice memoranda outlining a non-interventionist enforcement policy, Congress's allowance of cannabis decriminalization in D.C., and congressional approval of a budget rider preventing federal interference with state medical cannabis programs. While these changes are noteworthy,* Raich *nevertheless remains fundamentally correct. The underlying legal framework of the Controlled Substances Act remains unchanged, and calibrated policy choices that decline maximal use of Commerce Clause power should not nullify underlying*

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federal authority. Federal prohibition is unwise, and its end would be welcome, but that end should come by Congress's hand, not the Judiciary's. The alternative would unduly constrain federal authority and capacity to protect public health in complex matters of national scope.

I. INTRODUCTION

Federal cannabis[1] prohibition is scientifically flawed and inequitably enforced. Despite these disastrous defects, the U.S. Supreme Court's landmark 2005 decision upholding the constitutionality of federal cannabis control in *Gonzales v. Raich*[2] remains fundamentally correct. In *Raich*, the Court confirmed that the tightly controlled and comprehensive regulatory system of the Controlled Substances Act ("CSA") supported federal authority to regulate even purely intrastate, non-commercial cannabis activities in broad exercise of Congress's Commerce Clause power.[3] Much has changed in the past sixteen years, including the tempering of federal cannabis enforcement and the ascendance of the state legalization movement. Justice Clarence Thomas recently took note of these changes, penning a statement accompanying the denial of certiorari in *Standing Akimbo, LLC v. United States*[4] that pointedly characterizes the present-day federal approach to cannabis as a "half-in, half-out regime" and a "contradictory and unstable state of affairs [that] strains basic principles of federalism and conceals traps for the unwary."[5]

A short statement by a single Justice is rarely compelling cause to reexamine major U.S. Supreme Court precedent, and Justice Thomas's dissent in *Raich* itself makes his continuing objections unsurprising. Yet, his statement in *Standing Akimbo* deserves careful analysis. The statement was newsworthy,[6] and attorneys

1. This Article uses "cannabis" in most instances, rather than "marijuana." Both terms are now in common use, but "cannabis" better encompasses the variety of products available that are derived from *Cannabis sativa L.*, while "marijuana" historically referred to the dried flower that is commonly smoked. Though "marijuana" derives from Mexican Spanish, its incorporation into the American lexicon in part reflects early twentieth-century fearmongering and racism directed at Mexican-American immigrants. *See, e.g.*, Lauren Yoshiko, *The Difference Between Weed and Cannabis*, FORBES (Sept. 30, 2018, 7:18 PM), https://www.forbes.com/sites/laurenterry/2018/09/30/the-difference-between-weed-and-cannabis/?sh=5b0fa5f12d88 (contrasting associations with use of the word "cannabis" as compared to terms like "pot" and "weed"); Alex Halperin, *Marijuana: Is It Time to Stop Using a Word with Racist Roots?*, GUARDIAN (Jan. 29, 2018, 5:00 AM), https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism (describing the racist history of the adoption of the word "marijuana" in American English). However, reference to "marijuana" is in some cases unavoidable, as it continues to appear in various regulations and statutes, including the Controlled Substances Act (with the original spelling, "marihuana"). *See* 21 U.S.C. § 812, Sched. I(c)(10) (2013 & Supp. 2022).

2. 545 U.S. 1 (2005).

3. *Id.* at 22, 24, 32-33.

4. 955 F.3d 1146 (10th Cir. 2020).

5. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2236-37 (2021) (statement of Thomas, J., respecting denial of certiorari).

6. *See, e.g.*, Brendan Pierson, *U.S. Marijuana Ban 'May No Longer Be Necessary' – Justice Thomas*, REUTERS (June 28, 2021, 5:07 PM), https://www.reuters.com/legal/government/us-marijuana-ban-may-no-longer-be-necessary-justice-thomas-2021-06-28/ (discussing Justice Thomas's statement); Sam Reisman, *Justice Thomas Says Federal Pot Ban May Be Improper*, LAW360 (June 28, 2021, 11:39

have already begun to cite it in seeking reevaluation of federal drug laws as related to clients' criminal convictions.[7] *Standing Akimbo* itself involved federal business tax deductions,[8] undoubtedly an issue of great importance to the burgeoning legal cannabis industry.[9] However, the true significance of Justice Thomas's statement is in questioning whether the changes in state and federal approaches have altered the legal foundations of *Raich* and, consequently, the constitutional legitimacy of significant portions of federal cannabis law.[10]

Justice Thomas cites several key developments since *Raich* that he argues severely undermine its core rationale for expansive federal authority over intrastate cannabis activity.[11] He emphasizes four such changes: 1) the proliferation of state cannabis legalization, 2) Department of Justice ("DOJ") memoranda formalizing a non-interventionist policy toward activities that comply with state cannabis laws, 3) Congress's allowance of cannabis decriminalization in Washington, D.C., and 4) congressional budget appropriations riders prohibiting DOJ from expending funds to interfere with state medical cannabis laws.[12] In a characteristically succinct summary, he concludes that the current federal approach "bears little resemblance to the watertight nationwide prohibition that a closely divided Court found necessary to justify the Government's blanket prohibition in *Raich*."[13]

Justice Thomas is unmistakably correct that much has changed since *Raich*, and others have similarly noted that the extent of these changes raises the issue of whether *Raich* is due for reconsideration.[14] There are also strong public policy arguments that the federal government should finally terminate a prohibitionist

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AM), https://www.law360.com/articles/1398144/justice-thomas-says-federal-pot-ban-may-be-improper (discussing Justice Thomas's statement); Jeremy Temkin, *Will Justice Thomas Bring Consistency To Cannabis Regulation?*, FORBES (July 28, 2021, 5:05 PM), https://www.forbes.com/sites/insider/2021/07/28/will-justice-thomas-bring-consistency-to-cannabis-regulation/?sh=17f9fe8d3aa1 (discussing what Justice Thomas's statement means for the future of cannabis regulation).

7. *See, e.g.*, Petition for Writ of Cert. at 28-29, Safehouse v. U.S. Dep't of Just., No. 21-276, 2021 WL 3799833 (Aug. 23, 2021) (using Justice Thomas's statement as part of an argument to limit the reach of Commerce Clause authority under a statute prohibiting maintaining drug-involved premises as applied to a medically supervised consumption site intended to prevent opioid overdose deaths); Kyle Jaeger, *SCOTUS Justice's Marijuana Comments Should Help Federal Prisoner Win Freedom, Attorney Says*, MARIJUANA MOMENT (Aug. 17, 2021), https://www.marijuanamoment.net/scotus-justices-marijuana-comments-should-help-federal-prisoner-win-freedom-attorney-says/ (reporting an attorney's use of Justice Thomas's statement to argue for compassionate release).

8. *Standing Akimbo, LLC*, 141 S. Ct. at 2237-38.

9. *See, e.g.*, Bill Greenberg & Rebecca Greenberg, *26 USC Section 280E: Will the Dragon Now Be Slayed?*, 25 J.L. & POL'Y 551, 558-60, 568-73, 578-81 (2017) (discussing the inequality of tax treatment for cannabis-related enterprises).

10. *See Standing Akimbo, LLC*, 141 S. Ct. at 2236-37 (statement of Thomas, J.).

11. *Id.* at 2237.

12. *Id.* Among other related observations, Justice Thomas also notes several instances of "disjuncture between the Government's recent laissez-faire policies on marijuana and the actual operation of specific laws[,]" including taxation, banking, and firearm ownership. *Id.* at 2238.

13. *Id.*

14. *See* Douglas A. Berman, *After Big (Red) Marijuana Reforms, Is It Time for a* Raich *2.0 Challenge to Federal Marijuana Prohibition?*, MARIJUANA L., POL'Y & REFORM BLOG (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.

framework that has been flawed from the start and persistently enforced with profound inequity.[15] However, just because the federal government should not retain such a law does not mean that the Constitution forbids it. An important aspect of Justice Thomas's statement in *Standing Akimbo* is the argument that the federal government's decision to pull back some aspects of enforcement destroys a constitutional prerequisite for regulating intrastate activity.[16]

Despite the many changes since *Raich*, this Article argues that the decision remains fundamentally correct. The current federal approach has altered the on-the-ground realities of cannabis regulation, but the core legal framework of the CSA remains in place despite these long-overdue changes in enforcement strategy. The federal government's decision to decline maximal use of its Commerce Clause authority should not nullify that authority. While federal prohibition is unwise, and its end would be welcome, that end should come by Congress's hand,[17] not the Judiciary's.

The Article proceeds in three parts. Part II provides a brief overview of key historical developments in U.S. cannabis law and policy and explores *Raich*'s place in modern Commerce Clause jurisprudence. Part III addresses, in turn, each of the four major post-*Raich* developments cited by Justice Thomas in *Standing Akimbo* and explains why they are insufficient cause to rethink federal authority. Part IV uses a public health lens to illuminate risks beyond the drug control realm that flow from excessively limiting the federal government's ability to take calibrated approaches to complex national problems.

II. OLD GROWTH: CANNABIS PROHIBITION AND FEDERAL POWER

A. THE PROHIBITION ERA

The history of federal cannabis prohibition is non-linear, ebbing and flowing with changes in congressional attitudes, presidential administrations, and prevailing social trends. But for the better part of a century, the prevailing federal approach relied on strict prohibition while states periodically conducted limited experiments within their own legal frameworks.

15. There are similar arguments to be made regarding the War on Drugs more broadly that are beyond the scope of this Article.

16. *See Standing Akimbo, LLC*, 141 S. Ct. at 2238 (statement of Thomas, J.).

17. Congress may also elect to take various innovative paths along the way, such as protecting intrastate cannabis markets while maintaining prohibitions on interstate commerce. *See generally, e.g.*, Scott Bloomberg & Robert A. Mikos, *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*, 49 PEPP. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3909972 (arguing that Congress should suspend application of the Dormant Commerce Clause to facilitate preparation for a future national cannabis market).

1. Ignored to Prohibited

Cannabis has a long cultivation history,[18] including documented medical[19] and recreational[20] use over thousands of years. In the early United States, cannabis was primarily grown for use in rope, sails, clothing, and similar applications.[21] By 1851, however, the *Pharmacopoeia of the United States* officially recognized the medical utility of cannabis.[22] Medicinal use was common in the United States by the turn of the twentieth century, but recreational use was not.[23] Throughout this time, federal law largely ignored cannabis (as it did most drugs) until the early twentieth century,[24] at which point initial regulation focused on disclosure of substances' presence and dosage in various patent medicines.[25]

Soon thereafter, however, a combination of historical and social factors plunged the United States toward cannabis prohibition. Responding to racism against Mexican immigrants and African-Americans, a rise in immigration following the Mexican Revolution, and widespread unemployment during the Great Depression, opportunistic actors in law enforcement, politics, and journalism connected cannabis, crime, and race and used these issues to push for legal controls.[26] They succeeded, and, by 1931, a majority of states had prohibitions on cannabis.[27] The federal government followed suit with the

18. *See* NAT'L ACADS. OF SCIS., ENG'G, & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH 44 (2017) [hereinafter NASEM REPORT] (discussing cultivation history).

