



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Law Review

Volume 6 | Issue 3

2019

Reefer Madness: The Constitutional Consequence of the Federal Government's Inconsistent Marijuana Policy

Zachary Ford

Texas A&M University School of Law, zachford718@gmail.com



Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), [Law and Politics Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Zachary Ford, *Reefer Madness: The Constitutional Consequence of the Federal Government's Inconsistent Marijuana Policy*, 6 TEX. A&M L. REV. 671 (2019).

Available at: <https://doi.org/10.37419/LR.V6.I3.4>

Articles in the Texas A&M Law Review are published under an irrevocable, nonexclusive, royalty-free license. Except as otherwise stated, copyright remains with the author. Nonprofit educational institutions may make copies if they credit the author and the Texas A&M Law Review and include proper copyright notice. For other uses, please contact the author or the Texas A&M Law Review directly.

COMMENTS

REEFER MADNESS: THE CONSTITUTIONAL CONSEQUENCE OF THE FEDERAL GOVERNMENT'S INCONSISTENT MARIJUANA POLICY

by: Zachary Ford

ABSTRACT

In the past twenty years, the United States has witnessed over half of its states create marijuana laws that expressly contradict the federal government's complete ban of the drug. Nine states have completely legalized marijuana for recreational use in the past five years alone. Meanwhile, much of the country remains staunchly opposed to legalization in any form. This difference between state and federal law has the largest negative impact on noncitizens, namely lawful permanent residents whom reside in states that follow the federal government's complete ban. Congress's Immigration and Nationality Act broadly defines "conviction," so even minor drug convictions under the Controlled Substances Act—like simple possession of marijuana—render lawful permanent residents deportable.

This problem is a constitutional violation because lawful permanent residents found possessing marijuana in a legal-regime state suffer no consequences; whereas one found possessing marijuana in an illegal-regime state is arrested and immediately taken to an immigration detention center to await potential deportation. This disparate treatment results from a sole difference between the two noncitizens: their geographic location. Thus, the federal government's failure to uniformly enforce its marijuana laws constitutes a violation of lawful permanent residents' Fourteenth Amendment right to equal protection. Although Congress has traditionally been afforded great deference when constructing the country's immigration laws under the plenary power doctrine, such a disparate result supports the argument that the government's failure to act has no rational basis in its own laws, which demands action.

This Comment argues that the federal government is depriving lawful permanent residents of their Fourteenth Amendment constitutional right to equal protection by refusing to uniformly enforce its marijuana laws. Thus, lawful permanent residents experience disparate treatment and face potential deportation based solely on their geographic location.

TABLE OF CONTENTS

I. INTRODUCTION.....	672
II. THE TUMULTUOUS REGULATION OF MARIJUANA	674
A. <i>The Federal Government's Constitutional Prohibition on Marijuana</i>	674
B. <i>Recent State Efforts to Legalize Marijuana</i>	676
C. <i>The Executive Branch's Response to States' Legalized-Marijuana Regimes</i>	677
III. UNITED STATES IMMIGRATION LAWS AND HOW THEY ARE RELATED TO MARIJUANA OFFENSES	681

A. <i>Overview of the Immigration Process and Criminal Convictions Generally</i>	681
B. <i>ICE's Purpose</i>	682
C. <i>Drugs and Cases</i>	684
IV. EQUAL PROTECTION AND IMMIGRATION CONSEQUENCES	687
A. <i>Equal-Protection Analysis Under Rational Basis</i>	688
B. <i>Equal-Protection Analysis Under Strict Scrutiny</i>	689
C. <i>Courts Addressing Noncitizens' Fourteenth Amendment Claims</i>	691
V. PROBLEMS FROM LACK OF UNIFORM ENFORCEMENT...	694
A. <i>Potential Outcome if Litigated Under Strict Scrutiny</i>	694
B. <i>Potential Outcome if Litigated Under Rational Basis</i>	696
VI. POTENTIAL SOLUTIONS	699
A. <i>Federal Government Uniformly Enforces the CSA</i> ..	700
B. <i>Federal Government Removes Ban on Marijuana</i> ...	703
C. <i>Federal Government Amends the INA</i>	705
VII. CONCLUSION	706

I. INTRODUCTION

Hector, a lawful permanent resident in the United States for the previous fifteen years, is pulled over for a traffic violation.¹ Hector lives in California, a state—like seven others—in which state law deviates from the federal ban on marijuana by legalizing it for both medical and recreational purposes.² As the officer approaches the car, he smells the faint odor of marijuana emanating from within. Having established probable cause, the officer searches Hector's car and ultimately finds an ounce of marijuana in Hector's trunk.³ But the officer does not arrest or report Hector because marijuana possession is legal under California state law.⁴ Thus, there is no obligation for local law enforcement to report Hector to Immigration and Customs Enforcement ("ICE"), so Hector can return home to his family, job, and life.⁵

1. This is a hypothetical scenario, illustrating how the current criminal justice system unequally enforces federal law against lawful permanent residents who commit the same act, based solely on their geographic location.

2. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007); Control, Regulate, and Tax Adult Use of Marijuana Act ("Adult Use of Marijuana Act"), CAL. HEALTH & SAFETY CODE § 11018 (West Supp. 2018).

3. See CAL. CONST. art. I, § 13; see also *Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("[P]robable cause . . . exists[] where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found.").

4. See CAL. HEALTH & SAFETY CODE §§ 11018, 11362.5.

5. 8 U.S.C. § 1357(d) (2012) (requiring that when an alien is arrested by a Federal, State, or local law enforcement official for violating any part of the CSA, and the

The absence of a reporting obligation on behalf of California would be consistent whether this was the first time California's state police found Hector to be in possession of marijuana, or the tenth time.⁶ Because California legalized marijuana, there is not a state offense that Hector has committed that would warrant a report to ICE.⁷

That same day, Martin, Hector's twin brother and also a lawful permanent resident in the United States for the previous fifteen years, is pulled over for a similar traffic violation in Texas—where the state's law mirrors the federal government's ban on marijuana.⁸ Again establishing probable cause due to the faint odor of marijuana, the police search Martin's car and find an ounce of marijuana in his trunk.⁹ Martin is subsequently charged for possession of marijuana—his second such offense since arriving in the country—and arrested.¹⁰ Accordingly, the state initiates deportation proceedings by reporting Martin to ICE.¹¹

Now, Martin is confined in jail, awaiting transportation to an ICE detaining facility. Once there, he will discover that the living conditions are not very different from the jail he just left.¹² Officers will take many of Martin's personal belongings away, he will have to wear a jumpsuit uniform and be guarded by uniformed officers, his privacy will be limited by having to sleep in a large room with the other detainees, and he will be unable to receive phone calls.¹³ While Martin must stay in what is essentially a prison while awaiting his deportation proceedings, his twin brother, Hector, is free to not only spend time with his family but also to purchase and consume more marijuana without fear of being potentially deported. This hypothetical illus-

arresting officer informs an INA agent of the alien's legal status, the federal agent must promptly determine whether to issue a detainer on the alien).

6. 8 U.S.C. § 1227(a)(2)(B)(i) (2012) (requiring a conviction for violating a state or federal law relating to controlled substances before deportation). Because California legalized marijuana possession of one ounce or less, Hector did not violate California's state law.

7. 8 U.S.C. § 1357(d).

8. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–971); TEX. HEALTH & SAFETY CODE ANN. § 481.121 (West 2017).

9. See TEX. CONST. art. I, § 9; see also *Landa v. Obert*, 45 Tex. 539 (1876) (defining probable cause as “a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged”).

10. 8 U.S.C. § 1227(a)(2)(B)(i). There is a Personal Use exception under the INA, which prevents deportation for lawful permanent residents who have a single CSA conviction. *Id.* But because this is Martin's second such offense, and his initial possession offense resulted in a conviction, the personal use exception provides him no relief.

11. 8 U.S.C. § 1357(d).

12. Dagmar R. Myslinska, *Living Conditions in Immigration Detention Centers*, NOLO, <https://www.nolo.com/legal-encyclopedia/living-conditions-immigration-detention-centers.html> (last visited Jan. 4, 2019) [<https://perma.cc/7NFZ-P5JK>].

13. *Id.*

trates how the federal government's failure to uniformly enforce its marijuana laws is creating an unfair class system, particularly for lawful permanent residents, by violating their Fourteenth Amendment right of equal protection, based solely on their geographic location.

This Comment will discuss this issue in five parts: Part I provides a brief history of this country's regulation of the marijuana industry over the past century and explains how recent developments concerning both federal and state legislation have created confusion throughout the country. Part II explains how the Immigration Nationality Act—Congress's vast and thorough compilation of immigration legislation—interacts with the federal ban on marijuana by subjecting certain noncitizens to deportation proceedings for specific offenses. Part III analyzes cases in which the American judicial system held the Fourteenth Amendment to grant equal protection to lawful permanent residents throughout various circumstances. Part IV illustrates how the conflict between U.S. immigration and marijuana legislation and the federal government's failure to enforce its uniform marijuana ban throughout the country have caused lawful permanent residents to suffer disparate treatment, solely because of their geographic location. Finally, Part V provides three solutions to this constitutional issue which would potentially mitigate the unfair conditions facing lawful permanent residents in certain areas of the country.

II. THE TUMULTUOUS REGULATION OF MARIJUANA

A. *The Federal Government's Constitutional Prohibition on Marijuana*

Although the possession, cultivation, and delivery of marijuana is currently prohibited by federal law with the majority of state legislatures following suit, marijuana was not always viewed in such a negative light. Before the twentieth century, a variety of industries utilized marijuana to treat medical ailments¹⁴ and create products from marijuana's hemp.¹⁵ However, this came to a halt when Congress passed its first anti-marijuana prohibition bill in 1937.¹⁶ Many scholars believe that racial discrimination motivated this legislation, but it was ultimately repealed in 1969 to make way for the current federal marijuana statute—the Controlled Substances Act ("CSA").¹⁷ The CSA

14. RICHARD J. BONNIE & CHARLES H. WHITEBREAD, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 4 (1974) (describing hemp as a popular medical treatment in the mid-nineteenth century and noting that its primary use was for legitimate medical purposes).

15. *Id.* at 1 (providing the three main purposes of hemp: the fiber is used for making cloth, twine, and rope; the resin is used as a psychoactive agent, medicinal, religious, and intoxicating purposes; and the seeds are used for drying bird food and oil).

16. Marijuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (1937) (repealed 1969).

17. See, e.g., Sam Kamin, *The Challenges of Marijuana Law Reform*, in ASPATORE SPECIAL REPORT, *THE IMPACT OF THE DECRIMINALIZATION AND LEGALIZATION OF MARIJUANA* 5, 22 (Melanie Zimmerman ed., 2010); see generally BONNIE & WHITE-

regulates the manufacture, possession, and distribution of drugs, including marijuana.¹⁸

Under the CSA, Congress places drugs into one of five schedules (I–V), depending on their potential for abuse, risk to the public health, and medical value.¹⁹ Accordingly, Congress placed marijuana on Schedule I, thus imposing the strictest restrictions possible on it.²⁰ By determining that marijuana possessed no accepted medical use and a high potential for abuse, Congress thereby prohibited the manufacture, distribution, and possession of the drug.²¹

Although repeated attempts have been made to reschedule marijuana in the last forty-eight years, the federal government has repeatedly denied such efforts, even as recently as in 2016.²² With the recent medical-marijuana-legalization movement rushing through the states in the past decade, proponents of legalization question why the federal government remains adamant about criminalizing a drug most Americans believe is beneficial to those with serious medical conditions.²³ But the government's rigid stance stems from various beliefs: that its medical benefits are at best unproven by accurate science, that it harms users and those around them, and that it would eventually be diverted into the black market.²⁴

BREAD, *supra* note 14, at 32–33 (explaining the history of marijuana criminalization, including its association with racial minorities and poor people).

18. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–971).

19. 21 U.S.C. §§ 811–812 (2012).

