

# The Legalization of Marijuana: A Dead-end or the High Road to Fiscal Solvency?

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## I. INTRODUCTION

California has long engaged in the debate over the legalization of marijuana and has been a wellspring of innovation in marijuana legislation. In 1996, it became the first state to legalize the medical use of marijuana.<sup>1</sup> Since then fourteen other states have followed suit.<sup>2</sup> California is currently considering legislation and ballot initiatives that would legalize all marijuana use, in a manner similar to alcohol.<sup>3</sup> Advocates argue that California is in a state of economic crisis and that the legalization and taxation of marijuana would generate much needed revenue for the State.<sup>4</sup> For the first time, this proposal has a chance of passing. California, come November, may be the first state to legalize marijuana by popular vote.

The goal of this Article is to provide the framework and information necessary for a rational debate on marijuana legalization. Sections II and III of the Article provide background on the current CA state and federal laws and a comparison of the proposed initiatives. As discussed, any measure legalizing marijuana would be at odds with the federal prohibition of marijuana.<sup>5</sup> Thus, before engaging in debate on any of the issues involved, it must be determined whether legalization could even be implemented. Section IV discusses this

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1. MARIJUANA POLICY PROJECT, STATE-BY-STATE REPORT 2008: HOW TO REMOVE THE THREAT OF ARREST at F-15 (2008) [hereinafter MPP REPORT].

2. *Id.* at Table 2.

3. Assem. B. 390, 2009-10 Reg. Sess. (Cal. 2009); The Tax, Regulate, and Control Cannabis Act of 2010, Proposed Initiative Measure 09-0022 (July 15, 2009) [hereinafter TRCCA]; The Regulate, Control and Tax Cannabis Act of 2010, Proposed Initiative Measure 09-0024 (Aug. 4, 2009) [hereinafter RCTCA]; The Common Sense Act of 2010, Proposed Initiative Measure 09-0025 (Aug. 4, 2009) [hereinafter CS].

4. See, e.g., Marcus Wohlsen, *Backers Begin Push to Get Pot Measure on Ballot*, ASSOCIATED PRESS, Sept. 25, 2009, <http://cbs5.com/politics/california.marijuana.legalize.2.1208.570.html>; Jessica Greene, *Want to Legalize Pot? Sign Here, Please*, NBC BAY AREA, Sept. 25, 2009, <http://www.nbcbayarea.com/news/local-beat/Want-to-Legalize-Pot-Sign-Here-Please-61452187.html>.

5. For a more detailed discussion of the preemption issue, see Section IV.

conflict between federal and state laws and the issue of preemption. This Article argues that the main provisions of any legalization measure would be enforceable locally, but that the federal government would likely retaliate by increasing enforcement of the federal marijuana prohibitions. Section V estimates revenue figures for legalization through an analysis of potential costs and income, assuming that the federal government does not interfere with legalization in California. Because of the emphasis placed on the economic impact of legalization, it is essential for people, especially California voters this November, to understand the potential fiscal impact. If legalization is successfully implemented, legalization would generate billions of dollars for California.

This Article looks solely at the legal and economic issues involved in legalization. It does not examine the potential social and health consequences of legalization or the moral issues involved. While these are important considerations, they are too large to adequately discuss in this Article. The Article's goal is simply to provide the framework and information necessary to support a debate on the legal and economic issues.

## II. BACKGROUND

### *A. Federal Marijuana Laws: The Controlled Substances Act*

In 1970, Congress passed the Controlled Substances Act ("CSA"), a comprehensive regulation of the manufacture, sale and use of all drugs.<sup>6</sup> The goal of the CSA was to control the legitimate and illegitimate traffic of controlled substances, and to prevent diversion of these substances from legitimate channels to the illicit drug trade.<sup>7</sup> The CSA consolidated earlier piecemeal federal drug laws into a novel statutory scheme.<sup>8</sup> Prior to 1970, there were multiple laws, each targeting specific types of drugs such as marijuana, cocaine, or heroin.<sup>9</sup> These early laws were structured as revenue regulations, regulating specific drugs by licensing and taxing them, enforced by the Department of Treasury.<sup>10</sup>

The CSA unified federal drug laws under one comprehensive regulatory scheme. It organized all illicit and prescription substances into five schedules.<sup>11</sup> The schedules are set according to six factors: (1) the drug's potential for abuse; (2) current scientific knowledge regarding the drug; (3) the

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6. The Controlled Substances Act, 21 U.S.C. §§ 801-971 (2009).

7. *Raich*, 545 U.S. at 10.

8. *Gonzales v. Raich*, 545 U.S. 1, 12 (2005).

9. *See, e.g.*, Harrison Narcotics Tax Act, ch. 1, 38 Stat. 785 (1914); Marihuana Tax Act of 1937, 50 Stat. 551 (1937).

10. *See, e.g.*, Harrison Narcotics Tax Act, ch. 1, 38 Stat. 785 (1914); Marihuana Tax Act of 1937, 50 Stat. 551 (1937); *Raich*, 545 U.S. at 10.

11. 21 U.S.C. §§ 811-812 (2009).

scope, duration and the significance of abuse; (4) the risk to public health; (5) its psychic or physiological dependence liability; and (6) whether it is already controlled.<sup>12</sup>

Despite the efforts of marijuana activists, marijuana and its active ingredient, tetrahydrocannabinol (THC), are currently classified as schedule I drugs.<sup>13</sup> Schedule I drugs have a high potential for abuse, no accredited medical use, and “lack accepted safety . . . for use under medical supervision.”<sup>14</sup> Other schedule I drugs include heroin, amphetamines, and gamma-Hydroxybutyric acid (GHB).<sup>15</sup> Schedule II drugs also have a high potential for abuse and may lead to severe psychological or physical dependence. However, unlike schedule I drugs, they have a current accepted medical use with severe restrictions.<sup>16</sup> Drugs in schedules III, IV and V all have a currently accepted medical use in the United States and progressively lower potential for abuse and physical or psychological dependence.<sup>17</sup> Marinol, the marketed drug containing synthetic THC, is currently a Schedule III drug.<sup>18</sup> While Marinol is available, it is generally considered to be less effective than marijuana at relieving symptoms because of slow absorption rates and lack of control over dosing.<sup>19</sup>

The CSA regulates and controls the manufacturing, distribution, and dispensing of these controlled substances according to their schedule.<sup>20</sup> For instance, under the CSA, it is illegal for anyone to knowingly or intentionally possess any controlled substance unless obtained pursuant to a doctor’s prescription.<sup>21</sup> The exception for prescriptions, however, does not apply to schedule I drugs such as marijuana since those are considered to have no accepted medical use.<sup>22</sup>

### B. California Marijuana Laws

Similar to federal law, California laws generally prohibit the manufacture, possession, sale, and transportation of marijuana. Under the California Health and Safety Code, possession of marijuana is a misdemeanor punishable by at most one year in jail and a \$500 fine.<sup>23</sup> If a person is charged with possession

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12. § 811(c)-(d).

