# Disentangling Drug Rescheduling, Decriminalization, and Legalization

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*For decades, government officials and members of the public have attempted to reschedule marijuana, which involves moving it from Schedule I of the Controlled Substances Act (CSA) to a less-tightly regulated category. Proponents gained momentum when marijuana reform became a focus of the 2024 U.S. presidential election. Republicans and Democrats pledged to decriminalize marijuana, legalize it, or end unnecessary arrests. Substantial confusion followed. People wondered whether rescheduling could legalize marijuana or decriminalize it, and some stakeholders claimed rescheduling would put the U.S. out of compliance with international drug treaties. In 2026, the Department of Justice ordered a narrow range of marijuana products to be recategorized as Schedule III. Although historic, the order did little to reduce confusion. Instead of harmonizing state and federal drug laws, it further fractured the U.S. drug policy landscape. Dozens of U.S. states have legalized or decriminalized marijuana for medical or nonmedical use, and policymakers are considering similar changes for other controlled substances. The DOJ order split state marijuana industries in half because, while state-licensed medical marijuana products were rescheduled, unlicensed products, as well as marijuana used for nonmedical purposes, remained in Schedule I.*

*This Essay disentangles drug rescheduling, decriminalization, and legalization. Decriminalizing drugs eliminates or reduces criminal penalties for conduct associated with their personal use. Legalization creates regulatory frameworks governing drug production, distribution, and sale. The Essay explains how this distinction affects federal preemption, international treaty compliance, and public health. It applies the Supreme Court's anticommandeering framework from* Murphy v. NCAA *to show that decriminalization is constitutionally protected because Congress cannot compel states to criminalize conduct. Legalization, by contrast, often creates affirmative regulatory frameworks for conduct that federal law prohibits, raising conflicts with the CSA. The Food, Drug, and Cosmetic Act (FDCA) can also preempt state laws that legalize federally controlled substances. This preemptive potential persists even if drugs are descheduled, which removes*

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*them entirely from CSA control. Both the CSA and FDCA provide domestic regulatory infrastructure through which the United States complies with international drug control treaties. The CSA regulates controlled substance manufacturing, limits production, and penalizes drug trafficking. The FDCA provides import controls, manufacturing standards, and distribution oversight. Consequently, state laws that conflict with either statute may therefore implicate the federal government's authority over foreign affairs, weakening the presumption against preemption.*

*Rescheduling marijuana or other Schedule I controlled drugs does not legalize them or decriminalize them because FDCA constraints remain. However, descheduling can effectively decriminalize controlled substances, and both the U.S. Constitution and international drug treaties allow it—making decriminalization legally defensible across multiple domains, while legalization faces legal risk that varies with the degree to which state regulations undermine federal and international objectives. The Essay concludes with recommendations to reduce the confusion and fractured policy landscape associated with federal marijuana rescheduling.*



## Introduction

During a virtual town hall meeting in 2020, then-vice-presidential candidate Kamala Harris said that if voters elected Joseph Biden as President, their administration would decriminalize marijuana.[1] Four years later, during the 2024 election, Republican candidate Donald Trump wrote, "[I]t is time to end needless arrests and incarcerations of adults for small amounts of marijuana for personal use."[2] On the Democratic side, presidential candidate Harris pledged to legalize marijuana for adult recreational use.[3] Although

1. Leandra Bernstein, *Cannabis in the presidential race: Biden-Harris pledge to decriminalize marijuana*, WJLA (Sep. 17, 2020), https://wjla.com/news/nation-world/cannabis-in-the-presidential-race-biden-harris-pledge-to-decriminalize-marijuana [https://perma.cc/Y8NS-YCUA].

2. Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Sep. 8, 2024), https://truthsocial.com/@realDonaldTrump/posts/113105431683796730 [https://perma.cc/93HP-VNKE].

3. *See* Hannah Harris Green, *Kamala Harris Promises Full Marijuana Legalization – Is that a Gamechanger?* GUARDIAN (Oct. 19, 2024), https://www.theguardian.com/us-news/ng-interactive/2024/oct/19/election-harris-marijuana-legalization [https://perma.cc/F9KU-ERYS].

presidential candidates had not previously taken such strong positions on drug policy reform, their proposals were unclear because politicians and the media often use the terms "decriminalization" and "legalization" inconsistently or interchangeably.[4]

This Essay explains why terminological clarity matters. Some ambiguity stems from a lack of uniform standards for describing drug policies. Experts might use different or overlapping terms to describe one policy. The ambiguity likely persists in part because it serves a political function. Framing drug policies in flexible, imprecise terms allows public officials to entice constituencies concerned about diverse issues without making clear commitments. It can lead voters to think they are supporting one policy only to find themselves bound by another. Moreover, using inconsistent terms stifles meaningful debate between candidates, policy experts, and members of the public. Beyond impacting democratic deliberation and public accountability, the distinction between decriminalization and legalization carries legal consequences. The Essay uses a recent Department of Justice (DOJ) order to reschedule medical marijuana as a case study that illustrates these complexities. While representing a historic drug policy milestone, the order contributes to existing confusion and creates a more fractured federal drug policy landscape.

Under the CSA, the federal government can classify drugs into five *schedules* based on their potential for abuse, accepted medical use, and safety.[5] Since the CSA's enactment, marijuana has remained in Schedule I, the most restrictive category, reserved for substances with no currently accepted medical use.[6] Legalizing a controlled substance at the federal level requires engaging the scheduling process—at minimum, rescheduling the drug to a less restrictive category, or *descheduling* to remove it entirely from CSA control. Decriminalization, by contrast, could be achieved through descheduling or by exercising prosecutorial discretion without changing a drug's schedule. These approaches have different legal implications. For instance, state drug decriminalization is shielded from federal preemption by

4. *See, e.g.*, DOUGLAS HUSAK & PETER DE MARNEFFE, THE LEGALIZATION OF DRUGS: FOR & AGAINST 3 (Cambridge Univ. Press 2005) (noting inconsistent usage of the terms decriminalization and legalization).

5. 21 U.S.C. § 812(a)–(b) (2018) (establishing five schedules and setting forth the findings required for each, including a substance's "potential for abuse," whether it has "a currently accepted medical use in treatment in the United States," and its safety or dependence liability); 21 U.S.C. §§ 811(a)–(b), 812(b) (2018) (granting the Attorney General authority to schedule, reschedule, or deschedule controlled substances based on the criteria set forth in § 812(b)).

6. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1249 (codified as amended at 21 U.S.C. § 812 (2018)) (placing marijuana in Schedule I); *see* 21 U.S.C. § 812(b)(1) (defining Schedule I as including drugs with "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and a "lack of accepted safety for use . . . under medical supervision").

anticommandeering doctrine, while legalization stands on shakier ground. Moreover, the FDCA provides an independent basis for preempting state drug legalization, which persists even if the federal government reschedules or deschedules a controlled substance. And while international drug treaties prohibit parties from legalizing controlled substances for nonmedical commercial use, those treaties contain flexibilities that tolerate decriminalization. The recent DOJ rescheduling order illustrates these complexities.

The Acting U.S. Attorney General ordered marijuana products rescheduled only if the FDA approves them, or if they are "covered by a state medical marijuana license."[7] The order did not reschedule marijuana products produced, distributed, or possessed for nonmedical purposes. Accordingly, campaign promises to decriminalize marijuana, legalize its recreational use, or end needless arrests went largely unfulfilled. Although the order reclassified state-licensed medical marijuana as a less dangerous drug, it could not "legalize" state-licensed medical marijuana, which continues to violate the FDCA as an unapproved drug product. The order created a fragmented state marijuana landscape, where medical marijuana products that are FDA-approved or state-licensed are classified in Schedule III of the CSA, and all other marijuana products remain in Schedule I. Less clear, however, is the order's effect on plants grown by medical marijuana patients in states that have decriminalized that practice. It arguably sweeps them within its scope, along with state-licensed medical marijuana businesses. Like those business entities, the order ostensibly requires medical marijuana patients to register with the DEA. This Essay contends that future DOJ actions should address this paradoxical effect. Moreover, it concludes that whether federal officials aim to maximize state compliance with national drug laws, ensure U.S. compliance with drug treaties, or promote public health, drug decriminalization holds advantages over legalization.

The emerging consensus in favor of decriminalization is broad; even some scholars who generally defend drug prohibition support marijuana decriminalization.[8] Yet the United States appears to be moving in the opposite direction. In 2024, Oregon recriminalized personal drug possession that

7. Schedules of Controlled Substances: Rescheduling of Food and Drug Administration Approved Products Containing Marijuana from Schedule I to Schedule III; Corresponding Change to Permit Requirements, 91 Fed. Reg. 22714, 22714–22718 (Apr. 28, 2026) (to be codified at 21 C.F.R. pts. 1300, 1301, 1308, 1312) [hereinafter 2026 Medical Marijuana Rescheduling Order] ("I am hereby ordering that FDA-approved drug products containing marijuana, as well marijuana in any form covered by a state medical marijuana license, be placed in schedule III of the CSA.").

8. *See, e.g.*, HUSAK & DE MARNEFFE, *supra* note 4, at 178, 180 (stating that "the benefits of prohibition are too low to justify its costs" for marijuana, and supporting "not only marijuana decriminalization, but marijuana legalization as well").

voters had decriminalized just three years earlier.[9] Across multiple states, recent policies either repealed decriminalization or replaced it with commercial regulation. More recently, instead of legalizing or decriminalizing recreational marijuana as promised on the campaign trail, the DOJ's rescheduling order maintained recreational marijuana in Schedule I.

The Essay proceeds in two parts. Part I defines and contrasts drug decriminalization and legalization. It analyzes a growing global trend to decriminalize drugs, mounting resistance to that trend, and the medical and humanitarian case for decriminalization. Part II evaluates conflicts between state and federal drug laws and examines how international treaty obligations bear on the preemption analysis under the CSA and FDCA. The Essay concludes by applying this analysis to the DOJ's April 2026 marijuana rescheduling order, demonstrating that rescheduling marijuana could not resolve the independent FDCA barrier to legalization. Descheduling might better serve the purposes for which marijuana rescheduling was initially proposed, including reducing criminal penalties and unnecessary arrests, while resolving the conflicts between state and federal marijuana laws. It situates these findings within a broader convergence—across the political spectrum and internationally—toward decriminalization as a legally and scientifically defensible middle ground in drug policy.

## I. Decriminalization Versus Legalization

This Part defines and contrasts drug decriminalization and legalization. It analyzes a growing global trend to decriminalize drugs, mounting resistance to that trend, and the medical and humanitarian case for decriminalization. It studies Germany's recent decriminalization reform as a model with implications for the U.S. and other countries.

### *A. Decriminalization Trends and Signs of Reversal*

*De jure* decriminalization removes criminal penalties for conduct associated with personal drug use or replaces criminal punishments with civil penalties such as fines or mandatory education.[10] Jurisdictions can achieve *de*

9. Amended Ballot Measure 110, S.B. 755, 81st Leg. Assemb., Reg. Sess. (Or. 2021) (enrolled bill) (replacing criminal penalties for personal drug possession with a maximum $100 fine or health assessment referral); H.B. 4002, 82d Leg. Assemb., 2024 Reg. Sess. (Or. 2024) (signed by Governor Kotek on Mar. 1, 2024) (reclassifying possession of small quantities of controlled substances as a Class C misdemeanor, punishable by up to 180 days' imprisonment); Conrad Wilson, *Oregon Governor Signs Bill Criminalizing Drug Possession*, OPB (Apr. 1, 2024), https://www.opb.org/article/2024/04/01/drug-possession-oregon-kotek-sign-bill/ [https://perma.cc/M38P-ZDBF].

10. *See, e.g.*, Richard J. Bonnie, *The Meaning of "Decriminalization": A Review of the Law*, 10 CONTEMP. DRUG PROBS. 277, 285–87 (1981) (stating that "[p]ersons apprehended for a decriminalized offense should be issued citations and should not be subject to a full custody arrest"); *see* Edward Adams, *Just Don't Do It: Why Cannabis Regulations Are the Reason Cannabis*

*facto* decriminalization by retaining criminal penalties while disincentivizing or deprioritizing arrests or prosecution (sometimes called deprioritization or prosecutorial discretion).[11] Decriminalized conduct that supports personal use might include noncommercial drug possession, consumption, cultivation, sharing, and even purchasing limited quantities.[12] Around the world, jurisdictions have decriminalized home marijuana cultivation,[13] replaced prosecution for illicit drug possession with fines or referrals to addiction services,[14] or stopped arresting people for buying or sharing small quantities of controlled substances.[15]

Unlike decriminalizing drugs, which addresses activities related to personal use, legalizing drugs entails regulation that is typically directed toward commercial conduct. For instance, at the state level, lawmakers might license businesses to produce, distribute, or sell federally controlled drugs such as marijuana, while removing criminal penalties for those licensed

*Businesses Are Failing*, 34 NEV. L. J. 349, 369–70 (2024) (defining decriminalization as removing criminal penalties for small-quantity possession); *see* Nat'l Comm'n on Marihuana & Drug Abuse, *Marihuana: A Signal of Misunderstanding, Appendix* vol. I, at 551 (1972) [hereinafter Signal of Misunderstanding] (observing that reduced penalties for marijuana possession that existed in 1972 "may foreshadow the eventual decriminalization of possession for personal use," distinguishing penalty reduction from decriminalization); *see also* HUSAK & DE MARNEFFE, *supra* note 4, at 5–6 (arguing that any remaining punishments, including fines, fall short of decriminalization).

11. *See* Saba Rouhani, Leanne Zhang, Abigail K. Winiker, Susan G. Sherman & Sachini Bandara, *Emerging Models of De Facto Drug Policy Reforms in the United States*, DRUG & ALCOHOL DEPENDENCE, July 2024, at 2 (2024) (explaining that de facto decriminalization can be achieved with prosecutors using their discretion to adopt more lenient approaches or blanket nonprosecution policies for drug possession).

12. Mason Marks, *State Drug Laws*, 93 FORDHAM L. REV. 439, 445 (2024); *see Excerpts from the Report of the National Commission on Marijuana and Drug Abuse*, N.Y. TIMES (Mar. 23, 1972), https://www.nytimes.com/1972/03/23/archives/excerpts-from-the-report-of-national-commission-on-marijuana-and.html [https://perma.cc/E278-M2A7] (reporting on a government recommendation to decriminalize marijuana possession for personal use, including casual nonprofit distribution of small quantities) [hereinafter National Commission Excerpts].

13. *See* Ashley Cusicanqui, *New York Approves Home Cannabis Cultivation, Allowing Adults to Grow Their Own Plants*, CBS6 ALBANY (June 13, 2024), https://cbs6albany.com/news/local/new-york-approves-home-cannabis-cultivation-allowing-adults-to-grow-their-own-plants-cannabis-control-board-marijuana-weed-legal [https://perma.cc/E72N-85KB] (explaining that New York approved home cannabis cultivation rules allowing adults to grow cannabis plants at home for personal use); *see* Jessica Parker, *Cannabis Partially Decriminalised in Germany*, BBC (Mar. 31, 2024), https://www.bbc.com/news/world-europe-68674813 [https://perma.cc/5ZTT-F4ST] (reporting German decriminalization of home marijuana cultivation and nonprofit growing clubs).

14. *See* Amelia Templeton, *Oregon Becomes 1st State in the US to Decriminalize Drug Possession*, OPB (Nov. 3, 2020), https://www.opb.org/article/2020/11/04/oregon-measure-110-decriminalize-drugs/ [https://perma.cc/F73U-2T7X] (describing approval of Measure 110 by Oregon voters).

