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CANNABIS AND STATES' POWER:
A HISTORICAL REVIEW OF STATE EFFORTS AND AUTHORITY TO REGULATE CANNABIS

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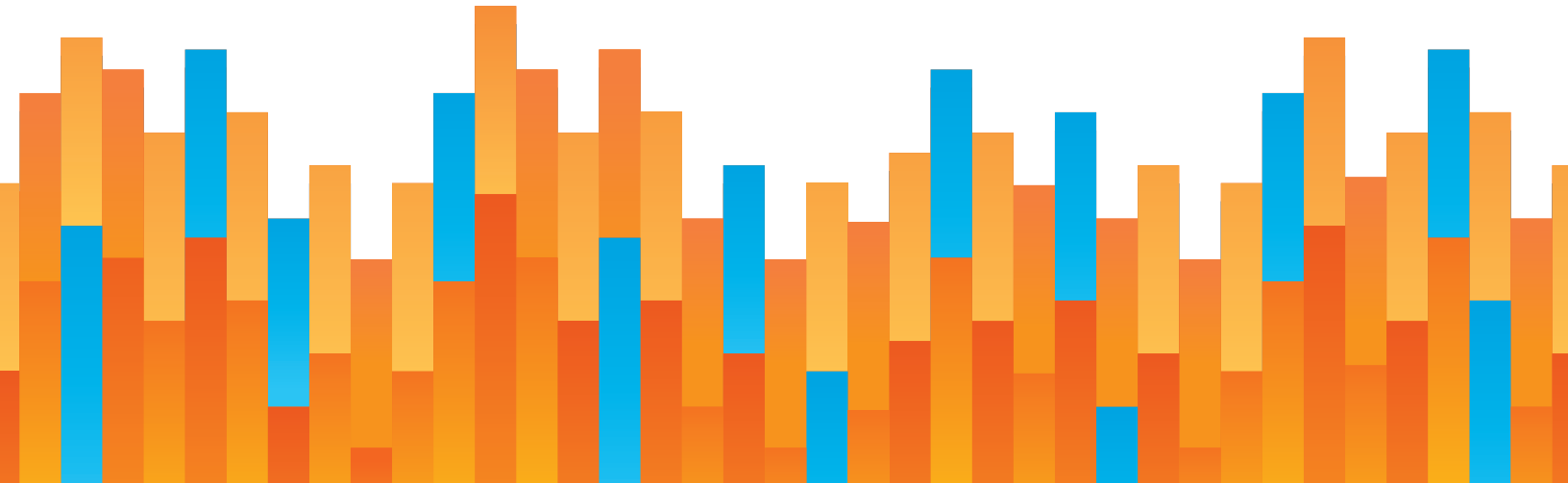

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BACKGROUND

Over the past century, state and federal agencies have developed a myriad of policy approaches for regulating the cultivation, production and sale of cannabis and cannabis-based products. Although many Americans living today have grown up in a policy environment of strict federal prohibition and have been socialized to accept that approach as the cultural norm, cannabis has been a significant agricultural product within the United States for much of its history.

Historically, Americans have farmed cannabis for several purposes. Most early interest in cannabis was for its stalks and fibers which were the primary material from which early American textiles were produced, as well as cordage and paper. Secondly, cannabis seeds and seed oil were also a historical feedstock for both humans and animals. Third, the flowers and leaves of the cannabis plant produce unique chemical compounds called the "cannabinoids" that can exert medical and psychoactive effects on humans. While scientists have identified more than 100 cannabinoids, the most famous is delta-9 tetrahydrocannabinol (THC), which produces a temporary psychoactive effect when consumed. Not all strains of cannabis produce significant amounts of THC, but among those that do, the dried leaves, flowers, resins and fertile seeds of those plants are legally defined today as marijuana. The remaining portions of the plant, and, in the case of low-THC strains of cannabis, the whole plant, are commonly classified as industrial hemp.

Cannabis farming played a central role in the founding of the American republic. In fact, it was a primary motive for British colonization of the original American colonies. Sailcloth

and cordage made from cannabis fibers were essential for maintaining the British fleet, and the island nation had limited land on which to grow the necessary supplies of both food and cannabis. King James ordered every property owner at Jamestown to grow a minimum of 100 cannabis plants for export to England. Throughout the 17th and 18th centuries, these quotas were expanded and the American colonies were restricted from trading cannabis with other nations so that any cannabis not consumed domestically would be shipped back to England. England's demand for cannabis fiber was so great that the Crown began to offer free transportation to America, free land and free seeds to induce additional migration to the colonies for cannabis cultivation. The Crown ultimately offered to purchase one pound of colonial cannabis fiber for as much as two pounds of tobacco—a new cash crop that unexpectedly flourished in the colonies.[1]