13. § 812(c)(17).

14. § 812(b)(1).

15. § 812.

16. § 812(b)(2).

17. § 812(b)(3)-(5).

18. MPP REPORT, *supra* note 1, at E-1.

19. *See, e.g., Id.* at C-1 (quoting MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE, INSTITUTE OF MEDICINE, 205-06 (1999)).

20. 21 U.S.C. §§ 821-830.

21. 21 U.S.C. § 844(a).

22. *See* 21 U.S.C. §§ 812 Schedule I (c)(10), 829; *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 492 n.5 (2001).

23. CAL. HEALTH & SAFETY CODE § 11357 (West 2009).

of less than 28.5 grams of marijuana and has been convicted at least three times during a two-year period for possession, they are diverted to education, treatment or rehabilitation programs, instead of facing incarceration or fines.<sup>24</sup> After two years, the defendant can petition for the records of possession arrests and convictions to be destroyed.<sup>25</sup> Cultivation, transportation, importation in-state, sale, possession in order to sell, furnishing, administering, and gifts of marijuana are all felonies punishable by imprisonment in state prison.<sup>26</sup> However, if the person is transporting or giving away less than 28.5 grams, they are only guilty of a misdemeanor and cannot be fined more than \$100.<sup>27</sup> There are similar restrictions under the Vehicle Code.<sup>28</sup>

In 1996, California voters passed Proposition 215, the Compassionate Use Act of 1996 (CUA).<sup>29</sup> The CUA passed with 55.58% approval.<sup>30</sup> This law was the first effective medical marijuana law in the United States.<sup>31</sup> The CUA removed criminal penalties for possession and cultivation by patients whose physicians recommended the medical use of marijuana.<sup>32</sup> It also contains similar exemptions for the patient's primary caregiver if the marijuana was for the personal medicinal use of that caregiver's qualified patient.<sup>33</sup> However, the California Supreme Court has held that the CUA does not grant immunity from arrest or prosecution.<sup>34</sup> It only makes a defense available at trial.<sup>35</sup>

Despite its effectiveness, the CUA neglected to fully provide for its implementation. It contained only vague provisions exempting patients and their caregivers from prosecution. For instance, it did not specify how much marijuana a patient could possess for "personal medical purposes" and what agency would establish guidelines for possession or cultivation. Furthermore,

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24. § 11357(b).

25. CAL. HEALTH & SAFETY CODE § 11361.5.

26. CAL. HEALTH & SAFETY CODE § 11358-60.

27. § 11360(b).

28. *E.g.*, CAL. VEH. CODE § 23222 (possession of less than 1 oz. while driving is a misdemeanor); CAL. HEALTH & SAFETY CODE § 11359 (possession with intent to sell any amount of marijuana is a felony); CAL. HEALTH & SAFETY CODE § 11360 (transporting, selling, or giving away marijuana is a felony; under 28.5 grams is a misdemeanor); CAL. HEALTH & SAFETY CODE § 11361 (selling or distributing marijuana to minors or using a minor to transport, sell or give away marijuana is a felony).

29. Compassionate Use Act, CAL. HEALTH & SAFETY CODE § 11362.5.

30. BILL JONES, SECRETARY OF STATE, STATEMENT OF VOTE: NOVEMBER 5, 1996, viii (1996).

31. MPP REPORT, *supra*, note 1, at F-15. Prior to 1996, a number of states passed laws permitting doctors to prescribe marijuana. *Id.* at 4-5. These laws were ineffective because it was illegal under federal law for doctors to prescribe marijuana and the laws did not provide for a method in which the patients could fill the prescriptions. *Id.* at 4-5.

32. § 11362.5. By requiring a doctor's recommendation, but not a prescription, the law avoided the federal prohibition against writing prescriptions for marijuana which had rendered similar initiatives ineffective. MPP REPORT, *supra*, note 1, at 5.

33. § 11362.5.

34. *People v. Mower*, 28 Cal. 4th 457, 467-74 (2002).

35. *Id.* at 474-75.

while it exempted cultivation from criminal prosecution, it did not exempt distribution to those patients who could not grow their own marijuana.

To remedy these omissions, in 2003, the California legislature passed Senate Bill 420, the Medical Marijuana Program (MMP).<sup>36</sup> The MMP established a confidential, voluntary identification card and registry program for qualified patients managed by the California Department of Health Services and local counties.<sup>37</sup> The goals of this program were to protect patients from “unnecessary arrest and prosecution” and to promote consistent enforcement of medical marijuana laws.<sup>38</sup> Thus, the MMP exempted any person or designated primary caregiver in possession of a valid identification card from arrest or prosecution for possession, transportation, delivery, or cultivation of authorized quantities of marijuana.<sup>39</sup>

The MMP also provided many of the definitions and regulations that the CUA lacked. For instance, it provided that patients and caregivers may possess at least eight ounces of marijuana and either six mature or twelve immature plants per patient.<sup>40</sup> Local governments can increase these amounts upon a doctor’s recommendation that the quantity does not meet the patient’s medical needs, but the limits cannot be lowered.<sup>41</sup> Furthermore, the CUA prohibited the smoking of medical marijuana near schools, in motor vehicles, while operating a boat, and in any place where tobacco smoking is prohibited.<sup>42</sup>

Importantly, the MMP authorized the use of non-profit collectives and cooperatives to furnish and distribute medical marijuana.<sup>43</sup> The introduction of collectives and cooperatives provided a legal procurement option for many patients who were unable to grow their own marijuana. The co-op system has been immensely popular—in 2008 there was estimated to be more than four hundred dispensaries operating throughout California.<sup>44</sup>

Many counties in California are resisting the implementation of the MMP. Initially, those counties refused to issue medical marijuana ID cards.<sup>45</sup> San

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36. Medical Marijuana Program, S.B. 420, 2003-04 Reg. Sess. (Cal. 2003); Medical Marijuana Program, CAL HEALTH & SAFETY CODE § 11362.7-11362.83.

37. §§ 11362.7(b), 11362.71(a), 11362.71(f); *see also* CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, *Medical Marijuana Program*, <http://www.cdph.ca.gov/programs/MMP/Pages/Medical%20Marijuana%20Program.aspx> (last visited Mar. 26, 2010).

38. Medical Marijuana Program, S.B. 420, 2003-04 Reg. Sess. § 1(b)(1)-(2) (Cal. 2003).

39. § 11362.71(e).

40. § 11362.77(a). The constitutionality of these limits on quantity is currently being challenged in *People v. Kelly* and the California Supreme Court has granted the petition for review. *People v. Kelly*, 163 Cal. App. 4th 124 (2008); *People v. Kelly*, 82 Cal. Rptr. 3d 167 (Cal. 2008) (granting petition for review).

41. § 11362.77(b)-(c).

