

# LEGALIZING MARIJUANA IN THE SHADOWS OF INTERNATIONAL LAW: THE URUGUAY, COLORADO, AND WASHINGTON MODELS

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## ABSTRACT

As enthusiasm for the war on drugs subsides, countries and sub-jurisdictions throughout the Americas are contemplating decriminalizing or legalizing possession of marijuana for personal use. The regulatory structures of the earliest experiments in Uruguay, Colorado, and Washington provide insights about challenges and regulatory gaps that may arise when crafting such legislation. At the same time, the Uruguay, Colorado, and Washington experiences demonstrate that while issues of federalism and potential international law conflicts are significant, neither present insurmountable obstacles to drug reform efforts in the region.

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## INTRODUCTION

The first comprehensive laws legalizing marijuana for recreational purposes in Uruguay,<sup>1</sup> Colorado,<sup>2</sup> and Washington<sup>3</sup> were

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<sup>1</sup> Ley No. 19.172, *Marihuana Y Sus Derivados*, ASAMBLEA GENERAL, Dec. 20, 2013 (Uru.) available at [http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons\\_min\\_803.pdf](http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons_min_803.pdf).

passed in the context of increasing resistance to the *war on drugs* in the Americas.<sup>4</sup> Many jurisdictions throughout the region had already decriminalized or reduced penalties for the use and possession of marijuana for recreational purposes prior to the passage of these new laws.<sup>5</sup> The new laws in Uruguay, Colorado, and Washington are unique, however, because they go far beyond decriminalizing recreational marijuana.<sup>6</sup>

In Latin America, the failure to control drug-trafficking related violence has driven dialogue about drug policy reform and efforts to legalize marijuana.<sup>7</sup> In the United States, calls to decriminalize and legalize personal use of marijuana began decades ago.<sup>8</sup> However, only recently did a majority of the population in the United States begin to favor the legalization of marijuana for recreational purposes.<sup>9</sup> Following

<sup>2</sup> COLO. CONST. art. XVIII, § 16.

<sup>3</sup> See generally 2013 Wash. Sess. Laws 1 (I.M. 502) (codified as amended at WASH. REV. CODE § 69.50 (2014)).

<sup>4</sup> See e.g., Jeremy McDermott, *Democratising the Drug Trade*, INT'L B. ASS'N (Jan. 10, 2012), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=3f887e8e-1a09-4491-88fa-0d7f7ae7e194>; Ethan Nadelmann, *Uruguay: ¿qué significa la legalización de la marihuana para el mundo?*, AMERICA ECONÓMICA (Aug. 14, 2013), <http://www.americaeconomia.com/analisis-opinion/uruguay-que-significa-la-legalizacion-de-la-marijuana-para-el-mundo>; *Marijuana legalization: Tokers' delight*, THE ECONOMIST, Sept. 18, 2013, <http://www.economist.com/blogs/democracyinamerica/2013/09/marijuana-legalisation>.

<sup>5</sup> For example, in Argentina, Chile, Colombia, Costa Rica, Paraguay, Peru and Uruguay, there is no penalty for unauthorized possession of a controlled substance for personal, private use by an adult. Other States impose non-criminal penalties for unauthorized possession of a controlled substance for personal, private use by an adult, including Bolivia, Brazil, and Mexico. Meanwhile, Jamaica, Panama, and Venezuela utilize alternative penalties for unauthorized possession of a controlled substance for personal, private use by an adult. ORG. OF AM. STATES, *THE DRUG PROBLEM IN THE AMERICAS: STUDIES, LEGAL AND REGULATORY ALTERNATIVES 21–24*, available at <http://www.cicad.oas.org/drogas/elinforme/informeDrogas2013> [hereinafter OAS].

<sup>6</sup> “Decriminalization” refers to a regulatory regime that eliminates criminal sanctions for consumption, while maintaining criminal sanctions for production and commerce related to prohibited substances. “Legalization” refers to a regime in which both production and consumption are legal. However, even under legalization regulatory structures, restrictions may remain for certain prohibited acts such as selling to minors, driving while under the influence, or licensing infractions. *Id.* at 8.

<sup>7</sup> See Ioan Grillo, *Drug War No More*, N.Y. TIMES, Nov. 27, 2013, [http://www.nytimes.com/2013/11/28/opinion/drug-war-no-more.html?\\_r=0](http://www.nytimes.com/2013/11/28/opinion/drug-war-no-more.html?_r=0).

<sup>8</sup> The National Commission on Marijuana and Drug Abuse favored ending marijuana prohibition and adopting other methods to discourage use during the Nixon administration. In 1973, Oregon became the first state to decriminalize cannabis. Jeffrey Miron, *Why Congress Should Legalize Pot*, CNN, illus. 24, 28, Nov. 19, 2014, <http://www.cnn.com/2014/11/19/opinion/miron-marijuana-legalization/>.

<sup>9</sup> Lydia Saad, *Majority Continues to Support Pot Legalization in U.S.*, GALLUP (Nov. 6, 2014), <http://www.gallup.com/poll/179195/majority-continues-support-pot-legalization.aspx>.

the legalization of recreational marijuana in Colorado and Washington, three other jurisdictions—Alaska,<sup>10</sup> Oregon,<sup>11</sup> and the District of Columbia<sup>12</sup>—followed suit with their own successful ballot initiatives.<sup>13</sup> Similar initiatives may appear on 2016 ballots in Arizona, California, Delaware, Hawaii, Maine, Maryland, Massachusetts, Montana, Nevada, New York, Rhode Island, and Vermont.<sup>14</sup>

Much has been written about the merits and risks of decriminalizing or legalizing marijuana.<sup>15</sup> This Note does not seek to contribute to that debate. Nor does it address medical marijuana, which is now legal in twenty-three US states and the District of Columbia.<sup>16</sup> Rather, this Note focuses on the structure and substance of the new laws in Uruguay, Colorado, and Washington. As public opinion and political support continue to grow to encourage similar reforms throughout the region, the relevant debate will increasingly shift towards discussion of

<sup>10</sup> Alaska's Ballot Measure No. 2 – 13PSUM passed with 53% of the vote in 2014. *2014 General Election November 4, 2014 Official Results*, STAT. ALASKA DIV. OF ELECTION, <http://www.elections.alaska.gov/results/14GENR/data/results.htm> (last updated Nov. 25, 2014).

<sup>11</sup> Oregon's Legalized Marijuana Initiative, Measure 91 (Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act) passed with 56% of the vote. *November 04, 2014 General Election Results Official Abstract of Votes*, OR. SEC'Y OF ST., <http://www.oregonvotes.gov/doc/history/nov42014/91.pdf>.

<sup>12</sup> The District of Columbia Ballot Initiative 71 ballot question (the Legalization of Home Cultivation and Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014) passed by a wide margin of nearly 65% on November 4, 2014. *DC Board of Elections and Ethics: Election Results*, D.C. BOARD OF ELECTIONS, [https://www.dcboee.org/election\\_info/election\\_results/2014/November-4-General-Election](https://www.dcboee.org/election_info/election_results/2014/November-4-General-Election) (last updated Dec. 3, 2014); However, the Washington, D.C., initiative faces additional challenges from Congress. Jennifer Steinhauer, *Republicans Warn Washington to Think Twice About Legalizing Marijuana*, N.Y. TIMES, Feb. 26, 2015, [http://mobile.nytimes.com/2015/02/27/us-as-marijuana-becomes-legal-in-washington-congressional-republicans-warn-city-to-think-twice.html?\\_r=0](http://mobile.nytimes.com/2015/02/27/us-as-marijuana-becomes-legal-in-washington-congressional-republicans-warn-city-to-think-twice.html?_r=0).

<sup>13</sup> A fourth November 2014 marijuana-related ballot initiative involved medical marijuana in Florida. The Florida ballot initiative failed to obtain the 60% of the vote required for the initiative to pass (58% of Floridians voted in favor of the initiative). Shaila Dewan, *Higher Minimum Wage Passes in 4 States; Florida Defeats Marijuana Measure*, N.Y. TIMES, Nov. 5, 2014, [http://mobile.nytimes.com/2014/11/05/us/politics/higher-minimum-wages-prove-popular-in-fla-marijuana-is-less-so.html?\\_r=0](http://mobile.nytimes.com/2014/11/05/us/politics/higher-minimum-wages-prove-popular-in-fla-marijuana-is-less-so.html?_r=0).

<sup>14</sup> Miron, *supra* note 8.

<sup>15</sup> See generally Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV., no. 3, 1301 (2013); see generally Eric Blumenso & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL'Y & L. 43 (2009); see generally, *Legalization: Marijuana Use*, SMART APPROACHES TO MARIJUANA (SAM), <http://learnaboutsam.org/the-issues/legalization/> (last visited Jan. 31, 2015).

<sup>16</sup> 23 *Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Jan. 8, 2015).

how to best design these new regulatory structures. Careful statutory drafting is particularly relevant in this area as backlash against problematic regulatory structures may threaten further efforts at reform.<sup>17</sup> For this reason, a comparative analysis of the first models in Uruguay, Colorado, and Washington is relevant to understand how the process may continue to unfold throughout the Americas, and to identify best practices and pitfalls in the earliest regulatory models.

At the same time, the impact of federal and international law on these new regulatory structures warrants consideration. This note discusses federal preemption issues in the context of the Controlled Substances Act (CSA) and the Colorado and Washington initiatives. It then investigates the relationship between these new laws and international obligations pursuant to the Single Convention on Narcotic Drugs of 1961 (SCND)<sup>18</sup> and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (CAIT).<sup>19</sup> This note concludes that although federal preemption and international law conflicts raise important concerns, neither presents an insurmountable challenge impeding further drug reform in the Americas.