15. *See* Ed Leuw, *Drugs and Drug Policy in the Netherlands*, 14 CRIME & JUST. 229, 231–33 (1991) (describing the flexibility of Dutch prosecutorial discretion regarding the sale of small quantities of soft drugs or possession of hard drugs for personal use); *see also* COLO. REV. STAT. § 12-170-109 (2023).

commercial activities.[16] At the national level, legalizing a controlled substance usually requires FDA approval for a medical purpose, followed by DEA rescheduling of the drug.[17]

Drug policy scholars and international institutions define "decriminalization" and "legalization" in varying ways, though most roughly track the above definition, distinguishing between the loosening of laws regulating personal use and commercial supply. Douglas Husak argues that decriminalizing a drug means that its use "should not be a criminal offense," while legalization refers to systems "in which the production and sale of drugs are not criminal offenses."[18] Other scholars similarly define decriminalization as the "de jure removal of criminal sanctions" for possession for personal use, whether replaced "by civil penalties," "by measures that divert people towards health or social support," or "by no sanction at all."[19] They too distinguish those scenarios from legalization, which they associated with commercial drug production and distribution.[20] Neil Boister describes a spectrum of approaches to decriminalization, from non-prosecution as a matter of policy, to reduced criminal penalties, to replacement of criminal punishments with civil or administrative penalties, to elimination of all penalties, i.e., full decriminalization.[21]

16. *See* Marks, *State Drug Laws*, *supra* note 12, at 445 (distinguishing decriminalization from legalization and noting that legalization generally entails licensing and regulation of commercial drug production, distribution, and sale); *see* OR. REV. STAT. § 475A.305, .325 (2023) (requiring psilocybin service center operators and facilitators to obtain licenses from the Oregon Health Authority); *id.* § 475A.275 (providing that manufacture, delivery, or possession of psilocybin by a licensee in compliance with the Oregon Psilocybin Services Act "does not constitute a criminal or civil offense under the laws of this state"); *id.* § 475.752(1), (2) (classifying unlicensed manufacture or delivery of psilocybin as a Class A felony).

17. JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 119TH CONGRESS 10 (2025).

18. DOUGLAS HUSAK & PETER DE MARNEFFE, THE LEGALIZATION OF DRUGS: FOR & AGAINST 3 (Cambridge Univ. Press 2002); *id.* at 9 ("[D]ecriminalization only pertains to punitive state policies toward drug users. It is noncommittal about how illicit drugs should be produced or sold.").

19. Alex Stevens, Caitlin Elizabeth Hughes, Shann Hulme & Rebecca Cassidy, Depenalization, *Diversion and Decriminalization: A Realist Review and Programme Theory of Alternatives to Criminalization for Simple Drug Possession*, 19 EUR. J. CRIMINOLOGY 29, 31 (2022).

20. *Id.* at 31 (distinguishing various forms of decriminalization, which the authors associate with drug possession, from legalization, which they associate with production and supply, and noting that the INCB "has made clear . . . that decriminalization of possession can occur within the current framework of the UN drug conventions, whereas legalization contravenes it."). *See also* Robert J. MacCoun & Peter Reuter, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES 40 (Cambridge Univ. Press 2001) (defining decriminalization to include any "reduction in criminal sanctions" for drug use).

21. Neil Boister, *Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs*, 29 LEIDEN J. INT'L L. 389, 393–94 (2016) (describing a range of approaches to decriminalization).

Not all scholars draw the line in the same place, and there are arguably good reasons for the divergence. Robert Mikos, a leading authority on marijuana law, employs "legalization" more broadly to describe any full repeal of penalties, criminal and civil, with or without accompanying regulation.[22] On this view, a state that removes criminal penalties for drug possession and use, while going no further, legalizes those activities. Mikos reserves "decriminalization" for policies that retain some form of state discouragement of drug use, such as criminal punishment, fines, or other civil penalties.[23]

The International Narcotics Control Board (INCB), in a definition adopted by the United Nations Office on Drugs and Crime (UNODC), veers toward Mikos's categories, referring to decriminalization as the reclassification of personal-use offenses from "criminal" to "non-criminal" through legislative action, "whilst remaining prohibited or contrary to law."[24] Meanwhile, the INCB reserves "legalization" for frameworks permitting "non-medical and non-scientific supply and use" that "entail no penalty, whether criminal, administrative, civil or otherwise."[25]

This Essay adopts the broader view of decriminalization, encompassing all approaches to reducing or eliminating criminal penalties for conduct related to personal drug use. It adopts the narrower view of legalization, which implies regulation, typically involving commercial drug production, distribution, and sales. These distinctions have practical significance. The INCB and other international bodies recognize decriminalization as drug treaty-compliant while viewing nonmedical commercial regulation as contravening international obligations. Similarly, as discussed in Part II, state decriminalization of federally illegal drugs may be immune from federal intervention on anticommandeering grounds.

State-level decriminalization dates to the 1970s. In 1973, Oregon became the first state to decriminalize personal marijuana possession by

22. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1419, 1422 n.2 (2009) ("By legalize, I mean the government permits some private conduct to occur free of *legal* sanctions, both civil and criminal. It means something more than decriminalize, which merely removes the threat of *criminal* sanctions.") (emphasis in original).

23. *See id.* at 1430–32 (characterizing state removal of marijuana prohibitions as "legalization"); *see also* Robert A. Mikos, *Murphy's Mistake, and How to Fix It*, *in* MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE 103, 114–1116 (Jonathan H. Adler ed., Brookings Inst. Press 2020) (describing state repeal of marijuana prohibitions as "authorization").

24. U.N. Off. On Drugs & Crime, *Legal and Policy Considerations on Decriminalization of Drug Use and Possession for Personal Use: International Legal Framework and the UN System Common Position on Drug-Related Matters* 2 (July 2025).

25. Int'l Narcotics Control Bd., *Report of the International Narcotics Control Board for 2022*, *iii*, ¶¶ 67–68, U.N. Doc. E/INCB/2022/1 (2023) (stating that "legalization of the non-medical and non-scientific supply and use of cannabis contravenes the provisions of the conventions") [hereinafter INCB Annual Report 2022].

replacing criminal punishment with a civil penalty consisting of a fine.[26] Five other states enacted similar reforms.[27] More recently, other state governments have eliminated criminal penalties for conduct associated with personal drug use. California voters approved Proposition 215, the Compassionate Use Act of 1996, which provided an affirmative defense to qualified patients and their caregivers for marijuana cultivation and possession.[28] In 2000, Colorado's Amendment 20 established an affirmative defense to criminal sanctions for similar conduct.[29] A few years later, California extended its affirmative defense to patients and caregivers who associated in collectives or cooperatives to cultivate and share medical marijuana.[30] In 2020, Oregon voters decriminalized possessing small quantities of non-FDA-approved controlled drugs, requiring people to pay a $100 fine or complete an over-the-phone health assessment.[31]

Although the decriminalization trend continues, a countertrend has emerged and appears to be accelerating.[32] Some jurisdictions have replaced laws that decriminalized federally illicit drugs with laws that ban noncommercial production while legalizing and strictly regulating commercial production, distribution, and sale. In 2010, Colorado's Medical Marijuana Code imposed new restrictions on patients, caregivers, and physicians.[33] It forced nonprofit marijuana cooperatives to transition to a licensed commercial dispensary model.[34] In 2015, California enacted the

26. Paul H. Blachly, *Effects of Decriminalization of Marijuana in Oregon*, 282 ANNALS N.Y. ACAD. SCI. 405, 405 (1976); Bonnie, *supra* note 10, at 278 (noting that Oregon was the first state to decriminalize possession of small amounts of marijuana).

27. Bonnie, *supra* note 10, at 278.

28. CAL. HEALTH & SAFETY CODE § 11362.5 (West) [hereinafter Compassionate Use Act].

29. *See* COLO. CONST. art. XVIII, § 14(2)(a) (detailing the affirmative defense).

30. *See* Medical Marijuana Program, ch. 875, § 2, 2003 Cal. Stat. 6422, 6432–33 (codified at Cal. Health & Safety Code § 11362.775) (effective Jan. 1, 2004) (providing that qualified patients and primary caregivers who associate within the State of California to collectively or cooperatively cultivate marijuana for medical purposes shall not be subject to state criminal sanctions for possession for sale, transportation, or maintaining a location for drug activity).

31. Templeton, *supra* note 14.

32. *See* Wilson, *supra* note 9 ("Drug possession will soon be a crime once again in Oregon."); Ian Austen, *Canada Re-Criminalizes Public Drug Use in British Columbia*, N.Y. TIMES (May 7, 2024), https://www.nytimes.com/2024/05/07/world/canada/british-columbia-public-drug-use.html [https://perma.cc/R7J6-QJN5] ("[P]eople in British Columbia are no longer permitted to use drugs in public places"); David Downs, *A Rash of Medical Pot Bans*, EAST BAY EXPRESS (Dec. 9, 2015), https://eastbayexpress.com/a-rash-of-medical-pot-bans-2-1/ [https://perma.cc/53TV-F329] (noting how "medical marijuana activity bans moved forward" in California).

33. COLO. REV. STAT. ANN. §§ 12-43.3 to 12-43.3-106 (West 2010) (repealed 2018) (replacing Colorado's decriminalized, affirmative-defense model with a comprehensive licensing regime, capping caregivers at five patients, and prohibiting physicians from recommending marijuana absent a prior counseling relationship).

34. *See* COLO. REV. STAT. ANN. § 12-43.3-103 (West 2010) (repealed 2018) (establishing state licensing as the "exclusive means" for the cultivation, manufacture, sale, distribution, and dispensing of medical marijuana).

Medical Marijuana Regulation and Safety Act (MMRSA), which replaced its decriminalization-based Compassionate Use Act.[35] For one year, the MMRSA exempted cooperatives and collectives that grew marijuana for patients and caregivers.[36] Thereafter, those nonprofit organizations had to become licensed or face criminal prosecution.[37] Almost immediately after California enacted the MMRSA, opponents of home marijuana cultivation pursued local bans on the practice.[38] Some state and national governments have recriminalized conduct associated with personal use of illicit drugs.[39]

Colorado also recriminalized certain activities associated with psychedelic use that voters had decriminalized six months earlier, such as sharing plants containing the psychedelic drug ibogaine.[40] In 2024, Oregon lawmakers recriminalized personal possession of many controlled substances.[41] In 2025 and early 2026, ballot initiatives to repeal or scale back state marijuana legalization laws emerged in multiple states.[42]

Remarkably, even prohibition advocates have proposed alternatives to legalization that maintain various forms of decriminalization rather than promoting pure prohibition, suggesting that decriminalization occupies a defensible middle ground in drug policy.[43] In Massachusetts, the Secretary of

35. 2015 Cal. Legis. Serv. Ch. 688, 689, 719 (A.B. 243, 266, and 643) (West) (imposing licensing and regulation requirements on medical marijuana-related activities such as cultivation, distributions, and sales).

36. 2015 Cal. Legis. Serv. Ch. 689 (A.B. 266) (West).

37. 2015 Cal. Legis. Serv. Ch. 688 (A.B. 243) (West).

38. Downs, *supra* note 32 (reporting that about 25 California cities and counties sought to enact "bans on marijuana activity up to and including banning the indoor cultivation of a single plant").

39. *See, e.g.*, Agence France Presse, *Ecuador President Orders Reversal of Drug Decriminalization*, BARRON'S (Nov. 25, 2023), https://www.barrons.com/news/ecuador-president-orders-reversal-of-drug-decriminalization-dc7b485a/ [https://perma.cc/P3EW-ZRMR] (reporting that Ecuador reversed its decriminalization policy); *see* Austen, *supra* note 32 (reporting that Canada reversed a policy that allowed possession of small amounts of heroin and cocaine without criminal charges).

40. *See* S.B. 23-290, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023); *see also* COLO. REV. STAT. ANN. § 12-170-104 (West 2022) (defining "natural medicines" to include five naturally occurring psychedelics) [hereinafter Natural Medicine Health Act].

41. Wilson, *supra* note 9.

42. *See, e.g.*, *Multiple States Facing Marijuana Legalization Repeal Threats in 2026*, NORML (Jan. 12, 2026), https://norml.org/blog/2026/01/12/multiple-states-facing-marijuana-legalization-repeal-threats-in-2026/ [https://perma.cc/2DZC-5RXP] (describing coordinated SAM-funded campaigns in Massachusetts, Arizona, and Maine as well as Idaho's legislative constitutional amendment).

43. Sensible Marijuana Policy Act for Arizona, Initiative No. I-04-2026 §§ 2–5(b), 3–4 (filed Dec. 17, 2025) [hereinafter AZ Sensible Marijuana Policy Act], https://apps.azsos.gov/election/Initiative/I-04-2026.pdf [https://perma.cc/X77G-2947] (repealing commercial retail sales while preserving personal possession of one ounce or less and home cultivation of up to six plants); *see* Ariz. Sec'y of State, Initiative, Referendum and Recall Applications, https://azsos.gov/elections/initiative-referendum-and-recall [https://perma.cc/CEW2-USUQ] (proposing repeal of laws authorizing commercial marijuana establishments while retaining existing laws allowing for

State certified a ballot initiative to repeal nonmedical marijuana sales and home cultivation while retaining decriminalized personal possession of up to two ounces and commercial medical marijuana production and sales.[44] In Arizona, the Sensible Marijuana Policy Act would similarly dismantle the state's nonmedical commercial market, while preserving both personal possession and home cultivation of up to six plants for nonmedical use, effectively replacing legalization with a framework resembling decriminalization.[45] Maine approved a comparable repeal petition in December 2025, though the campaign missed its February 2026 signature deadline and now targets 2027.[46] All three proposals received financial support from Smart Approaches to Marijuana (SAM).[47] Meanwhile, Idaho legislators placed a constitutional amendment on the 2026 ballot that would permanently strip citizens of the power to legalize drugs through the ballot initiative process.[48]

Some jurisdictions have rejected decriminalization in favor of continued prohibition. For instance, Washington state lawmakers enacted a bill to prevent drugs from being decriminalized when an existing criminal law would have expired.[49] In California, after years of political compromise, lawmakers approved a bill only to see it vetoed by Governor Newsom.[50] The

"personal possession, consumption, purchase, processing, manufacturing, and transporting one ounce or less of marijuana, and possession, transport, cultivation, and possession of up to six marijuana plants for personal use"); *cf.* An Act to Restore a Sensible Marijuana Policy, Mass. Initiative Petition No. 25-10 §§ 3–4 (2025) (repealing home cultivation and commercial sales of marijuana while noting that possession of small amounts is "punishable only by a civil penalty"); An Act to Amend the Cannabis Legalization Act and the Maine Medical Use of Cannabis Act (filed Dec. 8, 2025) (eliminating commercial and personal cultivation).

44. An Act to Restore a Sensible Marijuana Policy, Mass. Initiative Petition No. 25-10, § 1, (2025), https://www.mass.gov/doc/25-10-initiative-petition-for-a-law-relative-to-regulating-marijuana-version-b/download [https://perma.cc/7VFG-3S3L].

45. AZ Sensible Marijuana Policy Act, *supra* note 43, §§ 2(5)(b), 3–5 (preserving personal possession and home cultivation).

46. An Act to Amend the Cannabis Legalization Act and the Maine Medical Use of Cannabis Act (filed Dec. 8, 2025), https://www.maine.gov/sos/cec/elec/citizens/index.html [https://perma.cc/UQM9-CTAJ] [hereinafter Maine Repeal Initiative].

47. *See* Macey Wolfer, *Arizona Is the Latest State to Take Aim at Legal Weed*, VICE NEWS (Jan. 12, 2026), https://www.vice.com/en/article/arizona-is-the-latest-state-to-take-aim-at-legal-weed/ [https://web.archive.org/web/20260114132102/https://www.vice.com/en/article/arizona-is-the-latest-state-to-take-aim-at-legal-weed/] (reporting on SAM's financial backing of efforts to partially recriminalize marijuana in Arizona, Massachusetts, and Maine).

48. H.R.J. Res. 4, 68th Leg., 1st Reg. Sess. (Id. 2025) (proposing amendment to Idaho Const. art. III, § 26).

49. Taylor Romine, Paradise Afshar & Nouran Salahieh, *Washington Governor Signs New Law Keeping Drug Possession Illegal*, CNN (May 17, 2023), https://www.cnn.com/2023/05/17/us/washington-drug-possession-law/index.html [https://perma.cc/G8Q8-YWLU].

50. *See* California Governor's Office, Veto Message of Governor Gavin Newsom on S.B. 58 (Oct. 2023), https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-58-Veto-1.pdf [https://perma.cc/C645-26EQ] (vetoing S.B. 58, which would have decriminalized personal possession and use of

Governor asked lawmakers to return the following year with a bill to legalize only medical psychedelic use.[51] Meanwhile, Connecticut lawmakers abandoned a psychedelic drug decriminalization bill when their Governor indicated he might veto it.[52] The recent DOJ rescheduling order also falls into this category where jurisdictions maintain prohibition. Despite campaign pledges to decriminalize marijuana, and a recommendation from HHS to move it to Schedule III, the order rescheduled only state-licensed medical marijuana products, maintaining the prohibited Schedule I status of marijuana products without state-licensure and those produced or distributed for nonmedical use.[53]

### *B. Medical and Humanitarian Calls to Decriminalize*

In the 1960s and 1970s, under increasing pressure to criminalize drugs, some U.S. officials resisted. They cited public health concerns associated with punitive drug prohibition.[54] But lawmakers who favored drug prohibition prevailed. Today, despite emerging anti-decriminalization sentiment, experts in medicine, public health, and human rights increasingly endorse decriminalization as sound public policy. At the 2024 meeting of the American Medical Association House of Delegates, which builds physician consensus on emerging healthcare issues, participants voted two-to-one in favor of eliminating criminal penalties for personal drug possession and use.[55]

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psilocybin, psilocyn, dimethyltryptamine, and mescaline for adults twenty-one and older); *see also* S.B. 519, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (earlier, broader decriminalization bill sponsored by Senator Wiener that stalled in the Assembly).