42. § 11362.79.

43. § 11362.775.

44. MPP REPORT, *supra* note 1, at F-17.

45. Solano County Supes Approve Medical Marijuana ID Card Program, KTVU.com, June 23, 2009, <http://www.ktvu.com/news/19840589/detail.html>.

Diego and San Bernardino counties filed lawsuits contending that the ID program was unconstitutional both because it was preempted by the CSA and because it amended an initiative statute.<sup>46</sup> The Court of Appeal rejected both of these arguments and found that the ID program was valid.<sup>47</sup> Both the California and U.S. Supreme Courts denied review.<sup>48</sup> To date, there are still three counties that do not accept applications for medical marijuana ID cards.<sup>49</sup>

Alternatively, some cities and counties are resisting by passing bans and moratoriums on dispensaries. As of November 2009, seventy-three cities and seven counties have moratoriums and 120 cities and seven counties have complete bans.<sup>50</sup> The validity of these moratoriums and bans is currently being litigated in *Qualified Patients Association v. City of Anaheim*.<sup>51</sup>

The MMP was further clarified in August 2008 when California Attorney General Jerry Brown issued medical marijuana guidelines.<sup>52</sup> These guidelines clarify and confirm the law, including the legality of non-profit collectives and cooperatives, and provide guidelines on recordkeeping.<sup>53</sup> Attorney General Brown also recommended that law enforcement officers do not arrest individuals or seize marijuana under federal law if the activity is protected by state law.<sup>54</sup>

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46. *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 467, 484 (Cal. Ct. App. 2008); *see also id.* at 484 (“The proscription embodied in Article II, section 10, subdivision (c) of the California Constitution is designed to ‘protect the people’s initiative powers[.]’ ‘[L]egislative enactments related to the subject of an initiative statute may be allowed’ when they involve a ‘related but distinct area’ or relate to a subject of the initiative that the initiative ‘does not specifically authorize or prohibit.’ (citing Proposition 103 Enforcement Project v. Quackenbush 76 Cal. Rptr. 2d 342, 348 (Cal. Ct. App. 1998); *Mobilepark W. Homeowners Ass’n v. Escondido Mobilepark W.*, 41 Cal. Rptr. 2d 393, 400 (Cal. Ct. App. 1995); *People v. Cooper*, 115 Cal. Rptr. 2d 219, 227 (Cal. Ct. App. 2002))).

For a discussion on preemption, see Section IV. The Federal Issue: Preemption.

47. *Id.* at 483, 485.

48. *San Diego NORML*, 81 Cal. Rptr. 3d 461; *San Bernardino County, California v. Cal.*, 129 S. Ct. 2380 (2009).

49. *See* CALIFORNIA DEPARTMENT OF PUBLIC HEALTH COUNTY HEALTH SERVICES BRANCH, MEDICAL MARIJUANA PROGRAM IMPLEMENTATION SCHEDULE 1 (2009), <http://www.cdph.ca.gov/programs/MMP/Documents/MMP%20IMPLEMENTATION%20CHART%20-%20Nov%202009.pdf>.

50. Americans For Safe Access, Local California Dispensary Regulations, <http://www.safeaccessnow.org/article.php?id=3165> (last visited Mar. 26, 2010) (maintaining an up-to-date list of active marijuana dispensaries in California).

51. *Qualified Patients Association v. City of Anaheim*, No. G040077 (Cal. Ct. App. filed Mar. 13, 2008).

52. ATTORNEY GENERAL EDMUND G. BROWN, CAL. DEPT. OF JUSTICE, GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE (2008), [http://ag.ca.gov/cms\\_attachments/press/pdfs/n1601\\_medicalmarijuanaguidelines.pdf](http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf); MPP REPORT, *supra* note 1, at F-19.

53. MPP REPORT, *supra* note 1, at F-19.

54. *Id.*

### III. THE FUTURE OF CALIFORNIA MARIJUANA LAWS: TAXATION AND LEGALIZATION?

#### A. Legislative Action

Even though California is still facing difficulties with the implementation of the MMP, California is again at the forefront of the legalization movement by considering the taxation and complete legalization. In February 2009, Assemblymember Tom Ammiano introduced legislation to legalize, tax, and regulate marijuana.<sup>55</sup> The Marijuana Control, Regulation, and Education Act, Assembly Bill 390, seeks to treat marijuana similarly to alcohol, taxing sales to adults and prohibiting the sale to and possession by individuals under twenty-one years old.<sup>56</sup> Assemblymember Ammiano introduced the bill as a way to improve public safety and help solve the State's more than \$26 billion budget shortfall.<sup>57</sup> The State Board of Equalization estimated that this measure would generate approximately \$1.4 billion dollars in revenue annually through a sales tax and a \$50 per ounce levy.<sup>58</sup> These values were based on an estimated consumption of sixteen million ounces annually in California, accounting for changes in price and consumption due to legalization.<sup>59</sup> The proposed bill requires that the funds be used only for education, awareness, and rehabilitation programs.<sup>60</sup>

On a local level, Oakland, California passed a law in July 2009 exemplifying California's innovative approach to marijuana legislation; it imposed a 1.8% gross receipt tax on medical marijuana sold in the city, becoming the first city to directly tax medical marijuana.<sup>61</sup> The owners and managers of Oakland's four medical marijuana dispensaries proposed the measure.<sup>62</sup> The Oakland City Council approved the measure in April and it was passed in the July election with the approval of 80% of the voters.<sup>63</sup> This tax supplements the current sales tax, and is similar to the "sin taxes" on

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55. Assem. B. 390, 2009-10 Reg. Sess. (Cal. 2009).

56. *Id.*

57. Quintin Meche, Ammiano Proposes Bill To Tax And Regulate Marijuana, ASSEMBLYMEMBER TOM AMMIANO REPRESENTING THE 13TH ASSEMBLY DISTRICT – WELCOME, Feb. 23, 2009, [http://democrats.assembly.ca.gov/members/a13/News\\_Room/Press/20090223AD13PR01.aspx](http://democrats.assembly.ca.gov/members/a13/News_Room/Press/20090223AD13PR01.aspx);

David Sutherland, It's High Time We Tax Pot, NBC BAY AREA, July 16, 2009, <http://www.nbcbayarea.com/news/local-beat/Lawmaker-Its-High-Time-We-Taxed-Pot.html>.

58. STATE BOARD OF EQUALIZATION, STAFF LEGISLATIVE BILL ANALYSIS (DRAFT): ASSEMBLY BILL 390 at 6-7 (2009) [hereinafter BOE ANALYSIS: A.B. 390].

59. *Id.* at 6-7.

60. *Id.* at 5.

61. Dan Simon, Oakland, California, Passes Landmark Marijuana Tax, CNN.COM, July 22, 2009, <http://edition.cnn.com/2009/POLITICS/07/22/california.pot.tax/>; Stu Woo, *Oakland Council Backs a Tax on Marijuana*, WALL ST. J., Apr. 30, 2009, at A-4.

