

NOTE

Blazing a New Trail: Using a Federalism Standard of Review in Marijuana Cases

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ABSTRACT

*The current marijuana conundrum continues to cause conflict and tension between the state and federal governments and creates uncertainty for those who engage in actions legal under state law but illegal under federal law. Any challenge to the constitutionality of marijuana's scheduling has been shrouded from meaningful judicial review through the employment of two highly deferential standards—rational basis review and arbitrary and capricious review. The marijuana problem can effectively and efficiently be resolved through a revised standard of review. In *United States v. Windsor*, the Supreme Court deviated from a traditional standard of review and employed a standard of review derived from federalism principles. *Windsor* serves as an optimal framework for the standard of review that should be employed when deciding whether marijuana's status as a Schedule I substance is constitutional. This proposed standard of review would look at whether the federal intrusion into the federal balance is warranted given federalism principles and the personal liberties at stake. One of the bedrocks of the federal government is that individual and state rights should be honored above all but the most important federal imperatives, and this standard of review would finally allow for meaningful judicial review of whether the federal government's prohibition on marijuana is such an important federal imperative that it should be honored above individual and state rights.*

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INTRODUCTION

Alexander Hamilton once said, “[t]he State governments possess inherent advantages, which will ever give them an influence and ascendancy over the national government That their liberties indeed can be subverted by the federal head, is repugnant to every rule of political calculation.¹ The current marijuana conundrum exemplifies how the federal government can subvert state (and individual) liberties. The current clash between federal and state marijuana regulation has been largely understated even though it represents “one of the most important federalism conflicts in a generation.”² Despite the clear words of the Constitution’s Supremacy Clause, which states federal law—e.g., the Controlled Substances Act (“CSA”)³—“shall be the supreme Law of the Land,”⁴ it is not entirely clear whether the states’ actions legalizing marijuana are constitutional, and even if they are, they still raise serious questions about the legitimacy and supremacy of federal marijuana laws.⁵ One thing, however, is clear: the status quo cannot continue for much longer. Despite the increasing number of states that are reforming their marijuana laws, the federal prohibition on marijuana is still enforceable in every state, and serious consequences continue to stem from this federal prohibition.⁶

¹ Alexander Hamilton, Speech to the New York Ratifying Convention (June 17, 1788), in 5 THE PAPERS OF ALEXANDER HAMILTON, June 1788–November 1789, at 16, 26 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

² Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015). According to Brian Leiter’s Law School Rankings, in 2007 Erwin Chemerinsky was the third most cited legal professor in the area of constitutional and public law. *Most Cited Professors by Specialty, 2000–2007*, BRIAN LEITER’S L. SCH. RANKINGS (last updated Dec. 18, 2007), http://www.leiterrankings.com/faculty/2007faculty_impact_areas.shtml#ConstitutionalLaw.

³ Controlled Substances Act (CSA) of 1970, 21 U.S.C. §§ 801–889 (2012).

⁴ U.S. CONST. art. VI, cl. 2.

⁵ See TODD GARVEY et al., CONG. RESEARCH SERV., R43435, MARIJUANA: MEDICAL AND RETAIL—SELECTED LEGAL ISSUES 19–22 (2015), <https://www.fas.org/sgp/crs/misc/R43435.pdf> (providing an overview of cases decided in state courts that have analyzed whether federal law preempts the state’s medical or recreational marijuana laws).

⁶ See Chemerinsky et al., *supra* note 2, at 84–88, 90–100 (2015) (outlining the several consequences that arise from marijuana’s status as a Schedule I substance including its impact on banking, taxes, and access to legal services); see also John Kennedy, *Colo. Pot Credit Union Takes Key Account Suit to 10th Circ.*, LAW360 (Jan. 15, 2016, 4:34 PM), <http://www.law360.com/articles/747086/colo-pot-credit-union-takes-key-account-suit-to-10th-circ> (U.S. District Court Judge Jackson noted “the conflict between state and federal marijuana laws is unsustainable because it creates an ‘untenable’ situation in which marijuana businesses operating in states where the drug is legal can’t access banking services because it’s still illegal under federal law”).

One of the gravest consequences of the marijuana prohibition has been the diminishing respect for federal law.⁷ Marijuana, despite being illegal under the CSA, is the most commonly used illicit drug in the United States,⁸ and twenty-eight states and the District of Columbia have legalized it in some form.⁹ Currently, “about 60 percent of Americans now live in states where marijuana is at least partially legally available.”¹⁰ In 2016, 60% of Americans were in favor of legalizing marijuana compared to just 12% in 1969, the year before the CSA was passed.¹¹ Astonishingly, 69% of Americans think alcohol is more dangerous than marijuana.¹² In addition, 59% of Americans do not believe the federal government should enforce federal marijuana laws in states that allow marijuana use.¹³ As society’s attitude towards marijuana shifts and the availability and use of marijuana increases,

⁷ See NAT’L ORG. FOR THE REFORM OF MARIJUANA LAWS (NORML), REAL WORLD RAMIFICATIONS OF CANNABIS LEGALIZATION AND DECRIMINALIZATION 2 (2010), http://norml.org/pdf_files/NORML_Real_World_Ramifications_Legalization.pdf (noting that drug “prohibition promotes disrespect for the law”); see also Matthew A. Christiansen, *A Great Schism: Social Norms and Marijuana Prohibition*, 4 HARV. L. & POL’Y REV. 229, 246 (2010) (explaining that doctors who prescribe marijuana “are prescribing a federally banned Schedule I drug” and that dispensaries who provide marijuana to people “are engaging in narcotics trafficking”).

⁸ LISA N. SACCO & KRISTIN FINKLEA, CONG. RESEARCH SERV., R43164, STATE MARIJUANA LEGALIZATION INITIATIVES: IMPLICATIONS FOR FEDERAL LAW ENFORCEMENT 1 (2014), <https://www.fas.org/sgp/crs/misc/R43164.pdf>.

⁹ Nat’l Conference of State Legislatures, *State Medical Marijuana Laws* (Mar. 1, 2017), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (also noting that Guam and Puerto Rico have legalized medical marijuana). Most states have legalized medical marijuana, but eight states and the District of Columbia have either legalized or have implemented legislation that will legalize marijuana for recreational use. Ben Gilbert, *One in 5 Americans Will Soon Have Access to Fully Legal Marijuana*, BUS. INSIDER (Nov. 14, 2016, 12:01 PM), <http://www.businessinsider.com/marijuana-in-america-20-of-americans-can-now-access-legal-weed-2016-11>. This means that one in five Americans will have access to recreational marijuana. *Id.*

¹⁰ Jesse Gessin & Michael Chernis, *Jeff Sessions May Hate Pot, but That Doesn’t Mean He’ll Be a Total Buzzkill*, CNN (Nov. 23, 2016, 2:11 PM), <http://www.cnn.com/2016/11/23/opinions/sessions-cannabis-opinion-gessin-chernis/>.

¹¹ Art Swift, *Support for Legal Marijuana Use Up to 60% in U.S.*, GALLUP (Oct. 19, 2016), <http://www.gallup.com/poll/196550/support-legal-marijuana.aspx>; see also PEW RESEARCH CTR., IN DEBATE OVER LEGALIZING MARIJUANA, DISAGREEMENT OVER DRUG’S DANGERS 1 (2015), <http://www.people-press.org/files/2015/04/04-14-15-Marijuana-release.pdf> (providing numerous statistics and comments from those surveyed about their views on marijuana). See generally CSA of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (showing when the CSA was enacted).

¹² See PEW RESEARCH CTR., AMERICA’S NEW DRUG POLICY LANDSCAPE 11 (2014), <http://www.people-press.org/files/legacy-pdf/04-02-14%20Drug%20Policy%20Release.pdf>.

¹³ See PEW RESEARCH CTR., *supra* note 11, at 6.

momentum continues to build for a reform of current federal marijuana policy.¹⁴

One possible avenue to effectuate reform is through the courts, particularly the Supreme Court of the United States, and indeed a recent case decided last year represents the ideal type of case the Court should hear to effectively and efficiently resolve the current marijuana problem. In *United States v. Pickard*,¹⁵ a federal district court case decided in April 2015, the defendants challenged marijuana's classification as a Schedule I substance, claiming the classification and the penalties that attach to it violated their equal protection rights under the Fifth Amendment and the doctrine of equal sovereignty of the states under the Tenth Amendment.¹⁶ The defendants stated, "[w]e're asking that the statute be struck because it is unconstitutional at this particular day and this particular time in the history of the evolution of the evidence with regard to the effects of marijuana."¹⁷ The *Pickard* court had to decide whether marijuana's classification as a Schedule I substance under the CSA was constitutional.¹⁸ Although the court ultimately upheld marijuana's classification as a Schedule I substance, the court noted, "[a]t some point in time," a court may decide this status to be unconstitutional, "[b]ut . . . this is not the court and this is not the time."¹⁹

Pickard represents the ideal type of case the Supreme Court should hear because of the narrow federal question raised in that case and because resolution of that question turns primarily on which standard of review is employed.²⁰ *Pickard* also stands for a broader and more

¹⁴ See Madison Margolin, *This Election Could Determine the Future of Pot in America*, ROLLING STONE (Oct. 25, 2016), <http://www.rollingstone.com/politics/features/this-election-could-determine-the-future-of-pot-in-america-w446612>; see also SACCO & FINKLEA, *supra* note 8, at 1–2 (mentioning a "shift in public attitudes toward" marijuana and noting that state legalization efforts have raised questions about federal marijuana policy).

¹⁵ 100 F. Supp. 3d 981 (E.D. Cal. 2015). This case has been described as potentially "hav[ing] earthshaking consequences for the marijuana industry." See Anne Wallace, *US v. Schweder May Change Everything*, MJINews (Nov. 13, 2014), <http://www.mjinews.com/us-v-schweder-may-change-everything/>. This case is also referred to as *United States v. Schweder*, as Schweder was one of the defendants in the case. See *id.*

¹⁶ *Pickard*, 100 F. Supp. 3d at 981, 988–89.

¹⁷ *Id.* at 994 (quoting Transcript of Motion Hearing at 9, *Pickard*, 100 F. Supp. 3d 981 (No. 2:11-cr-00449), ECF No. 258).

¹⁸ *Id.* at 989.

¹⁹ *Id.* at 988.

²⁰ See *infra* Section II.D.

important notion: the standard of review should be treated as a fluid judicial tool that is continuously reevaluated and takes into account all relevant constitutional concerns. This is especially relevant in cases challenging marijuana's classification because these cases have generally been analyzed under a rational basis standard,²¹ which holds marijuana's scheduling presumptively valid so long as "any reasonably conceivable facts might provide a rational basis for the classification."²² Showing that there are no facts on which to rationally base marijuana's Schedule I classification is an extremely difficult showing to make, and indeed it has not been met in a single case.