20. 21 U.S.C. § 812(b)(1). At the most restrictive scheduling possible, marijuana shares this classification with drugs like heroin, LSD, and ecstasy. *Id.* Comparing marijuana's scheduling to other drugs with less stringent regulations—like cocaine, methamphetamine, and OxyContin—shows Congress's remarkable impression on marijuana.

21. 21 U.S.C. § 841 (2012).

22. *See* All. for Cannabis Therapeutics v. Drug Enf't Agency, 15 F.3d 1131 (D.C. Cir. 1994) (denying rescheduling petition and discussing the history of such efforts); Carrie Johnson, *DEA Rejects Attempt To Loosen Federal Restrictions On Marijuana*, NPR (Aug. 10, 2016), <http://www.npr.org/2016/08/10/489509471/dea-rejects-attempt-to-loosen-federal-restrictions-on-marijuana> [<https://perma.cc/LNE5-5AZJ>] (Drug Enforcement Administration chief Rosenberg said this “decision is rooted in science,” and he gave “enormous weight” to the FDA's conclusions that marijuana has “no currently accepted medical use in treatment in the United States”).

23. *Medical Marijuana in the U.S. – Statistics & Facts*, STATISTICA, <https://www.statista.com/topics/3064/medical-marijuana-in-the-us/> (last visited Jan. 4, 2019) [<https://perma.cc/GZV3-22HU>] (“According to surveys from recent years, public approval of medical marijuana has indeed increased, remaining above 77 percent since 2011.”).

24. *Medical Marijuana Referenda in America: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Gen. Barry McCaffrey, Dir., Office of Nat'l Drug Control Policy), (elaborating on the rationales behind the federal government's categorical ban); Memorandum from Jefferson B. Session, III, Attorney Gen., to all United States Attorneys (Jan. 4 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/M8VU-5PDU>] [hereinafter Sessions Memo] (rescinding the Obama Administration's lenient approach to marijuana enforcement because of “Congress's determination that mari-

The United States Supreme Court upheld the CSA as constitutional in *Gonzalez v. Raich*.²⁵ There, federal Drug Enforcement Administration (“DEA”) agents seized and destroyed all the respondent’s marijuana plants.²⁶ But the respondent’s use and cultivation of marijuana for medical purposes was considered legal under California’s Compassionate Use Act.²⁷ Additionally, Raich used all his plants for personal use, never attempting to sell or bring them across state lines.²⁸

Regardless, the Court upheld the CSA’s legitimacy under Congress’s authority derived from the Commerce Clause.²⁹ Although the Court defined Raich’s marijuana-related activities as purely local, it categorized them as part of “an economic ‘class of activities’ that have a substantial effect on interstate commerce.”³⁰ Accordingly, the Court ruled that Congress had a rational basis for implementing the CSA because the failure to regulate marijuana would “undercut the regulation of the interstate market in that commodity.”³¹ Legal scholars assumed this ruling would end state efforts to contravene the federal ban, but the majority of states have continued to defy the CSA, as the following Section explains.

B. Recent State Efforts to Legalize Marijuana

Although the federal government refuses to budge on its strict categorization of marijuana, the twenty-first century has seen a plethora of states contravene the CSA. As of this writing, twenty-nine U.S. states, the District of Columbia, Guam, and Puerto Rico have done so by either decriminalizing the drug, legalizing it for medical purposes, or outright legalizing recreational marijuana and regulating it like alcohol and tobacco.³²

The legalization movement began in 1996 when California passed Proposition 215, thus becoming the first state in the country to legally allow access to medical marijuana.³³ In the following twenty-one

juana is a dangerous drug and that marijuana activity is a serious crime.”); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1435 (2009).

25. *Gonzalez v. Raich*, 545 U.S. 1 (2005).

26. *Id.* at 7.

27. *Id.* at 6–7.

28. *Id.* at 18.

29. *Id.* at 26 (holding that because the CSA is a statute that directly regulates economic, commercial activity, there is no doubt regarding its constitutionality).

30. *Id.* at 16.

31. *Id.* at 18.

32. *State Marijuana Laws in 2018 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> [https://perma.cc/J6V2-HBRQ] (showing Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, Washington, and the District of Columbia have adopted “the most expansive laws legalizing marijuana for recreational use.”).

33. *State Medical Marijuana Laws*, NAT’L CONF. ST. LEGISLATURES (Nov. 8, 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [https://perma.cc/MWS7-6WWS] (protecting citizens from criminal penalties; providing ac-

years, twenty-eight states followed suit with respect to medical purposes.³⁴ These states generally have some type of patient registry, which provides protection against arrest for users possessing the drug for personal-medicinal use.³⁵ The road to regulation has not been easy though; every state has had to answer complicated policy questions, such as “how to regulate its recommendation, dispensing, and registration of approved patients.”³⁶

What may surprise some scholars is the fact that this movement is not confined to liberal or coastline states. Recently, southern and traditionally conservative states like Arkansas, Texas, Nevada, and Alabama have adopted their own legislation permitting medical marijuana.³⁷ Although these bills are narrowly drafted—they only allow access to “Low-THC Cannabis” for certain, qualified seizure patients—they still inspire proponents of legalization.³⁸ Now, not only do the majority of the States recognize marijuana’s beneficial medical effects, but their legislative efforts further undermine the federal government’s classification of the drug under Schedule I.³⁹

While states began legalizing medical marijuana in 1996, it took another sixteen years before two states finally took the next step: legalizing recreational marijuana. In separate 2012 referendums, the majority of both Colorado and Washington’s citizens voted to legalize marijuana for recreational use.⁴⁰ As some celebrated, many worried that the federal government would interfere with the states’ marijuana regimes by enforcing the CSA.⁴¹

C. *The Executive Branch’s Response to States’ Legalized-Marijuana Regimes*

Given the federal government’s attempted interference with California’s medical-marijuana laws,⁴² many expected similar, if not more aggressive attempts to thwart emerging recreational regimes.⁴³ But in

cess through home cultivation and dispensaries; allowing a variety of strains; and allowing either smoking or vaporizing marijuana products).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Johnson, *supra* note 22.

40. Christina Ng, A.B. Phillips, & Clayton Sandell, *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> [<https://perma.cc/R2NJ-DBKT>].

41. *Id.*

42. *Gonzalez v. Raich*, 545 U.S. 1 (2005) (upholding the federal government’s authority under the CSA to prosecute those in possession of marijuana, regardless of the state’s laws; but not invalidating California’s medical marijuana law).

43. See Robert A. Mikos, *On the Limits of Federal Supremacy When States Relax (or Abandon) Marijuana Bans*, CATO INST. 8 (Dec. 12, 2012), <https://object.cato.org/sites/cato.org/files/pubs/pdf/PA714.pdf> [<https://perma.cc/WQ5F-L7WR>].

2013, the Obama Administration's Department of Justice surprised the nation when it released the Cole Memo.⁴⁴ This memo acknowledged the recent trend of legalization—both medicinal and recreational—and set forth eight distinct “enforcement priorities” that the federal government would pursue.⁴⁵ Additionally, the Justice Department, recognizing its limited resources and manpower, had advised the states with some form of a legal-marijuana regime to develop and implement “strong and effective regulatory and enforcement systems.”⁴⁶

While the Cole Memo did not alter the Department's authority to enforce federal law under the CSA, it assured states like California and Washington that if they did not violate any of the eight “enforcement priorities” and they established a “legitimate” regulatory scheme, they should not expect the federal government to intrude upon their operations.⁴⁷ In the four years since the Cole Memo's issuance, the executive branch had been true to its word and refrained from enforcing the democratically passed CSA.⁴⁸

However, every new administration has the potential to drastically change previous policies. When Donald Trump became president in 2016, many feared for legal marijuana's uncertain future under a republican administration.⁴⁹ These fears were exacerbated when President Trump appointed Jeff Sessions as the new United States Attorney General.⁵⁰ Sessions is known to have “a long and antagonistic attitude toward marijuana.”⁵¹ While Sessions's combative views are

44. Memorandum from James M. Cole, Deputy Attorney Gen., to all United States Attorneys (Aug. 3, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/G9N9-JRKA>] [hereinafter Cole Memo].

45. *Id.*; (“1. Preventing the distribution of marijuana to minors; 2. Preventing revenue from marijuana sales from going to criminal enterprises, gangs, and cartels; 3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states; 4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; 5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana; 6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; 7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and 8. Preventing marijuana possession or use on federal property.”).

46. *Id.*

47. *Id.*

48. Dave Kopilak, *The Donald Trump Risk Factor and a Showdown for the Cole Memo*, EMERGE L. GROUP (Dec. 8, 2016), <http://emergelawgroup.com/the-donald-trump-risk-factor-and-a-showdown-for-the-cole-memo/> [<https://perma.cc/Y8AD-B6CZ>].

49. James Higdon, *Jeff Sessions' Coming War on Legal Marijuana*, POLITICO (Dec. 5, 2016), <https://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501> [<https://perma.cc/YN4T-BUS6>].

50. *Id.*

51. *Id.* As a federal attorney in Alabama in the 1980s, Sessions said he thought the KKK “[was] OK until [he] found out [its members] smoked pot.” In April of 2016, he

at least publicly known, the world has yet to hear President Trump's official opinion.⁵² In February 2015, then-presidential candidate Trump "expressed support for medical marijuana, but [he] drew the line at recreational adult use" at an annual Conservative Political Action Conference.⁵³ But proponents of legalization found solace in Trump's response when pressed on the states' rights aspect: "If they vote for it, they vote for it."⁵⁴

Since the 2016 election, the Trump Administration focused on the opioid crisis in the U.S. As recently as October 26, 2017, Sessions echoed the popular 1980s-era argument that marijuana is a "gateway" to harder drugs, like heroin.⁵⁵ President Trump echoed this sentiment, adding that "there is nothing desirable about drugs. They're bad."⁵⁶ But research has cast doubt on the effectiveness of the gateway theory and the "Just Say No" campaign that First Lady Nancy Reagan started in the 1980s.⁵⁷

Fearing a harsher policy from the new Trump Administration, four state governors sent a letter to Sessions urging him to continue the federal government's non-enforcement policy under the Cole Memo.⁵⁸ The Attorney General replied with a letter of his own, laying

said, "Good people don't smoke marijuana," and that it was a "very real danger" that is "not the kind of thing that ought to be legalized." *Id.* Sessions delivered a speech to a sheriff's gathering where he said, "I cannot and will not pretend that a duly enacted law of this country—like the federal ban on marijuana—does not exist. Marijuana is illegal in the United States—even in Colorado, California, and everywhere else in America." Thomas Angell, *Jeff Sessions Slams GOP Senator Over Marijuana*, FORBES (Feb. 12, 2018, 10:47 AM), <https://www.forbes.com/sites/tomangell/2018/02/12/jeff-sessions-slams-gop-senator-over-marijuana/#56b50bee7995> [<https://perma.cc/J7EG-8GZ9>]. Sessions is quoted as saying "I reject the idea that America will be a better place if marijuana is sold in every corner store. And I am astonished to hear people suggest that we can solve our heroin crisis by legalizing marijuana—so people can trade one life-wrecking dependency for another that's only slightly less awful." Tom Embury-Dennis, *Jeff Sessions Describes Marijuana as 'Only Slightly Less Awful' Than Heroin*, INDEP. (Mar. 16, 2017), <http://www.independent.co.uk/news/world/americas/us-politics/jeff-sessions-marijuana-cannabis-heroin-donald-trump-weed-a7634031.htm> [<https://perma.cc/VN26-YF54>].

52. Higdon, *supra* note 49.

53. *Id.* ("I say it's bad," then-presidential-candidate Trump answered when questioned over Colorado's recreational marijuana law.).

54. *Id.* (providing an inference that President Trump will not interfere with states who democratically choose to legalize marijuana).

55. Christopher Ingraham, *Trump Speaks Out on Drugs: 'They're Bad'*, WASH. POST: WONKBLOG (Oct. 26, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/10/26/trump-speaks-out-on-drugs-theyre-bad/?utm_term=.9e2ce875ec4c [<https://perma.cc/35MS-PEQC>].

