

# ALASKA: NORTH TO THE FUTURE OF FEDERAL MARIJUANA REGULATION

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## **ABSTRACT**

*The personal freedom Alaskans not only expect, but rely upon, exposes a significant need for federal cooperation in the reformation of marijuana laws, including the removal or reclassification of marijuana in the Controlled Substances Act. This Comment summarizes this issue in light of Alaska's recent recreational marijuana legalization. In doing so, elements unique to Alaska and their likely influence on the state's upcoming marijuana legislation; the history and evolution of Alaska marijuana laws; and the scholarly literature on Alaska marijuana law regarding the tensions between federal and state marijuana regulation are discussed. This Comment proposes that marijuana be removed from the Controlled Substance Act and that the federal government take a page out of Alaska's book in setting up a new marijuana regulatory system by shifting oversight of marijuana regulation from the Drug Enforcement Administration to the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Such a solution could provide for consistency among the continuing emergence of state recreational marijuana laws while still allowing each state to properly police itself on the basis of its unique needs.*

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## INTRODUCTION

*“The brilliant stars in the northern sky,  
The “Bear,” – the “Dipper,” – and, shining high,  
The great North Star with its steady light,  
Over land and sea a beacon bright.”<sup>1</sup>*

If you’ve seen the movie *North to Alaska*<sup>2</sup> starring John Wayne, you’ve taken a glimpse at Hollywood’s fascination with the wild nature of the vast lands way up north. The film opens with a rowdy saloon brawl. The bartender’s hat magically levitates above his head with each knock about his face by his attacker. Meanwhile, a thief attempts to steal the fortune strewn about the gambling tables – only to be stopped by a dog with amusing human-like qualities. The fight ends with chuckles and handshakes, and John Wayne’s character, Sam McCord, gets the girl by painfully telling her that he loves her. All’s well that ends well.

If Hollywood were to make a film about marijuana legalization in Alaska with the same levity as *North to Alaska*, its theme would best analogize with the Sam McCord statement: “[The] wonderful thing about Alaska is that matrimony hasn’t hit up here yet. Let’s keep it a free country.”<sup>3</sup> Though full of wild exaggerations, the theme in *North to Alaska* has gets thing right: personal freedom and independence is vital to what makes Alaskans Alaskan.

This vitality of personal freedom in Alaska furthermore illustrates the existing need for federal cooperation with states as they continue to legalize marijuana and the necessary removal or reclassification of marijuana in the Controlled Substances Act (CSA). The current classification of marijuana as a Schedule I substance under the CSA<sup>4</sup> is used by the federal government to supersede state policing rights under the Tenth Amendment; it furthermore undermines the right of state legislatures to legalize and regulate marijuana in accordance with the desires of its constituents.<sup>5</sup> As states continue to legalize recreational marijuana use, they will be faced with at least two large battles: pioneering and legitimizing an industry born of illegal activity, and the federal government’s limitations on the industry through an antiquated

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1. MARIE DRAKE, *ALASKA’S FLAG* (Royal Records 1955).

2. *NORTH TO ALASKA* (Twentieth Century Fox 1960).

3. *Id.*

4. 21 U.S.C. § 812 (2014).

5. Marijuana on the Ballot (by year), *BALLOTPEDIA* (2015), [http://ballotpedia.org/Marijuana\\_on\\_the\\_ballot#tab=By\\_year](http://ballotpedia.org/Marijuana_on_the_ballot#tab=By_year) [hereinafter *Marijuana on the Ballot*].

misclassification of marijuana in the CSA. The lack of federal support on the issue will continue to promote the current negative effects of the black market that states legalizing marijuana are attempting to alleviate.<sup>6</sup>

This Comment will examine Alaska's current state of marijuana legalization and offer suggestions for crafting federal marijuana regulations that do not violate the varying culture and political norms of the states. First, this Comment discusses certain elements unique to Alaska, including political climate, geography, and drug culture, in light of their suspected impact on the creation and implementation of local marijuana legislation. This Comment will then discuss the evolution of Alaska marijuana legislation before looking at the prominent scholarly literature on Alaska marijuana law and the broader tensions between federal and state marijuana regulation. The Comment concludes that, for the purposes of legalizing recreational marijuana, the federal government should remove marijuana from the Controlled Substance Act and provide a regulatory system that, like Alaska's proposed legislation, would regulate marijuana using existing administrative agencies.<sup>7</sup> This regulation should nonetheless allow for states to regulate marijuana in ways that respect their individual needs.

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6. 2012 Colorado State Ballot Information Booklet, *Amendment 64: Use and Regulation of Marijuana*, LEGISLATIVE COUNCIL OF THE COLORADO GEN. ASSEMBLY, Research Pub. No. 614 (Feb. 10, 2015), <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822971738&ssbinary=true>

(Colorado's Amendment 64 has a stated purpose of individual freedom (among others), and section (1)(b)(IV), states that the law seeks to allow legitimate, tax paying people, and not criminal actors to sell marijuana); *Washington Initiative Measure No. 502*, filed Jul. 8, 2011, Nov. 16, 2015, [http://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](http://sos.wa.gov/_assets/elections/initiatives/i502.pdf) (one intention stated in this measure is to take the marijuana out of the hands of illegal drug organizations); *Oregon Measure 91*, Nov. 11, 2015, <http://www.oregon.gov/olcc/marijuana/documents/measure91.pdf> (one of the stated intentions is to prevent marijuana revenue from supporting criminal drug enterprises, gangs, and cartels); *Campaign to Regulate Marijuana like Alcohol in Alaska, Full Initiative Text*, ALASKA STAT. § 17.38.010 (2014), <http://regulatemarijuanainalaska.org/full-initiative-text/> [hereinafter *Campaign to Regulate Marijuana*] (stating legitimate, taxpaying business people, and not criminal actors, will conduct sales of marijuana).

7. Until a Director of the Marijuana Control Board is appointed, the Director of the Alcoholic Beverage Control Board will serve as director. H.B. 123, 29th Leg., 1st Sess. (Alaska 2015). The staff for the Alcoholic Beverage Control Board will also be staff for the Marijuana Control Board. *Id.*

## I. ABOUT ALASKA

### A. Population and Geography

Alaska's geographical size is one of its most distinctive attributes. At 663,300 square miles, Alaska is the largest state in the country, spanning the size of California, Texas, and Montana combined.<sup>8</sup> Despite its sheer enormity, Alaska's population ranks forty-seventh out of fifty.<sup>9</sup> Alaska's population in 2014 was 736,732, with nearly half of the population residing in one city: Anchorage.<sup>10</sup> The population density in the state is approximately five times less than the population density in Wyoming, and about 10,000 times less than in Washington, D.C..<sup>11</sup>

Alaska's demographics also set it apart from the rest of the continental United States. The state's population is among the youngest in the nation with a median age of 37.2.<sup>12</sup> Nationally, Native Americans and Alaska Natives account for approximately 1.2 percent of the population.<sup>13</sup> Native Americans and Alaska Natives in Alaska, by comparison, constituted 14.3 percent of the state's population in 2013, which is the highest percentage of any state—about one in every seven people.<sup>14</sup> Alaska's size and diverse but sparse population has undeniably resulted in unique state and federal regulations, such as the allocation of land ownership in Alaska.<sup>15</sup> These aspects of the state will

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8. *How Big is Alaska?*, ALASKA CHANNEL, <http://www.alaska.org/how-big-is-alaska> (last visited Aug. 5, 2015).

