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## HEALTH EQUITY, FEDERALISM, AND CANNABIS POLICY

NICOLE HUBERFELD\*

### ABSTRACT

*Cannabis policy is a story of complexity and dynamism laced with tension and inequity. Policy makers' views are rapidly changing, reflected by many bills sitting before Congress. This Essay considers three of the major bills that have a more comprehensive approach to cannabis. These bills also take different approaches to the flipped federalism that could occur if the federal government were to suddenly decriminalize cannabis. The Essay next considers the state law landscape and compares it to Medicaid expansion under the Affordable Care Act, drawing a comparison to learn health equity lessons from recent health reform efforts. Federal legislation is needed and should at least reschedule marijuana under the Controlled Substances Act. But it should also create a legalization baseline that would improve the underlying determinants of health, which have been deeply affected by the fifty-year war on drugs. Additionally, Congress should consider how to make states into policy-making partners to more quickly entrench such a substantial policy shift. While states have been leading in cannabis policy making through the last decade, federal responsibility for major aspects of the legal landscape suggests that a federal response should take the lead and invite states to partner. Otherwise, the predictable variability of state law will continue to harm the health of already vulnerable populations.*

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## INTRODUCTION

One in three Americans live in states where individuals over the age of twenty-one can legally use cannabis,<sup>1</sup> reflecting a decade-long trend of decriminalization and legalization of marijuana for medical purposes, recreational purposes, or both.<sup>2</sup> Just eight years ago, only two states (Colorado and Washington) had legalized marijuana for recreational use.<sup>3</sup> The decriminalization and legalization of cannabis has come about through state voter ballot initiatives and legislative actions. For all of the recent policy movement, the goals in taking such action remain somewhat opaque. Is the primary driver criminal justice reform? Mitigating harms to communities targeted by the war on drugs? Safe medical access? Tax collection? The reasons are as varied as the states' laws, which stand in tension with federal law—namely, the Controlled Substances Act (“CSA”), which formally prohibits every use of marijuana.<sup>4</sup>

In 1996, California voters began the contemporary path to decriminalization through the Compassionate Use Act, which facilitated medical marijuana use.<sup>5</sup> Opinion polls indicate that regardless of political party affiliation, the public now generally supports cannabis reform, with the greatest support for medical

<sup>1</sup> Natalie Fertig & Mona Zhang, *1 in 3 Americans Now Lives in a State Where Recreational Marijuana Is Legal*, POLITICO (Nov. 4, 2020, 5:31 AM), <https://www.politico.com/news/2020/11/04/1-in-3-americans-lives-where-recreational-marijuana-legal-434004> [<https://perma.cc/SX3X-553B>].

<sup>2</sup> Marijuana is a common but controversial term, as its origins appear to reflect stoking of anti-Mexican prejudice in the 1930s. See Christopher Ingraham, *'Marijuana' or 'Marihuana'? It's All Weed to the DEA*, WASH. POST (Dec. 16, 2016, 7:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2016/12/16/marijuana-or-marihuana-its-all-weed-to-the-dea/>. Cannabis is the scientific terminology for the plant. *Cannabis (Marijuana) and Cannabinoids: What You Need to Know*, NAT'L CTR. FOR COMPLEMENTARY & INTEGRATIVE HEALTH [hereinafter *Cannabis and Cannabinoids*], <https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know> [<https://perma.cc/ET7D-SUYQ>] (last updated Nov. 2019). Advocates seeking to eliminate ties to the fraught and racialized history of drug regulation tend to favor the term cannabis, but some advocates still use the term marijuana. See Mariah Woelfel, *Pot? Weed? Marijuana? What Should We Call It?*, NPR (Sept. 19, 2019), <https://www.npr.org/local/309/2019/09/19/762044859/pot-weed-marijuana-what-should-we-call-it> [<https://perma.cc/VQ9M-C64D>]. This Essay uses both, reflecting current division in terminology preference. See *id.*

<sup>3</sup> Christina Ng, Abby Phillips & Clayton Sandell, *Colorado, Washington Become First States to Legalize Recreational Marijuana*, ABC NEWS (Nov. 6, 2012, 11:49 AM), <https://abcnews.go.com/Politics/OTUS/colorado-washington-states-legalize-recreational-marijuana/story?id=17652774> [<https://perma.cc/5SPK-DSGY>].

<sup>4</sup> 21 U.S.C. §§ 801-904.

<sup>5</sup> See CAL. HEALTH & SAFETY CODE § 11362.5 (West 2021); see also *Gonzales v. Raich*, 545 U.S. 1, 32-33 (2005); George J. Annas, *Reefer Madness – The Federal Response to California's Medical-Marijuana Law*, 337 NEW ENG. J. MED. 435, 435-38 (1997) (discussing the Compassionate Use Act and efforts to reschedule marijuana to Schedule II, which began shortly after the CSA was enacted).

marijuana laws.<sup>6</sup> Yet, a disconnect seems to exist between public support for medical marijuana and the reality of deeply disparate drug-enforcement efforts. Marijuana-related arrests comprise more than 40% of all drug arrests in the United States, and Black Americans are nearly four times more likely to be arrested for marijuana possession than white Americans.<sup>7</sup> This deep disparity exists even in states that have decriminalized or legalized marijuana possession.<sup>8</sup>

Medical marijuana laws create an exception to criminal rules, a policy choice that does not necessitate developing a comprehensive regulatory regime. State decriminalization of cannabis is sometimes accompanied by legalization and regulation,<sup>9</sup> and each state has addressed decriminalization/legalization somewhat differently. The spectrum of approaches ranges from permitting only noncommercial medical use, to full legalization for adults with attendant licensure schemes for new businesses, to expungement of criminal records, to opportunities for communities harmed by the war on drugs, to decriminalization of other drugs in addition to cannabis.<sup>10</sup> States appear to be learning from one

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<sup>6</sup> See generally John Hudak & Christine Stenglein, *Public Opinion and America's Experimentation with Cannabis Reform*, in MARIJUANA FEDERALISM 15, 31 (Jonathan H. Adler ed., 2020).