The first part of this note describes and analyzes the regulatory structures legalizing marijuana in Uruguay, Colorado, and Washington. The second part discusses federalism concerns unique to the United States, specifically the relationship between the federal Controlled Substances Act and the new laws in Colorado and Washington. The final section examines the relationship between two of the binding prohibitionist United Nations (UN) International Drug Conventions and how they impact the new laws in Uruguay, Colorado, and Washington.

## I. URUGUAY'S STATE-RUN MONOPOLY

On December 20, 2013, Uruguay—a nation of just over three million people,<sup>20</sup> carved out of South America as a buffer zone between

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<sup>17</sup> Martin Kaste, *A Majority In U.S. Favor Legal Pot, But Will That Stick?*, NPR (Dec. 17, 2013, 5:28 PM), <http://www.npr.org/2013/12/17/251946079/a-majority-in-u-s-favor-legal-pot-but-will-that-stick?sc=17&f=1001>.

<sup>18</sup> Single Convention on Narcotic Drugs, Mar. 25, 1961, 18 UST 1407, 520 U.N.T.S. 204, available at [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf).

<sup>19</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95, 28 I.L.M. 497, available at [https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf).

<sup>20</sup> Censos 2011, INSTITUTO NACIONAL DE ESTADISTICA URUGUAY, <http://www.ine.gub.uy/censos2011/index.html>.

the regional powers of Argentina and Brazil<sup>21</sup>—became the first nation in the world to comprehensively legalize marijuana for personal use.<sup>22</sup> The drive to legalize marijuana in Uruguay began in the executive office. In August 2012, the President of Uruguay, José Mujica, drafted a proposal to fully legalize marijuana throughout the nation and sent the proposed bill to the House of Representatives.<sup>23</sup> The controversial bill<sup>24</sup> narrowly passed in the lower house of Uruguay's Congress,<sup>25</sup> the Uruguayan Senate approved it by a vote of 16-13,<sup>26</sup> and the President signed it into law three days later.<sup>27</sup> At the time the bill was signed, sixty-three percent of the Uruguayan population opposed the new law.<sup>28</sup> Nevertheless, widespread popular opposition to the bill served only to delay its passage temporarily.<sup>29</sup>

Uruguay is unique in that it is one of a very few countries where possession of “reasonable amounts” of drugs for personal use has never

<sup>21</sup> PHILLIP KELLY, *CHECKERBOARDS AND SHATTERBELTS: THE GEOPOLITICS OF SOUTH AMERICA* 138 (University of Texas Press 1997).

<sup>22</sup> Malena Castaldi and Felipe Llambias, *Uruguay becomes first country to legalize marijuana trade*, REUTERS (Dec. 10, 2013), <http://www.reuters.com/article/2013/12/11/us-uruguay-marijuana-vote-idUSBRE9BA01520131211>.

<sup>23</sup> *Poder Ejecutivo remitió proyecto de ley que regula la comercialización de marihuana*, PRESIDENCIA REPÚBLICA ORIENTAL DEL URUGUAY (Aug. 8, 2012), <http://www.presidencia.gub.uy/comunicacion/comunicacionnoticias/proyecto-ley-regularizacion-venta-marihuana>.

<sup>24</sup> The Uruguayan law permits purchase of up to forty grams (1.4 ounces) of cannabis for personal use per month. Cultivation of up to six marijuana plants and 480 grams of marijuana per year for personal consumption is permitted, although home growers must register with the government. The creation of cannabis clubs of fifteen to forty-five members are also permitted and such groups may legally plant up to ninety-nine marijuana plants per year, with a yield of no more than 480 grams per member. Cannabis clubs must sell their products to the government, which sells to consumers via pharmacies. All forms of direct and indirect advertising of cannabis are prohibited, including via the Internet. Ley No. 19.172, art. 5(E)–(G), 11, *Marihuana y Sus Derivados*, ASAMBLEA GENERAL, Dec. 20, 2013 (Uru.) available at [http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons\\_min\\_803.pdf](http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons_min_803.pdf).

<sup>25</sup> *How Will Uruguay's Marijuana Law Work?*, THE ECONOMIST (Aug. 1, 2013), <http://www.economist.com/blogs/economist-explains/2013/08/economist-explains-1>.

<sup>26</sup> *Uruguay legalizó la producción de marihuana: resta la promulgación del ejecutivo*, EL PAÍS (Dec. 10, 2013, 10:33 PM), <http://www.elpais.com.uy/informacion/marijuana-ley-senado-uruguay-parlamento.html>.

<sup>27</sup> Ley No. 19.172.

<sup>28</sup> *Impacto de la Marihuana: La Regulación del Cultivo y Consumo de Marihuana y el Impacto Esperado en el Narcotráfico*, CIFRA/Gonzalez (July 29, 2013), <http://www.cifra.com.uy/novedades.php?idNoticia=201> (citing results of a telephone poll of 1021 Uruguayan households).

<sup>29</sup> See OAS, *supra* note 5, at 32.

been a crime.<sup>30</sup> Nearly forty years ago, however, while under the rule of a military dictatorship, Uruguay criminalized the production, sale, and growing of marijuana by signing the South American Agreement on Narcotic and Psychotropic Drugs (Acuerdo Sudamericano sobre Estupefacientes y Psicotrópicos (ASEP)), which integrated elements of the UN prohibitory conventions.<sup>31</sup> Yet, despite signing onto ASEP, Uruguay distinguished itself from the rest of the continent by refusing to criminalize possession of drugs for personal use.<sup>32</sup> Nevertheless, in practice, Uruguayan police and judges failed to distinguish between consumers and traffickers.<sup>33</sup> Inconsistencies in judges' interpretation about what constitutes a reasonable amount of drugs for personal consumption were also problematic.<sup>34</sup> The new Uruguayan law sought to address these issues, as well as the fact that Uruguayans had to break the law (to obtain, sell, or produce marijuana) before they could exercise their right to use marijuana.<sup>35</sup>

The primary policy principle underlying Uruguay's new law, however, is concern about the impact of the illegal drug trade.<sup>36</sup> Although Uruguay enjoys some of the lowest rates of violence in the region and has not been destabilized by the illegal drug trade to the extent of some Latin American nations, crime rates are rising.<sup>37</sup> Uruguay has also served as a money-laundering base for Colombian and Mexican drug cartels.<sup>38</sup> More importantly, survey results demonstrate that Uruguayans

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<sup>30</sup> GUILLERMO GARAT, FRIEDRICH EBERT STIFTUNG-URUGUAY, UN SIGLO DE POLÍTICAS DE DROGAS EN URUGUAY 8 (Apr. 2013), available at <http://library.fes.de/pdf-files/bueros/uruguay/10001.pdf>.

<sup>31</sup> Ley No. 14.294, ASAMBLEA GENERAL, Oct. 31, 1974 (Uru.) available at [http://www.infodrogas.gub.uy/html/marco\\_legal/documentos/02-DecretoLey14294.pdf](http://www.infodrogas.gub.uy/html/marco_legal/documentos/02-DecretoLey14294.pdf).

<sup>32</sup> GARAT, *supra* note 30, at 8–9; Coletta A. Youngers and John M. Walsh, *Drug Decriminalization: A Trend Takes Shape*, AMERICAS QUARTERLY, Fall 2009, <http://www.americasquarterly.org/node/978>.

<sup>33</sup> GARAT, *supra* note 30, at 9.

<sup>34</sup> OAS, *supra* note 5, at 25; Colette Youngers and Catalina Pérez Correa, *In Search of Rights: Drug Users and State Responses in Latin America*, COLECTIVO DE ESTUDIOS DROGAS Y DERECHOS (CEDD) Y CENTRO DE INVESTIGACIÓN Y DOCENCIA ECONÓMICAS A.C. (CIDE), July 2014, at 130–32.

<sup>35</sup> See Jonathan Watts, *Uruguay's marijuana legalization law could set new tone for war on drugs in Latin America*, RAW STORY (Nov. 18, 2013, 3:40 PM), <http://www.rawstory.com/rs/2013/11/18/uruguay-marijuana-legalization-law-could-set-new-tone-for-war-on-drugs-in-latin-america/>.

<sup>36</sup> Ley No. 19.172, Marihuana y Sus Derivados, ASAMBLEA GENERAL, Dec. 20, 2013 (Uru.) available at [http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons\\_min\\_803.pdf](http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons_min_803.pdf).

<sup>37</sup> James Bargent, *Uruguay Sees Homicide Uptick under Mujica*, INSIGHT CRIME (Dec. 1, 2014), <http://www.insightcrime.org/news-briefs/mujica-presidency-uruguay-homicides-democracy>.