62. Simon, *supra* note 61; Woo, *supra* note 61.

63. Simon, *supra* note 61; Woo, *supra* note 61.

cigarettes and alcohol.<sup>64</sup> It is expected to generate at least \$400,000 and possibly more than \$1 million annually in revenue.<sup>65</sup>

*B. The People's Choice: Statewide Ballot Initiatives*

While California state and local governments are considering legalizing and taxing marijuana, the issue will also be considered by the citizens of California through three legalization initiatives competing to be included on the November 2010 ballot: The Tax, Regulate, and Control Cannabis Act of 2010; The Regulate, Control, and Tax Act of 2010; and The Common Sense Act of 2010. All three measures have been certified by the Secretary of State and need 433,971 signatures from registered voters by February 2010 in order to qualify for the November ballot.<sup>66</sup>

There have been many ballot initiatives concerning legalization of marijuana or medical marijuana over the years, but there have been none since Proposition 215, The Compassionate Use Act of 1996.<sup>67</sup> The last initiative legalizing *all* marijuana use to qualify for the ballot was Proposition 19 in 1972 and it was rejected by voters.<sup>68</sup>

It is likely that at least one of the measures will qualify for the ballot and pass in November. Marijuana use is widespread and acceptance of marijuana use has increased in both California and the United States. For instance, a 2009 RAND study found that more than 25 million Americans have used marijuana in the past year.<sup>69</sup> Likewise, the 2007 National Survey of Drug Use and Health found that about 40% of Americans have used marijuana before.<sup>70</sup> It is estimated that there are at least 190,000 medical marijuana patients in California and that 16 million ounces of marijuana are consumed annually in California, both legally and illegally.<sup>71</sup>

Furthermore, there has been a general increase in approval for the legalization of marijuana nationwide. Gallup has tracked the nation's opinion

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64. CAL. STATE BOARD OF EQUALIZATION, SPECIAL NOTICE: IMPORTANT INFORMATION FOR SELLERS OF MEDICAL MARIJUANA (2007); *see also* BOE ANALYSIS: A.B. 390, *supra* note 58.

65. Simon, *supra* note 61; Woo, *supra* note 61.

66. Bob Egelko, *State OKs Petition Drive for Pot Legalization*, S.F. CHRON, Sept. 23, 2009.

67. CAL. SECRETARY OF STATE, A HISTORY OF CALIFORNIA INITIATIVES: DECEMBER 2002, at 8 (2002). *But cf.* CAL. SECRETARY OF STATE, A HISTORY OF CALIFORNIA INITIATIVES: DECEMBER 2002, at 51 (2002) (showing that in 1997, there was an initiative that failed to qualify for the ballot that concerned the industrial use of hemp, a product of the marijuana plant).

68. CAL. SECRETARY OF STATE, A HISTORY OF CALIFORNIA INITIATIVES: DECEMBER 2002 25 (2002).

69. BEAU KILMER & ROSALIE LICCARDO PACULA, RAND CORPORATION, TECHNICAL REPORT: ESTIMATING THE SIZE OF THE GLOBAL DRUG MARKET (REPORT 2) 10 (2009).

70. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., U.S. DEPT. OF HEALTH & HUMAN SERVICES, 2007 NATIONAL SURVEY OF DRUG USE AND HEALTH Table 1.24B (2008), <http://www.oas.samhsa.gov/NSDUH/2k7NSDUH/tabs/Sect1peTabs24to28.pdf>.

71. MPP REPORT, *supra* note 1, at F19; BOE ANALYSIS: A.B. 390, *supra* note 58, at 6.

on this subject since October of 1969.<sup>72</sup> In 1969, only 12% of Americans approved legalization. In 2003, 36% supported legalization, and in 2009, 44% agreed that marijuana should be legalized. Other polls have found similar or higher approval rates. In a 2002 Time/CNN poll, 72% of Americans agreed that people should not be incarcerated for simple marijuana possession, only fined.<sup>73</sup>

California polling data also shows increasing support and acceptance of marijuana. Field Research polls have found that voter support for medical marijuana has increased from 56% in 1996 to 74% in 2004.<sup>74</sup> In addition, 50% of those polled in 2004 believed that marijuana is no more dangerous than alcohol.<sup>75</sup> This represents an increase from 44% in 1983 and 16% in 1969.<sup>76</sup> More important for passage of the present initiatives, a 2009 Field poll of California voters found that 56% support legalizing and taxing marijuana.<sup>77</sup>

The actions of state legislatures also reflect a trend towards degrees of legitimization. Since 1978, thirty-six states have enacted some form of medical marijuana laws.<sup>78</sup> In the 2007-2008 legislative sessions alone, at least seventeen state legislatures considered bills reducing or eliminating penalties for, or expanding access to, medical marijuana.<sup>79</sup> A number of them were successful.<sup>80</sup>

While all of the pending initiatives would legalize marijuana, they differ greatly in the method of implementation. With the current support for legalization, it is especially important for voters to understand the differences and implications of these three measures.

### *1. Tax, Regulate, and Control Cannabis Act of 2010*

The Tax, Regulate, and Control Cannabis Act of 2010 (TRCCA), proposed by three Northern California criminal defense attorneys,<sup>81</sup> was the first legalization initiative certified for signature collection for 2010 ballot.<sup>82</sup> This measure would repeal all existing criminal laws relating to cannabis activities except California Vehicle Code § 23152 (driving while impaired) and

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72. LYDIA SAAD, GALLUP, U.S. SUPPORT FOR LEGALIZING MARIJUANA REACHES NEW HIGH (2009).

73. Joel Stein, *The New Politics of Pot*, TIME, Oct. 27, 2002, available at <http://www.time.com/time/covers/1101021104/story.html>.

74. Bob Egelko, *Medical Pot Law Gains Acceptance*, S. F. CHRON., Jan. 30, 2004.

75. *Id.*

76. *Id.*

77. THE FIELD POLL: WHILE CALIFORNIA VOTERS PREFER SPENDING CUTS TO TAX INCREASES TO RESOLVE THE STATE BUDGET DEFICIT, MAJORITIES OPPOSE CUTBACKS IN TEN OF TWELVE SPENDING CATEGORIES, FIELD RESEARCH CORPORATION (2009).

78. MPP REPORT, *supra* note 1, at 1, 10.

79. *Id.* at 12, L-1-L-9.