<sup>7</sup> ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 7 (2020), [https://www.aclu.org/sites/default/files/field\\_document/tale\\_of\\_two\\_countries\\_racially\\_targeted\\_arrests\\_in\\_the\\_era\\_of\\_marijuana\\_reform\\_revised\\_7.1.20\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/tale_of_two_countries_racially_targeted_arrests_in_the_era_of_marijuana_reform_revised_7.1.20_0.pdf) [https://perma.cc/8HHN-KE8Q]. The report summarizes:

In 2018, there were almost 700,000 marijuana arrests, which accounted for more than 43% of all drug arrests. In fact, in 2018, police made more marijuana arrests than for all violent crimes combined, according to the FBI. Further, it is not clear that marijuana arrests are trending down—they have actually risen in the past few years, with almost 100,000 more arrests in 2018 than 2015. This rise in marijuana arrests has been driven by states in which marijuana is still illegal, whereas between 2010 and 2018, marijuana arrests were significantly lower in states that had legalized and went down modestly in states that had decriminalized. Consistent with our previous report, the majority of marijuana arrests—nine out of every 10—were for possession.

Equally as troubling, this report finds that stark racial disparities in marijuana possession arrests have remained unchanged nationwide. On average, a Black person is 3.64 times more likely to be arrested for marijuana possession than a white person, even though Black and white people use marijuana at similar rates.

*Id.* at 5.

<sup>8</sup> *Id.* at 8, 32 tbl.7 (noting that state-by-state arrest rates vary widely, with some states as much as ten times more likely to arrest Black people for marijuana-related offenses).

<sup>9</sup> See Angela Dills, Sietse Goffard & Jeffrey Miron, *The Effect of State Marijuana Legalizations: An Update*, in MARIJUANA FEDERALISM, *supra* note 6, at 35, 37-42 (detailing history and variety of state actions decriminalizing and legalizing cannabis).

<sup>10</sup> Jonathan H. Adler, *Introduction to MARIJUANA FEDERALISM*, *supra* note 6, at 1, 5-7 (summarizing progression and range of state laws addressing cannabis use); see also Scott Akins & Clayton Mosher, *Oregon Just Decriminalized All Drugs – Here's Why Voters Passed This Groundbreaking Reform*, CONVERSATION (Dec. 10, 2020, 8:36 AM), <https://theconversation.com/oregon-just-decriminalized-all-drugs-heres-why-voters-passed-this-groundbreaking-reform-150806?utm> [https://perma.cc/QW2N-ULKJ].

another's statutory schemes, engaging in "horizontal federalism."<sup>11</sup> Unto itself, this horizontal federalism is not inherently positive, as states do not always engage in evidence-based policy making, but it may help states and the businesses dealing with new legalization regimes to navigate rough federal waters.

State legalization laws conflict directly with the federal statutory scheme of the CSA, which schedules marijuana as an illegal substance with no legal exceptions because it is deemed to have no medical benefits.<sup>12</sup> While executive policies have buffered this conflict, federal law remains hostile to marijuana used or sold for any purpose.<sup>13</sup> This approach contradicts evidence in the medical literature indicating that cannabis has multiple medical purposes that merit deeper study.<sup>14</sup> That deeper study is hampered by federal law prohibiting any use of marijuana, as federal funds are largely unavailable for scientific studies of illegal substances. But health concerns run deeper than marijuana's medical uses.

The decriminalization/legalization movement has been marching in one direction rather rapidly, and federal legislative action seems more likely than ever before. The Biden Administration has signaled support for decriminalization,<sup>15</sup> and several bills that reschedule marijuana sit before Congress.<sup>16</sup> Federal marijuana rescheduling would begin to mitigate the harms of decades of discriminatory drug-related arrests and convictions.

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<sup>11</sup> See Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1694, 1700, 1733-46, 1772-76 (2018) (discussing horizontal federalism in context of Medicaid expansion and health insurance exchange implementation under the ACA).

<sup>12</sup> 21 U.S.C. § 812(b)-(c).

<sup>13</sup> The Ogden and Cole Memoranda to Department of Justice Attorneys limited prosecution for marijuana possession so long as the possession was consistent with state law. Memorandum from David W. Ogden, Deputy Att'y Gen., DOJ, to Selected U.S. Att'ys (Oct. 19, 2009) [hereinafter Ogden Memorandum], [www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf](http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf) [https://perma.cc/4CBU-KMUC]; Memorandum from James M. Cole, Deputy Att'y Gen., DOJ, to U.S. Att'ys (June 29, 2011) [hereinafter Cole Memorandum], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [https://perma.cc/BX5K-XMJS]. Federal conflict is resolved slightly by the appropriation rider that creates a presumption against cannabis prosecution. See Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 531, 133 Stat. 2317, 2431. But the conflict between state and federal law is significant enough that the Congressional Research Service wrote a monograph. See TODD GARVEY, CONG. RSCH. SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS (2012), <https://fas.org/sgp/crs/misc/R42398.pdf> [https://perma.cc/8W87-M4XU].

<sup>14</sup> See *Cannabis and Cannabinoids*, *supra* note 2 (describing medically indicated uses for cannabis).

<sup>15</sup> Tim Craig, *Biden, Once a Warrior in the 'War on Drugs,' May Slowly Retreat*, WASH. POST (Jan. 11, 2021, 8:00 AM), <https://www.washingtonpost.com/politics/2021/01/11/biden-war-on-drugs/>.

<sup>16</sup> See, e.g., Marijuana 1-to-3 Act of 2021, H.R. 365, 117th Cong. (2021).