This Note argues that the Supreme Court should resolve the issue presented in *Pickard*—whether marijuana's classification as a Schedule I substance is constitutional—using a revised standard of review, specifically the one employed in *United States v. Windsor*.²³ The proposed standard of review would look at whether the federal intrusion into the federal balance is warranted given federalism principles and the personal liberties at stake.

Part I of this Note provides a historical background of marijuana regulation and discusses the current status of the marijuana prohibition. Part II analyzes cases that have challenged different aspects of the CSA and highlights the different questions that were presented and the standards of review that were employed. Part II also demonstrates how the constitutionality of the CSA and, in particular marijuana's scheduling and inclusion into the CSA, has evaded meaningful judicial review and how counterarguments calling for a different standard of review have been rejected by courts. Part III proposes a standard of review that, if employed, would effectively and efficiently resolve the current marijuana problem. Part III also addresses its particular application, its intended results, and any possible criticisms. Part IV discusses the feasibility and shortcomings of alternative solutions that can be executed by either the legislative or executive branch.

I. BACKGROUND OF MARIJUANA REGULATION

In 1970, the CSA combined all preexisting federal drug laws into a

²¹ See generally *United States v. Wilde*, 74 F. Supp. 3d 1092, 1098 (N.D. Cal. 2014) (listing cases that have applied rational basis review to challenges to marijuana's classification).

²² *Pickard*, 100 F. Supp. 3d at 1005.

²³ 133 S. Ct. 2675 (2013).

single act and expanded federal jurisdiction over those drugs to every state regardless of that state's own regulations and laws.²⁴ President Nixon, one of the biggest supporters of the CSA, described the Act as "provid[ing] a sound base for the attack on the problem of the availability of narcotics."²⁵ Almost fifty years after the CSA was passed, eighty-two percent of Americans believe the War on Drugs has still not been won.²⁶ Paradoxically, the United States, with some of the most stringent drug laws in the world, continues to have some of the highest levels of illegal drug use in the world.²⁷ The War on Drugs has cost over one trillion dollars²⁸ and has been a detriment to hundreds of thousands of nonviolent drug offenders who risk being denied affordable access to education, housing, and other benefits due to their criminal records.²⁹ Many can criticize the CSA on a general level—including its failure to treat drug addiction as a health issue and its emphasis on penal punishment rather than rehabilitation³⁰—but the inclusion of marijuana into the CSA triggers a more specific criticism,

²⁴ See SACCO & FINKLEA, *supra* note 8, at 3; Julia Granowicz, *Taking a Closer Look at the Controlled Substances Act*, MARIJUANA TIMES (May 16, 2016), <https://www.marijuanatimes.org/taking-a-closer-look-at-the-controlled-substances-act/>.

²⁵ Richard Nixon, XXXVII President of the United States, Special Message to the Congress on Drug Abuse Prevention and Control (June 17, 1971), <http://www.presidency.ucsb.edu/ws/?pid=3048> (transcript of speech provided by University of California Santa Barbara's "The American Presidency Project").

²⁶ See David Knowles, *82% of Americans Say U.S. Is Losing the 'War on Drugs'*, N.Y. DAILY NEWS (Aug. 19, 2013, 5:14 PM), <http://www.nydailynews.com/news/national/82-u-s-losing-war-drugs-article-1.1431125>.

²⁷ See Loulla-Mae Eleftheriou-Smith, *Drug Addiction: Maps Show Where Cocaine, Cannabis, Heroin and Amphetamines Are the Biggest Problem*, INDEPENDENT (Dec. 1, 2015, 12:08 PM), <http://www.independent.co.uk/life-style/health-and-families/health-news/drug-addiction-the-maps-showing-where-cocaine-cannabis-heroin-and-amphetamines-are-the-biggest-a6755741.html>.

²⁸ See Richard Branson, *War on Drugs a Trillion-Dollar Failure*, CNN (Dec. 7, 2012, 6:05 PM), <http://www.cnn.com/2012/12/06/opinion/branson-end-war-on-drugs/>.

²⁹ See generally ROBIN LEVI & JUDITH APPEL, DRUG POLICY ALL., OFFICE OF LEGAL AFFAIRS, COLLATERAL CONSEQUENCES: DENIAL OF BASIC SOCIAL SERVICES BASED UPON DRUG USE 1 (2003), https://www.drugpolicy.org/docUploads/Postincarceration_abuses_memo.pdf; *Drug War Statistics*, DRUG POLICY ALL., <http://www.drugpolicy.org/drug-war-statistics> (last visited Mar. 6, 2017). Marijuana is the leading cause for drug convictions and, between October 2012 and September 2013, over 27% of drug offenders in federal prisons were locked up for a crime related to marijuana. Kathleen Miles, *Just How Much the War on Drugs Impacts Our Overcrowded Prisons, in One Chart*, HUFFINGTON POST (Apr. 3, 2014), http://www.huffingtonpost.com/2014/03/10/war-on-drugs-prisons-infographic_n_4914884.html.

³⁰ For an example of such criticism, see Branson, *supra* note 28.

especially after one looks at the origins of the prohibition on marijuana.

A. *Origins of the Prohibition on Marijuana*

In the early twentieth century, the growth and use of marijuana was completely legal under federal law.³¹ Marijuana was not federally regulated until the Marihuana Tax Act of 1937,³² which unofficially banned marijuana through the Act's requirement of a rarely-issued high-cost tax stamp required for the sale of marijuana.³³ Harry Anslinger, the first commissioner of the Federal Bureau of Narcotics (now the Drug Enforcement Administration (DEA)), vigorously petitioned for the Tax Act.³⁴ Anslinger argued that marijuana should be prohibited based on its "effect on the degenerate races" and that marijuana "makes darkies think they're as good as white men."³⁵

Unfounded racist speculation also circulated among the states even before the Tax Act.³⁶ In response to the significant increase in Mexican immigrants, especially in the West, western states like Utah, New Mexico, and Texas were among the first states to pass marijuana legislation.³⁷ Prior to 1937, twenty-two states had already restricted the sale or possession of marijuana.³⁸ Even Colorado—one of the first states to legalize recreational marijuana³⁹—passed anti-marijuana

³¹ SACCO & FINKLEA, *supra* note 8, at 3.

³² Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937).

³³ SACCO & FINKLEA, *supra* note 8, at 3. The terms marijuana and marihuana are "primarily colloquial terms borrowed from Mexican Spanish" and are used interchangeably. Christopher Ingraham, 'Marijuana' or 'Marihuana'? It's All Weed to the DEA, WASH. POST (Dec. 16, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/12/16/marijuana-or-marihuana-its-all-weed-to-the-dea/?utm_term=.83a692cc857b.

³⁴ See Gene Taras, Note, *High Time for Change: How Legalizing Marijuana Could Help Narrow the Racial Divide in the United States*, 24 CARDOZO J. INT'L & COMP. L. 565, 568 (2016).

³⁵ Nick Wing, *Marijuana Prohibition Was Racist from the Start. Not Much Has Changed.*, HUFFINGTON POST (Jan. 25, 2014), http://www.huffingtonpost.com/2014/01/14/marijuana-prohibition-racist_n_4590190.html.

³⁶ See Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010 (1970).

³⁷ See *id.* at 1012–13.

³⁸ See *id.* at 1010.

³⁹ See Christina Ng et al., *Colorado, Washington Become First States to Legalize Recreational Marijuana*, ABC NEWS (Nov. 7, 2012), <http://abcnews.go.com/Politics/OTUS/colorado-washington-states-legalize-recreational-marijuana/story?id=17652774>.

legislation mere days after the *Denver Post* headlined a story about a girl being murdered by her Mexican stepfather who, according to the story, ran out of his supply of marijuana, causing him to lose his nerves.⁴⁰ Fear of marijuana was seen on the East Coast as well, and a *New York Times* article in 1913 described marijuana as having “practically the same effect as morphine and cocaine.”⁴¹ By 1970, marijuana was already illegal in all fifty states, with certain exceptions.⁴²

The federal government illegalized marijuana through its enactment of the CSA, which classified marijuana, along with heroin and LSD, as a Schedule I drug.⁴³ Under the CSA, there are five schedules that a substance can be scheduled under, with Schedule I drugs being the most restricted.⁴⁴ The CSA requires findings to be made that the substance meets the requirements under its proposed schedule.⁴⁵ Under Schedule I—marijuana’s current schedule—the substance must have 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.”⁴⁶

In 1970, the Assistant Secretary for Health and Scientific Affairs, Dr. Roger Egeberg, wrote to Congress “recommend[ing] . . . that marihuana be retained within schedule I at least until the completion of certain studies now underway to resolve the issue.”⁴⁷ Dr. Egeberg was referring to the studies being conducted by the National Commission on Marijuana and Drug Abuse, a commission appointed by President Nixon.⁴⁸ In 1972, the Commission released its report, in

⁴⁰ See Bonnie & Whitebread, *supra* note 36, at 1015.

⁴¹ *Muzzles the Dogs All Year 'Round*, N.Y. TIMES, July 29, 1914, at 6; see Bonnie & Whitebread, *supra* note 36, at 1016–20 (discussing the fear of marijuana in New York and marijuana prohibitions in eastern states).

⁴² See *Leary v. United States*, 395 U.S. 6, 16–17 (1969). These exceptions included marijuana that was prescribed by an authorized medical person. *Id.*

⁴³ See CSA of 1970, Pub. L. No. 91-513, §§ 202(c), 401, 84 Stat. 1236 (1970).

⁴⁴ See 21 U.S.C. § 812(b) (2012).

⁴⁵ See *id.*

⁴⁶ *Id.* § 812(b)(1).

⁴⁷ *Marijuana's Dependence Liability - 1970*, DRUG SCIENCE, <http://www.drugscience.org/Petition/C7A.html> (last visited Mar. 6, 2017).

⁴⁸ See Jeremy Daw, *Justice Denied: Supreme Court Ends 50-Year Saga*, LEAF ONLINE (Oct. 20, 2013), <http://theleafonline.com/c/politics/2013/10/justice-denied-supreme-court-ends-a-50-year-saga/> (explaining that Dr. Egeberg was referring to investigations of the Shafer Commission). See generally COMMON SENSE FOR DRUG POLICY, NIXON TAPES SHOW ROOTS OF MARIJUANA PROHIBITION: MISINFORMATION, CULTURE WARS AND PREJUDICE 1 (2002), <http://www.csdp.org/research/shafernixon.pdf> (explaining that

which it wrote this concluding statement:

We have carefully analyzed the interrelationship between marihuana the drug, marihuana use as a behavior, and marihuana as a social problem. . . .

. . . We would *deemphasize* marihuana as a problem.