56. *Id.*

57. *Id.*; *Marijuana?*, NAT'L INST. ON DRUG ABUSE 20–21 (2018), <https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/1380-marijuana.pdf> (last updated June 2018) [<https://perma.cc/DWV3-52VU>] ("[F]urther research is needed to explore this question," but the overwhelming majority of people who try marijuana do not go on to use other drugs).

58. Letter from Bill Walker et al., Governor of Alaska, to Jeff Sessions, Attorney Gen. (Apr. 3, 2017), <http://files.constantcontact.com/201bc6cf001/8bd444e9-e3c1-4fa5->

out his concerns that legalized states have failed to follow the Cole Memo's priorities.⁵⁹ Sessions ended his letter by inquiring how these states planned to address these findings.⁶⁰

On January 4, 2018, the Trump Administration finally answered these concerns when Sessions issued his own memo, which effectively and immediately rescinded the Cole Memo.⁶¹ Describing the Obama Administration's previous memo as "unnecessary," Sessions's memo makes multiple mentions of Congress's CSA and money-laundering statutes to bolster his Justice Department's position that "marijuana is a dangerous drug and that marijuana activity is a serious crime."⁶² Legislators representing states with legal-marijuana regimes have publicly bombarded Sessions's memo, with one Colorado Senator even threatening to hold U.S. Department of Justice nominees.⁶³

Therefore, legalized marijuana's future in the U.S. remains clouded in doubts and fear of federal intervention. This causes problems not just for lawful permanent residents like Martin—who suffers from nothing more than happening to live in a state that continues to prohibit marijuana—but also for all Americans who expect the federal government to uniformly treat its citizens in a fair and just manner.

a63d-9e9197350a87.pdf [https://perma.cc/8MZ2-GTLP]. The governors were the governors of Alaska, Colorado, Oregon, and Washington. *Id.*

59. Letter from Jefferson B. Sessions, Attorney Gen., to Jay Inslee et al., Governor of Washington (July 24, 2017), <https://s3.amazonaws.com/big.assets.huffingtonpost.com/LtrfromSessions.pdf> [https://perma.cc/5Y3L-RGZ3]. Sessions cited findings from a 2016 report by the Northwest High Intensity Drug Trafficking Area. *Id.* This report found the black market growing due to lack of regulation, oversight, and transparency; interstate transportation of Washington's marijuana; underage consumption, driving while impaired; and a 54% increase in marijuana-related calls to State Poison Control Center between 2012 and 2014. *Id.* See generally *Washington State Marijuana Impact Report*, N.W. HIGH INTENSITY DRUG TRAFFICKING AREA, <http://mfiles.org/docs/marijuanaimpact2016.pdf> (last updated Jan. 2019) [https://perma.cc/928A-SZK9].

60. Letter from Jefferson B. Sessions to Jay Inslee, *supra* note 59.

61. Sessions Memo, *supra* note 24.

62. *Id.* In the statement announcing his memorandum, Sessions said, "It is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law." Press Release, Jeff Sessions, Attorney General, Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> [https://perma.cc/6HHT-8VWR].

63. Jesse Paul & Jon Murray, *Cory Gardner Says AG Jeff Sessions' Decision to Rescind Marijuana Policy "Has Trampled on the Will" of Colorado Voters*, DENVER POST (Jan. 4, 2018, 12:34 PM), <https://www.denverpost.com/2018/01/04/cory-gardner-jeff-sessions-marijuana-policy/> [https://perma.cc/H9YM-WVTI]. U.S. Senator Cory Gardner of Colorado states that Sessions's memo "has trampled on the will of the voters" and accuses Sessions of lying to him during Sessions's confirmation hearing where Sessions "assured [Senator Garner] that marijuana would not be a priority for this administration." Senator Gardner maintains that the Administration's action "directly contradicts what [he] was told, and [that he is] prepared to take all steps necessary, including holding [U.S. Department of Justice] nominees, until the attorney general lives up to the commitment he made to [the senator] prior to his confirmation." *Id.*

III. UNITED STATES IMMIGRATION LAWS AND HOW THEY ARE RELATED TO MARIJUANA OFFENSES

This Part discusses how this country's immigration laws have developed in recent decades. Specifically, it discusses how the immigration agencies have incorporated Congress's CSA provisions with their own grounds for deportation. Additionally, this Part analyzes the trajectory of ICE's purpose and how its laws have impacted deportees.

A. *Overview of the Immigration Process and Criminal Convictions Generally*

Although once touted as a “country of immigrants,”⁶⁴ the United States has since developed an intricate and elaborate immigration scheme that makes legal immigration a complex process.⁶⁵ The Supreme Court has repeatedly stated that the federal government possesses plenary authority over immigration, thus clearing the way for Congress to establish the nation's immigration laws.⁶⁶ Congress's modern immigration legislation began in 1952 with the passage of the Immigration and Nationality Act (“INA”).⁶⁷

The INA was originally enforced by the U.S. Customs Service and the Immigration and Naturalization Service, but the two agencies merged in 2003 to create the Department of Homeland Security (“DHS”) and its subagency, ICE.⁶⁸ Because of ICE's unique combination of legal authorities, its investigators are touted as being more effi-

64. Brian Donnelly, *Foreign Affairs, Drug Interdiction, and Immigration*, 21 SUFFOLK TRANSNAT'L L. REV. 269, 274 (1998) (discussing how the United States is a “country of immigrants” by “constantly infusing into our gene pool peoples from all around the world,” thus establishing the U.S.'s great growth and vitality).

65. DeLeith Duke Gossett, *“(Take from Us Our) Wretched Refuse”: The Deportation of America's Adoptees*, 85 U. CIN. L. REV. 33, 36 (2017) (discussing recent legislation shifting the U.S. immigration experience from inclusion to exclusion and how many citizens believe this new regime is too restrictive and not cognizant of the U.S.'s origin).

66. U.S. CONST. art. I, § 8, cl. 4; *Arizona v. United States*, 567 U.S. 387, 395–96 (2012) (explaining such authority is derived from the government's constitutional power to “establish an uniform Rule of Naturalization” and its inherent power as sovereign to control and conduct relations with foreign nations); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (holding that the intent to displace state law altogether can be inferred from a framework of regulation “so pervasive . . . that Congress left no room for the States to supplement it.”).

67. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 201(a), 205, 66 Stat. 163, 175 (codified at 8 U.S.C. § 1151(b)(2)(A)(i) (2012)) (eliminating racial limitations on immigration).

68. *Who We Are*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/about> (last updated Dec. 18, 2018) [<https://perma.cc/R5NC-4HUY>]; U.S. DEP'T OF HOMELAND SECURITY, ICE INVESTIGATIONS: MISSION ROLES IN MULTI-AGENCY AREAS OF RESPONSIBILITY 1 (2007), https://www.fbiic.gov/public/2008/may/ice_mission_roles.pdf [<https://perma.cc/F5TK-N8LY>] [hereinafter ICE INVESTIGATIONS] (the Patriot Act's passing created the Department of Homeland Security, which merged the U.S. Customs Service and the Immigration and Naturalization Service into ICE).

cient and thorough than any previous enforcement agency.⁶⁹ ICE currently employs more than 20,000 employees in over 400 offices nationwide.⁷⁰

Under the INA's current structure, the list of deportable offenses is exhaustive and ranges anywhere from marriage fraud to firearm offenses.⁷¹ Regarding controlled substances, the INA's deportability grounds require a conviction before proceedings may begin.⁷² This conviction must result from a violation of any state or federal law relating to a controlled substance.⁷³ The statute refers to Section 802 of Title 21—the CSA—that includes marijuana as a controlled substance.⁷⁴ But the INA provides a personal-use exception for lawful permanent residents only.⁷⁵ If they plead guilty to possession of marijuana, they may avoid deportation if their guilty plea is “a single offense involving possession for one’s own use of thirty grams or less of marijuana.”⁷⁶ Put simply, a lawful permanent resident who has been convicted for possessing less than an ounce of marijuana is *not* subject to deportation under the personal-use exception *if* it is his or her first and only conviction.

But this exception would not afford a remedy for Martin because, as mentioned above, he has already been convicted once for marijuana possession prior to this new offense. Thus, Martin remains in an ICE detention facility, unable to control his future; whereas Hector has the freedom to visit his family throughout the country and participate in society.

B. ICE's Purpose

Currently, ICE enforces federal laws concerning immigration and border control.⁷⁷ Its purpose is to promote public safety and homeland security.⁷⁸ In its latest strategic plan for fiscal years 2016–2020, ICE's key goals are countering terrorism, protecting the borders, and

69. ICE INVESTIGATIONS, *supra* note 68 (ICE investigations derive authority under Title 19 and 8, permitting them to pursue a variety of cases, conduct searches and make arrests without obtaining a warrant, and seize criminal assets).

70. *Who We Are*, *supra* note 68.

71. 8 U.S.C. § 1227 (2012).

72. *Id.*

73. *Id.*; *Immigration Consequences of Drug Offenses: Handout*, NAT'L ASS'N OF CRIM. DEF. LAW., https://www.nacdl.org/uploadedFiles/Content/Legal_Education/Live_CLE/Live_CLE/03_Drug_Offenses_Handout.pdf. (last visited Jan. 4, 2019) [<https://perma.cc/8GQ2-8CTL>].

74. 8 U.S.C. § 1227. This means that, even if convicted of a state drug violation, someone is only subject to deportation if he or she is convicted for association with a drug that the CSA criminalizes.

75. *Id.*

76. *Id.*

77. *Who We Are*, *supra* note 68.

78. *Id.*

operating an efficient, effective agency.⁷⁹ Concerning ICE's role with illicit drugs, its overall mandate is to "detect, disrupt, and dismantle smuggling operations."⁸⁰

However, immigration-enforcement obligations do not solely consist of "initiating prompt proceedings that lead to removal at any cost."⁸¹ Rather, the Government concerns itself more with ensuring justice is done.⁸² The Third and Fifth Circuits have reiterated this responsibility specifically for ICE attorneys.⁸³

Within six years, ICE has experienced a drastic shift in its enforcement priorities. In 2011, then-DHS Director John Morton issued a guidance to ICE attorneys regarding their prosecutorial discretion.⁸⁴ Recognizing the agency's limited resources, this 2011 memo emphasized the agency's highest priority as removing "aliens who pose a danger to national security or a risk to public safety."⁸⁵

But once President Trump took office, John Kelly—then-DHS Secretary—quickly released the administration's new guidelines.⁸⁶ Kelly's memo directed ICE to hire an additional 10,000 officers and agents, thus increasing its resources to execute the INA against all removable aliens.⁸⁷ Further, the memo explicitly prioritizes the removal of those

79. See DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT: STRATEGIC PLAN 2016–2020 2 (Sept. 2016), https://www.dhs.gov/sites/default/files/publications/Office%20of%20Immigration%20Statistics%20Strategic%20Plan%20FY%202016-2020%20%28Final%29_0.pdf [<https://perma.cc/T79H-X5UF>].

80. DEP'T OF HOMELAND SECURITY, REVIEW OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S FISCAL YEAR 2017 DRUG CONTROL PERFORMANCE SUMMARY REPORT 1 (Jan. 30, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-02/OIG-18-45-Jan18.pdf> [<https://perma.cc/GBX7-9MQQ>].

81. S-M-J-, 21 I. & N. Dec. 722, 727 (B.I.A. 1997).

82. *Id.*

83. *Kang v. Attorney Gen.*, 611 F.3d 157, 167 (3d Cir. 2010) (quoting *Handford v. United States*, 249 F.2d 295, 296 (5th Cir. 1958)) (An ICE attorney is "the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to [his adversary].").

