

# RAVIN REVISITED: ALASKA'S HISTORIC COMMON LAW MARIJUANA RULE AT THE DAWN OF LEGALIZATION

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## ABSTRACT

*For the past forty years, Alaska has had one of the most unique marijuana laws in the United States. Under the Ravin Doctrine, adults in Alaska could use and possess a small amount of marijuana in their homes for any personal purpose. That common law rule, grounded in the Alaska Constitution's explicit right of privacy, was effectively codified in November 2014 when Alaska voters approved Ballot Measure 2: "An act to tax and regulate the production, sale, and use of marijuana." Measure 2 ushered in a new era of marijuana regulation, adding Alaska to the short list of states that permit the retail sale and use of recreational marijuana. This Article begins a discussion of this next phase of marijuana regulation in Alaska. The Article starts with a brief history of Alaska marijuana law prior to Measure 2, then summarizes the adoption and implementation of the ballot measure, including listing the marijuana-related activities now permitted, reviewing the ongoing process of developing a statewide regulatory framework, and describing the federal government's response to state-level marijuana legalization. The Article concludes with an analysis of the relationship between Measure 2 and the Ravin Doctrine, identifying new issues raised by the process of ballot initiative-led statutory legalization and finding that although Measure 2 did not clear up all of the previous grey areas surrounding marijuana regulation in Alaska, it was a significant step towards reconciling the Ravin Doctrine with Alaska's criminal marijuana laws.*

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## INTRODUCTION

This Article updates a December 2012 Alaska Law Review article in which I examined the legal history and status of marijuana in Alaska vis-à-vis the *Ravin* Doctrine, a series of judicial opinions that created a common law right to use and possess marijuana in Alaska.

At the time the 2012 article was published, confusion reigned.<sup>1</sup> The Alaska personal-use marijuana rule diverged from both state criminal marijuana statutes and the federal marijuana prohibition. That article was also published amidst a sea change in the national marijuana legal landscape. One month prior to printing, voters in Colorado and Washington approved laws that would allow people to lawfully grow, buy, and sell recreational marijuana pursuant to state-approved regulatory systems.<sup>2</sup> Several other states have since allowed medical marijuana use, and the federal government announced a new policy that allowed state marijuana legalization plans to continue as contemplated.<sup>3</sup>

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1. 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).

2. Colorado Amendment 64: Use and Regulation of Marijuana, COLO. CONST. art. XVIII, § 16 (amended 2012); Washington Initiative Measure No. 502 (codified as amended at WASH. REV. CODE § 69.50.401(3) (2015)). The terms “recreational” and “medical” refer to the purpose for which marijuana use is authorized by law, not necessarily to a distinct type of marijuana, though there are certain strains of marijuana and marijuana derivatives which lack psychoactive properties and are therefore usually exclusively used for medical purposes. See *Limited Access Marijuana Product Laws*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#Table%202> (last visited Sept. 19, 2015); Julie Anderson Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 598 n.2 (2015) (listing states that allow oil derived from marijuana to be used to treat seizures). Recreational marijuana laws allow marijuana use for any personal purpose, and the sale of recreational-use marijuana is referred to as retail sale. See generally John Hudak, *Colorado’s Rollout of Legal Marijuana Is Succeeding: A Report on the State’s Implementation of Legalization*, 65 CASE W. RES. L. REV. 651 (2015) (discussing Colorado’s marijuana regulatory scheme). Conversely, medical marijuana laws require a physician’s certification that an individual has a medical condition for which marijuana is a treatment. People may then use this reason as a defense against criminal charges for use and possession of marijuana. In some states, medical marijuana laws allow for the purchase and sale of marijuana for medicinal use. See *State Medical Marijuana Laws*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last visited Sept. 19, 2015) (listing state medical marijuana laws).

3. See Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 110 n.139 (2015) (listing state medical marijuana laws); Hill, *supra* note 2, at 598 n.2 (listing states that allow oil derived from marijuana to be used to treat seizures); *State Medical Marijuana Laws*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/health/state->

In November 2014, Alaska voters followed the Colorado and Washington examples and approved an initiative legalizing the recreational use and retail sale of marijuana.<sup>4</sup> Alaska is now one of just four states with such a law.<sup>5</sup> In light of these changes, this Article offers a preliminary discussion on the next chapter in Alaska's marijuana law history. It summarizes the adoption and implementation of 2014 Ballot Measure No. 2: An Act to tax and regulate the production, sale, and use of marijuana ("Measure 2"), updates the current status of Alaska's

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medical-marijuana-laws.aspx (last visited Sept. 19, 2015) (listing state medical marijuana laws).

4. Alaska Ballot Measure 2: An Act to Tax and Regulate the Production, Sale and Use of Marijuana (2014) (codified at ALASKA STAT. §§ 17.38.010–17.38.900 (2014)). Like Colorado's Amendment 64 and Washington's Initiative 502, *supra* note 2, Alaska's Ballot Measure 2 is credited with having "legalized" marijuana, but that term is misleading. "Legalized" implies that an activity is no longer subject to any criminal or civil penalties. But marijuana remains a Schedule VIA controlled substance under the Alaska Criminal Code, and failure to comply with state laws regulating marijuana cultivation, use, and sale can result in a penalty, ranging from a civil fine to felony prosecution. Thus, more accurately, Ballot Measure 2 legalized some marijuana conduct, decriminalized other conduct, and kept some conduct illegal. Despite these technicalities, the terms "legalize" and "decriminalize" are often used interchangeably. *See generally* David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL'Y REV. 359, 362 n.13 (2014) (describing the Colorado ballot initiative to legalize marijuana).

5. Oregon voters also passed Measure 91 at the November 2014 general election. Oregon Ballot Measure 91: Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act (2014). Similar to Alaska's Ballot Measure 2, this measure allowed for the non-medical (i.e., recreational) cultivation and use of marijuana in Oregon beginning July 1, 2015. The Oregon Liquor Control Commission would then begin accepting applications for growers, wholesalers, processors and retail outlets on January 4, 2016 with the ability for consumers to buy recreational marijuana at a retail outlet expected to start during the fall of 2016. *See Frequently Asked Questions, Recreational Marijuana*, OREGON.GOV, <http://www.oregon.gov/olcc/marijuana/Pages/Frequently-Asked-Questions.aspx> (last visited Sept. 19, 2015). In late July, the Governor of Oregon signed a bill that allowed medical marijuana dispensaries in Oregon to sell small amounts of marijuana to adults over 21 for recreational purposes beginning on October 1, 2015. That law will sunset on December 31, 2016. Shelby Sebens, Oregon governor oks early sales of recreational-use marijuana, REUTERS (July 29, 2015), <http://www.reuters.com/article/2015/07/30/us-usa-marijuana-oregon-idUSKCN0Q404520150730>; Educate Before You Recreate, WHAT'S LEGAL OREGON, <http://whatslegaloregon.com/#gift-or-share> (last visited Sept. 19, 2015). During the same election, voters in Washington, D.C. approved Initiative 71 which legalized the limited possession and cultivation of marijuana by adults who are 21 or older. *See* Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014, 61 D.C. Reg. 003602 (Apr. 4, 2014) (taking effect after a thirty-day review period). *But see* Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235 div. E, tit. VIII, § 809 (denying funding to Washington, D.C. for implementing a marijuana regulation system).

marijuana laws, discusses the impact of the ballot measure on the *Ravin* Doctrine, and identifies new issues raised in this era of statutory legalization. This Article concludes that the passage of Measure 2 cleared up most of the previous grey areas surrounding marijuana regulation in Alaska and was a significant step towards reconciling the *Ravin* Doctrine with Alaska's criminal marijuana laws.

## I. MARIJUANA REGULATION IN ALASKA PRIOR TO MEASURE 2

Even prior to the passage of Measure 2, the legal history of marijuana regulation in Alaska was perhaps the most unique of any state in the nation. Marijuana use first became quasi-legal in Alaska in 1975, when the Alaska Supreme Court ruled in *Ravin v. State*<sup>6</sup> that the right to privacy explicitly guaranteed by the Alaska Constitution protected an adult's right to possess and use small amounts of marijuana in the home. Over the next four decades, the *Ravin* decision led to a series of cases, statutes, and ballot initiatives—a complex interplay between the Alaska legislature, judiciary, and voters which pulled the law in several different directions. As a result, uncertainty has pervaded Alaska marijuana law, especially following the legislature's move to recriminalize all marijuana use in 2006.

### A. The *Ravin* Doctrine

For nearly forty years, *Ravin v. State* largely defined marijuana regulation in Alaska. In *Ravin*, the Alaska Supreme Court balanced an adult's fundamental right to privacy in the home against the state's interest in promoting public health and safety by prohibiting all marijuana use. The *Ravin* court placed the burden on the state to show a "close and substantial" relationship between the public welfare and control of ingestion or possession of marijuana in the home for personal use.<sup>7</sup> After reviewing the available scientific evidence on the harmfulness of marijuana, the court concluded the requisite "close and substantial" means-end fit was not present.<sup>8</sup> Marijuana was not dangerous enough to justify a state law that reached into the home and restricted an adult's personal use and possession of a small amount of marijuana.<sup>9</sup> Further, the state's interest was outweighed by the

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6. 537 P.2d 494, 496 (Alaska 1975).

7. *Id.* at 498.

8. *Id.* at 511.

9. *Id.* at 509.

heightened privacy protection afforded by the Alaska Constitution and “the distinctive nature of the home as a place where the individual’s privacy receives special protection.”<sup>10</sup>

*Ravin* was the first, and remains the only, reported judicial opinion to announce a privacy interest that covers marijuana use.<sup>11</sup> Though the case was a noteworthy ruling in favor of personal autonomy and privacy, *Ravin* only protected a narrow set of activities.<sup>12</sup> *Ravin* did not establish an absolute fundamental right to possess or use marijuana, rather it only covered marijuana possession and use by adults in their homes. *Ravin* did not permit transportation of marijuana in public, commercial marijuana activity, any marijuana use by minors, or driving under the influence of marijuana.

Controversy involving *Ravin* has never been far from any major marijuana law or policy decision in Alaska. Almost immediately following *Ravin*, the Alaska legislature decriminalized marijuana, then in 1982 removed any civil or criminal penalty for in-home use or possession of up to four ounces of marijuana, effectively codifying the decision.<sup>13</sup> In 1990, Alaska voters, urged by a strong push from the federal government, easily passed a ballot measure that recriminalized all marijuana possession, drawing a direct conflict between the state’s criminal marijuana laws and *Ravin*.<sup>14</sup> The status of *Ravin* remained shrouded by this cloud of legal uncertainty until the early 2000s, when the Alaska Court of Appeals overturned the 1990 initiative as it applied to conduct covered by *Ravin*, reinstating the four ounce personal use rule from 1982.<sup>15</sup> In subsequent rulings, the court limited the ability of law enforcement to investigate marijuana-related conduct by strengthening the probable cause standard that had to be met under *Ravin*.<sup>16</sup>

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10. *Ravin*, 537 P.2d at 503–04; ALASKA CONST. art. I, § 22. See also *Fraternal Order of Eagles v. City & Borough of Juneau*, 254 P.3d 348, 356 (Alaska 2011) (“Our decision in *Ravin* was firmly rooted in the constitutional protection for privacy in the home . . . .”); *Sampson v. State*, 31 P.3d 88, 94 (Alaska 2001) (quoting *Ravin*, 537 P.2d at 503) (emphasizing that the *Ravin* decision was based on the “distinctive nature of the home” in Alaska’s statutory and jurisprudential history); *Garhart v. State*, 147 P.3d 746, 751 (Alaska Ct. App. 2006) (“The *Ravin* decision is not based on a purported right to ingest or possess marijuana. Rather, it is based on people’s heightened expectation of privacy in their homes.”).

11. Brandeis, *supra* note 1, at 175.

12. *Ravin*, 537 P.2d at 502. *Ravin* established that the Alaska Constitution “provides Alaska citizens with greater protection than the federal constitution.” *Fraternal Order of Eagles*, 254 P.3d at 356.

13. Brandeis, *supra* note 1, at 178–82.

14. *Id.* at 182–84.

15. *Id.* at 186–91.