51. *See* Veto Message of Governor Gavin Newsom, *supra* note 50 (explaining that the bill would decriminalize possession of psychedelics before the state could draft medical guidelines).

52. Jordan Nathanial Fenster & Ken Dixon, *Will Connecticut Legalize Psilocybin Mushrooms? Some Say It Is 'Very Unlikely'*, SFGATE (Jan. 10, 2024), https://www.sfgate.com/connecticut/article/ct-psilocybin-mushrooms-legalize-lamont-18600089.php [https://perma.cc/J8TR-CT6A].

53. *See* 2026 Medical Marijuana Rescheduling Order, *supra* note 7 (noting that "maintaining unlicensed bulk marijuana in schedule I allows the United States to continue to meet . . . its obligations under the Single Convention without disruption.")

54. *See Excerpts from Hearings of the Subcommittee on the Executive Reorganization of the Senate Committee on Government Operations*, NAT'L LIBR. MED. (1966), https://medicineonscreen.nlm.nih.gov/transcripts-lsd-insight-or-insanity/ [https://perma.cc/X9D8-DYFQ] (quoting FDA officials urging Congress not to criminalize LSD); *see also* Signal of Misunderstanding, *supra* note 10, at 150 (reporting that a public health association officer deplored punitive measures, stating that imprisonment for marijuana use was "likely to do great damage to a young person's personality as well as to his future career").

55. *See* Doug Cunningham, *American Medical Association Delegates Vote to Decriminalize Drug Use, Possession*, UPI (June 13, 2024), https://www.upi.com/Health_News/2024/06/13/AMA-endorses-drug-decriminalization/9801718300625/ [https://perma.cc/K2TB-H8EN] (reporting a 345–171 vote in favor of the proposal despite the objection of AMA president-elect Bobby Mukkamala); *see also AMA Adopts New Policies on Substance Use During Second Day of Annual Meeting*, AMA (June 13, 2023), https://www.ama-assn.org/press-center/ama-press-releases/ama-adopts-new-policies-substance-use-during-second-day-annual [https://perma.cc/3CQ4-Y8P5] (voting to expand non-punitive penalties associated with drug possession and use).

One month later, the American College of Physicians called for decriminalizing personal possession and use of marijuana, as well as treatment-focused alternatives to incarceration for people convicted for illicit drug sales.[56] Doctors cited criminalization's negative effects on eligibility to receive public benefits and qualification for U.S. citizenship, as well as prohibition's disproportionate effects on racial minorities.[57] The ACLU has called drug criminalization an abject failure and supported decriminalization paired with public education and other harm-reducing measures.[58] Activists cite positive results from Portugal's national decriminalization and publicly funded addiction support services.[59] The international community draws similar conclusions.

Support for less punitive drug policies is becoming bipartisan. Rick Perry, the former Governor of Texas and U.S. Secretary of Energy, has urged states to offer drug treatment instead of prison for some people who use drugs, an approach Perry calls being "smart on crime."[60]

In 2021, U.N. human rights experts recommended decriminalization of personal drug possession and use, citing human rights violations associated with arbitrary detention,[61] a disproportionate impact on people living in poverty, and "massive costs for the dignity, humanity and freedom of people of African descent."[62] The Global Commission on Drug Policy described decriminalization as essential to containing the public-health impact of viral

56. Ryan Crowly, Katelan Cline, David Hilden & Micah Beachy, *Regulatory Framework for Cannabis: A Position Paper from the American College of Physicians*, 177 ANN. INTERN. MED. 1104, 1105 (2024), https://www.acpjournals.org/doi/10.7326/M24-0638 [https://perma.cc/J7U2-2XMM].

57. *Id.*

58. *See* Taylor Pendergrass, Editorial, *The War on Drugs Failed – Lawmakers Must Meet the Fentanyl Crisis with New Solutions*, ACLU (Mar. 11, 2022), https://www.aclu.org/news/smart-justice/the-war-on-drugs-failed-lawmakers-must-meet-the-fentanyl-crisis-with-new-solutions [https://perma.cc/ND27-4W9A] (contending that the current approach to the drug crisis is a "colossal waste of time" and advocating for life-saving therapies over traditional incarceration).

59. *See* Chris Brown, *How Europe's heroin capital solved its overdose crisis*, CBC NEWS, https://www.cbc.ca/news2/interactives/portugal-heroin-decriminalization/ [https://perma.cc/M5CH-2R9P] (detailing Portugal's use of "dissuasion commissions" to provide access to treatment and early intervention outside of the traditional court system).

60. Rick Perry, *Follow the Texas Model*, BRENNAN CTR. FOR JUST. (April 28, 2015), https://www.brennancenter.org/our-work/analysis-opinion/follow-texas-model [https://perma.cc/5A4V-QS35] (stating that drug courts can be more effective and less expensive than incarceration).

61. Working Grp. on Arbitrary Det., Arbitrary Detention Relating to Drug Policies, U.N. Doc. A/HRC/47/40 (May 18, 2021).

62. Press Release, U.N. Off. High Comm'r Hum. Rts., *UN Experts Call for End to Global "War on Drugs"* (June 23, 2023), https://www.ohchr.org/en/press-releases/2023/06/un-experts-call-end-global-war-drugs [https://perma.cc/XXG4-KE54].

hepatitis and HIV.[63] According to British medical journal *The Lancet*, "Evidence to show that criminalization has failed is overwhelming."[64] Its editors wrote, "Bold and comprehensive reforms are needed to pursue health-oriented, rights-based drug decriminalization policies."[65] The U.N. Office of Drugs and Crime (UNODC), which assists the U.N. to curtail drug abuse and trafficking, has pledged to promote alternatives to drug criminalization.[66] In 2024, the U.N. Special Rapporteur on the right to health argued that drug control laws, incarceration, and forced addiction treatment have produced human rights violations, and they compound discrimination against vulnerable communities.[67] She called for drug policies that comply with human rights laws and requested broad decriminalization that includes the "purchase and cultivation of drugs for personal use."[68] Human rights organizations applauded her proposal.[69]

Some drug policy experts emphasize that human-rights-oriented approaches to drug control require addressing the harms imposed by commercial actors.[70] Many consider marijuana legalization to be highly problematic.[71] State and national marijuana industries have reportedly been

63. *See* Editorial, *Drug decriminalization: grounding policy in evidence*, 402 LANCET 1941, 1941 (2023) (describing drug decriminalization as an "essential precursor" to ending HIV and viral hepatitis epidemics by removing barriers to care and safe equipment).

64. *Id.*

65. *Id.*

66. *United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration*, at 5, 7, U.N. OFF. DRUGS & CRIME (2023), https://www.unodc.org/res/un-common-position-drugs/index_html/2315371E-eBook.pdf [https://perma.cc/E95K-JHAP] (supporting alternatives to drug criminalization).

67. Tlaleng Mofokeng (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Drug Use, Harm Reduction and the Right to Health*, ¶¶ 22, 23, 37, 52, 54 U.N. Doc. A/HRC/56/52 (Apr. 30, 2024).

68. *Id.* at ¶ 85(c), (f).

69. *See Global: UN Report Must Signal End to Manifestly Failed 'War on Drugs'*, AMNESTY INT'L, June 24, 2024, https://www.amnesty.org/en/latest/news/2024/06/global-un-report-must-signal-end-to-manifestly-failed-war-on-drugs/ [https://perma.cc/9KNK-7W4N] (referring to the proposal as a "bold and urgent call on governments worldwide to finally abandon the manifestly failed policies of the so-called 'war on drugs.'"); Press Release, UNAIDS, To help ensure the end of AIDS, leaders need to move away from punitive approaches to people who use drugs (June 26, 2024) (agreeing with the Report's suggestion that drug policies must move away from punitive approaches).

70. Antonia Eliason & Robert Howse, *Towards Global Governance: The Inadequacies of the UN Drug Control Regime*, 114 AJIL UNBOUND 291, 294 (2020).

71. Canada, for example, has seen a significant backlash to legalization. *See* John Last, *Where Canada's Weed Legalization Went Wrong*, FOREIGN POL'Y (May 27, 2024), https://foreignpolicy.com/2024/05/27/canada-legalization-cannabis-marijuana-trudeau-economics-public-health/ [https://perma.cc/L696-M2S5] (reporting that an expert review of marijuana legalization commissioned by the Canadian government found significant flaws in the nation's highly-regulated marijuana industry); MORRIS ROSENBERG, OYEDEJI AYONRINDE, PATRICIA J. CONRAD, LYNDA L. LEVESQUE & PETER SHELBY, LEGISLATIVE REVIEW OF THE CANNABIS ACT:

plagued by regulatory dysfunction and corruption, anti-competitive practices, lack of transparency and public accountability, and product contamination and adulteration.[72]

FINAL REPORT OF THE EXPERT PANEL, HEALTH CAN. (2024), https://www.canada.ca/en/health-canada/services/publications/drugs-medication/legislative-review-cannabis-act-final-report-expert-panel.html [https://perma.cc/S9Q4-85LQ] (concluding that although Canadian marijuana legalization reduced drug-related incarceration, legalization did not adequately promote public health, scientific research, racial equity, or economic opportunity); Eva Lam, *Cannabis Use Among Seniors Rising – and so Are Related ER Visits*, CBC NEWS (June 1, 2024), https://www.cbc.ca/radio/thecurrent/cannabis-seniors-emergency-room-1.7221192 [https://perma.cc/QR2A-HKMH] (reporting increased rates of "cannabis poisoning" in Canadian seniors and calling for clear product labeling, more education, and improved guidance for safer marijuana consumption by older adults).

72. *See* Ben Markus, *Potential for Contaminated Cannabis Products in Colorado Creates Risk for Buyers*, CPR NEWS (Jan. 28, 2025), https://www.cpr.org/2025/01/28/concern-colorado-marijuana-testing-enforcement/ [https://perma.cc/DS4A-6RHT] (reporting on Colorado's ongoing challenge with marijuana contaminated by mold, yeast, and pesticides); Ben Warren & Julie Wernau, *Legal Marijuana Contains Dangerous Mold. States Approve It Anyway*, WALL ST. J. (Oct. 17, 2024), https://www.wsj.com/health/healthcare/marijuana-mold-contaminants-safety-a172c230 [https://perma.cc/4HGS-NH2E] (finding that contaminated samples of marijuana are being cleared for sale in several states); Paige St. John & Alex Halperin, *The Dirty Secret of California's Legal Weed*, L.A. TIMES (June 14, 2024), https://www.latimes.com/california/story/2024-06-14/the-dirty-secret-of-californias-legal-weed [https://perma.cc/YQC6-7HC3] (reporting on prohibited pesticides found in regulated marijuana products); Thomas Mitchell, *In Random Mold Tests at 25 Denver Dispensaries, 80 Percent Fail*, WESTWORD (Oct. 30, 2019), https://www.westword.com/marijuana/in-random-mold-tests-80-percent-of-denver-marijuana-dispensaries-fail-11467203 [https://perma.cc/KW8K-CN4D] (finding an 80% failure rate in mold tests conducted on marijuana sold by 25 Denver dispensaries); Charles McDaniel, Srinivasa Reddy Mallampati & Amber Wise, *Metals in Cannabis Vaporizer Aerosols: Sources, Possible Mechanisms, and Exposure Profiles*, 34 CHEM. RSCH. TOXICOLOGY 2331, 2332, 2334, 2340–41 (2021) (finding heavy metal contamination in the aerosols produced by thirteen marijuana vaporizer products sold in Washington State); Shira Schoenberg, *Marijuana Content Labels Can't Be Trusted*, COMMONWEALTH BEACON (Dec. 18, 2022), https://commonwealthbeacon.org/marijuana/marijuana-content-labels-cant-be-trusted/ [https://perma.cc/7YMW-YJUX] (finding that some products in Massachusetts cannabis stores contained unsafe levels of contaminants that would have prevented their sale if detected earlier); Jordan Nathaniel Fenster, *Radiation Is Used on Some Cannabis Products in CT. Cultivators Are Not Required to Label Packaging*, CT. INSIDER (May 3, 2024), https://www.ctinsider.com/cannabis/article/ct-radiation-remediation-mold-aspergillus-19435590.php [https://perma.cc/AD8T-GJ4J] (finding that some cannabis companies in Connecticut use radiation on contaminated products and do not disclose such remediation on packaging materials); Justine Griffin, *Meet Florida's Legal Drug Cartels*, TAMPA BAY TIMES (Apr. 14, 2017), https://www.tampabay.com/news/perspective/meet-florida8s-legal-drug-cartels/2320293/ [https://perma.cc/YE5M-RKRG] (describing anti-competitive practices in Florida's medical marijuana industry); Jim Araby, *Op-ed: Monopolies Are Taking Over Calif.'s Pot Economy. Only Lawmakers Can Stop Them*, SFGATE (Nov. 14, 2024), https://www.sfgate.com/cannabis/article/cannabis-california-monopolies-19913211.php [https://perma.cc/JTP6-TDMJ] (emphasizing the need for legislative solutions to corporate monopolies in the California cannabis industry); Walter Wuthmann, *What the Chaos Inside the Mass. Cannabis Commission Means for the Rest of Us*, WBUR (June 10, 2024), https://www.wbur.org/news/2024/06/10/massachusetts-cannabis-control-commission-controversy-marijuana [https://perma.cc/T8LF-BRZ5] (discussing regulatory dysfunction within the Massachusetts Cannabis Control Commission); *see also* Philip Wallach & Jonathan Rauch, *Bootleggers, Baptists, Bureaucrats, and Bongs: How Special Interests Will Shape Marijuana Legalization* 2 (Brookings Inst., Ctr. for Effective Pub. Mgmt., June 2016)

Perhaps counterintuitively, decriminalizing drugs, either alone or alongside legalization, can potentially mitigate these and other harms associated with commercial drug industries. When governments criminalize home cultivation and allow only regulated commercial sales, law-abiding consumers are at the whims of industries that often fail to provide safe products.[73] Moreover, costly state-regulated products often drive consumers to illicit drug markets with more affordable prices.[74]

Persistent illicit markets alongside regulated commercial industries illustrate a broader structural problem.[75] They suggest that legalization's failures are not merely a function of price. Rather, the regulatory infrastructure that accompanies legalization introduces frictions, such as reduced convenience, geographic inaccessibility, or limited product variety, that illicit markets lack.[76]

Decriminalization does not necessarily eliminate all lawful supply channels—it simply adds alternatives to commercial regulatory infrastructure. Home cultivation, as permitted in states like Colorado, and even preserved in Arizona's proposed repeal of legalization, allows individuals to produce marijuana for personal use.[77] Nonprofit growing

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(arguing that legalization would inevitably attract interest groups whose competitive rent-seeking would produce regulatory dysfunction and consumer harm).

73. *See supra* note 72.

74. *See* Anthony Effinger, *Oregon's Appetite for Psilocybin Is Being Fed Outside the Law in the Mushroom Underground*, WILLAMETTE WK. (Apr. 26, 2023), https://www.wweek.com/news/2023/04/26/oregons-appetite-for-psilocybin-is-being-fed-outside-the-law-in-the-mushroom-underground/ [https://perma.cc/G7LC-G7U7] (stating that the cost of regulated psilocybin services has prompted people to pursue psilocybin from illicit sources); Martin Kaste, *Black Market Cannabis Thrives in California Despite Legalization*, NPR (Apr. 5, 2024), https://www.npr.org/2024/04/05/1242165136/black-market-cannabis-california-legalization-marijuana-recreational-illegal [https://perma.cc/J73N-SX8M] (describing thriving illicit marijuana markets in states where marijuana has been legalized).