84. Memorandum from John Morton, Director U.S. Immigration & Customs Enforcement, to All ICE Employees (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/K65N-7HHS>]; *Enforcement and Litigation*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/enforcement-and-litigation> (last updated June 23, 2017) [<https://perma.cc/D3V8-6CN6>] (ICE attorneys "advance ICE's homeland security mission by enforcing the nation's immigration, customs and criminal laws and policies, defending the operational authorities and decisions of ICE agents and officers in federal court, and guiding and supporting the advocacy of ICE attorneys before the immigration courts and the Board of Immigration Appeals.").

85. Memorandum from Morton to All ICE Employees, *supra* note 84 (including extremely serious crimes like terrorism, espionage, violent crimes, and organized criminal gangs and reiterating the two-felony conviction requirement, commonly referred to as the personal-use exception for marijuana).

86. Memorandum from John Kelly, Secretary Dep't of Homeland Security, to Kevin McAleenan, Acting Comm'r Customs & Border Prot., et al. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [<https://perma.cc/8Z3R-6AQ7>].

87. *Id.*

aliens described by Congress in Section 237(a)(2) of the INA, which codifies the CSA's deportability grounds.⁸⁸ Another major policy shift involved ICE taking a step back from its previous focus on aliens who committed violent crimes.⁸⁹ Now, the focus is on removable aliens who "have been convicted of any criminal offense," as well as those who have only committed acts that constitute chargeable-criminal offenses but have yet to be charged or convicted.⁹⁰

Pertinent to this Comment, the recent ICE guidance explicitly prohibits prosecutorial discretion in a manner "that exempts or excludes a specified class or category of aliens" from enforcement of the INA.⁹¹ Yet this has been, and currently is, the result of the INA's enforcement since states began legalizing marijuana.⁹² Then-Secretary Kelly's guidance expressly conflicted with the Cole Memo, which effectively established two specified classes of aliens—those who live in legal-marijuana states, and those who do not.⁹³ Although Attorney General Sessions's recent memo attempts to resolve the conflict between enforcement agencies by announcing the common goal to enforce the law, the memo still provides little actual guidance.⁹⁴

Thus, immigration laws are not being consistently enforced because of the differences among state and federal law concerning marijuana. This governmental failure causes noncitizens like Martin to suffer the most, solely because of where they choose to reside in the U.S.

C. *Drugs and Cases*

Early decisions involving INA and CSA enforcement provisions were not favorable to lawful permanent residents.⁹⁵ Although the Obama Administration prioritized violent felonies, Congress drafted the INA such that it defined an "aggravated felony" to include as "il-

88. *Id.*

89. *Id.*; Memorandum from Morton to All ICE Employees, *supra* note 84.

90. Memorandum from Kelly to McAleenan, *supra* note 86. (Although this guidance does not specifically mention marijuana, it encourages ICE agents to pursue convictions of "any criminal offense," which includes simple marijuana possession under 21 U.S.C. § 812(b)(1)).

91. *Id.*

92. *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 566 (2010) (providing an example of ICE attempting to deport a lawful permanent resident for an aggravated felony conviction under Texas's similar ban marijuana where, had the immigrant been found in possession of marijuana in a legalized state, he would not have faced any ICE consequences).

93. Cole Memo, *supra* note 44.

94. Sessions Memo, *supra* note 24.

95. *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008) (holding that a lawful permanent resident's second state-law conviction for simple controlled substance possession requires mandatory removal), *vacated sub nom.* *Fernandez v. Holder*, 561 U.S. 1001 (2010), and *abrogated by Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *see also* *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008) (holding that a lawful permanent resident of ten years is subject to mandatory removal because of his state-law marijuana convictions), *abrogated by Moncrieffe v. Holder*, 569 U.S. 184 (2013).

licit trafficking in a controlled substance.”⁹⁶ “Illicit trafficking in a controlled substance” applies to convictions for offenses that the CSA punishes as felonies, i.e., offenses that are punishable by more than one year’s imprisonment.⁹⁷ Hence, a possession-of-marijuana conviction could still warrant an alien’s removal under the prior administration’s more lenient approach.⁹⁸ Additionally, lawful permanent residents convicted of an aggravated felony are not only deportable, but they are also ineligible for discretionary relief.⁹⁹

But in recent years the Supreme Court has begun analyzing aggravated felonies derived from CSA convictions with more scrutiny. In 2010, the Court held that “second or subsequent simple possession offenses are not aggravated felonies . . . when . . . the state conviction is not based on the fact of a prior conviction.”¹⁰⁰ In *Carachuri-Rosendo*, a lawful permanent resident faced deportation after committing two misdemeanor drug-possession offenses in Texas.¹⁰¹ The Government argued that deportation was mandatory because his charges amounted to an aggravated felony.¹⁰²

But the Court disagreed. Analyzing the statute’s “ordinary meaning,” the Court explained that a statutory scheme applying an “aggravated” label to “*any* simple possession offense is, to say the least, counterintuitive and unorthodox.”¹⁰³ Because the Government advanced its argument for a result contradictory to what the English language tells society to expect, the Court expressly warned that it must be “very wary of the Government’s position.”¹⁰⁴ Additionally, an ambiguity arose when determining whether the misdemeanor-possession offense was punishable by up to a year—as required by the INA—or whether the existence of recidivism would allow it to be punishable by

96. 8 U.S.C. § 1101(a)(43)(B) (2012).

97. See 18 U.S.C. §§ 924(c)(2), 3559(a)(5) (2012).

98. The INA defines a “felony” as an offense with a maximum term of imprisonment that is greater than one year. 18 U.S.C. § 3559(a)(5). If the state’s marijuana offense constitutes a “felony punishable under the Controlled Substances Act,” then it qualifies as an aggravated felony. *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006). Thus, it is possible for an alien to be subject to mandatory removal, based solely on marijuana drug offenses, if the state’s criminal offense mirrors the CSA.

99. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012). Generally, when lawful permanent residents are convicted of CSA drug charges, they are eligible for discretionary forms of relief. See 8 U.S.C. § 1158(b)(2)(A)(ii), 1158(b)(2)(B)(i). 8 U.S.C. § 1229b(a)(3), 1229b(b)(1)(C) (2012) providing that one can seek asylum or withholding and deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85; 8 C.F.R. § 1208.17(a) (2018)). But noncitizens convicted of aggravated felonies are ineligible for withholding of removal.

100. *Carachuri-Rosendo*, 560 U.S. at 566.

101. *Id.* at 563.

102. *Id.* at 572.

103. *Id.* at 574. The Court goes on to explain that a felony is “a serious crime usu[ally] punishable by imprisonment for more than one year or by death.” See also *Felony*, BLACK’S LAW DICTIONARY (10th ed. 2014).

104. *Carachuri-Rosendo*, 560 U.S. at 575.

up to two years, causing it to be treated as an aggravated felony.¹⁰⁵ This ambiguity in the criminal statutes referencing immigration laws required the Court to construe them in the noncitizen's favor.¹⁰⁶ Thus, the Court held that lawful permanent residents who commit second or subsequent simple possession offenses cannot be found to have committed aggravated felonies if the offenses were wholly separate.¹⁰⁷

In 2013, the Supreme Court held that state statutes criminalizing the social sharing of a small amount of marijuana are not aggravated felonies under the INA.¹⁰⁸ During a traffic stop in Georgia, police found 1.3 grams of marijuana in a lawful permanent resident's car.¹⁰⁹ After his subsequent guilty plea to possession of marijuana with intent to distribute, the Federal Government sought his removal.¹¹⁰ The Government reasoned that because Georgia's criminal statute is an offense under the CSA "punishable by up to five years' imprisonment," it constituted an aggravated felony.¹¹¹

But the Court disagreed. Employing the "categorical approach," the Court analyzed whether the state offense was comparable to any of the INA's offenses.¹¹² The categorical approach ignores the facts of the particular case and instead focuses on whether the "state statute defining the crime of conviction" categorically fits within the "generic" federal definition of a corresponding aggravated felony.¹¹³ This means the offenses must be viewed in the abstract to determine whether they have similar natures of comparison.¹¹⁴ Accordingly, a state offense categorically matches with a generic federal offense only if the state offense conviction "'necessarily' involved . . . facts equating to [the] generic [federal offense]."¹¹⁵ Because this approach is not fact-sensitive, the analysis focuses on the lowest-possible criminalized act from the statute.¹¹⁶

The Court concluded that although Georgia's criminal statute classified the crime as a felony, there was an exception that lowered it to a misdemeanor if it only "involve[d] a small amount of marijuana for no

105. *Id.* at 576.

106. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

107. *Carachuri-Rosendo*, 560 U.S. at 566.

108. *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013).

109. *Id.* at 188.

110. *Id.* at 188–89.

111. *Id.* at 189.

112. *Id.* at 190. When the Government alleges that a state conviction qualifies as an "aggravated felony" under the INA, the Court generally employs a "categorical approach" to determine whether the state offense is comparable to an offense listed in the INA. *See, e.g., Nijhawan v. Holder*, 557 U.S. 29, 33–38, (2009).

113. *Moncrieffe*, 569 U.S. at 190 (citing *Taylor v. United States*, 495 U.S. 575, 599–600 (1990)).

114. *Id.*

115. *Id.* (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion)).

116. *Id.* at 190–91.

remuneration.”¹¹⁷ Thus, the lawful permanent resident’s conviction did not “necessarily” contain facts that corresponded to “an offense punishable as a felony under the CSA.”¹¹⁸ Accordingly, the lawful permanent resident did not commit an aggravated felony, and his removal was no longer mandatory.¹¹⁹

While recent Supreme Court decisions may reassure Martin that his subsequent possession-of-marijuana charge will not be classified as an aggravated felony,¹²⁰ this by no means forecloses the possibility that Martin could get deported.¹²¹ But it does provide him an opportunity to contest the proceedings—something he would be unable to do had the Court ruled otherwise in *Moncrieffe*.¹²²

Therefore, Martin remains in ICE custody for a simple drug offense, like “one out of every four ‘criminal removals,’” which amounted to more than 250,000 deportations from 1997 to 2012 alone.¹²³ During his indefinite detention, Martin will experience “often horrible conditions of confinement.”¹²⁴ Ultimately, it is often hard to distinguish detention facilities from actual prisons, which makes the fact that Martin and the hundreds of thousands of legal permanent residents like him must suffer such humiliating conditions even more unjust.¹²⁵

IV. EQUAL PROTECTION AND IMMIGRATION CONSEQUENCES

The Fourteenth Amendment prevents a single sovereign from treating a citizen or class of citizens differently than others under similar

117. *Id.* at 193–94.

118. *Id.* at 194–95.

119. *Id.* at 204.

120. *Ming Wei Chen v. Sessions*, 864 F.3d 536 (7th Cir. 2017) (holding that a noncitizen’s prior Illinois conviction for possessing more than 30 but not more than 500 grams of marijuana did not qualify as an aggravated felony).

121. *Moncrieffe*, 569 U.S. at 204.

122. 8 U.S.C. § 1229b(a)(3) (2012) (The Attorney General does not have discretion to cancel removal proceedings for noncitizens convicted of aggravated felonies).

123. *Deportation and Drug Convictions*, IMMIGRANT DEF. PROJECT, <https://www.immigrantdefenseproject.org/deportation-and-drug-convictions/> (last visited Jan. 4, 2019) [<https://perma.cc/WLS7-ATLG>].

124. Sunita Patel & Tom Jawetz, *Conditions of Confinement in Immigration Detention Facilities*, AM. C.L. UNION 1, https://www.aclu.org/sites/default/files/field_document/unsr_briefing_materials.pdf (last visited Jan. 4, 2019) [<https://perma.cc/5ULR-R5W3>] (providing examples of horrible conditions that include “grossly inadequate health care, physical and sexual abuse, overcrowding, discrimination, and racism.”).