16. *Id.*

The resulting political backlash was swift, as then-Governor Frank Murkowski orchestrated an effort across two legislative sessions to again legislatively undercut *Ravin*.<sup>17</sup> That effort, supported by hours of expert testimony on both sides, yielded a bill in 2006 that banned all marijuana use and possession, once again leaving the Alaska statutes and *Ravin* inapposite. “High profile” litigation followed over the next three years, with the Alaska Supreme Court eventually dismissing the case on ripeness grounds.<sup>18</sup>

The end of that litigation returned the state of the *Ravin* Doctrine to its previous uncertain place: with a recent change to the Alaska statutes directly at odds with a settled state supreme court precedent.<sup>19</sup> Additionally, due to the interplay between the court’s ripeness ruling and a little-known policy adopted by the state attorney general prior to the litigation, the opportunity for the courts to revisit *Ravin* was severely restricted, ensuring the ongoing vitality of the *Ravin* Doctrine.<sup>20</sup>

## B. Medical Marijuana in Alaska

Alaska was one of the first four states to legalize the medical use of marijuana. Originally passed by voters in 1998, Alaska’s Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions Act provides an affirmative defense against prosecution to patients suffering from certain medical conditions.<sup>21</sup> Individuals seeking to lawfully use marijuana for medical purposes are required to first register with the state as a medical marijuana user. Upon approval, registered users can then treat a narrow set of “debilitating medical conditions” with marijuana under the direction of a physician.<sup>22</sup> Registered users (or their caregivers) may possess up to one ounce of marijuana and six plants, of which only three can be flowering and producing usable marijuana at any time.<sup>23</sup>

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17. *Id.* at 192–98.

18. *Id.* at 197–99.

19. *Id.* at 199–201.

20. *Id.*

21. ALASKA STAT. § 17.37.010–17.37.080 (2015).

22. *See* ALASKA STAT. § 17.37.070(a)–(c) (broadly defining “debilitating medical condition” as including “cancer, glaucoma, positive status for immunodeficiency virus, or acquired immune deficiency syndrome” or any other chronic diseases, or treatment for such diseases, which produce “cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis”).

23. *Id.* § 17.37.040(a)(4)(A)–(B). Alaska law only permits the primary caregiver to “deliver” marijuana to his or her patient, and vice versa. *Id.* § 17.37.040(a)(3). “Deliver” means the “actual, constructive, or attempted transfer

Though it was one of the first states to pass such a law, Alaska's medical marijuana law has remained one of the most restrictive. The majority of other medical marijuana states allow registered users to grow and possess a larger amount of marijuana and some states have allowed for the creation of medical marijuana dispensaries.<sup>24</sup> Alaska's medical marijuana statute did not authorize the purchase or sale of marijuana, nor did it provide any mechanism to create or regulate a commercial market for it.

Government entities and the population alike have shown little political will to expand Alaska's medical marijuana laws.<sup>25</sup> Historically, Alaska has been home to few registered medical marijuana users. In 1999, at the outset of the program, there were less than thirty.<sup>26</sup> That number grew very slightly during the next decade, increasing to just 130 by 2010.<sup>27</sup> Several factors likely account for the low numbers during

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from one person to another of a controlled substance whether or not there is an agency relationship." *Id.* § 11.71.900(6). Conversely, such a noncommercial transfer is not permissible under *Ravin*. See *Wright v. State*, 651 P.2d 846, 849 (Alaska Ct. App. 1982) ("We conclude that non-commercial transfers of small quantities of marijuana must be deemed to fall within the ambit of the prohibition against distribution which is contained in AS 17.12.010.").

24. Compare with the list of states that permit medical marijuana dispensaries. See *State Medical Marijuana/Cannabis Program Laws*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#2> (last visited Sept. 19, 2015) (listing states that permit medical marijuana dispensaries).

25. Still, there was enough support to put the 2000 and 2004 Alaska marijuana initiatives on the ballot, but both failed by large margins. Among other sweeping changes, the 2000 Initiative would have specifically allowed doctors to prescribe marijuana, and the 2004 Initiative would have removed restrictions on marijuana prescriptions. *Alaska Marijuana, Decriminalization Initiative, Measure 5 (2000)*, BALLOTPEDIA, [http://ballotpedia.org/Alaska\\_Marijuana\\_Decriminalization\\_Initiative\\_Measure\\_5\\_\(2000\)](http://ballotpedia.org/Alaska_Marijuana_Decriminalization_Initiative_Measure_5_(2000)) (last visited Sept. 22, 2015); *Alaska Legalize Marijuana Act, Measure 2 (2004)*, BALLOTPEDIA, [http://ballotpedia.org/Alaska\\_Legalize\\_Marijuana\\_Initiative\\_Measure\\_2\\_\(2004\)](http://ballotpedia.org/Alaska_Legalize_Marijuana_Initiative_Measure_2_(2004)) (last visited Sept. 22, 2015).

26. Jill Burke, *New Alaska Medical Marijuana Clinic Banks on Hazy Enforcement Policies*, ALASKA DISPATCH NEWS (July 13, 2012), <http://www.adn.com/article/new-alaska-medical-marijuana-clinic-banks-hazy-enforcement-policies>. Even with such few registered medical users, Alaska has consistently ranked as one of the states with a high percentage of marijuana users. See Alex Marin, *Which States Smoke the Most Marijuana? Check This Map*, MIC, <http://mic.com/articles/66809/which-states-smoke-the-most-marijuana-check-this-map> (last visited Sept. 19, 2015); *2011-2012 NSDUH Estimates of Substance Use and Mental Disorders*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., <http://archive.samhsa.gov/data/NSDUH/2k12State/NSDUHsae2012/Index.aspx> (last visited Sept. 19, 2015); Christopher Ingraham, *Where Americans Smoke Marijuana the Most*, WASH. POST (Aug. 5, 2014), <http://www.washingtonpost.com/news/wonkblog/wp/2014/08/05/where-americans-smoke-marijuana-the-most/>.

27. Burke, *supra* note 26.

these years. First, the *Ravin* Doctrine provided legal protection for any personal marijuana use, including use for medical purposes. That is, under *Ravin*, adults could possess marijuana and use it for medicinal purposes in their homes without having to disclose their use or private medical information to the state, nor reveal they were violating federal law. And because there were no medical marijuana dispensaries in Alaska, procuring medical marijuana was no easier as a registered medical user. Thus, when weighed against the benefits of being a registered user, the official medical marijuana option was not widely appealing. Additionally, shortly after the law went into effect, the federal government cracked down on states that permitted medical marijuana, limiting access to the drug and tacitly chilling doctors' ability to recommend marijuana to patients.<sup>28</sup>

Eventually, in step with more accepting national attitudes towards marijuana, the number of registered medical marijuana users in Alaska increased.<sup>29</sup> By the time the Department of Justice issued the second Cole Memo in 2013, the number of registered medical marijuana users in Alaska approached 1,000.<sup>30</sup> By late 2014, there were almost 2,000.<sup>31</sup>

### C. Alaska's Criminal Marijuana Laws

Like the federal government,<sup>32</sup> Alaska has long employed a

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28. See Chemerinsky, *supra* note 3, at 85–87.

29. Walt Hickey, *Chris Christie, Newfound Drug Warrior, Is Too Late To Stop Pot*, FIVETHIRTYEIGHT (July 30, 2015), <http://fivethirtyeight.com/datalab/chris-christie-newfound-drug-warrior-is-too-late-to-stop-pot/>; Juliet Lapidos, *The Public Lightens Up About Weed*, N.Y. TIMES (July 26, 2014), <http://www.nytimes.com/2014/07/27/opinion/sunday/high-time-the-public-lightens-up-about-weed.html>; Anna Greenberg, *The Past, Present, and Potential Future of Marijuana Legalization*, HUFFINGTON POST (June 16, 2015), [http://www.huffingtonpost.com/anna-greenberg/the-past-present-and-pote\\_b\\_7598838.html](http://www.huffingtonpost.com/anna-greenberg/the-past-present-and-pote_b_7598838.html).

30. Burke, *supra* note 26.

31. Suzanna Caldwell & Laurel Andrews, *Everything You Wanted to Know About Legalizing Marijuana*, ALASKA DISPATCH NEWS (Oct. 25, 2014), <http://www.adn.com/article/20141025/everything-you-wanted-know-about-legalizing-marijuana-werent-sure-you-could-ask>. By comparison, in Colorado, over 300,000 people have applied for medical marijuana registry identification cards since the program began in 2001. There are approximately 114,000 current, active patients in Colorado. *Medical Marijuana Registry Program Statistics*, COLO. DEP'T OF PUB. HEALTH & ENV'T (June 30, 2015), [https://www.colorado.gov/pacific/sites/default/files/06\\_2015\\_MMR\\_report.pdf](https://www.colorado.gov/pacific/sites/default/files/06_2015_MMR_report.pdf). That is fifty-seven times the number of registered users in Alaska, but Colorado's population (5.356 million) is just seven times the size of Alaska's population (736,732).

32. See 21 U.S.C. § 841(a)(1) (2012) (making it unlawful "to manufacture, distribute [sic], or dispense . . . a controlled substance"); *id.* § 802(6) (defining

controlled substances schedule which classified and restricted access to drugs differently depending on their characteristics, uses, and likelihood of harm, with varying criminal penalties attaching to each schedule. As discussed above, the Alaska Criminal Code's applicable criminal penalties for marijuana have shifted over time. For example, during the 1970s and 1980s, marijuana was decriminalized and the *Ravin* decision was effectively codified by statute. In the 1990s an effort was made to recriminalize marijuana by ballot initiative. In the 2000s, courts dealt a blow to that effort and the legislature then prohibited all marijuana-related activity.<sup>33</sup> During this time two exceptions to this general proscription of marijuana existed: *Ravin* and the Alaska medical marijuana law.

Outside of those exceptions, and prior to the passage of Measure 2, the possession, use, or distribution of marijuana, a Schedule VIA controlled substance,<sup>34</sup> was subject to prosecution as a B-level Misdemeanor to a C-level felony, depending on the purpose of the use or possession, the intent of the user or possessor, the location of the use or possession, the age of the user or possessor, and the amount of marijuana involved. Most recently, the four main crimes directly associated with marijuana were: Misconduct Involving a Controlled Substance in the Sixth Degree ("MICS-6"),<sup>35</sup> Misconduct Involving a Controlled Substance in the Fifth Degree ("MICS-5"),<sup>36</sup> Misconduct

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controlled substance to include drugs in "Schedule I"); *id.* § 812 (classifying marijuana as a Schedule I drug).

33. See ALASKA STAT. § 11.71.060(a)(1) (stating penalty for display of any amount of marijuana). Alaska, however, has historically rated marijuana offenses as among the least serious of all drug offenses and continues to classify it as a Schedule VIA substance—a drug with the lowest degree of danger to a person or the public. See *Waters v. State*, 483 P.2d 199, 201 (Alaska 1971) (finding no foundation for characterizing marijuana offender as the worst type of drug offender for sentencing purposes); ALASKA STAT. § 11.71.190(a)–(b).

34. Schedule VIA substances are considered to have the lowest degree of danger to a person or the public out of the state's categories of substances. ALASKA STAT. § 11.71.070(a). In contrast, under the CSA, marijuana is listed as a Schedule I controlled substance because it has "a high potential for abuse," "no currently accepted medical use in treatment," and "a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812 (b)(1)(A)–(C), (c) (2012).

35. This crime includes use or display of any amount of marijuana or possession of less than one ounce of marijuana. ALASKA STAT. § 11.71.060(a)(1)–(2). The penalty for this crime is a Class B Misdemeanor, punishable by up to ninety days in prison and a \$2,000 fine. *Id.* §§ 11.71.060(b), 12.55.135(b), 12.55.035(b)(6).

36. This crime includes manufacture or delivery, possession with intent to manufacture or deliver less than one ounce of marijuana, or simple possession of one ounce or more of marijuana. *Id.* § 11.71.050(a)(1)–(2). As used here, "deliver" or "delivery" means the actual, constructive, or attempted transfer from one

Involving a Controlled Substance in the Fourth Degree (“MICS-4”),<sup>37</sup> and Misconduct Involving a Controlled Substance in the Third Degree (“MICS-3”).<sup>38</sup> As discussed in Part II below, the enforceability of these criminal laws changed with the passage of Measure 2, though the criminal statutes themselves have not been revised.<sup>39</sup>

#### D. The State-Federal Relationship

Any discussion of Alaska marijuana law and policy requires consideration of the continued federal marijuana prohibition. The Controlled Substances Act (“CSA”) makes all marijuana possession, use, and sale illegal, and violations of the CSA’s marijuana provisions carry steep criminal penalties.<sup>40</sup> Thus, those who use, possess, grow, or sell marijuana violate federal law and can be prosecuted for doing so, even if they are in compliance with Alaska state law. The existence of two seemingly contradictory, yet simultaneously applicable, bodies of law may be perplexing at first, but is actually in line with traditional notions of federalism and Tenth Amendment jurisprudence.