The existing social and legal policy is out of proportion to the individual and social harm engendered by the use of the drug.⁴⁹

The Commission also stated: “The most notable statement that can be made about the vast majority of marihuana users . . . is that they are essentially indistinguishable from their non-marihuana using peers by any fundamental criterion other than their marihuana use.”⁵⁰ Although the Commission concluded that marijuana did not lead to any “significant physical, biochemical, or mental abnormalities” and “neither the marihuana user nor the drug itself can be said to constitute a danger to public safety,” the Nixon Administration and Congress declined to follow the Commission’s recommendations.⁵¹

B. *Current Status of the Prohibition on Marijuana*

Despite the numerous studies and scholarly works that acknowledge the fact that the prohibition on marijuana was founded in racism and on unsupported and oftentimes manipulated information, marijuana has remained a Schedule I substance for over forty years.⁵² Starting in the late 1990s, however, state sentiment began to shift, and in 1996, California became the first state to legalize marijuana for medical use.⁵³ This led the Supreme Court to decide in *Gonzales v. Raich*⁵⁴ the question of whether Congress has the power to restrict the intrastate cultivation and possession of marijuana, despite state law

the Shafer Commission was the National Commission on Marijuana and Drug Abuse and analyzing released Oval Office Tapes from 1971–1972 for any discrepancies between President Nixon’s agenda and the Commission’s recommendations).

⁴⁹ NAT’L COMM’N ON MARIHUANA & DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 167 (1972), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015009582654;view=1up;seq=4> (courtesy of Hathitrust).

⁵⁰ *Id.* at 41.

⁵¹ *Id.* at 61, 78; see SACCO & FINKLEA, *supra* note 8, at 4.

⁵² See, e.g., Bonnie & Whitebread, *supra* note 36, at 1012–16, 1046–47, 1162; COMMON SENSE FOR DRUG POLICY, *supra* note 48, at 2–4; *supra* Section I.A.

⁵³ See Chemerinsky et al., *supra* note 2, at 84–85.

⁵⁴ 545 U.S. 1 (2005).

permitting it.⁵⁵ Although the Supreme Court ruled in favor of the federal government, federal marijuana laws have been largely unenforced in states permitting marijuana use for two key reasons. First, federal officials lack the resources to enforce federal law in every state and rely heavily on state enforcement to carry out the prohibition on marijuana.⁵⁶ Second, the executive branch, through Justice Department memoranda, has “allowed” states to implement and carry out marijuana legalization laws and in some states, like Colorado, even implement a marijuana regulatory and taxation regime.⁵⁷

Although the status quo seems acceptable to some,⁵⁸ the bigger issue arises from the fact that the question of whether marijuana’s current placement in the CSA is constitutional remains protected from meaningful judicial review. Consider this: In order for a substance to be placed under Schedule I, it must be found to have “no currently accepted medical use in treatment in the United States.”⁵⁹ Yet, medical marijuana is currently legal in twenty-eight states and the District of Columbia,⁶⁰ and the Surgeon General of the United States and 76% of polled doctors from various countries including the United States believe marijuana has medical benefits.⁶¹ Even the federal government

⁵⁵ See *id.* at 5.

⁵⁶ See GARVEY et al., *supra* note 5, at 14; Chemerinsky et al., *supra* note 2, at 84; Stephen Gutwillig, *Federal vs. State Laws*, L.A. TIMES (Mar. 10, 2009), <http://www.latimes.com/la-oe-w-gutwillig-imler10-2009mar10-story.html>. The arrest ratio for marijuana offenses made at the state and local level compared to those made by federal officials is 109 to 1. Chemerinsky et al., *supra* note 2, at 84.

⁵⁷ See GARVEY et al., *supra* note 5, at 14–18; see, e.g., Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, on Guidance Regarding Marijuana Enforcement to All U.S. Att’ys 3–4 (Aug. 29, 2013) [hereinafter Cole Memorandum], <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

⁵⁸ See, e.g., PEW RESEARCH CTR., *supra* note 11, at 1–2 (showing that some Americans still believe marijuana should be illegal); Bernard Cole, *Marijuana Needs Regulation; Law Should Not Change*, BOZEMAN DAILY CHRON. (Oct. 19, 2016), http://www.bozemandailychronicle.com/opinions/letters_to_editor/marijuana-needs-regulation-law-should-not-change/article_9fff8d64-69f2-59c8-b6dd-5f3f33479d0d.html; Gutwillig, *supra* note 56 (explaining that the Supreme Court does not have a problem with the current situation of marijuana being legal under some state laws but illegal under federal law).

⁵⁹ See 21 U.S.C. § 812(b)(1)(B) (2012).

⁶⁰ See NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 9. Legislation in Arkansas, Florida, and North Dakota allowing for medical marijuana has not yet become effective. *Id.*

⁶¹ See Jonathan N. Adler & James A. Colbert, *Medicinal Use of Marijuana — Polling Results*, 368 NEW ENG. J. MED. e30(1), e30(1) (2013), <http://www.nejm.org/doi/pdf/10.1056/NEJMclde1305159>; Michelle Castillo, *Survey: 76 Percent of Doctors Approve of Medical Marijuana Use*, CBS NEWS (May 31, 2013, 3:29 PM),

believes in the medical benefits of marijuana as evidenced by the government's patent on cannabinoids for their potential use as antioxidants and neuroprotectants.⁶² Even many 2016 presidential candidates supported some form of medical marijuana legalization.⁶³ Despite all of this, marijuana has remained a Schedule I substance.⁶⁴

II. STANDARD OF REVIEW IN MARIJUANA CASES

Since marijuana's inclusion in the CSA, federal courts have decided a plethora of cases that challenge the federal government's treatment of marijuana. Some cases, like *Gonzales v. Raich*, challenged Congress's power to regulate intrastate cultivation and possession of medical marijuana contrary to state law permitting such activities.⁶⁵ Other cases, like *United States v. Pickard*, challenged Congress's decision in classifying marijuana as a Schedule I substance,⁶⁶ while others, like *Americans for Safe Access v. DEA*,⁶⁷ challenged the DEA's decision to deny a petition for marijuana's removal from Schedule I.⁶⁸ All these cases were decided in the government's favor.⁶⁹ For plaintiffs wishing to challenge the constitutionality of marijuana as a Schedule I substance, one of the biggest obstacles has been the standard of review used in these cases. Although the exact standard of review depends on

<http://www.cbsnews.com/news/survey-76-percent-of-doctors-approve-of-medical-marijuana-use/> (noting that the poll participants were doctors); Matt Ferner, *U.S. Surgeon General Vivek Murthy Says Marijuana 'Can Be Helpful' for Some Medical Conditions*, HUFFINGTON POST (Feb. 4, 2015), http://www.huffingtonpost.com/2015/02/04/vivek-murthy-marijuana_n_6614226.html.

⁶² See *Does the U.S. Government Own a Patent on Marijuana?*, LEAF SCI. (July 25, 2014), <http://www.leafscience.com/2014/07/25/u-s-government-patent-marijuana/> ("The patent claims exclusive rights on the use of cannabinoids for treating neurological diseases, such as Alzheimer's, Parkinson's and stroke, and diseases caused by oxidative stress, such as heart attack, Crohn's disease, diabetes and arthritis.").

⁶³ See *2016 Major Party Presidential Candidates: Where Do They Stand on Marijuana Policy?*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/2016-presidential-candidates/> (last visited Mar. 6, 2017).

⁶⁴ See 21 U.S.C. § 812(c).

⁶⁵ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 5 (2005); *Marin All. for Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1159 (N.D. Cal. 2011).

⁶⁶ See, e.g., *United States v. Pickard*, 100 F. Supp. 3d 981, 988 (E.D. Cal. 2015); *United States v. Wilde*, 74 F. Supp. 3d 1092, 1093 (N.D. Cal. 2014).

⁶⁷ 706 F.3d 438 (D.C. Cir. 2013).

⁶⁸ See, e.g., *id.* at 442; *All. for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1132–33 (D.C. Cir. 1994).

⁶⁹ *Raich*, 545 U.S. at 9; *Ams. for Safe Access*, 706 F.3d at 452; *All. for Cannabis Therapeutics*, 15 F.3d at 1137; *Pickard*, 100 F. Supp. 3d at 988; *Wilde*, 74 F. Supp. 3d at 1100; *Marin All. for Med. Marijuana*, 866 F. Supp. 2d at 1162.

the type of case the plaintiff brings, these three types of cases all feature a standard of review that is highly deferential to the federal government.⁷⁰

A. *Federal Standards of Review*

The standard of review that a court uses can be defined as the scope of deference the court will give to the findings of fact, legal conclusions, or rulings of a lower court, a jury, or an agency.⁷¹ One judge described standard of review as a judge's "measuring stick" that allows the judge to frame the issue and define the appropriate scope of review.⁷² The standard of review has a significant impact on the resolution of the case and in some cases means the difference between winning and losing.⁷³ If the law in question burdens a fundamental constitutional right or a suspect class, strict scrutiny review is applied.⁷⁴ Under strict scrutiny review—the most stringent standard of review—a law is presumed invalid unless the government proves there is a compelling governmental interest and the law is narrowly tailored to that interest.⁷⁵ If the law burdens a quasi-suspect class, such as gender or illegitimacy, an intermediate standard of review is applied.⁷⁶ This requires the law to be substantially related to an important government interest.⁷⁷ For all other laws that do not fall

⁷⁰ See, e.g., *Raich*, 545 U.S. at 22; *Ams. for Safe Access*, 706 F.3d at 441; *Pickard*, 100 F. Supp. 3d at 988.

⁷¹ See Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 279, 282 (2001).

⁷² See John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 810 (1976).

⁷³ See *Dickinson v. Zurko*, 527 U.S. 150, 152–62 (1999) ("The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used."); *Walsh v. Centeio*, 692 F.2d 1239, 1241 (9th Cir. 1982) ("[T]he outcome of the instant case turns on the standard of review . . ."); see also Colter Paulson, *How Important Are Standards of Review?*, SIXTH CIR. APP. BLOG (May 15, 2012), <http://www.sixthcircuitappellateblog.com/news-and-analysis/how-important-are-standards-of-review/> (finding that there is an almost twenty percent more likelihood that a case will be reversed under a "de novo" standard compared to a more deferential standard).

⁷⁴ *Strict Scrutiny*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁷⁵ See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1273–74 (2007).