80. *Id.*

81. Wohlsen, *supra* note 4.

82. See TRCCA, Proposed Initiative Measure 09-0022 (July 15, 2009).

California Penal Code § 272 (contributing to the delinquency of a minor).<sup>83</sup> It would permit the possession, use, cultivation, transportation and sale of marijuana and marijuana products for those over the age of 21.<sup>84</sup> It would prohibit furnishing marijuana to individuals under 21 years of age except for medical use, and it would also prohibit smoking near schools, on a school bus, or by the operator of a motorized vehicle, vessel, or aircraft.<sup>85</sup> It also prohibits the sale of marijuana to locations outside of California where such sales are prohibited by federal or international law.<sup>86</sup> The initiative provides general guidelines for these prohibitions, but leaves most penalties for the legislature to determine.<sup>87</sup>

Under this initiative, local governments would be prohibited from banning conduct authorized by the proposed law<sup>88</sup>—targeting cities and counties that have resisted implementing the CUA and MMP. It would prevent local governments from banning dispensaries or prohibiting the sale of marijuana within city limits.

The TRCCA does not provide all of the details of its implementation. Instead, it requires the government “to adopt reasonable laws to permit, license, control and issue taxes for the commercial cultivation and sale of cannabis,” including everything from non-smoking ordinances to environmental regulations to business permits to labeling requirements.<sup>89</sup> This amounts to a great deal of complex and potentially highly controversial regulations that must be created and approved by the legislature, state agencies, and local governments.

The TRCCA also requires that within one year the Legislature promulgate regulations taxing all marijuana that is commercially cultivated, distributed, or sold.<sup>90</sup> The tax must be at least \$50 per ounce and be spent on public education, health care, environmental programs, public works and state parks.<sup>91</sup> The tax regulations must also include provisions to foster environmentally responsible practices.<sup>92</sup> The economic implications, including those resulting from taxation, are discussed in Section V.

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83. *Id.* at §§ 4-11300(b)-(c).

84. *Id.* at § 4-11300.

85. *Id.* at §§ 2(a), 4-11304(a), (c).

86. *Id.* at § 4-11300(d).

87. *See, e.g., id.* at § 4-11304(a) (“Penalties . . . shall be consistent with penalties for similar alcohol related offenses in a manner to be determined by the Legislature.”); *id.* at § 4-11304(b) (“Penalties to the minor for cannabis related offenses shall be non-custodial as determined by the Legislature.”); *id.* at § 4-11304(d) (“[U]nauthorized sale of cannabis shall be subject civil and regulatory penalties to be determined by the Legislature.”).

88. *Id.* at § 4-11301(c).

89. *Id.* at §§ 2(d), 4-11301.

90. *Id.* at § 4-11302.

91. *Id.* at § 4-11302(a), (d).

92. *Id.* at § 4-11302(c).

The TRCCA also states that the entire Act will apply retroactively.<sup>93</sup> This has two very serious consequences. First, retroactive application will result in the expunging of all previous marijuana convictions.<sup>94</sup> Any person in jail or prison or on parole or probation for marijuana related offenses would be released.<sup>95</sup> Any person who has a past conviction for a marijuana offense would have that record expunged.<sup>96</sup> Thus, this provision would help reduce overcrowding in the correctional system and decrease the number of people that Governor Schwarzenegger needs to release under the *Coleman-Plata* decision.<sup>97</sup>

Second, the TRCCA prohibits discrimination or denial of any right or privilege in the context of, “but not limited to, healthcare, education, employment, retirement, and insurance, for conduct permitted by this Act.”<sup>98</sup> This provision, if applied retroactively to all cases, has the potential to create a landslide of litigation, for instance, where people have not been hired or who have been fired because of drug test results or marijuana-related conviction, expelled from school because of possession, denied insurance coverage because of a history of drug use, etc. Even if the TRCCA were not applied retroactively, it is unlikely that this discrimination would stop immediately.

If approved by voters, provisions of the TRCCA may be legally challenged due to the manner in which it modifies California marijuana laws.<sup>99</sup> First, instead of directly amending California Health & Safety code sections, it simply provides a nonexclusive list of affected laws.<sup>100</sup> As a result, this provision may be found unconstitutional.<sup>101</sup> Even if it is not found unconstitutional, there is likely to be litigation regarding the scope of affected laws. This measure repeals all state laws that prohibit marijuana-related activities and removes marijuana from any statutes regulating controlled substances, including those enacted in the future.<sup>102</sup> At the very least, there is likely to be litigation over which laws are repealed or amended, turning on whether the laws in question are regulatory or prohibitory. Specifically, the MMP is likely to be challenged because it regulates and prohibits certain

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93. *Id.* at § 4-11300(e).

94. *Id.*

95. *Id.*

96. *Id.*

97. *See generally* *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2009 U.S. Dist. LEXIS 67943 (E.D. Cal., Aug. 4, 2009); *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2009 U.S. Dist. LEXIS 84445 (N.D. Cal., Aug. 26, 2009).

98. TRCCA § 4-11300(f).

99. MAC TAYLOR & MICHAEL C. GENEST, LEGISLATIVE ANALYST OFFICE, 2009 INITIATIVE ANALYSIS: A.G. FILE NO. 09-0022, at 3 (2009) [hereinafter LAO Analysis: TRCCA].

100. TRCCA § 4-11300(b).

101. Legislative Analyst’s Office, Initiative Analysis: Measure 09-0022 at 2 (August 19, 2009).

102. TRCCA § 4-11300(b).

marijuana-related activities.<sup>103</sup> It will have to be determined whether this initiative will cause the elimination of the entire medical marijuana system, repeal of sections of the MMP and which sections, or if the MMP will not be affected at all.

## 2. *The Regulate, Control and Tax Cannabis Act of 2010*

The Regulate, Control and Tax Cannabis Act of 2009 (RCTCA) was inspired by Oakland's tax on medical marijuana dispensaries and sponsored by Richard Lee, Executive Director of Oaksterdam University,<sup>104</sup> and Jeffrey Way Jones, former Director of Oakland Cannabis Buyers' Cooperative.<sup>105</sup> It also has the backing of a prominent state politician, former state Senate President Pro Tem Don Perata.<sup>106</sup>

The goal of this initiative is to create a legal regulatory framework for governing marijuana, similar to the regulation of alcohol, but stricter.<sup>107</sup> The theory behind the initiative is that giving California control over marijuana-related activities will, among other things, ensure access and quality for those patients that need it, prevent access by minors, eliminate the dangerous black market for marijuana, allow local governments to prohibit the sale within city limits, and generate billions of dollars to fund state and local governments.<sup>108</sup>

Unlike the other marijuana measures, the RCTCA does not contain a blanket repeal of all marijuana provisions. Instead, its intended effect is to limit the application and enforcement of current marijuana laws.<sup>109</sup> It authorizes any person twenty-one years old and older to personally possess, share, or transport up to one ounce of marijuana that is not for sale.<sup>110</sup> Adults may consume marijuana both in private premises and licensed premises open to the public.<sup>111</sup> However, the initiative prohibits the consumption while operating a motor vehicle.<sup>112</sup> Smoking marijuana while minors are present is

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103. Medical Marijuana Program, CAL HEALTH & SAFETY CODE §§ 11362.7-11362.83 (2009).