> *Cannabis farming played a central role in the founding of the American republic.*

Given the centrality of cannabis in the settling of the American colonies, it is little surprise that many of the American founders, including George Washington, Thomas Jefferson and Benjamin Franklin, were cannabis farmers or processors. Further, their writings indicate that Washington, Jefferson and other major figures in American history not only harvested cannabis for its fibers, but also enjoyed smoking or cooking with the flowering parts of the plant.[2] The original drafts of the American Declaration of Independence were likely written on paper made from cannabis fibers, and Betsy Ross stitched the first American flag out of cannabis-based fabric.[3] Although the demand for cannabis fiber declined following the Civil War, the first Federal Reserve notes were still printed on paper made from cannabis fibers, and the original ten-dollar bill displayed a drawing of American farmers harvesting cannabis.[4]

1 Deitch, Robert. *Hemp – American History Revisited*. New York, NY: Algora Publishing, 2003. 7-44.

2 Ibid.

3 Gerber, Rudolph. *Legalizing Marijuana: Drug Policy Reform and Prohibition Politics*. Westport, CT: Praeger Publishers 2004. 2.

4 Gieringer, Dale. "The Origins of Cannabis Prohibition in California." *Contemporary Drug Problems*. Vol. 26 No. 2 (1999). https://www.researchgate.net/publication/242120559_The_Origins_of_Cannabis_Prohibition_in_

By the early 20th century, however, many countries in the West grew increasingly alarmed at the potentiality for cannabis to be consumed for its inebriating effects.[5] Following World War II, these concerns culminated in the passage of a series of federal legislation that made it either difficult or illegal to produce cannabis in any form, including for purely industrial purposes.

Prior to and throughout the century-long debate on federal treatment of the cannabis plant, however, individual states have developed a wide range of policy alternatives to regulate its production, sales and use. Although many states very recently have taken widely publicized actions to regulate cannabis within their own borders, states have been developing unique policy regimes to accomplish that same task dating back to the late 19th century.

California, Also available at: http://www.canorml.org/background/caloriginsmjproh.pdf; See also: Deitch, *Hemp – American History Revisited*. 16.

5 Cherney, Jerome and Ernest Small. "Industrial Hemp in North America: Production, Politics and Potential." *Agronomy*. Volume 6 Issue 4 (2016). 58. https://www.mdpi.com/2073-4395/6/4/58.

PART 1

HISTORICAL REGULATION OF CANNABIS BY STATES

The history of cannabis regulation begins largely in California during the Gold Rush, as a result of the opium trade. In the mid-1800s, San Francisco's many Chinese immigrants established a lively opium trade that policymakers began to view as problematic. The city of San Francisco responded in 1875 with the nation's first anti-narcotics law—an ordinance outlawing opium dens—which was adopted statewide in 1881. By 1907, new Governor James Gillet called for even stricter laws, and the legislature amended the state's poison law to prohibit the sale of opium, morphine or cocaine without a physician's prescription.

The poison law was carried out by the state Board of Pharmacy, whose most influential member, Henry Finger, became convinced former addicts of these substances would turn to cannabis extracts or serums commonly marketed in pharmacies. Finger pushed to add these products to the list of substances requiring a physician's prescription, succeeding in 1913 despite opposition from the California Pharmaceutical Association and the Retail Druggists' Association of San Francisco.[6]

[6] Gieringer. "The Origins of Cannabis Prohibition in California."

Other states soon followed California's lead by updating their own poison laws to require a prescription for the same substances. By 1915, Indiana, Maine, Utah, Vermont and Wyoming all passed similar requirements, in some cases requesting the language directly from the California Board of Pharmacy.[7] By 1933, some form of restriction on the use and sale of cannabis extracts had been enacted in 34 states. Most, but not all, took the form of California's approach of requiring a prescription.[8]

This approach is fundamentally similar to modern medical marijuana laws passed by states over the last two decades. Current medical marijuana laws typically require a physician's recommendation to obtain a state-issued medical marijuana card that allows patients to procure tightly regulated marijuana for the treatment of approved medical conditions that are usually enumerated in statute.

1.1 THE PUBLIC CAMPAIGN

Use of cannabis extracts for their inebriating effects was not highly prevalent in most states prior to these laws.[9] Although cannabis had remained America's third most important agricultural product as late as 1850, the emergence of cotton as a low-cost (but lower quality) fiber for textiles began to displace the farming of cannabis. When ironclad ships began to replace sailing vessels during the 1860s, the last major source of industrial demand for cannabis farming disappeared, leaving ensuing generations of Americans less familiar with the cannabis plant and its derivatives.[10]

7 Ibid.

8 Notable exceptions were Missouri and Colorado. An 1889 law in Missouri outlawed opium and hasheesh dens, as hasheesh dens had become popular in some Eastern states. Cannabis, including hasheesh and other concentrated forms, was not *per se* illegal in the state until 1935, however. Colorado also became the first state to outlaw the cultivation and sale of cannabis in 1917, although the prohibition on sales was lifted in 1919 before being recriminalized again in 1927. See Gieringer, "The Origins of Cannabis Prohibition in California."