<sup>38</sup> GARAT, *supra* note 30, at 19.

increasingly perceive crime as a serious problem in the nation.<sup>39</sup> Additionally, in recent years, anxiety about the proliferation of harder drugs, particularly cocaine base, have increased in Uruguay.<sup>40</sup> These concerns about public health and violence associated with the illegal drug trade and organized crime also drove the new legalization model in Uruguay.<sup>41</sup> Accordingly, Uruguay framed legalization of marijuana as a strategy to steer residents away from more dangerous drugs like crack cocaine.<sup>42</sup>

To employ this strategy, the new Uruguayan law essentially creates a “state monopoly on the production, processing, and distribution of marijuana.”<sup>43</sup> The regulation of cannabis by the state is in keeping with Uruguay’s centralized control of major energy and telecommunication industries as well as state intervention in price controls for milk, water, and tobacco.<sup>44</sup> Under the Uruguayan law, the regulation of cannabis is controlled by different governmental agencies, depending upon whether cannabis is classified as marijuana or hemp.<sup>45</sup> A newly created executive branch agency, the Institute for the Regulation and Control of Cannabis (IRCCA) fixes the price of marijuana to ensure that government rates undercut the black market.<sup>46</sup> Additionally, the IRCCA creates registries of consumers and growers of marijuana, and is responsible for ensuring that users’ identities remain anonymous.<sup>47</sup>

Despite the multitude of agencies involved in the regulation of marijuana in Uruguay, significant gaps in the regulatory structure remain. Notably, unauthorized or unregistered cultivation, production, or

<sup>39</sup> Marta Lagos & Lucía Dammert, *La Seguridad Ciudadana: El problema principal de América Latina*, CORPORACIÓN LATINOBARÓMETRO, 37, 38, 47 (May 9, 2012), [http://www.latinobarometro.org/documentos/LATBD\\_La\\_seguridad\\_ciudadana.pdf](http://www.latinobarometro.org/documentos/LATBD_La_seguridad_ciudadana.pdf).

<sup>40</sup> José P. Prieto & Cecilia Scorza, *Pasta Base de Cocaína*, LABORATORIO DE BIOLOGÍA CELULAR, INSTITUTO DE INVESTIGACIONES BIOLÓGICAS CLEMENTE ESTABLE MONTEVIDEO-UUGUAY 1 (2010), <http://www.iibce.edu.uy/DIVULGACION/Articulo%20de%20divulgacion%20de%20Uruguay-%20PASTA%20BASE%20DE%20COCAINA.pdf>.

<sup>41</sup> See Ley No. 19.172, Marihuana Y Sus Derivados, art. 1, 3,4, ASAMBLEA GENERAL, Dec. 20, 2013 (Uru.) available at [http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons\\_min\\_803.pdf](http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons_min_803.pdf).

<sup>42</sup> OAS, *supra* note 5, at 33.

<sup>43</sup> *Id.* at 32.

<sup>44</sup> Watts, *supra* note 35.

<sup>45</sup> In Uruguay, cannabis is classified as marijuana if the THC level is over 1% of its total volume, and as hemp if less than 1% (or .5% if seeds). Ley No. 19.172, Marihuana Y Sus Derivados, art. 5(B), ASAMBLEA GENERAL, Dec. 20, 2013 (Uru.) available at [http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons\\_min\\_803.pdf](http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons_min_803.pdf).

<sup>46</sup> Ley No. 19.172; Watts, *supra* note 35.

<sup>47</sup> Ley No. 19.172, art. 8, 17, 18.

sale of cannabis remains prohibited, and any products of such illegal activity are subject to destruction upon order by a judge.<sup>48</sup> Persons who engage in the unauthorized production, sale, or trafficking of marijuana remain subject to criminal penalties of twenty months to ten years in prison.<sup>49</sup> Driving while under the influence of cannabis remains illegal, although the exact prohibited tetrahydrocannabinol (THC) concentration levels that constitute a violation have yet to be determined at the time of this writing.<sup>50</sup> Additionally, in an attempt to avoid becoming a cannabis tourist destination, only Uruguayan citizens or permanent residents are eligible to purchase cannabis at pharmacies, and re-sale is prohibited.<sup>51</sup>

The Uruguayan legalization effort has faced significant domestic opposition, and implementation of the new law has been slow.<sup>52</sup> Some critics contend that the underlying goal of the law—to undermine the illegal drug trade—will fail because the new law does not impact the market of other drugs such as cocaine.<sup>53</sup> Proponents of the new law respond that separating the legal marijuana market from the illicit market of other “harder” drugs insulates marijuana users from contact with the more dangerous market for “harder” drugs.<sup>54</sup> Other critics have challenged the constitutionality of establishing a state monopoly over the cannabis business.<sup>55</sup> The Uruguayan National Public Education Administration raised an additional constitutional challenge to the provision requiring educators to provide information and services about

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<sup>48</sup> Ley No. 19.172, art. 5.

<sup>49</sup> Ley No. 19.172, art. 6, 7.

<sup>50</sup> Ley No. 19.172, art. 15.

<sup>51</sup> *Adquirentes de Cannabis*, INSTITUTO DE REGULACIÓN Y CONTROL DE CANNABIS, <http://www.ircca.gub.uy/ADQUIRENTES-DE-CANNABIS/>.

<sup>52</sup> As of November 30, 2014, it was reported that only about fifteen clubs and 1,000 people had registered for the government program. Lourdes Garcia-Navarro, *Uruguay Tries To Tame A ‘Monster’ Called Cannabis*, NPR (Nov. 30, 2014, 12:36 PM), [http://www.npr.org/blogs/parallels/2014/11/30/367258919/uruguay-tries-to-tame-a-monster-called-cannabis?sc=17&f=1001&utm\\_source=iosnewsapp&utm\\_medium=Email&utm\\_campaign=app](http://www.npr.org/blogs/parallels/2014/11/30/367258919/uruguay-tries-to-tame-a-monster-called-cannabis?sc=17&f=1001&utm_source=iosnewsapp&utm_medium=Email&utm_campaign=app); See also Magdalena Martinez, *Uruguay retrasa la puesta en marcha de la legalización de la marihuana*, EL PAÍS (Aug. 7, 2014), [http://internacional.elpais.com/internacional/2014/08/06/actualidad/1407361148\\_070069.html](http://internacional.elpais.com/internacional/2014/08/06/actualidad/1407361148_070069.html).

<sup>53</sup> *Comisión del Senado aprobó proyecto sobre regulación de la marihuana*, EL PAÍS (Nov. 26, 2013, 8:08 PM), <http://www.elpais.com.uy/informacion/comision-senado-aprobo-proyecto-marijuana.html>.

<sup>54</sup> GARAT, *supra* note 30, at 11–12.

<sup>55</sup> *Senado aprobó ley sobre marihuana: Unidad reguladora*, MONTEVIDEO PORTAL (Dec. 10, 2013, 10:39 PM), [http://www.montevideo.com.uy/notnoticias\\_221039\\_1.html](http://www.montevideo.com.uy/notnoticias_221039_1.html).

drug addiction to students on the grounds that it violates educators' autonomy.<sup>56</sup>

Uruguay has also faced opposition from regional neighbors. The Mexican and Brazilian governments criticized the Uruguayan law as a unilateral act, arguing that consensual regional action is required to successfully combat the illegal drug trade.<sup>57</sup> Further complicating Uruguay's relationship with its powerful trade partner and neighbor, the timing of the new law coincided with a Brazilian proposal to *increase* penalties for drug consumption.<sup>58</sup> The greatest threat to provisions of the law, however, may come from within. Incoming President Tabaré Vázquez has expressed concerns about the sale of state-controlled marijuana to registered consumers at pharmacies, which has yet to be implemented.<sup>59</sup> Nevertheless, although the form of marijuana commercialization remains in dispute, the viability of the legalization structure no longer seems to be in doubt in Uruguay.

On the other hand, the Secretary General of the OAS, José Miguel Insulza, stated that he has no objections to the Uruguayan experiment with legalization of marijuana.<sup>60</sup> At the same time, however, Secretary General Insulza recognized that the OAS cannot formally endorse the Uruguayan law because it does not have the support of all member nations, presumably referring to the United States.<sup>61</sup> The US government has largely refrained from publicly criticizing Uruguay's actions, though the State Department acknowledged that Uruguay's law violates the United Nations Single Convention on Narcotic Drugs of

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<sup>56</sup> Ley No. 19.172, art. 10, Marihuana y Sus Derivados, ASAMBLEA GENERAL, Dec. 20, 2013 (Uru.) available at [http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons\\_min\\_803.pdf](http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons_min_803.pdf); Daniel Isgleas, *FA admite que ley de marihuana es inconstitucional, pero igual la votará*, EL PAÍS (Nov. 22, 2013, 3:20 AM), <http://www.elpais.com.uy/informacion/fa-admite-que-ley-marihuana.html>.

<sup>57</sup> *Brasil y México buscan frenar la legalización de la marihuana en Uruguay*, INFOBAE (Nov. 7, 2013), <http://www.infobae.com/2013/11/07/1522084-brasil-y-mexico-buscan-frenar-la-legalizacion-la-marihuana-uruguay>.

<sup>58</sup> *Uruguay ratifica legalización de marihuana pese a oposición de Brasil*, ULTIMAHORA (Nov. 5, 2013, 9:38PM), <http://www.ultimahora.com/uruguay-ratifica-legalizacion-marijuana-pese-oposicion-brasil-n737899.html>.

<sup>59</sup> Uki Gofi, *Uruguay's legal marijuana plan to go ahead despite new president's concerns*, THE GUARDIAN Dec. 1, 2014, <http://www.theguardian.com/world/2014/dec/01/uruguay-vazquez-legal-marijuana>.

<sup>60</sup> *Marihuana: Insulza respaldó proceso de legalización en el país*, EL PAÍS, <http://www.elpais.com.uy/informacion/marijuana-insulza-respaldo-proceso-legalizacion.html> (last visited Feb. 2, 2015).

<sup>61</sup> *Id.*

1961.<sup>62</sup> The reluctance of the United States to publicly criticize Uruguay's new law is likely due to Colorado's and Washington's legalization of recreational marijuana.