19. *See* David R. Katner, *Up in Smoke: Removing Marijuana from Schedule I*, 27 B.U. PUB. INT. L.J. 167, 178-79 (2018); 1 U.S. COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING: THE TECHNICAL PAPERS OF THE FIRST REPORT OF THE NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE 3-10 (1972) [hereinafter NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE TECHNICAL PAPERS].

20. *See* Jann Gumbiner, *History of Cannabis in India*, PSYCH. TODAY (June 16, 2011), https://www.psychologytoday.com/us/blog/the-teenage-mind/201106/history-cannabis-in-india (discussing references to cannabis as a source of happiness in the sacred Hindu Vedas compiled in 2000–1400 B.C.E.); NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE TECHNICAL PAPERS, *supra* note 19, at 10-13 (tracing historical use of cannabis as an intoxicant from India to Asia and the Middle East, then to Africa, Europe, and eventually the United States).

21. *See* Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 791-92 (2019); *Marijuana Timeline*, FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html (last visited Dec. 1, 2021); Mark Hay, *Marijuana's Early History in the United States*, VICE (Mar. 30, 2015, 11:00 PM), https://www.vice.com/en/article/xd7d8d/how-marijuana-came-the-united-states-456.

22. *See* NASEM REPORT, *supra* note 18, at 43, 85.

23. *See* Hay, *supra* note 21.

24. *See* Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T L. REV. 359, 361-62 (2013).

25. *See* Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768; *see also* Vitiello, *supra* note 21, at 793-94 (noting early medicinal disclosure requirements).

26. *See* Vitiello, *supra* note 21, at 797; *Marijuana Timeline*, *supra* note 21; Hay, *supra* note 21.

27. *See* NASEM REPORT, *supra* note 18, at 43; Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 104-06 (2018).

Marihuana Tax Act of 1937,[28] indirectly but effectively criminalizing cannabis at the federal level and cementing "Reefer Madness" as policy.[29] Enforcement strategies and punishment structures varied over time, including a punitive peak in the 1950s following the enactment of the Boggs Act and related legislation providing for lengthy mandatory minimum sentences for simple possession.[30]

The 1960s brought the counterculture movement, and with it, both a significant uptick in (predominantly white and middle class) youth cannabis use and advocacy for changes in drug policy.[31] In 1969, the U.S. Supreme Court invalidated the Marihuana Tax Act in a case involving counterculture figure and psychedelic drug advocate Dr. Timothy Leary,[32] whom President Richard Nixon reportedly once called "the most dangerous man in America."[33] Invalidation of the Marihuana Tax Act forced the federal government to consider a replacement, enabling President Nixon to take up the prohibitionist baton and initiate the infamous "War on Drugs."[34]

In 1970 Congress enacted the CSA to provide national uniformity on drug policy and bring the country into line with the United Nations Single Convention on Narcotic Drugs.[35] Though less punitive than predecessor laws, the CSA significantly increased the role of the federal government in regulating several classes of drugs,[36] dividing them into five "schedules" based on factors related to medical utility, potential for abuse, and harm to public health.[37] Cannabis was initially placed on Schedule I, with additional research commissioned to inform

28. Pub. L. 75-238, 50 Stat. 551. The "marihuana" spelling is now uncommon, but it still appears in some statutes, including the CSA. *See* 21 U.S.C. § 812, Sched. I (c)(10).

29. *See* Mathew Swinburne & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. BUS. & TECH. L. 235, 237 (2020). The original "Reefer Madness" film of the era has since become unintentionally humorous camp, but at the time of its release it was humorless propaganda. *See* Vitiello, *supra* note 21, at 801.

30. *See* Swinburne & Hoke, *supra* note 29, at 238; *Marijuana Timeline*, *supra* note 21.

31. *See Marijuana Timeline*, *supra* note 21; Hay, *supra* note 21.

32. *See* Leary v. United States, 395 U.S. 6 (1969). The Court invalidated the Act as violating the privilege against self-incrimination because the Act required registration and payment of a tax to obtain cannabis, forcing persons not legally authorized to possess the drug to either register (essentially declaring their criminal activity) or to commit another crime by failing to register and pay the tax. *Id.* at 12, 16, 29. *See also* Richard D. Pullman, Leary v. United States*: Marijuana Tax Act – Self-Incrimination*, 23 SW. L.J. 939, 939 (1969) (explaining the holding in *Leary*).

33. *See* Laura Mansnerus, *Timothy Leary, Pied Piper Of Psychedelic 60's, Dies at 75*, N.Y. TIMES (June 1, 1996), https://www.nytimes.com/1996/06/01/us/timothy-leary-pied-piper-of-psychedelic-60-s-dies-at-75.html. *But see* Marc Gunther, *No, Richard Nixon Did Not Call Timothy Leary "The Most Dangerous Man in America"*, MEDIUM (Dec. 4, 2020), https://medium.com/the-psychedelic-renaissance/no-richard-nixon-did-not-call-timothy-leary-the-most-dangerous-man-in-america-72d04d6bb611 (arguing that there is no specific evidence for the claim outside the New York Times obituary).

34. *See* JOHN HUDAK, MARIJUANA: A SHORT HISTORY 56 (2020).

35. *See id.* at 53. The United States itself had strongly influenced the Single Convention in a prohibitionist direction via the efforts of Commissioner Henry J. Anslinger, who had been a driving force behind prohibition of cannabis and other drugs in the United States for decades. *See* David Bewley-Taylor & Martin Jelsma, *Regime Change: Re-visiting the 1961 Single Convention on Narcotic Drugs*, 23 INT'L J. DRUG POL'Y 72, 73-74 (2012).

36. *See* HUDAK, *supra* note 34, at 54; Vitiello, *supra* note 21, at 802-03.

37. *See* 21 U.S.C. § 812(b).

its future placement.[38] The Shafer Commission conducted this research and, in 1972, issued a report generally recommending decriminalization of simple possession.[39] The Nixon Administration, however, ignored this recommendation and pressed on with strict prohibition as part of a racism-infected "law and order" focus.[40]

2. Prohibited to (Sometimes) Permitted

Beginning with cannabis prohibitions predating the Marihuana Tax Act, states have been the primary enforcers of cannabis control laws, and most have adopted parallel versions of the CSA based on the Uniform Controlled Substances Act.[41] However, several states altered their course on cannabis in the 1970s. By the end of the decade, eleven states had decriminalized simple possession under state law.[42] Decriminalization generally removed or reduced criminal penalties while retaining civil penalties,[43] but even this limited experiment halted amid the "Just Say No" era of the 1980s and early 1990s.[44] Federal drug enforcement also ramped up considerably, increasing penalties and contributing substantially to the explosive and inequitable growth of the prison population.[45]

Under the continuing cloud of federal prohibition, California lit the spark for major change in cannabis law in 1996, becoming the first state to partially legalize medical cannabis with its Compassionate Use Act.[46] California's law allowed qualifying patients and their caregivers to possess cannabis for medical purposes, expanding on decriminalization by eliminating *all* penalties but restricting application to a specific population defined by health status.[47] By the time California's law was highlighted in *Raich*,[48] ten other states had adopted similar laws, though their construction and operation varied considerably.[49] Despite state

38. *See* Lewis A. Grossman, *Life, Liberty, [and the Pursuit of Happiness]: Medical Marijuana Regulation in Historical Context*, 74 FOOD & DRUG L.J. 280, 291-92 (2019).

39. *See generally* U.S. COMM'N ON MARIHUANA & DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING: THE OFFICIAL REPORT OF THE U.S. NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE 174-84 (1972) [hereinafter NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE OFFICIAL REPORT] (discussing total prohibition of marihuana).

40. *See* Vitiello, *supra* note 21, at 801-02.

41. *See* JOANNA R. LAMPE, CONG. RES. SERV. THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 117TH CONGRESS (Feb. 5, 2021), https://sgp.fas.org/crs/misc/R45948.pdf.

42. Rosalie Liccardo Pacula, Jamie F. Chriqui & Joanna King, *Marijuana Decriminalization: What Does it Mean in the United States?* (May 2003) (Nat'l Bureau of Econ. Res., Working Paper No. 9690, 2003), http://www.nber.org/papers/w9690.pdf.

43. *See id.*; Katner, *supra* note 19, at 188-89.

44. *See* Katner, *supra* note 19, at 189.

45. *See* Vitiello, *supra* note 21, at 803.

46. *See* CAL. HEALTH & SAFETY CODE § 11362.5 (West 2021) (removing criminal penalties relating to possession and cultivation of cannabis with respect to qualifying patients and their primary caregivers and physicians).

47. *Id.*

48. Gonzales v. Raich, 545 U.S. 1, 5-6 (2005).

49. *See* NAT'L CONF. OF STATE LEGISLATURES, *Deep Dive: Marijuana*, https://www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx (last visited Mar. 31, 2022).

innovation, federal control remained robust. Federal agents under the Clinton and G.W. Bush Administrations continued to vigorously enforce the CSA against medical cannabis growers and dispensaries.[50] Other federal laws similarly gave no ground, continuing to recognize no medical exception to cannabis prohibition in housing or employment discrimination, among other areas.[51]

B. *RAICH* AND THE COMMERCE CLAUSE

In the context of this growing tension between nascent state medical legalization and continued federal prohibition, the U.S. Supreme Court affirmed federal control in *Raich* in 2005. This decision also found the Court wrestling with its own recent history and the rise of "New Federalism," which had developed contemporaneously with the War on Drugs.

Like cannabis policy, the reach of federal Commerce Clause authority has also ebbed and flowed over time.[52] Early cases confirmed that Congress could regulate beyond a strictly literal definition of commerce "among the several states"[53] and reach at least some intrastate activities.[54] Some New Deal-era cases construed federal authority more strictly,[55] but an expansive view of federal power prevailed after the late 1930s, including recognition that Congress could properly regulate intrastate activities that "substantially affect" interstate commerce.[56] One of the most important cases of this era, *Wickard v. Filburn*,[57] is both a high-water mark for federal Commerce Clause authority[58] and, in many ways, the most similar case to *Raich*.[59] *Wickard* permitted federal regulation of wholly intrastate, non-commercial activity (wheat cultivation for personal consumption) on the basis of its aggregated effect on interstate commerce, the facts and logic of which *Raich* later cited extensively.[60]

After a half-century of broad Commerce Clause power, two cases from the Rehnquist Court seemed to signal a shift toward a more limited interpretation often

50. *See* Grossman, *supra* note 38, at 309-10.

51. *See* Leslie P. Francis, *Illegal Substance Abuse and Protection from Discrimination in Housing and Employment: Reversing the Exclusion of Illegal Substance Abuse as a Disability*, 2019 UTAH L. REV. 891, 894-95, 899-902, 905-06.