9. *Alaska State and County Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/02000.html> (last modified Aug. 6, 2015).

10. Table 14. *State Population – Rank, Percent Change, and Population Density: 1980–2010*, U.S. CENSUS BUREAU (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0014.pdf>.

11. *See id.* (listing Alaska's population per square mile as 1, Wyoming's as 5.8, and the District of Columbia's as 9,856.5).

12. *Age and Sex Composition: 2010*, C2010BR-03, U.S. CENSUS BUREAU (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

13. *U.S. State and County Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last modified Aug. 5, 2015).

14. *American Indian and Alaska Native Populations*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/minorityhealth/populations/REMP/aian.html> (last modified July 31, 2015).

15. Forty million acres of land has been transferred to Alaska Native Corporations through the Alaska Native Claims Settlement Act, or ANCSA. 43 U.S.C. §§ 1601–1629(h) (2012); *Alaska*, U.S. DEP'T. OF THE INTERIOR, BUREAU OF LAND MGMT (last modified Feb. 4, 2015), [http://www.blm.gov/ak/st/en/res/pub\\_room/faqs.html](http://www.blm.gov/ak/st/en/res/pub_room/faqs.html). This accounts for almost 11% of the total land in Alaska. *Who Owns Alaska*, RESOURCE DEV. COUNCIL FOR ALASKA, INC. 1 (2009), <http://www.rdcarchives.org/newsletters/2009/whoownsalaska.pdf>. Moreover, sixty percent of Alaska land is owned by the federal government. *Id.*

certainly play a role in the Alaska Legislature's continuing efforts to regulate the commercial marijuana industry following its recent legalization.

Alaska is furthermore a state of remote access and extreme conditions. Alaska is home to the tallest mountain in North America,<sup>16</sup> the northern lights,<sup>17</sup> and on its longest days has nineteen hours of sunlight.<sup>18</sup> Alaska is so far west from the contiguous United States and so close to Russia that, when the Bering Strait freezes over, the two countries are separated by a mere two and a half mile walk.<sup>19</sup> Parts of Alaska, such as Juneau, can only be accessed by air or sea.<sup>20</sup>

Alaska's geographic characteristics will affect how the commercial marijuana industry will operate. For example, the state's rugged terrain and extreme shifts in daylight will require commercial growers to operate within a distinct set of limitations.<sup>21</sup> The geography will limit Alaskan marijuana business to specific areas and may affect the state's marijuana cultivators' ability to provide enough marijuana to meet the demands of the entire state without relying on marijuana cultivated in other states. Moreover, the burden of cultivating marijuana year round will likely weigh on Alaska's most populated areas where the resources exist to support larger year-round cultivation sites.<sup>22</sup> These larger cultivation sites will create a greater need for commercial marijuana regulation in the areas where they exist, while more remote areas such as native villages may need different regulatory approaches depending their particular abilities, standards, and needs.

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16. *Denali: More than a Mountain*, NAT'L PARK SERV., <http://www.nps.gov/dena/index.htm> (last visited Sept. 13, 2015).

17. *Frequently Asked Questions about Aurora and Answers*, UNIV. OF ALASKA FAIRBANKS, GEOPHYSICAL INST. (Aug. 3, 2015), <http://odin.gi.alaska.edu/FAQ/>.

18. *Shortest Day in Alaska*, ALASKA CHANNEL (2015), <http://www.alaska.org/advice/shortest-day-in-alaska> (last visited Oct. 25, 2015).

19. *Statewide FAQs*, ALASKA PUB. LANDS INFO. CTRS., <http://www.alaskacenters.gov/faqs.cfm> (last visited Sept. 13, 2015).

20. *Id.* In its most remote location, and inaccessible by car, St. Matthew Island is 209 miles from the closest town or village. Ned Rozell, *The Most Remote Spot in Alaska*, UNIV. OF ALASKA FAIRBANKS, GEOPHYSICAL INST. (Aug. 1, 2012), <http://www.gi.alaska.edu/alaska-science-forum/most-remote-spot-alaska>. On the mainland, the most remote place is 120 miles from the nearest town or village. *Id.*

21. *See generally 16 Easy Steps to Gardening in Alaska*, UNIV. OF ALASKA FAIRBANKS, COOP. EXTENSION SERV. (Apr. 2014), <http://www.uaf.edu/files/ces/publications-db/catalog/anr/HGA-00134.pdf> (providing special instructions on starting a garden in Alaska).

22. Resources include, but are not limited to, electricity, water, access to larger buildings that can be accessed by employees throughout the year, access to supplies, and access to transportation sources to move the product around the state.

While the Alaska legislature will take the needs of its diverse constituents into account in writing its marijuana legislation, the rights that the Alaska legislature provides to its citizens is cut short by Congress' refusal to adjust the laws its current laws that directly conflict with these freedoms. This refusal to cooperate effectively throws a wrench into state voter-approved marijuana commerce, particularly where the voters are legalizing recreational marijuana to effectuate a reduction in crime<sup>23</sup> that which federal marijuana prohibition has not accomplished.<sup>24</sup>

## B. Political Climate

The majority in both Alaska's State Senate and House are Republican.<sup>25</sup> Though Alaska is currently the only state with a politically independent governor,<sup>26</sup> it is the fourth most Republican state in the country as measured by Gallup poll data of self-reported political orientation.<sup>27</sup>

It is no surprise that Alaska leans conservative towards most political issues. The state imposes few restrictions on gun ownership,<sup>28</sup> including gun possession in restaurants, schools, childcare centers, courtrooms, and certain shelters.<sup>29</sup> Same-sex marriage in Alaska was

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23. H.B. 123, 29th Leg., 1st Sess. (Alaska 2015).

24. Tina Dorsey and Priscilla Middleton, *Drug and Crime Facts*, U.S. DEPT. OF JUSTICE, at 20, (Nov. 16, 2015), <http://www.bjs.gov/content/pub/pdf/pcf.pdf> (According to the U.S. Dept. of Justice, marijuana is the most possessed drug by arrestees, and marijuana drug arrests have consistently increased from 1991-2007. Federal marijuana prohibition has ultimately resulted in more arrests and more reported use in recent years, while state approaches that remove the criminal element from the act of consuming and possessing marijuana, result in reduced crime by mere function of legalizing an act that was once illegal.).

25. For the 2015-2016 session, Alaska's Senate is composed of fourteen Republicans, and six Democrats, while the House is twenty-three Republicans, sixteen Democrats, and one unaffiliated representative. *29th Alaska State Leg. 2015-2016 Sess.*, STATE OF ALASKA DIV. OF ELECTIONS (July 6, 2015), <http://www.elections.alaska.gov/doc/forms/H04.pdf>.

26. *State Political Parties*, THE HENRY J. KAISER FAMILY FOUND. (2015), <http://kff.org/other/state-indicator/state-political-parties/>.