In sum, despite limited domestic support, Uruguay's experiment with its newest industry continues to advance. This is in part due to nation's long-standing refusal to criminalize marijuana and its location in a region plagued by drug-related violence, but with relatively low incidences of violence within its own borders. The decision to limit marijuana sales to Uruguayans likely also has helped stem further regional resistance to the Uruguayan experiment. Latin American reformers will continue to watch and learn from the bureaucratic challenges that arise as Uruguay continues to implement its newly regulated state-run cannabis industry.

## II. COLORADO'S CONSTITUTIONAL AMENDMENT

While the Uruguayan Parliament was debating its own legalization bill, Colorado legalized the private consumption of recreational marijuana via a ballot initiative passed on November 6, 2012.<sup>63</sup> Colorado's ballot initiative, Amendment 64, asked Colorado voters if the Colorado Constitution should be amended to provide for the regulation of marijuana and industrial hemp.<sup>64</sup> The amendment did not apply to or alter the previous medical marijuana law already in place in Colorado.<sup>65</sup> The policies driving Colorado Amendment 64 were to promote the "efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom," as well as "the interest of the health and public safety of our citizenry."<sup>66</sup> Unlike in Uruguay, no explicit mention was made of the war on drugs or the violence generated by the international drug trafficking trade.

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<sup>62</sup> Roque Planas, *Uruguay's Prez Rips Into U.N. Official Over Marijuana Law: 'Stop Lying'*, HUFFINGTON POST (Dec. 13, 2013, 5:10 PM), [http://www.huffingtonpost.com/2013/12/13/uruguay-marijuana-united-nations\\_n\\_4442077.html](http://www.huffingtonpost.com/2013/12/13/uruguay-marijuana-united-nations_n_4442077.html).

<sup>63</sup> John Hudak, *Colorado's Rollout of Legal Marijuana Is Succeeding: A Report on the State's Implementation of Legalization*, BROOKINGS INST. 1 (July 2014), <http://www.brookings.edu/~media/research/files/papers/2014/07/colorado-marijuana-legalization-succeeding/cepmmjcov2.pdf>.

<sup>64</sup> COLO. CONST. art. XVIII, § 16(1).

<sup>65</sup> COLO. CONST. art. XVIII, § 16(7).

<sup>66</sup> COLO. CONST. art. XVIII, §§ 16(1)(a)-(b).

The Colorado ballot measure required only a simple majority to win.<sup>67</sup> It passed with fifty-four percent of the vote, despite opposition from the state attorney general, many mayors, and the law enforcement community.<sup>68</sup> Governor John Hickenlooper, who opposed the bill, officially promulgated the law by adding the amendment to the Colorado Constitution on December 10, 2012.<sup>69</sup> The governor also established a task force to implement the bill.<sup>70</sup> The task force adopted strict deadlines to create regulations, in an attempt to prevent efforts to delay or dismantle the new law.<sup>71</sup> In accordance with the task force's schedule, the Colorado Department of Revenue adopted permanent rules on September 9, 2013, permitting the first retail marijuana establishments to open by January 1, 2014.<sup>72</sup>

Early analysis of the rapid rollout of the Colorado law has been positive.<sup>73</sup> Six regulatory actions have been deemed significant to its success: (1) a seed-to-sale tracking system to monitor cannabis supply and prevent diversion; (2) a vertically integrated structure for the marijuana market whereby all aspects of cultivation, processing and

<sup>67</sup> John Walsh, *The Will of the Voters: Colorado and Washington Have Put Legal Marijuana on the Map*, WASHINGTON OFFICE ON LATIN AMERICA (Nov. 13, 2012), [http://www.wola.org/commentary/the\\_will\\_of\\_the\\_voters](http://www.wola.org/commentary/the_will_of_the_voters) [hereinafter Walsh].

<sup>68</sup> Matt Ferner, *Amendment 64 Opponents Speak Out On Legal Weed*, HUFFINGTON POST, Nov. 7, 2012, [http://www.huffingtonpost.com/2012/11/07/hickenlooper-federal-law-\\_n\\_2088989.html](http://www.huffingtonpost.com/2012/11/07/hickenlooper-federal-law-_n_2088989.html) (last updated Nov. 8, 2012).

<sup>69</sup> *Gov. Hickenlooper opposes Amendment 64*, COLO: OFFICIAL ST. WEB PORTAL (Sept. 12, 2012), <http://www.colorado.gov/cs/Satellite/GovHickenlooper/CBON/1251630730489>; *Gov. Hickenlooper signs Amendment 64 proclamation, creates task force to recommend needed legislative actions*, COLO: OFFICIAL ST. WEB PORTAL (Dec. 10, 2012).

<sup>70</sup> Governor Hickenlooper explained his decision, "the voters have spoken, and we have to respect their will. This will be a complicated process, but we intend to follow through." Hudak, *supra* note 63, at 5.

<sup>71</sup> Hudak, *supra* note 63, at 5.

<sup>72</sup> Hudak, *supra* note 63, at 5; Colorado Amendment 64 limits possession to less than one ounce of marijuana or six marijuana plants, of which only three can be mature, flowering plants. Unlike alcohol regulations, the marijuana regulations do not permit marijuana plants to be visible to the public and dictate that up to one ounce of marijuana may be given as a gift to other citizens over the age of twenty-one, but not sold. Regulations within the Colorado structure include prohibitions against the sale of marijuana to anyone younger than twenty-one years of age and driving under the influence of marijuana. The law imposes an excise tax at the wholesale level, at a rate not to exceed 15 percent, with the first \$40 million in revenue directed to the construction of public schools. An additional 10% special sales tax and 2.9% standard Colorado sales tax also apply. Local taxes may also be added. COLO. CONST. art. XVIII, §§ 16(1)(b)(I)–(III), (3)(b); Phillip Wallach & John Hudak, *Comparing Legal Marijuana Systems in Colorado and Washington*, BROOKINGS INST. (May 2013), <http://www.brookings.edu/~media/research/files/papers/2014/07/colorado-marijuana-legalization-succeeding/comparing-legal-marijuana-table.pdf>.

<sup>73</sup> Hudak, *supra* note 63, at 1.

manufacturing, and retail sales must be a common enterprise; (3) constructing temporary barriers to new market entrants and preference for producers of preexisting medical marijuana enterprises;<sup>74</sup> (4) limits on the quantity of marijuana that can be sold to individuals to limit diversion after purchase;<sup>75</sup> (5) extensive video surveillance requirements of cultivation, processing and retail facilities; and (6) changes to the tax revenue system.<sup>76</sup> Regulatory challenges that remain include addressing the risk of diversion of homegrown plants, correcting the disparity between the taxation of medical and recreational marijuana, developing effective regulation of marijuana edibles,<sup>77</sup> and fixing the “misaligned incentives” that lead tourists to use more dangerous edibles due to prohibitions against smoking in public spaces.<sup>78</sup>

The impact of Colorado Amendment 64 has been significant and immediate. Less than one week after the ballot initiative passed in Colorado, the leaders of Mexico, Belize, Honduras, and Costa Rica jointly declared their intention to reconsider their own prohibitionist policies towards marijuana.<sup>79</sup> Closer to home, however, the Denver City Council responded to the passage of Amendment 64 by proposing a rule to re-criminalize marijuana.<sup>80</sup> Ultimately, the Denver City Council receded from this proposal following protests by the American Civil Liberties Union (ACLU) and other organizations.<sup>81</sup> Nonetheless, many

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<sup>74</sup> Licenses are also not available to “criminal actors.” COLO. CONST. art. XVIII, §16(1)(b)(IV). Regulations provide that an applicant’s criminal history must demonstrate that the applicant is of “good moral character.” COLO. CODE REGS. §§ 212-1:1.201(E)(1), 212-1:1.231(C)(2), (D)(2). This vague description ensures that the licensing agency has maximum discretionary power to deny cannabis licenses to applicants with certain criminal history.

<sup>75</sup> Colorado residents may purchase one ounce of flower. Visitors are limited to purchasing one quarter ounce. Hudak, *supra* note 63, at 10.

<sup>76</sup> Hudak, *supra* note 63, at 9–11.

<sup>77</sup> See generally Associated Press, *Colorado Health Department to Recommend ‘Pre-market Approval’ for Edible Marijuana*, N.Y. TIMES (Nov. 16, 2014), <http://www.nytimes.com/2014/11/17/us/colorado-health-department-to-recommend-pre-market-approval-for-edible-marijuana.html>.

<sup>78</sup> Hudak, *supra* note 63, at 13–20.

<sup>79</sup> Walsh, *supra* note 67.

<sup>80</sup> Jeremy P. Meyer, *Denver scales back proposed pot rules, would allow back yard smoking*, DENV. POST Oct. 29, 2013, [http://www.denverpost.com/breakingnews/ci\\_24412660/denver-scales-back-proposed-pot-rules-would-allow](http://www.denverpost.com/breakingnews/ci_24412660/denver-scales-back-proposed-pot-rules-would-allow).

<sup>81</sup> *Id.*

Colorado cities and counties have established bans on retail marijuana shops or moratoriums on the opening of new shops.<sup>82</sup>

The federal government, however, did not intervene throughout the electoral process in Colorado.<sup>83</sup> Nine months after Amendment 64 was signed into law, the federal government declared that it would not sue the state for contravening the federal Controlled Substances Act (CSA).<sup>84</sup> Nevertheless, in December of 2014 the Attorneys General of Nebraska and Oklahoma petitioned the Supreme Court for permission to file an original action seeking declaratory judgment that Colorado's new law is preempted by federal law, and therefore is unconstitutional.<sup>85</sup> The complaint further alleges that Nebraska and Oklahoma's economies are negatively impacted by a "significant influx of Colorado-sourced marijuana," which requires Nebraska and Oklahoma to apprehend, incarcerate, and prosecute larger numbers of people.<sup>86</sup> Nebraska and Oklahoma specify six points of contention with Colorado's new regulations:

<sup>82</sup> Matt Ferner, *Almost Anyone Can Have a Marijuana Business in Colorado Starting Today*, HUFFINGTON POST (July 1, 2014), [http://www.huffingtonpost.com/2014/07/01/colorado-marijuana\\_n\\_5548620.html?icid=hp\\_politics\\_top\\_art](http://www.huffingtonpost.com/2014/07/01/colorado-marijuana_n_5548620.html?icid=hp_politics_top_art).