Decriminalization is just the beginning; legalization offers an opportunity to craft a statutory scheme that addresses the many goals reflected in state laws so far. The war on drugs has exacerbated nearly every underlying determinant of health—from incarceration, to wealth, to education, to political participation<sup>17</sup>—and federal legalization offers an opportunity to address health equity more comprehensively than the somewhat narrow issue of medical marijuana.

Cannabis policy is a story of complexity and dynamism but also tension and inequity. In recognition that policy makers' views are rapidly changing, Part I of this Essay first considers three of the major bills currently before Congress, chosen for their more comprehensive approach to cannabis as well as the ways that they address federalism concerns. Next, Part I considers the state law landscape and compares it to Medicaid expansion under the Affordable Care Act ("ACA"), drawing a comparison to learn health equity lessons from recent health reform efforts. Part II concludes that federal legislation should reschedule marijuana under the CSA but should also create a legalization baseline that would improve the underlying determinants of health so deeply affected by the fifty-year war on drugs. Further, Congress should consider what it would take to make states agreeable partners if it is to succeed with a substantial policy shift. While states have been leading over the last several years, federal responsibility for the major features of the legal landscape suggests that a federal response should account for the need to have states engage with federal policy. Otherwise, state law variability will continue to harm the health of already vulnerable populations.

#### I. DECRIMINALIZATION, LEGALIZATION, AND FEDERAL/STATE CONFLICT

Cannabis sits at a cross section of key policy matters, including medicine, public health, criminal justice, constitutional interpretation, and democratic engagement. These matters became more pronounced during 2020, a year in which health and economic disparities were elevated through the COVID-19 pandemic, the Black Lives Matter movement, and the presidential election.<sup>18</sup> These are issues that raise national questions and are shaped by major federal law. The national questions have been addressed to a degree through executive action, but until recently, Congress has not appeared willing to amend the CSA or to otherwise deal with increasingly prominent cannabis questions.

##### A. *Federal Landscape*

The CSA classifies marijuana, along with other substances such as peyote, LSD, and heroin, as a Schedule I drug.<sup>19</sup> This means the formal federal policy is that marijuana has no recognized medical use, a high potential for abuse, and the

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<sup>17</sup> See generally MARC MAUER & RYAN S. KING, SENT'G PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY (2007).

<sup>18</sup> See Emily Badger, *Inequality Was Never So Visible as in 2020. What Did We Learn?*, N.Y. TIMES, Dec. 29, 2020, at B3.

<sup>19</sup> 21 U.S.C. § 812(c) Schedule I.

possibility of dependence.<sup>20</sup> While some states agree with this approach and choose to work with federal law enforcement, states are not obligated to enforce federal laws.<sup>21</sup> Those states that have enacted new laws decriminalizing and legalizing cannabis do so under an umbrella of federal illegality, creating risk for those who use cannabis and those who sell it, especially in states that move beyond decriminalization to legalization with a regulatory scheme. During the Obama Administration, the Cole and Ogden Memoranda instructed U.S. Attorneys to refrain from prosecuting individuals in compliance with state laws that legalize and regulate cannabis, creating a sort of safe harbor.<sup>22</sup> But this subregulatory guidance was reversed early on in the Trump Administration and became a source of controversy and uncertainty.<sup>23</sup>

Perhaps tellingly, the fifty-year-old CSA has come under fire from key policy makers at both the federal and state levels. Despite long-standing reluctance to revisit the CSA's schedule system, a number of major bills addressing cannabis policy are before Congress, three of which are discussed here. The most comprehensive, sponsored by Senator Cory Booker for several years, is called the Marijuana Justice Act.<sup>24</sup> This bill amends the CSA, decriminalizing cannabis by removing "marihuana" and other references to cannabinoids from the list of scheduled substances and eliminating criminal penalties for individuals who import, export, manufacture, distribute, or possess with intent to distribute marijuana.<sup>25</sup> Following through on decriminalization, the bill instructs federal courts to expunge convictions for marijuana use and possession.<sup>26</sup> Notably, the bill would reduce federal funding for prison or jail construction for any state that has not legalized marijuana and that has a disproportionate arrest or incarceration rate for marijuana-related criminal offenses.<sup>27</sup> It also establishes the Community Reinvestment Fund, which would offer grants to support communities most affected by the war on drugs by providing job training and

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<sup>20</sup> See *Drug Scheduling*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/drug-scheduling> [<https://perma.cc/3KBA-D9VW>] (last visited Apr. 13, 2021).

<sup>21</sup> See *Printz v. United States*, 521 U.S. 898, 928 (1997) (holding that state officials cannot be "dragooned" into enforcing federal laws (quoting *Mack v. United States*, 66 F.3d 1025, 1035 (9th Cir. 1995) (Fernandez, J., concurring and dissenting))); *New York v. United States*, 505 U.S. 144, 175-76 (1992) (holding that federalism prevents the federal government from "commandeer[ing]" states for federal regulatory purposes).

<sup>22</sup> Cole Memorandum, *supra* note 13; Ogden Memorandum, *supra* note 13.

<sup>23</sup> See Memorandum from Jefferson B. Sessions, III, Att'y Gen., DOJ, to All U.S. Att'ys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/CN3F-5Z8N>].

<sup>24</sup> Marijuana Justice Act of 2019, S. 597, 116th Cong. (2019).

<sup>25</sup> *Id.* § 2.

<sup>26</sup> *Id.* § 3(c).