⁷⁶ See *Love v. Beshear*, 989 F. Supp. 2d 536, 543 (W.D. Ky. 2014) (listing gender and illegitimacy as quasi-suspect classifications and noting that courts apply intermediate scrutiny to such classifications); *Intermediate Scrutiny*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁷⁷ *Intermediate Scrutiny*, *supra* note 76.

under either strict scrutiny or intermediate scrutiny, rational basis review is applied.⁷⁸ Under rational basis review, the law is presumed valid unless the defendant can prove that the law is not rationally related to a legitimate governmental interest.⁷⁹ Rational basis review is especially problematic because it affords great deference to the government and prevents judges from overruling a law unless it is clearly irrational.⁸⁰ In other words, so long as there is an imaginable justification for the law, a judge may not overrule the law even if it is “overinclusive, underinclusive, illogical, and unscientific.”⁸¹ In some cases, the form of rational basis review that is employed is more rigorous than it is traditionally.⁸² This standard is less deferential to the government and allows a judge to strike down a law that is determined to be unreasonable.⁸³

In cases where the court is reviewing whether the CSA is constitutional or whether marijuana’s inclusion as a Schedule I substance is constitutional, the standard of review has been the traditional form of rational basis, which looks at whether the measure is rationally related to the achievement of an important government interest.⁸⁴ When the court is reviewing whether a substance has been correctly scheduled or whether the DEA correctly followed the CSA’s provisions, the court uses an agency deferential standard of review.⁸⁵ A look at the types of cases mentioned above will demonstrate how these standards of review were used and how they impacted the cases’ outcomes.

B. Challenges to Congress’s Regulation of Marijuana

Gonzales v. Raich presented the Supreme Court with the question of whether Congress, through the CSA, can prohibit the intrastate cultivation and use of marijuana under its Commerce Clause powers.⁸⁶

⁷⁸ See *Rational-Basis Test*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ *United States v. Pickard*, 100 F. Supp. 3d 981, 1005 (E.D. Cal. 2015).

⁸² See *United States v. Wilde*, 74 F. Supp. 3d 1092, 1096 (N.D. Cal. 2014).

⁸³ See *id.*

⁸⁴ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *Pickard*, 100 F. Supp. 3d at 1005–06; see also Jared L. Hausmann, *Sex, Drugs, and Due Process: Justice Kennedy’s New Federalism as a Framework for Marijuana Liberalization*, 53 U. LOUISVILLE L. REV. 271, 298–300 (2015) (discussing the degree of judicial deference warranted in cases involving the constitutionality of the federal marijuana prohibition).

⁸⁵ See, e.g., *John Doe, Inc. v. DEA*, 484 F.3d 561, 570 (D.C. Cir. 2007).

⁸⁶ See *Raich*, 545 U.S. at 5.

Under the Commerce Clause, Congress has the power to regulate activity that when viewed in the aggregate would substantially affect interstate commerce.⁸⁷ In this case, one of the activities in question—possession of medical marijuana—was both a noncommercial and purely intrastate activity.⁸⁸ The Supreme Court used a rational basis standard, which requires that Congress have a “rational basis” for believing that the activity in question would substantially affect interstate commerce.⁸⁹

The Supreme Court has applied a rational basis standard in most Commerce Clause cases;⁹⁰ however, in *Raich*, the Court applied this standard differently.⁹¹ Unlike in *Wickard v. Filburn*⁹² where specific factfinding was relied upon to rule on whether home consumption of wheat was within Congress’s regulatory scheme, the Court in *Raich* stated that “the absence of particularized findings does not call into question Congress’ authority to legislate.”⁹³ Without any specific factfinding, the Court found that Congress had a rational basis for concluding the intrastate cultivation and possession of marijuana would substantially affect interstate commerce.⁹⁴ Ultimately, the *Raich*

⁸⁷ See *id.* at 18–20.

⁸⁸ See Alex Kreit, *Rights, Rules, and Raich*, 108 W. VA. L. REV. 705, 714, 718–19 (2006).

⁸⁹ See *Raich*, 545 U.S. at 19; see also *Rational-Basis Test*, *supra* note 78 (explaining the rational basis test).

⁹⁰ See Peter J. Liuzzo, Comment, *Brzonkala v. Virginia Polytechnic and State University: The Constitutionality of the Violence Against Women Act—Recognizing that Violence Targeted at Women Affects Interstate Commerce*, 63 BROOK. L. REV. 367, 390, 393 (1997) (“[T]he Court has used a rational basis test in all of its prominent Commerce Clause cases spanning over almost sixty years.”). *But see* Dan Hasenstab, Comment, *Is Hate a Form of Commerce? The Questionable Constitutionality of Federal “Hate Crime” Legislation*, 45 ST. LOUIS U. L.J. 973, 1001 (2001) (explaining that the Court did not use rational basis in *United States v. Morrison*, 529 U.S. 598 (2000)).

⁹¹ See *Raich*, 545 U.S. at 53–55 (O’Connor, J., dissenting) (discussing how the Court’s application of the rational basis test was inconsistent with precedent).

⁹² 317 U.S. 111 (1942).

⁹³ See *Raich*, 545 U.S. at 20–21; Lauren Bianchini, Comment, *Homegrown Child Pornography and the Commerce Clause: Where to Draw the Line on Intrastate Production of Child Pornography*, 55 AM. U. L. REV. 543, 566 (2005) (discussing the Court’s reliance or nonreliance on findings in *Wickard* and *Raich*).

⁹⁴ See *Raich*, 545 U.S. at 21 & n.32, 32 (noting that “Congress did make findings regarding the effects of intrastate drug activity on interstate commerce” and rejecting the argument that findings regarding the effect on interstate commerce of the specific activities at issue should be required); *id.* at 53–54 (O’Connor, J., dissenting) (arguing that particularized findings regarding the specific activities at issue should have been required to determine whether those activities substantially affected interstate commerce).

decision meant Congress, through the CSA, could regulate the intrastate consumption of medical marijuana and supersede any conflicting state law.⁹⁵

C. Challenges to the DEA's Denial of Marijuana Rescheduling Petitions

Although the Supreme Court has not yet heard a case that challenges the DEA's decision to deny a rescheduling petition in regards to marijuana, one federal appellate court has decided this issue on multiple occasions.⁹⁶ Under the CSA, a person may file a petition with the DEA for the rescheduling of a controlled substance.⁹⁷ In the event that the DEA denies the petition, a person may obtain judicial review of that denial.⁹⁸ In 1972, a petition was filed with the Bureau of Narcotics and Dangerous Drugs—now the DEA—which initiated proceedings only after the United States Court of Appeals for the District of Columbia Circuit mandated it to do so.⁹⁹ The petition was ultimately denied after twenty-two years in *Alliance for Cannabis Therapeutics v. DEA*.¹⁰⁰ In 2011, a second suit was brought in the D.C. Circuit to compel the DEA to respond to a rescheduling petition filed in 2002.¹⁰¹ The DEA responded shortly after with a denial of the petition, which petitioners appealed.¹⁰² In 2013, the D.C. Circuit in *Americans for*

⁹⁵ See Charles Lane, *A Defeat for Users of Medical Marijuana*, WASH. POST (June 7, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/06/AR2005060600564.html>.

⁹⁶ See, e.g., *Ams. for Safe Access v. DEA*, 706 F.3d 438 (D.C. Cir. 2013); *Gettman v. DEA*, 290 F.3d 430 (D.C. Cir. 2002); *All. for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994); *All. for Cannabis Therapeutics v. DEA*, 930 F.2d 936 (D.C. Cir. 1991); *NORML v. DEA*, 559 F.2d 735 (D.C. Cir. 1977); *NORML v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974).

⁹⁷ See 21 U.S.C. § 811(a) (2012). The statute gives the Attorney General the authority to schedule, reschedule, or deschedule substances, but the Attorney General's authority has been delegated to the DEA, which is the agency that primarily takes these actions. See *All. for Cannabis Therapeutics*, 15 F.3d at 1133; Paul Armentano, *Time to Remove Marijuana from the Controlled Substances Act*, HILL (June 16, 2016, 12:04 PM), <http://thehill.com/blogs/pundits-blog/uncategorized/283710-time-to-remove-marijuana-from-the-controlled-substances-act>.

⁹⁸ See 21 U.S.C. § 877 (allowing review in the United States Court of Appeals for the District of Columbia Circuit or in the federal appellate court where the person's principal place of business is located).

⁹⁹ See *All. for Cannabis Therapeutics*, 15 F.3d at 1134; *NORML v. Ingersoll*, 497 F.2d 654, 655–56, 660–61 (D.C. Cir. 1974).

¹⁰⁰ See 15 F.3d 1131, 1133, 1137 (D.C. Cir. 1994).

¹⁰¹ See DRUG POLICY ALL., *THE DEA: FOUR DECADES OF IMPEDING AND REJECTING SCIENCE* 12 (2014), <http://www.drugpolicy.org/resource/dea-four-decades-impeding-and-rejecting-science>.

¹⁰² See *Ams. for Safe Access v. DEA*, 706 F.3d 438, 439–42 (D.C. Cir. 2013); *DRUG*

Safe Access v. DEA refused to overturn the DEA's decision not to initiate proceedings to reschedule marijuana.¹⁰³ In 2011, a third petition¹⁰⁴ was initiated by the Governors of Washington and Rhode Island.¹⁰⁵ But on August 11, 2016, the DEA denied this petition and announced that marijuana will remain a Schedule I controlled substance.¹⁰⁶

In cases challenging the DEA's denial of a rescheduling petition, the court looks not at whether marijuana has a currently accepted medical use, but whether the DEA's decision to deny the rescheduling petition was arbitrary and capricious.¹⁰⁷ An agency's decision will be upheld if the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation" for its decision.¹⁰⁸ This standard means that even if a court disagrees with the DEA's decision, the DEA's decision must be upheld so long as the action is not irrational or arbitrary.¹⁰⁹

Under this standard, it is hard to imagine a case that would not be decided in the government's favor given that the extensive research constraints placed on marijuana hinders the very research that could get it rescheduled.¹¹⁰ One such constraint is the approval process required to conduct marijuana research. "[T]he FDA, Drug Enforcement Agency and National Institute on Drug Abuse [(“NIDA”)] all play[] a role in allowing an approved researcher access to federal

POLICY ALL., *supra* note 101, at 12.

¹⁰³ See *Ams. for Safe Access*, 706 F.3d at 452.

¹⁰⁴ This Note mentions only those petitions that were filed in the D.C. Circuit and were determined on the merits.

¹⁰⁵ See Letter from Lincoln D. Chafee, Governor of R.I., and Christine O. Gregoire, Governor of Wash., to Michele Leonhart, Adm'r of the DEA (Nov. 30, 2011), https://web.archive.org/web/20120916211232/http://www.governor.wa.gov/priorities/healthcare/petition/combined_document.pdf.

¹⁰⁶ Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,688 (Aug. 12, 2016) (to be codified at 21 C.F.R. pt. 1301); *DEA Announces Actions Related to Marijuana and Industrial Hemp*, U.S. DEA (Aug. 11, 2016), <https://www.dea.gov/divisions/hq/2016/hq081116.shtml>.