<sup>83</sup> *Ballot Measures: A Liberal Drift*, THE ECONOMIST Nov. 10, 2013, <http://www.economist.com/news/united-states/21565972-local-votes-suggest-more-tolerant-country-but-not-more-left-wing-one-liberal-drift>.

<sup>84</sup> *Justice Department Announces Update to Marijuana Enforcement Policy*, DEP'T OF JUST. (Aug. 29, 2013), <http://www.justice.gov/opa/pr/2013/August/13-opa-974.html>.

<sup>85</sup> Federal law pre-empts state law in three situations: (1) Where Congress explicitly mandates preemption of state law ("express" preemption); (2) Where Congress implicitly indicates an intent to occupy an entire field of regulation to the exclusion of state law ("field" preemption); or, (3) Where federal and state law conflict ("implied" preemption). *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988). The third situation—when federal and state law conflict—can occur in two ways. First, federal law can pre-empt state law if compliance with both at the same time would be a "physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Second, federal law pre-empts state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (referring to this as "frustration of purpose" preemption). Nebraska and Oklahoma allege both forms of conflict preemption in their complaint, claiming that Colorado's Amendment 64 directly conflicts with the Controlled Substances Act and frustrates the purposes of federal law. Motion to Leave to File Complaint, at ¶¶ 20-21, 41-46, *Nebraska & Oklahoma v. Colorado, petition for cert. filed* (U.S. Dec. 18, 2014) (No. 141), 2014 WL 7474136 [hereinafter Motion to Leave to File Complaint]. If permitted to proceed with this action, Nebraska and Oklahoma would have to overcome a strong presumption against federal preemption of state law, a presumption which is particularly strong in cases involving a State's police powers. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

<sup>86</sup> Motion to Leave to File Complaint, *supra* note 85, ¶¶ 54-65.

(1) The regulations lack safeguards to prevent the interstate transfer of marijuana sold within Colorado; (2) Sale of cannabis in Colorado is not limited to residents of Colorado; (3) There is no requirement that marijuana purchased at retail dispensaries be consumed at the point of purchase; (4) Regulations fail to prohibit multiple purchases of marijuana from the same retail dispensary within a specified period of time; (5) Marijuana is not tracked after it is sold, and; (6) Criminal background checks are not required for marijuana purchasers, thus failing to ensure that “criminal enterprises, gangs, and cartels” do not acquire marijuana inventory from retail stores.<sup>87</sup>

Although the outcome of Nebraska and Oklahoma’s challenge to Colorado’s law remains uncertain, it may be useful for drafters of similar regulations in the future to take note of the areas alleged to be problematic in the complaint against Colorado and in other more recent legal challenges to the new law.

In conclusion, by changing the law via constitutional amendment, Colorado ensured that the new law cannot be modified by normal legislative action, thus helping to ensure the longevity of the legalization of marijuana in the state. Furthermore, the federal government’s current lack of desire to challenge the constitutionality of the new law bodes well for the amendment’s sustainability. At the same time, pending litigation at the Supreme Court suggests that the biggest threat to the viability of the new law in Colorado may hinge on efforts to prevent diversion of Colorado cannabis, including edibles, to neighboring states that are hostile to Colorado’s legalization experiment.

### III. WASHINGTON’S LIMITED APPROACH

Like Colorado’s Amendment 64, Washington’s marijuana legislation appeared on the November 2012 ballot.<sup>88</sup> Washington voters passed Initiative 502 by a similar margin of 56 to 44 percent, with record voter turnout of 81 percent.<sup>89</sup> Unlike Colorado’s Amendment 64, Washington’s Initiative 502 did not amend the state constitution.<sup>90</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Gregoire & Reed Certify 2012 Election, Including Marriage & Marijuana Laws*, OFFICE SEC’Y ST. OF WASH. (Dec. 5, 2012), [http://www.sos.wa.gov/office/osos\\_news.aspx?i=H6P9WeC8mCTWdBX6gjyyMw%3D%3D](http://www.sos.wa.gov/office/osos_news.aspx?i=H6P9WeC8mCTWdBX6gjyyMw%3D%3D).

<sup>89</sup> *Id.*

<sup>90</sup> Washington’s Initiative 502 permits marijuana retailers to purchase marijuana from licensed processors and to possess, deliver, and sell any combination of one ounce of useable marijuana; sixteen ounces of marijuana-infused product in solid form; or seventy-two ounces of marijuana-infused product in liquid form to people over twenty-one years of age, without facing criminal

The guiding principle behind Washington's Initiative 502 was to "stop treating adult marijuana use as a crime" so that law enforcement resources can focus on violent and property crimes.<sup>91</sup> Like Uruguay, the state of Washington also sought to take "marijuana out of the hands of illegal drug organizations" by regulating its distribution in a similar manner to hard alcohol.<sup>92</sup> Another policy goal of the Washington law is to generate new tax revenue for education, health care, research, and substance abuse prevention.<sup>93</sup> To achieve this end, Initiative 502 establishes a dedicated marijuana fund controlled by the state treasurer consisting of all "marijuana excise taxes, license fees, penalties, forfeitures," and marijuana-related revenue.<sup>94</sup>

Rather than create new regulatory agencies, Initiative 502 empowers the Washington State Liquor Control Board to adopt rules and regulations to implement the law, oversee the licensing process, and inspect facilities.<sup>95</sup> The Liquor Control Board also has the power to determine the maximum number of retail outlets permitted in each county and the maximum quantity of marijuana that a producer may maintain on the premises without violating Washington state law.<sup>96</sup> In conducting this analysis, the Liquor Control Board is to take into account "licensees' ability to . . . undercut illegal market prices."<sup>97</sup> Another pre-existing agency, the Washington State Department of Agriculture, is tasked with consulting with the Liquor Control Board to qualitatively establish classes of marijuana and marijuana-infused products.<sup>98</sup>

Also different from the Colorado model is the fact that Initiative 502 does not adopt a vertical licensing structure, but rather establishes

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and civil offenses. However, the sale of marijuana by non-licensed dealers who did not pay \$1,250 for a valid license remains illegal, as cannabis remains a Schedule I drug under Initiative 502. This means that criminal and civil sanctions and forfeiture of real property still apply to anyone who possesses marijuana for commercial purposes without a valid Washington license. 2013 Wash. Sess. Laws 42, 47-48; *Id.* at 44 (applying civil infractions to anyone who "open[s] a package containing marijuana . . . or [who] consume[s] marijuana . . . in view of the general public").

<sup>91</sup> *Id.* at 29.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 53-54.

<sup>94</sup> *Id.* at 52-53 (taxing marijuana at twenty-five percent of each wholesale sale in addition to state and local sales tax but empowering the state liquor control board to review the tax levels in order to ensure the tax rate both discourages use and undercuts illegal market prices).

<sup>95</sup> *Id.* at 34-37, 39, 41.

<sup>96</sup> *Id.* at 39-40.

<sup>97</sup> *Id.* at 40.

<sup>98</sup> *Id.*

three types of licenses: a wholesale marijuana license for producers who sell to marijuana processors and other marijuana producers; a processor license for those who process, package, and label useable marijuana; and a retailer license.<sup>99</sup> An individual may hold dual licenses to produce and process marijuana, however, producers and processors may not hold retail marijuana licenses, nor can they have a direct or indirect financial interest in a licensed marijuana retailer.<sup>100</sup> A separate license is required for each location where marijuana is produced, processed, or sold.<sup>101</sup> Licenses are only available to people over the age of twenty-one who have resided in the state of Washington for at least three months, and the prior criminal conduct of applicants is considered in licensing decisions.<sup>102</sup> Furthermore, licenses are granted to individuals exclusively, unless all members of a corporation, cooperative, or organization are qualified to obtain the license.<sup>103</sup>

Washington's Initiative 502 leaves significant gaps unaddressed. First, unlike in Colorado, the personal cultivation of marijuana plants remains prohibited.<sup>104</sup> Consequently, Washington residents can still be prosecuted for cultivating marijuana plants in their homes for personal consumption. Second, Initiative 502 does not regulate industrial hemp because the law only decriminalizes and regulates cannabis with a THC concentration greater than 0.3 (in Washington, industrial hemp is defined as containing less than 0.3 percent THC, and thus remains illegal and unregulated).<sup>105</sup> Third, Initiative 502 does not address or change medical marijuana laws in the state.<sup>106</sup> Although certain medical providers may write prescriptions for medical marijuana under limited circumstances in Washington, medical marijuana dispensaries remain illegal under Washington state law.<sup>107</sup> Further, under Initiative 502, if a current

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<sup>99</sup> *Id.* at 33–34.

<sup>100</sup> *Id.* at 41–42 (further prohibiting marijuana retailers from selling any product or service that is not marijuana-based).

<sup>101</sup> *Id.* at 33–34.

<sup>102</sup> *Id.* at 34–37.