Full analysis of this issue is beyond the scope of this Article.<sup>41</sup> A

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person to another of a controlled substance whether or not there is an agency relationship. *Id.* § 11.71.900(6). Under Section 17.38, this crime would be applicable to amounts greater than one ounce. Section 17.38 also allows adults over twenty-one years old to transfer up to one ounce of marijuana to another person without remuneration. MICS-5 is a Class A Misdemeanor, punishable by up to one year in prison and a \$10,000 fine. *Id.* §§ 12.55.135(a), 12.55.035(b)(5), 11.71.050(b).

37. This crime includes manufacture, delivery, or possession with intent to manufacture or deliver one ounce or more of marijuana, possession of four ounces or more of marijuana, possession of any amount of marijuana with reckless disregard that the possession occurs on or within 500 feet of school grounds, at or within 500 feet of a recreation or youth center, or on a school bus, or possession of twenty-five or more marijuana plants. *Id.* § 11.71.040(a)(2)-(4). MICS-4 is a Class C Felony, punishable by a prison sentence of up to five years and a \$50,000 fine. *Id.* §§ 11.71.040, 12.55.125(e), 12.55.035(b)(4).

38. This crime includes delivery of any amount of marijuana to a person under nineteen years of age who is at least three years younger than the person delivering it. *Id.* § 11.71.030(a)(2). This is a Class B Felony, punishable by a prison sentence of up to ten years and a \$100,000 fine. *Id.* §§ 11.71.030(c), 12.55.125(d), 12.55.035(b)(3).

39. Emi Sasagawa, *Marijuana in Alaska Has Long Been Legal. Now the State is Struggling to Regulate it*, WASH. POST (July 17, 2015), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/07/17/marijuana-in-alaska-has-long-been-legal-now-the-state-is-struggling-to-regulate-it/>.

40. *See, e.g.*, 21 U.S.C. § 844(a) (2012) (detailing criminal penalties for simple possession of a controlled substance, such as marijuana).

41. *See* Chemerinsky, *supra* note 3, at 102 (discussing this issue further). *See generally* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1419 (2009)

cursor analysis is as follows: the principles of federalism allow states to function as “laboratories of democracy,” a phrase popularized by Justice Louis Brandeis, and understood to mean that states may “try novel social and economic experiments without risk to the rest of the country.”<sup>42</sup> Legal scholars point to the Tenth Amendment’s anti-commandeering rule as the counterbalance that protects a state’s ability to enact marijuana legislation that diverges from federal policy. The anti-commandeering rule precludes the federal government from forcing states to enact coexistent, or even complementary, controlled substance laws, or from requiring state officers to enforce federal drug laws within the state.<sup>43</sup>

As such, states may experiment with different legalization and decriminalization programs, but the resulting state-federal relationship is complicated and potentially antagonistic. This is the legal theory under which the *Ravin* Doctrine has peacefully coexisted with the CSA,<sup>44</sup> and the one by which legalization plans in Colorado, Washington, Oregon, and Alaska will operate.

## II. ADOPTION AND IMPLEMENTATION OF MEASURE 2

### A. Measure 2 and the Campaign to Regulate Marijuana like Alcohol in Alaska

Following the success of the marijuana legalization movements in Colorado and Washington, as well as the national trend favoring legalization,<sup>45</sup> marijuana law reform advocates identified Alaska as a state that would be receptive to a tax-and-regulate approach.<sup>46</sup>

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(analyzing the interaction between federal and state regulations on marijuana use).

42. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). Justice Brandeis was the first to describe this notion of states being laboratories of democracy, and it is sometimes referred to as “Brandeisian Experimentation.” Chemerinsky, *supra* note 3, at 77.

43. Brandeis, *supra* note 1, at 232–33.

44. *Id.* at 230.

45. The majority of Americans now live in jurisdictions that allow some form of legal marijuana use. Hickey, *supra* note 29. Additionally, polls suggest that a majority of Americans now favor marijuana legalization. Lapidos, *supra* note 29.

46. Craig Medred, *Marijuana Policy Project Plans Alaska Ballot Measure to Decriminalize Pot in 2014*, ALASKA DISPATCH NEWS (Jan. 16, 2013), <http://www.adn.com/article/marijuana-policy-project-plans-alaska-ballot-measure-decriminalize-pot-2014>; Rob Kampa, *What Are the Next States to Legalize*

In spring 2013, the backers of the movement organized an initiative committee called The Campaign to Regulate Marijuana Like Alcohol in Alaska.<sup>47</sup> In February 2014, the initiative was certified to be placed on the ballot.<sup>48</sup> The initiative ultimately passed that November with fifty-three percent of the vote.<sup>49</sup>

The initiative, entitled “An Act to Tax and Regulate the Production, Sale, and Use of Marijuana” and known as Ballot Measure 2, sought to use strict, state-based regulation, enforcement, and oversight to move marijuana activity out of the black market, remove some of the confusion related to *Ravin*, and create a safe and consistent marijuana industry.<sup>50</sup> Proponents of the initiative also believed it would generate revenue through taxes and licensing fees, create economic and business

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*Marijuana?*, HUFFINGTON POST (Mar. 2, 2013), [http://www.huffingtonpost.com/rob-kampia/state-marijuana-legalization\\_b\\_2377847.html](http://www.huffingtonpost.com/rob-kampia/state-marijuana-legalization_b_2377847.html).

47. *Initiative Petition List*, DIV. OF ELECTIONS, [http://www.elections.alaska.gov/pbi\\_ini\\_status\\_list.php#13psum](http://www.elections.alaska.gov/pbi_ini_status_list.php#13psum) (last visited Sept. 13, 2015). As a disclosure, the author of this Article provided legal services to the Campaign to Regulate Marijuana Like Alcohol in Alaska.

48. The initiative was originally slated for the Primary Election in August of that year. However, because the Alaska legislative session ended five days late, the three initiatives scheduled for the Primary Election were pushed to the General Election in November. Alaska law mandates that 120 days separate the last day of the legislative session and the next election for initiatives.

49. *2014 General Election: Official Results*, DIV. OF ELECTIONS (Nov. 11, 2014), <http://www.elections.alaska.gov/results/14GENR/data/results.htm>. This was not the first attempt to revise Alaska’s marijuana laws by ballot initiative; there had been four such efforts previously making it to the ballot. *Marijuana on the ballot*, BALLOTPEDIA, [http://ballotpedia.org/Marijuana\\_on\\_the\\_ballot#Alaska](http://ballotpedia.org/Marijuana_on_the_ballot#Alaska) (last visited Sept. 13, 2015). In 1990, voters attempted to overturn *Ravin* by passing an initiative that “recriminalized” all marijuana use and possession. Matt Ferner, *Alaska Becomes Fourth State to Legalize Marijuana*, HUFFINGTON POST (Nov. 5, 2014), [http://www.huffingtonpost.com/2014/11/05/alaska-marijuana-legalization\\_n\\_5947516.html](http://www.huffingtonpost.com/2014/11/05/alaska-marijuana-legalization_n_5947516.html). In 1998, the state’s voters approved a medical marijuana law. There were also two unsuccessful attempts to fully legalize marijuana in 2000 and 2004. There are a number of noteworthy differences between the 2000 and 2004 campaigns and the 2014 campaign. See *Alaska Marijuana, Decriminalization Initiative, Measure 5 (2000)*, BALLOTPEDIA, [http://ballotpedia.org/Alaska\\_Marijuana\\_Decriminalization\\_Initiative\\_Measure\\_5\\_\(2000\)](http://ballotpedia.org/Alaska_Marijuana_Decriminalization_Initiative_Measure_5_(2000)) (last visited Sept. 22, 2015) (explaining details of initiative to legalize hemp); *Alaska Legalize Marijuana Act, Measure 2 (2004)*, BALLOTPEDIA, [http://ballotpedia.org/Alaska\\_Legalize\\_Marijuana\\_Initiative\\_Measure\\_2\\_\(2004\)](http://ballotpedia.org/Alaska_Legalize_Marijuana_Initiative_Measure_2_(2004)) (last visited Sept. 22, 2015) (providing overview of the Legalize Marijuana Act).

50. ALASKA STAT. § 17.38.010. The initiative summary appearing on the ballot is available online. *Ballot Measure No. 2 - 13PSUM*, DIV. OF ELECTIONS, <https://www.elections.alaska.gov/doc/bml/BM2-13PSUM-ballot-language.pdf> (last visited Sep. 13, 2015). The full initiative text is also available. *An Act to Tax and Regulate the Production, Sale, and Use of Marijuana*, DIV. OF ELECTIONS (Apr. 16, 2013), <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=94268>.

opportunities, and reduce the number of people arrested for minor marijuana crimes.<sup>51</sup>

The proposed legislation applied to three categories of marijuana-related activities: production, sale, and use. “Production” referred to the cultivation of marijuana and the creation of marijuana-based products, both from “home grow” and commercial grow operations.<sup>52</sup> “Sale” covered transfer of marijuana from one party to another, mostly through restricted, taxed, and highly monitored commercial transactions.<sup>53</sup> “Use” included the possession and consumption of various forms of marijuana for any personal purpose.<sup>54</sup>

Given Alaska’s preexisting marijuana use laws, the provisions governing marijuana use resulted in the least controversial changes found among these three categories. As discussed above, in addition to a medical marijuana law, Alaska already had a unique personal use marijuana law that allowed adults to possess up to four ounces of marijuana in the home. However, Measure 2 revised the personal use amount, allowing adults over twenty-one years of age to possess up to one ounce of marijuana, six plants (only three of which can be flowering at any given time), and the marijuana produced by those plants. And, as the initiative allowed for the lawful transportation of marijuana, such possession rights now extended beyond the home. Previously, this conduct had been classified as a Class B Misdemeanor.<sup>55</sup>

Marijuana home grow operations had been subject to even greater penalties, depending on the weight and the number of plants involved. Notwithstanding *Ravin*, six marijuana plants and the resulting harvested

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51. *Id.* According to an ACLU report, there were 2,219 arrests for marijuana offenses in Alaska in 2010, of which ninety-one percent were for possession. *The War on Marijuana in Black and White*, AMERICAN CIVIL LIBERTIES UNION (June 2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>. See also *Voter Guide*, CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL IN ALASKA, <http://regulatemarijuanainalaska.org/about/voter-guide/#sthash.sPy9gnro.dpuf> (last visited Sept. 19, 2015); Payne, *It’s Complicated: Marijuana Law Enforcement Numbers in Anchorage*, ALASKA DISPATCH NEWS (Oct. 25, 2014), <http://www.adn.com/article/20141025/its-complicated-marijuana-law-enforcement-numbers-anchorage> (finding that available evidence suggests the Anchorage Police Department is not focused on making arrests solely for marijuana use, display, or possession, but the department does seize marijuana an average of two to three times per day).

52. ALASKA STAT. § 17.38.010.

53. *Id.*

54. *Id.*

55. Accordingly, the conduct is punishable by up to ninety days in prison and a \$2,000 fine. ALASKA STAT. §§ 11.71.060(a)(2), 11.71.060(b); § 12.55.135(b), 12.55.035(b)(6). There may be a greater penalty depending on the weight involved.

marijuana could have resulted in a Class A Misdemeanor<sup>56</sup> or a Class C Felony.<sup>57</sup> Measure 2 amended this and provided specific guidance on home grow operations, required them to be in a private, secure, and concealed location,<sup>58</sup> allowed for the possession of marijuana harvested from such a home grow,<sup>59</sup> and established a separate civil penalty for a non-conforming grow operation.<sup>60</sup>

Additionally, one of the most significant, yet underreported, aspects of Measure 2 was that it decriminalized low-level marijuana conduct, such as public use of a small amount of marijuana. Prior to the effective date of Measure 2, such activity was classified as a Class B Misdemeanor, punishable by up to 90 days in prison and a \$2,000 fine.<sup>61</sup> Measure 2 re-classified public consumption of marijuana as a violation, a noncriminal offense punishable only by a fine of up to \$100.<sup>62</sup>

Though the “Use” provisions of Measure 2 proposed several important changes, the provisions that allowed for the commercial production and sale of marijuana, and for the creation of a regulated marijuana industry similar to the alcohol industry, were more controversial and represented a dramatic shift from the status quo. Such provisions included those that: allowed marijuana to be sold and produced in commercial quantities by licensed establishments; permitted marijuana to be purchased and consumed by individuals over twenty-one years of age; provided a local option for communities to limit the sale of marijuana within their borders; established an excise tax of \$50 per ounce on sales or transfers from a marijuana cultivation facility to a retail store. Additionally, the whole in-state commercial marijuana industry would be overseen by the Alcoholic Beverage Control (“ABC”) Board, or a new regulatory entity, the Marijuana Control Board (“MCB”), could be created and granted oversight.<sup>63</sup>

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56. This conduct is punishable by up to one year in prison and a \$10,000 fine. *Id.* §§ 12.55.135(a), 12.55.035(b)(5), 11.71.050(b).