¹⁰⁷ See *Ams. for Safe Access*, 706 F.3d at 440.

¹⁰⁸ See *id.* at 449 (alterations in original) (quoting *MD Pharm., Inc. v. DEA*, 133 F.3d 8, 16 (D.C. Cir. 1998)).

¹⁰⁹ See *id.* at 449, 452.

¹¹⁰ See Alex Kreit, *Controlled Substances, Uncontrolled Law*, 6 ALB. GOV'T L. REV. 332, 354–56 (2013); Jayson Chesler & Alexa Ard, *Feds Limit Research on Marijuana for Medical Use*, USA TODAY (Aug. 18, 2015, 11:28 AM), <http://www.usatoday.com/story/news/2015/08/18/feds-limit-research-marijuana-medical-use/31547557/>; Shaunacy Ferro, *Why It's So Hard for Scientists to Study Medical Marijuana*, POPULAR SCI. (Apr. 18, 2013), <http://www.popsci.com/science/article/2013-04/why-its-so-hard-scientists-study-pot>.

funding and federally-provided marijuana.”¹¹¹ “Between 2000 and 2009, the federal government approved only eleven research projects into marijuana’s value as a medicine, fewer than the number of states that passed medical marijuana laws during that same period.”¹¹² Another constraint is the limited supply of marijuana. NIDA unilaterally controls “the manufacturing and distribution of cannabis,”¹¹³ which raises legitimate concerns, as NIDA’s mission is to “advance science on the causes and consequences of drug use and addiction.”¹¹⁴ These strict research constraints coupled with the courts’ extremely deferential standard of review will continue to lead to the same conclusion—that the DEA did not arbitrarily deny these rescheduling petitions.

D. Challenges to Congress’s Classification of Marijuana as a Schedule I Substance

Another related category of cases has arisen challenging the constitutionality of marijuana’s classification as a Schedule I substance.¹¹⁵ In these cases, the standard of review has almost always been rational basis,¹¹⁶ making it inevitable that the government will win.¹¹⁷ Whether rational basis review should be applied is arguably the

¹¹¹ Chesler & Ard, *supra* note 110.

¹¹² Kreit, *supra* note 110, at 354–55 (footnote omitted).

¹¹³ Chesler & Ard, *supra* note 110.

¹¹⁴ Ferro, *supra* note 110; *see also* NIDA’s Mission, IDA, <https://www.drugabuse.gov/about-nida/strategic-plan/nidas-mission> [<https://perma.cc/F69D-CABK>] (last visited Mar. 7, 2017). One professor notes: “If you’re going to run a trial to show this [marijuana] is going to have positive effects, they’re [NIDA] essentially not going to allow it.” Ferro, *supra* note 110.

¹¹⁵ *See, e.g.*, United States v. Pickard, 100 F. Supp. 3d 981, 989 (E.D. Cal. 2015); United States v. Wilde, 74 F. Supp. 3d 1092, 1094 (N.D. Cal. 2014). Unlike most other controlled substances that were placed in their respective schedules by the DEA, marijuana was placed under Schedule I through congressional action, which is why the arbitrary and capricious standard of review does not apply. *See Date Rape Drugs: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Commerce*, 106th Cong. 67 (1999) (statement of Nicholas Reuter, Associate Director, Domestic and International Drug Control Office of Health Affairs, Food and Drug Administration); Jacob Sullum, *Congress and the DEA Share the Blame for Marijuana’s Mystifying Misclassification*, FORBES (Aug. 18, 2016, 10:12 AM), <http://www.forbes.com/sites/jacobsullum/2016/08/18/congress-and-the-dea-share-the-blame-for-marijuanas-mystifying-misclassification/#1fcfda383a33>.

¹¹⁶ *See, e.g.*, Pickard, 100 F. Supp. 3d at 1005–06; Wilde, 74 F. Supp. 3d at 1098 (applying rational basis review and listing numerous cases that have applied rational basis review).

¹¹⁷ *See* Jacob Sullum, *Marijuana and the Poverty of ‘Rational Basis’ Review*, REASON: HIT & RUN BLOG (Apr. 27, 2015, 1:51 PM), <http://reason.com/blog/2015/>

most important determination that is made, because if this standard is used the question becomes whether Congress's scheduling of marijuana is rational, and as the court in *Pickard* stated: "[t]o ask that question in this case, under rational basis review, is to answer it."¹¹⁸ Unlike many courts that do not vigorously analyze what standard of review should be applied,¹¹⁹ the *Pickard* court stated that it had previously "left open ultimate determination of the applicable level of scrutiny, allowing development of the record to ensure its decision fit the facts of this case."¹²⁰ The defendants in *Pickard* argued that: (1) the court should apply strict scrutiny because a fundamental right was being implicated and because a suspect class was being targeted; and (2) if not strict scrutiny, the court should apply a heightened form of rational basis review.¹²¹

1. *Strict Scrutiny Review*

Strict scrutiny, as previously noted, is the most stringent standard of judicial review and treats a law as presumptively invalid unless the government can prove there is a compelling governmental interest and the law is narrowly tailored to that interest.¹²² When determining if strict scrutiny is applicable, the court looks at whether there is a fundamental right at issue or whether there is a suspect class being targeted.¹²³

A fundamental right is one that is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."¹²⁴ In *Pickard*, the defendants argued that marijuana's classification implicated their fundamental right "to be free from incarceration,"¹²⁵ but the court rejected the defendant's broad

04/27/marijuana-and-the-poverty-of-rational-ba.

¹¹⁸ *Pickard*, 100 F. Supp. 3d at 1006.

¹¹⁹ See Todd J. Bruno, *Say What?? Confusion in the Courts over What Is the Proper Standard of Review for Hearsay Rulings*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 1, 17 (2013) ("Standards of review have become a 'cut and paste' option for court opinions and offer little analysis regarding why a specific standard has been chosen in reviewing a particular case." (quoting Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 255 (2009))).

¹²⁰ *Pickard*, 100 F. Supp. 3d at 1002.

¹²¹ *Id.* at 1003.

¹²² See *Strict Scrutiny*, *supra* note 74; see also Fallon, Jr., *supra* note 75, at 1273–74.

¹²³ See *Strict Scrutiny*, *supra* note 74.

¹²⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

¹²⁵ *Pickard*, 100 F. Supp. 3d at 1003 (quoting Memorandum in Support of Defendant Brian Pickard's Notice of Motion & Motion to Dismiss Indictment as

characterization of the liberty at stake and found that no fundamental right was “implicated by the CSA’s scheduling of marijuana.”¹²⁶ The United States Court of Appeals for the Ninth Circuit, the circuit in which the *Pickard* court is located, has held on multiple occasions that there is no fundamental right to cultivate, distribute, possess, or use medical marijuana.¹²⁷ The Ninth Circuit noted “that day [when the right to medical marijuana is deemed fundamental] has not yet dawned” and that “[u]ntil that day arrives, federal law does not recognize a fundamental right to use medical marijuana.”¹²⁸

The *Pickard* court also looked at whether strict scrutiny review was warranted on the basis that a suspect class was being targeted.¹²⁹ This required the defendants to prove that the law in question “ha[d] a disparate impact on a particular group” and that this impact was the result of a discriminatory purpose.¹³⁰ To show this, the defendants relied on statements made by Harry Anslinger, the former Commissioner of the Federal Bureau of Narcotics.¹³¹ The court found these statements unpersuasive because they were made thirty-three years before the CSA was enacted and because the defendants did not argue that Anslinger was part of the decisionmaking regarding the CSA’s enactment or that Congress relied on those statements when passing the CSA.¹³² Additionally, the defendants failed to present evidence that they were members of the group that would have been targeted by the CSA’s classification.¹³³

2. Rational Basis Review

The *Pickard* court then analyzed which type of rational basis review—either its traditional form or its heightened form—applied.¹³⁴

Violative of the United States Constitution (Amendment V, & Article VI/Amendment X), & Request for Evidentiary Hearing at 10, *Pickard*, 100 F. Supp. 3d 981 (No. 2:11-cr-00449), ECF 199-1.

¹²⁶ *Id.*

¹²⁷ *See, e.g.*, *Sacramento Nonprofit Collective v. Holder*, 552 F. App’x 680, 683 (9th Cir. 2014); *Mont. Caregivers Ass’n, LLC v. United States*, 526 F. App’x 756, 758–59 (9th Cir. 2013); *United States v. Faasumalie*, 539 F. App’x 840, 841–42 (9th Cir. 2013); *Raich v. Gonzales (Raich II)*, 500 F.3d 850, 866 (9th Cir. 2007).

¹²⁸ *See Raich II*, 500 F.3d at 866.

¹²⁹ *See Pickard*, 100 F. Supp. 3d at 1003–04.

¹³⁰ *Id.* at 1003–04.

¹³¹ *See id.* at 1004.

¹³² *See id.*

¹³³ *See id.* at 1005.

¹³⁴ *See id.* at 1004–05.

Explaining that the heightened rational basis was applicable in situations where “important but not fundamental rights or sensitive but not suspect classifications are involved,”¹³⁵ the court noted that this form of rational basis review was typically applied when a classification appeared to have been based on “animus or a desire to harm a politically unpopular group.”¹³⁶ The court found that the heightened form of rational basis review was not warranted because the defendants did not submit any evidence showing any animus or discriminatory motive on part of the legislature and because evidence did not exist showing that defendants belonged to “a politically unpopular group.”¹³⁷

After deciding that the traditional form of rational basis review should be applied, the court looked at whether Congress had a rational basis for deciding that marijuana was and should continue to be a Schedule I substance.¹³⁸ The court “made history by granting the first extended [evidentiary] hearings” on this issue in federal court.¹³⁹ As one writer noted, “[i]n an ideal legal system, the legitimacy of the Schedule 1 classification would be decided by the weight of the empirical evidence.”¹⁴⁰ But as the court explained, “under rational basis review, the government ‘has no obligation to produce evidence to sustain the rationality of a statutory classification.’”¹⁴¹ In fact, under rational basis review, “legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”¹⁴²

The court noted that the burden on the defendants was a “heavy” one—requiring them to prove the “irrationality of the Schedule I classification,”¹⁴³ which could only be done by “negat[ing] ‘every

¹³⁵ *Id.* at 1005 (quoting *Dairy v. Bonham*, No. C-13-1518 EMC, 2013 WL 3829268, at *5 n.4 (N.D. Cal. July 23, 2013)).

¹³⁶ *Id.* (quoting *United States v. Wilde*, 74 F. Supp. 3d 1092, 1097 (N.D. Cal. 2014)).

¹³⁷ *See id.* (quoting *Wilde*, 74 F. Supp. 3d at 1097).