<sup>103</sup> *Id.*

<sup>104</sup> *FAQs on I-502*, WASH. ST. LIQUOR CONTROL BOARD, [http://lcb.wa.gov/marijuana/faqs\\_i-502](http://lcb.wa.gov/marijuana/faqs_i-502) (last visited Feb. 12, 2015) [hereinafter *FAQs on I-502*].

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Medical Marijuana: Healthcare Provider Frequently Asked Questions*, WASH. ST. DEPARTMENT HEALTH, <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/MedicalMarijuanaCannabis/HealthCareProvidersFrequentlyAskedQuestions.aspx> (last visited Dec. 1, 2013).

medical marijuana outlet obtains a new retail license, it is prohibited from comingling medical and recreational marijuana.<sup>108</sup> Fourth, it is unclear what limits, if any, will be imposed with regard to how often an individual buyer may purchase legal quantities of marijuana at state-sanctioned retailers. Fifth, individual purchasers are prohibited from sharing marijuana they legally purchase, presenting another possible opportunity for law enforcement officers to prosecute marijuana purchasers.<sup>109</sup>

Additionally, Initiative 502 does not address the topic of drug testing. The Washington State Liquor Control Board states that, “it is our understanding that employers may still conduct drug testing at their discretion. Since marijuana is illegal under federal law, institutions that receive federal funds will still be subject to mandated testing.”<sup>110</sup> Ironically, one employer that may continue to drug test employees for marijuana is the Washington State Liquor Control Board, the very agency charged with implementing the new regulations decriminalizing marijuana use.<sup>111</sup>

A final area of complication in the implementation of Washington’s new law has been resistance from medical marijuana advocates to Initiative 502’s provision on driving under the influence of marijuana.<sup>112</sup> Opponents expressed concern that the provision provides a pretext to shift prohibitionist enforcement from possession and sale to driving violations.<sup>113</sup> This rift between medical and recreational marijuana advocates is likely to reemerge in other jurisdictions.

In conclusion, by failing to address key areas including personal cultivation, industrial hemp, and drug testing, the first iteration of the Washington model leaves significant issues unaddressed. Future efforts to amend and improve the new Washington law will be facilitated by the fact that, unlike in Colorado, Washington’s new law did not alter its constitution. Furthermore, the fact that Washington state shares a border

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<sup>108</sup> *FAQs on I-502*, *supra* note 104.

<sup>109</sup> *Id.* (noting that criminal sanctions also apply if marijuana purchased legally in Washington is transported to other states).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Drivers over twenty-one are prohibited from having delta-9 THC concentrations (the primary psychoactive substance of the cannabis plant) over 5.00 nanograms per millimeter of whole blood within two hours of driving. 2013 Wash. Sess. Laws 62, 66; *FAQs on I-502*, *supra* note 104; Dominic Holden, *Pot Activists vs. Pot Activists*, THE STRANGER (Mar. 7, 2012), <http://www.thestranger.com/seattle/pot-activists-vs-pot-activists/Content?oid=12927887>.

<sup>113</sup> *Id.*

with only two other states—one of which (Oregon) recently passed a similar legalization bill—suggests that Washington is unlikely to face the same level of resistance from neighboring states that has recently plagued Colorado.

#### IV. FEDERAL PREEMPTION AND THE CONTROLLED SUBSTANCES ACT

Despite the new laws in Colorado, Washington—and most recently in Alaska, Oregon, and the District of Columbia—use and possession of marijuana remain illegal under the federal Controlled Substances Act (CSA).<sup>114</sup> Under the CSA, marijuana is still classified as a Schedule I substance—the most dangerous classification, along with heroin, ecstasy, methaqualone, and peyote<sup>115</sup>—despite sustained lobbying and litigation.<sup>116</sup> Thus, notwithstanding the new laws, producers, processors, and retailers of marijuana in states where recreational marijuana is legal remain subject to federal prosecution and asset forfeiture for violating the CSA.<sup>117</sup>

Nevertheless, aggressive federal enforcement of marijuana laws in states where it has been decriminalized or legalized has begun to abate, and the federal government appears to be ceding jurisdiction to the states on this narrow issue.<sup>118</sup> On August 29, 2013, U.S. Deputy Attorney General James M. Cole announced that the U.S. Department of Justice (DOJ) would continue to defer to state and local authorities to enforce their own narcotics laws.<sup>119</sup>

This recently announced deference to the states comes with caveats, however. First, the DOJ reaffirmed the federal government's

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<sup>114</sup> Controlled Substances Act, 21 U.S.C. §§ 801, 844 (2010) (controlling the enforcement of federal drug laws and their preemption of contrary state drug laws).

<sup>115</sup> 21 U.S.C. § 812(c)(c)(10) (2012); *Drug Schedules*, U.S. DRUG ENFORCEMENT ADMIN. <http://www.dea.gov/druginfo/ds.shtml> (last visited Feb. 12, 2015).

<sup>116</sup> Michael Vitiello, *Why the Initiative Process Is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215*, 43 MCGEORGE L. REV. 63, 70 (2012).

<sup>117</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005) (justifying the federal endorsements of marijuana prohibition under the Commerce Clause of the U.S. Constitution); Katherine Godin, *Pot or Not: State or Federal Government Regulation and (De)criminalization of Marijuana?*, R.I. B.J., Sept./Oct. 2013, at 5.

<sup>118</sup> Gerald Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 MCGEORGE L. REV. 127, 128–29 (2012).

<sup>119</sup> Memorandum from the Deputy Attorney General for all United States Attorneys: Guidance Regarding Marijuana Enforcement 2 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. [hereinafter Deputy Attorney General Memo].

authority and jurisdiction to prosecute violations of the CSA involving marijuana, even in states that have decriminalized certain marijuana offenses.<sup>120</sup> Second, the DOJ intends to continue to enforce other provision of the CSA aggressively.<sup>121</sup> The DOJ identified eight priority areas for continued enforcement of the CSA to guide federal prosecutors.<sup>122</sup> Third, federal discretion to refrain from prosecutions in Colorado and Washington is contingent on the creation of appropriately strict regulatory systems in those states.<sup>123</sup> The DOJ warns that the state regulations must be tough both on paper and in practice, include strong state-based enforcement efforts, and be backed by adequate funding.<sup>124</sup> The DOJ further threatens that its prosecutors will “act aggressively” to prosecute in the event of lax or ineffective state regulations, and that at any time the federal government can decide to challenge the constitutionality of the state regulatory schemes themselves.<sup>125</sup>

Federal government acquiescence may be due in part to the fact that the CSA “limits its pre-emption to situations where there is a ‘positive conflict’ between state and federal law ‘so that the two cannot consistently stand together.’”<sup>126</sup> The Colorado and Washington laws do not prohibit the federal government from enforcing its own laws under the CSA. Rather, the new state laws merely alter their own statewide enforcement and punishment mechanisms, and specify conditions for exemption from state penalties.<sup>127</sup> For this reason, a federal preemption challenge may be difficult to sustain in federal court. Nevertheless, the

<sup>120</sup> *Id.* at 4.

<sup>121</sup> *Id.* at 1.

<sup>122</sup> *Id.* at 1-2 (preventing (1) the distribution of marijuana to minors; (2) the revenue from sales going to criminal enterprises, gangs or cartels; (3) the diversion of marijuana to states where marijuana remains criminalized; (4) the use of marijuana as a pretext for trafficking of other illegal drugs or other illegal activity; (5) violence and firearms problems related to marijuana; (6) drugged driving and adverse public health consequences; (7) the growing of marijuana on public lands and; (8) marijuana possession or use on federal property).

<sup>123</sup> *Id.* at 3.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*; Justice Department Announces Update to Marijuana Enforcement Policy, Aug. 29, 2013, <http://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>; Kirk Siegler, *Colorado’s Pot Industry Looks To Move Past Stereotypes*, NPR, (Dec. 2, 2014), <http://www.npr.org/2014/12/02/367767955/colorados-pot-industry-looks-to-move-past-stereotypes> (reporting that marijuana business owners have also recognized that diversion to the black market is a serious threat to the legal regulated market).

<sup>126</sup> Jacob Sullum, *Tolerating Pot with a Frown*, REASON (Sept. 18, 2013), <http://reason.com/archives/2013/09/18/tolerating-pot-with-a-frown>.

<sup>127</sup> *Id.*; See generally Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5 (2013).

regulations for growers and sellers may be subject to attack by the federal government in court, if it should choose to pursue this option.<sup>128</sup>

At the same time, the federal government softened its tone by distributing guidelines to financial institutions interested in entering into business contracts with marijuana-based enterprises in Colorado and Washington.<sup>129</sup> In the absence of federal guidance, businesses involved in the financing of the newly legal marijuana industries in Colorado and Washington were at risk of violating federal laws by providing banking services, such as opening accounts or providing loans.<sup>130</sup> As a result, marijuana-related businesses were forced to use cash for normal business transactions including payroll.<sup>131</sup> This, in turn, hindered efforts at transparent accounting and compromised public security.<sup>132</sup> To resolve these issues, the Financial Crimes Enforcement Network (FinCEN), a body of the Department of the Treasury, issued guidelines for banks seeking to do business with the marijuana industry.<sup>133</sup> The guidelines seek to provide information so that “financial institutions can provide services to marijuana-related businesses consistent with their [Bank Secrecy Act] obligations.”<sup>134</sup> Likewise, FinCEN offers guidance about federal and state law enforcement priorities to financial institutions so that each institution can assess the risk of doing business with a particular marijuana-related business.<sup>135</sup> Notably, this federal regulation explicitly states that its purpose is to “enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.”<sup>136</sup> In other words, the regulations seek to “give banks

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<sup>128</sup> U.S. DEP’T OF JUSTICE, RESPONSE TO QUESTIONS FOR THE RECORD: CONFLICT BETWEEN STATE AND FEDERAL MARIJUANA LAWS 3 (2013), available at <http://www.judiciary.senate.gov/download/cole-responses-91013> [hereinafter U.S. DEP’T OF JUSTICE].