<sup>27</sup> *Id.* § 3. The Marijuana Justice Act defines disproportionate arrest rate as occurring when "the percentage of minority individuals arrested for a marijuana related offense in a State is higher than the percentage of the non-minority individual population of the State, as determined by the most recent census data." *Id.* § 3(a)(2)(A).



reentry services, paying for expenses related to expungement, funding public libraries and community centers, paying for youth programming, and creating health education programs, among other programs.<sup>28</sup> In addition to this bill, Senator Booker has cosponsored other, less comprehensive bills, such as the Fair Chance to Compete for Jobs Act, which prohibits the federal government from inquiring about criminal convictions in the hiring process.<sup>29</sup> The Record Expungement Designed to Enhance Employment Act—reintroduced in 2019 with an identical House bill called the Next Step Act<sup>30</sup>—would seal criminal records for adults and juveniles, expunge some juvenile records, and lift the federal ban on Supplemental Nutrition Assistance Program (“SNAP”) and Temporary Assistance for Needy Families (“TANF”) benefits for people convicted of nonviolent drug-related crimes.<sup>31</sup> The Compassionate Access, Research Expansion, and Respect States Act (“CARES Act”) would legalize medical marijuana.<sup>32</sup>

The Marijuana Opportunity Reinvestment & Expungement Act (“MORE Act”), sponsored in the Senate by then-Senator Kamala Harris<sup>33</sup> and passed by the House on December 4, 2020, also decriminalizes cannabis by amending the CSA and removing marijuana from Schedule I.<sup>34</sup> Senator Booker is a cosponsor, and like the Marijuana Justice Act, this bill eliminates criminal penalties for an

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<sup>28</sup> *Id.* § 4.

<sup>29</sup> Fair Chance to Compete for Jobs Act of 2019, S. 387, 116th Cong. (2019).

<sup>30</sup> Next Step Act of 2019, H.R. 1893, 116th Cong. (2019).

<sup>31</sup> Next Step Act of 2019, S. 697, 116th Cong. (2019).

<sup>32</sup> CARES Act of 2017, S. 1764, 115th Cong. (2017). Senator Booker introduced this bill in 2017 to counteract then–Attorney General Jeff Sessions’s goal of renewing DOJ prosecution in all drug cases, including those involving marijuana. *See* Matt Laslo, *Medical Marijuana Bill Aims to Fight Jeff Sessions’ Renewed War on Drugs*, ROLLING STONE (June 16, 2017, 3:05 PM), <https://www.rollingstone.com/politics/politics-news/medical-marijuana-bill-aims-to-fight-jeff-sessions-renewed-war-on-drugs-194046>.

<sup>33</sup> MORE Act of 2019, S. 2227, 116th Cong. (2019).

<sup>34</sup> MORE Act of 2020, H.R. 3884, 116th Cong. (2020); *Actions Overview H.R. 3884 — 116th Congress (2019-2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/3884/actions> [<https://perma.cc/Ry34-DU3B>] (last visited Apr. 13, 2021). Former Massachusetts Cannabis Control Commissioner Shaleen Title expressed concern that this bill is a compromise.

What happens with federal legalization obviously depends on . . . who controls the [US] Senate. In general, though, it’s hard to be excited about Biden. He was the only serious Democratic candidate who didn’t support legalization and seems to think putting drug users in mandatory treatment is a policy to be proud of. . . .

And based on what we saw recently with the MORE Act, I’m not sure today’s federal legalization bills fully reflect the lessons we’ve learned at the state level. . . . Obviously it was historic for the [US] House to pass that bill and it would stop some of the arrests that have devastated people, but we’ve done too much work and come too far to just settle.

Dan Adams, *Q&A with Outgoing Cannabis Commissioner Shaleen Title*, BOS. GLOBE (Dec. 29, 2020, 1:12 PM), <https://www.bostonglobe.com/2020/12/29/marijuana/qa-with-outgoing-cannabis-commissioner-shaleen-title/> (second and fifth alterations in original).

individual who manufactures, distributes, or possesses marijuana and rectifies some historical prejudices by replacing statutory references to “marijuana” and “marihuana” with “cannabis.”<sup>35</sup> The bill also seeks to address economic equity issues: for example, it requires the Bureau of Labor Statistics to publish demographic data on cannabis business owners and employees; establishes a fund to support programs and services for individuals and businesses in communities impacted by the war on drugs, paid for in part by a 5% tax on cannabis products; and makes Small Business Administration loans and services available to cannabis-related businesses or service providers.<sup>36</sup> The MORE Act prohibits denial of federal public benefits and denial of benefits and protections under immigration laws on the basis of cannabis-related convictions.<sup>37</sup> This bill also establishes a process to expunge convictions and conduct sentence review hearings related to federal offenses.<sup>38</sup> The MORE Act is nearly as comprehensive as Senator Booker’s Marijuana Justice Act, but it lacks the automatic expungement provision and does not support communities as robustly. It also does not penalize states that choose not to follow the amended federal approach.

The Marijuana Freedom and Opportunity Act sponsored by Senator Chuck Schumer also amends the CSA and decriminalizes marijuana by removing it from Schedule I and eliminating criminal penalties for use and possession.<sup>39</sup> Similar to the MORE Act, this bill establishes a fund, this one targeted to assisting women- and minority-owned cannabis businesses.<sup>40</sup> The bill requires federal research into the impact of cannabis use on highway safety and public health, authorizes federal restrictions on the marketing of cannabis-related products, and provides federal funds to state and local governments to expunge or seal convictions for cannabis possession.<sup>41</sup> The bill has another difference, stating: “Nothing in this Act, or an amendment made by this Act, may be construed to modify the authority of the Federal Government to prevent marijuana trafficking from States that have legalized marijuana to those that have not.”<sup>42</sup> This provision is explained by the bill’s press release, which asserted that the proposal would respect states’ rights and “allow[] states to continue to function as laboratories of democracy and ultimately decide how they will treat marijuana possession.”<sup>43</sup>

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<sup>35</sup> H.R. 3884 § 3.

<sup>36</sup> *Id.* §§ 4-6.

<sup>37</sup> *Id.* §§ 8-9.

<sup>38</sup> *Id.* § 10.

<sup>39</sup> Marijuana Freedom and Opportunity Act, S. 1552, 116th Cong. (2019).

<sup>40</sup> *Id.* § 3(c).

<sup>41</sup> *Id.* §§ 4-7.