27. Jeffery M. Jones, *State of the States: Political Party Affiliation*, GALLUP (Jan. 28, 2009), <http://www.gallup.com/poll/114016/state-states-political-party-affiliation.aspx>.

28. *Alaska State Profile*, NAT'L RIFLE ASSOC. INST. FOR LEGISLATIVE ACTION (2015), <https://www.nraila.org/gun-laws/state-gun-laws/alaska/> (last visited Oct. 25, 2015).

29. *Alaska Statutes and Regulations Concerning Concealed Handgun Permits*, DEP'T. OF PUBLIC SAFETY, DIV. OF STATEWIDE SERVS. (Mar. 18, 2014), <http://dps.alaska.gov/statewide/PermitsLicensing/docs/achp/ACHP%20Statutes%20and%20Regs.pdf>. Alaska's permissive gun laws have earned the state an

banned until a U.S. District Court held the state's same-sex marriage ban unconstitutional in 2014.<sup>30</sup> Alaska also proudly holds the title of the most tax-friendly state in the nation.<sup>31</sup> While Alaska imposes taxes on the sale of alcohol and tobacco,<sup>32</sup> there are currently no personal income taxes in Alaska,<sup>33</sup> no sales and use taxes,<sup>34</sup> and no estate taxes.<sup>35</sup> Uniquely, just before becoming a state, Alaska's Territorial Legislature abolished the death penalty in 1957,<sup>36</sup> and Alaska still has not legalized capital punishment.<sup>37</sup>

Alaska's political climate tends to suggest that the state will implement commercial marijuana regulations that limit government involvement in regulation; however, given the newness of recreational marijuana commerce, it's possible that the state will be more cautious in its approach. Either way, Alaska's specific regulations are likely to

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'F' by the Brady Campaign. *2013 State Scorecard*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (2013), <http://www.bradycampaign.org/sites/default/files/SCGLM-Final10-spreads-points.pdf>.

30. *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1073 (D. Alaska 2014); Katie Moritz, *State to Suspend Same-Sex Marriage Appeal*, JUNEAU EMPIRE, Jan. 16, 2015, <http://juneauempire.com/local/2015-01-16/state-suspend-same-sex-marriage-appeal>. The ruling overturned the state's 1998 Measure 2, which stated, "To be valid or recognized in this State, a marriage may exist only between one man and one woman." Lyle Denniston, *Court Allows Same Sex Marriages in Alaska*, SCOTUS BLOG (Oct. 17, 2014), <http://www.scotusblog.com/2014/10/court-allows-same-sex-marriages-in-alaska/>.

31. *5 Most Tax-friendly States to Live In*, DAILY FIN. (Apr. 13, 2010), <http://www.dailyfinance.com/2010/04/13/5-most-tax-friendly-states-to-live-in/>; Rand Paul, *Simplify the Tax Code, Reduce the Budget, and Balance It*, NAT'L REV., <http://www.nationalreview.com/article/423549/simplify-tax-code-reduce-budget-and-balance-it-rand-paul> (last visited Oct. 15, 2015) (There exists a notion that conservative government is thought to be less involved in daily life, and promotes reduced taxation. "Conservatives need to be more boldly for what we are supposedly for – lower taxes and smaller government.").

32. *Alcoholic Beverages Tax*, ALASKA DEP'T OF REVENUE TAX DIV., <http://www.tax.alaska.gov/programs/programs/index.aspx?60165> (last visited Sept. 13, 2015); *Tobacco Tax*, ALASKA DEP'T OF REVENUE TAX DIV., <http://www.tax.alaska.gov/programs/programs/index.aspx?60170> (last visited Sept. 13, 2015).

33. *Personal Income*, ALASKA DEP'T OF REVENUE TAX DIV., <http://www.tax.alaska.gov/programs/programs/index.aspx?10001> (last visited Sept. 13, 2015).

34. *Sales and Use Tax*, ALASKA DEP'T OF REVENUE TAX DIV., <http://www.tax.alaska.gov/programs/programs/index.aspx?10002> (last visited Sept. 13, 2015).

35. *Other Taxes*, ALASKA DEP'T OF REVENUE TAX DIV., <http://www.tax.alaska.gov/programs/programs/index.aspx?60200> (last visited Sept. 13, 2015).

36. Melissa S. Green, *The Death Penalty in Alaska*, UNIV. OF ALASKA ANCHORAGE JUSTICE CTR. (Winter 2009), [http://justice.uaa.alaska.edu/forum/25/4winter2009/f\\_death-alaska.html](http://justice.uaa.alaska.edu/forum/25/4winter2009/f_death-alaska.html).

37. *Id.*

differ from other states in a similar manner to which medical marijuana regulations have come to vary from state to state.<sup>38</sup>

### C. Drug Culture

The 2014 Annual Drug Report released by Alaska law enforcement states that Alaska is ranked sixth in the nation for illicit drug use.<sup>39</sup> The report lists alcohol, cocaine, heroin, marijuana, methamphetamine, and prescription drugs as the primary substances of abuse in the state.<sup>40</sup> Marijuana and alcohol are listed as the most used drugs in rural areas, with heroin and opiate-based prescription drugs becoming an increasing problem throughout the state.<sup>41</sup>

Alaska's legalization of recreational marijuana will, by definition, help to lower its illegal drug use rankings. Still, the Alaska legislature will likely keep the state's drug use prevalence in mind as it continues to determine how marijuana will be regulated, both in terms of disincentivizing overall drug use and with respect to "dry" rural and native communities that currently prohibit alcohol locally<sup>42</sup> and will also want prohibit marijuana. The clash between Alaska's recognition of marijuana-use rights, through both case law and legislation, and these local community goals emphasizes the need on a larger scale to regulate commercial recreational marijuana on the basis of local needs and goals.

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38. See *State Medical Marijuana Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 14, 2015), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (comparing state marijuana program laws and showing most other states allow dispensaries and recognize patients from other states).

39. *2014 Annual Drug Report*, ALASKA STATE TROOPERS, ALASKA BUREAU OF INVESTIGATION, STATEWIDE DRUG ENF'T UNIT 4 (2014), <http://dps.alaska.gov/ast/ABI/docs/SDEUreports/2014%20Annual%20Drug%20Report.pdf>. Oddly, a 2015 Gallup Poll shows Alaska has the lowest reported daily mood-altering drug use among adults in the nation. Justin McCarthy, *Mood-Altering Drug Use Highest in West Virginia, Lowest in Alaska*, GALLUP (Apr. 1, 2015), <http://www.gallup.com/poll/182192/mood-altering-drug-highest-west-virginia-lowest-alaska.aspx>.

40. *2014 Annual Drug Report*, *supra* note 39, at 6.

41. *Id.*

42. See *Schedule of Open Option Communities*, ALCOHOL BEVERAGE CONTROL BOARD (Jan. 22, 2015), <https://www.commerce.alaska.gov/web/Portals/9/pub/Localopt01-22-15.pdf> (listing local option communities in Alaska). The ability for communities in Alaska to prohibit alcohol locally is covered by Alaska Stat. § 04.11.491 (2014).