75. *See* Cannabis Black Market, PUB. SAFETY CAN., https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20200930/026/index-en.aspx [https://perma.cc/SN3Q-QUC3] (documenting persistent illicit cannabis markets following Canadian legalization); *Canada Legalized Pot in October. But Its Black Market Is Still Going Strong.*, WASH. POST (Jan. 4, 2019), https://www.washingtonpost.com/world/the_americas/canada-legalized-pot-in-october-but-its-black-market-is-still-going-strong/2019/01/04/ca09a3b0-fe53-11e8-a17e-162b712e8fc2_story.html [https://perma.cc/7SC6-DPVT] (reporting a substantial price premium for legal marijuana products); *Cannabis Black Market Thrives Despite Legalization*, CTR. ALCOHOL & SUBSTANCE USE STUD., RUTGERS UNIV., https://alcoholstudies.rutgers.edu/cannabis-black-market-thrives-despite-legalization/ [https://perma.cc/4QXS-97SK] (analyzing illicit market persistence across North American jurisdictions).

76. *See generally* Kirsten Robertson & Maree Thyne, *Legalization of Recreational Cannabis: Facilitators and Barriers to Switching from an Illegal to a Legal Source*, 24 PREVENTIVE MED. REPS. 101639 (2021) (finding that price, regulatory burden, reduced accessibility, and limited product variety were primary barriers to consumer adoption of legal cannabis).

77. AZ Sensible Marijuana Policy Act, *supra* note 43, §§ 2(5)(b) (preserving personal possession and home cultivation); Colo. Const. art. XVIII, § 16(3)(b) (authorizing adults twenty-

cooperatives, as established by Germany's 2024 reform, provide an alternative, community-based supply model.[78] Gifting and sharing controlled substances among adults, which several U.S. jurisdictions have decriminalized, provides another avenue.[79] Even the proposal to repeal nonmedical marijuana sales in Massachusetts would allow gifting between adults.[80] By reducing reliance on illicit markets without creating the regulatory dysfunction and corporate capture that have plagued state-legalized commercial industries, decriminalization may more effectively serve the public health and human rights goals that many drug reform proponents aim to advance.

## II. State Conflicts with Federal Law

The distinctions between decriminalization and legalization determine the extent to which state drug laws conflict with other sources of legal authority, including federal drug statutes and international drug treaties. Principles of federalism and statutory interpretation play key roles in evaluating these conflicts. However, a recent Supreme Court decision, *Murphy v. NCAA*,[81] complicates the analysis.

This Part proceeds in two stages. Section A analyzes conflicts between the CSA and state laws that legalize or decriminalize federally controlled drugs. Section B examines parallel conflicts arising under the FDCA. Throughout, the analysis turns on structural constitutional principles, state sovereignty, and the supremacy of federal law.[82]

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one or older to grow up to six marijuana plants, with three or fewer being mature flowering plants, for personal use on the premises where grown).

78. *See* Parker, *supra* note 13 (reporting German decriminalization of home marijuana cultivation and nonprofit growing clubs).

79. *See, e.g.*, COLO. CONST. art. XVIII, § 16(3)(c) (authorizing transfer of up to one ounce of marijuana, without remuneration, between adults twenty-one or older); COLO. REV. STAT. § 18-18-434(5)(a) (authorizing adults twenty-one or older to share plants containing natural psychedelic substances, for personal use and without remuneration); D.C. CODE § 48-904.01(a)(1) (decriminalizing transfer without remuneration of up to one ounce of marijuana between adults twenty-one or older); COLO. REV. STAT. § 12-170-109 (2023).

80. Summary of No. 25-09, Initiative Petition for a Law Relative to Regulating Marijuana (Version A), Mass. Att'y Gen. 1 (Sep. 3, 2025), https://www.mass.gov/doc/final-summary-for-25-09-initiative-petition-for-a-law-relative-to-regulating-marijuana-version-a/download [https://perma.cc/2QFS-CNT9] (allowing persons twenty-one years of age and older to gift or transfer up to one ounce of marijuana to other adults).

81. 138 S. Ct. 1461 (2018).

82 *See* 21 U.S.C. § 903 (2018) (stating the CSA shall not to be construed as overriding duly authorized state legislation on identical subject matter unless there is a "positive conflict" such that the state and federal provisions "cannot consistently stand together"); *see also* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S.Ct. 1461, 1477–80 (2018) (affirming that the anticommandeering doctrine is rooted in the Tenth Amendment and the Constitution's structural division of sovereignty).

### *A. CSA Preemption of State Drug Laws*

The Supreme Court's decision in *Murphy* complicates the CSA preemption analysis. The Court held that the Professional and Amateur Sports Protection Act (PASPA) violated the anticommandeering doctrine by prohibiting states from "authorizing" sports gambling.[83] The Court rejected the argument that anticommandeering applies only to affirmative federal commands, holding that the distinction between compelling a state to enact legislation and prohibiting a state from enacting new laws is "empty."[84] According to *Murphy*, "Congress cannot issue direct orders to state legislatures" regardless of whether those orders compel or prohibit legislative action.[85]

This reasoning has significant implications for drug-law federalism. If the anticommandeering doctrine prevents Congress from ordering states to maintain their own criminal prohibitions, then a state's decision to decriminalize personal drug possession is constitutionally protected from federal interference.[86] However, while *Murphy* addressed the relationship between anticommandeering and preemption in general terms, it did not resolve whether the CSA preempts specific state drug laws, such as those imposing commercial regulatory frameworks. The Court distinguished anticommandeering, which prevents Congress from directing state lawmakers to act, from preemption, which displaces state law under the Supremacy Clause when state law conflicts with valid federal regulation of private conduct.[87] This distinction is of critical importance to state drug policy. Anticommandeering prevents Congress from forcing a state to enact or maintain federal drug regulations, including prohibition. In contrast, when a state goes further and affirmatively regulates activity that federal law forbids, raising conflicts with the CSA or the FDCA, preemption potentially allows those federal statutes to displace state law.[88] Decriminalization, which

83. *Murphy*, 138 S. Ct. at 1478, 1484–85.

84. *Id.* at 1477–80 (stating that the anticommandeering doctrine applies equally whether Congress compels state action or prohibits states from enacting new laws).

85. *Id.*

86. *See* New York v. United States, 505 U.S. 144, 162 (1992) (quoting Hodel v. VA Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264, 288 (1981)) (establishing that Congress may not "'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'"); *Murphy*, 138 S. Ct. at 1467, 1475, 1479–80 (2018) (stating that the anti-commandeering doctrine prohibits Congress from "directly compelling [the States] to enact and enforce a federal regulatory program" and distinguishing commandeering from preemption); *see also* Mikos, *Murphy's Mistake*, *supra* note 23, at 108–09, 117 (arguing that blocking a state from repealing a criminal prohibition is functionally indistinguishable from ordering it to adopt one).

87. *Murphy*, 138 S. Ct. at 1475, 1479–80, 1481.

88. *See id.* at 1479–80 (distinguishing preemption, which displaces conflicting state law under the Supremacy Clause, from commandeering, which directs state legislatures to act); *see also*

removes or reduces penalties for personal conduct without regulating private conduct, sits more comfortably on the anticommandeering-protected side of this line.[89]

Congress can preempt state law expressly through statutory text, or impliedly, either by regulating a field so pervasively that courts infer Congress intended to occupy it, or by enacting federal law that conflicts with state law to the point that they cannot coexist.[90] In the CSA, Congress specified that no provision should be construed to indicate congressional intent to occupy the field of drug control and enforcement.[91] CSA Section 903 also provides that no provision shall preempt state laws on similar subject matter unless there is a "positive conflict" such that the state and federal provisions "cannot consistently stand together."[92] Congress apparently intended to preempt some state drug laws, but it omitted clear criteria for identifying which ones.[93] Consequently, courts make fact-specific determinations to fill the gap.[94] Courts could find that Congress implicitly occupied the field of drug control by regulating it so completely that it left no room for state regulation (field preemption).[95] Alternatively, courts could find state laws implicitly preempted if they conflict sufficiently with CSA requirements. State and federal laws might conflict to such an extent that regulated entities could never simultaneously comply with both (impossibility preemption), or state laws could obstruct full achievement of

Gonzales v. Raich, 545 U.S. 1, 26, 29 (2005) (stating that "if there is any conflict between federal and state law, federal law shall prevail" in the context of the CSA); Peter Grossi & Daphne O'Connor, *FDA Preemption of Conflicting State Drug Regulation and the Looming Battle over Abortion Medications*, J.L. & BIOSCIENCES, Jan.–June 2023, at 1, 2, 5 (2023) (arguing that state drug regulations conflicting with FDA determinations under the FDCA are preempted by virtue of the Supremacy Clause, given FDA's plenary authority over the approval, prescription, and distribution of all drug products).

89. *See* Mikos, *Murphy's Mistake*, *supra* note 23, at 109–10, 116 (noting that Congress may not preempt state law if it removes restrictions or rights, that is, if the state law deregulates private actors).

90. *Murphy*, 138 S. Ct. at 1480–81.

91. *See* 21 U.S.C. § 903 (2018) (stating that "[n]o provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties").

92. *Id.*

93. *See id.* (declining to articulate when state and federal law "cannot consistently stand together").

94. *See* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L & POL'Y 5, 9–10, 13–15 (2013) (noting that courts hold that a state law is preempted when, after an in-depth analysis, the court decides that is physically impossible to comply with both state and federal law or that the state law poses an obstacle to Congress' objectives).

95. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000) (describing field preemption).

CSA objectives (obstacle preemption).[96] Both impossibility and obstacle preemption require analyzing the CSA's purposes and the extent to which state laws stand in its way.

The preemption analysis presupposes that the CSA is a valid exercise of federal power. In *Gonzales v. Raich*,[97] the Supreme Court confirmed that it is, holding that Congress's Commerce Clause authority extends to prohibiting purely intrastate marijuana cultivation and possession, even where state law allows those activities.[98] Courts have reached divergent conclusions on the separate question of whether the CSA preempts specific state marijuana laws.

In *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*,[99] the Oregon Supreme Court held that the CSA preempted a provision of Oregon's Medical Marijuana Act that authorized medical marijuana use, stating that registry cardholders may "engage in the medical use of marijuana." The court reasoned that "affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act."[100] With the authorization preempted, an employee's marijuana use could no longer be excluded from "illegal use of drugs" under Oregon's disability discrimination statute, and an employer's duty to accommodate the employee fell away. Critically, the court left intact the Oregon law's exemption of medical marijuana possession, production, and distribution from state criminal penalties, which the court viewed as distinct from the law's authorization of medical marijuana use.[101]

Other courts have drawn a different line for preemption. In *Noffsinger v. SSC Niantic Operating Co.*,[102] a federal district court in Connecticut held that the CSA does not preempt Connecticut's requirement that employers accommodate employees' medical marijuana use.[103] The *Noffsinger* court reasoned that because the CSA does not regulate the employment relationship, an employer accommodation requirement does not stand as an

96. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 873 (2000) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (explaining obstacle and impossibility preemption); *see also* Hines, 312 U.S. at 67 (articulating obstacle preemption).

97. 545 U.S. 1 (2005).

98. *See id.* at 15, 29.

99. 230 P.3d 518 (2010).

100. *Id.* at 529 (holding that OR. REV. STAT § 475.306(1) (2010), which authorized medical marijuana cardholders to "engage in the medical use of marijuana," was preempted by the CSA because it "affirmatively authorize[d]" conduct that federal law prohibits, thereby standing "as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act").

101. *Id.* at 536 ("[W]e do not hold that the Controlled Substances Act preempts provisions of the Oregon Medical Marijuana Act that exempt the possession, manufacture, or distribution of medical marijuana from state criminal liability.").

102. 273 F. Supp. 3d 326 (D. Conn. 2017).

103. *Id.* at 334.

obstacle to federal drug enforcement objectives.[104] In *Buenos Hill Inc. v. Saratoga Springs Planning Board*,[105] the Supreme Court of New York held that the CSA does not preempt New York's Marihuana Regulation and Taxation Act, which included a commercial licensing framework.[106] The court reasoned that because the law did not compel anyone to violate the CSA, it was not impossible for them to comply simultaneously with state and federal law, and therefore impossibility preemption did not apply.[107] This reasoning, however, arguably undervalues obstacle preemption. A state law need not make federal compliance impossible to be preempted.[108] It may be sufficient that a state law stands as an obstacle to full achievement of congressional goals.[109] Additionally, in *Buenos Hill* and comparable cases, courts have relied on the presumption against preemption to uphold state marijuana legalization against CSA preemption challenges.[110] But that presumption carries less force and might not apply when state law implicates foreign affairs or conflicts with U.S. treaty obligations.[111] The Supreme Court has recognized that preemption is more readily found when Congress has legislated in a field affecting international relations, a principle in tension

104. *Id.* at 334 ("The CSA . . . does not make it illegal to employ a marijuana user. Nor does it purport to regulate employment practices in any manner.").

105. Buenos Hill Inc. v. Saratoga Springs Planning Bd., 206 N.Y.S.3d 902 (Sup. Ct. 2024), *aff'd*, 239 N.Y.S.3d 316 (2025), *appeal dismissed*, 44 N.Y.3d 1015 (2025).

106. *Id.* at 905–06, 911.

107. *See id.* at 914–15 ("[C]ompliance with both laws is physically possible so long as the state legislation does not require anyone to violate the CSA.").

108. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (holding that state law was preempted where it posed an obstacle to congressional objectives, even though simultaneous compliance with state and federal law was technically possible); *see also* Mich. Canners & Freezers v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 478 n.21 (1984) (holding that a state law authorizing conduct that federal law prohibited stood as an obstacle to congressional purposes and was preempted, even though individuals could avoid engaging in the authorized conduct).

109. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (holding that a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

110. *See, e.g.*, Buenos Hill, 206 N.Y.S.3d at 909–10 (quoting De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997)) (devoting a section of the opinion to "[t]he Starting Presumption Against Preemption" and concluding that the CSA does not preempt New York's Cannabis Law in part because plaintiff failed to overcome the "considerable burden" of rebutting the presumption that Congress did not intend to supplant state law); Ter Beek v. City of Wyoming, 846 N.W.2d 531, 535–39 (2014) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)) (beginning the preemption analysis from "the basic presumption that Congress did not intend to displace state law" and holding that the CSA does not preempt Michigan's Medical Marihuana Act because the Act's limited state-law immunity does not create a positive conflict with federal law).

111. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 417–20, 419 n.11 (2003) (holding that state law is subject to preemption when it encroaches on the federal government's exclusive authority over foreign affairs, even absent a conflicting federal statute, and distinguishing between state laws that address traditional state responsibilities and those that "simply take a position on a matter of foreign policy").

with the presumption against preemption.[112] The United States is a party to three multilateral drug control agreements—the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol; the 1971 Convention on Psychotropic Substances; and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances—which together require parties to limit drug use to medical and scientific purposes, impose criminal penalties for illicit trafficking, and maintain licensing and oversight for drug manufacture and distribution.[113]

State marijuana legalization, as distinguished from decriminalization, puts the U.S. out of compliance with the drug control treaties.[114] The CSA is the principal domestic statute through which the United States fulfills its

112. The Supreme Court has long held that preemption is more readily found "in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." *Hines*, 312 U.S. at 68 (holding that a federal alien registration law preempted a similar state law); *see also Crosby*, 530 U.S., at 374–88 (finding obstacle preemption, without invoking the presumption, of a state law that prohibited trade with Burma). Scholars have identified this foreign affairs canon as standing in direct tension with the presumption against preemption, particularly when a federal statute simultaneously implicates foreign affairs and a traditional state prerogative. *See* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 191, 200 (arguing that in such cases the competing presumptions cancel each other out and courts should "perform preemption analysis without recourse to the presumptive canons"); *see* David H. Moore, *Treaties and the Presumption Against Preemption*, 2015 BYU L. REV. 1555, 1567 (2016) (noting that "[t]he Court has also expressed doubt about whether the presumption against preemption applies to statutes bearing on foreign affairs").

113. Single Convention on Narcotic Drugs art. 4(c), Mar. 30, 1961, 520 U.N.T.S. 151, *as amended by* Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 976 U.N.T.S. 3 (requiring parties to "limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs"); *id.* arts. 29–30 (requiring that manufacturing and trade in narcotic drugs "be under licence"); Convention on Psychotropic Substances art. 7(b), Feb. 21, 1971, 1019 U.N.T.S. 175 (requiring that manufacture, trade, distribution, and possession of Schedule I psychotropic substances be under special license or prior authorization); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3(1), Dec. 20, 1988, 1582 U.N.T.S. 95 (requiring parties to establish as criminal offenses the production, manufacture, distribution, and sale of narcotic drugs and psychotropic substances "contrary to the provisions of" the 1961 and 1971 Conventions).