<sup>42</sup> *Id.* § 8.

<sup>43</sup> Press Release, Senate Democrats, Schumer Introduces Marijuana Freedom and Opportunity Act - New Legislation Would Decriminalize Marijuana at Federal Level (June 27, 2018), <https://www.democrats.senate.gov/newsroom/press-releases/schumer-introduces->

The three major bills—the Marijuana Justice Act, MORE Act, and Marijuana Freedom and Opportunity Act—represent efforts at both decriminalization and legalization, and they present a range of federal and state governance possibilities. The Marijuana Justice Act addresses states’ key role in disparate arrest and conviction rates related to marijuana, which supports the new federal standards that the bill would create using monetary penalties.<sup>44</sup> Offering new funding or withholding federal funding is a common congressional tool for influencing state policy choices. This indirect regulatory approach does not run afoul of the coercion doctrine expressed in *NFIB v. Sebelius*,<sup>45</sup> as only 10% of federal funds for prison and jail construction would be jeopardized by state actions continuing prejudicial drug law enforcement.<sup>46</sup> It is difficult to predict whether this penalty could be high enough to influence state policy choice. Though, as *South Dakota v. Dole*<sup>47</sup> indicated, a mere 5% reduction in funding may be enough for states to feel pressure to change their laws.<sup>48</sup>

Any of these bills could create a flipped federalism dynamic from current law. Now, the federal government forbids marijuana use and sales entirely, but nearly two-thirds of states have decided to decriminalize and legalize cannabis.<sup>49</sup> If Congress were to amend the CSA to decriminalize or legalize marijuana, then the states that retain criminal penalties become the outliers facing a conflict with federal law. The states’ choice (or inaction) would continue the complexity of the current layered drug law regime and would keep the door open to significantly more drug arrests and convictions in those states.

The MORE Act and the Marijuana Freedom and Opportunity Act amend the federal baseline but do little to address this possibility that states could continue with opposing or conflicting policies. These two bills very likely do not offer enough incentive to states that resist decriminalization. Additionally, the Schumer-sponsored Marijuana Freedom and Opportunity Act contains a rule of construction retaining authority for the federal government to “prevent marijuana trafficking from States that have legalized marijuana to those that have not.”<sup>50</sup> This provision acknowledges that states may continue to criminalize most or all cannabis use after the federal government decriminalizes, which would conflict with the policy goals of an amended CSA. Federalism scholars may argue that this allows for the experiment of the states to continue, with each

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marijuana-freedom-and-opportunity-act -new-legislation-would-decriminalize-marijuana-at-federal-level [https://perma.cc/M82C-YLUZ].

<sup>44</sup> Marijuana Justice Act of 2019, S. 597, 116th Cong. § 3(b) (2019).

<sup>45</sup> 567 U.S. 519, 579 (2012) (plurality opinion).

<sup>46</sup> *See id.*; *see also* S. 597 § 3(b)(1).

<sup>47</sup> 483 U.S. 203 (1987).

<sup>48</sup> *Id.* at 211.

<sup>49</sup> *Deep Dive: Marijuana*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx> [https://perma.cc/8ZZ2-JKMY] (last visited Apr. 13, 2021).

<sup>50</sup> Marijuana Freedom and Opportunity Act, S. 1552, 116th Cong. § 8 (2019).

state choosing a policy that suits its priorities. The trouble is that such experiments sometimes fail even with seemingly optimal state laws in place.

B. *State Experiments, Variability, and Equity Concerns*

The notion that “competitive federalism” drives state policy innovation is undercut by the near impossibility that low-income people will move to or from their residence based on policy experimentation.<sup>51</sup> To the extent that people of color are more likely to be lower income and therefore less likely to be able to vote with their feet,<sup>52</sup> this means that the people most affected by states’ cannabis laws are also the least likely to be able to move based on policy preferences.

When Justice Brandeis’s iconic federalism dissent is quoted, the second part of his observation is often overlooked: “It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments *without risk to the rest of the country*.”<sup>53</sup> In the modern era, the likelihood that a given policy experiment will not pose risks that spill over to neighbor states or the nation as a whole is quite limited.

The Massachusetts community contracting program offers a cautionary tale. In 2016, when Massachusetts legalized marijuana possession, the state created a plan for not only ceasing arrests but also repairing the harms of the war on drugs. Massachusetts’ law required equity in commercial opportunities, foregrounding disproportionately harmed communities in the newly created legal cannabis regime.<sup>54</sup> But multiple town officials became the subject of a federal bribery investigation when they appeared to get greedy in the dispensary contracting process and demanded cash from start-up cannabis businesses.<sup>55</sup> In a state that takes health policy seriously—famously having been first to craft universal insurance coverage—it is notable that the outgoing cannabis commissioner described the reparative design of the state’s law as an ongoing

<sup>51</sup> See, e.g., Adler, *supra* note 10, at 5-6; see also JAMILA MICHENER, FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS 4-5 (2018) (reporting that low-income people become immobilized due to reliance on social programs like Medicaid as it exists in a particular state); Gluck & Huberfeld, *supra* note 11, at 1722-24 (noting that state policy action in health care can result in a race to the bottom because states cannot self fund).

<sup>52</sup> *Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCH. ASS’N (July 2017), <https://www.apa.org/pi/ses/resources/publications/minorities> [https://perma.cc/ZZM8-K2N6].

<sup>53</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added).

<sup>54</sup> See Adams, *supra* note 34 (discussing Cannabis Control Commission’s challenges and successes, including goal of achieving equity).