104. Oaksterdam University is a trade school educating students on all aspects of the cannabis trade. There are classes on topics such as law, politics, history, cooking, horticulture, science, economics and business. The school was started in Oakland, California, but has expanded to Los Angeles, California, Sebastapol, California, and Ann Arbor, Michigan. *See generally* Oaksterdam University—Quality Training For the Cannabis Industry, <http://www.oaksterdamuniversity.com/> (last visited Mar. 26, 2010).

105. Jessica Greene, *Want to Legalize Pot? Sign Here, Please*, NBC BAY AREA, Sept. 25, 2009, <http://www.nbcbayarea.com/news/local-beat/Want-to-Legalize-Pot-Sign-Here-Please-61452187.html>.

106. *Id.*; Wohlsen, *supra* note 4.

107. RCTCA at § 2(B).

108. *Id.*

109. *Id.* at § 2(C)(1).

110. *Id.* at § 3-11300(a)(i).

111. *Id.* at § 3-11300(b).

112. *Id.* at § 3-11300(c)(iii).

also prohibited.<sup>113</sup> The RCTCA permits cultivation on private property for personal use, but land used for cultivation cannot exceed an area of twenty-five square feet.<sup>114</sup> In addition, it explicitly leaves certain regulations unaffected including, but not limited to, those related to possession on school grounds, use in the workplace, driving while under the influence, or contributing to the delinquency of a minor.<sup>115</sup> The RCTCA has a much broader list of such exemptions than the TRCCA, which only exempts driving under the influence and contributing to the delinquency of a minor from its blanket repeal.<sup>116</sup>

In an interesting twist, the RCTCA delegates regulatory decisions and control to local governments rather than the state government.<sup>117</sup> Local governments would have authority over cultivation, distribution, taxation, sale, possession for sale and, consumption within licensed premises.<sup>118</sup> They also may increase the limits on the sale, personal possession and cultivation, and commercial cultivation and transportation of marijuana.<sup>119</sup> This delegation of regulatory power would likely result in “wet” and “dry” counties. However, the RCTCA does permit state regulation if the legislature passes an act amending the initiative.<sup>120</sup>

The RCTCA prohibits state and local governments from attempting to, threatening to, or actually seizing or destroying marijuana plants or seeds if they are lawfully cultivated, transported, possessed, sold or consumed.<sup>121</sup>

Under this initiative criminal penalties involving marijuana are maintained but used only when minors are involved. The RCTCA prohibits a host of acts involving minors with penalties dependent on the age of the offender and the minor. For instance, it forbids individuals over the age of 18 to offer, furnish, administer or give marijuana to a minor.<sup>122</sup> The punishment for a violation is a state prison term of three, five, or seven years, if the minor is under fourteen years old, and three, four, or five years, if the minor is between fourteen and eighteen years old.<sup>123</sup> In addition, the RCTCA punishes anyone twenty-one years or older who offers, furnishes, administers, or gives marijuana to a person between the ages of eighteen and twenty-one with up to six months in jail and a \$1,000 fine.<sup>124</sup> It also proscribes the sale of marijuana to a minor, inducing a minor to use marijuana, and the use of a minor in the transportation, preparation, gift, or sale of marijuana by any individual over the age of 18

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113. *Id.* at § 3-11300(c)(iv).

114. *See id.* at § 3-11300(a)(ii)-(iv).

115. For a complete list of unaffected code sections, see *id.* at § 2(C)(2).

116. TRCCA § 4-11300(c).

117. RCTCA § 3-11301.

118. *Id.* at § 3-11301.

119. *Id.* at § 3-11301(a).

120. *Id.* at § 5(b).

121. *Id.* at § 4-11303.

122. *Id.* at § 4-11361(a)-(b).

123. *Id.*

124. *Id.* at § 4-11361(c).

years, punishable by a state prison term of three, five, or seven years.<sup>125</sup> There are additional penalties for those authorized to sell marijuana under the Act who negligently offer, furnish, administer, or give marijuana to a person under twenty-one years old.<sup>126</sup> If the authorized seller does so, he or she cannot own, operate, be employed by, assist, or enter any licensed premises for one year. These provisions are much stricter than the corresponding regulations for alcohol; punishing the individual who actually commits the act, not just the license holder, and providing more penalty options.<sup>127</sup>

The RCTCA does not intend to affect code sections concerning the use of controlled substances in the workplace or by persons whose jobs involve public safety.<sup>128</sup> However, it will likely do so, but in a manner much more limited than the other initiatives. The RCTCA prohibits the punishment, fine, discrimination against, or denial of any right or privilege because of conduct authorized under this initiative.<sup>129</sup> It provides an exception, though, for situations where consumption actually impairs job performance.<sup>130</sup> This protection is both broader than the TRCCA by protecting individuals who would use marijuana, and narrower by protecting employers rights and ensuring a functioning and effective workforce. The TRCCA lacks this nuanced approach and expands its consequences with its retroactive application.<sup>131</sup>

The RCTCA appears well thought-out and relatively conservative in its approach to legalization. It is not a typical legalization statute in that it provides a stricter framework than alcohol regulations, places limits on quantities of marijuana, retains many existing marijuana laws, and mandates strict punishments for any violations involving minors. It allows for greater flexibility in the regulations throughout the state by allocating authority to local governments to create regulations that meet the needs and opinions of local communities. In addition, since local governments would be able to impose taxes and fees, legalization of marijuana through the RCTCA could generate revenue to help cope with shortfalls caused by recessions and the state budget

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125. *Id.* at § 4-11361(a).

126. *Id.* at § 4-11361(d).

127. *See* CAL. BUS. & PROF. CODE § 25658 (2009). The criminal penalties for the selling alcohol to a minor are a \$250 fine and/or twenty-four to thirty-two hours of community service for the first offense. The statute does not provide for jail time unless the alcohol is given away and causes grievous bodily harm. CAL. BUS. & PROF. CODE § 25658. The California Department of Alcohol and Beverage Control also can issue administrative penalties against the license owner. These are discretionary and decided on a case by case basis. They include a \$750-\$3,000 fine, fifteen day license suspension, or probation, for the first offense. For the second offense within three years, there is a mandatory license suspension of twenty-five days and only on the third offense within three years might the license be revoked. *See* CAL. DEPT. OF ALCOHOL & BEVERAGE CONTROL, PENALTY GUIDELINES 1-2 (2003).

128. RCTCA § 2(C)(2).

129. *Id.* at § 3-11304(c).