9 Gieringer. "The Origins of Cannabis Prohibition in California."

10 Deitch. *Hemp – American History Revisited*. 36-38.

> *When ironclad ships began to replace sailing vessels during the 1860s, the last major source of industrial demand for cannabis farming disappeared, leaving ensuing generations of Americans less familiar with the cannabis plant and its derivatives.*

With the growing popular ignorance about the cannabis plant, policymakers seeking to include cannabis within their state poison laws saw an opportunity to reframe the issue by capitalizing on a growing anti-immigrant sentiment. Following the outbreak of the Mexican Civil War in 1910, thousands of refugees began relocating to southwestern states and brought with them the common habit of smoking high-THC varieties of cannabis which they called by an unfamiliar name: "marijuana." These immigrants and their habits of smoking marijuana were vilified both in the press and in the private correspondence of influential policymakers like Henry Finger who, at times, also complained of its use by immigrant Turks, Syrians and Hindus. As one example, Finger wrote to an ally within the narcotics division of the U.S. State Department:

> *Within the last year we in California have been getting a large influx of Hindoos and they have in turn started quite a demand for cannabis indica; they are a very undesirable lot and the habit is growing in California very fast; the fear is now that it is not being confined to the Hindoos alone but that they are initiating our whites into this habit.*[11]

Likewise, popular periodicals regularly promoted these stereotypes. For example, the *Washington Post* printed a story in 1911 that slandered Mexicans as addicts, equated marijuana with opium and cocaine, and even confused the cannabis plant with an unrelated poisonous plant (astralgalus):

> *It is reported that the Mexican Marihuano or loco weed (astragalus hornu) is being feared and fought by the California Board of Pharmacy as an enemy no less dreadful than opium or cocaine…more than one-third of the people of Mexico are believed to be more or less*

[11] "California and the Oriental." California State Board of Control. Report to Gov. William Stephens. 19 June 1920. 122. Available at: https://catalog.hathitrust.org/Record/008650276.

> *addicted to the use of the drug. Much of it is brought into California by the Mexican laborers, who are greatly addicted to it...[T]he loco narcotic destroys body, soul and mind.*[12]

It is unlikely that the few policymakers who wanted to include cannabis in these early laws that were otherwise intended to restrict access to opium and cocaine would have been successful without the public association of its use with immigrant groups. This theme would become apparent again two decades later during the drive toward federal prohibition of cannabis.

1.2 EMERGENCE OF FEDERAL PROHIBITION

Although this paper concerns itself primarily with the actions taken by states to regulate cannabis, these approaches must be considered within the context of federal law, which supersedes state laws. The earliest federal attempts to control narcotics focused mainly on opium and cocaine. The Harrison Act of 1914, for instance, regulated and taxed the production, importation and distribution of these drugs. Henry Finger's ally within the U.S. State Department, Narcotics Affairs Director Hamilton Wright, drafted the initial versions of the Harrison Act, including cannabis among the restricted substances. With little concern about cannabis from within the medical community, however, Congress elected to strike its references from the text before passage.[13]

“The earliest federal attempts to control narcotics focused mainly on opium and cocaine.... Henry Finger's ally...drafted the initial versions of the Harrison Act, including cannabis among the restricted substances.”

[12] “War on Crazing Drug: California Fears the Dread Loco Weed that Has Menaced Mexico.” *Washington Post*. 6 November 1911. Print.

[13] Gieringer. “The Origins of Cannabis Prohibition in California.”

It was not until the waning years of alcohol prohibition that federal attention became fixed upon cannabis, due in part to a famous propaganda effort put forth by the director of the Federal Bureau of Narcotics, Harry Anslinger. Anslinger had gained a reputation as a zealous assistant commissioner of the Bureau of Prohibition, and became the founding commissioner of the Federal Bureau of Narcotics when it was formed in 1930. Prior to accepting his new post, Anslinger said he believed it was an "absurd fallacy" that cannabis could make people go mad or become violent.[14] But historical evidence shows that after accepting his new post, Anslinger collected a series of fantastic stories about violent acts supposedly committed by marijuana users and promoted them through the press to build political support for federal legislation that would give his new agency a wide-ranging mission. Among the 200 stories comprising his "Gore Files" series that purported to illustrate how cannabis leads to violence and insanity, 198 have been shown to be wrongly attributed to cannabis use. The remaining two cases appear to have been made up entirely, as there is no record concerning the purported crimes.[15] Anslinger also attempted to marshal scientific evidence to support his cause and consulted 30 scientists about the effects of marijuana. Of those, 29 told Anslinger that cannabis was not a dangerous drug. In response Anslinger presented to the public the only the expert who supported his adopted view.[16] Finally, he promoted the narrative from two decades prior that marijuana use was most prevalent within immigrant and minority communities and that its use could lead to interracial relations between men and women.[17]

…[Anslinger] promoted the narrative from two decades prior that marijuana use was most prevalent within immigrant and minority communities and that its use could lead to interracial relations between men and women.