<sup>55</sup> Dan Adams, Felicia Gans & Naomi Martin, *Federal Grand Jury Investigating Municipal Marijuana Contracts*, BOS. GLOBE (Nov. 4, 2019, 7:44 PM), [https://www.bostonglobe.com/news/marijuana/2019/11/04/federal-grand-jury-investigating-municipal-marijuana-contracts/ftz2S54H5iiReLuPIOSWaL/story.html?p1=Article\\_Inline\\_Text\\_Link](https://www.bostonglobe.com/news/marijuana/2019/11/04/federal-grand-jury-investigating-municipal-marijuana-contracts/ftz2S54H5iiReLuPIOSWaL/story.html?p1=Article_Inline_Text_Link).

challenge.<sup>56</sup> Other states have followed this reparation-oriented model—recently New Jersey, though it softened the equity language of the Massachusetts law.<sup>57</sup>

Practically speaking, it is unrealistic to think that one state would be able to keep legalized drugs entirely within its borders, as the Supreme Court acknowledged in *Gonzales v. Raich*.<sup>58</sup> Congress controls this national and international market in cannabis through the commerce power because the market is almost never purely local. The person growing five pot plants on her windowsill is but one transaction away from the national market. In other words, to choose policy approaches as if states can contain their cannabis policies is to deny the reality of modern markets. Additionally, state control of a policy matter with deeply disparate and life-long implications for those affected by local laws is one way that disparities have been allowed to continue. To underscore the wide assortment of state approaches to cannabis law, and the implications of this state policy variety,<sup>59</sup> Figure 1 shows state cannabis legalization laws as of November 2020.<sup>60</sup>

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<sup>56</sup> See Adams, *supra* note 34.

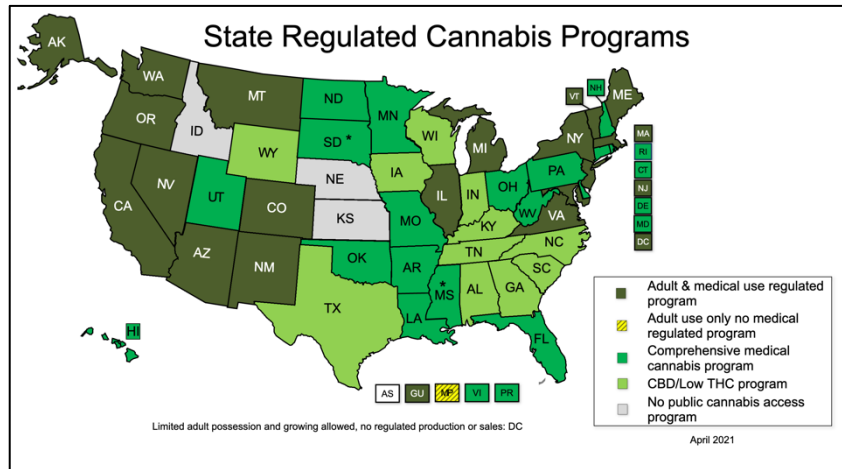
<sup>57</sup> See New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, S. 21, 219th Leg., Reg. Sess. (N.J. 2020).

<sup>58</sup> 545 U.S. 1, 32 (2005).

<sup>59</sup> See ACLU, *supra* note 7, at 7-9 (reporting state-by-state variability in cannabis laws, arrests, and conviction rates).

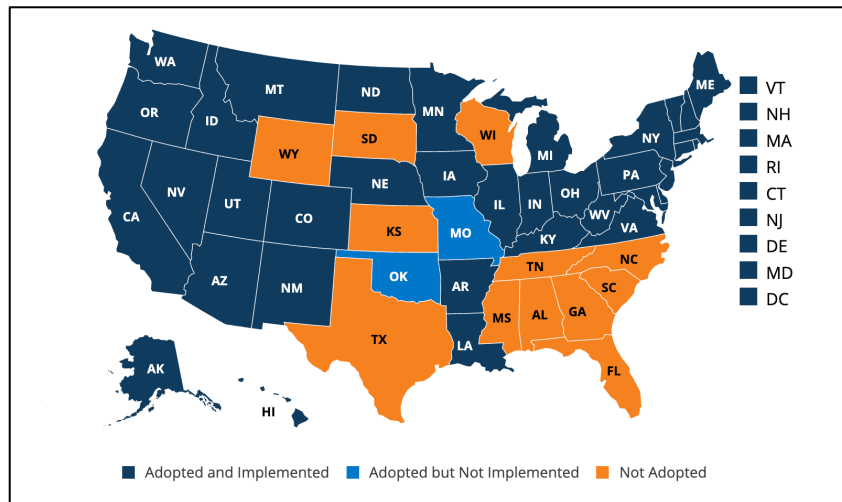
<sup>60</sup> *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/T47D-XBNS>] (last updated Apr. 5, 2021).

**Figure 1.** State Cannabis Programs.



It is striking that the cannabis law map looks much like the state Medicaid expansion map:<sup>61</sup>

**Figure 2.** Status of State Action on the Medicaid Expansion Decision.



<sup>61</sup> *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND., <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/> [<https://perma.cc/7B8H-7BZH>] (last updated Apr. 13, 2021).

If health equity is a national goal—which the federal government, in passing laws like the ACA, has indicated it is<sup>62</sup>—then leaving major policy change to the states invites policy inconsistency that may be not only suboptimal but also harmful. These maps provide snapshots that illustrate the significance of setting federal baselines if one goal of cannabis decriminalization is to mitigate the war on drugs’s impact on health. The war on drugs introduced a national statutory scheme designed to deter drug use with roots in racism. Fifty years of unceasing drug use across all demographics, but increasing incarceration of Black and Hispanic populations,<sup>63</sup> indicates that this “war” against President Nixon’s “public enemy number one”<sup>64</sup> should not have linked drugs and addiction with crime but rather with health care and social determinants of health. Senator Booker’s bill does this by withholding federal funds from states that continue to discriminate in drug law implementation.<sup>65</sup> Other bills allow states to continue to criminalize cannabis, hoping that the federal push will lead by example. Health reform efforts indicate that this may not be enough where deep disparities are entrenched.