114. *See* INCB Annual Report 2022, *supra* note 25, *iii*, ¶¶ 67–68 (concluding that "legalization of the non-medical and non-scientific supply and use of cannabis contravenes the provisions of the conventions"); Stevens et al., *supra* note 19, at 31 (noting that the INCB "has made it clear . . . that decriminalization of possession can occur within the current framework of the UN drug conventions, whereas legalization contravenes it"); *Legal and Policy Considerations on Decriminalization of Drug Use and Possession for Personal Use: International Legal Framework and the UN System Common Position on Drug-Related Matters*, at 3–5, U.N. OFF. DRUGS & CRIME (2025), https://www.unodc.org/res/scientists/drug-policy-publications_html/UNODC_policy_note_Legal_and_policy_considerations_on_decriminalization_of_drug_use_and_possession_for_personal_use_2025.pdf [https://perma.cc/K4R6-SG77] (reaffirming that the conventions "do not require [State parties to establish] drug use for non-medical or non-scientific purposes *per se* as a criminal offence" while maintaining that nonmedical commercial supply contravenes treaty obligations).

treaty obligations to prohibit and penalize drug trafficking.[115] The FDCA serves a complementary treaty-compliance function, implementing the treaties' requirements for import controls, manufacturing standards, and oversight of controlled substance distribution.[116] When a state affirmatively authorizes and regulates conduct that the CSA or FDCA prohibits or strictly regulates, and that the drug treaties require the United States to suppress, the foreign affairs dimensions of those statutes are engaged, and courts should not reflexively apply the presumption against preemption as though the case involved a purely domestic regulatory conflict. Decriminalization, by contrast, is accommodated by the treaties, which provide flexibility for measures related to personal use, and it does not implicate the CSA's or the FDCA's treaty-compliance functions in the same way.[117] The presumption

115. 21 U.S.C. § 801(7) (2018) (finding that "[t]he United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances"); *id.* § 811(d)(1) (authorizing the Attorney General to issue scheduling orders to satisfy U.S. obligations under international treaties without the scientific and medical findings ordinarily required under § 811(a)–(b)); *see* Single Convention on Narcotic Drugs art. 36, Mar. 30, 1961, 520 U.N.T.S. 151 (requiring parties to adopt penal provisions for cultivation, production, manufacture, distribution, trade, use, and possession of drugs "contrary to the provisions of this Convention"); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3(1), Dec. 20, 1988, 1582 U.N.T.S. 95 (requiring parties to establish as criminal offenses the production, manufacture, distribution, and sale of narcotic drugs and psychotropic substances "contrary to the provisions of" the 1961 and 1971 Conventions).

116. *See* Single Convention on Narcotic Drugs arts. 29–32, Mar. 30, 1961, 520 U.N.T.S. 151 (requiring parties to establish manufacturing licenses, trade and distribution controls, and import-export authorization systems for narcotic drugs); Convention on Psychotropic Substances art. 7, Feb. 21, 1971, 1019 U.N.T.S. 175 (requiring that manufacture, trade, distribution, and possession of Schedule I psychotropic substances be under special license or prior authorization). The FDCA implements these requirements domestically through its drug approval process, 21 U.S.C. § 355, its authority to refuse admission of unapproved, adulterated, or misbranded drugs at the border, *id.* § 381, and its current good manufacturing practice regulations, 21 C.F.R. pt. 211. The CSA's treaty-implementation function is more explicit. Congress provided that when scheduling is required by U.S. treaty obligations, the Attorney General may issue control orders without regard to normal scientific findings, but the FDCA's regulatory apparatus serves a complementary role by ensuring that only approved drugs manufactured under federally supervised conditions reach consumers, a function that parallels the treaties' manufacturing and distribution controls.

117. The drug treaties contain three independent sources of flexibility for decriminalization. First, Article 36(1)(b) of the Single Convention, as amended by the 1972 Protocol, permits parties to provide "measures of treatment, education, after-care, rehabilitation and social reintegration" as alternatives to conviction or punishment for persons who commit drug offenses. Single Convention on Narcotic Drugs art. 36(1)(b), Mar. 30, 1961, 520 U.N.T.S. 151, *as amended by* Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 976 U.N.T.S. 3.

Second, the treaties contain safeguard clauses that permit parties to decline to impose criminal sanctions that would exceed their constitutional authority or conflict with basic features of their legal systems. Single Convention on Narcotic Drugs art. 36(1)(a), Mar. 30, 1961, 520 U.N.T.S. 151 (qualifying the obligation to criminalize drug-related conduct with the phrase "subject to its constitutional limitations"); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3(2), Dec. 20, 1988, 1582 U.N.T.S. 95 (subjecting criminalization

against preemption therefore retains its force in the decriminalization context, though as explained above, decriminalization is unlikely to be preempted.

The Supreme Court has not drawn a clear line between permissible federal preemption of state drug laws and unconstitutional commandeering.[118] In the absence of clear doctrinal boundaries, federal enforcement discretion has become the primary mechanism for managing conflicts between state and federal drug law.[119] The 2013 Cole Memo directed federal prosecutors to deprioritize enforcement against marijuana businesses in states with "strong and effective regulatory and enforcement systems."[120] Repealed in 2018, the Cole Memo reflected a belief that strict state drug regulation could further CSA objectives, including preventing youth access to controlled substances, reducing diversion from states where substances are legal and regulated to prohibition states, and shrinking drug-cartel revenue.[121]

The empirical record on whether state legalization achieves these objectives is mixed. Some evidence suggests that state marijuana legalization has increased youth access, promoted interstate drug trafficking, and produced safety failures in regulated markets.[122] If preventing these outcomes

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requirements to "constitutional principles and the basic concepts of [each party's] legal system"); *see, e.g.*, DAVID POZEN, THE CONSTITUTION OF THE WAR ON DRUGS 166 (2024) (discussing the striking down of laws criminalizing drug possession for personal use in private as unconstitutional by the Argentinian and Colombian high courts); Boister, *Waltzing on the Vienna Consensus*, *supra* note 21, at 394 (describing Mexico's reliance on the Article 3(2) safeguard clause to exempt possession of small quantities from federal criminal prosecution).

Third, U.N. human rights guidelines affirm that parties may "use flexibilities in the UN drug control conventions to decriminalise the possession, purchase, or cultivation of controlled substances for personal consumption." International Guidelines on Human Rights and Drug Policy 7 (2019); INCB Annual Report 2022, *supra* note 25, at 8 (recognizing that drug-related criminal offenses, "including those involving the possession, purchase or the cultivation of illicit drugs, when committed by people who use drugs do not automatically require the imposition of conviction and punishment"). *See generally* David Bewley-Taylor, *Politics and Finite Flexibilities: The UN Drug Control Conventions and Their Future Development*, 114 AM. J. INT'L L. 285, 285 (2020) (concluding that "the thrust of the Single Convention's punitive provisions is the prohibition of drug trafficking," not personal use).

118. Mikos, *Murphy's Mistake*, *supra* note 23, at 103.

119. *See* Alex Kreit, *Federal Nonenforcement in the Face of State Drug Policy Reforms*, 21 OHIO ST. J. CRIM. L. 239, 241–43 (2024) (arguing federal marijuana enforcement relies on prosecutorial discretion rather than statutory authorization).

120. *See* Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys, Guidance Regarding Marijuana Enforcement 2–3 (Aug. 29, 2013) [hereinafter Cole Memo] (stating that an organization that complies with an effective state regulatory system poses a reduced threat to federal enforcement interests).

121. *Id; see also* Memorandum from Jefferson B. Sessions III, Att'y Gen., to All U.S. Att'ys, Marijuana Enforcement (Jan. 4, 2018) (repealing the Cole Memo).

122. *See, e.g.*, Magdalena Cerdá, Christine Mauro, Ava Hamilton, Natalie S. Levy, Julián Santaella-Tenorio, Deborah Hasin, Melanie M. Wall, Katherine M. Keyes & Silvia S. Martins, *Association Between Recreational Marijuana Legalization in the United States and Changes in Marijuana Use and Cannabis Use Disorder from 2008 to 2016*, 77 JAMA PSYCHIATRY

is among the CSA's goals, then state legalization schemes that exacerbate them might frustrate federal objectives and constitute uncooperative federalism.[123] Decriminalization laws that avoid creating commercial infrastructure might mitigate those conflicts, although because many states have simultaneously legalized and decriminalized marijuana, it can be difficult to distinguish the effects of each policy approach.[124]

The DOJ's April 2026 rescheduling order constrained cooperative marijuana federalism to the medical context. It stated that "cooperative federalism best serves the statutory purposes of the CSA in the context of a well-regulated medical marijuana market."[125] In other words, the order's cooperative federalism claim is limited to incorporating state medical marijuana licenses into the CSA's registration framework. It does not address the independent FDCA barrier to legalization, alter the marijuana-specific criminal penalties that remain unchanged by rescheduling, or change the Schedule I status of state-licensed recreational marijuana, all areas where frictions between state and federal laws remain. In those contexts, federal prosecutorial discretion plays a significant role in mitigating federal-state conflicts. However, even if the federal government decided to enforce preemption against state drug laws, limited resources constrain it. For example, the DEA could never close every state marijuana market.[126] It lacks the staff and other resources necessary for that enormous task. But smaller and more conspicuous state drug programs remain susceptible to targeted enforcement. In 2023, after Georgia enacted a law allowing conventional pharmacies to sell marijuana oil, the DEA sent letters to Georgia pharmacists warning that dispensing marijuana products violates the CSA.[127] State

165, 167–68 (2020) (finding modest but statistically significant increases in cannabis use disorder among adolescents aged 12 to 17, from 2.18% to 2.62%, following nonmedical legalization); *see* D. Mark Anderson & Daniel I. Rees, *The Public Health Effects of Legalizing Marijuana*, 61 J. ECON. LIT. 86, 98, 100–01 (2023) (reviewing conflicting evidence on nonmedical legalization and youth marijuana use, noting one study finding a 13–15% increase among 12- to 17-year-olds); *see supra* notes 71 and 72 (regarding safety failures).

123. Jessica Bullman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–60 (2009) (defining uncooperative federalism and stating that "a sensible account of federalism ought to recognize that uncooperative federalism occurs in practice").

124. *See* Rosalie Liccardo Pacula & Eric L. Sevigny, *Marijuana Liberalization Policies: Why We Can't Learn Much from Policy Still in Motion*, 33 J. POL'Y ANALYSIS & MGMT. 212, 214–16 (2014) (describing the challenges of distinguishing the effects of different marijuana policy approaches); *see also* Beau Kilmer, Jonathan P. Caulkins, Michelle Kilborn, Michelle Priest & Kristin M. Warren, *Cannabis Legalization and Social Equity*, 101 B.U. L. REV. 1041, 1047–48 (2021) (explaining that state legalization "natural experiments" are "not very clean or powerful for inferring causal effects" due to variation in how legalization is implemented across states).

125. *See* 2026 Medical Marijuana Rescheduling Order, *supra* note 7, at 22720.

126. *See* Mikos, *On the Limits of Supremacy*, *supra* note 22, at 1464 (demonstrating that "the federal government does not have the resources to impose [sanctions] frequently enough to make a meaningful impact on proscribed behavior").

127. Matthew J. Strait, Drug Enf't Admin., Guidance to Pharmacies on the Dispensing of Certain Tetrahydrocannabinols (Nov. 27, 2023); GA. CODE ANN. § 16-12-191 (West 2022).

psychedelic drug industries are similarly conspicuous. Oregon launched a regulated industry for supervised psychedelic use in 2023, and Colorado opened a similar market in 2025.[128] Because few states have legalized psychedelics and their markets remain small, federal intervention could significantly curtail their operations.

If preemption claims were raised against state laws that establish regulated industries that provide supervised administration of psychedelics, proponents might argue that those services constitute the practice of medicine, relying on *Gonzales v. Oregon*.[129] In *Gonzales,* the Court held that the Attorney General exceeded his statutory authority by prohibiting Oregon physicians from prescribing Schedule II substances for physician-assisted suicide.[130] The majority characterized the Attorney General's action as an impermissible attempt to define medical practice rather than to control drug trafficking as Congress intended.[131] However, *Gonzales v. Oregon* is unlikely to shield state-licensed psychedelic businesses. In *Gonzales*, the physicians prescribed FDA-approved Schedule II drugs that were legal to dispense.[132] State-licensed psychedelic businesses, by contrast, dispense unapproved Schedule I substances that have no currently accepted medical use.[133] The Supreme Court has affirmed congressional authority to regulate purely intrastate use of unapproved controlled drugs.[134] Applying similar reasoning, courts could conclude that state-licensed psychedelic businesses are dealing or trafficking drugs without DEA authorization.

State marijuana and psychedelic laws illustrate a regulatory paradox. Legislators might expect that building a complex regulatory framework around nonmedical drug access would make their laws more legally defensible and their constituents safer. The opposite may be true. The preemption risk attaches to the regulatory apparatus itself, regardless of whether it serves commercial interests, public health objectives, or nonprofit service models.[135] Each obligation that state regulation places on private actors creates an independent point of potential conflict with federal law. The

128. Marks, *supra* note 12, at 455; Bill Ojile, Carrie Shaffer, Jordyn McDowell & Mark Stern, *Colorado's Magic Mushroom Industry Has Officially Arrived*, SNELL & WILMER (Oct. 31, 2025), https://www.swlaw.com/publication/colorados-magic-mushroom-industry-has-officially-arrived/ [https://perma.cc/LND3-3F7D].

129. 546 U.S. 243 (2006).

130. *Id.* at 250, 258, 274–75.

131. *See id.* at 268, 270–74 (describing the Attorney General's attempt to regulate the practice of medicine as improper and emphasizing his limited authority).

132. *Id.* at 250.

133. Diversion Control Div., Drug Enf't Admin., U.S. Dep't of Just., List of: Controlled Substances 22 (2026), https://www.deadiversion.usdoj.gov/schedules/orangebook/orangebook.pdf [https://perma.cc/T7TB-D7H2].

134. *See* Gonzales v. Raich, 545 U.S. 1, 22 (2005).

135. *See* Mikos, *Murphy's Mistake*, *supra* note 23, at 116–17 (stating that Congress may preempt state laws only to the extent that they impose restrictions or confer rights on private actors).

constitutional vulnerability of a state drug reform is a function of its regulatory burden, not only its commercial character.[136]

The Oregon Psilocybin Services Act illustrates this dynamic. It produced a comprehensive regulatory scheme encompassing psilocybin product manufacturing, laboratory testing, facility licensing, and supervised consumption.[137] Individuals who dispense psilocybin must complete state-approved training, pass a licensing exam, and comply with state practice guidelines.[138] Colorado's Natural Medicine Health Act adds complexity. In addition to legalizing supervised consumption of certain psychedelic drugs, it decriminalized the personal possession, cultivation, sharing, and use of plants and fungi that produce those substances.[139] Consequently, Colorado's Act is a hybrid. To the extent that it decriminalizes personal drug use by removing criminal penalties, it merely lifted prior restrictions and is protected from preemption by the anticommandeering rule. But to the extent that it imposes affirmative regulatory requirements on businesses and individuals, such as testing mandates, training requirements, facility restrictions, and other limitations, those provisions impose new obligations on private actors and are potentially preempted by the federal CSA.[140]

By creating state-regulated commercial markets for non-FDA-approved psilocybin, states like Oregon and Colorado risk undermining the FDA's federal approval process, forming a landscape where consumers and healthcare professionals encounter FDA-approved and non-FDA-approved psilocybin, with little ability to distinguish between them. These dynamics reinforce the constitutional case for decriminalization over legalization. As Part I documented, analogous state regulatory systems built around legalized marijuana have been plagued by corruption, product contamination, anti-competitive practices, and prices that drive consumers to illicit markets.[141]

The preemption analysis in this area is complicated by the fact that courts and scholars load the word "authorize" with different meanings. In *Murphy*, the Court explained that "[t]he concept of state "authorization"

136. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475, 1480–81 (2018) (holding that a federal law "prohibiting state authorization of" an activity, without independently regulating private actors, violates the anti-commandeering principle).

137. OR. REV. STAT. §§ 475A.210–722 (2023); *see* Marks, *supra* note 12, at 454–55 (categorizing Measure 109 as 'supported adult use' legislation).

138. OR. ADMIN. R. 333-333-3050 (2022); *id.* 333-333-3070 (2023); *id.* 333-333-3090; *id* 333-333-5130; *id.* 333-333-6040.

139. COLO. REV. STAT. § 12-170-109 (2023); COLO. CODE REGS. §§ 755-2.2, 2.5 (2024); *see* Marks, *supra* note 12, at 447–48, 457 (describing Colorado's voter-enacted Proposition 122, which simultaneously decriminalized five psychedelic substances and legalized the supervised administration of psilocybin).