52. *See* United States v. Lopez, 514 U.S. 549, 553-59 (1995) (summarizing Commerce Clause jurisprudence from the early nineteenth century to the late twentieth).

53. U.S. CONST. art. I, § 8, cl. 3.

54. *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 74-75 (1824) (holding that Congress's commerce regulation authority included regulation of navigation).

55. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (holding that fixing hours and wages of intrastate business is an invalid exercise of federal power).

56. *See Lopez*, 514 U.S. at 556-59.

57. 317 U.S. 111 (1942).

58. *See Lopez*, 514 U.S. at 560 (referring to *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity . . . .").

59. *See* Gonzales v. Raich, 545 U.S. 1, 17-18 (2005) (referring to *Wickard* as "of particular relevance" and noting that "similarities between [*Raich*] and *Wickard* are striking").

60. *See id.* at 17-22.

dubbed "New Federalism."[61] In *United States v. Lopez*,[62] the Court struck down the Gun-Free School Zone Act as lacking the necessary connection to commerce or economic activity, in part noting the absence of any particularized congressional findings to that effect.[63] In *United States v. Morrison*,[64] the Court invalidated the Violence Against Women Act despite such congressional findings, emphasizing the inherently non-economic nature of the activity Congress sought to regulate (gender-motivated violent crimes).[65]

Just a few years after *Morrison*, the U.S. Supreme Court returned again to the Commerce Clause in *Raich*.[66] Federal agents targeted Angel McClary Raich and Diane Monson, who used cannabis for medicinal purposes pursuant to California's Compassionate Use Act.[67] Monson cultivated her own cannabis (a total of six plants), while Raich received hers at no charge from two caregivers.[68] While noting that the facts of the case were "troubling," the Court held that the CSA was nevertheless a valid exercise of federal power even with respect to regulation of intrastate, non-commercial medical cannabis activities.[69] Justice John Paul Stevens, writing for the majority, emphasized that the federal prohibition on cultivation, possession, and use of cannabis was part of a wide-ranging federal program regulating controlled substances more broadly.[70] Neither any of the parties nor any of the Justices argued that such regulation was beyond Congress's Commerce Clause authority in general, given that such drugs move (illegally) in interstate commerce.[71] The *Raich* majority also viewed activities regulated by the CSA as "quintessentially economic."[72] Thus, the question before the Court was only whether federal authority could properly reach cannabis produced, possessed, and consumed locally for non-commercial medical purposes.[73]

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61. *See* Jonathan H. Adler, *Is* Morrison *Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 754-62 (2005); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 622 (1995).

62. 514 U.S. 549.

63. *Id.* at 561-63.

64. 529 U.S. 598 (2000).

65. *Id.* at 613.

66. Gonzales v. Raich, 545 U.S. 1, 8-9 (2005).

67. *Id.* at 5-6.

68. *Id.* at 6-7.

69. *See id.* at 9, 32-33.

70. *See* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

71. *See Raich*, 545 U.S. at 15; John T. Parry, "*Society Must Be [Regulated]": Biopolitics and the Commerce Clause in* Gonzales v. Raich, 9 LEWIS & CLARK L. REV. 853, 858 (2005); *see also* Adler, *supra* note 61, at 762 (noting that there would have been "little basis for challenging the constitutionality of federal regulation of interstate markets in regulated drugs.").

72. *Raich*, 545 U.S. at 25-26. Some scholars have objected strongly to this conclusion. *See, e.g.*, Adler, *supra* note 61, at 763 (arguing that "the Court never really explains how the activity in question here is 'economic' in any meaningful sense of the word" and instead "searches out a relatively elastic definitions of economic, and then stretches it beyond its own discovered definition."). Professor Jonathan H. Adler persuasively notes that even *Wickard* involved an underlying commercial activity (in the form of the farmer's larger wheat cultivation) that appeared to be missing in *Raich*. *See id.* at 763-64.

73. *Raich*, 545 U.S. at 15.

The majority relied heavily on *Wickard*.[74] While individual growers' and patient-consumers' actions would be unlikely to substantially affect interstate commerce alone, their aggregate impact might be significant. Importantly, the regulation at issue in *Raich* was also part of a broader, comprehensive regulatory framework.[75] In some respects, this created a mirrored aggregation principle, allowing congressional authority to swell based on aggregation not only of the *objects* of the regulation (individual economic activities), but also the *subjects* of the regulation (comprehensiveness of applicable frameworks). In cannabis control, both the sum of individual cultivation and use activities and the wide scope of federal drug control laws thus contribute to an expansive federal authority over intrastate activities.

Several legal scholars excoriated the Court's decision in *Raich*.[76] Among other examples, Professor Ilya Somin declared that *Raich* rendered federalism itself a "[c]asualty of the War on Drugs."[77] Professor Randy E. Barnett, who argued *Raich* before the Court on behalf of Raich and Monson,[78] went even further, likening the decision to the U.S. Supreme Court's infamous decisions denying citizenship to enslaved persons in *Dred Scott v. Sandford*,[79] upholding racial segregation in *Plessy v. Ferguson*,[80] and sanctioning Japanese internment during World War II in *Korematsu v. United States*.[81] Coming after the New Federalism victories of *Morrison* and *Lopez*, the reaction is perhaps understandable, as *Raich* seemed to extinguish an emerging doctrinal shift.[82] Indeed, as Professors Glenn H. Reynolds and Brannon P. Denning noted, *Raich* appeared to render *Lopez* and *Morrison* outliers, as the broader sweep of U.S. Supreme Court Commerce Clause jurisprudence reflected few judicially imposed limits on the scope of federal authority.[83]

Those who saw *Raich* as the death knell of federalism itself may have been at least somewhat relieved to see the Court later reject a Commerce Clause basis for the Affordable Care Act's "individual mandate" for health insurance coverage

74. *See id.* at 17-22.

75. *Id.* at 24-25.

76. *See, e.g.*, Martin D. Carcieri, Gonzales v. Raich: *Congressional Tyranny and Irrelevance in the War on Drugs*, 9 U. PA. J. CONST. L. 1131 (2007) (criticizing the *Raich* decision); Gregory W. Watts, Gonzales v. Raich: *How to Fix a Mess of "Economic" Proportions*, 40 AKRON L. REV. 545 (2007) (criticizing the *Raich* decision).

77. Ilya Somin, Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 507 (2006).

78. Randy E. Barnett, *Foreword: Limiting* Raich, 9 LEWIS & CLARK L. REV. 743, 743 (2005).

79. 60 U.S. 393 (1857).

80. 163 U.S. 537 (1896).

81. 323 U.S. 214 (1944). *See also* Barnett, supra note 78, at 743 (stating that the dissenters in *Raich* will likely be compared to the dissenters in *Korematsu*, *Plessy*, and *Dred Scott* "who later came to be more principled than the majority.").

82. *See, e.g.*, Adler, *supra* note 61, at 777 (referring to *Raich* as "[t]he death of *United States v. Morrison*").

83. *See* Glenn H. Reynolds & Brannon P. Denning, *What Hath* Raich *Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 932-33 (2005).

in *National Federation of Independent Business v. Sebelius* (*NFIB*),[84] which Professor Barnett also argued before the Court.[85] Chief Justice John G. Roberts' controlling concurrence in *NFIB* emphasized that the Commerce Clause empowers Congress to "*regulate* commerce, not to *compel* it."[86] While the Chief Justice's opinion was carefully cabined and the factual circumstances of the case were unique, four other Justices had no difficulty concluding that mandating health insurance coverage fell within Congress's Commerce power.[87] Those four highlighted that the very existence of the Commerce Clause had been a solution to the unworkable system of leaving regulation of commerce to the states under the Articles of Confederation,[88] a point similarly emphasized in *Raich*.[89] While *NFIB*, *Lopez*, and *Morrison* demarcate some outer boundaries, the conception of federal power underlying *Raich* remains the prevailing view for the time being.

III. NEW GROWTH: CHANGES IN FEDERAL CANNABIS POLICY

Over fifteen years since *Raich*, much has changed. In *Standing Akimbo*, Justice Thomas cited four such changes that, in his view, erode the federal government's justification for regulating intrastate cannabis activities: 1) the proliferation of state cannabis legalization, 2) DOJ memoranda formalizing non-interventionist policy toward activities that comply with state cannabis laws, 3) congressional allowance of cannabis decriminalization in Washington, D.C., and 4) congressional approval of a budget rider prohibiting DOJ from expending funds to interfere with state medical cannabis laws.[90] This Part will address each of those developments in turn and explain why they are insufficient to alter the existing jurisprudential approach.

A. STATE LEGALIZATION IN BLOOM

Despite continued federal enforcement after *Raich*, six more states passed medical cannabis laws by 2011. Even more radically, Colorado and Washington

84. 567 U.S. 519, 552-58 (2012). However, the Court's ultimate acceptance of a taxing power justification for the mandate likely snuffed out any such relief. *See id.* at 574.

85. Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat?)*, 65 FLA. L. REV. 1331, 1332 (2013). Professor Barnett appeared to view the narrow defeat of the federal position in *NFIB* as definitive, emphasizing the finality of the fact that "the reasons advanced by the Government, by most law professors, and by the four liberal Justices . . . for upholding the ACA were rejected." *See id.* at 1332. Yet, this seems at odds with his view of the narrow victory of the federal position in *Raich*, which he referred to as a mere "setback," lauding the "clear and ringing endorsement" of three dissenting Justices "as testimony to the plausibility, nay the correctness of [his] approach[.]" Barnett, *supra* note 78, at 743.

86. *See NFIB*, 567 U.S. at 520-21.

87. *See id.* at 589-91 (Ginsburg, J., concurring in part and dissenting in part).

88. *Id.* at 599-601.

89. *See* Gonzales v. Raich, 545 U.S. 1, 16 (2005) (stating "[t]he Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.").

90. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2236-37 (2021) (statement of Thomas, J. respecting denial of certiorari).

passed the nation's first adult use cannabis legalization ballot initiatives in 2012, launching the next chapter in the development of U.S. cannabis law. Adult use legalization, in a sense, builds on medical legalization, which has preceded adult use in every state thus far, because medical legalization creates a foundation of licensure, cultivation, distribution, and other essential frameworks.[91] Importantly, however, adult use legalization is a significant departure in that it does not condition lawful cannabis access on any medical diagnosis, but rather regulates cannabis more like other age-restricted consumer products such as alcohol or tobacco.[92] Such parallels to other products, especially alcohol, were fundamental in marketing adult use legalization to voters, with many ballot initiative advocates adopting "Regulate Marijuana Like Alcohol" as an official or unofficial tagline.[93]

By the end of 2021, eighteen states[94] and D.C. had legalized adult use cannabis, and thirty-six states and D.C. had legalized medical cannabis.[95] Most of these actions came via ballot initiative, but a growing number have begun to develop through state legislatures.[96] There are multiple potential interpretations of the state legalization movement. However, none signify any fundamental change in the scope of federal oversight, and thus none are sufficient to negate the reasoning in *Raich*.