57. This conduct is punishable by a prison sentence of up to five years and a \$50,000 fine. *Id.* §§ 11.71.040, 12.55.125(e), 12.55.035(b)(4).

58. *Id.* § 17.38.030.

59. *Id.* § 17.38.020(b).

60. *Id.* § 17.38.030(b).

61. *Id.* §§ 11.71.060(b), 12.55.135(b), 12.55.035(b)(6).

62. *Id.* § 17.38.040. A violation is a noncriminal offense punishable only by a fine. *Id.* § 11.81.900(65).

63. *An Act to Tax and Regulate the Production, Sale, and Use of Marijuana*, DIV. OF ELECTIONS (Apr. 16, 2013), <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=94268>. Still, the legislature could create a new Marijuana Control Board (“MCB”) to establish a system of licensing and regulating under which the commercial marijuana industry in Alaska would function. *Id.*

## B. Lawful Marijuana Activities under Measure 2

By proposing a new regulatory scheme, Measure 2 pushed Alaska further into the group of states that have “legal-but-not-entirely-legal” marijuana.<sup>64</sup> The ballot measure codified two new broad categories of lawful marijuana activity under Alaska law: personal recreational use and retail sale.

The new recreational use laws established a possession cap based on the weight of marijuana and the number of plants present, limited where one could use marijuana and created rules for home grow operations. These changes took effect on February 24, 2015—ninety days after the election results were certified.<sup>65</sup> The retail sale law, part of a much more complex administrative rulemaking phase, involves developing regulations for all aspects of the marijuana industry, from large-scale grow operations and product testing facilities to training requirements for so-called “budtenders” who work at marijuana dispensaries.<sup>66</sup> During this phase, lawmakers also have to promulgate regulations for public health and safety, local zoning and land use, and tax matters.<sup>67</sup> At the time of this writing, the regulations for Alaska’s marijuana industry were still being debated, so this section summarizes only the broad contours of lawful marijuana activity permitted by Measure 2 and of the developing regulatory framework.

### 1. Recreational Marijuana

#### *a. Recreational Marijuana Use, Possession, and Transfer*

The Alaska Statutes now allow individuals to possess and use marijuana recreationally.<sup>68</sup> The following acts are legal under Alaska state law if performed by persons twenty-one years of age or older: (1) possessing, using, displaying, purchasing, or transporting one ounce or less of marijuana;<sup>69</sup> (2) possessing, growing, processing, or transporting no more than six marijuana plants (with three or fewer being mature,

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64. See Chemerinsky, *supra* note 3, at 89 n.54 (summarizing the Colorado and Washington initiatives).

65. ALASKA STAT. § 17.38.090.

66. See *id.* § 17.38.110 (noting what local governments may prohibit or establish). See generally, Ricardo Baca, *What About ‘Budtender’: Did Oxford Miss Out on the True Word of the Year?*, THE CANNABIST (Nov. 17, 2014), <http://www.thecannabist.co/2014/11/17/budtender-oxford-vape-word-year/23480/> (defining ‘budtender’ as one who serves customers at a cannabis dispensary).

67. *Id.*

68. *Id.* § 17.38.020(1)–(4).

69. *Id.* § 17.38.020(1).

flowering plants);<sup>70</sup> (3) possessing marijuana produced by lawfully-possessed marijuana plants on the premises where the plants were grown;<sup>71</sup> (4) transferring one ounce or less of marijuana and up to six immature marijuana plants to a person who is twenty-one years of age or older without remuneration;<sup>72</sup> (5) non-public<sup>73</sup> consumption<sup>74</sup> of marijuana;<sup>75</sup> (6) assisting another person who is twenty-one years of age or older with any lawful marijuana conduct described in Alaska Stat. § 17.38;<sup>76</sup> (7) possessing, using, displaying, purchasing, or transporting marijuana accessories;<sup>77</sup> (8) manufacturing, possessing, or purchasing marijuana accessories;<sup>78</sup> and (9) distribution or sale of marijuana accessories to a person who is twenty-one years of age or older.<sup>79</sup>

*b. Personal Marijuana Cultivation*

Via Measure 2, Alaska law now allows people twenty-one years and older to cultivate their own marijuana for recreational use (referred to as a “home grow”), subject to four limitations. First, a person twenty-

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70. *Id.* § 17.38.020(2).

71. *Id.*

72. *Id.* § 17.38.020(3).

73. ALASKA STAT. § 17.38.040 does not define “public.” Consequently, the ABC Board adopted an emergency regulation defining “in public” as “in a place to which the public or a substantial group of persons has access and includes highways, transportation facilities, schools, places of amusement or business, parks, playgrounds, prisons, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.” Memorandum from Scott Meriwether to Michaela Fowler, Dep’t of Commerce, Cmty. and Econ. Dev., *Alcoholic Beverage Control Board: Emergency Regulations re: definition of “in public”*, 3 AAC 304.990(b), Feb. 24, 2015, <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=98820>. Municipalities such as Anchorage have adopted ordinances enforcing similar definitions. *Anchorage Alaska AO No. 2015-7*, DEP’T OF LAW 2 (Jan. 13, 2015), <http://www.akml.org/wp-content/uploads/2015/02/Municipality-of-Anchorage.pdf>. More information about what “in public” means is available online. See, e.g., Scott Woodham, *What if My Neighbors’ Pot Smoke Violates My Airspace?*, ALASKA DISPATCH NEWS (Feb. 5, 2015), <http://www.adn.com/article/20150205/what-if-my-neighbors-pot-smoke-violates-my-airspace> (referring to a public place as “a place to which the public or a substantial group of persons has access”); Laurel Andrews, *State Takes Aim at Marijuana Social Clubs*, ALASKA DISPATCH NEWS (July 2, 2015), <http://www.adn.com/article/20150702/state-takes-aim-marijuana-social-clubs> (explaining that consuming marijuana in public is illegal, but members-only marijuana clubs are not public places).

74. ALASKA STAT. § 17.38.900(3) (“[C]onsumption’ means the act of ingesting, inhaling, or otherwise introducing marijuana into the human body.”).

75. *Id.* § 17.38.020(4).

76. *Id.* § 17.38.020(e).

77. *Id.* §§ 17.38.010(1), 17.38.060.

78. *Id.* § 17.38.060.

79. *Id.*

one years of age or older may grow up to six marijuana plants, three of which may be mature, flowering plants.<sup>80</sup> Second, the marijuana must be grown in a location where the plants are not subject to public view without the use of binoculars, aircraft, or other optical aids.<sup>81</sup> Third, the marijuana plants must be secure from unauthorized access.<sup>82</sup> And finally, the marijuana may only be grown on property lawfully in possession of the cultivator or with the consent of the person in lawful possession of the property.<sup>83</sup>

## 2. *Commercial Marijuana Production and Sale*

Measure 2 authorized the operation of four types of “marijuana establishments”<sup>84</sup> in Alaska: marijuana cultivation facilities,<sup>85</sup> marijuana testing facilities,<sup>86</sup> marijuana product manufacturing facilities,<sup>87</sup> and retail marijuana stores.<sup>88</sup> Lawful operation of any such establishment is contingent upon a current, valid registration and all persons acting as owner, employee, or agent of the establishment must be at least twenty-one years of age.<sup>89</sup>

A qualifying “Retail Marijuana Store” is one that meets the following criteria: (1) possessing, displaying, storing, or transporting marijuana or marijuana products, except that marijuana and marijuana products may not be displayed in a manner that is visible to the general public from a public right-of-way; (2) delivering or transferring marijuana or marijuana products to a marijuana testing facility; (3)

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80. *Id.* § 17.38.020(2).

81. *Id.* § 17.38.030(a)(1).

82. *Id.* § 17.38.030(a)(2).

83. *Id.* § 17.38.030(a)(3).

84. *Id.* § 17.38.900(9) (“‘[M]arijuana establishment’ means a marijuana cultivation facility, a marijuana testing facility, a marijuana product manufacturing facility, or a retail marijuana store.”).

85. *Id.* § 17.38.900(8) (“[A]n entity registered to cultivate, prepare, and package marijuana and to sell marijuana to retail marijuana stores, to marijuana product manufacturing facilities, and to other marijuana cultivation facilities, but not to consumers.”).

86. *Id.* § 17.38.900(12) (“[A]n entity registered to analyze and certify the safety and potency of marijuana.”).

87. *Id.* § 17.38.900(10) (“[A]n entity registered to purchase marijuana; manufacture, prepare, and package marijuana products; and sell marijuana and marijuana products to other marijuana product manufacturing facilities and to retail marijuana stores, but not to consumers.”).

88. *Id.* § 17.38.900(13) (“[A]n entity registered to purchase marijuana from marijuana cultivation facilities, to purchase marijuana and marijuana products from marijuana product manufacturing facilities, and to sell marijuana and marijuana products to consumers.”).

89. Sections 17.37.080(a)-(d) and 17.38.070(e) of the Alaska Statutes provide that it is lawful under Alaska law to lease or otherwise allow property to be used as a marijuana establishment.

receiving marijuana or marijuana products from a marijuana testing facility; (4) purchasing marijuana from a marijuana cultivation facility; (5) purchasing marijuana or marijuana products from a marijuana product manufacturing facility; and (6) delivering, distributing, or selling marijuana or marijuana products to consumers.<sup>90</sup>

By contrast, a “Marijuana Cultivation Facility” is defined as one engaged in the following practices: (1) cultivating, manufacturing, harvesting, processing, packaging, transporting, displaying, storing, or possessing marijuana; (2) delivering or transferring marijuana to a marijuana testing facility; (3) receiving marijuana from a marijuana testing facility; (4) delivering, distributing, or selling marijuana to a marijuana cultivation facility, a marijuana product manufacturing facility, or a retail marijuana store; (5) receiving or purchasing marijuana from a marijuana cultivation facility; and (6) receiving marijuana seeds or immature marijuana plants from a person twenty-one years of age or older.<sup>91</sup>

A “Marijuana Product Manufacturing Facility” is defined as an entity engaged in the following practices: (1) packaging, processing, transporting, manufacturing, displaying, or possessing marijuana or marijuana products; (2) delivering or transferring marijuana or marijuana products to a marijuana testing facility; (3) receiving marijuana or marijuana products from a marijuana testing facility; (4) delivering or selling marijuana or marijuana products to a retail marijuana store or a marijuana product manufacturing facility; (5) purchasing marijuana from a marijuana cultivation facility; and (6) purchasing of marijuana or marijuana products from a marijuana product manufacturing facility.<sup>92</sup>

Finally, a “Marijuana Testing Facility” is an entity in the business of (1) possessing, cultivating, processing, repackaging, storing, transporting, displaying, transferring, or delivering marijuana; (2) receiving marijuana or marijuana products from a marijuana cultivation facility, a marijuana retail store, a marijuana products manufacturer, or a person twenty-one years of age or older; and (3) returning marijuana or marijuana products to a marijuana cultivation facility, marijuana retail store, marijuana products manufacturer, or a person twenty-one years of age or older.<sup>93</sup>

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90. ALASKA STAT. § 17.38.070(a)(1)–(6).

91. *Id.* § 17.38.070(b)(1)–(6).

92. *Id.* § 17.38.070(c)(1)–(6).

93. *Id.* § 17.38.070(d)(1)–(3).

### C. Implementation of Measure 2

At the time of this writing, implementation of Measure 2 is ongoing. The statutory changes mandated by the ballot measure took effect February 24, 2015. Immediately thereafter began a rulemaking period of up to nine months, during which time the designated state agency was required to craft the regulatory framework for the industry.<sup>94</sup>

The initial authority for rulemaking and promulgation of regulations rested with the State's Alcoholic Beverage Control ("ABC") Board.<sup>95</sup> But Measure 2 also granted the Alaska Legislature the authority to establish a Marijuana Control Board ("MCB") to oversee the cultivation, manufacture, and sale of marijuana in the state.<sup>96</sup> The MCB was established in April 2015 and its appointees were named in July 2015.<sup>97</sup>

The MCB must now adopt regulations consistent with the parameters set out in Measure 2 by November 24, 2015.<sup>98</sup> If the MCB fails to establish applicable regulations within the allotted time frame, the authority to regulate falls to local governments, who would in turn be responsible for administering the recreational marijuana industries within their political boundaries.<sup>99</sup> The MCB previously announced a rulemaking timeline that contemplated completion and adoption of the regulations by the deadline. Operating under that timeframe, the first

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94. The 2014 General Election vote was certified on November 24, 2014. *Marijuana Initiative FAQs*, ALCOHOLIC BEVERAGE CONTROL BOARD, <https://www.commerce.alaska.gov/web/abc/MarijuanaInitiativeFAQs.aspx> (last visited Oct. 5, 2015). Alaska law specifies that statutes enacted by ballot measure take effect ninety days later. *Id.* §§ 17.38.110, 17.38.090(a).