140. *See* Mikos, *Murphy's Mistake*, *supra* note 23, at 118 (observing that state reforms that go beyond merely repealing prohibitions to impose restrictions or confer benefits on marijuana activities "are vulnerable to congressional override").

141. *See supra* note 72.

makes sense only against a backdrop of prohibition or regulation," because without a preexisting prohibition there is nothing for the state to authorize in any meaningful sense.[142] A state does not "authorize" residents to brush their teeth, sing in the shower, or eat apples; it authorizes conduct only when it lifts a prior restriction on that conduct.[143] The Court illustrated the point with a drug policy example. In footnote 28, the Court cited Vermont's 2018 marijuana statute as an example of a state "*authoriz*[ing] the recreational use of [marijuana] by an act of a state legislature."[144] Vermont's Act 86 removed criminal penalties for adult possession of up to one ounce of marijuana and allowed for limited home cultivation.[145] It did not create a licensed commercial market. In this Essay's terminology, Vermont decriminalized rather than legalized marijuana, yet the Court treated that reform as a paradigm case of state "authorization." The Court reinforced this point by responding to the federal government's contention that conduct "merely left unregulated" after a state repeal is not conducted "'pursuant to'" state law.[146]

The United States argued that "pursuant to" requires something more than bare non-prohibition, and someone conducting a sports-gambling operation "merely left unregulated" would not naturally be described as acting "pursuant to state law."[147] The Court disagreed, stating: "Now that the State has legalized the sale of marijuana, Joe is able to sell the drug pursuant to state law."[148] Notably, the Court's use of "legalized" here refers to the bare removal of a prior prohibition, not to the creation of an affirmative regulatory framework. In other words, *Murphy*'s key example of state drug-related

142. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1474 (2018) ("We commonly speak of state authorization only if the activity in question would otherwise be restricted.").

143. *Id.*

144. *Id.* at 468 n.28 (2018) (citing A. McCullum, *Vermont's Legal Recreational Marijuana Law: What You Should Know*, USA TODAY NETWORK (Jan. 23, 2018)) (emphasis added by the Court).

145. Act of Jan. 22, 2018, No. 86, 2018 Vt. Acts & Resolves 1 (eliminating penalties for possession of one ounce or less of marijuana and cultivation of two mature and four immature plants by adults twenty-one and older, while retaining criminal penalties for possession, dispensing, and sale of larger amounts).

146. *Murphy*, 138 S. Ct. at 1474.

147. *Id*.

148. *Id.*

"authorization" is what this Essay calls decriminalization, where the state has simply gotten out of the way.[149] An action can be authorized, allowing it to be done pursuant to law, without it being. In the Court's example, Joe is selling marijuana in a state where it has been decriminalized (under this Essay's definition). Consequently, he is selling marijuana pursuant to state law. But the state has not legalized marijuana (under this Essay's definition), which would require affirmative regulation of marijuana.

This Essay draws a distinction between authorization through decriminalization and legalization through licensing and regulation. The Supreme Court and the DEA appear to draw a parallel distinction. The Court does so by treating Vermont's marijuana decriminalization law as a paradigmatic case of "authorization," and the DOJ rescheduling order does so by citing California's 1996 Compassionate Use Act, an affirmative-defense statute that created no licensed market, as a key example of state authorization. The *Murphy* Court also disposed of PASPA's prohibition on state "licens[ing]" of sports betting, holding without further analysis that it "suffers from the same defect as the prohibition of state authorization. It issues a direct order to the state legislature."[150] Authorization and licensing are not necessarily synonymous state actions—authorization removes a prohibition, while implementing a licensing framework typically entails regulation. But the constitutional defect is the same. For commandeering purposes, the distinction between authorization and licensing is immaterial, according to *Murphy* [151] However, for preemption purposes, which *Murphy* did not directly address, the distinction matters because only the regulatory obligations associated with licensing generate the conflicts with federal law that preemption requires. In other words, the anticommandeering doctrine protects both decriminalization and legalization as sovereign legislative acts. A state's decision to repeal its marijuana prohibition and a state's decision to build a licensed commercial market are both beyond Congress's power to forbid.[152] But it does not follow that the substance of a legalization regime is immune from federal preemption.[153] Murphy's holding concerns the federal government's power to command state legislatures, while claiming nothing about whether the specific regulatory obligations a state attaches to a

149. *Id.* ("When a State completely or partially repeals old laws banning [an activity], It 'authorize[s]' that activity.").

150. *Id.* at 481.

151. *Id.* at 481–82. Robert Mikos has emphasized that state issuance of a license is analytically separable from the regulatory obligations that typically accompany a licensing regime. *See* Mikos, *Murphy's Mistake*, *supra* note 23, at 117—18. This Essay uses "licensing" to refer to an entire licensing regime, encompassing both the bare grant of permission and the surrounding regulatory framework.

152. *Murphy*, 138 S. Ct. at 1481–82.

153. Mikos, *Murphy's Mistake*, *supra* note 23, at 117–18.

licensing framework conflict with federal law.[154] Those obligations impose restrictions or confer rights on private actors, and they may or may not obstruct federal objectives. They are subject to ordinary preemption analysis regardless of whether the legislative decision to create them was constitutionally protected by the anticommandeering doctrine.

The decriminalization-legalization framework developed here provides a basis for unbundling the repeal component of a state drug reform from its affirmative-regulatory component, and for evaluating each on its own terms. Decriminalization removes penalties without imposing new obligations on private actors; there is effectively nothing for federal law to preempt. Legalization creates regulatory obligations that may generate the conflicts with federal law that preemption doctrine is designed to address. The constitutional vulnerability of a state drug reform is therefore not a function of whether it is "authorized" because *Murphy* establishes that all forms of authorization are protected from federal commands. The vulnerability of state law to federal preemption turns on whether it imposes affirmative regulatory obligations on private actors that conflict with federal law.[155]

These distinctions cast the *Emerald Steel* opinion in new light. The Oregon Supreme Court's holding rested on the premise that state authorization of federally prohibited conduct is per se an obstacle to federal purposes. The court never asked whether ORS 475.306(1) imposed restrictions or conferred rights on private actors. Under the court's framework, the authorization alone was enough to trigger preemption. The court drew a categorical distinction between "authorization," which it held was preempted, and "exemption[] from criminal liability," which it acknowledged as protected by the anticommandeering doctrine.[156] The court claimed that its different treatments of authorization and exemption "turn on different constitutional principles."[157] But *Murphy* collapsed that distinction. Authorization reflects nothing more than a state declining to maintain a restriction or prohibition. According to *Murphy*, authorization "makes sense only against a backdrop of prohibition or regulation," meaning that when Oregon decided that cardholders may engage in marijuana use, that was no different than exempting them from criminal liability. Both are examples of the state removing a prior restriction.

154. *Murphy*, 138 S. Ct. at 1481–82.

155. Mikos, *Murphy's Mistake*, *supra* note 23, at 117–18.

156. Emerald Steel Fabricators, Inc. v. Bureau of Lab. and Indus., 230 P.3d 518, 530–31 (2010).

157. *Id.*

Drawing on *Murphy*, Mikos has argued that *Emerald Steel* rests on the flawed premise that state laws which "authorize" federally prohibited conduct are, without more, a basis for preemption.[158] This Essay agrees that Emerald Steel's per se authorization rule is untenable, especially after *Murphy*. But that does not mean that *Emerald Steel* presents nothing preemptible. The state's authorization—its decision to stop prohibiting medical marijuana use—is protected by the anticommandeering doctrine.[159] What remains subject to ordinary preemption analysis are the downstream regulatory consequences, such as the accommodation obligation that Oregon's legal system imposed on a private employer. Whether that obligation conflicts with federal law requires conflict analysis rather than a per se rule. *Noffsinger* undertook that analysis and concluded that because the CSA does not regulate employment, the accommodation duty does not obstruct federal enforcement objectives. [160]

Mikos's preemption framework, read in combination with *Murphy*'s structural holding, can help resolve remaining uncertainty. *Murphy* establishes that preemption operates exclusively on private actors: "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted."[161] It follows that state law which does not itself impose restrictions or confer rights on private actors, but merely removes prior state-imposed restrictions, presents nothing for federal law to preempt. Mikos drafted an amicus brief articulating this principle in *Murphy*,[162] stating that "authorization qua repeal is not pre-emptible," but any regulatory obligations attached to that authorization might be.[163] Mikos argues that when a state law regulates private actors, whether that law is preempted by federal law turns on congressional intent. Applying that framework, Mikos concludes that Congress likely did not intend to preempt most state marijuana laws because

158. *See* Mikos, *Murphy's Mistake*, *supra* note 23, at 114–15 (arguing that *Murphy* "should quell claims that marijuana reforms are preempted merely because they 'authorize' activities federal law forbids").

159. *See Murphy*, 138 S. Ct. at 1474 ("The concept of state 'authorization' makes sense only against a backdrop of prohibition or regulation."); *see also* Mikos, *Murphy's Mistake*, *supra* note 23, at 109 (reading *Murphy* to establish that bare repeal of a state prohibition constitutes authorization within the meaning of the anticommandeering doctrine).

160. Noffsinger v. SSC Niantic Operating Co. LLC, 273 F. Supp. 3d 326, 334 (D. Conn. 2017) ("The CSA . . . does not make it illegal to employ a marijuana user. Nor does it purport to regulate employment practices in any manner.").

161. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480 (2018).

162. Brief of Amici Curiae Constitutional Law Scholars in Support of Petitioners, Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (No. 16-476).

163. *Id.* at 6 n.3 ("Just like authorization, licensure merely provides the state's permission to engage in activity. If that is all licensing does, then it is not pre-emptible, for the same reasons authorization qua repeal is not pre-emptible.").

state regulatory restrictions tend, in his view, to advance the CSA's objectives of curbing consumption.[164]

The structural insight that authorization qua repeal cannot be preempted is sound. Mikos's further claim that Congress likely did not intend to preempt most state marijuana laws rests on the premise that state regulations help advance the CSA objectives of curbing drug abuse and diversion. There are good reasons for taking this position, and state marijuana regulators and industry stakeholders support it. At the same time, as described above, state regulations do not necessarily promote federal drug control objectives, even when they seemingly control access and are strictly enforced.[165] In some cases, state marijuana laws might increase drug diversion, youth access, and interstate drug trafficking.[166] Furthermore, a primary goal of the CSA was to reduce drug abuse, which federal agencies effectively define as any use of controlled drugs that is not for scientific or medical purposes. Because state laws that legalize nonmedical use obstruct this goal, they cannot be said to promote federal drug control objectives. Meanwhile, even if a state's drug laws could promote CSA objectives, they might still frustrate congressional goals embodied by the FDCA, as well as impede the goal of maintaining U.S. drug treaty compliance.

Although state laws that decriminalize controlled substances might obstruct federal objectives, they cannot be preempted because they merely repeal criminal prohibitions rather than imposing new obligations or conferring new rights on private actors.[167] Legalization, by contrast, typically adds regulatory requirements, creating the restrictions and rights that expose state laws to federal preemption.[168] Decriminalization is therefore not only less likely to be preempted than legalization; it occupies a constitutionally distinct category that federal preemption cannot reach, provided that it is

164. *See* Mikos, *Murphy's Mistake*, *supra* note 23, at 118 (stating that whether state marijuana laws "are, in fact, preempted depends on congressional intent; for a variety of reasons explored elsewhere, it seems doubtful Congress would want to preempt many of them"); *see also* Mikos, *Preemption Under the CSA*, 16 J. HEALTH CARE LAW & POL'Y 5, 18 (2018) ("Regulations that promote marijuana-related activities are preempted because they undermine one of the chief objectives of the CSA—curbing the consumption of marijuana. . . . By contrast, regulations that restrict the marijuana market are not preempted, because they help to advance Congress's objective of curbing marijuana consumption, at least to some extent.").

165. *See supra* note 120.

166. *See id*; *see also supra* note 122.

167. *See* Marks, *supra* note 12, at 445–46 (defining decriminalization as reducing or eliminating criminal penalties); *see also* Mikos, *Murphy's Mistake*, *supra* note 23, at 116–17 (stating that Congress can only preempt state laws that impose restrictions or confer rights upon private actors).

168. *See* Marks, *supra* note 12, at 445 (defining legalization as typically involving the licensing and regulation of commercial activities such as manufacturing, distribution, testing, packaging, labeling, and sales); *see also* Mikos, *supra* note 23, at 118 (identifying Colorado's marijuana product testing, packaging, and labeling requirements as examples of state-imposed restrictions on private actors that are vulnerable to preemption).

unaccompanied by rules imposing regulatory obligations on private actors.[169] This conclusion reflects a structural feature of anticommandeering doctrine, which one scholar has called "an asymmetry biased toward liberty"—while Congress can confer rights that states must respect, it cannot compel states to restrict liberty.[170] Applied to drug policy, that means Congress can prohibit drug possession as a matter of federal law, but it cannot require states to enforce the prohibition.[171]

The 2026 federal rescheduling order puts these doctrinal distinctions to the test. The DOJ issued it under 21 U.S.C. § 811(d)(1), which applies when drug treaties require a substance to be controlled.[172] This provision authorizes the Attorney General to determine an appropriate schedule without consulting HHS for medical and scientific recommendations.[173] The order defines a state-issued medical marijuana license to include those "authorizing the licensee to manufacture, distribute, and/or dispense marijuana . . . for medical purposes."[174] Several statements suggest that the order's definition includes patients and their caregivers who cultivate marijuana for medical use. For example, the order cites California's 1996 Compassionate Use Act as the first example of state authorization of medical marijuana use.[175]

Instead of repealing prohibition or creating a regulatory framework, the Compassionate Use Act merely provided an affirmative defense to criminal prosecution for patients and caregivers who cultivated or possessed medical marijuana.[176] Elsewhere, the order claims that "[s]tate medical licensing regimes oversee permissible uses of medical marijuana, confining distribution to registered patients or caregivers through approved dispensaries or other authorized channels."[177] These references to the Compassionate Use Act, as well as accessing medical marijuana through authorized channels other than dispensaries, suggest that the order's definition of state licensure

169. *See* Mikos, *Murphy's Mistake*, *supra* note 23, at 116–18 (regarding preemption if state laws impose restrictions or confer rights on private actors).

170. Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 NOTRE DAME L. REV. 351, 378 (2020).

171. *See id.* at 377–78 (arguing that a hypothetical federal law providing "states cannot authorize any person to possess marijuana" would create no federal crime or private duty, and would amount to commandeering states into prohibition); *id.* at 377 n.145 ("Congress cannot prohibit a state from legalizing marijuana because that is the same thing as requiring a state to prohibit marijuana.").

172. 21 U.S.C. § 811(d)(1).

173. *Id.*

174. 2026 Medical Marijuana Rescheduling Order, *supra* note 7, at 22721 ("State medical marijuana license means a license issued by a state entity (or by a District of Columbia entity or a federal territorial entity) authorizing the licensee to manufacture, distribute, and/or dispense marijuana or products that contain marijuana for medical purposes.").

175. *Id.* at 22720 ("State medical marijuana regulatory systems have matured significantly since California first authorized medical use in 1996.").

176. Compassionate Use Act, *supra* note 28.

177. 2026 Medical Marijuana Rescheduling Order, *supra* note 7, at 22716.

is broad. It encompasses state programs that merely authorize patients and caregivers to cultivate and possess medical marijuana regardless of whether state law provides an affirmative defense to a criminal prohibition, repeals that prohibition, requires patient registration, or creates more complex regulatory frameworks. The order's broad interpretation of authorization parallels *Murphy*'s broad reading, which includes state laws that decriminalize the production, possession, or distribution of controlled substances.[178]

By reaching diverse forms of state authorization, the order produces surprising results. It seemingly classifies state-authorized medical marijuana patients and caregivers as "manufacturers, distributors, and/or dispensers" of a controlled substance.[179] Technically, they already were. The CSA requires every person who "manufactures" a controlled substance to obtain a registration from the Attorney General.[180] The CSA defines "manufacture" to include "production," and defines "production" to include "cultivation, growing, or harvesting of a controlled substance."[181] If state-authorized marijuana production by patients and caregivers falls within the order's scope, then the order defines those individuals as "manufacturers" of a Schedule III substance who must register with the DEA.[182]

This broad reading of the order's text is supported by its own analysis, including reliance on California's affirmative-defense statute, references to authorized channels other than dispensaries, and broad framing of state authorization in parallel with *Murphy*. Under that textual reading, the order requires patients and caregivers to register with the DEA or be subject to criminal penalties. The DOJ likely did not intend that result. The order claims to cause "the least disruption for patients and existing state systems," and converting decriminalized patients into DEA-registered manufacturers is the

178. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1474 (2018) (describing the example of Joe selling marijuana to illustrate conduct that is authorized but left unregulated).