## II. THE EVOLUTION OF MARIJUANA LAWS IN ALASKA

Alaska's development and interpretation of marijuana laws distinguishes the state from the rest of the country.<sup>43</sup> The Alaska Supreme Court is the only court—state or federal—to announce a constitutional right to privacy that encompasses limited marijuana use and possession in the home.<sup>44</sup>

### A. *Ravin v. State* and the Protection of Limited Marijuana Use in the Home

In 1972, the Alaska Supreme Court decided *Ravin v. State*,<sup>45</sup> a case in which Ravin was charged with violating Alaska Statutes section 17.12.010, the state's criminal possession of marijuana law. Section 17.12.010 provided: "Except as otherwise provided in this chapter, it is unlawful for a person to manufacture, compound, counterfeit, possess, have under his control, sell, prescribe, administer, dispense, give, barter, supply or distribute in any manner, a depressant, hallucinogenic or stimulant drug."<sup>46</sup> Alaska Statute section 17.12.150 supplemented section 17.12.010 by providing that "depressant, hallucinogenic, or stimulant drug" included cannabis.<sup>47</sup>

Ravin challenged section 17.12.010 as violating his federal and state rights to privacy.<sup>48</sup> He also argued the law denied him both state and federal due process and the equal protection of law provisions by classifying marijuana as a dangerous drug, while use of alcohol and tobacco is not prohibited.<sup>49</sup>

In a decision influential to Alaska's marijuana laws today, the *Ravin* court held that the Alaska Constitution broadens the right to privacy afforded by the federal constitution<sup>50</sup> and that state laws prohibiting non-commercial, personal possession of marijuana and use by an adult in his or her home cannot survive strict scrutiny under the privacy

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43. See Jason Brandeis, *The Continuing Vitality of Ravin v. State: Alaskans Still Have A Constitutional Right to Possess Marijuana in the Privacy of Their Homes*, 29 ALASKA L. REV. 175 (2012) (acknowledging the uniqueness of Alaska's marijuana laws in the article's opening sentence).

44. Andrew S. Winters, *Ravin Revisited: Do Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes?*, 15 ALASKA L. REV. 315, 319-20 (1998); Brandeis, *supra* note 43, at 175.

45. 537 P.2d 494, 496 (Alaska 1975).

46. ALASKA STAT. § 17.12.010 (1975).

47. ALASKA STAT. § 17.12.150 (1982).

48. *Ravin*, 537 P.2d at 497.

49. *Id.* at 496-97.

50. *Id.* at 515.

provisions in the Alaska Constitution.<sup>51</sup> In an important illustration of Alaska's political values, Justice Boochever explained in a concurring opinion that Alaska's state constitution's right to privacy includes "the right to be left alone and to do as one pleases as long as the activity does not infringe on the rights of others."<sup>52</sup> The *Ravin* decision reinforced Alaska's emphasis on individual liberty, particularly in the home.<sup>53</sup>

Just eleven days prior to *Ravin*, the Alaska legislature proposed a bill to decriminalize possession of small amounts of marijuana.<sup>54</sup> The legislation became law about a week after *Ravin* was issued.<sup>55</sup> This suggests a culmination of positive attitudes toward marijuana legalization by both the judiciary and state legislature even before *Ravin* was decided.<sup>56</sup>

### **B. The Legalization of Medical Marijuana**

In 1998, about 25 years after *Ravin*, Alaskans voted to legalize medical marijuana.<sup>57</sup> Ballot Measure 8 was passed by nearly 59% of the vote, allowing Alaskans with a debilitating medical condition and physician recommendation to possess no more than one ounce of usable marijuana and to grow no more than six plants, only three plants being mature at any time.<sup>58</sup> Alaska, once again at the forefront of progressive marijuana laws, joined California, Oregon and Washington as one of the only states permitting medical marijuana use at the time.<sup>59</sup> Since then, twenty-three states have joined the move towards comprehensive medical marijuana protection, and fifteen states offer cannabidiol (CBD)<sup>60</sup> protection in some form.<sup>61</sup>

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51. *Id.* After a detailed presentation of the inconsistencies of marijuana criminalization, the *Ravin* court ruled to remand the case for further fact-finding on the circumstances of *Ravin's* possession of marijuana and the details leading to his arrest. *Id.* at 513.

52. *Id.* at 515.

53. *Id.* at 503-04, 514.

54. S. JOURNAL, 9th Leg., 1st Sess. 1122 (Alaska 1975); H. JOURNAL, 9th Leg., 1st Sess. 1235 (Alaska 1975).

55. Act of 1975, ch. 110, 1975 Alaska Sess. Law 2 (providing the "[a]ctual effective date: September 2, 1975").

56. Brandeis, *supra* note 43, at 181.

57. *Ballot Measure 8, Bill Allowing Medical Use of Marijuana*, STATE OF ALASKA DIV. OF ELECTIONS (1998), <http://www.elections.alaska.gov/doc/oep/1998/98bal8.htm>.

58. *Id.*; *Alaska Medical Marijuana Act, Measure 8 (1998)*, BALLOTPEDIA (2015), [http://ballotpedia.org/Alaska\\_Medical\\_Marijuana\\_Act\\_Measure\\_8\\_\(1998\)](http://ballotpedia.org/Alaska_Medical_Marijuana_Act_Measure_8_(1998)).

59. 23 *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated July 1, 2015).

60. *What is CBD?*, PROJECT CBD (2015), <http://www.projectcbd.org/>

### C. The Legalization of Recreational Marijuana Use and The Future

In 2014, Alaska voters approved Ballot Initiative 2 to regulate recreational use of marijuana.<sup>62</sup> It passed with nearly 53% of voters in favor of the legalizing recreational marijuana in the state.<sup>63</sup> Ballot Initiative 2 allows for those age 21 and over to participate in recreational use of marijuana, possession of up to one ounce of usable cannabis, and to cultivate a maximum of six plants, with no more three being mature at any time.<sup>64</sup> Alaska's initiative was one of four similarly constructed marijuana-legalization ballot measures nationwide introduced between 2012 and 2015.<sup>65</sup> As of November 16, 2015, eighteen states have followed suit with marijuana-legalization ballot initiatives for 2016.<sup>66</sup> This upcoming year will offer better insights into the direction of commercial marijuana regulation in Alaska, which is likely to influence the laws in other states with similar political ideologies.

Subsequent to the passage of Ballot Initiative 2, the Alaska Legislature has introduced several pieces of legislation<sup>67</sup> and has passed one bill establishing the Marijuana Control Board.<sup>68</sup> The basic function or purpose of the regulation passed and those pending are as follows:

#### *HB 123: Establish Marijuana Control Board*

- Of the marijuana regulations bills, HB 123 is the only bill that has passed and is in effect.
- In this bill, the Director's appointment and removal from the Marijuana Control Board is established. The qualifications for and appointment of board members are also established.

#### *HB 59: Marijuana Concentrates; Licenses*

- The primary purpose of this bill is to prohibit marijuana concentrates until regulations can be enacted. It delays for one year any regulations regarding the manufacture and commercialization of marijuana concentrates to allow for implementation preparation.

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about/introducing-cbd/.

61. *State Medical Marijuana Laws*, *supra* note 38.