14 Adams, Cydney. "The Man Behind the Marijuana Ban for All the Wrong Reasons." *CBS News*. 17 November 2016. https://www.cbsnews.com/news/harry-anslinger-the-man-behind-the-marijuana-ban/.

15 Perkins, Earl. "Victor Licata's Strange Legacy." *Thursday Review*. 30 May 2014. http://www.thursdayreview.com/VictorLicataPot.html.

16 Adams. "The Man Behind the Marijuana Ban for All the Wrong Reasons."

17 Ibid.

This effort eventually culminated in passage of the Marihuana Tax Act of 1937, the first drafts of which were penned by Anslinger himself.[18] Importantly, as the Harrison Act did for opium and cocaine, the Marihuana Tax Act did not prohibit cannabis altogether. Rather, the Act required all producers of cannabis, both of the high-THC and industrial hemp varieties, to register with the Federal Bureau of Narcotics and pay a new excise tax which, incidentally, created a dedicated funding source for Ansligner's agency. However, taxes ranged as high as $100 per ounce (roughly the equivalent of $1,753 in 2018 dollars), making it highly punitive to participate in the industry. Further, the Act was applied equally to all forms of cannabis, including both the flowering parts of high-THC plants, low-THC plants and plant parts that hold industrial uses other than cannabinoid availability. Thus, the Act brought about an abrupt and dramatic decline in American hemp farming.

“The American Medical Association opposed passage of the Act on grounds that marijuana might have health benefits and did not cause addiction.”

The American Medical Association opposed passage of the Act on grounds that marijuana might have health benefits and did not cause addiction. Dr. William C. Woodward, the organization's legislative counsel advised in a letter to the Senate Finance Committee:

> *There is no evidence, however, that the medicinal use of these drugs [“cannabis and its preparations and derivatives”] has caused or is causing cannabis addiction. As remedial agents they are used to an inconsiderable extent, and the obvious purpose and effect of this bill is to impose so many restrictions on their medicinal use as to prevent such use altogether. Since the medicinal use of cannabis has not caused and is not causing addiction, the prevention of the use of the drug for medicinal purposes can accomplish no good end whatsoever. How far it may serve to deprive the public of the benefits of a drug that on further research may prove to be of substantial value, it is impossible to foresee.*[19]

Nonetheless, the Act passed and production of all forms of cannabis quickly waned.

[18] Geirenger. “The Origins of Cannabis Prohibition in California.”

[19] U.S. Congress, Senate Committee on Finance, Taxation of Marihuana. Hearing on H.R. 6906. 75th Cong., 1st Sess. 12 July 1937. Washington: Government Printing Office. 33.

In 1952, Congress passed the Boggs Act, creating mandatory prison sentencing for possession of any cannabis on which excise taxes had not been paid, beginning with the first offense. States passed similar laws, including in California, where any possession of marijuana carried a minimum sentence of one year in prison, while sale of marijuana resulted in at least five years of imprisonment. The enforcement costs of these provisions escalated quickly and, by 1974, more than 103,000 marijuana arrests were made in California alone. Harsh penalties had done little to stem the growing use of marijuana for its inebriating effects during the 1960s, and state and federal authorities alike began removing mandatory sentencing provisions in the 1970s.

In 1969, the U.S. Supreme Court struck down the Marihuana Tax Act on the grounds that it violated the Fifth Amendment. But instead of this leading to freer access to cannabis for industrial, medical and recreational purposes, Congress acted swiftly to replace the defunct Marihuana Tax Act with the Controlled Substances Act in 1970. This Act went further than the Marihuana Tax Act ever did by creating a strict, *per se* ban on substances classified within Schedule I, including marijuana. Although the Controlled Substances Act goes to some length to define marijuana as only those portions of the cannabis plant likely to contain high concentrations of THC,[20] in practice the DEA largely enforced the ban against all forms of cannabis due to the difficulty of visibly distinguishing low-THC strains of cannabis from high-THC varieties.

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[20] United States Code. Title 21. Controlled Substances Act. Subchapter 1. Part A. §802(16).