95. *Id.* § 17.38.080.

96. *Id.* §§ 17.38.080, 17.38.084(a).

97. See H.B. 123, 29th Leg., 1st Spec. Sess. (Alaska 2015) (naming MCB appointees). Board members are appointed by the Governor and confirmed by a majority vote of the legislature in joint session. ALASKA STAT. § 17.38.080(b). Board members are selected based on the following criteria: (1) one person from the public safety sector; (2) one person from the public health sector; (3) one person currently residing in a rural area; (4) one person actively engaged in the marijuana industry; and (5) one person who is either from the general public or actively engaged in the marijuana industry. *Id.* §§ 17.38.080(b)(1)–(5). The initial Board may contain no more than two representatives with experience in the marijuana industry. H.B. 123, 29th Leg., 1st Spec. Sess., § 10 (Alaska 2015). Governor Walker appointed the initial five MCB members on July 1, 2015. Governor's Office, *Gov. Walker Appoints Marijuana Control Board*, PRESS ROOM (July 1, 2015), <http://www.gov.state.ak.us/Walker/press-room/full-press-release.html?pr=7224>.

98. *Marijuana Initiative FAQs*, *supra* note 94.

99. ALASKA STAT. § 17.38.110. (explaining that authority to regulate goes to local governments).

licenses would issue by the end of May 2016, with retail marijuana establishments opening to the public during the latter half of 2016.<sup>100</sup>

Prior to the formation of the MCB, the ABC Board identified principal considerations which would guide and influence its marijuana industry rulemaking.<sup>101</sup> There has been no public indication that the MCB would prioritize different items. These principles are intended to: (1) keep marijuana away from underage persons; (2) protect public health and safety; (3) respect privacy and constitutional rights; (4) prevent diversion of marijuana; and (5) degrade illegal markets for marijuana.

Measure 2 required that adopted regulations satisfy a number of criteria.<sup>102</sup> First, procedures for the issuance, renewal, suspension, and revocation of a registration to operate a marijuana establishment, are made subject to all requirements of the Alaska Administrative Procedures Act. Additionally, the Measure 2 schedule of application, registration, and renewal fees for marijuana establishments shall not exceed \$5,000, unless determined otherwise by the board. Third, the qualifications for registration must be directly and demonstrably related to the operation of a marijuana establishment. Fourth, regulations shall include sufficient security requirements for marijuana establishments, including for the transportation of marijuana by marijuana establishments. Fifth, regulations shall include requirements to prevent the sale or diversion of marijuana and marijuana products to persons under the age of twenty-one. Sixth, labeling requirements must be satisfied for marijuana and marijuana products sold or distributed by a marijuana establishment. Seventh, the board must adopt health and safety regulations and standards for the manufacture of marijuana products and the cultivation of marijuana. Eighth, there must be reasonable restrictions on the advertising and display of marijuana and

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100. See *Marijuana Initiative FAQs*, *supra* note 94 (explaining deadlines for the board to adopt regulations). ALASKA STAT. § 17.38.100(b) requires the MCB to begin accepting and processing applications to operate marijuana establishments one year after the effective date of the act, February 24, 2016. If the board has not adopted regulations by this time, applications may be submitted directly to local regulatory authorities. *Id.* § 17.38.110(g). Action must be taken on registration applications within forty-five to ninety days of receipt. *Id.* § 17.38.100(d). This means the first licenses would be issued no later than May 24, 2016.

101. These goals were identified by the ABC Board before the MCB was created. See *Preliminary Considerations for Implementation of AS 17.38 (Prepared for the Alcoholic Beverage Control Board and Public)*, ALASKA DEP'T OF COMMERCE, COMTY., & ECON. DEV. (Feb. 12, 2015), [https://www.commerce.alaska.gov/web/Portals/9/pub/Preliminary\\_Considerations\\_for\\_ImplementationofAS%2017.38.pdf](https://www.commerce.alaska.gov/web/Portals/9/pub/Preliminary_Considerations_for_ImplementationofAS%2017.38.pdf).

102. ALASKA STAT. § 17.38.090(a)(1)–(9).

marijuana products. Finally, the board must establish civil penalties for the failure to comply with regulations made pursuant to this chapter.

Additionally, though its role in the immediate regulatory process is limited, the Alaska Legislature may influence and direct regulation in the future through legislation, with the following limitations: (1) the legislature cannot repeal an initiative within two years of the effective date;<sup>103</sup> (2) legislation tantamount to repeal is prohibited;<sup>104</sup> and (3) the Act prohibits rules that make the operation of retail marijuana establishments “unreasonably impracticable.”<sup>105</sup>

#### D. The Federal Response to State Legalization

In response to increased acceptance of marijuana use at the state level and growing popular and political support for medical marijuana, federal policy with respect to states’ rights and enforcement of the CSA began to shift.<sup>106</sup> In 2009, the Obama Administration’s Department of Justice released the “Ogden Memo,” which announced a significant change: a “hands-off” policy toward enforcement of federal marijuana laws in states where marijuana use was authorized under those states’ laws.<sup>107</sup> Under the Ogden Memo, individuals acting in concert with their state’s marijuana laws were no longer an enforcement priority and U.S. Attorneys were instructed that federal resources should not focus on prosecuting such cases.<sup>108</sup> But in 2011, as marijuana industries in several states were growing quickly, the Department of Justice explained that the Ogden Memo had been misread by those who saw it as a “green

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103. ALASKA CONST. art. XI, § 6.

104. *Warren v. Thomas*, 568 P.2d 400, 402–03 (Alaska 1977).

105. ALASKA STAT. § 17.38.090(a). This term is defined in the Act as when the “measures necessary to comply with the regulations require such a high investment of risk, money, time, or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson.” *Id.* § 17.38.900(14).

106. Polling suggests that the majority of Americans now support marijuana legalization. Lapidus, *supra* note 29.

107. Chemerinsky, *supra* note 3, at 87.

108. In that memorandum, Deputy Attorney General David Ogden wrote to U.S. Attorneys around the country, providing them with enforcement priority guidance. David W. Ogden, *Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, U.S. DEP’T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GEN. (Oct. 19, 2009), <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> (“As a general matter, pursuit of [federal] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”).

light” to begin large-scale marijuana production.<sup>109</sup> The subsequent “Cole Memo I” clarified that the federal government maintained the right to enforce the CSA and that state and local laws permitting marijuana activity were not a defense to federal prosecution.<sup>110</sup> In practice, under the Cole Memo policy large-scale marijuana growing operations became an enforcement priority; a number of enforcement actions were initiated or were threatened after the release of the memo.<sup>111</sup> This renewed enforcement shut down numerous medical marijuana businesses operating in accordance with state laws throughout the country.<sup>112</sup>

The November 2012 general election left the marijuana industry with need for further guidance on potential federal-state conflict of laws issues.<sup>113</sup> During that election, voters in Colorado and Washington approved ballot measures that legalized personal recreational marijuana use for adults ages twenty-one years and older, and allowed the licensed commercial sale of marijuana in retail establishments.<sup>114</sup> These laws also repealed criminal penalties for possession of small amounts of marijuana and directed the state legislatures to create frameworks to tax and regulate the production and sale of marijuana for recreational purposes.<sup>115</sup>

In August 2013, the United States Department of Justice (“DOJ”) explained that while it remained committed to enforcing the federal marijuana prohibition, it would not immediately take legal action to attempt to overturn the Colorado and Washington laws.<sup>116</sup> Instead it would take a “trust but verify” approach.<sup>117</sup> Several key parts of this

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109. Chemerinsky, *supra* note 3, at 87–88.

110. *Id.* at 88; James M. Cole, *Memorandum For All United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, U.S. DEP’T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GEN. (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

111. Chemerinsky, *supra* note 3, at 88; Sam Kamin, *The Limits of Marijuana Legalization in the States*, 99 IOWA L. REV. BULL. 39, 40–41 (2014), [http://ilr.law.uiowa.edu/files/ilr.law.uiowa.edu/files/ILRB\\_99\\_Kamin.pdf](http://ilr.law.uiowa.edu/files/ilr.law.uiowa.edu/files/ILRB_99_Kamin.pdf).

112. See Chemerinsky, *supra* note 3, at 86–90 (explaining how U.S. Attorneys used prosecution and threats of prosecution to close marijuana businesses operating under state law).

113. *Id.* at 88–90 (discussing state ballot measures and speculation over the federal response).

114. *Id.*

115. *Id.*

116. James M. Cole, *Memorandum For All United States Attorneys: Guidance Regarding Marijuana Enforcement*, U.S. DEP’T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GEN. 2–3 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

117. See *id.* at 2–4 (explaining how the Department of Justice is relying upon

new policy are outlined in the “Cole Memo II.”<sup>118</sup> The memo allowed the Colorado and Washington recreational marijuana legalization laws to go into effect, permitted continued operation for medical marijuana distributors and suppliers operating in compliance with state laws, and reiterated that federal resources should not be used to prosecute either seriously ill medical marijuana patients and their caregivers, or individuals who possess small amounts of marijuana for other personal uses.<sup>119</sup>

The linchpin of the policy is that it requires state governments to take an active role in creating and implementing “strong and effective regulatory and enforcement systems” to mitigate the potential harm legalization and decriminalization could pose to public health, safety, and other law enforcement efforts.<sup>120</sup> In short, the federal government is concerned that state legalization could open the floodgates to an era of excessive marijuana use that will lead to an uptick in crime, substance abuse, and the other dangers the CSA is intended to prevent.<sup>121</sup> States must therefore act to safeguard against those concerns. If state regulatory protocols are eventually found to be insufficient, DOJ may challenge the states’ regulations themselves and/or bring individual enforcement actions or criminal prosecutions.<sup>122</sup>

The Cole Memo II also identified eight instances where federal marijuana laws would still be enforced by DOJ, irrespective of state laws. These include enforcement aimed to prevent: (1) distribution of marijuana to minors; (2) revenue from marijuana sales going to criminal enterprises; (3) exportation of marijuana from states where it is legal to states where it is not; (4) the use of state-authorized marijuana activity as a cover or pretext for other illegal activity; (5) violence and use of firearms in the cultivation and distribution of marijuana; (6) driving under the influence of marijuana and other public health consequences associated with marijuana use; (7) growing marijuana on public lands;

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states and local governments to enact strong and effective regulatory systems, but will continue to review marijuana cases). Note also that “trust but verify” is not in the memo itself, but is a quote attributed to Eric Holder in discussing the memo. *E.g.*, Ryan J. Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect*, HUFFINGTON POST (Aug. 29, 2013), [http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj\\_n\\_3837034.html](http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html).

118. *Id.* at 1–4.

119. *See generally id.* (stating that it is inefficient to prosecute seriously ill individuals or their caretakers and that the size of a marijuana operation is a relevant consideration for federal enforcement purposes).

120. *Id.* at 2.

121. *Id.* at 1–3.

122. *Id.* at 3.

and (8) marijuana use or possession on federal property.<sup>123</sup>

In theory, as long as a state system is compliant with the federal protocols and policy, and as long as an actor within the state is compliant with the state system, the federal government is unlikely to begin an enforcement action. Under these circumstances states will largely be left alone to regulate marijuana within their borders. This approach respects state sovereignty and allows state-level marijuana legalization experiments to continue.

But reliance on executive policy statements is dangerous, as exhibited by the set of memoranda discussed above. After evidencing a hands-off approach in the Ogden Memo, the federal government flexed its muscle with Cole Memo I then returned to a more permissive policy with Cole Memo II. These policies can change without much notice and without formal legislative or court action. Essentially, DOJ has made a non-binding promise to limit enforcement of the federal marijuana prohibition—a promise which exists at the whim of the current executive and with no guarantee it will be continued by the next administration.<sup>124</sup>

This leaves the states that have “legal-but-not-entirely-legal” marijuana in a precarious situation. In addition to the fear of arrest, criminal prosecution, and asset forfeiture for marijuana professionals (such as growers, retailers, and the owners and employees of dispensaries) and marijuana-adjacent businesses (such as landlords, accountants, and investors), other federal difficulties exist that can forestall the development of a legal marijuana industry. For example, Section 280E of the Internal Revenue Code prohibits marijuana business operators from deducting operating expenses, such as rent and the costs of paying employees, from their taxes.<sup>125</sup> This puts marijuana businesses at a serious disadvantage and makes running a marijuana business very difficult.