130. *Id.*

131. TRCCA, Proposed Initiative Measure 09-0022 (July 15, 2009) § 4-11300(e).

crisis. It is also forward-thinking in that it provides a process to legally amend the initiative.<sup>132</sup> This last provision is lacking in the other ballot initiatives and is important since a legislative act cannot amend a proposition passed by voters without such a provision.<sup>133</sup>

### 3. *Common Sense Act of 2010*

The Common Sense Act of 2010 (CS) was sponsored by John Donohue of Long Beach, California.<sup>134</sup>

This initiative is very simple in its approach to legalization. Effective immediately upon passage, it repeals existing prohibitions on marijuana use, cultivation, possession, transportation, and sale.<sup>135</sup> It prohibits all government entities in California from spending any funds enforcing any law that prohibits these marijuana-related activities.<sup>136</sup> Under this measure, all levels of the government, including federal, would be authorized to tax the manufacture, sale, and use of marijuana.<sup>137</sup> The act explicitly instructs the state legislature to enact taxes and regulations within one year, using the wine industry as a model.<sup>138</sup> It also instructs all United States Congress members from California to work actively to remove marijuana from the schedule of controlled substances under the CSA and vote against any funding that would be used to enforce laws prohibiting marijuana or hemp products.<sup>139</sup>

While this measure would go into effect immediately upon voter approval, the government would have up to a year to enact regulations concerning the cultivation, transportation, sale, possession, and consumption of marijuana.<sup>140</sup> It could feasibly take the Legislature the entire year to develop, negotiate, and pass regulations and during that period of time, marijuana would be decriminalized, but not regulated. This would be the case with all of three proposed measures, but would have more severe implications for this one. The CS's repeal does not contain any of the exceptions for laws concerning vehicles or minors like the other measures do.<sup>141</sup> It does not prohibit the sale, possession, or use of marijuana by or around children. Perhaps this is because it envisions the Legislature enacting new provisions of this nature, just as it has

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132. RCTCA § 5.

133. *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 467 (Cal. Ct. App. 2008).

134. *Cash for Kush?*, CANNABIS NEWS, Oct. 31, 2009, <http://cannabisnews.com/news/25/thread25125.shtml>; Wohlsen, *supra* note 4.

135. CS, Proposed Initiative Measure 09-0025, §3(A), 6(A) (Aug. 4, 2009).

136. CS, §3(C).

137. CS § 3(B).

138. CS §§ 4, 6(B).

139. CS § 5.

140. CS §§ 4, 6.

141. For the exceptions in the other initiatives, see RCTCA, Proposed Initiative Measure 09-0024 (Aug. 4, 2009) § 2(C)(2); TRCCA, Proposed Initiative Measure 09-0022 (July 15, 2009) § 4-11300(c).

for tobacco and alcohol. However, until the Legislature enacts regulations, these activities would be considered legal.<sup>142</sup>

Furthermore, unlike the other measures, this initiative does not explicitly prohibit the use of marijuana by minors. It does instruct the legislature to formulate regulations over marijuana related activity by taking into account alcohol and tobacco regulations and using the wine industry as a model.<sup>143</sup> The legislature would likely interpret this instruction to permit them to pass legislation prohibiting use by minors, either those minors under eighteen or twenty-one years old. Any legislation placing such limits, however, would be open to constitutional challenge; an initiative cannot be amended by a legislative act unless the initiative expressly permits the Legislature to do so.<sup>144</sup> The CS does not include a provision explicitly permitting amendments by legislative act and opponents would likely argue that legislation prohibiting the use of marijuana by minors violates the California Constitution by legislatively amending the initiative without voter approval. In fact, the constitutional challenge to the MMP's quantity limits in the *Kelly* case is based on this same theory.<sup>145</sup>

#### IV. THE FEDERAL ISSUE: PREEMPTION

There currently exists a conflict between Federal and California state laws concerning marijuana. Under Federal law, there is a blanket prohibition of all marijuana-related activities, but California permits these activities for medical purposes.<sup>146</sup> If any of these ballot initiatives pass and marijuana is legalized under California law, this conflict will be even greater. This is a classic conflict over balancing federal power and states' rights: who has the power to regulate this conduct and which law is controlling? This conflict is governed by the Commerce and Supremacy Clauses of the Constitution.

##### A. Commerce Clause

The United States Constitution grants certain powers to the federal government. One of those powers, under the Commerce Clause, is the authority to regulate interstate commerce.<sup>147</sup> All powers not enumerated in the Constitution are reserved to the States through the Tenth Amendment.<sup>148</sup>

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142. See CS § 3(A) (repealing the prohibition on use, cultivation, possession, sale, and transportation); CS § 6(A) (establishing that the provisions of the CS will become effective immediately).

143. CS § 4.

144. CAL. CONST. art. II, § 10(c); see also *People v. Kelly*, 77 Cal. Rptr. 3d, 397 (Cal. Ct. App. 2008).

145. See *Kelly*, 77 Cal. Rptr. 3d at 394-401.

146. 21 U.S.C. § 801 (2009); CAL HEALTH & SAFETY CODE §§ 11362.5, 11362.7-11362.83 (2009).

147. U.S. CONST. art. I, § 8, cl. 3.

148. U.S. CONST. amend. X.

Congress clearly has the power to regulate the interstate commerce of marijuana. In the 2005 case, *Gonzales v. Raich*, the Supreme Court held that the federal government also had the power under the Commerce Clause to regulate *intrastate* marijuana activities.<sup>149</sup> Acting under the CSA, the Drug Enforcement Administration (“DEA”) raided the homes of two California residents seizing and destroying marijuana plants grown for their personal medical use in compliance with state laws.<sup>150</sup> These individuals sought an injunction to prevent enforcement of the CSA, challenging the authority of the federal government to interfere with their purely local activities.<sup>151</sup> The Supreme Court held that Congress had a rational basis for believing that the local cultivation and use of marijuana, in the aggregate, could substantially affect interstate commerce.<sup>152</sup> As a result, the Court held that the federal government has the authority under the Commerce Clause to prohibit local cultivation and use of marijuana ancillary to comprehensive legislation to regulate the interstate market in marijuana.<sup>153</sup>

### B. Preemption

Since Congress has the power to regulate both interstate and intrastate marijuana-related activities, the issue becomes whether that federal regulatory authority may preempt state laws.<sup>154</sup> The Supremacy Clause of the United States Constitution provides that federal law is controlling whenever there is a conflict between state and federal laws.<sup>155</sup> In a federal system, however, states are given great latitude in legislating.<sup>156</sup> A Supremacy Clause analysis begins with an assumption that Congress does not intend to displace the state law.<sup>157</sup>

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149. *Gonzales v. Raich*, 545 U.S. 1, 1 (2005).

150. *Id.* at 6-7.

151. *Id.* at 7-8.

152. *Id.* at 22.

153. *Id.*; see also Allison J. Garton, *Constitutional Law—Commerce Clause—Regulation of Intrastate Cultivation of State-Authorized Medical Marijuana Is within Congress’s Commerce Power*, 36 CUMB. L. REV. 179 (2006).

154. This issue was not examined in *Gonzales v. Raich*. The *Raich* court examined the narrow issue of whether Congress had the power under the Commerce Clause “to prohibit the local cultivation and use of marijuana in compliance with California law.” *Raich*, 545 U.S. at 5. While the decision mentions the Supremacy Clause, it made no finding on the issue of preemption. See *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 656, 673-75 (Cal. Ct. App. 2007).