PART 2

STATES REASSERT THE RIGHT TO REGULATE CANNABIS: 1970S–1990S

Within two short years of passage of the Controlled Substances Act, the newly formed National Organization for the Reform of Marijuana Laws (NORML) filed a petition to reschedule marijuana so that it could again be prescribed by physicians. The DEA, a modern incarnation of the Federal Bureau of Narcotics created to enforce the Controlled Substances Act, initially refused to hear the petition and court battles dragged on for 22 years before a final decision was made by the U.S. Court of Appeals. In the meantime, however, it appeared that cannabis would be rescheduled federally, prompting states to pass legislation during the 1970s to again allow access to marijuana for medical purposes.

An important forerunner to this new round of legislation by states was a narrow program launched by the federal Food and Drug Administration in the 1970s. A few medical studies during this period noted that marijuana use led to temporary reduction in interocular pressure. This finding became particularly important for those suffering from glaucoma, as it became apparent that marijuana could provide effective, temporary relief for many of the symptoms. In 1975, Robert Randall, a Washington, D.C. glaucoma sufferer who was arrested for possession and cultivation of marijuana, argued he had a medical necessity to procure

the drug. After a lengthy court battle, Randall's charges were ultimately dismissed. The FDA responded by launching an Investigational New Drug program that allowed a limited number of individuals to be supplied with marijuana by the federal government after a review board recommended it would be the best means of medical treatment.

Due to the complexity of receiving federal approval to participate in the Investigational New Drug program, only 13 individuals were ever admitted to participate, but states were allowed to create their own parallels to the program that used medical review boards created by the states themselves. These Therapeutic Research Programs received their marijuana supply from the National Institute on Drug Abuse—the same federal agency that supplied marijuana for the Investigational New Drug program launched by the FDA. In the short span between 1978 and 1981, 22 states enacted legislation authorizing a Therapeutic Research Program. Only eight ever became operational, though, due to the complexity of complying with federal guidelines.[21]

Iowa, Michigan, Minnesota, New Mexico, Tennessee and the District of Columbia all took a different or supplemental approach during this period by rescheduling cannabis out of Schedule I in their own state versions of the Controlled Substances Act. These states did so with the intent that physicians would regain the ability to prescribe marijuana for medical purposes.

Iowa, Michigan, Minnesota, New Mexico, Tennessee and the District of Columbia all took a different or supplemental approach during this period by rescheduling cannabis out of Schedule I in their own state versions of the Controlled Substances Act. These states did so with the intent that physicians would regain the ability to prescribe marijuana for medical purposes. However, since the federal government retains the authority to license physicians for the prescription of medicines, this approach largely fell short of its objective. Other

[21] Schmitz, Richard and C. Thomas. "State-by-State Medical Marijuana Laws: How to Remove the Threat of Arrest." Marijuana Policy Project, 2001. Available at: https://medicalmarijuana.procon.org/sourcefiles/state-by-state-guidelines-remove-threat-of-arrest.pdf.

states anticipated this complication and instead developed a third approach, enacting legislation to protect physicians from prosecution if they prescribed marijuana.[22]

Alaska became an outlier in 1975 when a state supreme court decision held that the Alaska Constitution's right to privacy protects an adult's ability to possess or use small amounts of marijuana within their own home. This decision effectively legalized marijuana use for both medical and recreational purposes until a 1990 ballot initiative recriminalized possession in any amount.[23]

In total, 33 states plus the District of Columbia passed laws between 1978 and 1983 to allow for the medical use of cannabis.

In total, 33 states plus the District of Columbia passed laws between 1978 and 1983 to allow for the medical use of cannabis.[24] Some of these laws—including a majority of Therapeutic Research Programs—never went into effect, while others offered only limited ability for residents to use marijuana. Yet, by 1983, more than four-fifths of Americans lived in a state that had taken some action to legalize marijuana for medical purposes.

22 Pacula, Rosalie et. al. "State Medical Marijuana Laws: Understanding the Laws and Their Limitations." The Robert Wood Johnson Foundation Research Paper Series No. 13, 2001. Chicago: University of Illinois at Chicago.

23 Edge, Megan and Laurel Andrews. "Timeline: Notable Moments in 40 Years of Alaska's History with Marijuana." *Anchorage Daily News.* 13 April 2014. https://www.adn.com/cannabis-north/article/alaska-weed-history/2014/04/14/.