125. *See id.* (Both facilities share “lack of access to necessary medications[;] . . . shackling; use of segregation or tasers for disciplinary purposes; [and] inability to visit with family members. . . .”); *see also* Ed Pilkington, *Torn Apart: The American Families Hit by Trump’s Immigration Crackdown*, *GUARDIAN* (Apr. 21, 2017, 5:00 AM), <https://www.theguardian.com/us-news/2017/apr/21/immigration-families-deportation-crackdown-donald-trump> [<https://perma.cc/SBH6-G8D4>] (describing one daughter’s experience visiting her father in an immigration detention center in California. It was “like a prison,” she recalled, and it surprised her “that as soon as [she went] in to hug him, and sit down, they [said] you cannot touch him.”).

circumstances.¹²⁶ This Amendment provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹²⁷ Our judicial system has further defined “person” as including “[a]liens, even aliens whose presence in this country is unlawful.”¹²⁸ Both provisions—Due Process and Equal Protection—are universal in their application, “without regard to any differences of race, of color, or of nationality.”¹²⁹ While the Fourteenth Amendment should guarantee these rights, the Government’s current system of partial enforcement fails to equally protect lawful permanent residents, depending on their geographic location.

A. *Equal-Protection Analysis Under Rational Basis*

Equal protection litigation has a rooted history in states implementing laws to limit their immigrants’ ability to participate in the economy.¹³⁰ Traditionally, states were subject to a rational-basis analysis when classifying categories in “the area of economics and social welfare,”¹³¹ thus retaining broad discretion for their actions.¹³² Such broad discretion meant that they only had to show that a rational relationship existed “between the disparity of treatment and some legitimate governmental purpose.”¹³³

Congress’s ability to create such categories without “actually articul[ing] at any time the purpose or rationale supporting its classification” provides flexibility for these classifications.¹³⁴ Thus, courts must uphold such classifications against equal protection challenges if “there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”¹³⁵ If a court finds the government’s reasoning to be inadequate, it may use post-hoc rationalization

126. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

127. U.S. CONST. amend. XIV, § 1.

128. *Pyler v. Doe*, 457 U.S. 202, 210 (1982).

129. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

130. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948) (recounting that during WWII, an amendment to the California Fish and Game Code was adopted prohibiting issuance of a license to any “alien Japanese”); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (challenging a Pennsylvania law that required every adult immigrant to register annually and provide certain information and money).

131. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

132. *Pyler*, 457 U.S. at 216 (explaining that a “legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill”).

133. *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993); *see, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

134. *Nordlinger*, 505 U.S. at 15.

135. *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

by substituting its own “state of facts” that would satisfy the rational basis for the classification.¹³⁶

This does not mean, however, that rational-basis review for equal protection analyses is “a license for courts to judge the wisdom, fairness, or logic of legislative choices.”¹³⁷ Nor does this approach permit courts to judge Congress’s wisdom or the desirability of its policy determinations concerning areas that “neither affect fundamental rights nor proceed along suspect lines.”¹³⁸ Therefore, a governmental classification fails rational-basis review only when it “rests on grounds wholly irrelevant to the achievement of the State’s objective.”¹³⁹

B. *Equal-Protection Analysis Under Strict Scrutiny*

Recognizing that certain classifications require greater protection, the Supreme Court has established that classifications based on alienage, similar to nationality¹⁴⁰ or race,¹⁴¹ are “inherently suspect and subject to close judicial scrutiny.”¹⁴² Thus, state legislation applying exclusively to its alien inhabitants as a class “is confined within narrow limits.”¹⁴³ To survive strict scrutiny, the classification “must be narrowly tailored to promote a compelling governmental interest,” with no less restrictive means of furthering that interest.¹⁴⁴

The Court defines “narrowly tailored” as requiring “a sufficient nexus between the stated government interest and the classification created by the [regulation or its implementation].”¹⁴⁵ A law is not narrowly tailored when it fails to ensure its implications minimize any burden on those subject to its classification.¹⁴⁶ Further, the narrow-tailoring analysis does not vary “simply because the objective appears acceptable.”¹⁴⁷ Its purpose is to ensure “that the means chosen fit th[e] compelling goal so closely that there is little or no possibility that

136. *Id.* at 315 (holding that the Court may conclude that a rational basis exists for the legislative distinction on the basis of “speculation unsupported by evidence or empirical data,” and the fact that the Court had no evidence that the legislature actually considered the Court’s speculations is irrelevant).

137. *Id.* at 313.

138. *Dukes*, 427 U.S. at 303.

139. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)).

140. *See Oyama v. California*, 332 U.S. 633, 644–46 (1948); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

141. *Loving v. Virginia*, 388 U.S. 1, 9 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

142. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

143. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948).

144. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997).

145. *Nunez*, 114 F.3d at 945.

146. *Id.* at 948.

147. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (holding that although promoting female achievement in education is a legitimate state purpose, its policy of excluding men from the all-women nursing institution was unconstitutional).

the motive for the classification was illegitimate racial prejudice or stereotype.”¹⁴⁸

For example, in *Zablocki v. Redhail*, the Court invalidated a Wisconsin statute that prevented residents with delinquent child-support payments from marrying without first obtaining a court order.¹⁴⁹ Wisconsin’s asserted compelling interests were that the law provided an opportunity to counsel delinquent residents on the necessity of fulfilling their prior support obligations, and it protected the welfare of out-of-custody children.¹⁵⁰ But the Court held that the law was not narrowly tailored to these interests because it merely prevented delinquent residents from getting married, without providing any money for their prior children.¹⁵¹ Further, there were less restrictive means available that did not outright prohibit marriage.¹⁵²

Unlike under rational basis, courts are unable to provide their own reasoning to support classifications when analyzing heightened-scrutiny claims.¹⁵³ Thus, when a court conducts a strict-scrutiny analysis, it may only rely on the explanation and reasoning that the governmental actor explicitly provides in its argument. For example, in *United States v. Virginia*, the Supreme Court held that Virginia’s policy of categorically excluding women from the Virginia Military Institute (“VMI”) violated the Equal Protection Clause.¹⁵⁴ The Court rendered this decision even after Virginia attempted to remedy the situation by creating a sister institution, the Virginia Women’s Institute for Leadership (“VWIL”), which Virginia argued provided an equal alternative to its VMI.¹⁵⁵

The Court analyzed this case under intermediate scrutiny, which required the State to “show ‘at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”¹⁵⁶ The Court explicitly noted that the State’s justification “must be genuine, not hypothesized or invented *post hoc* in

148. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

149. *Zablocki v. Redhail*, 434 U.S. 374, 391 (1978).

150. *Id.* at 388.

151. *Id.* at 389.

152. *Id.* at 389–90 (recognizing alternative solutions under Wisconsin’s current laws, like wage assignments, civil contempt proceedings, and criminal penalties).

153. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (“[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”); *United States v. Virginia*, 518 U.S. 515 (1996).

154. *Virginia*, 518 U.S. at 556.

155. *Id.* at 526.

156. *Id.* at 533 (quoting *Wengler v. Druggists Mut. Ins.*, 446 U.S. 142, 150 (1980)).

response to litigation.”¹⁵⁷ The Court concluded that VWIL was in fact inferior to VMI and “unequal in tangible and intangible facilities.”¹⁵⁸

Although the Equal Protection Clause was originally intended to limit state legislation that discriminates against certain classifications, the Court eventually extended its coverage to include discriminatory actions by the federal government itself.¹⁵⁹ For example, in *Bolling v. Sharpe*, the Court held that the District of Columbia acted unconstitutionally by denying African Americans admissions to public school solely because of their race.¹⁶⁰ Although the District of Columbia was not technically a “state” that the Constitution explicitly prohibited from maintaining racially segregated public schools, the Court held “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”¹⁶¹

The Supreme Court has also recognized equal protection violations when discrimination is based upon some group characteristic such as geographic location.¹⁶² For example, in *Gray v. Sanders*, the Court invalidated a Georgia law that gave more weight to votes from rural voters in state elections.¹⁶³ The Court analogized the different treatment based on geographic location to different treatment based on race. It determined it would clearly be unconstitutional to give greater weight to votes based on the voter’s race.¹⁶⁴

Therefore, Martin’s greatest chance at succeeding is for courts to analyze his claim under strict scrutiny by arguing that the federal government’s lack of enforcement has created a classification based on alienage. If successful, he must then persuade the judiciary that the federal laws are not narrowly tailored and/or that there are less restrictive means available to achieve the government’s compelling interest.

C. Courts Addressing Noncitizens’ Fourteenth Amendment Claims

The Supreme Court has struggled to balance its growing precedent regarding equal protection challenges with the INA. Two pertinent questions the Court has faced are: (1) What is the definition of “person within its jurisdiction” as used in the Fourteenth Amendment, and

157. *Id.*

158. *Id.* at 547–49 (“VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. . . . VWIL students do not experience the ‘barracks’ life crucial to the VMI experience.”).

159. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.”).

160. *Id.* at 500.

161. *Id.*

162. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 92 (1973) (White, J., dissenting); *see also* *Gordon v. Lance*, 403 U.S. 1, 4 (1971); *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964); *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

163. *Gray*, 372 U.S. at 381.

164. *Id.* at 379.

(2) Should state and federal regulations receive the same level of scrutiny?¹⁶⁵

In 1886, the Court first recognized that “person” included not only American citizens, but also “aliens and subjects of [other countries].”¹⁶⁶ Further, in *Graham v. Richardson*, the Court explicitly held that “person” applies to lawful permanent residents.¹⁶⁷ Thus, in the last century, the Court has analyzed equal protection claims for citizens and aliens alike.

Legislative history dating back to 1886 has provided the Court its definition of “within its jurisdiction.”¹⁶⁸ The congressional debate of the time focused on the importance of one’s actual location, rather than the means by which the person got there.¹⁶⁹ Accordingly, the Fourteenth Amendment’s protection extends to anyone—citizen or stranger—“who is subject to the laws of a State, and reaches into every corner of a State’s territory.”¹⁷⁰

Since 1941, the Court has demonstrated a higher level of deference towards Congress’s acts on immigration¹⁷¹ for two reasons: First, immigration regulations are “so intimately blended and intertwined with the responsibilities of the national government” that when both act on the same subject, the federal action is supreme, and the state must yield.¹⁷² Second, when Congress, in exercising such superior authority, has enacted a comprehensive scheme of regulation, “states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law.”¹⁷³ Accordingly, state laws concerning immigration can be invalidated by either preemption or an equal protection analysis employing strict scrutiny.

For example, in *Graham v. Richardson*, the Court invalidated a state law that conditioned welfare benefits on citizenship.¹⁷⁴ But Congress had broadly declared its federal policy that lawful permanent

165. See Sessions Memo, *supra* note 24.

166. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (holding that Congress statutorily extended constitutional protections “to aliens as well as to citizens”); see also *Yick Woo v. Hopkins*, 118 U.S. 356, 368 (1886) (invalidating California law under the Equal Protection Clause because it prohibited certain Chinese subjects from working their accustomed occupation, while allowing similarly situated other Chinese subjects).

167. *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

168. *Pyler v. Doe*, 457 U.S. 202, 214–15 (1982) (citing CONG. GLOBE, 39th Cong., 1st Sess. 1033, 1090 (1866)) (posing the following question in support of the resolution: “Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?”).

169. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (outlining the broad objectives of the Fourteenth Amendment to cover all people, regardless of citizenship).

170. *Pyler*, 457 U.S. at 215.

171. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

172. *Id.*

173. *Id.*

174. *Graham v. Richardson*, 403 U.S. 365, 378–80 (1971).

residents are not subject to deportation if they become public charges for causes arising after their entry.¹⁷⁵ Further, the statute imposed auxiliary burdens upon the residence of aliens who, after entry, suffered economic dependency on public assistance.¹⁷⁶ Thus, the Court reasoned that Congress's policy preempted the state law.¹⁷⁷

Strict scrutiny has proven difficult for states to overcome, even when armed with substantial interests.¹⁷⁸ For example, in *In re Griffith*, the Court invalidated a Connecticut law that explicitly restricted bar admission to citizens of the United States.¹⁷⁹ Although the Court acknowledged that the State had a substantial interest in the qualifications of those admitted to the bar, Connecticut's reasoning did not persuade it to uphold the law because it was not narrowly tailored and there were many less restrictive means to achieve the State's interest.¹⁸⁰ Thus, the Court ruled in favor of noncitizens.¹⁸¹

By contrast, federal laws concerning immigration are reviewed under rational basis.¹⁸² For example, in *Matthews v. Diaz*, the Court considered the constitutionality of a Social Security Act provision that denied eligibility to aliens unless they were permanent residents and met a five-year-residence requirement.¹⁸³ The Court upheld the federal law, stating that it is "unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence."¹⁸⁴ This decision differs from *Graham* because here, the federal government was properly acting to regulate naturalization and immigration by regulating the conditions of entry and residence of aliens, whereas in *Graham*, a state contradicted existing federal law.¹⁸⁵

Furthermore, the Court has extended equal protection of the law to everyone in the U.S., regardless of citizenship or legality.¹⁸⁶ But some

175. *Id.* at 378.

176. *Id.* at 378–79 (comparing the similarity of the state statute here with the one in *Shapiro v. Thompson*, 394 U.S. 618 (1969); both discouraged entry into or continued residency in the state).

177. *Id.* at 380.

178. *See In re Griffiths*, 413 U.S. 717, 725 (1973).

179. *Id.*

180. *Id.* at 724–28. Connecticut defended its law by arguing noncitizens would struggle with their national loyalty, would not foster public confidence, and that some would be unsuited to the practice of law. *Id.* at 724. But the Court disagreed, holding that Connecticut can, and does, require competency training, two oaths promising to perform the job faithfully and honestly, and supporting the constitutions of both Connecticut and the U.S. *Id.* at 725–26.

181. *Id.* at 728.

182. *See, e.g., Matthews v. Diaz*, 426 U.S. 67, 80–83 (1976) (recognizing that Congress regularly makes rules over naturalization and immigration that would be unacceptable if applied to citizens, and just because "Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens").

183. *Id.* at 82.

184. *Id.* at 83.

185. *Id.*

186. *Pyler v. Doe*, 457 U.S. 202, 214–15 (1982).

laws—specifically federal—have traditionally been entitled to more deference under judicial review because of Congress’s broad authority over immigration.¹⁸⁷ Accordingly, courts review state laws that classify nationality under strict scrutiny and federal laws creating similar classifications under rational basis.

Now this Comment has reached its critical issue. Which potential analysis will provide Martin the greatest opportunity to remain in the U.S.? If a court reviewed the CSA and INA in conjunction, Martin would probably only be afforded rational basis—the least likely avenue for success. But Martin could argue that the States’ legal-marijuana laws violate his constitutional right to equal protection—thus affording him strict scrutiny. Lastly, Martin could abandon his equal protection claim and focus solely on preemption.

V. PROBLEMS FROM LACK OF UNIFORM ENFORCEMENT

Since states began contravening the CSA by establishing their own marijuana regimes—either for medical use, recreational use, or both—the federal government has hesitated to fulfill its enforcement role.¹⁸⁸ Whether this hesitation results from a lack of resources, leadership, or fear of public backlash,¹⁸⁹ one result is clear: Noncitizens are suffering disparate treatment based solely on their geographic location. Families in similar conditions as Martin and Hector are experiencing heartbreak and dismay when one brother is thrown out of the country (potentially forever) while the other suffers no repercussions.¹⁹⁰

A. *Potential Outcome if Litigated Under Strict Scrutiny*

If Martin’s deportation was litigated, the first step would be to determine the applicable level of scrutiny. An injured noncitizen with

187. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

188. Cole Memo, *supra* note 44; Sessions Memo, *supra* note 24.

189. Paul Waldman, *Why Jeff Sessions’ Marijuana Crackdown Is Going to Make Legalization More Likely*, SALT LAKE TRIB. (Jan. 6, 2018), <https://www.sltrib.com/opinion/commentary/2018/01/06/paul-waldman-why-jeff-sessions-marijuana-crackdown-is-going-to-make-legalization-more-likely/> [https://perma.cc/6WF6-ZYBJ] (“In states with legal marijuana systems, such a crackdown [would] produce an outcry from both Democrats and Republicans. . . . Federal prosecutors ‘lack the resources to go into California and enforce the marijuana laws against everybody.’”).

190. Pilkington, *supra* note 125 (illustrating how the Trump Administration’s immigration approach has increased removals for noncitizens who have not committed serious crimes. For example, federal officials questioned Angel Ortiz at his home about a coworker, before realizing Ortiz illegally entered the country in 2000. Ortiz was subsequently hauled away as his two young children watched from the window. The article also explains how José Gutiérrez Castañeda arrived at a courthouse to pay for minor traffic infractions but wound up in removal proceedings once the court discovered his illegal status. Castañeda has a one-year-old daughter who came to the country “as a child and was granted temporary legal status as a ‘Dreamer’ by Obama,” who now must wait at least five years and pay thousands of dollars in legal fees before she could possibly see her father in the U.S. again).

standing¹⁹¹ would insist that the more stringent strict-scrutiny basis should apply because the issue involves classifications based on alienage, which are “inherently suspect and subject to close judicial scrutiny.”¹⁹² Accordingly, the noncitizen could argue the federal government violated his or her constitutional right to equal protection by refusing to uniformly enforce the INA deportability statute (in relation to the CSA) and instead allowing states to create laws which expressly contradict the CSA.¹⁹³

To survive strict scrutiny, the federal government must prove the classification created by the INA and CSA is narrowly tailored to promote a compelling governmental interest.¹⁹⁴ Here, the federal government’s compelling interests likely involve protecting the safety and welfare of the nation and its citizens and encouraging law-abiding noncitizens to seek entrance into the U.S.¹⁹⁵ Both of these justifications are likely to satisfy a court’s definition of a compelling governmental interest.¹⁹⁶

But proving the government’s classification is narrowly tailored will be more difficult. The federal government will likely argue that it treats illegal immigrants the same throughout the country because it expects all of them to abide by their respective local and state laws, whatever those laws might be.¹⁹⁷ Further, the government can argue that the INA’s deportability provision regarding marijuana contains a personal-use exception,¹⁹⁸ which prevents ICE from initiating removal proceedings against any noncitizen found in possession of illegal marijuana until they have previously been convicted of a similar offense.

But this argument will likely fail under strict scrutiny because the federal government’s inconsistent enforcement does not promote its compelling state interests, and there are less restrictive means available. First, lawful permanent residents like Martin can argue that the

191. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (“[R]espondents can demonstrate standing only if application of the regulations by the Government will affect *them*. . . .”). Here, noncitizens affected by the federal government’s lack of uniform marijuana enforcement, like Martin because he is in removal proceedings, have standing because the Government’s action or inaction directly affects them.

192. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (recognizing laws that operate to “the disadvantage of some suspect class” require strict judicial scrutiny); *Graham v. Richardson*, 403 U.S. 365 (1971).

193. *State Marijuana Laws in 2018 Map*, *supra* note 32.

194. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997).

195. Memorandum from Kelly to McAleenan, *supra* note 86; Email Interview with Robert Mikos, Professor, Vanderbilt Law Sch. (Sept. 22, 2017) (on file with *Texas A&M Law Review*).

196. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1990) (“[P]romoting the health, safety, and welfare of its citizens . . . provided a sufficiently ‘substantial’ governmental interest. . . .”); *Pyler v. Doe*, 457 U.S. 202, 228 (1982) (“[A] State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population [due to illegal immigration].”).

197. Email Interview with Robert Mikos, *supra* note 195.

198. 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

federal government's enforcement of minor marijuana-possession offenses does not protect the safety and welfare of the nation because half of the states have enacted laws allowing the drug in some form.¹⁹⁹ Instead of providing security to the nation, immigration officials are weeding out peaceful noncitizens, whose "crime" is one that almost 20% of the country's states have democratically legalized.²⁰⁰

Second, there are less restrictive means available to achieve the government's interests, namely, amending the INA's deportability statute as it relates to marijuana by only allowing removal proceedings for serious drug offenses like possession with intent to distribute. This is an offense that all states with legal-marijuana regimes have retained,²⁰¹ so there would never be a situation where a noncitizen could be charged in a state following the federal government's ban, like Texas, but not be charged in a legal-regime state, like Colorado.

Therefore, Martin is likely to succeed in his Fourteenth Amendment claim if the court applies strict scrutiny because the federal government will be unable to meet its heavy burden. But as mentioned above, this result largely depends on whether the court would analyze the issue as pertaining to a racial classification—where strict scrutiny would apply—rather than under Congress's inherent authority over immigration matters.

B. *Potential Outcome if Litigated Under Rational Basis*

The federal government could avoid the strict-scrutiny analysis by arguing its law should be reviewed under rational basis—the most deferential standard possible.²⁰² This argument stems from the federal government's plenary authority regarding immigration.²⁰³ Thus, the federal government need only show that its system bears "some rational relationship to legitimate" federal purposes.²⁰⁴

For example, the federal government could argue that noncitizens who violate the law are dangerous or unworthy of remaining in the

199. *State Marijuana Laws in 2018 Map*, *supra* note 32.

200. *Id.*

201. See *Marijuana Legalization: Florida Law*, U. W. FLA., <https://uwf.edu/enrollment-and-student-affairs/departments/wellness-services/marijuana-dope-facts/marijuana-legalization/> (last visited Jan. 4, 2019) [<https://perma.cc/6PZQ-FHR3>] (showing how Florida has legalized medical marijuana, but still criminalizes citizens who sell it).

202. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993) (stating that under rational basis, "a classification in a statute . . . comes to us bearing a strong presumption of validity. . . . [A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.").

203. *Arizona v. United States*, 567 U.S. 387, 395 (2012); *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941) ("When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute.").

204. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

country.²⁰⁵ Thus, Congress's purpose when drafting immigration laws was to ensure only law-abiding individuals may remain in the country. Further, the federal government could argue that it is irrelevant whether the drug laws vary from state to state because when it creates immigration legislation, it expects immigrants to abide by local laws.²⁰⁶ Or to put it differently, the federal government can claim it is treating all noncitizens the same because it expects all noncitizens to respect local laws, whatever those laws might be.²⁰⁷

But Martin could counter this argument by illustrating how the INA's deportability provisions specifically relate to whether the state offense also constitutes a federal violation.²⁰⁸ Thus, instead of the federal government creating a minimum floor for what constitutes a crime throughout the country, it has instead created a ceiling while allowing many states to create less-stringent laws or even abandon them altogether. Martin can therefore argue that the federal government's lack of uniform enforcement is not rationally related to this state interest because it classifies people in one part of the country as "law-abiding," while classifying those in another part as "criminals," when they have both committed the same act that the federal government has deemed illegal.

Lastly, the federal government could argue that lawful permanent residents can choose to reside elsewhere, such as one of the legal-regime states. But this argument would likely strengthen Martin's case because such a "solution" would continue violating noncitizens' Fourteenth Amendment rights, and the federal government could be considered to have conceded it does not equally protect its citizens. Furthermore, the court would likely hold that this "solution" does not bear any rational relationship to the legitimate federal purpose of ensuring only law-abiding aliens remain in the country because "law-abiding" here would solely be determined by one's geographic location in relation to that state's marijuana laws.

Unfortunately for Martin, if the court is dissatisfied with the federal government's reasoning, it can substitute its own under this more lenient standard.²⁰⁹ Because of the court's deference to democratically passed legislation, it affords the challenged Act "a strong presumption

205. *Demore v. Kim*, 538 U.S. 510, 518 (2003) (listing statistics that showed "[c]riminal aliens were the fastest growing segment of the federal prison population[,] . . . and they formed a rapidly rising share of state prison populations as well. . . . [D]eportable criminal aliens who remained in the United States often committed more crimes before being removed.").