¹³⁸ *See id.* at 1006–08.

¹³⁹ Jeremy Daw, *Schedule I Constitutional, Rules Federal Judge*, LEAF ONLINE (Apr. 15, 2015), <http://theleafonline.com/c/politics/2015/04/schedule-constitutional-rules-federal-judge/>; *see* Dominick T. Armentano, *Federal Cannabis Standards Are Irrational*, INDEP. INST. (May 23, 2015, 10:38 AM), <http://www.independent.org/newsroom/article.asp?id=7385>.

¹⁴⁰ Armentano, *supra* note 139.

¹⁴¹ *See Pickard*, 100 F. Supp. 3d at 1005 (quoting *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993)).

¹⁴² *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

¹⁴³ *Pickard*, 100 F. Supp. 3d at 1008 (quoting *United States v. Fogarty*, 692 F.2d

conceivable basis which might support it.”¹⁴⁴ This burden is extremely high given the inevitable disagreement among medical experts and the fact that the government can choose on what studies it relies and even prevent the studies with which it does not agree.¹⁴⁵ The court noted, “[i]n view of the principled disagreements among reputable scientists and practitioners regarding the potential benefits and detrimental effects of marijuana . . . Congress still could rationally choose one side of the debate over the other.”¹⁴⁶ Following the extremely deferential rational basis standard of review, the court held that the scheduling of marijuana was not “so arbitrary or unreasonable as to render it unconstitutional.”¹⁴⁷

III. IMPLEMENTATION OF THE PROPOSED STANDARD OF REVIEW

A. *Proposed Standard of Review*

Currently, the two highly deferential standards—rational basis and arbitrary and capricious—cloak the questions—whether marijuana’s scheduling is constitutional and whether the DEA appropriately denied a petition for rescheduling—in a veil of protection, shrouded from meaningful judicial review.¹⁴⁸ These standards of review give heightened deference to the federal government at the expense of state sovereignty and personal liberties. The best solution would be to adopt a standard of review that accords less deference to the federal government and more deference to state governments. This can be done either by changing the standard of review to a more stringent one already recognized by the Supreme Court or, more ideally, by changing the standard of review to a new judicially created one. It is important to note that standards of review are not a constitutional obligation, but a judicial tool courts have created.¹⁴⁹ The Supreme Court has on several occasions departed from

542, 547 (8th Cir. 1982)).

¹⁴⁴ *Id.* (emphasis added) (quoting *Beach Commc’ns, Inc.*, 508 U.S. at 315).

¹⁴⁵ *Id.* at 1008–09 (noting the disagreement between scientists and Congress’s ability to “choose one side of the debate over the other”); Chesler & Ard, *supra* note 110; Ferro, *supra* note 110 (“If you’re going to run a trial to show that marijuana has positive effects, the NIDA essentially is not going to allow it.”).

¹⁴⁶ *Pickard*, 100 F. Supp. 3d at 1008–09. This same rationale was given by another district court thirty-five years earlier. See *NORML v. Bell*, 488 F. Supp. 123, 136 (D.D.C. 1980).

¹⁴⁷ See *Pickard*, 100 F. Supp. 3d at 1009.

¹⁴⁸ See *supra* Sections II.C–D.

¹⁴⁹ See Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE

its usual approach of applying one of the traditional standards of review.¹⁵⁰

Such a departure occurred in a recently decided case, *United States v. Windsor*, where the Court did not even mention which one of the three standards of review, if any, was being employed.¹⁵¹ In *Windsor*, the question before the Supreme Court was whether the Defense of Marriage Act (“DOMA”)¹⁵²—which defined “marriage” as “a legal union between one man and one woman”¹⁵³—violated the Equal Protection Clause when applied to those persons in same-sex marriages.¹⁵⁴ In addition to the significance of the Court’s ultimate holding in *Windsor*,¹⁵⁵ the integral role that federalism played in the Court’s decisionmaking is equally important.¹⁵⁶ As one scholar notes, “[f]ederalism principles played a critical role in defining the contours of the equality right at stake, limiting which governmental interests could weigh against that right, and influencing the level of deference that the Court owed to how Congress had weighed those rights and interests.”¹⁵⁷

Ordinarily, courts give considerable deference to Congress under the rational basis review because “democratically elected

U. L. REV. 11, 45–46 (1994); Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2012–2013 CATO SUP. CT. REV. 117, 143.

¹⁵⁰ Such occasions include: *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) (explaining that the Court did not apply strict scrutiny or “anything that resembles [the] deferential framework” of rational basis); *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2644 (2013) (Ginsburg, J., dissenting) (explaining that the Court failed to “even identify[] a standard of review”); *District of Columbia v. Heller*, 554 U.S. 570, 628–29, 634 (2008); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (writing that the Court applied “an unheard-of form of rational-basis review”). Additionally, there seems to be at least five Justices on the Supreme Court who seem open to departing from the traditional standards of review given that Justice Kennedy’s approach in *Windsor*, 133 S. Ct. 2676 was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

¹⁵¹ *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) (explaining that the Court did not apply strict scrutiny or “anything that resembles . . . [the] deferential framework” of rational basis); see Lide E. Paterno, Note, *Federalism, Due Process, and Equal Protection: Stereoscopic Synergy in Bond and Windsor*, 100 VA. L. REV. 1819, 1851 (2014).

¹⁵² Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012)).

¹⁵³ 1 U.S.C. § 7 (2012).

¹⁵⁴ See *Windsor*, 133 S. Ct. at 2683.

¹⁵⁵ See *id.* at 2695 (holding “that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution”).

¹⁵⁶ See Young & Blondel, *supra* note 149, at 117, 119.

¹⁵⁷ See *id.* at 119.

legislatures . . . presumably have superior institutional capacity to decide social and economic issues.”¹⁵⁸ In fact, rational basis review is said to be “a paradigm of judicial restraint.”¹⁵⁹ Although this reason normally lends weight to giving deference to Congress, it certainly does not mandate deference to Congress in cases involving both federal and state legislatures, given that the state legislature is just as competent and is arguably more in tune with the wishes of the people and what lies in their best interest.¹⁶⁰ *Windsor* was such a case.

In *Windsor*, the Court’s focus on federalism led to a heightened standard of review that took into account the state’s interest in the matter, the level of intrusion by the federal government into the state’s affairs, and the burden the federal government was placing on individuals whom the state deemed were entitled to “recognition, dignity, and protection.”¹⁶¹ Normally under rational basis review, Congress’s stated interest behind its statute suffices for the Court to rule in its favor,¹⁶² and the Court has even said that “a legislature that creates . . . categories [of those affected by a statute] need not ‘actually articulate at any time the purpose or rationale supporting its classification.’”¹⁶³ In *Windsor*, however, the Court rejected Congress’s stated purposes—including its interest in uniformity—and “considered only [Congress’s] *actual* purpose,”¹⁶⁴ which, according to the Court, was “to impose a disadvantage . . . upon all who enter into same-sex marriages.”¹⁶⁵

Although the Court did not explicitly explain why it was holding Congress to its actual purpose, scholars believe that federalism played a large part.¹⁶⁶ Indeed, the Court hinted at federalism concerns, noting that:

The State’s decision to give this class of persons the right to

¹⁵⁸ See *id.* at 143.

¹⁵⁹ *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993).

¹⁶⁰ See Young & Blondel, *supra* note 149, at 143–44, 144 n.134.

¹⁶¹ *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013); see Young & Blondel, *supra* note 149, at 139–40.

¹⁶² See Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 384 (2012).

¹⁶³ See *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992)).

¹⁶⁴ Young & Blondel, *supra* note 149, at 138–39 (quoting *Windsor*, 133 S. Ct. at 2693).

¹⁶⁵ See *Windsor*, 133 S. Ct. at 2693–95; *id.* at 2696 (Roberts, C.J., dissenting) (explaining that uniformity was one of Congress’s interests in the law).

¹⁶⁶ See Young & Blondel, *supra* note 149, at 140.

marry conferred upon them a dignity and status of immense import. But the Federal Government uses the state-defined class for the opposite purpose—to impose restrictions and disabilities. The question is whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment, since what New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.¹⁶⁷

Federalism also likely played a part in the Court's requirement of "a somewhat closer-than-usual fit" between the statute's purpose and the means used to achieve that purpose rather than the usual requirement that the statute be rationally related to the purpose.¹⁶⁸ The Court took special notice of the fact that a federal law was displacing state laws by regulating an area that was traditionally regulated by states.¹⁶⁹ The Court noted that DOMA "creat[ed] two contradictory marriage regimes within the same State" and "force[d] same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law."¹⁷⁰ Even though the Court agreed that Congress had the authority to regulate in such an area, the fact that Congress's extensive regulation under DOMA displaced state laws led the Court to decide the means did not fit the stated purpose.¹⁷¹

B. *Application of the Proposed Standard of Review*

The same federalism principles that led to a heightened standard of review in *Windsor* can be applied in cases challenging marijuana's classification. The standard of review inquiry would change from whether there is a fundamental right in question or a suspect class involved to whether federalism principles warrant heightened scrutiny. Courts would then finally have to resolve the federalism question—whether the federal government can refuse to recognize valid state laws permitting marijuana use—which is arguably at the heart of the marijuana conundrum.

Under the *Windsor* framework, a court would first look at the actual purpose of marijuana's scheduling and not just Congress's

¹⁶⁷ *Windsor*, 133 S. Ct. at 2681.

¹⁶⁸ See Young & Blondel, *supra* note 149, at 144. See generally *Rational-Basis Test*, *supra* note 78 (explaining rational basis test).

¹⁶⁹ See *Windsor*, 133 S. Ct. at 2689–91, 2696; Young & Blondel, *supra* note 149, at 139–40.

¹⁷⁰ *Windsor*, 133 S. Ct. at 2694.

¹⁷¹ See *id.* at 2690, 2696.

proffered purpose.¹⁷² Depending on what evidence is presented, a court may find that the actual purpose of marijuana's scheduling was invidious and decide right from the start that marijuana's scheduling is unconstitutional.¹⁷³ As the Supreme Court in *Windsor* stated, "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."¹⁷⁴ Assuming *arguendo*, however, that a court does not find that the actual purpose is invidious, a court may glean Congress's purpose from the introductory provisions of the CSA, which suggest a desire "to maintain the health and general welfare of the American people" and to prevent the "illegal importation, manufacture, distribution, and possession and improper use of controlled substances."¹⁷⁵

Notably, Congress's interests are no different than the states' interests, even when the two take very different approaches in pursuit of those interests. Like Congress, states also have an interest in protecting the health and welfare of their citizens and in preventing the influx of uncontrolled and unmonitored substances that pose harm to their citizens.¹⁷⁶ Indeed, the states that have legalized marijuana—particularly medical marijuana—have done so for the health and welfare of their citizens, using their legitimate police powers to do so.¹⁷⁷ Unlike in *Windsor*, a court is unlikely to find that Congress's purpose is illegitimate or that it lacks an interest in how marijuana is

¹⁷² See generally *id.* at 2693–95 (showing that the Court rejected Congress's stated purpose behind DOMA and instead looked at what the Court considered to be the actual purpose for the law); Young & Blondel, *supra* note 149, at 138–39 (explaining that the *Windsor* Court looked at Congress's "actual purpose" for DOMA (quoting *Windsor*, 133 S. Ct. at 2693)).