62. *Campaign to Regulate Marijuana like Alcohol in Alaska, Full Initiative Text*, ALASKA STAT. § 17.38.010 (2014), <http://regulatemarijuanainalaska.org/full-initiative-text/> [hereinafter *Campaign to Regulate Marijuana*].

63. *Alaska Marijuana Legalization, Ballot Measure 2 (2014)*, BALLOTPEdia (2015), [https://ballotpedia.org/Alaska\\_Marijuana\\_Legalization,\\_Ballot\\_Measure\\_2\\_\(2014\)](https://ballotpedia.org/Alaska_Marijuana_Legalization,_Ballot_Measure_2_(2014)).

64. *Id.*

65. *Marijuana on the Ballot*, *supra* note 5.

66. *Id.*

67. *Id.*

68. H.B. 123, 29th Leg., 1st Sess. (Alaska 2015).

- This bill also charges the Alcoholic Beverage Control Board with creating package and label requirements for marijuana concentrates, including prohibitions on combining marijuana concentrates with nicotine and alcohol.
- Referred to Judiciary on March 11, 2015, this bill also seeks to make a few clarifications to the original initiative, such as changing the use of the word “registration” to “license.”

*HB 75: Marijuana Regulations; Clubs; Municipalities; Local Opt Elect*

- HB 75 seeks to address registration of marijuana establishments by municipalities; to further define “marijuana”; to clarify standards for personal use of marijuana by persons 21 years of age and older; to prohibit public consumption of marijuana; and to clarify local option elections in established villages regarding marijuana establishments.
- HB 75 was referred to the Committee on Rules on April 19, 2015.

*HB 133: Regulation of Marijuana Businesses; Board*

- Referred to Labor and Commerce on March 4, 2015, HB 133 seeks to set out regulations for marijuana business operations and adds some rules for the board’s operation.
- HB 133 addresses specifics of applying for a new license, renewal, transferring a license to another person or location.
- The bill adds clarification to the criminal background check, and requirement for notice of an application.
- The bill also creates the board’s authority to impose conditions or restrictions on a license.<sup>69</sup>

Alaska is forging its own new, distinct path in the transition from criminalizing marijuana commerce to regulating a legal recreational marijuana industry. And, like with medical marijuana, other states will likely follow in its footsteps.

If legalization or recreational marijuana nationally follows the same historical pattern as medical marijuana, the nation will soon face a need for federal regulations overseeing interstate marijuana commerce. It would be unrealistic for the federal government to regulate all states based on an overarching political ideology that would diminish state individuality.<sup>70</sup> Rather, federal regulations as they currently stand should be adjusted to emulate similar industries that already operate

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69. H.B. 59, 29th Leg., 1st Sess. (Alaska 2015); H.B. 75, 29th Leg., 1st Sess. (Alaska 2015); H.B. 123, 29th Leg., 1st Sess. (Alaska 2015); H.B. 133, 29th Leg., 1st Sess. (Alaska 2015).

70. States (with Alaska as a prime example) are clearly and drastically different from each other. See *Ranking and Discussion (Freedom in the 50 States)*, MERCATUS CTR., GEORGE MASON UNIV., <http://mercatus.org/freedom-50-states-2011/ranking-discussion> (ranking, for example, Massachusetts as third lowest in personal freedom, while ranking Alaska fifth highest).

70. *Washington D.C. Marijuana Legalization, Initiative 71* (November 2014), <http://dcmj.org/>.

and exist, like alcohol. Every recreational marijuana legalization initiative passed so far (except for Washington, D.C.) has successfully done this.<sup>71</sup> Federally regulating marijuana like alcohol will give due regard to state prerogatives in a manner consistent voter-approved use, possession, and cultivation of marijuana in their states, while shifting federal marijuana oversight from the Drug Enforcement Administration to the Bureau of Alcohol, Tobacco, Firearms, and Explosives.

### III. LITERATURE REVIEW

Marijuana legalization in the United States is a hot topic that has been written about by many. Often discussed is the lack of federal regulation guiding state marijuana programs and the need for federal action to properly regulate the marijuana industry, especially as interstate marijuana commerce between states that have legalized recreational marijuana begins to emerge.<sup>72</sup>

Jason Brandeis is a leading scholar on the subject of marijuana laws in Alaska. He revisited the *Ravin* case nearly four decades after it was decided,<sup>73</sup> just prior to the popular vote legalizing recreational marijuana use under Ballot Measure 2. Brandeis explained in his article, *The Continuing Vitality of Ravin v. State*, that while possession and use in the privacy of one's home is protected under *Ravin*, the state criminal code still prohibited possession of any amount of marijuana at that time, with the exception of Alaska's medical marijuana defense.<sup>74</sup> Nevertheless, he concluded that regarding personal use and possession of marijuana, *Ravin* was still good law in 2012.<sup>75</sup> His article illustrates the confusion that seemingly conflicting laws, like the *Ravin* case and the Alaska state laws criminalizing marijuana possession, create for citizens. Following the passage of Ballot Measure 2, this intrastate legal tension in Alaska has diminished, bringing the tension between federal and state marijuana laws to the fore.

In an article addressing recent case law development,<sup>76</sup> Allison

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72. 23 *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, *supra* note 59; *A Look at U.S. Marijuana Laws*, CNN POLITICS, <http://www.cnn.com/interactive/2014/01/politics/map-marijuana/> (last updated Apr. 30, 2015).

73. Brandeis, *supra* note 43, at 175.

74. *Id.* at 176.

75. *Id.* at 177. The landmark Alaska case is closely tied to the marijuana laws in the state, and Ballot Measure 2 specified that the new recreational marijuana law would have no effect on the rule of *Ravin*. *Campaign to Regulate Marijuana*, *supra* note 62.

76. Allison J. Garton, *Constitutional Law – Commerce Clause – Regulation of*

Garton discusses and analyzes *Gonzales v. Raich*,<sup>77</sup> where the Supreme Court of the United States held that the federal government has the authority to regulate intrastate activities through its commerce powers so long as regulation of those activities is necessary to maintain an interstate regulatory scheme.<sup>78</sup> Specifically, the case found that Congress may criminalize the production and use of marijuana in the Controlled Substances Act pursuant to its Commerce Clause power despite medical production and use of marijuana being lawful in the state.<sup>79</sup> The *Raich* court relied on *Wickard v. Filburn*<sup>80</sup> to emphasize that Congress's commerce power extends even to non-commercial, intrastate activity where there is a rational basis to believe that activity would have a substantial economic impact on interstate commerce.<sup>81</sup> Finally, the court closed by observing that alternative relief may potentially be found through the voting public's power to petition Congress—as opposed to the states—to change the Controlled Substances Act scheduling of marijuana.<sup>82</sup> Following Garton's exploration of *Raich* and other cases relating to Congress's commerce power,<sup>83</sup> she concludes by noting that the Court's endorsement of the democratic process was the most viable alternative solution for relief it offered.<sup>84</sup>

In contrast, Freidman and Lakier offer a more critical perspective on the *Raich* holding.<sup>85</sup> The authors propose that the language of the Commerce Clause gives Congress the right to regulate, but not the right to prohibit all commerce in products of which it disapproves, such as marijuana.<sup>86</sup> Particularly, the authors use an examination of *Champion v. Ames*<sup>87</sup> to challenge the assumption that Congress has the power to shut down an industry that states would otherwise allow.<sup>88</sup> Additionally, they assert that the Framers intended the Commerce Clause “to facilitate interstate trade and markets” for the benefit of the states.<sup>89</sup> In support of this proposition, they suggest the Framers' use of the word “regulate” in

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*Intrastate Cultivation of State-Authorized Medical Marijuana Is Within Congress's Commerce Power*, 36 CUMB. L. REV. 179, 191 (2006).