206. Email Interview with Robert Mikos, *supra* note 195.

207. *Id.*

208. See 8 U.S.C. § 1227(a)(2)(B)(i) (2012); *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

209. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–20 (1993) (Dissatisfied with the party's reasoning, the Court conceived of two rational reasons for the distinctions embodied in the Cable Communications Policy Act).

of validity.”²¹⁰ But this does not mean all is lost for noncitizens. Although courts afford much deference to the federal government’s decisions under this standard,²¹¹ nongovernmental entities have overcome this burden.²¹²

For example, in *U.S. Department of Agriculture v. Moreno*, the Court struck an amendment to the Food Stamp Act that rendered ineligible any household containing an individual unrelated to any other member of the household.²¹³ The Court first examined the express purposes of the Act, which included “establishing and maintaining adequate national levels of nutrition. . . .”²¹⁴ After concluding that the statutory classification (households with related persons versus those containing one or more unrelated persons) was “clearly irrelevant to the stated purposes of the Act,”²¹⁵ the Court turned to its legislative history, which they also found to be dissatisfactory.²¹⁶

Finally, the Court considered the Government’s ad hoc argument that the amendment was aimed at preventing fraud.²¹⁷ But the Act already contained various provisions addressing this issue.²¹⁸ Thus, the Court struck the amendment under rational basis because instead of maintaining adequate national levels of nutrition, it excluded from participation only “those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility.”²¹⁹

In *Zobel v. Williams*, another case where rational basis was not met, the Court invalidated Alaska’s 1980 constitutional amendment because it violated the Equal Protection Clause.²²⁰ The amendment proportionally distributed state funds to Alaskan citizens based on each year of residency subsequent to the state’s inception in 1959.²²¹ Applying rational basis, the Court determined Alaska’s state interest was to create a financial incentive for citizens to establish and maintain residence in the state.²²² But the Court concluded that this amendment was not rationally related to the distinct classifications based on state duration because this interest was “not in any way served by

210. *Id.* at 314–25.

211. *See id.* at 314–16.

212. *Zobel v. Williams*, 457 U.S. 55 (1982); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973).

213. *Moreno*, 413 U.S. at 538.

214. *Id.* at 533.

215. *Id.* at 534.

216. *Id.* (finding the only legislative history available indicated that the amendment was “intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”).

217. *Id.* at 535.

218. *Id.* at 536–37.

219. *Id.* at 538.

220. *Zobel v. Williams*, 457 U.S. 55, 65 (1982).

221. *Id.* at 57.

222. *Id.* at 61.

granting greater dividends to persons for their residency during the [twenty-one] years prior to the enactment.”²²³

The Court, concerned about the potential consequences of upholding the amendment, questioned what would preclude states from varying university tuition or restricting “access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile[.]”²²⁴ Accordingly, the Court held that Alaska failed to show that the amendment’s residency-duration classification rationally served any state interest.²²⁵

Therefore, regardless of how courts decide to analyze this equal protection claim, there are a variety of arguments that lawful permanent residents have at their disposal to fight for change and equal treatment. If analyzed under strict scrutiny, the government should fail because there are less restrictive means to accomplish its express purpose of preventing serious drug smuggling,²²⁶ for example, by exempting simple possession of marijuana from the INA’s list of deportable offenses in conjunction with the CSA. If analyzed under rational basis, the government should still fail because only punishing lawful permanent residents in one part of the country, while condoning conduct of others in specific states, is not rationally related to its interest in promoting law-abiding immigration.

VI. POTENTIAL SOLUTIONS

If a court finds that the INA, in conjunction with the CSA, fails a Fourteenth Amendment equal protection challenge, then the federal government must change the law to prevent lawful permanent residents from suffering further deprivations. As this Comment demonstrates, the federal government’s unwillingness to uniformly enforce its laws has violated lawful permanent residents’ Fourteenth Amendment right to equal protection, solely based on their geographic location.

Therefore, changes must be made in order to eliminate this disparate result. This Comment sets forth three potential solutions.²²⁷ First, the federal government could uniformly enforce its laws throughout the country. Second, the federal government could pass legislation removing the current ban on marijuana. Third, Congress could amend the INA by exempting any marijuana offense from requiring a report

223. *Id.* at 62.

224. *Id.* at 64.

225. *Id.* at 65.

226. DEP’T OF HOMELAND SECURITY, *supra* note 80, at 1.

227. Others have addressed similar proposals in the context of other constitutional rights, such as the Sixth Amendment. See Jordan Cummings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 U.C.L.A. L. Rev. 510 (2015). These proposals lend support to the argument that they should also be considered in the context of the Fourteenth Amendment here.

to ICE. Alternatively, Congress could solve this problem through an INA amendment which would require all states—even those with legal-marijuana regimes—to report marijuana offenses to ICE.

A. *Federal Government Uniformly Enforces the CSA*

The simplest and most pragmatic solution to the geographic discrimination facing noncitizens would be for the federal government to enforce the CSA uniformly throughout the nation. Thus, lawful permanent residents like Martin would have no equal protection argument because Hector would also have been arrested and been subject to deportation proceedings for the exact same offense, even though they were on opposite ends of the country. But just because this may be the simplest answer does not mean it is the best solution, mainly because the federal government will have a difficult time implementing it. For example, Congress may not compel or coerce states to enforce federal law.²²⁸ But Congress can prevent states from creating laws contrary to its own under the concept of preemption.²²⁹

Congress could threaten legislation designed to preempt all state marijuana laws unless the states agreed to promulgate laws banning marijuana categorically like Congress does.²³⁰ While this may facially appear to be coercive and unfair, the Supreme Court has upheld such conditional-preemption legislation providing states equally dire options.²³¹ This method may be preferable because it provides states the image of autonomy, rather than Congress simply drafting a law forbidding states from legislating in the field of marijuana.

If Congress were to formally preempt this field, then courts would assumedly strike down any contrary state law relating to marijuana

228. *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that while Congress has substantial constitutional power to encourage states to do certain things, Congress “may not compel the States to enact or administer a federal regulatory program”).

229. *Gibbons v. Ogden*, 22 U.S. 1, 18 (1824) (defining the Supremacy Clause as follows: “[I]f the mere exercise of a power by Congress takes away all right from the State to act under that power, then any State law, under such a power, would be void; not as conflicting with the supreme law of Congress, but as being repugnant to the provisions of the constitution itself, and as being passed by the State, in the first instance, without authority.”).

230. Mikos, *supra* note 24, at 1460.

231. *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 765 (1982) (“There is nothing in PURPA ‘directly compelling’ the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States’ ‘separate and independent existence.’”); *Oklahoma v. U.S. Civil Serv. Comm’n*, 330 U.S. 127, 143 (1947) (upholding Congress’s power to attach conditions to grants-in-aid received by the States, although the condition under attack involved an activity that “the United States is not concerned with, and has no power to regulate”).

under the Supremacy Clause.²³² Although this would not address the federal government's lack of enforcement, it would halt states that currently follow the federal ban on marijuana from considering its legalization. Further, it would send a strong message to all citizens that the federal government is finally addressing the issue. However, due to the country's current state of division over issues like Deferred Action for Childhood Arrivals²³³ and drug policy,²³⁴ this may not be Congress's most favorable approach.

The federal government could also pursue scare tactics by prosecuting a large investor for the marijuana industry. Under the Sessions Memo, the Department of Justice can begin prosecutions against cannabis business owners and operators "who are completely in compliance with State law," thereby dealing a crippling blow to capital formation and innovation.²³⁵ Once the Attorney General initiates legal proceedings against a reputable investor like Arcview,²³⁶ then the flow of investing money will likely come to a halt due to fear of legal and reputational repercussions.²³⁷ It may be wise for the federal government to pursue a couple of small investors as well to make the marijuana industry aware that no one is safe from its reach.²³⁸

232. *Gibbons*, 22 U.S. at 18. This has happened in the immigration realm before. See *Arizona v. United States*, 567 U.S. 387 (2012).

233. Andrew Desiderio, *Democrats Divided Over Forcing a DACA-Shutdown Even After Trump's 'Sh*thole' Saga*, DAILY BEAST (Jan. 16, 2018, 11:07 PM), <https://www.thedailybeast.com/democrats-divided-over-forcing-a-daca-shutdown-even-after-trumps-shthole-saga> [https://perma.cc/9AM4-WMFR] (demonstrating that Progressive Democrats are seeking to excite their base with a "my way or the highway" strategy on DACA; meanwhile Republicans are divided over whether to support stopgap measures).

234. Maia Szalavitz, *Women Are Leading the Fight Against the War on Drugs*, VICE (Feb. 5, 2018, 1:10 PM), https://www.vice.com/en_us/article/8xd9pv/women-are-leading-the-fight-against-the-war-on-drugs [https://perma.cc/7WPS-UNQY]. Although the article cites statistics showing the majority of the U.S.'s adult population (including "the same Republican Party that remains behind Trump") supports legalizing marijuana, it notes that "a return to all-out drug war seems implausible" after President Trump's State of the Union speech where he "doubled down once again on the drug war, calling for policies that 'get much tougher on dealers and pushers.'").

235. Alan Brochstein, *Cannabis Stock Investors Should Pay Attention to the U.S. Federal Policy Change*, FORBES (Jan. 21, 2018, 9:02 PM), <https://www.forbes.com/sites/alanbrochstein/2018/01/21/cannabis-stock-investors-should-pay-attention-to-the-u-s-federal-policy-change/#49eb04d37889> [https://perma.cc/7XRU-N5GN].

236. Paul Sullivan, *As States Legalize Marijuana, Investors See an Opportunity*, N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/your-money/marijuana-investments.html> [https://perma.cc/HP7C-3927]. Since 2011, Arcview, consisting of 600 investors, "has made \$155 million worth of investments in the cannabis industry, from growers and dispensaries to companies that make ancillary products, like vaping devices." *Id.* Almost \$50 million of their investments came from 2017 alone. *Id.*

237. Brochstein, *supra* note 235 (Sessions's memo has left "cannabis operators and their regulators subject to being prosecuted for breaking federal law and has created a very uncertain operating environment.").

238. Email Interview with Robert Mikos, *supra* note 195.

Investors are not the only potential target; the federal government could also prosecute banks under federal money-laundering laws²³⁹ to stifle the marijuana industry.²⁴⁰ A crackdown on banks would hurt the already “all-cash businesses,” making it even harder for marijuana companies to pay taxes.²⁴¹ Recent state efforts to address this problem include Colorado chartering its own credit union dedicated entirely to marijuana companies.²⁴² But the federal banking system and the courts rejected this approach because it would “facilitate criminal activity.”²⁴³ Although this strategy would not initially solve Martin’s problem of unequal protection, it could potentially lead states to follow the federal government’s marijuana ban. This would cause lawful permanent residents like Martin’s brother, Hector, to be criminally charged, regardless of their geographic location.

However, not every possible scenario to uniformly enforce the CSA involves strong-arming the states through litigation. A common congressional tactic involves offering states grants in exchange for them passing certain legislation.²⁴⁴ For example, Congress could avoid preemption altogether by offering states grants for improving their highways²⁴⁵ or adopting national standards,²⁴⁶ in exchange for state legislation that eliminates exemptions and mirrors Congress’s categorical criminal bans on marijuana.²⁴⁷ This falls short of compelling state action because the grants could theoretically be refused.²⁴⁸ Courts have also held that if a congressional action passes muster under the Commerce Clause, then it cannot be considered coercion under the

239. 18 U.S.C. § 1956(a) (2012).

240. See Jeremy Berke, *This Could Be the No. 1 Problem Facing Legal Weed Businesses in America*, BUS. INSIDER (Apr. 20, 2016, 11:59 AM), <http://www.businessinsider.com/no-1-problem-facing-legal-weed-businesses-2016-4> [<https://perma.cc/6VJG-KV8X>]; Katherine Pickle, *Will State-Based Changes To Marijuana Laws Soon Impact Entire Country?*, YELLOW HAMMER, <http://yellowhammernews.com/politics-2/will-state-based-changes-marijuana-laws-soon-impact-entire-country/> (last visited Jan. 4, 2019) [<https://perma.cc/8C47-C9FR>] (noting that banks “may be penalized for money laundering or tied into the illegal transport of the drug over state lines. Attorneys are hesitant to work for marijuana corporations, as attorneys remain bound by federal law.”).