Another burden facing marijuana businesses is limited access to basic banking services.<sup>126</sup> Cole Memo I warned financial institutions which knowingly engage in transactions involving the proceeds of activities known to violate the CSA that they may also be violating federal drug laws, federal money laundering laws, and other federal

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123. *Id.* at 1–2.

124. Kamin, *supra* note 111, at 42. See Blake, *supra* note 4, at 360 n.6 (discussing federal raids).

125. See Kamin, *supra* note 111, at 43 (stating that § 280(E) will prohibit marijuana businesses from deducting operating expenses).

126. See *id.* at 47 (explaining “the difficulty that marijuana businesses have in obtaining basic banking services”).

commerce and financial laws.<sup>127</sup> As a result, many banks and credit card companies have refused to work with marijuana businesses, leaving the marijuana industry mostly a cash-only enterprise.<sup>128</sup> Such businesses must keep lots of cash on hand to pay their employees and taxes.<sup>129</sup> As a result, they become prime targets for crime, and regulators have more difficulty tracking sales, enforcing tax payments, and preventing illegal diversion of marijuana to the black market.<sup>130</sup>

Operation of a large retail business without banking services poses a significant problem for both the regulators and the regulated. In response, the Department of Treasury, Financial Crimes Enforcement Network (“FinCEN”) issued guidance to make it easier for marijuana-related businesses to operate.<sup>131</sup> FinCEN’s 2014 guidelines allow banks to legally provide financial services to state-licensed marijuana businesses under certain conditions.<sup>132</sup> Much like the Cole Memo II requirements for state marijuana regulators, banks must vigorously monitor their marijuana-industry customers to ensure their compliance with FinCEN’s guidelines and that the enforcement priorities outlined by DOJ are not compromised.<sup>133</sup> However, compliance with FinCEN’s guidance requires extensive due diligence—reporting of every marijuana-related transaction—and is therefore very costly and time-consuming.<sup>134</sup> Additionally, the DOJ is not bound by these policies, and can choose to investigate and prosecute at any time.<sup>135</sup>

Congress has considered several pieces of legislation aimed at remedying this tension between state and the federal law. Examples include bills that would: reschedule marijuana or remove marijuana

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127. See Cole, *supra* note 116, at 1-2 (warning that those who knowingly facilitate the business of cultivating, selling, or distributing marijuana are in violation of the CSA and may also violate federal money laundering statutes and other federal financial laws).

128. Hill, *supra* note 2, at 600-02.

129. See Kamin, *supra* note 111, at 47 (“If marijuana exists as a cash only business, the risk of illegal diversion and non-payment of taxes is necessarily magnified.”). See also Steve Lynn, *Cash-Only Pot Sales Irk State, Owners*, BIZWEST (Apr. 4, 2014), <http://bizwest.com/cash-only-pot-sales-irk-state-owners/> (stating that many marijuana businesses are cash only businesses).

130. See Kamin, *supra* note 111, at 47 (explaining how marijuana businesses are a target for violent crime and difficult to monitor for tax evasion, fraud, and compliance with the law).

131. FIN. CRIMES ENFORCEMENT NETWORK, DEP’T OF THE TREASURY, FIN-2014-G001, *BSA Expectations Regarding Marijuana-Related Businesses* (Feb. 14, 2014), [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-G001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf).

132. *Id.* at 2.

133. *Id.* at 3.

134. Hill, *supra* note 2, at 613-17.

135. *Id.* at 616-17.

from the CSA schedule of drugs;<sup>136</sup> allow marijuana for medical use in states where medical marijuana has been legalized;<sup>137</sup> amend the asset forfeiture provisions of the CSA to prohibit the seizure of real property used in activities performed in compliance with state marijuana laws;<sup>138</sup> prohibit the DEA and the DOJ from spending taxpayer money to raid, arrest, or prosecute medical marijuana patients and providers in states where medical marijuana is legal;<sup>139</sup> and provide legal immunity from criminal prosecution to banks and credit unions providing financial services to marijuana-related businesses acting in compliance with state law.<sup>140</sup> However, to date, none of these bills “have gained much traction.”<sup>141</sup>

### III. MEASURE 2 AND THE *RAVIN* DOCTRINE

In 2012, I wrote that “*Ravin* retains its vitality and should be respected as good law unless and until the Alaska Supreme Court rules otherwise.”<sup>142</sup> That statement still holds true. Nothing has happened since to affect *Ravin*’s core holding that the Alaska Constitution’s right of privacy protects an adult’s personal marijuana use in the home. The Alaska Legislature has not passed any legislation regarding marijuana use and possession since 2006, and the only recent reported opinions involving *Ravin* affirmed the health of the doctrine.<sup>143</sup>

Additionally, Measure 2 specifically stated that it was not intended to interfere with *Ravin*.<sup>144</sup> But the enactment of a statutory right to

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136. Ending Fed. Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. § 101 (2013). Federal law would continue to prohibit trafficking and the unlicensed cultivation, production, manufacturing, and sale of marijuana. *Id.* §§ 103, 301.

137. States’ Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. § 4 (2013).

138. States’ Medical Marijuana Property Rights Protection Act, H.R. 784, 113th Cong. § 3 (2013).

139. Commerce, Justice, Science, and Related Agencies Appropriations Act, H.R. 4660, 113th Cong. §§ 557, 558, 560 (2013) (amended 2014).

140. Marijuana Businesses Access to Banking Act of 2013, H.R. 2652, 113th Cong. § 3 (2013).

141. See Chemerinsky, *supra* note 3, at 113–14 (listing proposed bills).

142. Brandeis, *supra* note 1, at 178.

143. *Good v. State*, a memorandum opinion by the Alaska Court of Appeals, declined to extend *Ravin* to conduct the court deemed public. No. A-11505, 2014 WL 5421217, at \*1 (Alaska Ct. App. Oct. 22, 2014). *Hunter v. State*, another memorandum opinion by the Court of Appeals, held that *Ravin* and the right of privacy did not allow the manufacture of a small amount of homebrew alcohol in a dry community. No. A-11328, 2015 WL 4874786, at \*1–2 (Alaska Ct. App. Aug. 12, 2015).

144. ALASKA STAT. § 17.38.010(c) (2014) (“The people of the state of Alaska further declare that the provisions of this Act are not intended to diminish the right to privacy as interpreted by the Alaska Supreme Court in *Ravin v.*

possess and use marijuana and the passage of a comprehensive regulatory framework for a commercial marijuana industry raise questions about the future role for the *Ravin* Doctrine in Alaska's evolving marijuana regime, how the activity protected under *Ravin* meshes with the activity authorized by Measure 2, and what impact *Ravin* will have on the implementation of Measure 2.

### A. The Continuing Relevance of *Ravin* on Alaska Marijuana Law and Policy

*Ravin* stands as a bulwark against government intrusion into citizens' private lives. Though it was decided in the context of marijuana possession, at its core, *Ravin* is a case about privacy—it has been cited numerous times for establishing the proposition that the Alaska Constitution provides stringent privacy protection.<sup>145</sup> *Ravin* is also much more than a philosophical symbol. Prior to the passage of Measure 2, *Ravin* was synonymous with marijuana regulation in Alaska. The decision set a baseline for lawful marijuana possession that could not be overlooked, and every major marijuana-related policy decision made in Alaska during the past 40 years was made with *Ravin* in mind.<sup>146</sup>

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*State . . .*").

145. See, e.g., *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) ("Because this right to privacy is explicit, its protections are necessarily more robust and 'broader in scope' than those of the implied federal right to privacy."); *Anchorage Police Dep't Emps. Ass'n v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001) ("We have held that both of these provisions afford broader protection than their federal counterparts."); *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. For Choice*, 948 P.2d 963, 968 (Alaska 1997) ("[The Alaska Constitution] provides more protection of individual privacy rights than the United States Constitution."). See also Erwin Chemerinsky, *Privacy and the Alaska Constitution: Failing to Fulfill the Promise*, 20 ALASKA L. REV. 29, 31 (2003) ("The Alaska Supreme Court continues, at times, to provide greater protection for privacy rights under the Alaska Constitution than under the United States Constitution."); Susan Orlansky & Jeffrey M. Feldman, *Justice Rabinowitz and Personal Freedom: Evolving A Constitutional Framework*, 15 ALASKA L. REV. 1, 26 (1998) ("Justice Rabinowitz treated the adoption of article I, section 22 as underscoring the importance of the right of privacy in Alaska and supporting adoption of stricter controls on warrantless government action than is required under the federal Constitution."); Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293, 295-96 (2005) ("Because the Federal Constitution provides a sturdy floor for civil rights, the Alaska Supreme Court's independent interpretation of the Alaska Constitution based on Alaska's local constitutional heritage can serve to safeguard rights beyond federal constitutional protections.").

146. The legislature's decision to decriminalize home possession of marijuana in 1982 harmonized the state statutes with *Ravin*. The ballot initiative to re-criminalize marijuana in 1990 came about because *Ravin* had paved the

Going forward, even with a marijuana legalization statute on the books, a comprehensive regulatory framework developing, and a commercial marijuana industry forming, *Ravin* will remain part of the discussion; it adds a unique additional layer to the already complex system of marijuana regulation in Alaska.

## B. *Ravin's* Impact on Measure 2

### 1. *Ravin* Limits the Reach of a Marijuana Local Option

Alaska state law allows residents to hold an election to determine whether the sale, importation, or possession of alcohol will be allowed in their communities.<sup>147</sup> This “local option” law has resulted in a number of communities restricting alcohol use within their borders.<sup>148</sup> In several cases, *Ravin* and the Alaska courts’ acceptance of personal marijuana use has been invoked in an attempt to overturn these laws.<sup>149</sup> The argument is that if the right of privacy protects an adult’s personal marijuana use and possession in the home, it should similarly allow an adult to consume alcohol.<sup>150</sup> Restrictions to the contrary would violate the right of privacy.

Interestingly, in decisions that have been historically antithetical to nationwide drug and alcohol policies, Alaska courts have repeatedly found that while the right to privacy protects personal use and possession of marijuana, that right does not extend to alcohol.<sup>151</sup> The *Ravin* framework requires a sufficiently “close and substantial”

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way for limited lawful marijuana use, and the legislature’s move to re-criminalize marijuana in 2006 followed on the heels of other attempts to get the judiciary to revisit *Ravin*.

147. ALASKA STAT. § 04.11.491 (2014).

148. 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). If a community decides not to allow alcoholic beverages, it is called a “dry” community. *Dry/Damp Communities*, ALCOHOL BEVERAGE CONTROL BOARD, <https://www.commerce.alaska.gov/web/abc/DryDampCommunities.aspx> (last visited Oct. 2, 2015). If a community allows limited amounts of alcoholic beverages, it is called a “damp” community. *Id.*

149. See, e.g., *Hunter v. State*, No. A-11328, 2015 WL 4874786, at \*2 (Alaska Ct. App. Aug. 12, 2015) (explaining the constitutional right to privacy invoked in cases involving personal marijuana use); *Harrison v. State*, 687 P.2d 332, 337–38 (Alaska Ct. App. 1984) (examining the application of *Ravin* to a local option law).

150. See *Hunter*, 2015 WL 4874786, at \*1 (describing argument that the constitutional right to privacy at stake in *Ravin* also protected home use of alcohol).

151. See, e.g., *Hunter*, 2015 WL 4874786, at \*1–2 (citing previous decisions denying right to privacy in cases involving alcohol use); *Harrison*, 687 P.2d at 337–38 (discussing previous differentiation of marijuana from other drugs).

relationship between the prohibition of an intoxicating substance and the protection of public health and welfare.<sup>152</sup> With regard to marijuana, the *Ravin* court found it “relative[ly] harmless[,]”<sup>153</sup> but with regard to alcohol, the Alaska Court of Appeals has found that the evidence “unmistakably established a correlation between alcohol consumption and poor health, death, family violence, child abuse, and crime.”<sup>154</sup> Under Alaska law, given the “undisputed harmful effects [sic] and societal costs [sic] of alcohol consumption,” a sufficiently close and substantial relationship exists between a local option law that bans “alcohol consumption whether it occur[s] inside or outside of the home” and the legislative purpose of protecting public health and welfare.<sup>155</sup>

A “local option” that allows for “damp” marijuana communities was incorporated directly into Measure 2.<sup>156</sup> It provides the option for local governments to “prohibit the operation of marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, [and] retail marijuana stores through the enactment of an ordinance or by a voter initiative.”<sup>157</sup> Communities can therefore opt out of allowing commercial marijuana activities, though they cannot ban personal use or possession entirely. This is a sticking point for communities that wish to remain marijuana free, but because of *Ravin*’s constitutional protection for marijuana use by adults in the home, their ability to do so is limited.<sup>158</sup> Mandated “dry” marijuana communities are not permitted under *Ravin*.