<sup>129</sup> U.S. DEP’T OF THE TREASURY, FIN-2014-G001, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESS 1 (2014), available at [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-G001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf) [hereinafter DEP’T OF TREASURY].

<sup>130</sup> Scott Neuman, *Feds Clear Banks to Do Business with Budding Pot Industry*, NPR (Feb. 14, 2014), <http://www.npr.org/blogs/thetwo-way/2014/02/14/277044409/feds-clear-banks-to-do-business-with-budding-pot-industry?sc=17&f=1001>.

<sup>131</sup> *Id.*

<sup>132</sup> Serge F. Kovalski, *U.S. Issues Marijuana Guidelines for Banks*, N.Y. TIMES, Feb. 14, 2013, <http://www.nytimes.com/2014/02/15/us/us-issues-marijuana-guidelines-for-banks.html> [hereinafter Kovalski].

<sup>133</sup> DEP’T OF TREASURY, *supra* note 129.

<sup>134</sup> *Id.* at 1.

<sup>135</sup> *Id.* at 2.

<sup>136</sup> *Id.* at 1.

confidence that they will not be punished if they provide services to legitimate marijuana businesses in states that have legalized [it],” despite the fact that marijuana remains prohibited under federal law.<sup>137</sup> At the same time, the Department of Treasury regulations include mandatory reporting obligations for financial institutions of “suspicious activity” by marijuana-related businesses.<sup>138</sup>

Unsurprisingly, some banking industry leaders remain wary of working with marijuana-related businesses while the drug is still listed under Schedule I of the CSA, as doing so puts them in jeopardy of federal prosecution or sanctions.<sup>139</sup> The efforts of medical researchers to study the effects and potential uses of marijuana are similarly hampered by the CSA.<sup>140</sup> The federal prohibition against marijuana also presents serious obstacles to the creation of efficient economies of scale due to the prohibition of interstate marijuana commerce and inconsistent regulatory structures in individual states.<sup>141</sup>

In conclusion, recent remarks by the Attorney General’s office and the Treasury Department strongly suggest that federal preemption of the new state laws decriminalizing marijuana will not significantly hinder the implementation of these laws in the immediate future.<sup>142</sup> Nevertheless, the status quo—whereby state laws expressly permit citizens to violate federal law—is tenuous. Furthermore, the federal government’s warnings to states that they must sufficiently fund and enforce the new regulations remain nebulous and subject to divergent interpretations. More importantly, the federal government’s benevolent deference to state authorities is subject to a review of state officials’ implementation and enforcement of these new laws. If federal authorities deem the states insufficiently vigilant in their implementation and enforcement of the new laws, their ability to step in to prosecute and challenge the new laws looms large. Consequently, federalism issues remain pertinent. Thus, state reformers would be remiss to ignore the fact

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<sup>137</sup> Kovaleski, *supra* note 132.

<sup>138</sup> See DEP’T OF TREASURY, *supra* note 132.

<sup>139</sup> Kovaleski, *supra* note 129.

<sup>140</sup> Miron, *supra* note 8.

<sup>141</sup> Cf. John Leland & Mosi Secret, *For Pot Inc., the Rush to Cash In Is Underway*, N.Y. TIMES, Oct. 31, 2014, <http://www.nytimes.com/2014/11/02/nyregion/a-competition-to-get-a-medical-marijuana-license-in-new-york.html> (noting that the current conditions in the medical marijuana market, with each state setting its own laws and no distribution across state lines, hinders the creation of interstate economies of scale).

<sup>142</sup> Miron, *supra* note 8 (noting that the administration assuming office in 2017 has the authority to order the attorney general to enforce federal prohibition regardless of state law).

that the long-term success of their state experiments requires federal reforms—particularly the reclassification of marijuana under the Controlled Substances Act (CSA).<sup>143</sup> In fact, the most impactful long-term aspect of state laws decriminalizing marijuana may be their ability to propel change at the federal level by amending the scheduling of marijuana under the CSA.<sup>144</sup>

## V. BINDING INTERNATIONAL DRUG CONVENTIONS

In addition to federal preemption challenges, legislation legalizing marijuana potentially conflicts with UN conventions mandating that member states criminalize possession of marijuana—in particular, the Single Convention on Narcotic Drugs of 1961 (SCND)<sup>145</sup> and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (CAIT).<sup>146</sup> These conventions focus on supply-side demands while also “criminally prohibit[ing] all production, traffic and sale of illicit drugs for anything other than scientific and medical purposes.”<sup>147</sup>

The first of these treaties to codify the international war on drugs, SCND, criminalizes narcotics, which are divided into four schedules based on the perceived addictiveness of the drug.<sup>148</sup> As in the CSA, the SCND classifies cannabis as a Schedule I drug.<sup>149</sup> Although the SCND focuses on destroying the supply-side of the drug trade, it also requires that member states prohibit *possession* of controlled substances and that they adopt penal provisions to enforce the treaty domestically.<sup>150</sup>

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<sup>143</sup> Indeed, various bills have been introduced to remove or reschedule cannabis as a Schedule I drug under the CSA, and to limit the federal government’s ability to interfere with the new legalization laws. *See, e.g.* Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013).

<sup>144</sup> Walsh, *supra* note 67 (observing that supporters of Colorado’s experiment believe “state and local decisions are driving the marijuana policy debate in the face of ongoing inertia—not to say paralysis—at the federal level.”).

<sup>145</sup> Single Convention on Narcotic Drugs, 1961, Mar. 30, 1961, 18 UST 1407, 520 UNTS 204, available at [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf) [hereinafter Single Convention on Narcotic Drugs].

<sup>146</sup> U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95, 28 I.L.M. 497.

<sup>147</sup> Brian A. Ford, *From Mountains to Molehills: A Comparative Analysis of Drug Policy*, 19 ANN. SURV. INT’L & COMP. L. 197, 205 (2013).

<sup>148</sup> Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 UNTS 204, available at Single Convention on Narcotic Drugs, *supra* note 18.

<sup>149</sup> *Id.* at 26 (schedule).

<sup>150</sup> *Id.*

More than two decades after the SCND entered into force, the United Nations General Assembly requested that the International Narcotics Control Board (UNCND) draft another treaty, CAIT, to impose mandatory criminalization for illegal drug violations. CAIT explicitly criminalizes possession, purchase, and cultivation of drugs for personal consumption and mandates punishments including “imprisonment or other forms of deprivation of liberty, pecuniary sanctions, and confiscation” for drug violations.<sup>151</sup>

The SCND and CAIT have received near-universal acceptance—Uruguay and the United States are a party to both treaties.<sup>152</sup> Despite a recent policy shift at the United Nations away from prohibiting the supply of drugs to combating the demand for drugs, the SCND and CAIT remain binding on member states.<sup>153</sup> Nevertheless, many signatories of these conventions have “liberalized certain aspects of their control policies” on the demand side, and there is significant variation in the “aggressiveness of . . . enforcement on the supply side,” which is largely undefined in the conventions.<sup>154</sup> This leaves states with significant discretion in terms of how to implement the requirements of the conventions, particularly with regard to personal use.<sup>155</sup> Nevertheless, it is generally understood that full-scale legalization of any scheduled drug would violate the conventions.<sup>156</sup> Concern about violating international

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<sup>151</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 19, art. 3.

<sup>152</sup> Status, Single Convention on Narcotic Drugs [SCND], U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-18&chapter=6&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-18&chapter=6&lang=en) (last visited Feb. 14, 2015) (showing that 184 states are party to SCND); Status, United Nations Convention Against Illicit Traffic [CAIT] in Narcotic Drugs and Psychotropic Substance, U.N. TREATY COLLECTION [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en), (last visited Feb. 14, 2015) (to date 189 states are party to CAIT); Ford, *supra* note 147, at 203.

<sup>153</sup> See Ford, *supra* note 147, at 200 n. 9 (citing U.N. Office on Drugs and Crime [UNODC], Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem, 52nd Sess. (2009) at 46-47, ¶¶12, 27 & 29, available at [www.unodc.org/documents/commissions/CND-Uploads/CND-52-RelatedFiles/V0984963-English.pdf](http://www.unodc.org/documents/commissions/CND-Uploads/CND-52-RelatedFiles/V0984963-English.pdf)).

<sup>154</sup> OAS, *supra* note 5, at 10.

<sup>155</sup> Dave Bewley-Taylor and Martin Jelsma, *The UN drug control conventions: The Limits of Latitude*, TRANSNATIONAL INSTITUTE, March 2012, at 1, 5-9, <http://gdppc.idebate.org/sites/live/files/The%20UN%20Drug%20Control%20Conventions%20-%20The%20Limits%20of%20Latitude.pdf>.