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91. *See* Beau Kilmer & Robert J. MacCoun, *How Medical Marijuana Smoothed the Transition to Marijuana Legalization in the United States*, 13 ANN. REV. L. & SOC. SCI. 181, 192-97 (2017) (describing five possible mechanisms by which medical legalization may have contributed to later adult-use legalization, including the creation of a visible and active industry and confirmation that the federal government would accept state and local tax revenue generation from cannabis). Some adult-use states have ultimately merged their medical and adult-use regulatory frameworks into a unitary system. *See* Daniel G. Orenstein & Stanton A. Glantz, *Cannabis Legalization in State Legislatures: Public Health Opportunity and Risk*, 103 MARQ. L. REV. 1313, 1344-45 (2020).

92. Some state medical cannabis laws require not only that a qualifying patient obtain a physician's recommendation, but also that the recommendation be tied to one of a specified number of medical diagnoses. *See* NAT'L CONF. OF STATE LEGISLATURES, *State Medical Cannabis Laws* (Nov. 20, 2021), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (noting for each medical cannabis state whether specific conditions are required for eligibility). In contrast, any adult of legal age (twenty-one in all states to date) may purchase cannabis in an adult-use state, similar to the approach to alcohol and tobacco. *See* Orenstein & Glantz, *supra* note 91, at 1370-72 (discussing minimum purchase age requirements).

93. *See, e.g.*, *Campaign to Regulate Marijuana Like Alcohol*, BALLOTPEDIA, https://ballotpedia.org/Campaign_to_Regulate_Marijuana_Like_Alcohol (last visited Dec. 1, 2021) (describing campaign activities of Campaign to Regulate Marijuana Like Alcohol, registered as a ballot committee in multiple states and connected to legalization advocacy organization Marijuana Policy Project).

94. South Dakota was briefly the nineteenth, having passed an adult-use law via ballot initiative at the same time as its medical cannabis initiative in 2020. However, the adult-use initiative was ultimately invalidated by the South Dakota Supreme Court in November 2021 as violating the state constitution's single subject requirement for ballot initiatives. *See* Thom v. Barnett, 2021 SD 65, ¶ 65, 967 N.W.2d 261, 283.

95. *See* Michael Hartman, *Cannabis Overview*, NAT'L CONF. STATE LEGISLATURES (July 6, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx.

96. *See id.*

1. Inaction as Congressional Consent

Congress has rejected or failed to act on numerous proposals to alter the legal status of cannabis under the CSA.[97] For example, bills to that effect were introduced in 2011,[98] 2012,[99] 2015,[100] 2017,[101] and 2019.[102] None passed. When Congress *does* intend to alter the legal status of cannabis, it has no difficulty clearly expressing this objective. For example, the 2018 Farm Bill explicitly removed hemp from the definition of marijuana in the CSA, kickstarting the legal production and sale of cannabidiol ("CBD") products across the country.[103]

Nonetheless, if Congress has watched states make sweeping changes to their laws in ways that undermine federal control and has done nothing in response, Congress has arguably implicitly consented to that change. If so, Congress has potentially given up its claim to the necessity of national uniformity and, with it, the authority to regulate purely intrastate activity. To that point, Justice Thomas highlights the *Raich* majority's emphasis on the CSA's complete prohibition and the consequent necessity of prohibiting any intrastate use to avoid a "gaping hole" in an otherwise "closed regulatory system."[104]

Yet one can also interpret putative congressional consent here not as abdication but as annexation. States have long been the primary actors in drug law enforcement. Congress cannot force states to cooperate with federal goals, but it may encourage or incentivize them to do so. This holds just as well for reducing enforcement as for increasing it. When Congress sought ironfisted control, it enlisted states as enforcement partners, including funding joint law enforcement efforts.[105] If Congress now wishes to reduce criminal enforcement, it could certainly amend the CSA, but this would initiate a wholesale national change in longstanding law and policy. Condoning state experimentation, however, realizes the desired modification and allows Congress to observe potential effects on a more limited scale while maintaining the availability of federal enforcement as necessary should states fail to regulate effectively.

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97. *See* LAMPE, *supra* note 41, at 28.

98. Ending Federal Marijuana Prohibition Act of 2011, H.R. 2306, 112th Cong. (2011).

99. Respect States' and Citizens' Rights Act of 2012, H.R. 6606, 112th Cong. (2012).

100. Regulate Marijuana Like Alcohol Act, H.R. 1013, 114th Cong. (2015).

101. Legitimate Use of Medicinal Marihuana Act, H.R. 714, 115th Cong. (2017); H.R. 2020, 115th Cong. (2017).

102. Marijuana Justice Act, S. 597, 116th Cong. (2019); Marijuana Freedom and Opportunity Act, S. 1552, 116th Cong. (2019); Marijuana Revenue and Regulation Act, H.R. 1120, 116th Cong. (2019-2020); Marijuana Opportunity Reinvestment and Expungement Act, S. 2227, 116th Cong. (2019-2020).

103. *See generally Hearings to Examine Hemp Production and the 2018 Farm Bill Before the S. Comm. On Agric., Nutrition, and Forestry*, 116th Cong. (2019), https://www.fda.gov/news-events/congressional-testimony/hemp-production-and-2018-farm-bill-07252019 (statement of Amy Abernethy, Principal Deputy Commissioner, Office of the Commissioner, Food and Drug Administration, Department of Health and Human Services).

104. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2236 (2021) (quoting Gonzales v. Raich, 545 U.S. 1, 13 (2005)).

105. *See* LISA N. SACCO, CONG. RSCH. SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 16-17 (2014), https://sgp.fas.org/crs/misc/R43749.pdf.

Congress has, in this way, "allowed" states to act in ways consistent with updated Congressional goals. The Court in *Raich* noted that "[t]he main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."[106] Congress previously took one approach toward that end, with "a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA."[107] Yet prohibition is not the only means of control. Orderly state experimentation within a federal outline can also advance that goal by incorporating state approaches into the broader legal tapestry.

States have not permitted unregulated cannabis markets, and there is no indication that any seek to do so. Instead, modern state legalization frameworks are detailed and complex.[108] These legal regimes appear to address precisely the priorities of the CSA, explicitly and implicitly providing measures to address drug abuse[109] and erecting comprehensive tracking, licensure, inspection, and other regimes to control traffic in cannabis in a manner every bit as comprehensive as a flat prohibition. Specific guardrails for experimentation were provided in DOJ memoranda, discussed in more detail in Part II.B.,[110] further indicating that the federal government has not given up on the goal of controlling traffic in controlled substances, but rather has merely altered the approach.

This division of power between the states and the federal government is consistent with principles of federalism and with other aspects of drug laws. For example, drugs on the other four CSA schedules are also restricted, but they are not entirely prohibited.[111] The federal government approves new drugs,[112] dictates whether a prescription is required (including CSA scheduling when appropriate),[113] and provides some specific prescribing restrictions and requirements.[114] However, most actual prescribing activity is overseen by states

106. *Raich*, 545 U.S. at 12.

107. *Id.* at 13. *See also* Ter Beek v. City of Wyoming, 846 N.W.2d 531, 539 (Mich. 2014) (citing *Raich* and explaining the purpose of the CSA).

108. *See, e.g.*, Talia Lux, Note, *The California Cannabis Industry: The Complexities Since Recreational Legalization*, 13 J. BUS. ENTREPRENEURSHIP & L. 209, 216-25 (2020) (surveying several key regulatory requirements in California).

109. While "abuse" has long been used in the context of substance use, many health and addiction experts have come to consider it a stigmatizing term. *See, e.g.*, NAT'L INST. ON DRUG ABUSE, *Words Matter — Terms to Use and Avoid When Talking About Addiction*, https://www.drugabuse.gov/nidamed-medical-health-professionals/health-professions-education/words-matter-terms-to-use-avoid-when-talking-about-addiction (last visited Nov. 30, 2021) (stating that "abuse" is a stigmatizing term because it was "found to have a high association with negative judgments and punishment.")

110. *See infra* II.B. While these memoranda reflected executive branch action, rather than congressional action, that is consistent with the Constitution's vesting in the Executive the duty to "take Care that the Laws be faithfully executed." *See* U.S. CONST. art. II, § 3.

111. *See* 21 U.S.C. § 812(b)(2)-(5).

112. *See* 21 U.S.C. § 355 (2013 & Supp. 2022) (providing for FDA approval of new drugs).

113. *See* 21 U.S.C. § 353(b) (2013 & Supp. 2022) (providing for labeling requirement).

114. There are some specific limitations provided under federal law regarding controlled substances. *See, e.g.*, 21 C.F.R. 1306.01-.27 (2022) (providing various requirements and limitations on prescriptions).

as part of their traditional regulation of the practice of medicine.[115] Prescribing authority can even extend to "off-label" prescribing, in which medical professionals prescribe a drug for a condition or type of patient other than those for which the drug was originally approved.[116] Few would argue that this complex power-sharing arrangement prevents the federal government from simultaneously regulating other related activities, such as manufacturing controlled substances,[117] rather than leaving all such regulation to the states.

Nor is prohibition essential to the logic underlying *Raich*. *Raich* relied heavily on *Wickard*,[118] and while the wheat cultivation limits at issue in the latter were strict and comprehensive, they were also plainly regulatory rather than prohibitory.[119] There are numerous ways to comprehensively regulate a product or activity, and Congress is empowered to choose among them and to alter course in response to changing circumstances. If Congress has "consented" to state legalization, this is consistent with an intention to establish a form of comprehensive control less restrictive than prohibition and to incorporate state cooperation into that approach. Congress could create a parallel or preemptive federal system, but it is also empowered to conclude that current state approaches suffice to advance congressional intent.

2. Discretion as Executive Consent

Alternatively, the proliferation of state legalization may not express congressional consent at all. One could just as easily interpret states' actions as a response to the enforcement discretion exercised by the executive branch, as exemplified in the DOJ memos discussed in Part II.B.[120] If it is the Executive "consenting," as opposed to Congress, this should not weaken Congress's authority.

It is an axiomatic principle of constitutional law that Congress makes law and the Executive enforces law. The CSA gives the DEA authority (delegated from the Attorney General)[121] to schedule a substance, change its schedule, or remove it from scheduling if appropriate criteria are met.[122] The complex procedures for initiating rulemaking in this framework also involve the Secretary of Health and Human Services, who delegates authority for a required scientific and medical

115. *See* Lars Noah, *Ambivalent Commitments to Federalism in Controlling the Practice of Medicine*, 53 U. KAN. L. REV. 149, 172-76 (2004). Professor Lars Noah cites medical cannabis as one of several examples where federal regulation has intruded on medical practice. *See id.* at 180-83.

116. *See id.* at 172-76.