## 2. *Ravin* Allows Marijuana Use by Some Adults Under Twenty-One

The proponents of Measure 2 suggested that marijuana should be regulated like Alcohol. Indeed, that approach was incorporated directly into the campaign’s name.<sup>159</sup> And, just as in the Colorado, Washington,

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152. *Ravin v. State*, 537 P.2d 494, 498 (Alaska 1975).

153. *Harrison*, 687 P.2d at 337 (citing *Ravin*, 537 P.2d at 511).

154. *Hunter*, 2015 WL 4874786, at \*2 (quoting *Harrison*, 687 P.2d at 338).

155. *Hunter*, 2015 WL 4874786, at \*3.

156. *Id.*

157. ALASKA STAT. § 17.38.110(a) (2014).

158. Section 17.38.020 states that personal use, possession, cultivation, and transfer of marijuana remains lawful in all political subdivisions in the state, and that local governments also remain bound by the Alaska Supreme Court’s ruling in *Ravin* regarding individual constitutional privacy rights and marijuana use and possession. *Id.* § 17.38.020. Also, in *Harrison*, the Alaska Court of Appeals found that a community could ban alcohol without violating *Ravin*. *Harrison*, 687 P.2d at 336–39.

159. See *Voter Guide*, CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL IN ALASKA, <http://regulatemarijuanainalaska.org> (last visited Oct. 2, 2015) (describing Measure 2’s proposed regulations of marijuana based on current alcohol regulation).

and Oregon legalization plans, the Alaska approach borrowed one of the hallmarks of alcohol regulation by limiting marijuana use, possession, and sale to those over twenty-one years of age.<sup>160</sup> But there is a significant difference in Alaska: some adults under twenty-one years of age are still protected by the *Ravin* doctrine and may continue to use and possess marijuana in the privacy of their homes, subject to future judicial interpretation of the Alaska Constitution's right of privacy.<sup>161</sup>

Though minors typically become legally recognized adults at age eighteen,<sup>162</sup> in *Allam v. State*, the Alaska Court of Appeals upheld the constitutionality of a statute which established nineteen years as the age of majority for the purpose of regulating possession of marijuana.<sup>163</sup> The court noted that "[s]tatutes [that set the age for possession of tobacco, possession of alcohol, age of consent for sexual intercourse, etc.] and the social policy decisions that underlie them, are within the province of the legislature. There is no legal requirement that the same age of majority apply to all activities and circumstances."<sup>164</sup> Further, "it is the legislature's prerogative to restrict or forbid the use of dangerous intoxicants ... based on age, [and] to establish the age at which persons can presumably be trusted to handle those intoxicants in a mature and socially acceptable manner."<sup>165</sup>

*Allam* addressed the 1982 version of the Alaska criminal marijuana statute, which allowed for some marijuana use by adults, and was later amended by a 1990 voter initiative.<sup>166</sup> The 1990 Initiative recriminalized all marijuana use and possession, but its applicability was then limited

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160. See *supra* text accompanying notes 54–65.

161. See *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581–82 (Alaska 2007) (explaining that the right to privacy extends to minors as well as adults); *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 264–66 (Alaska 2004) (explaining that a minor's right to privacy is "deserving of the most exacting scrutiny," just as with adults) (quoting *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 45 (Alaska 2001)).

162. See ALASKA STAT. § 25.20.010 (2014) (establishing 18 as the age of majority).

163. 830 P.2d 435, 438 (Alaska App. 1992).

164. *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 594 (2007) (quoting *Allam*, 830 P.2d at 438).

165. *Westbrook v. State*, No. A-8334, 2003 WL1732398, at \*1 (Alaska Ct. App. April 2, 2003) (quoting *Allam*, 830 P.2d at 438–39). See also ALASKA STAT. §§ 11.76.100, 11.76.105 (prohibiting possession of tobacco by those under 19 years of age); *id.* § 04.16.050(a) (prohibiting a person under 21 years of age from possessing or consuming alcoholic beverages); *id.* § 11.71.030(a)(2) (delivery of any amount of marijuana to a person under 19 years of age who is at least three years younger than the person delivering the substance is MICS-3).

166. ALASKA STAT. § 11.71.060 (1982), *invalidated by Noy v. State*, 83 P.3d 538 (Alaska Ct. App. 2003).

by *Noy v. State*.<sup>167</sup> In *Noy*, the court struck down the 1990 law to the extent it prohibited conduct protected by *Ravin*.<sup>168</sup> *Noy* did not specifically address the rights of minors under the 1990 initiative, which prohibited all marijuana use regardless of age, nor has any subsequent legislative action clarified the age of adulthood with respect to *Ravin*. Thus, *Allam* remains the most recent guidance on the rights of adults younger than 21 under the *Ravin* Doctrine.<sup>169</sup>

### C. Measure 2's Impact on the *Ravin* Doctrine

Prior to the passage of Measure 2, there was a sharp divide between the Alaska Criminal Code's explicit proscription of all recreational marijuana use and the *Ravin* Doctrine's rule that adults could use marijuana for any personal purpose in the home. Measure 2 goes a long way towards reconciling Alaska's criminal marijuana statutes with *Ravin*, but it is not a perfect fit—a few grey areas remain.

For all its uniqueness and historical value, *Ravin* has several limitations which are highlighted when viewed through the lens of Measure 2. For example, while *Ravin* notably permitted adults to use and possess marijuana in the privacy of their homes, it provided no mechanism to procure marijuana other than by growing it oneself. It remained illegal to buy, sell, or even give marijuana away, a ban which extended even to obtaining seeds or clippings to start growing a plant.<sup>170</sup> Transporting marijuana any place outside the home was also illegal. Essentially, while it was legal to possess marijuana in one's home, everything necessary to actually get it there was not.

Conversely, Measure 2 proposed a more comprehensive and practical approach to regulating marijuana in Alaska, and addressed some of the grey areas present under *Ravin*. In addition to allowing the development of a system that will permit lawful commercial transactions, Measure 2 allowed anyone twenty-one years of age or over to possess up to one ounce of marijuana on their person outside of the home and to transport it.<sup>171</sup>

Measure 2 also provided needed specificity for home growing operations.<sup>172</sup> The act allows for home cultivation and transportation of plants.<sup>173</sup> It also provides clear delineation of the number of plants

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167. 83 P.3d 538 (Alaska Ct. App. 2003).

168. *Noy*, 83 P.3d at 542.

169. See discussion *infra*, Section III.C.2.

170. ALASKA STAT. § 11.71.900(14) (2014) (defining "marijuana").

171. *Id.* § 17.38.020

172. *Id.* § 17.38.030.

173. *Id.* § 17.38.020.

permitted (six, three of which may be “mature, flowering plants”)<sup>174</sup> and where a “home grow” could be located (“in a location where the plants are not subject to public view without the use of binoculars, aircraft, or other optical aids”).<sup>175</sup> Finally, it specifies that care must be taken “to ensure the plants are secure from unauthorized access” and that “cultivation may only occur on property lawfully in possession of the cultivator or with the consent of the person in lawful possession of the property.”<sup>176</sup>

1. *Ballot Measure 2 Expands the Forms of Marijuana that May Be Possessed under Ravin*

*Ravin* harkens back to a simpler time of marijuana use—an era when marijuana meant greenish-brown dried plant matter that was rolled in paper, smoked in a pipe, or maybe once in a while baked into a brownie. *Ravin* came about well before laboratory-produced marijuana concentrates, homemade hash oil, vaping, dabbing, or the increased availability of marijuana-infused edible products from gluten-free cupcakes to sports drinks to gummy bears. Reflecting current trends in marijuana use and production, Measure 2 contained a definition of marijuana broader than the “traditional” notion of marijuana as the flowers, buds, or other smokeable THC-containing parts of the cannabis plant.<sup>177</sup> The new statutory definition increases options for the forms of marijuana that adults can lawfully consume in the privacy of their homes, and potentially broadens *Ravin*’s applicability.<sup>178</sup>

The Alaska Statutes currently contain two definitions for marijuana. The most recent, added by Measure 2, defines marijuana as:

[A]ll parts of the plant of the genus cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marijuana concentrate[.] “marijuana” does not include fiber produced from the stalks, oil, or cake made from

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174. *Id.* § 17.38.020(2).

175. *Id.* § 17.38.030(a)(1)–(3).

176. *Id.*

177. *See id.* § 17.38.900(6). *See also* Martin Kaste, *Marijuana ‘Hash Oil’ Explodes in Popularity, And Kitchens*, NORTH CAROLINA PUBLIC RADIO (Jan. 10, 2014), <http://www.npr.org/2014/01/10/261390781/marijuana-hash-oil-explodes-in-popularity-and-kitchens> (discussing the emergence and use of hash oil); Ricardo Baca, *Colorado Report Describes, In Detail, First Year of Recreational Marijuana*, THE CANNABIST (Feb. 27, 2015), <http://www.thecannabist.co/2015/02/27/marijuana-report-colorado-pot-med/30604/> (discussing large percentage of legal marijuana market filled by edibles in Colorado).

178. ALASKA STAT. § 17.38.900(6).

the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products.<sup>179</sup>

This definition incorporates the many popular methods of marijuana production and consumption that now exist, but differs from the preexisting definition found in the Alaska Criminal Code.<sup>180</sup> The main difference is that the statutory definition created by the initiative specifically includes “resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marijuana concentrate.”<sup>181</sup> Conversely, the previous definition excludes “the resin or oil extracted from any part of the plants, or any compound, manufacture, salt, derivative, mixture, or preparation from the resin or oil, including hashish, hashish oil, and natural or synthetic tetrahydrocannabinol” from the definition of marijuana.<sup>182</sup> As a result of these changes, the new definition allows for marijuana concentrates such as hash and hash oil, which are often consumed on their own or used to prepare edibles, to be considered “marijuana,” and thereby lawfully possessed, sold, and used in Alaska.<sup>183</sup> Previously, hashish and other marijuana derivatives were

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179. *Id.* § 17.38.900(6).

180. The Alaska Criminal Code provides that “marijuana” means the seeds, and leaves, buds, and flowers of the plant (genus) *Cannabis*, whether growing or not; it does not include the resin or oil extracted from any part of the plants, or any compound, manufacture, salt, derivative, mixture, or preparation from the resin or oil, including hashish, hashish oil, and natural or synthetic tetrahydrocannabinol; it does not include the stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the stalks, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. *Id.* § 11.71.900(14).

181. *Id.* § 17.38.900(6).

182. *Id.* § 11.71.900(14).

183. Several pieces of legislation addressing marijuana concentrates were considered during the last legislative session. Senate Bill 30 contained revisions to the Alaska Criminal Code that would have incorporated the changes mandated by section 17.38 of the Alaska Statutes. S.B. 30, 29th Leg., 1st Sess., (Alaska 2015). S.B. 30 also contained a definition for “marijuana concentrate” (a product created from resins of or by extracting cannabinoids from any part of the plant (genus *Cannabis*) and maintains concentrates within the definition of marijuana). ALASKA STAT. § 34. The Alaska House of Representatives proposed an amendment to SB 30 that would have removed concentrates from the definition of marijuana, thereby effectively banning marijuana concentrates. Laurel Andrew, *Marijuana Concentrates Would Be Illegal In Alaska In 2017 Under Amendment*, ALASKA DISPATCH NEWS (Mar. 13, 2015), <http://www.adn.com/article/20150313/marijuana-concentrates-would-be-illegal-alaska-2017-under-amendment>. That amendment failed. Laurel Andrews, *Alaska Senate Passes*

listed only as Schedule IIIA controlled substances, the unlawful possession, use or distribution of which carry much greater criminal penalties than applicable for marijuana, contained in Schedule IVA.<sup>184</sup>

Consumer demand for products other than “traditional” marijuana, including edibles, concentrates, and other derivatives, is growing.<sup>185</sup> This trend, along with multiple statutory definitions and resulting inconsistency in the state’s criminal drug schedules, illustrates the complexity of modern marijuana regulation and the need for the Alaska Legislature to synthesize and revise the state’s controlled substances laws in light of Measure 2.