<sup>156</sup> OAS, *supra* note 5, at 10.

law is believed to have constrained nations, such as the Netherlands, from exploring further legalization models.”<sup>157</sup>

Until the new laws were passed in Uruguay, Colorado, and Washington, no country or jurisdiction “freely permitt[ed] personal possession or use” of substances banned by the conventions.<sup>158</sup> The prospect of violating the UN conventions is particularly uncomfortable in the Uruguayan context,<sup>159</sup> as in recent decades the nation has prided itself as a leader in the promotion of and adherence to principles of international law.<sup>160</sup> Meanwhile, the United States—which heavily promoted and financed both conventions—finds itself in the awkward position of being at risk of non-compliance with the very international agreements that it spearheaded and aggressively promoted.<sup>161</sup>

The International Narcotics Control Board (INCB), a quasi-judicial body charged with promoting and monitoring government compliance with the international drug control conventions, has led the UN’s public response to the new laws in Uruguay and the United States. The INCB released several statements, first expressing concern,<sup>162</sup> then discouraging,<sup>163</sup> and eventually condemning<sup>164</sup> the Uruguayan legalization

<sup>157</sup> *Id.* at 11 (explaining that although never previously employed, violations of the conventions may result in “embargoes against the lawful production of drugs for medical purposes in a country if . . . determin[e]d that the country is violating international drug treaties”).

<sup>158</sup> *Id.* at 17.

<sup>159</sup> Press Release, International Narcotics Control Board (INCB), Uruguay Is Breaking the International Conventions on Drug Control with the Cannabis Legislation Approved by its Congress, U.N. Press Release UNIS/NAR/1190 (Dec. 11, 2013) available at [http://incb.org/documents/Publications/PressRelease/PR2013/press\\_release\\_111213.pdf](http://incb.org/documents/Publications/PressRelease/PR2013/press_release_111213.pdf) [hereinafter International Narcotics Control Board].

<sup>160</sup> Wagner Menezes, *Derecho Internacional en América Latina*, MINISTERIO DAS RELAÇÕES EXTERIORES [Ministry of Foreign Relations] 150, 294, 304 (Ana Carolina Izaga de Senna Ganem trans., 2010), [http://www.funag.gov.br/biblioteca/dmdocuments/Derecho\\_internacional.pdf](http://www.funag.gov.br/biblioteca/dmdocuments/Derecho_internacional.pdf) (Braz.).

<sup>161</sup> Dale H. Gieringer, *The Forgotten Origins of Cannabis Prohibition in California*, 26 J. CONTEMP. DRUG PROBS. 237 (1999) (explaining that drug prohibition in the United States began in the twentieth century with the criminalization of marijuana in California in 1913, and extended to every other state by 1937, the same year that Congress first prohibited marijuana by passing the Marijuana Tax Act of 1937); Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV’T L. REV. 359, 362-63 (2013); Miron, *supra* note 8; Ford, *supra* note 147, at 202.

<sup>162</sup> Press Release, International Narcotics Control Board (INCB), INCB Is Concerned About Draft Cannabis Legislation in Uruguay, U.N. Press Release UNIS/NAR/1186 (Nov. 19, 2013) available at [http://www.incba.org/documents/Publications/PressRelease/PR2013/press\\_release\\_191113e.pdf](http://www.incba.org/documents/Publications/PressRelease/PR2013/press_release_191113e.pdf).

<sup>163</sup> Press Release, International Narcotics Control Board (INCB), INCB President Urges Uruguay to Remain Within the International Drug Control Treaties, Noting Draft Cannabis Legislation, U.N.

model. Specifically, the INCB alleges that the Uruguayan model violates the conventions because it fails to prohibit the production, distribution, and use of a scheduled drug.<sup>165</sup> The president of the INCB expressed dismay that Uruguay, a state with a reputation as “an active partner in international cooperation and in the maintenance of the international rule of law,” knowingly enacted legislation violating the 1961 Single Convention on Narcotic Drugs.<sup>166</sup> The INCB voiced concern about the consequences to public health and risk of cannabis abuse by youth, as well as the fact that Uruguay failed to participate in a “dialogue” with the INCB before passing its law.<sup>167</sup>

The INCB similarly declared that the Colorado and Washington initiatives violate the SCND, which restricts the use of cannabis to medical and scientific purposes.<sup>168</sup> In 2011, the INCB “reminded” member states with federal structures of their obligation to implement the international drug control treaties.<sup>169</sup> Of particular concern to the INCB is the fact that, unlike the Uruguayan model, neither the Colorado nor Washington laws contains consumer registration provisions intended to help prevent drug tourism and diversion of marijuana to jurisdictions where it remains illegal.<sup>170</sup> The US Department of Justice sidesteps the issue by maintaining that the United States is not in violation of its international treaty obligations because federal law continues to list marijuana as a Schedule I drug and the federal government continues to enforce the CSA.<sup>171</sup>

Concerns about violating the international drug conventions may be moderated for several reasons. First, more than thirty countries have decriminalized drug use in violation of international conventions, yet none have suffered significant consequences.<sup>172</sup> Second, nations legalizing recreational marijuana may be able to avoid confrontations with UN drug conventions by denouncing and subsequently re-acceding

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Press Release UNIS/NAR/1176 (Aug. 1, 2013) available at [http://incb.org/documents/Publications/PressRelease/PR2013/press\\_release010813.pdf](http://incb.org/documents/Publications/PressRelease/PR2013/press_release010813.pdf).

<sup>164</sup> *Id.*

<sup>165</sup> OAS, *supra* note 5, at 33–34.

<sup>166</sup> International Narcotics Control Board, *supra* note 159.

<sup>167</sup> OAS, *supra* note 5, at 30.

<sup>168</sup> *US recreational cannabis use would violate international laws, UN anti-narcotics panel says*, UN NEWS CENTRE, Mar. 14, 2013, <http://www.un.org/apps/news/story.asp?NewsID=44376>.

<sup>169</sup> OAS, *supra* note 5, at 32.

<sup>170</sup> OAS, *supra* note 5, at 34.

<sup>171</sup> U.S. DEP'T OF JUSTICE, *supra* note 128, at 4.

<sup>172</sup> Garat, *supra* note 30, at 16.

to the conventions with a reservation regarding marijuana.<sup>173</sup> Although this has not been attempted yet in the context of marijuana, Bolivia successfully employed this tactic in 2013 when it denounced and re-acceded to SCND with a reservation for coca leaves.<sup>174</sup> Finally, the United States is unlikely to pursue a campaign to employ sanctions for violators of the international drug conventions, due to the widespread public support of recreational marijuana in the United States and the fact that an increasing number of US states are moving towards legalization of recreational marijuana.

Thus, although the risk of violating the international drug conventions is highly unattractive to Uruguay and the United States, the greatest threat posed by the legalization of recreational marijuana may be to the longevity of the international conventions themselves. The ability of Uruguay and the United States to openly violate provisions of the conventions with relative impunity invites future treaty violations. In the absence of flexibility or revision of the scheduling of marijuana as a Schedule I drug, the conventions may continue to lose authority over the actions of member states. As violations of international law remain unsanctioned, respect for the authority and enforceability of other provisions of the SCND and CAIT—and perhaps other international treaties as well—may be undermined. Rescheduling of marijuana under both conventions would likely enhance the strength and authority of the UN drug conventions.

## VI. CONCLUSION

The momentum towards reform of punitive marijuana drugs laws in the Americas is robust, as demonstrated by the first comprehensive legalization efforts for recreational marijuana in Uruguay, Colorado, and Washington. As debate continues to shift from the merits of such reforms to the structure and design of new legalization models, learning from these early models of reform is prudent to ensure the success of the larger drug reform movement.

The early regulatory models in Uruguay, Colorado, and Washington highlight several key areas where further reform is needed. First, the new laws demonstrate the need for sufficient monitoring to prevent diversion of marijuana and homegrown plants to jurisdictions

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<sup>173</sup> OAS, *supra* note 5, at 9 n. 4.

<sup>174</sup> *Id.*

where it remains prohibited. Second, clear guidance with regard to marijuana edibles and hemp production is necessary. Third, banks and other financial industries require regulatory guidance about how they may interact with marijuana-based businesses. Other areas that need to be addressed include tax compliance (i.e., how businesses may properly deduct marijuana-related business expenses). Finally, avoiding disparities between the taxation of medical and recreational marijuana is vital to the success of legalization efforts.

New laws legalizing marijuana impact a wide range of agencies and industries, including agriculture, transportation, public health, and law enforcement.<sup>175</sup> Legalization of marijuana also impacts numerous areas of law, including land use, tax, employment, insurance, intellectual property, housing, securities and bankruptcy protection.<sup>176</sup> Thus, further guidance is required in diverse areas of the law—including clarification on ethical issues for attorneys and others who counsel emerging marijuana businesses—to ensure the success of these drug reform efforts.<sup>177</sup>

In sum, the new laws in Uruguay, Colorado, and Washington demonstrate that federalism concerns and conflicts with binding international drug conventions are far from fatal to further efforts to legalize recreational marijuana. At the same time, in the United States, until marijuana is rescheduled under the Controlled Substances Act, the longevity and stability of the new state laws remain in jeopardy. Similarly, to ensure the success of the new legalization models, as well as to protect the vitality of the international conventions themselves, rescheduling is also required at the international level under the Single Convention on Narcotic Drugs and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Until rescheduling of marijuana occurs, piecemeal legalization and decriminalization efforts will continue, borrowing from the innovative Uruguayan, Colorado, and Washington models.

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<sup>175</sup> Hudak, *supra* note 63, at 7.

<sup>176</sup> Leonard I. Frieling, *Overview of Medical Marijuana in Colorado*, COLO. LAW, Apr. 2011, at 37; Vitiello, *supra* note 116, at 71; American Bar Association, Section of State and Local Government Law, *The Wild World of Cannabis: A Quick Trip through the Civil Law Issues of Medical and Legal Marijuana* (Publication Accompanying Audio Continuing Legal Education, Program broadcast on Jan. 12, 2015), at 19 [hereinafter *Wild World of Cannabis*].

<sup>177</sup> *Wild World of Cannabis*, *supra* note 176, at 10–16.