## II. CAN WE LEARN FROM OTHER REFORM EFFORTS?

President Joe Biden has voiced some support for decriminalizing cannabis possession; however, his position while campaigning was that states should continue to set their own policies.<sup>66</sup> Scholars have written that this creates a federalism quandary for deciphering which aspects of federal law are supreme and which aspects of state law conflicting with federal law are permissible.<sup>67</sup> This quandary

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<sup>62</sup> See *Affordable Care Act (ACA)*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/affordable-care-act/> [<https://perma.cc/7P5X-36UF>] (last visited Apr. 13, 2021).

<sup>63</sup> DRUG POL’Y ALL., THE DRUG WAR, MASS INCARCERATION AND RACE 1 (2015), [https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DP\\_A\\_Fact\\_Sheet\\_Drug\\_War\\_Mass\\_Incarceration\\_and\\_Race\\_June2015.pdf](https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DP_A_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf) [<https://perma.cc/S45G-KDR8>].

<sup>64</sup> Much has been written on this topic. For a quick summary, see Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), <https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/>.

<sup>65</sup> Marijuana Justice Act of 2019, S. 597, 116th Cong. § 3(b) (2019).

<sup>66</sup> A Biden spokesperson stated that

[Biden] supports decriminalizing marijuana and automatically expunging prior criminal records for marijuana possession, so those affected don’t have to figure out how to petition for it or pay for a lawyer. . . . He would allow states to continue to make their own choices regarding legalization and would seek to make it easier to conduct research on marijuana’s positive and negative health impacts by rescheduling it as a schedule 2 drug . . . .

Max Greenwood, *Biden Backs Decriminalizing Marijuana*, HILL (May 16, 2019, 3:25 PM), <https://thehill.com/homenews/campaign/444105-biden-backs-decriminalizing-marijuana> [<https://perma.cc/EC66-YA5D>].

<sup>67</sup> Professor Robert A. Mikos has written extensively in this field. See, e.g., ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY (2017); Robert A. Mikos, *Murphy’s Mistake, and How to Fix It*, in MARIJUANA FEDERALISM, *supra* note 6, at 103 (discussing preemption concerns); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana*

should lead to the question whether states ought to be tasked with such policy making.

Common goals are valuable for supporting robust developments in law. To use the example of health reform, a similarly fraught policy space, common goals have been challenging to ascertain, with long-standing debate between private market advocates and collective-action social reformers as to whether health is a civil right in the United States. Yet, broad desire for universal coverage now seems to exist.<sup>68</sup> The common wisdom is that full stakeholder cooperation is needed to achieve any law that moves the policy needle meaningfully; a decade ago, this reality played out in crafting the ACA, with all industry stakeholders but few political partners coming to the table, leading to years of politically motivated litigation.<sup>69</sup> Similarly, cannabis decriminalization/legalization includes a wide variety of stakeholders and reflects their disparate goals, which makes state-based reform both easier (being closer to the people) and harder (being subject to capture).<sup>70</sup>

Would it be enough for the federal government to lead by example? The experience of the ACA and states holding out on Medicaid expansion indicates that the answer may be no. States refused expansion as a political matter, to the detriment of their health care providers and contrary to evidence that Medicaid expansion actually delivers inclusive coverage, better access to care, and improvements in underlying determinants of health.<sup>71</sup> Deep South and Central Midwest states have continued to opt out even during the pandemic, despite the evidence that their budgets would stabilize and their people would be healthier if they expanded.<sup>72</sup>

Learning from the example of Medicaid expansion, it matters whether and how the federal government acts beyond amending the schedules of the CSA. Some cannabis advocates seek decriminalization and improvements in criminal justice such as automatic expungement for drug-related crimes.<sup>73</sup> Others seek new sources

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*and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1419 (2009).

<sup>68</sup> Nicole Huberfeld, *Is Medicare for All the Answer? Assessing the Health Reform Gestalt as the ACA Turns 10*, 20 HOUS. J. HEALTH L. & POL'Y 69, 74 (2020).

<sup>69</sup> See, e.g., Abbe R. Gluck & Nicole Huberfeld, *Federalism Under the ACA: Implementation, Opposition, Entrenchment*, in *THE TRILLION DOLLAR REVOLUTION: HOW THE AFFORDABLE CARE ACT TRANSFORMED POLITICS, LAW, AND HEALTH CARE IN AMERICA* 176, 180 (Ezekiel J. Emanuel & Abbe R. Gluck eds., 2020).

<sup>70</sup> See *supra* note 55 and accompanying text (describing Massachusetts bribery scandal).

<sup>71</sup> MADELINE GUTH, RACHEL GARFIELD & ROBIN RUDOWITZ, KAISER FAM. FOUND., *THE EFFECTS OF MEDICAID EXPANSION UNDER THE ACA: UPDATED FINDINGS FROM A LITERATURE REVIEW* (2020), <http://files.kff.org/attachment/Report-The-Effects-of-Medicaid-Expansion-under-the-ACA-Updated-Findings-from-a-Literature-Review.pdf> [<https://perma.cc/8JR4-FV7H>].

<sup>72</sup> Nicole Huberfeld & Sidney Watson, *Medicaid's Vital Role in Addressing Health and Economic Emergencies*, in *ASSESSING LEGAL RESPONSES TO COVID-19*, at 103, 104 (Scott Burris, Sarah de Guia, Lance Gable, Donna E. Levin, Wendy E. Parmet & Nicolas P. Terry eds., 2020), [https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f4d6578225705285562d0f0/1598908033901/COVID19PolicyPlaybook\\_Aug2020+Full.pdf](https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f4d6578225705285562d0f0/1598908033901/COVID19PolicyPlaybook_Aug2020+Full.pdf) [<https://perma.cc/6W53-9RXH>].