24 Markoff, Steven. "State-by-State Medical Marijuana Laws." Published by Markoff. Compiled by Marijuana Policy Project Foundation, June 1997. Available at: http://stevencmarkoff.com/cms/wp-content/uploads/2018/02/State-by-State-Medical-Marijuana-Laws-1997.pdf

TABLE 1: STATE MARIJUANA LAWS ENACTED BETWEEN 1978 AND 1983

State	Therapeutic Research Program (Year Enacted)	Rescheduled from State Controlled Substances Act (Year Enacted)	Law Authorizing Medical Prescriptions (Year Enacted)	Year Repealed or Allowed to Expire
Alabama	1979			
Alaska	1983			1986
Arizona	1980			
Arkansas			1981	1987
California	1979			1989
Colorado	1979			1995
Connecticut			1981	
District of Columbia		1981		
Florida	1978			1984
Georgia	1980			
Illinois	1978			
Iowa	1979			
Louisiana			1978	
Maine	1979			1987
Michigan	1979	1979		1987
Minnesota	1980	1980		
Montana	1979			
Nevada	1979			1987
New Hampshire			1981	
New Jersey	1981			
New Mexico	1978	1978		
New York	1980			
North Carolina			1979	1987

State	Therapeutic Research Program (Year Enacted)	Rescheduled from State Controlled Substances Act (Year Enacted)	Law Authorizing Medical Prescriptions (Year Enacted)	Year Repealed or Allowed to Expire
Ohio	1980			1984
Oregon			1979	1987
Rhode Island	1980			
South Carolina	1980			
Tennessee	1981	1981		
Texas	1980			
Vermont			1981	
Virginia			1979	
Washington	1979			
West Virginia	1979			
Wisconsin			1982	
Total No. of States	24	5	9	11

Sources: Markoff, Steven. "State-by-State Medical Marijuana Laws." Published by Markoff. Compiled by Marijuana Policy Project Foundation, June 1997. Available at: http://stevencmarkoff.com/cms/wp-content/uploads/2018/02/State-by-State-Medical-Marijuana-Laws-1997.pdf. See also: Pacula et al. "State Medical Marijuana Laws."

A handful of reasons led to the eventual decline of these efforts. First, the initial hopes for a federal rescheduling of marijuana were beginning to wane. Hearings on the 1972 petition did not even commence until 1986 and, by that time, the Reagan administration showed minimal tolerance for cannabis to be used for any purpose. Second, Marinol, a pharmaceutical using a synthetic version of THC, was approved by the FDA in 1986 and, although extremely expensive, this product was marketed as an approved substitute for medical marijuana. Eleven states eventually either repealed these laws allowing medical marijuana or allowed them to expire. Others left them on the books, but they eventually all became inoperable, especially following the removal of federal authority for the Investigational New Drug program and parallel state Therapeutic Research Programs under the Bush administration in 1992.[25]

[25] Ibid.

PART 3

STATES REASSERT THE RIGHT TO REGULATE CANNABIS: 1990S–PRESENT

In December 1989, DEA Administrator John Lawn officially rejected the non-binding recommendation of administrative law Judge Francis Young from one year prior to move marijuana to a Schedule II classification under the Controlled Substances Act. This ended the reclassification petition originally filed by NORML in 1972. Although the petitioners challenged Lawn's action in court as well, it was eventually upheld by the U.S. Court of Appeals in 1994.[26] This decision marked a low point in the struggle by advocates to make cannabis products available to patients or recreational users anywhere in the nation. There was now no jurisdiction in America that offered any form of exception to the federal ban on cannabis.

This was the atmosphere in which advocates in California and Arizona began organizing a petition drive to place medical marijuana on the 1996 ballot. The AIDS outbreak in San Francisco sparked renewed interest in marijuana as a treatment for pain, nausea and other

[26] Pacula et al. "State Medical Marijuana Laws."

related symptoms, leading state lawmakers to approve legislation authorizing the medical use of marijuana in both 1994 and 1995. Both bills were vetoed by Governor Pete Wilson. In 1995, this prompted organizers to begin collecting the more than 400,000 signatures required to place Proposition 215 on the 1996 ballot. After a bitter campaign that captured national headlines, the measure passed with 55.6% of the vote, allowing for the medical use of marijuana within California's borders.[27]

Meanwhile, that same year in Arizona, a ballot measure on criminal justice reform was presented that also included a provision allowing physicians to prescribe marijuana for "a seriously or terminally ill patient." The initiative, Proposition 200, won with 65.4% of the vote, but its implementation was delayed as the Arizona Legislature acted quickly to nullify most of its provisions. However, organizers again qualified the initiative for the ballot in 1998, where it again passed along with a companion initiative that prevented the legislature from amending voter-approved statutes.[28]

These high-profile electoral decisions inspired organizers in other states with initiative processes to place medical marijuana on the ballot as well. In 1998, voters in Alaska, Nevada, Oregon, Washington and the District of Columbia all passed ballot initiatives authorizing the medical use of marijuana. Voters in Maine did so a year later and Colorado followed in 2000. By 2004, 11 states plus the District of Columbia had legalized marijuana for medical use—a number that has since grown to 33.

By 2004, 11 states plus the District of Columbia had legalized marijuana for medical use—a number that has since grown to 33.