77. 545 U.S. 1 (2005).

78. *Id.* at 9.

79. *Id.* at 22.

80. 317 U.S. 111 (1942).

81. *Raich*, 545 U.S. at 17.

82. *Id.* at 33.

83. Garton, *supra* note 76, at 182-91.

84. *Id.* at 191-92.

85. Barry Friedman & Genevieve Lakier, “To Regulate,” Not “To Prohibit”: Limiting the Commerce Power, 2013 SUP. CT. REV. 255, 258-59 (2012).

86. *Id.*

87. 188 U.S. 321 (1903).

88. Friedman & Lakier, *supra* note 85, at 277-80.

89. *Id.* at 264.

relation to the states was distinct from their use of the same word in reference to foreign commerce (which unequivocally included the power to ban goods).<sup>90</sup> Finally, the authors argue that a proper power distribution in the federalist system would provide states the necessary policing power over what is sold within its borders, but still leave federal regulation to maintain consistent rules from state to state in support of commercial trade.<sup>91</sup>

Moving forward, it is important to question how state and federal governments can resolve the tensions between their laws and strike a balance in the legalization and regulation of marijuana. While the three articles discussed above offer different perspectives on this balance, all agree that the federal government should offer a basic and uniform level of protection for marijuana use, as marijuana continues to be legalized across the country.

One regulatory option is offered by Alex Kreit, from Thomas Jefferson School of Law, who suggests that the federal government could “us[e] marijuana policy in the Netherlands as a guide . . . [by] amend[ing] federal drug laws to permit retail sale of marijuana while continuing to prohibit its commercial manufacture and wholesale distribution.”<sup>92</sup> While retail marijuana sales are legal in the Netherlands, commercial production and distribution of marijuana are not.<sup>93</sup> While this distinction may not be immediately apparent to tourists who partake in cannabis consumption at any of the many coffee shops throughout Amsterdam,<sup>94</sup> scholars have argued that this “quasi-legalization,” with limitations on production and distribution, has allowed marijuana prices in the Netherlands to remain high and use rates to remain low.<sup>95</sup>

Still, Kreit notes that his proposal may not be the most preferable, and would fail to completely eliminate the federal-state conflict.<sup>96</sup> One

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90. *Id.* at 268.

91. *Id.* at 295–302.

92. Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OR. L. REV. 1029, 1031 (2013).

93. *Id.* at 1032.

94. *Id.*

95. *Id.* Kreit believes it is possible that global competition will reduce the demand in Amsterdam, and therefore equalize the price of marijuana because marijuana tourism is now available in other places. *See id.* at 1038 (“Legal commercial manufacture and distribution, by contrast, have greater potential to decrease the price of marijuana and impact the marijuana market nationwide.”).

96. In fact, Kreit acknowledges that despite this proposal, he remains personally inclined towards U.S. Representative Jared Polis’s stance that marijuana be removed from the Controlled Substances Act (CSA) entirely. *Id.* at 1030. Polis’s stance would liken the treatment of marijuana to alcohol most consistently, as alcohol is not a controlled substance and marijuana would be

concern with his proposal is that a commercial marijuana industry would behave like the United States tobacco industry.<sup>97</sup> Downsides of creating “another big tobacco” include the often-cited risk of mass marketing<sup>98</sup> and the reduction in product price that comes with mass production.<sup>99</sup> Another concern is that the federal government may not commandeer state governments by requiring that they criminalize certain conduct or enforce federal law on behalf of the federal government.<sup>100</sup> The federal government has never tried to block any state or local medical marijuana law on preemption grounds.<sup>101</sup> Moreover, the federal government is almost completely dependent on the states to enforce drug prohibition.<sup>102</sup>

Sam Kamin, from the University of Denver, also examines the push and pull of federal versus state control over marijuana in his article, *Cooperative Federalism and State Marijuana Regulation*.<sup>103</sup> In particular, he analyzes Deputy Attorney General Cole’s memo regarding the federal government’s stance on the recreational legalization of marijuana in Colorado and Washington.<sup>104</sup> Cole authored the memo following the 2012 general election, when Colorado and Washington voters passed initiatives to legalize recreational marijuana.<sup>105</sup> Kamin recognizes the autonomy afforded by the Cole memo, which essentially allows states to create marijuana policy in violation of the Controlled Substances Act,<sup>106</sup> but points out that many problems would go unresolved if the federal government were to limit its regulations to those outlined in the Cole memo.<sup>107</sup> Notably, the Cole memo failed to address legal issues in the

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regulated by the same agency that oversees federal alcohol regulation, the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Press Release, Congressman Jared Polis, *Polis and Blumenauer Introduce Bills to End the Federal Prohibition and Tax Marijuana* (Feb. 20, 2015), <http://polis.house.gov/news/documentsingle.aspx?DocumentID=397743>.

97. Kreit, *supra* note 92, at 1032.

98. *Id.* See *Preventing Another Big Tobacco*, SMART APPROACHES TO MARIJUANA, <http://learnaboutsam.com/marijuana-is-like-tobacco/> (last visited Oct. 4, 2015) (noting that the tobacco industry lied to Americans through marketing about the dangers of smoking and has contributed to the deaths of thousands).

99. Kreit, *supra* note 92 at 1032.

100. *Id.* at 1035.

101. *Id.* at 1036.

102. *Id.* at 1036–37.

103. See generally Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105 (2014) (sketching out a possible cooperative solution for the shared state and federal regulation of marijuana).

104. *Id.* at 1120–22.

105. *Id.*

106. *Id.*

107. *Id.* See Deputy Attorney General James M. Cole, *Memorandum for all United States Attorneys*, U.S. DEP’T OF JUSTICE (Aug. 29, 2013), <http://>

areas of contracting, banking, legal services, employment, probation and parole, and public services (among others), forcing legitimate state marijuana businesses to operate outside federal law.<sup>108</sup>

Ultimately, Kamin asserts that expecting states to functionally allow legitimate marijuana businesses to operate is unreasonable without greater cooperation on the part of the federal government.<sup>109</sup> He proposes a solution in which the federal government allows states to opt out of the Controlled Substances Act; this would prevent states from breaking federal law and afford marijuana businesses the same protections as any other legitimate business.<sup>110</sup>

With a more conservative attitude toward the legalization of marijuana than Kreit or Kamin, Andrew Renehan recommends broader federal regulation to control the medical marijuana industry. Asserting that state medical marijuana laws are preempted by FDA regulations, he suggests that Congress should utilize its spending power to force states to discontinue their medical marijuana programs, or alternatively, that Congress use its power to re-schedule marijuana under the Controlled Substances Act.<sup>111</sup> He argues that federal regulation is necessary to reduce the relative ease of access to medical marijuana enjoyed by those using the plant for personal enjoyment, and to prevent the dispensing of medical marijuana by non-licensed pharmacists.<sup>112</sup>

Though the extent of regulation they desire differs, together these articles represent a collective call for the federal government to

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[www.justice.gov/iso/opa/resources/3052013829132756857467.pdf](http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf) (stating that the guidance to local departments and law enforcement has focused on the following: distribution to minors; revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; diversion of marijuana from states where it is legal under state law in some form to other states; marijuana activity from covering trafficking of other illegal drugs or other illegal activity; violence and use of firearms in the cultivation and distribution of marijuana; drugged driving and other adverse public health risks associated with marijuana use; use of public land for cultivations; and use and possession on federal land).