179. *See* 2026 Medical Marijuana Rescheduling Order, *supra* note 7, at 22720 (stating that "the Attorney General has determined that incorporating state licensing systems into the federal registration framework represents the most effective and efficient means of achieving the CSA's objectives with respect to medical marijuana," and describing a "new registration pathway for state-licensed medical marijuana entities").

180. 21 U.S.C. 822.

181. 21 U.S.C. 802.

182. 2026 Medical Marijuana Rescheduling Order, *supra* note 7, at 22720 (describing incorporation of "state licensing systems into the federal registration framework," and framing it as "the most effective and efficient means of achieving the CSA's objectives with respect to medical marijuana").

opposite of minimal disruption.[183] The textualist reading is therefore in tension with the order's stated purpose.

No interpretive solution within the order's framework cleanly resolves this tension. A narrower reading limited to formal state licensing regimes for medical marijuana businesses would spare patients in states with affirmative-defense regimes from Schedule III registration, but it would leave those patients in Schedule I, a worse outcome for patients that is equally inconsistent with the order's stated purpose. An interpretation retaining Schedule III classification but excusing patients from DEA registration would conflict with the CSA's text. Section 822(a)(1) requires every person who manufactures a controlled substance to register, and the DOJ cannot override a statutory requirement by interpreting its own order.[184] The dilemma reflects a structural limit on rescheduling. The CSA's registration architecture applies uniformly across Schedules II–V, and rescheduling cannot change that.[185] To eliminate the registration requirement, Congress would have to amend the CSA to deschedule marijuana, removing it entirely from the CSA control.

The order also fractures state marijuana regimes, separating licensed medical products in Schedule III from unlicensed and recreational products that remain in Schedule I.[186] The Acting Attorney General argued that drawing this distinction maintains U.S. compliance with the Single Convention.[187] His order states that leveraging existing state medical marijuana infrastructure reflects his "considered judgment that cooperative federalism best serves the statutory purposes of the CSA in the context of a well-regulated medical marijuana market."[188]

Whether recreational marijuana might also be moved to Schedule III is not foreclosed. Alongside the order, the DOJ announced an expedited administrative hearing process, starting June 29, 2026, to consider broader rescheduling of marijuana from Schedule I.[189] But the order's stated rationale

183. *Id.* at 22720.

184. 21 U.S.C. § 822(a)(1).

185. 21 U.S.C. § 822(a).

186. 2026 Medical Marijuana Rescheduling Order, *supra* note 7, at 22718 (stating that "maintaining in schedule I all unlicensed marijuana crops, bulk marijuana, and any marijuana or marijuana extract that has not been incorporated into a FDA-approved drug product" is "necessary for the United States to meet its obligations" under the Single Convention).

187. *Id.* at 22720.

188. *Id.*

189. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., No. 26-392, Justice Department Places FDA-Approved Marijuana Products and Products Containing Marijuana Subject to a Qualifying State-Issued License in Schedule III, Strengthening Medical Research While Maintaining Strict Federal Controls (Apr. 23, 2026), https://www.justice.gov/opa/pr/justice-department-places-fda-approved-marijuana-products-and-products-containing-marijuana [https://perma.cc/86M7-348G].

might constrain what this hearing can achieve. The Acting Attorney General justified his order by emphasizing that recreational marijuana would remain in Schedule I, as required by the Single Convention; rescheduling recreational marijuana would contradict that rationale. As discussed above, however, while the treaties prohibit the nonmedical commercial supply of controlled substances, they tolerate their decriminalization. Accordingly, the Attorney General could deschedule recreational marijuana under 21 U.S.C. § 811(d)(1) without compromising U.S. drug treaty compliance. That path would resolve the patient-cultivation problem that the order's broad reading creates.

Although the DOJ order referenced medical marijuana and the patients who utilize it, the Attorney General's role is limited to enforcing the CSA.[190] The FDCA is administered by the FDA, and the CSA provision under which the Acting Attorney General issued the rescheduling order does not reach FDCA matters.[191] That may be why the order seemingly overlooked its implications for FDCA enforcement. The following Section analyzes potential conflicts between the FDCA and state laws that legalize unapproved controlled drugs.

### *B. FDCA Preemption of State Drug Laws*

Unlike the FDCA's provisions governing over-the-counter drugs and medical devices, which contain statements of express preemption, the FDCA's prescription drug provisions lack a statement of express preemption.[192] The 1962 Kefauver-Harris Amendments stated only that federal prescription drug laws preempt state provisions that create a "direct and positive conflict" with the FDCA.[193] Consequently, courts rely on implied preemption and fact-specific analyses to infer congressional intent.[194]

Most FDCA preemption cases have involved state product-defect or failure-to-warn claims regarding branded or generic drugs, where

190. Gonzales v. Oregon, 546 U.S. 243, 268, 270–74 (describing the Attorney General's limited authority over medical matters under the CSA).

191. 21 U.S.C. § 811(d)(1).

192. *See* Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L.J. 845, 862 & n.118 (2017) (noting that the FDCA contains express preemption provisions for over-the-counter drug labeling requirements, 21 U.S.C. § 379r(e), and for medical device requirements, 21 U.S.C. § 360k, but "no provision in the FDCA that expressly preempts" prescription drug claims).

193. Drug Amendments of 1962 § 202, Pub. L. 87-781, 76 Stat. 780, 793 (codified at 21 U.S.C. § 379r(f)).

194. *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 574–75 (2009) (declining to find implied obstacle preemption of failure-to-warn claims).

manufacturers have raised FDA labeling requirements as a defense.[195] These cases turn on whether the drug manufacturer had an independent avenue to change its label.[196] In *Wyeth v. Levine*,[197] the Court declined to find a branded manufacturer's state-law failure-to-warn claims preempted, reasoning that the manufacturer could have unilaterally strengthened its label under the FDA's regulation.[198] The Court emphasized that impossibility preemption is "a demanding defense" and that FDA approval alone does not establish it.[199] In contrast, in *PLIVA, Inc. v. Mensing*,[200] the Court held that federal law preempted comparable state-law claims against a generic drug manufacturer because generic manufacturers cannot independently change their labels.[201]

These cases have led some scholars to conclude that the Supreme Court has moved away from obstacle preemption in the FDCA context, favoring instead an expanded version of impossibility preemption.[202] However, because the case law has been confined almost entirely to drug-labeling disputes, it is difficult to generalize to other areas of FDCA regulation. The Court has observed that state drug-labeling requirements can complement rather than obstruct the FDA's regulatory objectives, suggesting that not all state regulation of drug products is preempted.[203]

More recently, courts have confronted a different category of cases: state bans on FDA-approved drugs. These have become more common due to state attempts to restrict abortion medications such as mifepristone.[204] The facts and policy implications of state drug bans differ from those of failure-to-warn cases, and the preemption analysis accordingly differs as well.

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195. *See, e.g.*, *Wyeth*, 555 U.S. at 563–65 (involving failure-to-warn claim to which a drug manufacturer argues that FDA labeling requirements preempt state law); PLIVA, Inc. v. Mensing, 564 U.S. 604, 612–18 (2011) (deciding with a drug manufacturer's argument that FDA labeling requirements preempt more restrictive state tort law).

196. *See Wyeth*, 555 U.S. at 570–71 (identifying as "a central premise of federal drug regulation" that "the manufacturer bears responsibility for the content of its label at all times"); *PLIVA*, 564 U.S. at 618 (finding that it was impossible for drug manufacturers to comply with "both their state-law duty to change the label and their federal-law duty to keep the label the same").

197. 555 U.S. 555 (2009).

198. *Id.* at 570–71.

199. *Id.* at 573.

200. 564 U.S. 604 (2011).

201. *Id.* at 618, 620, 623–24.

202. Lars Noah, *Preempting Red State Restrictions on the Use of FDA-Approved Drugs in Gender-Affirming Care?*, 2024 UTAH L. REV. 833, 842–43 (2024).

203. *See* Wyeth, 555 U.S. at 578–79, 581 (stating that state failure-to-warn claims can complement FDA's regulatory objectives).

204. *See, e.g.*, GenBioPro, Inc. v. Raynes, 144 F.4th 258, 268, 273, 275–76 (4th Cir. 2025) (rejecting field and impossibility preemption challenges to West Virginia's restrictions on mifepristone); *see also* Grossi & O'Connor, *FDA Preemption*, *supra* note 88, at 31 (cataloging how state restrictions on mifepristone conflict with FDA's REMS).

In *Zogenix, Inc. v. Patrick*,[205] the U.S. District Court for the District of Massachusetts considered whether Massachusetts's emergency ban on Zohydro ER, an FDA-approved opioid analgesic, obstructed the FDA's congressional mandate.[206] Although *Zogenix* is a district court decision, its reasoning applies the obstacle-preemption standard the Supreme Court articulated in *Hines v. Davidowitz* and remains the most sustained judicial analysis of how that standard operates against state laws that displace FDA approval decisions.[207]

The FDA had approved Zohydro ER after determining that its benefits outweighed its risks.[208] Massachusetts nevertheless issued an emergency order banning the drug's prescription, ordering, dispensing, and administration.[209] Judge Rya Zobel found the state ban preempted on obstacle preemption grounds. If Massachusetts could substitute its judgment for the FDA's, Zobel reasoned, it would undermine the agency's congressional mandate.[210] Many legal scholars have agreed that state laws banning FDA-approved drugs could be vulnerable to obstacle preemption.[211]

Critically, Judge Zobel rejected the argument that *Wyeth* had foreclosed obstacle preemption in the FDCA context. She interpreted *Wyeth* narrowly, explaining that the Supreme Court had "simply concluded that Congress did not view state tort suits as an obstacle to achieving the FDA's purposes" regarding safety warnings.[212] *Wyeth* addressed drug labeling, and unlike in *Zohydro*, the case assumed the continued availability of the drug at issue.[213] A state ban, by contrast, presented a more direct obstruction. Moreover,

205. No. 14–11689–RWZ, 2014 WL 1454696 (D. Mass. Apr. 15, 2014).

206. *Id.* at *2.

207. *See id.* at *1–3 (granting preliminary injunction against Massachusetts's emergency ban on Zohydro ER on obstacle preemption grounds, reasoning that the state had "countermand[ed] the FDA's determinations and substitute[d] its own requirements . . . undermin[ing] the FDA's ability to make drugs available to promote and protect the public health"). The court applied the standard from *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), under which state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

208. *See* Zogenix, 2014 WL 1454696, at *2–3 ("The FDA endorsed Zohydro ER's safety and effectiveness when it approved the drug.").

209. *Id.* at *1.

210. *Id.* at *2.

211. *See, e.g.*, Grossi & O'Connor, *FDA Preemption*, *supra* note 88, at 32–34 (2023) (arguing that state bans on mifepristone frustrate Congress's mandate to balance safe use with reasonable access). The mifepristone obstacle-preemption argument rests additionally on the FDA's Risk Evaluation and Mitigation Strategy (REMS), a formal agency action not at issue in *Zogenix*. Zettler, *Pharmaceutical Federalism*, *supra* note 192, at 873–74. *But see* Noah, *supra* note 202, at 833, 842–43 (arguing that obstacle preemption has fallen into disuse).

212. *Zogenix*, 2014 WL 1454696, at *2.

213. *See id.* at *3 ("*Wyeth* assumed the availability of the drug at issue and analyzed whether stronger state labeling requirements obstructed the FDA's objectives. Here, the obstruction is clearer because the drug Massachusetts wants Zogenix to adopt—Zohydro ER with an 'abuse-resistant formulation'—has not been approved by the FDA.").

Massachusetts had requested use of an abuse-resistant formulation that the FDA had not approved, which arguably enhanced the obstacle the ban posed to federal regulatory authority.[214]

Although the preemption analyses of failure-to-warn cases may not apply directly to state drug prohibition or legalization, their dicta on FDA regulatory authority are instructive. In *Wyeth*, the Court observed that Congress enacted the FDCA to build upon the 1906 Pure Food and Drugs Act and bolster consumer protection against harmful products.[215] The Court reasoned that Congress likely omitted a federal remedy for consumers harmed by unsafe drugs because it believed state rights of action provided adequate remedies, and that state tort laws could incentivize manufacturers to maintain safety standards.[216] In other words, in the field of drug labeling, state and federal goals aligned. That reasoning is unlikely to extend to states that ban FDA-approved drugs or legalize unapproved, controlled substances because in those cases, states ostensibly obstruct rather than complement congressional and FDA goals.

By enacting the FDCA and the Kefauver-Harris Amendments, Congress aimed to create a cohesive national framework for evaluating drug safety and efficacy.[217] To promote uniformity, the FDA retrospectively evaluated drugs that had been marketed since 1938, applying its new efficacy standards.[218] Congress reinforced its commitment to uniformity in the FDA Modernization Act of 1997, which codified FDA's mission to protect public health by ensuring that "human and veterinary drugs are safe and effective," and to harmonize domestic regulatory requirements with those of other countries.[219]

State legalization of unapproved controlled drugs poses a category of FDCA preemption questions that is distinct from both failure-to-warn litigation and state drug prohibition, yet it remains underexplored. The distinction between decriminalization and legalization carries through to the

214. *Id.* at *2–3.

215. *Wyeth*, 555 U.S. at 566–67.

216. *See id.* at 574–78 (explaining that Congress' omission of any direct proscription on state remedies is strong evidence of an endorsement of those remedies for injured consumers).

217. *See* Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780 (codified as amended in scattered sections of 21 U.S.C.); 21 U.S.C. § 393(b)(1)–(2) (2018) (stating that the FDA's mission includes protecting public health by ensuring "that . . . drugs are safe and effective" and "that there is reasonable assurance of the safety and effectiveness of devices intended for human use"); Patricia J. Zettler, *Pharmaceutical Federalism*, *supra* note 192, at 854–57 (describing the role of the FDCA in promoting drug safety and effectiveness).

218. *See* Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780 at 788–89 (codified as amended in scattered sections of 21 U.S.C.) (extending supervisory authority to drugs proliferated since the original 1938 "basic Act").

219. Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, § 406, 111 Stat. 2296, 2369 (codified at 21 U.S.C. § 393(b)(2)–(3) (2018)) (providing that the FDA shall protect public health by ensuring drug safety and effectiveness and "participate through appropriate processes with representatives of other countries" to harmonize regulatory requirements).

FDCA analysis. The FDCA regulates commercial manufacture, distribution, labeling, and marketing of drugs intended for human use.[220] If a state removes criminal penalties for personal use without authorizing a commercial market, its reforms could arguably sidestep FDCA regulations. The obstacle-preemption concerns raised in this Section attach once a state constructs regulations to license drug manufacturers, approve products for sale, set potency or labeling standards, and govern distribution. In other words, legalization arguably produces a parallel drug-approval system in tension with the FDA's public health and uniformity mandates.

To date, courts evaluating state laws that legalize unapproved controlled drugs have focused on CSA preemption.[221] But the FDCA dimension deserves equal attention because state legalization affects the FDA's congressional mandates no less than it does the CSA's enforcement objectives. Some state laws and ballot initiatives have gone beyond legalizing individual unapproved substances to grant state bodies functions that Congress assigned to the FDA as lead federal regulator of drug safety and efficacy. Colorado's Natural Medicine Health Act empowers a state agency to evaluate additional psychedelic substances for inclusion in its regulated medical and nonmedical markets.[222] An unsuccessful Massachusetts ballot initiative would have created a state advisory board to recommend "potential future regulation and use of additional psychedelic substances with therapeutic potential."[223] FDCA preemption claims against those state laws could be stronger than those directed at state marijuana laws. Instead of legalizing a single substance, they potentially regulate several drugs and assign state officials functions that mirror those delegated by Congress to FDA officials.[224] Allowing states to legalize drugs without FDA approval for

220. *See, e.g.*, 21 U.S.C. § 331 (prohibiting acts involving adulteration and misbranding in the context of drug manufacture, distribution, labelling, and marketing).

221. *See* Buenos Hill Inc. v. Saratoga Springs Planning Bd., N.Y.S.3d 902, 911–16 (Sup. Ct. 2024) (conducting CSA preemption analysis without addressing FDCA implications).

222. COLO. REV. STAT. § 12-170-104(12) (2023) (describing psilocybin, psilocin, dimethyltryptamine, ibogaine, and mescaline as "natural medicine").