2. *Measure 2 and the Amount of Marijuana Adults May Possess under Ravin*

The *Ravin* Doctrine is understood to protect an adult’s ability to use and possess a small amount of marijuana for personal use in the home. But the Alaska courts have never defined precisely what a “small amount” is.<sup>186</sup> Rather, the Alaska courts have consistently deferred to legislative determinations on the amount of marijuana indicative of an intent to sell and the amount of marijuana adults could lawfully possess

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*Marijuana Crime Bill, Shoots Down Concentrate Ban*, ALASKA DISPATCH NEWS (Mar. 30, 2015), <http://www.adn.com/article/20150330/alaska-senate-passes-marijuana-crime-bill-shoots-down-concentrate-ban>. Senate Bill 30 passed the Senate and is under consideration in the House. Another bill, House Bill 59, also defines marijuana concentrates (“an oil, liquid, or other substance created by extracting cannabinoids from marijuana for the purpose of increasing the strength or proportion of the cannabinoids”), and seeks to delay implementation of any regulations governing concentrates. H.R. 59, 29th Leg., 1st Sess., § 23 (Alaska, Mar. 11, 2015), <http://www.legis.state.ak.us/PDF/29/Bills/HB0059B.PDF>; Suzanna Caldwell, *Supporters Condemn Legislative Efforts To Define, Delay Marijuana Concentrates*, ALASKA DISPATCH NEWS (Jan. 19, 2015), <http://www.adn.com/article/20150119/supporters-condemn-legislative-effort-define-delay-marijuana-concentrates>. The MCB’s proposed regulations also include a specific definition for marijuana concentrates: “resin, oil, wax, or any other substance produced by extracting or isolating cannabinoids, THC, or other components from the marijuana plant or harvest thereof.” *See Proposed Regulations for AS 44.62.190(d)*, ALCOHOL BEVERAGE CONTROL BOARD 9 (May 19, 2015), [https://www.commerce.alaska.gov/web/Portals/9/pub/MJ\\_Regulations\\_Set\\_1\\_PCR2.pdf](https://www.commerce.alaska.gov/web/Portals/9/pub/MJ_Regulations_Set_1_PCR2.pdf).

184. ALASKA STAT. § 11.71.060(a)(1)–(2) (2014).

185. The statutes created by Measure 2 provide some additional clarification by defining terms such as “marijuana products.” *See id.* § 17.38.900(11). (“[C]oncentrated marijuana products and marijuana products that are comprised of marijuana and other ingredients and are intended for use or consumption, such as, but not limited to, edible products, ointments, and tinctures.”).

186. *See* Brandeis, *supra* note 1, 179 n.23 (examining previous cases which discuss, but do not define, “small amount”).

under *Ravin*.<sup>187</sup>

Prior to the enactment of Measure 2, the *Ravin* Doctrine allowed in-home personal possession of up to four ounces of marijuana, as established in the Alaska Court of Appeals case, *Noy v. State*.<sup>188</sup> There the court held that the 1990 voter initiative, which purported to recriminalize all marijuana use and possession, had to be limited in scope<sup>189</sup> and interpreted in a manner consistent with *Ravin*: “[t]o make the statute conform to the constitution again, we must return it to its pre-1990 version.”<sup>190</sup> The court recognized that:

[b]efore the marijuana laws were amended by voter initiative in 1990, the Alaska Legislature had (by statute) defined the amount of marijuana that adults could lawfully possess in their home for personal use. Under the pre-1990 statutes governing marijuana possession, an adult could be prosecuted for possessing four ounces or more of marijuana in their home for personal use. Possession of less than this amount was not a crime.<sup>191</sup>

Accordingly, the court ruled that “Alaska citizens have the right to possess less than four ounces of marijuana in their home for personal use.”<sup>192</sup> How Measure 2 affects this dividing line and the calculation for how much marijuana may lawfully be possessed in the home is now subject to debate.

Though the intent of Measure 2 was in line with *Ravin*, the resulting statutes yield another apparent conflict between Alaska’s judicial opinions, which permit up to four ounces of marijuana for personal use,<sup>193</sup> and the Alaska Statutes, which permit possession of up to one ounce and six plants.<sup>194</sup> This raises the question of whether Measure 2 should substitute for a legislative determination on the amount of marijuana indicative of personal use, and thereby set the amount of marijuana adults may lawfully possess under *Ravin*. Alternatively, if Measure 2 and *Ravin* operate in separate legal spheres, a way to reconcile these two rules must develop.

Numerous permutations and practical application questions arise

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187. *Id.* at 216–18. See generally *Noy v. State*, 83 P.3d 538 (Alaska Ct. App. 2003) (marking four ounces of marijuana as the upper limit allowed for in-home possession under *Ravin*).

188. *Noy*, 83 P.3d at 543.

189. *Id.* at 544.

190. *Id.* at 543.

191. *Id.*

192. *Id.* at 540.

193. *Id.*

194. ALASKA STAT. § 17.38.020 (2014).

from this debate—questions that will make it difficult for the public and law enforcement to adequately gauge their respective rights and responsibilities. While arguing over the maximum amount of marijuana one may possess in the home may seem trivial, serious consequences exist. A cornerstone of the *Ravin* doctrine, and now of marijuana legalization law in general, is the rule that a search warrant may not be issued absent probable cause to believe that illegal marijuana activity is present.<sup>195</sup> Law enforcement officials must therefore have clear indication of what type of marijuana conduct is permissible, and what is not.

Traditionally, statutes enacted by the ballot initiative process are assessed in the same way as statutes enacted by the “normal legislative process.”<sup>196</sup> As the legislature has the authority to determine by statute what constitutes a small amount of marijuana for personal use under the *Ravin* Doctrine,<sup>197</sup> it follows that citizens, via the ballot initiative process, would too.<sup>198</sup> Indeed, this logic dictated the *Noy* decision where the court reviewed the 1990 voter initiative as if it had been enacted by the “normal legislative process.”<sup>199</sup> Thus an argument can be made that the *Ravin* Doctrine now protects an adult’s ability to use and possess the amount of marijuana set in Measure 2, effectively substituting the statute approved by the recent ballot measure for the Alaska Legislature’s 1982 determination of what constitutes a personal-use amount of marijuana. However, Measure 2 specifies that it was not intended to impact or limit the rights protected under *Ravin*.<sup>200</sup> Thus, any decisions that would affect an adult’s use and possession of marijuana within the heightened realm of privacy afforded by the home must be considered within that rubric.<sup>201</sup>

Of course, since the current and historic posture of Alaska’s marijuana laws is anything but normal, the answer is not that simple.

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195. See Brandeis, *supra* note 1, at 189–91, 225–29 (examining when a search warrant is issuable for marijuana-related activity).

196. *Noy*, 83 P.3d at 542.

197. Brandeis, *supra* note 1, at 217–18.

198. The Alaska Constitution Article XII, section 11 states that “the law-making powers assigned to the legislature may be exercised by the people through the initiative.”

199. *Noy*, 83 P.3d at 542.

200. ALASKA STAT. § 17.38.010(c) (2014).

201. Note that Measure 2 allows possession of up to one ounce of marijuana in general; it is not restricted to the home. Thus it could be viewed as complimentary to *Ravin*, not as a replacement for it. Indeed, Measure 2 further solidifies *Ravin* by codifying the ability to use and possess marijuana. However, *Ravin* did not provide an absolute right to use and possess marijuana; rather, it was about the right of privacy in the home. *Ravin v. State*, 537 P.2d 494, 496 (Alaska 1975).

Further complicating matters is the fact that Measure 2 does not actually provide a firm upper limit on the amount of marijuana one may possess in the home. The initiative permits possession of one ounce or less without civil or criminal penalty,<sup>202</sup> as well as “no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown.”<sup>203</sup> This suggests that individuals could possess one ounce of marijuana procured by any lawful means and a potentially unlimited and self-replenishing supply of additional marijuana, so long as it is produced by lawfully-possessed plants and does not leave the grow location. This language could also be interpreted to include any marijuana concentrate or other derivatives made from the marijuana harvested from those plants.

In light of the untested legal status of the *Ravin* doctrine vis-à-vis Measure 2, the State of Alaska’s current position seems to permit at least the four ounce in-home possession limit set by *Noy*.<sup>204</sup> The ABC Board website lists a number of “Marijuana Initiative FAQs,” including the question “How much harvested marijuana does Section 17.38 allow an unlicensed person to possess in his or her home?”<sup>205</sup> In response, the Board answered:

Four ounces or less—AS 17.38.020 allows for the in-home production and possession of marijuana for personal use. The Alaska Court of Appeals in *Noy v. State*, 80 P.3d 255 (Alaska App. 2003) ruled that possession of marijuana in an amount greater than four ounces is not personal use possession. Additionally, AS 17.38.020 specifies it will be lawful to possess marijuana harvested from up to six plants (three or fewer being mature, flowering plants) on the premises where the plants were grown.<sup>206</sup>

This passage is a little muddled. It states that the upper limit on in-home marijuana possession is four ounces, but the use of the term

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202. ALASKA STAT. § 17.38.020(a).

203. *Id.* § 17.38.020(b) (emphasis added).

204. Scott Woodham, *What’s The Status Of Alaska’s Rules On Cannabis Concentrates?*, ALASKA DISPATCH NEWS (Aug. 13, 2015), <http://www.adn.com/article/20150813/whats-status-alaskas-rules-cannabis-concentrates>.

205. Alcoholic Beverage Control Board, *Marijuana Initiative FAQs*, STATE OF ALASKA DEP’T OF COMMERCE, COMTY., & ECON. DEV., <https://www.commerce.alaska.gov/web/abc/MarijuanaInitiativeFAQs.aspx> (last visited Oct. 2, 2015). The MCB is organized within the ABC Board. ALASKA STAT. § 17.38.080.

206. Alcoholic Beverage Control Board, *Marijuana Initiative FAQs*, STATE OF ALASKA DEP’T OF COMMERCE, COMTY., & ECON. DEV., <https://www.commerce.alaska.gov/web/abc/MarijuanaInitiativeFAQs.aspx> (last visited Oct. 2, 2015).

“additionally” in the last sentence indicates that possession of *all* of the marijuana harvested from a lawful home-grow operation is also permissible.

In the absence of any legislative or judicial guidance, this attempt by an administrative agency to bring these two complimentary-but-semi-contradictory rules into alignment is understandable. *Noy* deferred to legislative judgment and found that restricting possession of more than four ounces of marijuana was a valid limitation on personal use and possession. In contrast, a completely open-ended in-home (or wherever the marijuana in question was grown) possession limit is problematic from a regulatory standpoint. A theoretically unlimited ceiling presents significant enforcement obstacles and could lead to leakage or diversion of legal marijuana back onto the black market, or otherwise adversely affect demand on the legal market.

### CONCLUSION

A new era of marijuana regulation is taking shape, and once again, Alaska is at the forefront. From the historic formation of the *Ravin* Doctrine in the 1970s, to the adoption of a medical marijuana law in 1998, to the groundbreaking legalization era ushered in by the recent passage of Measure 2, Alaska’s marijuana laws have again reformed ahead of the pace of the rest of the country.

Marijuana legalization plans have also been implemented in Colorado, Washington, and Oregon, and voters in several other states are poised to consider statewide legalization questions when they go to the polls over the next few years. Other state legislatures are considering similar ‘tax and regulate’ plans that would allow adults over twenty-one to lawfully purchase, possess, and use marijuana. In all of these instances, the issues raised by the prospect of legalization are similar: the conflict between state and federal law, the appropriate regulatory and economic controls for implementation, the impact of legalization on the criminal justice system, and the unknown social and public health consequences of allowing a commercial marijuana industry, to name a few. But in Alaska, these issues come with an additional twist: the *Ravin* Doctrine, Alaska’s historic common law marijuana rule, adds a layer of complexity to marijuana regulation that does not exist in other states. *Ravin*, which continues to influence all statewide marijuana law and policy decisions, requires a unique, stringent respect for the privacy rights of marijuana users.

The *Ravin* Doctrine has led to much controversy and confusion throughout its time. *Ravin* has often stood alongside conflicting criminal statutes and state laws which did not permit individuals to obtain or

transport marijuana, and has always existed opposite the federal marijuana prohibition. Now, *Ravin* has essentially been codified and expanded to fit with modern views on marijuana regulation. Measure 2 and changes in federal policy have reconciled most of the legal grey areas that have surrounded *Ravin* for these past 40 years, but beginning to analyze the interplay between these laws yields new unanswered questions—questions that will likely be answered as the regulations governing Alaska’s nascent marijuana industry take hold, as the industry itself develops, and as the legislature and courts have an opportunity respond.