108. Kamin, *supra* note 103, at 1113–20.

109. *Id.* at 1120.

110. *Id.* Tobacco and alcohol are not scheduled, and are federally regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives, which seems the most proper agency to oversee the federal regulation of interstate marijuana sales. Comparing the manner in which states regulate alcohol and tobacco to the federal government method of regulation, a similar pattern should support the federal regulation of marijuana commerce.

111. Andrew Renehan, *Clearing the Haze Surrounding State Medical Marijuana Laws: A Preemption Analysis and Proposed Solutions*, 14 HOUS. J. HEALTH L. & POL'Y 299, 300–01 (2014).

112. *Id.* at 320. Renehan notes that without re-scheduling marijuana, there would be a lack of trained professionals to dispense marijuana as medicine. *Id.* at 323. Re-scheduling the drug would return this dispensing to the hands of pharmacists, rather than untrained workers. *Id.*

acknowledge state legalization of marijuana and to enact some legitimate regulation of the commercial marijuana industry. Yet, this regulation must allow for enough state-to-state variance to suit the unique aspects of individual states, such as Alaska's numerous geographic, cultural, and social differences.<sup>113</sup>

#### IV. FEDERAL SUPREMACY VERSUS STATES' RIGHTS

Alaska's distance from the rest of the United States contributes to notions of independence held by the state's citizens.<sup>114</sup> Still, the state's isolated location also creates reliance on the other states, especially with respect to interstate commerce. Alaska is an example of the need to allow states to regulate based on their specific needs;<sup>115</sup> however, this can only be done if the federal government allows for such a structure. Moreover, a federal regulatory framework could allow all marijuana-friendly states to help one another develop stronger, safer programs, while still providing flexibility for other states to join or opt-out of the regime.

Congress recently introduced restrictions on the use of federal funds for prosecution of medical marijuana businesses,<sup>116</sup> but it is uncertain at what point Congress or the Attorney General will address state laws that contradict the Controlled Substances Act. It took thirty-two states to legalize some form of medical cannabis before Congress took action to prevent the prosecution of medical marijuana

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113. See Sari Horowitz, *In Rural Villages, Little Protection for Alaska Natives*, WASH. POST, Aug. 2, 2014, <http://www.washingtonpost.com/sf/national/2014/08/02/in-rural-villages-%E2%80%8A-little-protection%E2%80%8A-for-alaska-natives/?hpid=z2> (reporting on stories which further support the lack of other types of police protection available in remote villages).

114. See *Ravin v. State*, 537 P.2d 494, 503-04 (Alaska 1975) ("Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.")

115. See generally Richard J. Stenmark, *An Introduction to Alaska*, 6B RMMFL-INST. 2 (1978) (expounding on Alaska's unique attributes, such as the prevalence of subsistence farming, state environmental focus, and distinctive land use); *Understanding Alaska: People, Economy, and Resources*, INST. OF SOC. AND ECON. RESEARCH, U. OF ALASKA ANCHORAGE (May 2006) (explaining Alaska's economic development issues related to population logistics, a focus on resource extraction, among other unique attributes).

116. Consolidated and Further Continuing Appropriations Act 2015, Pub. L. 113-235 § 538, 128 Stat. 2130, 2217 (2014) ("None of the funds made available in this Act to the Department of Justice may be used . . . to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.").

businesses.<sup>117</sup> What was it that made Congress finally decide to stop raiding medical marijuana facilities legally operating within state laws? Was it a matter of increasing state legalization? If so, how many states will have to legalize marijuana for recreational use before similar federal action is taken? As many states have passed laws allowing some form of legalized marijuana use<sup>118</sup> and others continue to do so,<sup>119</sup> this issue seems ripe for Congress to address.

Whether viewed as a refusal to regulate or as a continued desire to prohibit recreational marijuana use,<sup>120</sup> federal laws continue to police violators despite increasing voter preferences towards legalization.<sup>121</sup> The *Raich* court points to Congress to provide a federal solution,<sup>122</sup> but such a solution seems unlikely to occur until more states legalize marijuana, which leaves pioneering states in turmoil.

## V. PRESERVING FEDERALISM IN MARIJUANA LEGALIZATION

Preserving federalism in marijuana legalization is vital because states like Alaska should and must be allowed to implement legislation as desired by the people and to police those regulations themselves. The states under the Tenth Amendment of the constitution are to retain authority over an area of law within its borders unless the Constitution specifically gives the federal government the power to regulate the area

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117. Evan Halper, *Congress Quietly Ends Federal Government's Ban on Medical Marijuana*, L.A. TIMES, Dec. 16, 2014, <http://www.latimes.com/nation/la-na-medical-pot-20141216-story.html>.

118. See *State Info*, NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS (2015), <http://www.norml.org/states> (four states plus the District of Columbia have fully legalized marijuana, fifteen states have decriminalized marijuana, and twenty-three states plus the District of Columbia allow medicinal use while an additional fifteen allow medical cannabidiol).

119. Katy Steinmetz, *These Five States Could Legalize Marijuana in 2016*, TIME (Mar. 17, 2015), <http://time.com/3748075/marijuana-legalization-2016/>.

120. Regulation involves an active form of operations management, whereas prohibition of an entire industry requires no regulation—prohibiting an industry does not allow for it to be regulated.

121. See Tim Marcin, *Marijuana Legalization 2015: 58% of US Supports Recreational Use of Pot, Poll Finds*, INT'L BUS. TIMES, Oct. 21, 2015, <http://www.ibtimes.com/marijuana-legalization-2015-58-us-supports-recreational-use-pot-poll-finds-2150492> (reporting that 58% of Americans in favor of legalization of marijuana).

122. See *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (“We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress.”).

or alternatively prohibits a state from having it.<sup>123</sup> Thus, citizens in states that have legalized recreational marijuana use within its borders should not have to be concerned with federal overreach under the CSA. Still federalism exists to help the individual states function in unison.<sup>124</sup> As more and more states continue to legalize marijuana, federal regulation over interstate marijuana commerce is needed.

Alaska offers a starting point for establishing the proper balance of federal marijuana regulations. Not only does the state tend to represent the outermost edge of independent culture in the United States, but also its current and proposed regulations for the recreational marijuana industry offer specific examples for how the federal government can regulate the industry through already-existing agencies.