117. *See* 21 U.S.C. § 822(a)(1) (2013 & Supp. 2022) (requiring registration by "[e]very person who manufactures or distributes any controlled substance").

118. *See* Gonzales v. Raich, 545 U.S. 1, 17-18, 32-33 (2005).

119. Mr. Roscoe C. Filburn's wheat crop was capped at 11.1 acres by federal regulation, but he sowed twenty-three acres and was assessed a fine on the excess production. *See* Wickard v. Filburn, 317 U.S. 111, 114-15 (1942).

120. *See infra* II.B.

121. *See* 28 C.F.R. § 0.100(b) (2022).

122. *See* 21 U.S.C. § 811(a) (2013 & Supp. 2022).

evaluation to the Food and Drug Administration,[123] though the DEA also has authority to temporarily schedule substances that pose an imminent hazard to public safety.[124] Regardless of the byzantine nature of this framework,[125] all of the agencies involved are in the executive branch. This gives the Executive significant authority over the operation of the CSA, lending credence to the idea that changes in state approaches are in response to executive rather than congressional activity. Yet the executive branch, like Congress, has repeatedly declined opportunities to actually alter the CSA with respect to cannabis. The DEA, for example, has consistently rejected petitions to reschedule or deschedule cannabis,[126] including as recently as 2020.[127] FDA has, however, approved four cannabinoid pharmaceuticals that are separately scheduled.[128]

Executive action (and inaction) has not altered the underlying statutory framework of the CSA, nor could it do so. Neither have executive agencies exercised their available rulemaking authority to change the status of cannabis. The only real change in the Executive's approach has come in the form of enforcement discretion, as discussed more fully in Part II.B.[129] Discretion is an inherent power of prosecutorial authority and is part of the Executive's exercise of its constitutional responsibilities.[130] Such discretion is presumptively not even judicially reviewable unless Congress has provided clear instructions or the agency has adopted a policy so extreme as to abdicate its statutory responsibilities.[131]

While DOJ has exercised its discretion to deprioritize cannabis activities that accord with state law, the agency has continued to enforce the CSA for activities that fall outside the scope of those carefully defined boundaries, such as trafficking operations and gang-related activities.[132] Electing not to commit scarce agency

123. *See* 21 U.S.C. § 811(b).

124. *See* 21 U.S.C. § 811(h)(1).

125. *See, e.g.*, LAMPE, *supra* note 41, at 9-11 (discussing administrative and emergency scheduling).

126. *See, e.g.*, Denial of Petition To Initiate Proceedings To Reschedule Marijuana, 81 Fed. Reg. 53688, 53688 (Aug. 12, 2016) (denying a petition to reschedule marijuana); Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499, 10499-503 (Mar. 22, 1992) (concluding that marijuana has no medical use and denying petition to reschedule marijuana); Nat'l Org. for the Reform of Marijuana Laws v. Drug Enf't Admin., 559 F.2d 735, 757 (D.C. Cir. 1977) (affirming the decision to deny a petition to reschedule marijuana).

127. Answering Brief for Federal Respondents at 5-6, Sisley v. U.S. Drug Enf't Admin., 11 F.4th 1029 (9th Cir. Aug. 30, 2021) (No. 20-71433).

128. This includes one (Epidiolex) derived directly from cannabis and three (Marinol, Syndros, and Cesamet) containing synthetic cannabinoids. *See* FDA, *FDA and Cannabis: Research and Drug Approval Process*, https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process (last updated Oct. 10, 2020).

129. *See infra* Part II.B.

130. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (comparing presumptively unreviewable agency decisions not to exercise coercive power to traditional prosecutorial discretion regarding whether or not to bring an indictment).

131. *See id.* at 833 n.4 (citing Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc)).

132. *See* LAMPE, *supra* note 41, at 26-27; Press Release, Dep't of Justice, DEA Investigation in Chapel Hill Area Uncovers Large-Scale Drug Ring (Dec. 17, 2020), https://www.justice.gov/usao-mdnc/pr/dea-investigation-chapel-hill-area-uncovers-large-scale-drug-ring; Press Release, Dep't of Justice, Pittsburgh-area Man Sentenced for Supplying SCO Gang with Drugs (Jan. 21, 2021), https://www.justice.gov/usao-wdpa/pr/pittsburgh-area-man-sentenced-supplying-sco-gang-drugs; Press

resources to low-level individual violations or markets overseen by extensive state regulatory systems is consistent with prudent prioritization of agency focus, and it does not appear to represent an abdication of statutory responsibilities, particularly given the well-established nature of enforcement discretion as a component of agency authority.

3. State Action as State Action

The third and simplest interpretation of the proliferation of state legalization is that it is the independent actions of states, nothing more. States' actions are certainly influenced by prevailing federal policy environments, but such decisions do not necessarily reflect the intent of either Congress or the federal Executive. State legalization, in many instances, says little even about the intent of state legislatures. Most state legalization, particularly adult use cannabis laws, has arisen through ballot initiative processes designed to circumscribe legislative inaction.[133] The first state legislatures to legalize adult use cannabis were Vermont in 2018 (which did not include sales) and Illinois in 2019.[134]

From the early twentieth century through the present, states have been the primary enforcers of cannabis prohibition and other drug control laws, particularly for simple possession.[135] The federal government frequently coordinates with and provides shared funding for state and local drug law enforcement, but overall federal efforts are dwarfed by that of state and local authorities.[136] This is both a constitutional and practical necessity. Constitutionally, the federal government is prohibited from commandeering state law enforcement (or other officials or resources) to enforce federal law,[137] whereas states have intrinsic sovereign authority to regulate in the interest of public health and safety under their police power.[138] Practically, the federal government simply lacks the human resource capacity to aggressively enforce the CSA on its own. The DEA, for example, has over ten thousand employees,[139] but this pales in comparison to the over seven

Release, Dep't of Justice, Indictment Charges Bridgeport Gang Members with Drug Trafficking, Committing 4 Murders (Jan. 22, 2021), https://www.justice.gov/usao-ct/pr/indictment-charges-bridgeport-gang-members-drug-trafficking-committing-4-murders.

133. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 92; Orenstein & Glantz, *supra* note 91, at 1323-25 (discussing origins of the ballot initiative process and its implications for cannabis legalization).

134. *See* Candice Norwood, *Why Illinois' Marijuana Legalization Law is Different From All Others*, GOVERNING (June 10, 2019), https://www.governing.com/archive/gov-illinois-marijuana-legalization-legislature.html.

135. *See* SACCO, *supra* note 105, at 16-17.

136. *See id.* For example, in 2012 DEA made approximately thirty thousand arrests for federal drug offenses compared to 1.3 million such arrests by state and local law enforcement. *Id.*

137. *See* Swinburne & Hoke, *supra* note 29, at 243-45.

138. *See* Brannon P. Denning, *State Legalization of Marijuana as a "Diagonal Federalism" Problem*, 11 FIU L. REV. 349, 353-54 (2016); James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 328-29 (1998).

139. U.S. DRUG ENF'T ADMIN., DEA FACT SHEET (Dec. 2012), https://ehs.unc.edu/wp-content/uploads/sites/229/2015/09/1207_fact-sheet.pdf.

hundred fifty thousand full-time sworn officers (not counting other employees) at state and local departments nationally.[140]

While federal enforcement of the CSA thus has practical limits, it remains possible, and nothing about state cannabis legalization prevents this. State courts have relied on this premise to find that the CSA does not preempt core aspects of state cannabis laws.[141] The CSA explicitly disclaims express federal preemption,[142] so the law's preemptive force is limited to conflict preemption.[143] This is unsurprising, as the federal government had neither the interest nor the capacity to usurp states' role in drug control via the CSA. Given the traditional primacy of state enforcement, states' legalization experiments say little about the intent of any federal branch and thus should not be interpreted as directly affecting the limits of federal authority.

B. TAKE A MEMO: OGDEN, COLE, SESSIONS, AND DISCRETION

The second major post-*Raich* development Justice Thomas cites in *Standing Akimbo* is a series of DOJ memoranda formalizing a policy of non-enforcement. These memos were highly influential, signaling to states that DOJ would stay its hand on enforcing provisions of the CSA if certain conditions were met. However, the legal impact of these memos is surprisingly limited.

The 2009 "Ogden Memo" instructed U.S. attorneys to deprioritize prosecutions of "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[144] The memo emphasized that such prosecutions were "unlikely to be an efficient use of limited federal resources."[145] However, the memo also outlined key characteristics that would continue to trigger enforcement, including activities related to firearms, violence, sales to minors, financial and marketing malfeasance, large volumes of cannabis, possession or sale of other controlled substances, and ties to criminal enterprises.[146] The memo clearly stated an intention to serve "solely as a guide to the exercise of investigative and

140. U.S. DEP'T OF JUST., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 2 (Oct. 4, 2016), https://bjs.ojp.gov/content/pub/pdf/nsleed.pdf. This total does not include non-sworn staff such as clerks, dispatchers, and jailers. *See id.*

141. *See, e.g.*, Ter Beek v. City of Wyoming, 846 N.W.2d 531, 537-41 (Mich. 2014) (finding that CSA does not preempt Michigan Medical Marihuana Act); White Mountain Health Ctr. v. Maricopa Cnty, 386 P.3d 416, 427 (Ariz. App. 2016) (finding that CSA does not preempt Arizona Medical Marijuana Act).

142. *See* 21 U.S.C. § 903 (2013).

143. *See, e.g.*, Musta v. Mendota Heights Dental Ctr., 965 N.W.2d 312, 321-25 (Minn. 2021) (determining conflict preemption was at issue); Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1229-30 (D.N.M. 2016) (discussing whether the state medical marijuana laws conflict with the CSA); Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 527-29 (Or. 2010) (discussing conflict in the context of preemption).

144. Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states.

145. *See id.*

146. *See id.*

prosecutorial discretion" and affirmed that it provided no legal defense to violations of federal law, including the CSA.[147]

In response to overbroad interpretations of the Ogden Memo,[148] the first "Cole Memo"[149] clarified that the outlined prosecutorial discretion applied only to small-scale, non-commercial medical cannabis[150] and specifically warned that "[p]ersons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the [CSA]."[151] Both the Ogden Memo and the first Cole Memo were thus quite modest in scope. They applied only to individual activities completely inside the bounds of state law and, even for these activities, neither bound the federal government nor provided any actual legal defense.

The second Cole Memo was broader, addressing new adult use laws and implicitly accepting the existence of state-regulated legal markets. Issued in response to the 2012 passage of state adult use legalization ballot initiatives in Colorado and Washington,[152] the memo reiterated federal commitment to CSA enforcement but again emphasized the judicious use of "limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way."[153] The memo outlined eight key enforcement priorities, largely paralleling those in the Ogden Memo.[154] Among important additions, the second Cole Memo highlighted federal concerns related to preventing diversion from legalizing to non-legalizing states and preventing public health harms such as drugged driving.[155] The memo instructed U.S. attorneys "to focus their enforcement resources and efforts" on conduct contrary to listed federal priorities but indicated that those priorities were "listed in general terms" and encompassed "a variety of conduct."[156]

The second Cole Memo further explained that, in legalizing states with "strong and effective regulatory and enforcement systems," compliance would be "less likely to threaten the federal priorities"[157] and implicitly thus less likely to merit federal enforcement. The memo specifically explained that, in well-controlled and "tightly regulated" markets, "state and local law enforcement and

147. *See id.*

148. *See* Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183, 189-90 (2016).

149. Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 2 (June 29, 2011) [hereinafter Cole Memo 2011], https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf.

150. *See* Kamin, *supra* note 148, at 190.

151. Cole Memo 2011, *supra* note 149, at 2.

152. *See* Memorandum from James M. Cole, Deputy Att'y Gen., to all U.S. Att'ys, Guidance Regarding Marijuana Enforcement 1 (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

153. *Id.* at 1.

154. *Id.* at 1-2.

155. *Id.* at 2.

156. *Id.* at 2 n.1.

157. *Id.* at 3.

regulatory bodies should remain the primary means of addressing marijuana-related activity," with federal enforcement looming "[i]f state enforcement efforts are not sufficiently robust."[158] As Professor Sam Kamin has noted, this explicit recognition of states' primary role in illicit drug enforcement was somewhat novel,[159] but it was also historically accurate, given states' longstanding role as primary enforcement actors.

Despite the apparent "green light" for state legalization, these memoranda were merely internal agency guidance and thus highly susceptible to changes in the prevailing political winds.[160] Following the election of President Donald J. Trump in 2016, Attorney General Jeff Sessions formally rescinded the Ogden and Cole memos in 2018.[161] However, the "Sessions Memo" still followed their model, couching its directive in terms of utilization of "finite resources" and directing federal prosecutors to "weigh all relevant considerations"[162]—in other words, to use enforcement discretion.[163] The Sessions Memo did not actually contradict the Ogden and Cole memos, but rather deemed them "unnecessary" based on existing general principles guiding enforcement.[164] After the Sessions Memo, the federal government did not change its cannabis enforcement approach in any significant way,[165] yet nothing prevents a future administration from doing so. The CSA still prohibits cannabis, and aggressive enforcement of that provision under a future administration would be on the same legal footing as when *Raich* was decided.[166]

Guidance documents, including all four DOJ memos, can certainly influence public behavior, and they may even create protected reliance interests.[167]

158. *Id.* at 3.

159. *See* Kamin, *supra* note 148, at 190.

160. *See* Swinburne & Hoke, *supra* note 29, at 247 (noting that "[s]ince the Ogden and Cole memos are an expression of the governing administration enforcement policies, they can change as the policies of the administration change or if a new administration assumes power."); Denning, *supra* note 138, at 352 (stating "the Cole Memorandum is worth no more than the paper on which it is written. If the Hillary Clinton Administration decides that legalization has not been successful, she can order the memo revoked, shut down dispensaries, and arrest their owners overnight.").

161. Memorandum from Jefferson B. Session, III, Att'y Gen., to all U.S. Att'ys, Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download [hereinafter Sessions Memo]. While Professor Denning's electoral forecast did not come to fruition, his prediction of the vulnerability of the Cole Memo was clearly vindicated. *See* Denning, *supra* note 138, at 352.

162. Sessions Memo, *supra* note 161.

163. *See id.*

164. *See id.*

165. *See* Kyle Jaeger, *One Year After Jeff Sessions Rescinded A Federal Marijuana Memo, The Sky Hasn't Fallen*, MARIJUANA MOMENT (Jan. 4, 2019), https://www.marijuanamoment.net/one-year-after-jeff-sessions-rescinded-a-federal-marijuana-memo-the-sky-hasnt-fallen/.

166. The appropriations rider prohibiting DOJ expenditure of funds to interfere with state medical cannabis laws is a limited barrier, as discussed *infra* II.D. However, this rider must be renewed annually to remain effective, applies only to strict compliance with state medical programs, and provides no protection regarding adult use cannabis. *See* Swinburne & Hoke, *supra* note 29, at 248. However, at least one court has viewed the impact of the rider quite differently, finding that the rider "effectively suspended" parts of the CSA with respect to state medical cannabis programs. Hager v. M&K Constr., 247 A.3d 864, 887 (N.J. 2021).

167. *See, e.g.*, Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 957-58 (2017) (asking if the policies offer protection through detrimental reliance on them); Troy Sims, *The*

However, such documents are by definition non-binding and lacking the force of law.[168] Nothing about the underlying statutory framework of the CSA has changed. The federal government has never prosecuted every person who possessed cannabis, nor could it do so as a practical matter. That does not undermine the legal authority of the federal government to prosecute any particular individual for an offense that merits federal enforcement. The Ogden and Cole memos simply formalized and standardized the approach to determining which types of cases were worth the federal government's effort. Enforcement discretion is a longstanding feature of criminal justice. Typically, enforcement criteria are not public information, and those in charge of enforcement maintain that such criteria do not limit their authority to enforce the law, even contrary to stated criteria.[169] Moreover, agency decisions not to take enforcement actions are typically exempt from judicial review as committed to agency discretion by law, though this exception is narrow.[170]

Comparison to another contemporaneous exercise of enforcement discretion helps confirm the nature of the DOJ memos. Similar to its evolution on cannabis enforcement, the Obama Administration began exercising significant enforcement discretion in immigration through the creation of the Deferred Action for Childhood Arrivals ("DACA") program in 2012.[171] Like the specific, formal state regulatory considerations of the Cole and Ogden memos, DACA outlined specific factors to be considered with respect to the deportation of immigrants brought to the United States as children (*e.g.*, continuous residence, education, lack of criminal history).[172] However, the Supreme Court held that DACA was more than just a "passive non-enforcement policy" because it also directed the creation of processes that necessitated agency programs for identifying eligible individuals, soliciting and reviewing applications, and providing notice to individuals.[173] DACA also provided for access to specific benefits, including work authorization, Social Security, and Medicare.[174] Even though DACA existed purely as an executive action, these complexities created reliance interests and other

Biden Administration Should Resolve Cannabis Regulation Chaos, BILL HEALTH BLOG (Aug. 13, 2021), https://blog.petrieflom.law.harvard.edu/2021/08/13/biden-administration-cannabis-regulation/ (discussing protections provided by procedural due process rights); Mary D. Fan, *Legalization Conflicts and Reliance Defenses*, 92 WASH. U. L. REV. 907, 929-32, 948-49 (2015) (discussing protections provided by other principles).

168. *See* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 475-78 (2013). However, if guidance documents or similar non-legislative rules have binding effect in practice, courts may deem them to be legislative rules and subject to the procedural requirements required by the Administrative Procedure Act. *See id.* at 482-84.

169. *See* F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 336 (2021).

170. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905-06 (2020); Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

171. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1901-02.

172. *See id.*

173. *Id.* at 1906.

174. *Id.* at 1911-12.

considerations that necessitated greater procedural requirements for dismantling the program, frustrating the Trump Administration's efforts to do so.[175]

In contrast, the Cole and Ogden memos created no new programs or procedures and authorized no new benefits. To the contrary, other aspects of federal law—from housing discrimination[176] to banking[177] to taxation[178]—continued to view cannabis as entirely illicit. Consequently, Attorney General Sessions' rescission of the Cole and Ogden memos was a far simpler process than the Trump Administration's attempt to undo DACA. These memos should be understood as "passive non-enforcement policy" and, as such, of limited legal importance despite their practical impact.

C. DECRIMINALIZATION COMES TO THE DISTRICT

The third major post-*Raich* change Justice Thomas cites is the 2009 decriminalization of cannabis in Washington, D.C., which he argues was "enabled" by Congress.[179] Congress has the authority to review changes to laws in D.C. and has a long history of obstructing attempts to liberalize cannabis policy.[180] D.C. voters were among the first in the nation to vote in favor of medical cannabis legalization, overwhelmingly approving a ballot initiative to that effect in 1998.[181] Congress then blocked implementation by prohibiting funding, finally lifting that ban in 2009.[182] The D.C. Council subsequently passed a bill to legalize medical cannabis, which Congress did not overrule within the thirty-day review period.[183] Legal dispensaries opened in 2013,[184] some fifteen years after the original ballot measure.

D.C. then decriminalized adult use cannabis possession in 2014.[185] Decriminalization, however, does not mean legalization. As was the case for the brief state decriminalization wave of the 1970s, D.C.'s decriminalization did not

175. *See id.* at 1916.

176. *See* U.S. DEP'T OF HOUS. & URBAN DEV., MEMORANDUM: MEDICAL USE OF MARIJUANA AND REASONABLE ACCOMMODATION IN FEDERAL PUBLIC AND ASSISTED HOUSING 4-9 (Jan. 20, 2011), https://bit.ly/3tXbNCV.

177. *See* Julie Andersen Hill, *Cannabis Banking: What Marijuana Can Learn from Hemp*, 101 B.U. L. REV. 1043, 1049-60 (2021).

178. *See* Greenberg & Greenberg, *supra* note 9, at 549.

179. *See* Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2237 (2021) (statement of Thomas, J., respecting denial of certiorari).

180. *See* Ashley Southall, *Washington, D.C., Approves Medical Use of Marijuana*, N.Y. TIMES (May 4, 2010), https://www.nytimes.com/2010/05/05/us/05marijuana.html.

181. *See id.*; *Ballot Initiative 59*, WASH. POST (1998), https://www.washingtonpost.com/wp-srv/local/longterm/library/dcelections/races/dcq59.htm.

182. *See* Southall, *supra* note 180.

183. *See* Tim Craig, *Medical Marijuana Now Legal*, WASH. POST D.C. WIRE (July 27, 2010, 12:13 AM), http://voices.washingtonpost.com/dc/2010/07/medical_marijuana_now_legal.html.

184. *See* Martin Austermuhle, *In Latest Spending Bill, Congress Still Won't Let D.C. Legalize Sales of Marijuana*, NPR (Dec. 18, 2019), https://www.npr.org/local/305/2019/12/18/789249004/in-latest-spending-bill-congress-still-won-t-let-d-c-legalize-sales-of-marijuana.

185. Marijuana Possession Decriminalization Amendment Act of 2014, D.C. Act 20-305, 1, Mar. 31, 2014, https://bit.ly/31KDzII. *See also* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 95 (discussing legalization of marijuana).

authorize possession or remove all punishments; it merely made possession a civil violation (punishable by a twenty-five dollar fine).[186]

Congress's approach to D.C.'s cannabis reform carries more limited weight than it may at first appear. While Congress actively stymied attempts at local reform until 2009, subsequent non-intervention has been comparatively passive. Additionally, about one-third of D.C. is federally controlled land where cannabis possession remains strictly prohibited.[187] This hardly reflects a sea change in congressional approach. Moreover, Congress stepping out of the way of D.C.'s limited reforms should be assessed in the context of the District's own appalling enforcement history.