241. Berke, *supra* note 240; Pickle, *supra* note 240 (“[M]arijuana corporations cannot write-off expenses like rent or utilities when filing their federal taxes.”).

242. Pickle, *supra* note 240.

243. *Id.*

244. Fed. Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 766 (1982).

245. Cf. South Dakota v. Dole, 483 U.S. 203, 212 (1987) (holding that a statute conditioning receipt of highway funds on a state’s adoption of a minimum drinking age is a “valid use of the spending power”).

246. Cf. Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989) (holding that Congress’s establishment of a national speed limit did not violate the Tenth Amendment).

247. Mikos, *supra* note 24, at 1460.

248. New York v. United States, 505 U.S. 144, 171–73 (1992) (distinguishing conditional spending from commandeering); Skinner, 884 F.2d at 449 (“Withholding funds is simply a lesser form of coercion than enacting a flat Congressional mandate with which a state is obligated to comply.”).

Spending clause.²⁴⁹ This strengthens the federal government's power to preempt states with legal-marijuana regimes because the Supreme Court has already held that the Commerce Clause provided constitutional authority to Congress to ban marijuana under the CSA.²⁵⁰

Although the federal government appears to have the legal authority to reign in states with legal-marijuana regimes and has made some steps in this direction,²⁵¹ many Americans still doubt it will enact serious intrusions because of rising public support for legalization²⁵² and lack of federal resources.²⁵³ Any attempt to require legal states to enforce the federal marijuana prohibition by using their own resources will be futile under coercion.²⁵⁴ Thus, the federal government would have to supply its own DEA agents to administer its laws, but the lack of resources and manpower within the DEA is why the Obama Administration issued its lenient Cole Memo in the first place.²⁵⁵

While some of these tactics will not immediately affect lawful permanent residents like Martin, their end-result—enforcing a uniform ban on marijuana—will result in Martin and Hector receiving equal treatment, regardless of their geographic location.

B. Federal Government Removes Ban on Marijuana

The antithesis to the first-proposed solution involves the federal government acquiescing to state and public pressure to remove its ban on marijuana. Congress could easily achieve this by removing marijuana from the CSA.²⁵⁶ If Congress takes this step, then it must decide the next crucial issue: whether it should impose national regulations or allow states the freedom to establish their own requirements for li-

249. *Skinner*, 884 F.2d at 449–50.

250. *Gonzalez v. Raich*, 545 U.S. 1 (2005).

251. See Sessions Memo, *supra* note 24.

252. Victoria Balara, *Fox News Poll: Support for Legalizing Marijuana Hits Record High*, FOX NEWS (Feb. 7, 2018), <https://www.foxnews.com/politics/fox-news-poll-support-for-legalizing-marijuana-hits-record-high> [<https://perma.cc/6JT8-CVCC>] (showing a 33% increase in favoring legalization since 2001); Sean Williams, *This New Marijuana Survey Tells You Everything You Need to Know About Public Sentiment*, MOTLEY FOOL (Feb. 10, 2018, 11:41 AM), <https://www.fool.com/investing/2018/02/10/this-new-marijuana-survey-tells-you-everything-you.aspx> [<https://perma.cc/R544-MNHQ>] (Fox News poll from January 2018 found that “59% of the 1,002 respondents favored legalizing weed.” Gallup’s poll from October 2017 found that “64% of respondents favored legalization.” This was an increase from only 25% in 1995.).

253. Phillip Smith, *3 Reasons Why Trump Might Hesitate to Go After Legal Pot*, ALTERNET (Nov. 17, 2016), <https://www.alternet.org/drugs/3-reasons-trump-unlikely-go-after-legal-marijuana> [<https://perma.cc/Y3QA-UXP3>] (“The DEA doesn’t have an army big enough to effectively [enforce federal marijuana laws]. . . . Marijuana legalization is popular, more popular than Trump.”).

254. *New York v. United States*, 505 U.S. 144, 188 (1992).

255. Cole Memo, *supra* note 44 (recognizing the federal government’s limited resources, this memo encouraged prosecutors to focus on serious drug crimes, rather than simple possession crimes).

256. Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE WESTERN RES. L. REV. 689, 709 (2015).

censing and business-regulation purposes. Unbeknownst to many, in 2013 Congressman Jared Poll introduced a comprehensive proposal comprised of such considerations with his Ending Federal Marijuana Prohibition Act.²⁵⁷ Under this Act, marijuana would be exempt from the CSA, and enforcement authority over the drug would transfer from the DEA to a newly renamed Bureau of Alcohol, Tobacco, *Marijuana*, Firearms, and Explosives.²⁵⁸

Many opponents of the current federal ban on marijuana advocate rescheduling the drug to a lower level.²⁵⁹ But this solution does nothing to help those in Martin's position around the country, and it would not address the federal government's inconsistent enforcement strategy. Regardless of its schedule, if marijuana remains listed under the CSA (even if under the most lenient Schedule V classification), then the INA's corresponding sections still subject such marijuana-possession offenses to deportation.²⁶⁰ Thus, only a complete declassification of marijuana from the CSA would prevent the application of the INA's deportability section.²⁶¹

Another possibility involves the federal government allowing the states discretion in how they wish to regulate marijuana. This can be achieved in one of two ways. First, Congress could pass legislation allowing states to either follow the current federal ban, or submit their own regulatory legislation, subject to approval by the Secretary of Health. This mirrors dispute in *Gade v. National Solid Wastes Management*.²⁶² There, Congress adopted OSHA, which created safe and healthful working conditions.²⁶³ Instead of entirely preempting states from creating their own safety conditions, Congress added a section providing states the opportunity to submit their own plans to the Secretary of Health for approval.²⁶⁴ This strategy would benefit the federal government because it would ultimately retain the final say on marijuana regulation.

257. H.R. 499, 113th Cong. § 101 (2013).

258. *Id.*

259. Harrison Jacobs, *The DEA Treats Heroin and Marijuana As Equally Dangerous Drugs*, BUS. INSIDER (May 22, 2016, 5:54 PM), <http://www.businessinsider.com/us-drug-scheduling-system-heroin-marijuana-2016-5> [<https://perma.cc/9E2C-922N>] ("Over the years, the DEA has repeatedly resisted attempts to reschedule or deschedule marijuana, despite the appeals of advocacy groups and the DEA's own members." Such groups include the American Medical Association, the National Academy of Medicine, the American Academy of Pediatrics, and the National Organization for Marijuana Laws.).

260. 21 U.S.C. § 802(6) (2012) (defining a controlled substance as a drug included in schedules I, II, III, IV, or V of the chapter). The controlled substance inadmissibility and deportability grounds both refer to this definition. *See* 8 U.S.C. § 1182(a)(2)(A)(i) (2012); 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

261. 21 U.S.C. § 802(6).

262. *See Gade v. Nat'l Solid Wastes Mgmt.*, 505 U.S. 88 (1992).

263. *Id.* at 96.

264. *Id.* at 97.

Second, Congress could repeal any mention of marijuana from the CSA, thus removing its prohibition, and allow states to choose whether to legalize it or not. This solution would benefit Martin because even if Texas were to remain a prohibition state, Martin's possession conviction would no longer be a federal offense. Thus, ICE and the INA would not be involved in Martin's subsequent state criminal proceedings, making Martin's deportation highly unlikely, if not impossible.

C. Federal Government Amends the INA

Although lowering marijuana's scheduling under the CSA would not affect the INA's applicability for deportation, amending the INA could provide an adequate remedy for Martin.²⁶⁵ Congress could propose legislation to amend the INA that would exempt any marijuana-possession offense from being reported to and acted upon by ICE. This would not be the first time Congress has amended the INA.²⁶⁶ If passed, then it would not matter if lawful permanent residents reside in legal-marijuana states. For example, even if Martin received two marijuana-possession convictions in an illegal state, like Texas, there would be no fear of potential deportation because ICE would not be notified.²⁶⁷ And even if state officers who opposed this lenient approach notified ICE anyways, ICE would have no legal authority to punish Martin under such legislation.

Alternatively, Congress could amend the INA to require legalized states to report if a noncitizen is found to be in possession of marijuana. Although the federal government cannot compel state officials and law enforcement to do its regulatory work for them,²⁶⁸ the government could attempt to obtain state acquiescence by conditioning state grants.²⁶⁹ For example, courts would likely uphold a federal law conditioning funds for improving a state's infrastructure on its compliance with this INA reporting amendment.²⁷⁰

But this is the least likely solution for the government to pursue because it fails to adequately address this Comment's concerns for lawful permanent residents like Martin. Additionally, states that currently have legal-marijuana regimes are unlikely to abandon them for federal funds when they have been making over a billion dollars each

265. 21 U.S.C. § 802(6); *see* 8 U.S.C. § 1182(a)(2)(A)(i); 8 U.S.C. § 1227(a)(2)(B)(i).

266. 8 U.S.C. § 1227(a)(2)(B)(i) (In the early 2000s, Congress amended the INA by adding the personal-use exception.).

267. *Id.* The INA requires a conviction for violating a state or federal law relating to controlled substances before a noncitizen is subject to deportation. *Id.*

268. *New York v. United States*, 505 U.S. 144, 188 (1992).

269. *South Dakota v. Dole*, 483 U.S. 203, 212 (1987).

270. *See id.*

year from the marijuana industry.²⁷¹ Instead of relying on the federal government for its infrastructural needs, states could use their profits from marijuana taxation. Ultimately, states with legal-marijuana regimes would likely not follow this reporting requirement, thereby foregoing the federal funds to maintain their current system and continue appeasing its constituents,²⁷² the majority of whom voted for legalization in their state referendum.²⁷³ This would result in the same problem that is currently imposed upon lawful permanent residents: unequal treatment based solely on their geographic location. Thus, amending the INA is unlikely to effect the change needed to address the government's Fourteenth Amendment violation.

VII. CONCLUSION

The consequences facing lawful permanent residents because of the INA's deportability provision, in relation to the CSA's listing of marijuana, are severe and unconstitutional. Noncitizens are subject to prison-like detentions, and families have been torn apart for "crimes" that a majority of states have decriminalized and a fifth of which have even fully legalized, contrary to federal law. Most importantly, the federal government's failure to uniformly enforce its marijuana ban has caused lawful permanent residents in one part of the country to be treated unequally from those in another, solely because of their geographic location. This problem will only grow larger as other states adopt more lenient approaches towards marijuana. This Comment suggests several ways for the government to correct this wrong, but ultimately the key to finding a solution that addresses the concerns of noncitizens involves conducting a national dialogue where every voice has the opportunity to be heard.

271. James Nash, *A \$1 Billion Marijuana Windfall for New Jersey? Some Say it's Possible*, NORTH JERSEY (Jan. 2, 2018, 5:18 PM), <https://www.northjersey.com/story/news/new-jersey/2018/01/02/1-billion-marijuana-windfall-new-jersey-some-say-its-possible/990192001/> [<https://perma.cc/TG74-TKUU>]; Alicia Wallace, *Colorado's 2017 Marijuana Sales Reach \$1 Billion in Just Eight Months*, CANNABIST (Oct. 11, 2017, 5:54 PM), <https://www.thecannabist.co/2017/10/11/colorado-marijuana-sales-august-2017-tax-data/89751/> [<https://perma.cc/8CYK-8PMX>].

272. Pickle, *supra* note 240 ("[M]any argue that legalization should be for state citizens to decide.").

273. See *History of Marijuana on the Ballot*, BALLOTPEDIA, https://ballotpedia.org/History_of_marijuana_on_the_ballot (last visited Feb. 25, 2018) [<https://perma.cc/ZJM6-TJ8W>]. Of the 30 states that have passed medical marijuana legalization, half were through statewide ballot measures. *Id.* "Nine marijuana-related measures appeared on statewide ballots in 2016. All but one was approved." *Id.*