Despite early efforts by federal authorities to combat state laws allowing for the medical use of marijuana—including regular raids of state-approved farms and dispensaries, seizures of assets, and criminal charges filed against patients and proprietors alike—

27 Vitiello, Michael. "Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy." University of the Pacific Scholarly Commons, 1998. https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?referer=https://en.wikipedia.org/&httpsredir=1&article=1093&context=facultyarticles.

28 Gerber. *Legalizing Marijuana.* 2004.

enforcement actions eventually began to soften. In October 2009, the U.S. Justice Department issued a memorandum by Deputy Attorney General David Ogden instructing U.S. district attorneys to concentrate prosecutorial efforts related to controlled substances toward cases that involved violence, firearms, criminal enterprises, sales to minors, or against offenders not in compliance with state laws.[29]

Despite the Ogden Memo, raids against state-licensed marijuana businesses continued[30] until additional clarification was issued in 2013 by Deputy Attorney General James Cole.[31] The Cole Memo was followed in 2014 by an amendment to the federal budget that prohibited the Justice Department from using any part of its funding to prosecute marijuana businesses that operate in accordance with state law. The Cole Memo was ultimately rescinded by the Justice Department in January 2018, but the Rohrabacher-Farr amendment to the federal budget remains in place as an important protection for state-licensed marijuana businesses, and grants leeway for states to pursue licensing programs to allow for the medical or recreational use of cannabis.

“The Cole Memo was ultimately rescinded by the Justice Department in January 2018, but the Rohrabacher-Farr amendment to the federal budget remains in place as an important protection for state-licensed marijuana businesses, and grants leeway for states to pursue licensing programs to allow for the medical or recreational use of cannabis.”

29 Ogden, James W. “Memorandum for Selected United States Attorneys: Investigation and Prosecutions in States Authorizing the Medical Use of Marijuana.” U.S. Department of Justice, 19 October 2009. https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states.

30 Sullum, Jacob. “Bummer: Barack Obama Turns Out to Be Just Another Drug Warrior.” *Reason Magazine*, October 2011. http://reason.com/archives/2011/09/12/bummer/singlepage.

31 Ogden, James W. “Memorandum for Selected United States Attorneys: Guidance Regarding Marijuana Enforcement.” U.S. Department of Justice, 29 August, 2013. https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

These federal allowances coincided with the first actions to legalize cannabis for recreational purposes in Colorado and Washington. Colorado voters approved Amendment 64 to the state constitution on the 2012 ballot, which granted adults the freedom to possess up to one ounce of marijuana and to cultivate up to six plants for personal consumption, while also authorizing commercial licensing and sales. Likewise, Washington voters approved Initiative 502, which did not allow for personal cultivation, but did allow adults to possess up to one ounce of marijuana and provided for commercial licensing and sales.[32]

These ground-breaking efforts to legalize marijuana for adult use and to regulate it like alcohol quickly inspired advocacy groups in other states to organize similar ballot initiatives. In the 2014 election, voters in Alaska and Oregon approved similar initiatives, while those in the District of Columbia approved an initiative to legalize adult possession without providing for a framework of commercial production and sales. Two years later, California, Nevada, Massachusetts and Maine approved additional initiatives. With voter approval of a similar 2018 initiative in Michigan, along with legislative enactment of a statute permitting possession but not commercial sales in Vermont, 10 states plus the District of Columbia have legalized the recreational use of marijuana. Despite an ongoing federal prohibition, one in four Americans now lives in a state where marijuana is legal.

[32] Walsh, John. "Q&A: Legal Marijuana in Colorado and Washington." Brookings Institution, Governance Studies, 13 May 2013. https://www.brookings.edu/wp-content/uploads/2016/06/QA-Legal-Marijuana-in-Colorado-and-Washington-WEB.pdf.

PART 4

STATES' ABILITY TO REGULATE VIS-À-VIS THE INTERSTATE COMMERCE CLAUSE

These recent actions by states have inspired intense debate regarding their authority to legalize, regulate or tax goods that are strictly prohibited by federal law. Specifically, the Supremacy Clause to the United States Constitution makes clear that federal law supersedes any and all laws made by states or municipalities. However, since the Constitution itself amounts to a compact among the states and awards powers to the federal government only insomuch as they are explicitly enumerated and granted by the individually sovereign states, the scope within which federal authorities are permitted to legislate is limited to those enumerated powers. In the realm of regulating commercial goods, traditional interpretations have limited the scope of federal regulation to commerce that crosses state boundaries, as indicated by the Interstate Commerce Clause.