223. *Law Proposed by Initiative Petition Full Text of Question 4: The Natural Psychedelic Substances Act*, SECRETARY OF THE COMMONWEALTH OF MASS. (2024), https://www.sec.state.ma.us/divisions/elections/publications/information-for-voters-24/quest_4_full_text.htm [perma.cc/855F-CPWW]; Molly Farrar, *Question 4: Voters Reject Legalization of Some Psychedelic Substances*, BOSTON.COM (Nov. 6, 2024), https://www.boston.com/news/politics/2024/11/06/question-4-voters-reject-legalization-of-some-psychedelic-substances/ [https://perma.cc/7SHN-E8ES].

224. Some scholars have characterized state medical marijuana regimes as resembling medical practice laws. *See* Zettler, *Pharmaceutical Federalism*, *supra* note 192, at 877 ("The mechanisms through which state laws permit and regulate access to medical marijuana often resemble medical practice laws, including licensing requirements for marijuana cultivators, dispensers, and prescribers."). That characterization captures important features of the earlier generation of medical marijuana statutes, which emphasized physician judgment and patient qualifying conditions. In

safety and efficacy could return the country to the pre-1938 landscape, before the sulfanilamide disaster prompted Congress to impose uniform safety testing and the thalidomide tragedy prompted additional safeguards.[225]

Professor Zettler has persuasively argued that compared to prescription drug cases, state medical marijuana laws pose less of an obstacle to the achievement of FDA objectives.[226] This Essay reaches a different conclusion with respect to commercial legalization. The medical marijuana laws Zettler analyzed were closer to decriminalization than legalization.[227] They allowed patient access without constructing the kind of parallel drug-approval system that full commercial legalization creates.[228]

Several psychedelics under potential state regulation have been designated by the FDA as investigational new drugs under study in clinical trials.[229] Allowing drug manufacturers to circumvent FDA authority and market drugs through state-regulated industries could produce dual regulatory systems where state-regulated products compete with FDA-approved formulations.[230] For example, if the FDA approves psilocybin as a treatment for depression or other mental health conditions, patients and healthcare professionals in states like Oregon and Colorado could encounter FDA-approved and non-FDA-approved psilocybin in the same markets, or even the same buildings or clinics, and it could be difficult to distinguish between them.[231] The DOJ marijuana rescheduling order produced an analogous situation. By placing both FDA-approved marijuana products and state-licensed medical marijuana in Schedule III, the order grouped products that

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contrast, the commercial marijuana and psychedelic frameworks that emerged more recently include licensing regimes for large-scale cultivation, product manufacturing, and wholesale distribution that extend meaningfully beyond the practice-of-medicine paradigm.

225. *See* Carol Ballentine, *Taste of Raspberries, Taste of Death: The 1937 Elixir Sulfanilamide Incident*, FDA CONSUMER, June 1981, at 18–21 (explaining that food and drug law did not require studies demonstrating drug safety prior to the sulfanilamide disaster, and additional safeguards were later developed in response to the thalidomide tragedy); Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780, 780 (codified as amended in 21 U.S.C. 351) (requiring sanitary conditions for drug manufacturing to prevent products from becoming "injurious to health").

226. Zettler, Pharmaceutical Federalism, supra note 192, at 880.

227. *See id.* at 877–81 (observing that state medical marijuana laws "generally remove state criminal penalties for medical marijuana use" and that "[t]he mechanisms through which state laws permit and regulate access to medical marijuana often resemble medical practice laws").

228. *See id.* at 877–79 (describing how state medical marijuana programs operate through physician recommendations, patient registries, and home cultivation or dispensaries rather than through a state-level drug-approval framework).

229. *See, e.g.*, Usona Inst., *A Study of Psilocybin for Major Depressive Disorder*, NAT'L LIBRARY OF MEDICINE (June 5, 2023), https://clinicaltrials.gov/study/NCT03866174 [https://perma.cc/BTB3-BPJM] (studying the effects of psilocybin on people with symptoms of major depressive disorder).

230. This would, of course, raise potential preemption issues. *See* Noah, *supra* note 202, at 834 (discussing field and conflict preemption in the context of FDA law).

231. Mason Marks, *State-regulated psychedelics on a collision course with FDA*, 330 JAMA 2338, 2338 (2023).

have undergone the FDA's clinical trials, safety review, and efficacy evaluation with products that have not. Patients and healthcare professionals encountering Schedule III marijuana cannot readily distinguish between them based on schedule alone. By treating FDA-reviewed and state-licensed products as equivalent for scheduling purposes, the order conflates two distinct regulatory pathways. That conflation compounds the regulatory paradox identified in Section A. The state frameworks that are constitutionally vulnerable to CSA and FDCA preemption may also undermine the federal drug approval process instead of merely complementing it. If the same drugs can be sold through state-regulated markets that do not require clinical trials or FDA approval, then manufacturers may have little incentive to invest in clinical research or the federal approval process.[232]

Evaluating FDCA preemption of state laws legalizing unapproved drugs presents facts different from those of cases evaluating state medication bans. Nevertheless, the reasoning of *Zogenix*, read against FDA's public health mission, supports the conclusion that state legalization poses comparable obstacles to the FDA's congressional mandate, embodied in the Kefauver-Harris Amendments, and codified in FDA's statutory mandate to ensure that new drugs are proven safe and effective before reaching consumers.[233] Congress gave the FDA primary authority to evaluate pharmaceutical safety and efficacy. Allowing states to undermine its role could weaken the FDA's capacity to combat the types of public health disasters that led Congress to create the modern drug regulatory framework. As with the CSA, and as Section II.A discussed in the context of CSA preemption, the FDCA's significance extends beyond domestic regulation. The FDCA's import controls, manufacturing standards, and drug approval requirements serve as mechanisms for U.S. compliance with the international drug control treaties' requirements for manufacturing and distribution oversight.[234] State

232. *Cf.* Steven Joffe & Holly Fernandez Lynch, *Federal Right-to-Try Legislation—Threatening the FDA's Public Health Mission*, 378 NEW ENG. J. MED. 695, 696–97 (2018) (discussing critiques of right-to-try legislation asserting that alternative access routes to unapproved drugs weaken manufacturers' incentive to pursue FDA approval and undermine the clinical-trial system that generates evidence about safety and efficacy).

233. Zogenix, Inc. v. Patrick, No. 14-11689-RWZ, 2014 WL 3339610, at *2 (D. Mass. Apr. 15, 2014) (reasoning that Massachusetts can "regulate the administration of drugs by the health professions. But it may not exercise those powers in a way that is inconsistent with federal law," and holding that states cannot countermand the FDA's determinations); 21 U.S.C. § 393(b) (stating that the FDA shall "protect the public health by ensuring that . . . human and veterinary drugs are safe and effective").

234. *See* Single Convention on Narcotic Drugs art. 29, Mar. 30, 1961, 520 U.N.T.S. 151, *as amended by* Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 976 U.N.T.S. 3 (requiring that the manufacture of narcotic drugs "be under license" and that licensed manufacturers obtain permits "specifying the kinds and amounts of drugs which they shall be

legalization that circumvents these requirements may undermine the FDCA's treaty-compliance function as well, further weakening the rationale for employing a presumption against preemption.

The DOJ's April 2026 rescheduling order illustrates this tension.[235] The order moved FDA-approved marijuana products and state-licensed medical marijuana from Schedule I to Schedule III. But the order did not—and it could not—resolve the FDCA dimension.[236] State-dispensed medical marijuana has not undergone the clinical trials, safety review, or efficacy evaluation that § 355(a) requires before a new drug enters interstate commerce.[237] Its manufacture and distribution remain prohibited acts under § 331. Now that the CSA obstacle has been reduced for state-licensed medical marijuana, the FDCA stands as a conspicuous independent legal barrier. For the time being, state-licensed medical marijuana products can be manufactured and distributed only to the extent that the federal government exercises its enforcement discretion and chooses not to pursue them.[238]

The preemption analysis thus converges across both federal statutes. State legalization of controlled drugs raises preemption concerns under the CSA and the FDCA, while decriminalization remains beyond the reach of both.

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entitled to manufacture"); *id.* art. 30 (requiring that the "trade in and distribution of drugs be under license"); *id.* art. 31 (establishing import and export certificate requirements for the international trade of narcotic drugs); *see also* 21 U.S.C. § 355 (2018) (prohibiting the introduction of any "new drug" into interstate commerce without FDA approval); *id.* § 351 (defining adulteration standards, including current good manufacturing practice requirements); *id.* § 381 (authorizing the Secretary to refuse admission of any drug that "appears" to be adulterated, misbranded, or unapproved); *id.* § 331 (prohibiting the manufacture, sale, or importation of adulterated or misbranded drugs). The treaties do not prescribe the specific domestic statutory framework through which parties must satisfy these obligations, but the FDCA's prohibitions on manufacturing and distributing drugs that are unapproved, adulterated, or misbranded serve this function in the United States.

235. 2026 Medical Marijuana Rescheduling Order, *supra* note 7, at 22718.

236. *Id.* at 22718 (limiting rescheduling to " marijuana contained in FDA-approved products or subject to a state medical marijuana license"); *see* Robert A. Mikos, *The False Promise of Rescheduling*, 60 TULSA L. REV. 1, 4 (2025) (observing that the FDCA "will still ban *all* interstate commerce in the drug" because "[m]arijuana has not been approved for sale by the [FDA], and HHS made it abundantly clear that its rescheduling recommendation did not confer such approval").

237. 21 U.S.C. § 355(a) (2018); *see* Mikos, *False Promise*, *supra* note 236, at 22 (explaining that HHS's rescheduling recommendation was "not meant to imply that safety and effectiveness have been established for marijuana that would support FDA approval").

238. *See* 21 U.S.C. § 331(d) (2018) (prohibiting introduction into interstate commerce of any drug that is not in compliance with the FDCA's approval requirements); *see DEA Downschedules State Medical Marijuana to Schedule III; Expedited Hearing Set to Consider Broader Rescheduling*, GIBSON DUNN (Apr. 28, 2026), https://www.gibsondunn.com/dea-downschedules-state-medical-marijuana-to-schedule-iii-expedited-hearing-set-to-consider-broader-rescheduling/ [https://perma.cc/S6W2-LA8P] (noting that "the order leaves unresolved the legal status of marijuana sold as . . . unapproved drugs under the [FDCA]" and that "FDA is likely to continue exercising enforcement discretion after rescheduling").

## Conclusion

This Essay has argued that drug decriminalization and legalization are analytically distinct concepts with different legal consequences under federal and international law. Decriminalization, which entails removing criminal penalties for conduct associated with personal drug use, is protected from federal preemption by the anticommandeering doctrine and compatible with an emerging public health and human rights consensus. Legalization, which involves affirmative regulation of activities that federal or international law prohibit, raises preemption concerns under both the CSA and the FDCA. It has produced structural failures in many jurisdictions, and it can place national governments out of compliance with international treaties.

The distinction between decriminalization and legalization also carries consequences for federal marijuana rescheduling. The 2026 DOJ rescheduling order moved FDA-approved marijuana products and state-licensed medical marijuana to Schedule III, but it neither legalized nor decriminalized marijuana. Because the FDA has not approved botanical marijuana for marketing in the United States, rescheduling cannot allow physicians to prescribe it legally under the FDCA. Nor can rescheduling eliminate criminal penalties for personal possession, which are set by marijuana-specific provisions of the CSA rather than by the drug's schedule. As Part II demonstrated, the order could not resolve the independent FDCA barrier to federal legalization. The FDCA continues to prohibit the manufacture and distribution of unapproved drugs, and state-dispensed marijuana products remain unapproved. For now, state-licensed medical marijuana industries can operate only because the federal government exercises enforcement discretion, not because federal law has fully authorized them.

Descheduling marijuana would decriminalize it under the CSA and would be treaty compliant due to flexibilities within the treaties. The FDCA's prohibitions on manufacturing and distributing unapproved drugs would persist, but those provisions constrain commercial legalization, not decriminalization of personal use. Despite rising anti-decriminalization rhetoric in parts of North America, support for decriminalization is emerging across the political spectrum. Lawmakers in Europe, Australia, Mexico, and South America increasingly acknowledge the public health and human rights arguments for decriminalization, and international treaty bodies have moved to endorse it.[239] Even those who oppose legalization are designing their

239. In Europe, Portugal decriminalized personal possession of controlled substances in 2001. Lei n. º30/2000, de 29 de novembro [Act no. 30/2000 of 29 November], https://diariodarepublica.pt/dr/legislacao-consolidada/lei/2000-34545875 (Port.). Italy classifies possession for personal use as an administrative violation under Decree 309/1990. UNODC, Legal and Policy Considerations on Decriminalization of Drug Use and Possession for Personal Use 2

preferred alternatives to preserve core features of decriminalization. The 2025–2026 marijuana reform proposals in Massachusetts, Arizona, and Maine reflect this pattern. They would dismantle nonmedical commercial marijuana markets while preserving prior decriminalization of possession for personal use, and in Arizona's case, home cultivation. Regardless of one's view on these proposals, their retention of some aspects of decriminalization reflects enduring respect for this policy approach.

Despite its limitations, the 2026 rescheduling order is the strongest contemporary illustration of why decriminalization is the more coherent path. The order produced a fractured state marijuana landscape, assigning FDA-approved and state-licensed medical marijuana products to Schedule III while leaving all remaining products in Schedule I. It also created a structural dilemma for state-authorized medical marijuana patients. A broad reading of the order's "state medical marijuana license" trigger sweeps decriminalized patient cultivation into the CSA's federal registration architecture, while a narrower reading drops those patients back into Schedule I with harsher penalties. The order's treaty rationale arguably narrows what future administrative hearings on broader rescheduling can achieve. Since treaty compliance is the DOJ's premise for fracturing state marijuana industries, legalizing recreational marijuana would undermine that premise. The treaties require criminal penalties for nonmedical commercial supply, but their flexibilities allow decriminalizing nonmedical production and possession for personal use.

Federal legalization would require more than DOJ action. Allowing commercial marijuana markets under federal law would require Congress to amend both the CSA and the FDCA. The United States would also need to address its obligations under international drug control treaties, which require criminal penalties for nonmedical commercial supply. None of those steps is foreclosed, but each requires legislative or diplomatic action that lies beyond the Attorney General's scheduling authority. Descheduling, by contrast, lies

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(Policy Note, July 2025). In Australia, the Australian Capital Territory decriminalized personal possession of small quantities of commonly used illicit drugs in 2023. *Drugs of Dependence (Personal Use) Amendment Act 2022* (ACT) ss 169, 171 (effective Oct. 28, 2023). In Mexico, legislation adopted in 2009 decriminalized possession of small amounts of drugs for "personal and immediate use." Leah Utyasheva, *Mexico Decriminalizes Small-Scale Drug Possession*, HIV/AIDS POL'Y & L. REV., Dec. 2009, at 23. In South America, Brazil's Supreme Federal Tribunal voted in 2024 to decriminalize personal possession of marijuana. Chris Benson, *Brazilian Supreme Court Votes to Decriminalize Personal Use of Marijuana*, UPI (June 26, 2024), https://www.upi.com/Top_News/World-News/2024/06/26/brazil-marijuana-cannabis-decriminalization-Rodrigo-Pacheco/9531719434817/ [https://perma.cc/3SHN-XS5V]. As for international treaty bodies, the United Nations System Chief Executives Board for Coordination adopted a common position in 2018 committing the UN system to "promote alternatives to conviction and punishment in appropriate cases, including the decriminalization of drug possession for personal use." U.N. System Chief Executives Bd. for Coordination, *United Nations System Common Position Supporting the Implementation of the International Drug Control Policy Through Effective Inter-Agency Collaboration*, at 8, U.N. Doc. CEB/2018/2 (2018).

within that authority and resolves the immediate federalism tensions this Essay identifies.

Descheduling addresses the fractured U.S. drug policy landscape by treating personal use uniformly under federal law. It would lift the CSA registration requirement that the DOJ order extended to patient cultivation. When authorized by state law, patient cultivation would no longer constitute the "manufacture" of a controlled substance under the CSA. Descheduling remains treaty compliant, because the drug treaties tolerate decriminalizing personal use even though they prohibit legalizing nonmedical commercial supply. Moreover, decriminalization avoids triggering the FDCA's prohibition on unapproved drug commerce. That prohibition reaches drug legalization, but not decriminalization for personal use. Therefore, decriminalizing through descheduling aligns federal drug policy with constitutional structure, treaty obligations, and an emerging public health consensus.