Amid the extensive and disturbing inequities of cannabis prohibition enforcement generally, D.C. has ranked among the worst examples. Racial disparities in cannabis possession arrests are woefully ubiquitous, but D.C. had the second-highest Black-white disparity in the country as of 2010, with Black persons over eight times more likely to be arrested than white persons.[188] The District also had the third-highest Black arrest rate for cannabis possession overall[189] and the highest per capita fiscal expenditures for enforcing cannabis possession laws.[190] Viewed in this light, taking action to address these issues (or, more accurately, not standing in the way of action) was not only reasonable, but a moral imperative.[191]

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186. *See* Marijuana Possession Decriminalization Amendment Act of 2014, *supra* note 185, §§ 101, 103; *see also* German Lopez, *Congress Will Block Marijuana Legalization in Washington, DC*, VOX (Dec. 9, 2014, 10:00 PM), https://www.vox.com/2014/12/9/7360463/weed-legalization-washington-dc (stating that although marijuana was not yet legalized in D.C., it was still decriminalized, punishable only by a twenty-five dollar civil fine). Decriminalization was soon supplanted by an adult-use legalization measure passed overwhelmingly in 2014. *See* Southall, *supra* note 180; *Ballot Initiative 59*, *supra* note 181; WASH. POST METRO D.C. VOTERS' GUIDE 1998, https://www.washingtonpost.com/wp-srv/local/longterm/library/dcelections/races/dcq59.htm. However, that measure legalized only limited cultivation, possession, and transfers without payment and did not authorize cannabis sales, though a measure to legalize sales was under consideration by the D.C. Council as of late 2021. *See* Martin Austermuhle, *Here's Just About Everything You Need To Know About Pot Legalization in D.C.*, WAMU (Feb. 25, 2015), https://wamu.org/story/15/02/25/heres_just_about_everything_you_need_to_know_about_pot_legalization_in_dc/; *D.C. Council Holds Historic Hearing on Legalizing Cannabis Sales*, MARIJUANA POL'Y PROJECT (Nov. 22, 2021), https://www.wusa9.com/article/news/local/dc/dc-council-residents-discuss-legalizing-cannabis-sales-in-marathon-meeting/65-086b8ee1-3413-4401-9d12-b4173af7f10a.

187. *See* Aaron C. Davis & Peter Hermann, *Lawmakers Encourage Bowser to Reconsider Declaring Pot Legal in D.C.*, WASH. POST (Feb. 24, 2015), https://www.washingtonpost.com/local/dc-politics/dc-mayor-despite-legal-pot-city-will-not-become-like-amsterdam/2015/02/24/c34a4d3a-bb9b-11e4-b274-e5209a3bc9a9_story.html.

188. EZEKIEL EDWARDS ET AL., THE WAR ON MARIJUANA IN BLACK AND WHITE, ACLU 17-18 (2013), https://www.aclu.org/report/report-war-marijuana-black-and-white.

189. *Id.* at 18.

190. *Id.* at 23.

191. Unfortunately, it was also demonstrably insufficient. While some progress followed, large disparities in cannabis-related arrests, including for public use, remain pervasive in the District, similar to disparities in the enforcement of many other minor offenses. *See Racial Disparities in D.C. Policing: Descriptive Evidence from 2013-2017*, ACLU D.C. (last update July 31, 2019), https://bit.ly/3wpKIrP [hereinafter *Racial Disparities in D.C. Policing*]. These continuing challenges reflect that, while cannabis legalization is, in significant ways, a social justice issue, larger systemic problems and inequities require broader and more comprehensive solutions.

D. BUDGET RIDERS AND HOW TO BUCK THEM

The fourth and final post-*Raich* development Justice Thomas cites is also Congress's most direct action on state cannabis activity. In contrast to inferences to be drawn from the general proliferation of state legalization, DOJ enforcement discretion, or local changes in D.C., Congress's passage of a series of budget appropriations riders protecting state medical cannabis programs represents a continuing and active expression of congressional intent. First passed in 2014, the rider prohibits DOJ from spending any funds from the federal omnibus appropriations bill (which funds the federal government) to prevent states that have passed medical cannabis laws from implementing those laws.[192] Known initially as the Rohrabacher-Farr Amendment,[193] the rider has since been included in must-pass appropriations bills every year.

Yet even Congress's actions here do not have the scope necessary to undo the comprehensiveness that justified *Raich*. First, the budget rider's restriction applies by its own terms only to medical cannabis, and thus not to adult use laws. Implicit recognition of medical utility is certainly relevant to the CSA, but this at most represents a tentative initial step toward change. Moreover, as discussed above, most substances governed by the CSA are not flatly prohibited, only controlled, and that distinction does not render the CSA any less comprehensive. The current federal approach incorporates limited state experiments into the broader legal tapestry,[194] and specific DOJ guidance has helped shape those state experiments, ensuring that they advance congressional intent in the CSA by remaining "tightly regulated."[195]

Second, Congress has not done anything it cannot easily undo. The rider must be passed every year, and recent partisan budget fights make this a highly uncertain process.[196] Congress has commonly used appropriations riders to exert control over administrative actions in other contexts without destroying or negating underlying authority.[197] Rather, appropriations riders can be "a way of hitting the 'pause' button on a substantive policy while continuing to consider the policy's merits."[198]

The Ninth Circuit held that the rider prohibits DOJ from spending federal funds to take enforcement action not only against states, but also against

192. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–225, § 538, 128 Stat. 2130, 2217 (2014).

193. *See, e.g.*, *Federal Policy*, MARIJUANA POL'Y PROJECT (July 14, 2021), https://www.mpp.org/policy/federal/ (stating that the Rohrabacher-Farr Amendment has been in place since December 2014 and must be renewed each fiscal year).

194. *See supra* II.A.

195. *See supra* II.C.

196. *See, e.g.*, Jacob Pramuk, *Biden Signs Temporary Funding Bill to Prevent Government Shutdown*, CNBC (Sept. 30, 2021, 8:18 PM), https://www.cnbc.com/2021/09/30/government-shutdown-congress-moves-to-pass-funding-bill.html (discussing Republicans blocking a bill to fund the government and suspend the debt ceiling despite the risk of a government shutdown).

197. *See* Price, *supra* note 167, at 1011-12.

198. *Id.* at 1013.

individuals for conduct permitted by state law.[199] But what of tomorrow? The Appropriations Clause protects the separation of powers by allowing Congress to check executive expenditures and ensure they remain consistent with congressional intent.[200] The rider currently ties DOJ's hands, but, as the Ninth Circuit noted, "Congress could appropriate funds for such prosecutions tomorrow."[201] Additionally, the First Circuit, the only other federal court of appeals to interpret the rider to date, clarified that the rider's protections are broad, but not absolute.[202] While "DOJ may not spend funds to bring prosecutions if doing so prevents a state from giving practical effect to its medical marijuana laws[,]" prosecution nevertheless remains legally viable for persons engaged in "blatantly illegitimate activity" or activity "which the state has itself identified as falling outside its medical marijuana regime."[203] Such limitations of the rider itself and the ease with which Congress could change it are both more consistent with hesitant experimentation than with congressional retreat.

As a practical matter, it is indeed difficult to imagine a challenge paralleling *Raich* reaching the Court under the present system. An individual or entity cultivating or distributing cannabis non-commercially for medical use in rigorous compliance with prevailing state law would be highly unlikely to come to the attention of federal authorities. Even if they did, the rider would inhibit DOJ enforcement in such a case. Supporters of more limited federal control in *Raich* have, in that sense, won the war, even if they lost the initial battle. This also means Justice Thomas is probably correct about the overall status of *Raich* insomuch as an identical case would produce a different result today.

Cultivation or distribution for recreational use, however, might still yield a challenge similar to *Raich*. The budget rider does not apply to adult use cannabis, and little other than politics currently stands in the way of aggressive federal enforcement. The Cole and Ogden memos have been rescinded and were mere guidance even when in effect. If DOJ deemed it appropriate to raid an adult use cannabis cultivator or retailer and arrest everyone present for various violations of the CSA, it could do so. Yet if the activities involved were sufficient to attract such federal attention, this would likely indicate either non-compliance with state law or a failure of state regulatory control, neither of which would enjoy protection pursuant to any changes from the past sixteen years. In that sense, many post-*Raich* changes, including Congress's budget rider, are remarkably superficial despite their real-world impact.

199. United States v. McIntosh, 833 F.3d 1163, 1176-77 (9th Cir. 2016).
200. *See id.* at 1175.
201. *Id.* at 1179.
202. United States v. Bilodeau, 24 F.4th 705, 714 (1st Cir. 2022).
203. *Id.* at 713-14.

IV. PLANTING SEEDS: THINKING BEYOND CANNABIS

The argument that *Raich* remains good law is in no way an endorsement of current federal law. Cannabis prohibition has been wrong since long before the present wave of public sentiment against it. Federal cannabis law is poorly grounded in science,[204] inhibits advancement of that science,[205] and remains profoundly inequitable in enforcement.[206] Any of these alone would be sufficient to pronounce prohibition bad policy; together, they render it a public health disaster. Early cannabis prohibition was steeped in racism.[207] The CSA could have been a step forward toward a public health approach, as even the federal government's own experts recognized a need for change,[208] but those recommendations were ignored, again due in part to racism.[209] The War on Drugs is now widely and correctly recognized as having failed utterly in achieving its goals[210] while heaping horrific damage on minoritized communities[211] and eroding public health by exacerbating disparities across a wide array of social determinants of health.[212] Cannabis prohibition has played a significant role in this tragedy.

Congress should begin the process of undoing the damage of cannabis prohibition by formally amending the CSA to reschedule or deschedule cannabis.[213] Congress could also potentially insert specific exceptions for

204. At a minimum, the established medical effectiveness of cannabis and cannabinoids for at least some conditions indicates that Schedule I is an inappropriate categorization—if it was ever the correct one. *See, e.g.*, NASEM REPORT, *supra* note 18, at 127-29 (summarizing report conclusions regarding cannabis and cannabinoid effectiveness for various health conditions); *see also* NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE OFFICIAL REPORT, *supra* note 39, at 190-91 (recommending in 1972 that personal possession and distribution without remuneration should no longer be criminal offenses under federal law).

205. *See* NASEM REPORT, *supra* note 18, at 377-83 (cataloging research barriers).

206. *See, e.g.*, EDWARDS ET AL., *supra* note 188, at 17-20 (discussing the extreme racial disparities in marijuana arrests); *Racial Disparities in D.C. Policing*, *supra* note 191 (discussing the disproportionate arrest of Black individuals by the D.C. Metropolitan Police Department).

207. *See, e.g.*, Vitiello, *supra* note 21, at 797-800 (showing how racism played a significant role in the prohibition of marijuana).

208. *See generally* NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE OFFICIAL REPORT, *supra* note 39 (reporting findings of the Shafer Commission recommending decriminalization of possession).