As such, states have largely relied on this limitation of federal authority to presume unto themselves the power to regulate commerce that occurs only within their own borders, including commerce involving marijuana products. It is, in part, for this reason that states have relied extensively on track-and-trace systems to monitor the movements of all

licensed marijuana products to ensure they do not cross state boundaries. The limitation on federal authority to regulate only interstate commerce was also implicitly recognized in the Cole Memo, which gave greater leeway to states that had implemented effective systems for preventing marijuana products from moving across state lines or onto federally owned lands.

However, the debate over federal authority to regulate purely intrastate commerce in marijuana is far from resolved. Indeed, much uncertainty exists regarding the possibility of future enforcement action by federal authorities.

> *The federal government claims authority for regulating even intrastate commerce to outlaw marijuana products through a series of decisions by the U.S. Supreme Court.*

The federal government claims authority for regulating even intrastate commerce to outlaw marijuana products through a series of decisions by the U.S. Supreme Court. In 1942, the Court held that the federal government had authority to fine Roscoe Filburn for growing too much wheat and using it to feed his own animals on his Ohio farm. At that time, the Agricultural Adjustment Act, a New Deal-era attempt at federal price controls for foodstuffs, placed strict limits on the amount of allowable wheat production so that farmers could not subvert the government's price controls. Filburn argued that the federal government had no authority to regulate his production because it neither crossed state boundaries nor even involved any transaction with another person or entity.

The Court's decision in this case dramatically expanded traditional interpretations of the Interstate Commerce Clause, declaring: "...even if[Filburn]'s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"[33] In other words, the Court judged that Filburn's production of his own animal feed prevented him from purchasing that feed elsewhere, thus affecting the prices in

[33] *Wickard v. Filburn*. 317 U.S. 111 (1942).

interstate commerce. The *Filburn* decision introduced, for the first time, broad federal authority to regulate even items of non-interstate, non-commerce.

This premise of the *Filburn* decision was central to a 2005 Court ruling relating directly to state regulation of marijuana. In *Gonzales v. Raich*, Angel Raich and Diane Monson were patients who cultivated marijuana in their own homes as a treatment for severe pain and believed they were protected by California's medical marijuana laws. They were raided by the DEA and their plants were destroyed. In response, they sued, claiming the DEA acted in violation of the Interstate Commerce Clause, the Due Process Clause of the Fifth Amendment, and the Ninth and Tenth Amendments, which reserve powers not specifically enumerated in the Constitution to the states. The Court ruled 6-3 in favor of the government, which relied upon the *Filburn* notion that growing marijuana at home for personal use can affect the interstate commerce of marijuana even though it involves no transaction.[34]

Justice Clarence Thomas' dissenting opinion in *Raich* was particularly poignant for those who subscribe to the traditional interpretation on the Interstate Commerce Clause and, thereupon, believe states retain the power to regulate marijuana within their own borders. He said:

> *Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers…In the early days of the Republic, it would have been unthinkable that Congress could prohibit the cultivation, possession, and consumption of marijuana.*[35]

[34] *Gonzales v. Raich*. 545 U.S. 1 (2005).

[35] Ibid.

PART 5

CONCLUSION

This paper makes three facts particularly clear. First, cannabis played a central role in the forming of the American republic. Second, states have historically taken the lead in regulating the market for cannabis products that contain the psychoactive cannabinoid THC within their own borders. Third, federal action to outlaw marijuana was unfounded on the science, was used as justification for growth of the federal bureaucracy, and has created tense friction with state governments regarding the federal allocation of powers under the U.S. Constitution.

There is no evidence that states intend to relinquish to federal agencies the power to regulate marijuana within their borders. To the contrary, a growing number of states are passing laws to legalize marijuana for either medical or recreational purposes as a direct affront to federal assertions of power under the *Filburn* interpretation of the Interstate Commerce Clause. Although early versions of these laws were almost exclusively passed by voter initiative, state lawmakers have increasingly considered legalization statutes through the legislative process. In 2018, Vermont became the first state to legalize marijuana for recreational use by a legislative act, indicating antipathy from even state policymakers toward the federal assertion of power in this area.

Predicting the future is difficult, and no one knows how this conflict will ultimately be resolved. Congress may elect to end the federal prohibition of marijuana at any point, such as through a reclassification under the Controlled Substances Act or another means. It has recently taken similar action with regard to low-THC strains of cannabis, or hemp, which is

now protected from prosecution under the Controlled Substances Act when grown under a license issued by the U.S. Department of Agriculture pursuant to provisions of the 2018 Agriculture Act.[36] Alternatively, Congress might restore the traditional interpretation of the Interstate Commerce Clause by reserving to the states the undisputed power to regulate marijuana within their borders.

On the other end of the spectrum, Congress may elect to crack down more forcefully on state marijuana programs and the businesses they license. One thing is for certain though: The status quo, given all the staunchly competing interests, is untenable.

[36] House Resolution 2642. U.S. Congress. 113th Session.

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