¹⁷³ Evidence that would help support this conclusion could include congressional hearings and reports that illuminate the backdrop against which marijuana was included in the CSA as well as statistics showing the exorbitantly high and unequal number of minorities, especially African Americans, who are incarcerated due to marijuana possession. See, e.g., AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 17–20, 65 (2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

¹⁷⁴ See *Windsor*, 133 S. Ct. at 2693 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

¹⁷⁵ See 21 U.S.C. § 801(1)–(2), (7) (2012).

¹⁷⁶ See generally *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

¹⁷⁷ See Dean M. Nickles, *Federalism and State Marijuana Legislation*, 91 *NOTRE DAME L. REV.* 1253, 1276 (2016); see, e.g., *Raich II*, 500 F.3d 850, 867 (9th Cir. 2007) ("The Compassionate Use Act [the act legalizing medical marijuana], aimed at providing for the health of the state's citizens, appears to fall squarely within the general rubric of the state's police powers.").

scheduled. Thus, the court would then move to the second step in the *Windsor* framework—analyzing the means Congress employed to achieve the purpose behind marijuana’s scheduling.¹⁷⁸

Normally under rational basis review, the means only need to be rationally related to the end;¹⁷⁹ however, in *Windsor*, the Court required a “closer-than-usual fit between means and ends.”¹⁸⁰ Important to the Court’s decision was the fact that a federal law was displacing state laws by regulating an area traditionally regulated by states.¹⁸¹ Here, the CSA displaced all state marijuana laws, and it regulated an area—marijuana—that states had been regulating for fifty years before the CSA was enacted.¹⁸² Congress may argue that the Court already ruled in *Raich* that Congress had the constitutional authority to enact the CSA, thereby displacing state law, and to regulate marijuana even intrastate.¹⁸³ But the specific issue of whether marijuana’s scheduling is constitutional was never raised in *Raich*. Congress may also argue that these state laws, contrary to federal law, impermissibly frustrate the federal government’s purposes of providing a uniform drug policy.¹⁸⁴ But the 2013 Cole Memorandum seems to foreclose this argument as it mentions federal interests are “less likely” to be threatened if the state implemented “strong and effective” regulations on its marijuana industry.¹⁸⁵ In addition, states are the primary enforcers of the prohibition on marijuana, and if states choose not to enforce it, the federal government would lack the authority to force them.¹⁸⁶

Congress’s scheduling of marijuana not only regulates marijuana in a way inconsistent with state laws, but it deprives citizens of the

¹⁷⁸ See generally Young & Blondel, *supra* note 149, at 133, 142–43 (explaining that the *Windsor* Court analyzed Congress’s means of furthering DOMA’s purported purpose).

¹⁷⁹ See *Rational-Basis Test*, *supra* note 78.

¹⁸⁰ Young & Blondel, *supra* note 149, at 144.

¹⁸¹ See *United States v. Windsor*, 133 S. Ct. 2675, 2689–91, 2696 (2013); Young & Blondel, *supra* note 149, at 139–40.

¹⁸² See Hausmann, *supra* note 84, at 278–79, 297.

¹⁸³ See generally *supra* Section II.B (discussing *Raich*).

¹⁸⁴ See generally *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (explaining the conflict preemption doctrine, under which federal law preempts state law that frustrates achievement of the federal law).

¹⁸⁵ See Cole Memorandum, *supra* note 57, at 3.

¹⁸⁶ See JUDY APPEL & DANIEL ABRAHAMSON, DRUG POLICY ALL., MEDICAL MARIJUANA LAW AND LEGISLATION: THE ROLE OF STATE LAW ENFORCEMENT 1 (n.d.); Chemerinsky et al., *supra* note 2, at 84; Gutwillig, *supra* note 56.

rights afforded to them by their state. Many states—twenty-eight in total—have extended a right to their citizens to use medical marijuana,¹⁸⁷ and for medical marijuana users, this use allows them to exercise the same amount of bodily autonomy as those patients who use other legal, and sometimes more dangerous, medical drugs.¹⁸⁸ The CSA, like DOMA, “singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty” and “imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.”¹⁸⁹

The Court in *Windsor* also noted the uncertainty that DOMA created and the differences in people’s rights from one state to another.¹⁹⁰ Similarly, there is uncertainty arising from the CSA’s effect on the legitimacy of state law, and through the Department of Justice’s memoranda, there are actual differences in the likelihood of prosecution depending on where an individual lives. Under the *Windsor* framework, it is possible that the Court would find Congress’s employed means to regulate marijuana do not fit its ends, given that states have the same interests as Congress but employ means that are less intrusive to personal liberties and more align with traditional state powers. This would lead the Supreme Court to ultimately hold that marijuana does not meet the requirements of a Schedule I substance and consequently must be removed from the CSA altogether.¹⁹¹ This

¹⁸⁷ See NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 9.

¹⁸⁸ See Paterno, *supra* note 151, at 1866. Those states that have extended a right to their citizens to use recreational marijuana are respecting the will of their people who voted in favor of legalizing recreational marijuana. See Matt Ferner, *Amendment 64 Passes: Colorado Legalizes Marijuana for Recreational Use*, HUFFINGTON POST (Nov. 20, 2012), http://www.huffingtonpost.com/2012/11/06/amendment-64-passes-in-co_n_2079899.html; Sean Williams, *This Map Shows Where Marijuana Is Legal*, MOTLEY FOOL (Nov. 20, 2016, 9:12 AM), <http://www.fool.com/investing/2016/11/20/this-map-shows-where-marijuana-is-legal.aspx> (listing the recent initiatives that led to the legalization of recreational marijuana).

¹⁸⁹ See *United States v. Windsor*, 133 S. Ct. 2676, 2695–96 (2013).

¹⁹⁰ Young & Blondel, *supra* note 149, at 133.

¹⁹¹ It is beyond the authority of the Supreme Court to reschedule marijuana under a Schedule it determines fits. This decision must be made by the DEA in conjunction with the Department of Health and Human Services. See 21 U.S.C. § 811(b) (2012); *supra* note 97. Deserving of quick mention but not lengthy discussion are two other alternative approaches the Supreme Court and other federal courts may take. One approach would be to overturn *Gonzales v. Raich*, 545 U.S. 1 (2005); however, this would require the Supreme Court to hold that Congress lacks the power to enforce the CSA’s provisions in regards to intrastate activities. This holding would then serve as precedent to limit the federal government’s ability to regulate other intrastate activities in the future. Another approach would be for the CSA to be overruled on

would allow the CSA to remain intact, would respect state sovereignty as well as federal supremacy, and would allow the Court to avoid deciding the much more complicated issue of whether there is a substantive right to marijuana.

C. Criticisms to the Proposed Standard of Review

Some may argue that a bright-line rule that determines which of the three traditional standards of review should apply is attractive given its easy application and consistency, but this presents the problem that a court, after determining the proper standard of review, will analyze the case only as vigorously as the standard of review permits.¹⁹² This is why the standard of review is important, if not dispositive, to a case's outcome.¹⁹³ Additionally, if the outcome of the case is unjust, the standard of review is unlikely to change given that the determination of which standard of review applies is seldom given further consideration by subsequent courts.¹⁹⁴

Some may also argue that although rational basis may not be the appropriate standard of review, there are other standards of review—namely strict scrutiny and heightened rational basis—that could be employed.¹⁹⁵ In order to trigger strict scrutiny, the Supreme Court would have to decide that there is either a fundamental right or suspect class involved.¹⁹⁶ This is unlikely, as previously stated, given

other grounds, such as finding its scheduling provisions unconstitutional. The problem with this approach is that federal courts have never confronted this issue, and it is unclear whether such an argument would be successful. Another problem is that this would invalidate the entire CSA, thereby eliminating the only current uniform federal drug policy.

¹⁹² See generally, e.g., *Hoffman v. United States*, 767 F.2d 1431, 1436 (9th Cir. 1985) (stating in its application of rational basis that “[i]n applying the Fourteenth Amendment to most forms of state actions, reviewing courts should ‘seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose’” (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982))).

¹⁹³ See *supra* Section II.A.

¹⁹⁴ See generally *Bruno*, *supra* note 119, at 17; *Peters*, *supra* note 119, at 255–56 (explaining that “[m]any appellate courts merely cut and paste another court’s discussion on the standard of review into the opinion”).

¹⁹⁵ Because there is little support in both caselaw and academic literature for intermediate scrutiny being applied in this context and because intermediate scrutiny has generally been applied in cases involving discrimination on the basis of sex or illegitimacy, this Note does not explore intermediate scrutiny as an alternative standard of review. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting the types of cases where intermediate scrutiny has been applied).

¹⁹⁶ See *United States v. Pickard*, 100 F. Supp. 3d 981, 1003 (E.D. Cal. 2015); *Strict Scrutiny*, *supra* note 74.

that no court has yet recognized a fundamental right to use marijuana or has been persuaded by the argument that a suspect classification is involved.¹⁹⁷ In order to trigger heightened rational basis, a classification likely would have to be “based on animus or a desire to harm a politically unpopular group.”¹⁹⁸ Again, this standard is unlikely to be adopted as demonstrated by the fact no court has been persuaded by this argument.¹⁹⁹

A more specific criticism to the use of *Windsor*'s framework in the context here is that unlike in *Windsor*, where the Court did not believe Congress had the constitutional power to define marriage, the Court ruled in *Raich* that Congress had the constitutional power to regulate marijuana.²⁰⁰ This Note's proposed standard of review does not ignore this fact, nor does it require the Court to disaffirm its holding in *Raich*. Congress does have the constitutional power to regulate marijuana under the CSA if marijuana's inclusion and scheduling is *constitutional*. This question was not raised in *Raich*, and, in fact, the Court noted this possibility—that marijuana might be determined to be incorrectly scheduled—in *Raich*, in which it stated, “evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule

¹⁹⁷ See, e.g., *Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 683 (9th Cir. 2014); *Raich II*, 500 F.3d 850, 866 (9th Cir. 2007); *Pickard*, 100 F. Supp. 3d at 1003–04.