209. *See, e.g.*, Vitiello, *supra* note 21, at 801-07 (discussing racism and marijuana). These later manifestations of racism were less overt but no less damaging.

210. *See* Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure* of the *War on Drugs*, CATO INST. (Apr. 12, 2017), https://www.cato.org/publications/policy-analysis/four-decades-counting-continued-failure-war-drugs.

211. *See* Lahny Silva, *The Trap Chronicles, Vol. 1, How U.S. Housing Policy Impairs Criminal Justice Reform*, 80 MD. L. REV. 565, 566-67, 573-74, 583-87 (2021); Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 AM. CRIM. L. REV. 1685, 1685-86, 1691-97 (2021).

212. *See* Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097, 1098, 1122-24 (2013); Lisa D. Moore & Amy Elkavich, *Who's Using and Who's Doing Time: Incarceration, the War on Drugs, and Public Health*, 98 AM. J. PUB. HEALTH 782, 782-85 (2008); *see also* Nicole Huberfeld, *Health Equity, Federalism, and Cannabis Policy*, 101 B.U. L. REV. 897, 902 (2021) (discussing how disparities in public health became more conspicuous after 2020).

213. The specific parameters of such a change, including whether rescheduling or descheduling is the more appropriate path, are beyond the scope of this Article.

legalizing states,[214] essentially formalizing the approach of the Cole Memos and allowing states to chart independent paths while maintaining a "backstop" of federal oversight and control.[215] These would be welcome changes, but Congress has not made them as of this writing.

The federal government *should not* prohibit the possession or consumption of cannabis. However, to say that the federal government *may not* do so is an entirely different point. Commerce Clause authority is a powerful tool that should be used cautiously, but the context of its application should not dictate its constitutional propriety. Professor Sara E. Rosenbaum, writing shortly after *Raich*, highlighted that what matters is not the wisdom of Congress's decision to regulate, only whether it has the requisite authority and provides the necessary minimally rational basis.[216] This is entirely consistent with the Court's own view of its role, as the *Wickard* Court acknowledged in noting that it had no role in adjudicating the "wisdom, workability, or fairness" of Congress's plans.[217] Even when Congress appears to buck accepted science, public opinion, or common sense, its decisions may nevertheless be valid, and the primary check on this power is the political process.[218] The Commerce Clause was a solution to the unworkable system of leaving regulation of commerce to the states alone under the Articles of Confederation, historical roots that were also at the heart of *Raich*.[219] The necessity of such federal power, where appropriate, has not diminished with time. If anything, an increasingly mobile and interconnected society makes it even more vital.

If Congress wishes to continue its odious, dangerous, and Quixotic fight for cannabis prohibition, the Constitution does not forbid it. The first substantial question, as raised in *Raich*, is to what extent Congress may regulate purely intrastate activities as part of such an endeavor. The second, as raised by Justice Thomas in *Standing Akimbo*, is whether the federal government must maintain

214. *See* Denning, *supra* note 138, at 355-56; Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RSRV. L. REV. 567, 567 (2015) [hereinafter *Vertical Federalism*].

215. *See Vertical Federalism*, *supra* note 214, at 594. As Professor Denning suggests, a constitutional amendment legalizing cannabis and providing for its regulation would be even clearer and would potentially spur a beneficial national policy debate on drug policy, *id.*, but that proposal is beyond the scope of this Article.

216. *See* Sara Rosenbaum, Gonzales v. Raich: *Implications for Public Health Policy*, 120 PUB. HEALTH REPS. 680, 680-81 (2005).

217. Wickard v. Filburn, 317 U.S 111, 129 (1942).

218. *See* Rosenbaum, *supra* note 216, at 682 (linking Congress's Commerce Clause authority as outlined in *Raich* to then-pending litigation on federal abortion restrictions and noting that "Congress is free to make decisions for reasons other than those embodied in science and evidence, and regularly does so."). Notably, this is a double-edged sword that Congress can wield in ways patently offensive to those of various political leanings. *See* Somin, *supra* note 77, at 545-46 (arguing that uses of federal power to advance conservative policy goals, such as the 2003 federal "partial birth abortion" ban, the No Child Left Behind Act, a proposed federal ban on recognizing non-heterosexual marriages, and federal intervention in end-of-life cases led the political left to embrace more robust limits on federal power traditionally favored by conservatives and libertarians).

219. *See* Gonzales v. Raich, 545 U.S. 1, 16 (2005) (providing that "[t]he Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.").

"watertight nationwide prohibition" in order to retain the full scope of its Commerce Clause power.[220]

The object of federal regulation must be economic or commercial, but the *Raich* Court confirmed that even non-commercial cannabis activities are "quintessentially economic,"[221] despite appearances to the contrary. Moreover, Congress may sweep in even activities with *de minimus* impacts on interstate commerce in pursuit of regulating an entire class of activities.[222] The universe of state-legal cannabis activities has unquestionably expanded since *Raich*, but this larger scope and accompanying federal enforcement restraint should not diminish federal authority. There are an estimated 5.5 million registered medical cannabis patients alone across legalizing states as of 2021.[223] Should all these persons individually cultivate cannabis for private medical use, even without any commercial intent, it is naïve to think this would not substantially affect the (illicit) interstate market for cannabis.

In 2020, almost fifty million Americans aged twelve or older (about eighteen percent) reported using cannabis in the past year,[224] but historically, use prevalence peaked in the late 1970s,[225] not long after the passage of the CSA. Total elimination of the cannabis market was never a wise or achievable goal, and federal enforcement now appears to have shifted toward regulation of that market. Yet a market it remains. Controlling cannabis via a tightly regulated system is at least as apt an application of Commerce Clause authority as prohibition. The federal approach remains a comprehensive framework, albeit a more permissive one.

Indeed, there is a risk that if courts are willing to allow Congress to regulate strictly and pervasively under a national scheme but wary of more nuanced or limited approaches, Congress would be encouraged to "get big or get out" by enacting broader laws to forestall constitutional challenge.[226] Most products (as for most things in life) are neither "safe" nor "unsafe." They fall somewhere along a continuum reflecting how they are used and how they are regulated, among other factors. Consistent with well-established anti-commandeering doctrine, the federal government cannot dictate a particular approach to states,[227] but the promise of federal restraint is a legitimate means of encouraging state

220. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2237 (2021).

221. *Raich*, 545 U.S. at 25-26.

222. *See id.* at 17-18.

223. *Medical Marijuana Patient Numbers*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/ (last updated May 27, 2021).

224. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *Highlights for the 2020 National Survey on Drug Use and Health*, https://www.samhsa.gov/data/sites/default/files/2021-10/2020_NSDUH_Highlights.pdf (last visited Mar. 31, 2022).

225. *See* NASEM REPORT, *supra* note 18, at 62.

226. *See* Reynolds & Denning, *supra* note 83, at 922-23; *see also* Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325, 1330-33 (2001) (noting that the Commerce Clause currently encourages bundling and broadening of federal policies).

227. *See* Denning, *supra* note 138, at 354.

innovation.[228] If, instead, Congress must choose between iron-fisted control and laissez-faire abstention, it will pick the former at least as often as the latter. And, when faced with better evidence or realization of prior error, the federal government may allow overregulation to persist, as it has done with respect to cannabis, rather than accept diminution of federal authority. Thus, it is essential to permit federal control to ratchet down more gradually and encourage a more calibrated approach. Such nuance is crucial, particularly in public health regulation.

In a broader context, *Raich* is important in the pantheon of modern U.S. Supreme Court federalism, but it is even more important as a statement about the federal government's power to act in the interest of public health.[229] Over the past twenty-five years, public health measures have frequently been battlegrounds for significant decisions on the reach of federal Commerce Clause authority to address complex issues from guns in schools (*Lopez*), to gender-motivated violence (*Morrison*), to drug control (*Raich*), to health insurance (*NFIB*). The legal fallout from COVID-19 has produced further recent challenges to federal authority, albeit largely concentrated in doctrines of administrative law rather than constitutional law.[230] While states traditionally play the lead role in public health regulation pursuant to their police power, the federal government's role is significant and increasingly essential in a modern interconnected society.[231] Erosion of federal authority to act on matters of national concern threatens the collective ability of government to respond to public health challenges. While cannabis prohibition should end, it should be Congress that does so, as judicial intervention risks consequences that would reverberate across public health law.

V. CONCLUSION

Justice Thomas raised important questions in *Standing Akimbo* regarding the continuing constitutionality of the federal government's approach to cannabis.

228. Professor Nicole Huberfeld has drawn particularly telling parallels between a map of state cannabis legalization and a map of state Medicaid expansion. Huberfeld, *supra* note 212, at 909. While Professor Huberfeld's point relates primarily to health equity, *id.* at 910, the similarity is also illustrative of the inability of the federal government to mandate state law and the limits of encouraging states to do so.

229. As Professor John T. Parry argued, "doctrinally, *Raich* clearly is a federalism case. But underneath the veneer of federalism is a broad idea and endorsement of comprehensive regulatory power, be it federal (through the Commerce Clause) or state (through the so-called police power)." Parry, *supra* note 71, at 863.

230. For example, the U.S. Supreme Court struck down the Centers for Disease Control and Prevention's ("CDC") extension of the federal eviction moratorium as beyond the scope of the agency's statutory authority. *See* Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2486-90 (2021) (holding that CDC likely lacked statutory authority to continue the moratorium in the absence of specific Congressional authorization, even accounting for the strong public interest in combating COVID-19). Similarly, the Court stayed the Biden Administration's "test or vaccinate" mandate for most large employers via the Occupational Safety and Health Administration as exceeding the agency's statutory authority. *See* Nat'l Fed. Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 664-66 (2022).

231. *See* Hodge, *supra* note 138, at 323-25, 330-32, 335-38.

Enforcement of the CSA with respect to intrastate, non-commercial cannabis activities already stood on the outer fringes of federal Commerce Clause authority, and much has indeed changed since *Raich* was decided. Yet these changes are less substantial than they appear.

A majority of states have legalized medical cannabis, and a significant minority have legalized recreational cannabis, as well. However, state actions reveal little about either the intent or authority of federal actors, and states have always played the leading role in drug enforcement. The DOJ has pulled back on federal enforcement and formalized a non-interventionist approach in widely publicized guidance documents, but those memos have been rescinded and were of only limited legal effect even when in force. Congress allowed D.C. to proceed with decriminalization, yet a history of obstruction and inequity reveals that this was the very least effort justice required. Congress has also prohibited the DOJ from interfering with state medical cannabis programs. Still, even this is tenuous and limited in scope. None of these developments justify chipping away at the federal authority recognized in *Raich*.

Cannabis prohibition is bad public policy and bad for public health. But bad policy is not bad law. Judicially undermining the CSA based on minimal evolutions in the exercise of federal authority presents grave risks to the future ability of the federal government to act in the interest of public health on matters of national scope. Change is coming, as it should, but how it comes matters immensely.