<sup>73</sup> E.g., John Washington, *He Was Arrested for Marijuana 17 Years Ago. Now It's Legal. So Why Is He Still Guilty of a Crime?*, VOX (Dec. 10, 2020, 10:15 AM),



of tax revenue to fill state budgetary shortfalls.<sup>74</sup> Others want to support or suppress a powerful, tobacco-like industry on the rise.<sup>75</sup> Some seek economic equity by assisting communities harmed by the war on drugs, and others see a chance to improve health equity by developing prescription drug safety and efficacy, improving pain management, and increasing access to care. Others see potential for harm reduction by exploring more deeply the possibilities of cannabis as a mitigating feature of substance use disorder treatment.<sup>76</sup> Still others want to protect minors, seeing parallels to alcohol and tobacco use and the damage they inflict on developing biological systems.<sup>77</sup> Each of these goals requires more than decriminalization—they also require novel forms of regulation.

A health equity lens may provide focus. Public health seeks to minimize risk and reduce harm, translating evidence into law and policy that prioritizes underlying determinants of health. Disparate enforcement of drug use has measurably harmed health by, for example, cutting off needed access to medical care for people targeted by law enforcement and overincarcerating populations already disadvantaged by structural racism and health disparities both within the criminal justice system and in the health care system.<sup>78</sup> Federalism as a governance structure continues these disparities, allowing state-by-state differences in law that increase risks to health.

Each of the three major federal bills discussed above recognizes the conflict between state and federal law that would continue if Congress amends Schedule I of the CSA because, although many states have been on the legalization path, many will continue existing criminal regimes. Congress facilitated this problem and should address it both at the federal level and by ensuring that states want to engage with any shift in federal policy. The Marijuana Justice Act reflects a history-informed approach. Many studies show that the nation's drug policies have caused lasting harm, especially for Black people, Indigenous people, and other people of color. States have played a major role in these ongoing health disparities. Leaving policy choices in the hands of states risks continued health disparities between and within states while not addressing the actual problem of substance use disorder. While

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<https://www.vox.com/the-highlight/21749376/marijuana-expungements-biden-harris-conviction-drug-war>.

<sup>74</sup> E.g., Bernie Becker, *Cannabis Was Supposed to Be a Tax Windfall for States. The Reality Has Been Different.*, POLITICO: AGENDA (Oct. 14, 2019, 9:44 AM), <https://www.politico.com/agenda/story/2019/10/14/marijuana-tax-revenue-001062/> [<https://perma.cc/EAS3-JRB5>].

<sup>75</sup> See, e.g., Jonah Engel Bromwich, *Actually, Maybe Yes*, N.Y. TIMES, Nov. 8, 2020, at ST1 (noting states are using legalization to “fill coffers in the midst of a pandemic” and, observing size of industry that it is building reflects much more than hippie counterculture roots opposed by President Nixon).

<sup>76</sup> Honor Whiteman, *Marijuana May Help Combat Substance Abuse, Mental Health Disorders*, MED. NEWS TODAY (Nov. 16, 2016), <https://www.medicalnewstoday.com/articles/314159> [<https://perma.cc/TCQ6-BL4Y>].

<sup>77</sup> See generally Christian Hopfer, *Implications of Marijuana Legalization for Adolescent Substance Use*, 35 SUBSTANCE ABUSE 331 (2014).

<sup>78</sup> See, e.g., Erin Dehon, Nicole Weiss, Jonathan Jones, Whitney Faulconer, Elizabeth Hinton & Sarah Sterling, *A Systematic Review of the Impact of Physician Implicit Racial Bias on Clinical Decision Making*, 24 ACAD. EMERGENCY MED. 895 (2017).

Congress cannot force states to change their laws, it can do more than amend the CSA; for example, it could provide states with more funding to implement equity-promoting laws and/or withhold prison funding for continued disparate arrests and convictions.

#### CONCLUSION

Cultural attitudes regarding cannabis use have shifted significantly in the last decade.<sup>79</sup> For all the attention given to marijuana policy in recent years, and despite the polls indicating broad support for medical marijuana, little about the current landscape suggests that health is a primary driver in state policy making. Rather, state budgets appear to be.<sup>80</sup>

Congress is beginning to take up this fraught question, and the Biden Administration may support decriminalization, but some policy makers oppose even addressing these issues. Yet, it may be possible to oppose drug use and still to agree with the goal of decriminalizing and legalizing cannabis within robust legalization regimes.<sup>81</sup> The keystone may be underlying determinants of health, as this framework is widely accepted to be critical for responding to public health challenges.<sup>82</sup> Federal funding that supports state change but that does not reduce federal funding for discriminatory practices will miss an opportunity to entrench a massive federal policy shift through state partnership. The fact that Black populations are incarcerated at much greater rates than they represent in the total population and that incarceration is a lifelong harm that affects ability to earn stable income, accumulate wealth, access health care, attain education, and every other underlying determinant of health, takes priority over old-fashioned war on drugs controversy.

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<sup>79</sup> The popular opinion shift may extend to more drugs than cannabis. *See, e.g.*, Bromwich, *supra* note 75, at ST1 (assessing meaning of successful drug legalization voter initiatives in 2020 election cycle).

<sup>80</sup> Jeff Chapman, Adam Levin & Alexandria Zhang, *Can Revenue from Legalized Recreational Marijuana Help States Close Budget Gaps?*, PEW TRS. (Dec. 8, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/12/08/can-revenue-from-legalized-recreational-marijuana-help-states-close-budget-gaps> [https://perma.cc/7HCL-3EDT] (noting that advocates in the four states that legalized cannabis in 2020 touted budgetary benefits of new potential source of tax revenue).

<sup>81</sup> John Boehner provides such an example—while he was formerly an opponent of legalization, he is now the chairman of the National Cannabis Roundtable. *See* Bromwich, *supra* note 75, at ST1.

<sup>82</sup> *See, e.g.*, Nabarun Dasgupta, Leo Beletsky & Daniel Ciccarone, *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182, 182 (2018).