As Freidman and Lakier point out in their writing, years of misunderstood law should not lead to a future of continued confusion.<sup>125</sup> There are a wide range of possible solutions being proposed by scholars and politicians alike to create a cohesive regulatory system. Some are more hostile toward pioneering states' marijuana policies—these call for federal regulation to maintain and enforce a federal ban on marijuana, potentially prohibiting both medical and recreational use.<sup>126</sup> But perhaps the most prevalent—and best in the author's opinion—attitude toward marijuana regulation calls for cooperation between the states and federal government. Such a cooperatively federalist solution likely would include a flexible application of the Controlled Substances Act to reduce conflicts between pioneering states' marijuana laws and federal regulation.<sup>127</sup>

Whatever approach the federal government chooses, it should regulate in accordance with the state's laws, or risk ignoring what the voters have chosen and destroying the purpose of allowing voters to directly influence the laws in their jurisdiction. It is important for the federal government to become involved in the future of the recreational

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123. *Marijuana on the Ballot*, *supra* note 5.

124. *Federalism*, LEGAL INFO. INST. (2015), <https://www.law.cornell.edu/wex/federalism>.

125. *See generally* Friedman & Lakier, *supra* note 85 (proposing that the Commerce Clause only allows Congress to regulate, not prohibit, commerce).

126. Marty Nemko, *Legalize Pot? You Must Be High*, TIME (Nov. 7, 2014), <http://time.com/3573394/legalize-pot-you-must-be-high/>; *see generally* Renehan, *supra* note 111 (recommending broader federal regulation to control the medical marijuana industry).

127. *See* Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015) (arguing that the federal government should allow some states to become exempt from the Controlled Substances Act provisions that cover marijuana if they meet certain federal requirements).

marijuana industry; it will continue to exist whether or not the federal government decides to regulate or prohibit it entirely.

### A. Recommendations

The political, cultural, and social differences between states supports the view that states ought to serve as incubators of political policies and laboratories of democracy.<sup>128</sup> Alaska, for example, is a state with many important and distinct characteristics. Consideration towards unique state characteristics is an essential step towards finding the proper balance for federal and state regulation of marijuana.

Alaska's proposed regulatory scheme for recreational marijuana use provides a promising example for federal regulation. Alaska House Bill 133 is both comprehensive and cohesive, at least in part because it is based on food and beverage regulatory legislation.<sup>129</sup>

The most important aspect of Alaska's regulatory scheme is that the regulatory program relies on existing agencies which regulate similar types of commerce. Utilizing already-existing agencies to regulate interstate marijuana commerce may be the most logical approach for the federal government in making the transition from prohibition to regulation. In Alaska, for instance, the Department of Agriculture works with cultivation and farming.<sup>130</sup> In another example, the Bureau of Alcohol, Tobacco, Firearms and Explosives oversees an effort to reduce crime within the alcohol and tobacco industries, while supporting commerce in these areas.<sup>131</sup>

Undeniably, internal contradictions within the federal government present arguments against the Drug Enforcement Administration (DEA)'s stance on marijuana enforcement.<sup>132</sup> The most confusing part of

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128. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that the "right to experiment" is one of the fundamental principles of the federal system).

129. See generally H.B. 133, 29th Leg., 1st Sess. (Alaska 2015) (suggesting a regulatory scheme for marijuana based on Alaska's preexisting food and beverage regulations).

130. See generally U.S.D.A. *Programs and Services*, UNITED STATES DEP'T OF AGRIC., [http://www.usda.gov/wps/portal/usda/usdahome?navid=PROGRAM\\_AND\\_SERVICE](http://www.usda.gov/wps/portal/usda/usdahome?navid=PROGRAM_AND_SERVICE) (last visited Sept. 11, 2015) (listing the department's numerous programs, including conservation and agricultural research).

131. See generally *Alcohol and Tobacco*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, <https://www.atf.gov/alcohol-tobacco> (last visited Sept. 11, 2015) (describing the bureau's mission to prevent the trafficking of liquor and tobacco in avoidance of federal and state taxes and laws).

132. U.S. DEP'T OF JUSTICE, DRUG ENF'T ADMIN., *THE DEA POSITION ON MARIJUANA* (Apr. 2013), available at <http://www.dea.gov/docs/>

the DEA's stance is the fact that the United States Department of Health and Human Services possesses the patent for cannabinoids as antioxidants and neuroprotectants.<sup>133</sup> Additionally, the federal government continues to operate its medical marijuana program for the grandfathered participants,<sup>134</sup> and the National Institute of Health continues to purchase marijuana from the University of Mississippi for research and to supply the remaining federal marijuana patients with their marijuana.<sup>135</sup> Federal legalization and regulation in the marijuana arena would solve these conflicting stances.

As states continue to legalize marijuana for medical and recreational use in the absence of a federal marijuana regulatory scheme, more and more people operate between conflicting state protection and federal prosecution. The threat of federal prosecution will limit the exercise of the personal freedoms of citizens, whose states have legalized recreational marijuana use. This especially harms states such as Alaska where personal freedom is of vital importance. It is foremost apparent that marijuana should be removed from the CSA entirely. Congress then needs to create a regulatory scheme for interstate marijuana commerce. Authorizing the ATF to regulate marijuana commerce as it regulates alcohol commerce would be an easy and manageable solution that would allow states to modify use within their states to fit their unique needs.

## CONCLUSION

Only time will tell if the federal government will take a cooperative, productive approach or a heavy-handed, resistant approach in response to the marijuana laws being passed by state voters. The first approach supports commerce, trade, and economic growth, while the latter results in continued criminalization of marijuana use, possession, and commerce, costly imprisonment, and wasted economic opportunities. In making its decision, however, the federal government would benefit by looking to Alaska's recent regulatory measures.

The federal government may be in a position of disadvantage in

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marijuana\_position\_2011.pdf.

133. U.S. Patent No. 6,630,507 (filed Feb. 2, 2001).

134. Katie Rucke, *While Arresting Thousands Of Pot Smokers Daily, Feds Supply 4 Patients With Legal Marijuana*, MINT PRESS NEWS (June 17, 2013), <http://www.mintpressnews.com/even-while-arresting-thousands-of-pot-smokers-daily-feds-supply-4-patients-with-legal-marijuana/163682/>.

135. Alex Rogers, *Uncle Sam Will Buy \$69 Million Worth of Pot From Ole Miss*, TIME (Mar. 23, 2015), <http://time.com/3755253/university-mississippi-marijuana/>.

dealing with the specific needs of each state, but this defies the rationale supporting federal regulation of any industry. With the current state of pseudo-legalization that exists, the doors to an unregulated and potentially dangerous illegitimate industry remain open. The opposition of federal and state law allows for criminal activity that leaves victims without recourse due to hit-or-miss consistency in local law enforcement. Only federal action can completely address the criminal issues lingering in states attempting to move away from such undesirable effects of the marijuana black market.

Alaska's voting public and the state legislature have begun the move towards significant commercial marijuana regulations following the recent passing of Ballot Measure 2. Congress would benefit from looking towards Alaska's legislation in order to create a regulatory system using existing governmental agencies. No matter how the system is designed, however, the federal government needs to respect unique state needs, like of those in Alaska.