¹⁹⁸ *Pickard*, 100 F. Supp. 3d at 1005 (quoting *United States v. Wilde*, 74 F. Supp. 3d 1092, 1097 (N.D. Cal. 2014)).

¹⁹⁹ See, e.g., *United States v. Heying*, No. 14–CR–30 (JRT/SER), 2014 WL 5286153, at *4–6 (D. Minn. Aug. 15, 2014) (rejecting heightened rational basis standard and stating that the discriminatory intent of Congress, not President Nixon, must be shown). But it is worth noting that an interview of former President Nixon's domestic policy chief, John Ehrlichman, recently published in *Harper's Magazine*, provides further evidence of the discriminatory motive behind President Nixon's War on Drugs campaign. See Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016, 3:14 PM), <http://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie/>. In the interview, John Ehrlichman states,

We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin. And [sic] then criminalizing both heavily, we could disrupt those communities . . . Did we know we were lying about the drugs? Of course we did.

Id.

²⁰⁰ See Young & Blondel, *supra* note 149, at 141.

I.”²⁰¹

IV. NON-JUDICIAL SOLUTIONS

Some may argue that non-judicial approaches are more preferable and practical solutions,²⁰² but a judicial solution would resolve the marijuana conundrum more effectively and efficiently than a legislative or executive solution. The judicial branch is in a better position to solve this problem given the problems of permanency inherent to executive solutions and the problems that arise from the cumbersome legislative process. Resolution by the Supreme Court, specifically, would lead to a more uniform, comprehensive, and final solution. Although the judicial branch should spearhead this effort, it is important to note that the legislative and executive branches must still deal with lingering issues, including whether marijuana should be added back to the CSA under a different schedule or if a completely different statutory scheme for marijuana should be created.

One of the arguments in favor of a legislative approach is that it is more akin to the values of democracy, as the members of Congress are arguably more connected to their constituents than the executive branch or the unelected judicial panel of nine, i.e., the Supreme Court. However, the divergent ideas and political loyalties of congressional members and the cumbersome legislative process have resulted in no meaningful change on the marijuana front since the CSA was enacted. Several bills regarding marijuana reform have been proposed by Congress, but to date, none have succeeded.²⁰³ The Compassionate Access, Research Expansion and Respect States Act of 2015 (“CARERS Act”)²⁰⁴ was introduced in 2015 but has not come up for a vote.²⁰⁵ The

²⁰¹ See *Gonzales v. Raich*, 545 U.S. 1, 27 n.37 (2005).

²⁰² See, e.g., Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL’Y & L. 43, 70–80 (2009) (calling for legislative and executive solutions); Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE W. RES. L. REV. 689, 699–717 (2015) (outlining several marijuana reforms proposals all stemming from Congress); Grace Wallack & John Hudak, *Marijuana Rescheduling: A Partial Prescription for Policy Change*, 14 OHIO ST. J. CRIM. L. 207, 215 (2016) (noting that because executive power is limited, “changes must come from Congress”).

²⁰³ See, e.g., Ending Federal Marijuana Prohibition Act of 2011, H.R. 2306, 112th Cong. (2011); Personal Use of Marijuana by Responsible Adults Act of 2009, H.R. 2943, 111th Cong. (2009); States’ Rights to Medical Marijuana Act, H.R. 2087, 109th Cong. (2005).

²⁰⁴ Compassionate Access, Research Expansion, and Respect States Act of 2015, S. 683, 114th Cong. (2015).

²⁰⁵ See Rita Rubin, *Many States Have Legalized Medical Marijuana, so Why Does*

CARERS Act would, inter alia, exempt from the CSA those who “produc[e], possess[], distribut[e], dispens[e], administ[er], . . . test[], or deliver[] . . . medical marijuana” legally under state law; would transfer marijuana to Schedule II of the CSA; and would allow Department of Veterans Affairs health care providers to provide veterans with recommendations and opinions regarding participation in state marijuana programs.²⁰⁶ Although this bill could lead to some substantial changes, it is unlikely to pass anytime soon for two main reasons. First, this bill was referred to the Committee on the Judiciary over a year and a half ago and has remained there ever since.²⁰⁷ One writer has described referral to a committee as sentencing a bill to “the oblivion of committees.”²⁰⁸ Second, given the 2016 election, where the Republicans maintained control of both the House and Senate,²⁰⁹ it is unclear whether the bill could even garner enough votes. It is also important to note that some would argue that marijuana should not even be on the CSA, let alone a Schedule I substance.²¹⁰ Thus, the legislative reshuffling of marijuana in the CSA would not resolve the bigger issue of whether marijuana should be included in the CSA at all, and, if so, what schedule it should be placed under.

Any action by the executive branch has the benefit of not having to go through the cumbersome legislative process, but has the downside of being limited in duration. Executive action is only a temporary solution that can be immediately overturned by the next incoming President.²¹¹ Executive action thus would only serve as a temporary

DEA Still Say It Has No Therapeutic Use?, FORBES (Nov. 16, 2016, 10:32 AM), <http://www.forbes.com/sites/ritarubin/2016/11/16/many-states-have-legalized-medical-marijuana-so-why-does-dea-still-say-it-has-no-therapeutic-use/#3c6a820835a1>.

²⁰⁶ S. 683 §§ 2–3, 6–8.

²⁰⁷ See *id.*; see also 161 CONG. REC. S1,385 (daily ed. Mar. 10, 2015) (statement of Sen. Booker); Chris Roberts, *Will Congress Reschedule Marijuana?*, SF WEEKLY (Feb. 2, 2016), <http://www.sfweekly.com/sanfrancisco/news-cannabis-obama-rescheduling-controlled-substances-act-earl-blumenauer/Content?oid=4448416>.

²⁰⁸ See Roberts, *supra* note 207.

²⁰⁹ Eric Bradner, *Republicans Keep Control of Congress*, CNN: POLITICS (Nov. 9, 2016, 3:08 AM), <http://www.cnn.com/2016/11/08/politics/congress-balance-of-power-2016-election/>.

²¹⁰ See, e.g., Paul Armentano, *It Is Time to Deschedule, Not Reschedule, Cannabis*, NORML BLOG (Apr. 6, 2016), <http://blog.norml.org/2016/04/06/it-is-time-to-deschedule-not-reschedule-cannabis/>; Armentano, *supra* note 97; Chris Weigant, *Taking Marijuana Reform Seriously*, HUFFINGTON POST: BLOG (Oct. 14, 2016), http://www.huffingtonpost.com/chris-weigant/taking-marijuana-reform-s_b_8297992.html.

²¹¹ See Weigant, *supra* note 210.

amnesty from prosecution under federal law. In addition, under the executive branch, the process of rescheduling marijuana must begin either by the DEA's self-initiation, by request of the Secretary of Health and Human Services, or by a rescheduling petition to the DEA.²¹² In the highly unlikely case that the rescheduling process is initiated, the DEA would then request a "binding 'scientific and medical evaluation'" and "a recommendation for appropriate scheduling" from the Food and Drug Administration.²¹³ Given that research into marijuana is extremely limited and its potential for growth lies solely in the control of the federal government,²¹⁴ it is highly unlikely that under the current regime scientific evidence will be found that would lead to the rescheduling of marijuana. Additionally, rescheduling marijuana would only make marijuana legal for medical use pursuant to a prescription and not for recreational use.²¹⁵

Some scholars, such as Erwin Chemerinsky, a leading expert on drug laws, have suggested leaving the federal prohibition on marijuana intact but allowing states to opt out of the CSA provisions so long as they meet the criteria outlined in the 2013 Cole Memorandum.²¹⁶ This approach is said to strike an ideal federalism balance because it would allow for state experimentation with marijuana regulation while also allowing for the enforcement of federal laws in those states that have not opted out.²¹⁷ But one major problem with this is that it still does

²¹² See 21 U.S.C. § 811(a) (2012); Cong. Research Serv., *The Legal Process to Reschedule Marijuana*, CRS LEGAL SIDEBAR (Nov. 2, 2015, 10:35 AM), <https://www.fas.org/sgp/crs/misc/reschedule.pdf>; *supra* note 97. Rescheduling through one of these avenues is improbable given that the DEA is unlikely to initiate the rescheduling petition on its own and because the DEA has never rescheduled marijuana despite numerous marijuana rescheduling petitions. See generally *supra* Section II.C (discussing multiple times the DEA has denied rescheduling petitions).

²¹³ See Cong. Research Serv., *supra* note 212 (quoting 21 U.S.C. § 811(b) (first quotation)).

²¹⁴ See *id.*; Kristen Wyatt, *Colorado Publishes Review of Marijuana Health Research*, GAZETTE (Feb. 2, 2015, 1:06 PM), <http://gazette.com/colorado-publishes-review-of-marijuana-health-research/article/1545633>; *supra* notes 110–114 and accompanying text.

²¹⁵ See Grace Wallack & John Hudak, *Clearing Up Misconceptions About Marijuana Rescheduling: What It Means for Existing State Systems*, BROOKINGS: FIXGOV (May 27, 2016), <https://www.brookings.edu/blog/fixgov/2016/05/27/clearing-up-misconceptions-about-marijuana-rescheduling-what-it-means-for-existing-state-systems/>; Will Yakowicz, *Can the Next U.S. President Reschedule Marijuana?*, INC. (Aug. 17, 2016), <http://www.inc.com/will-yakowicz/can-the-next-us-president-reschedule-marijuana.html>.

²¹⁶ See, e.g., Chemerinsky et al., *supra* note 2, at 80; Kreit, *supra* note 202, 706–07.

²¹⁷ See Chemerinsky et al., *supra* note 2, at 80–81.

not address the larger issue: whether the classification of marijuana as a Schedule I substance is constitutional. Also, for those who feel medical marijuana should be permitted in all states, this cooperative federalism approach would not ensure a uniform medical marijuana policy.

CONCLUSION

Currently, any challenge to the constitutionality of marijuana's scheduling or to the DEA's denial of a petition for rescheduling has been shrouded from meaningful judicial review through the employment of two highly deferential standards of review—rational basis review and arbitrary and capricious review.²¹⁸ But given the federalism principles and personal liberties at stake, the significant change in society's attitudes towards marijuana, and the legalization of marijuana in some form in over half of the states, the time has come to rethink the standard of review in marijuana cases. The federalism framework in *United States v. Windsor* provides the ideal standard of review when deciding the constitutionality of marijuana's inclusion and scheduling in the CSA. Like in *Windsor*, the situation here involves a federal law that displaces state laws and deprives citizens of the rights afforded to them by their states. One of the bedrocks of the federal government is that individual and state rights should be honored above all but the most important federal imperatives, and this Note's proposed standard of review would finally allow for meaningful judicial review of whether the federal government's prohibition on marijuana is such an important federal imperative that it should be honored above individual and state rights.

²¹⁸ See *supra* Sections II.C–D.