155. U.S. CONST. art. VI, § 2; *Raich*, 545 U.S. at 29.

156. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)); *City of Garden Grove*, 68 Cal. Rptr. 3d at 674-65. “To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. 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.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

157. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009); *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 475-76

When Congress legislates in a field traditionally occupied by the states, the presumption is even stronger, and the assumption is applied unless there is a “clear and manifest purpose of Congress” to the contrary.<sup>158</sup> Throughout this analysis, “the purpose of Congress is the ultimate touchstone.”<sup>159</sup>

There are four types of preemption: express, field, obstacle, and conflict.<sup>160</sup> Express preemption occurs when Congress explicitly defines the extent to which a federal law preempts state law.<sup>161</sup> Field preemption occurs when Congress enacts a legislative scheme with the implied intent of preempting all state laws on the issue.<sup>162</sup> Courts usually find field preemption when the legislation is “sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.”<sup>163</sup> Obstacle preemption occurs when enforcement of the state law would hinder the achievement of the full purposes and objectives of Congress.<sup>164</sup> Lastly, federal law preempts state law under conflict preemption if the state and federal laws conflict in a manner that prevents simultaneous compliance with both laws.<sup>165</sup>

The California Court of Appeal for the Fourth District has considered the issue of whether the CSA preempts the MMP twice.<sup>166</sup> In *County of San Diego v. San Diego NORML*, the court found that the CSA did not preempt the MMP identification card system, and in *City of Garden Grove v. Superior Court*, it found that the Supremacy Clause did not prohibit the return of marijuana to a qualified patient whose possession is legal under state law.<sup>167</sup> The California Supreme Court and the United States Supreme Court refused to review either case.<sup>168</sup> These two decisions provide a guide for analyzing a possible

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(Cal. Ct. App. 2007); *S. Blasting Servs. Inc. v. Wilkes County, N.C.*, 288 F.3d 584, 589 (4th Cir. 2002); *Garden Grove*, 68 Cal. Rptr. 3d at 674-75.

158. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *San Diego NORML*, 81 Cal. Rptr. 3d at 478 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009).

159. *San Diego NORML*, 81 Cal. Rptr. 3d at 475 (quoting *Retail Clerks Int’l Ass’n, Local 1625 v. Schermerborn*, 375 U.S. 96 103 (1963)); *S. Blasting Servs.*, 288 F.3d at 590.

160. *San Diego NORML*, 81 Cal. Rptr. 3d at 476; *S. Blasting Servs.*, 288 F.3d at 590.

161. *San Diego NORML*, 81 Cal. Rptr. 3d at 476; *S. Blasting Servs.*, 288 F.3d at 590.

162. *San Diego NORML*, 81 Cal. Rptr. 3d at 476; *S. Blasting Servs.*, 288 F.3d at 590.

163. *San Diego NORML*, 81 Cal. Rptr. 3d at 476; *see also S. Blasting Servs.*, 288 F.3d at 590.

164. *San Diego NORML*, 81 Cal. Rptr. 3d at 476; *see also Boultinghouse v. Hall*, 583 F. Supp. 2d 1145, 1157 (C.D. Cal. 2008).

165. *San Diego NORML*, 81 Cal. Rptr. 3d at 476; *see also Boultinghouse*, 583 F. Supp. 2d at 1157.

166. *San Diego NORML*, 81 Cal. Rptr. 3d at 461; *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 678 (2007).

167. *San Diego NORML*, 81 Cal. Rptr. 3d at 461; *City of Garden Grove*, 68 Cal. Rptr. 3d at 678.

168. Review denied by *County of San Diego v. San Diego NORML*, 2008 Cal. LEXIS 12220 (Cal., Oct. 16, 2008); certiorari denied by *San Diego County v. San Diego Norml*, 129 S.Ct. 2380 (2009); certiorari denied by *San Bernardino County v. Cal.*, 2009 U.S. LEXIS 3594 (U.S., May 18, 2009); review denied by *Garden Grove, City of v. S.C. (Kha)*, 2008 Cal. LEXIS 3517 (Cal.,

challenge to an initiative legalizing marijuana.

The CSA would not preempt any state law legalizing marijuana under either an express or field preemption analysis. When passing the CSA, Congress neither expressly preempted state regulations of controlled substances nor intended to preempt the field of controlled substances regulation.<sup>169</sup> In fact, the Act explicitly provides for state regulation.<sup>170</sup> As the CSA's preemption provision, Section 903, states:

No provision of [the CSA] shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together.<sup>171</sup>

Obstacle and conflict preemption analyses are not as lucid, partially because these two separate issues are merged by many courts. Section 903 clearly establishes that preemption only occurs when “there is a *positive conflict* between [the state and federal law] so that the two cannot consistently stand together.”<sup>172</sup> Obstacle preemption occurs when the state law only hinders the objectives of Congress, but conflict preemption requires the much higher standard of a conflict such that compliance with both laws is impossible.<sup>173</sup> In interpreting a similar provision in another federal law, the U.S. Court of Appeals for the Fourth District required a direct and positive conflict, not just hindering the objectives of Congress.<sup>174</sup> Based on this language and reasoning, the court in *San Diego NORML* held that the CSA “intended to supplant only state laws that could not be adhered to without violating the CSA.”<sup>175</sup> Following the authority of *San Diego NORML*, it is likely that California courts would continue to follow this reasoning and apply a conflict preemption analysis.

In the unlikely circumstances that the courts do conduct an obstacle

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Mar. 19, 2008); certiorari denied by *Grove v. Superior Court of Ca*, 2008 U.S. LEXIS 8568 (U.S., Dec. 1, 2008).

169. *Boultinghouse v. Hall*, 583 F. Supp. 2d 1145, 1157 (C.D. Cal. 2008); *see also* *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006); *S. Blasting Servs. v. Wilkes County, N.C.*, 288 F.3d 584, 590 (4th Cir. 2002) (holding that a provision similar to section 903 found in another law indicated that Congress did not expressly or impliedly preempt state laws in the field).

170. *Gonzales v. Oregon*, 546 U.S. at 251; *San Diego NORML*, 81 Cal. Rptr. 3d at 461; *City of Garden Grove*, 68 Cal. Rptr. 3d at 656.

171. 21 U.S.C. § 903 (2009).

172. § 903 (emphasis added).

173. *San Diego NORML*, 81 Cal. Rptr. 3d at 476; *see also* *Boultinghouse*, 583 F. Supp. 2d at 1157.

174. *S. Blasting Servs.*, 288 F.3d at 590.

175. *San Diego NORML*, 81 Cal. Rptr. 3d at 479; *c.f.* *Southern Blasting Services*, 288 F.3d 584; *Levine v. Wyeth*, 183 Vt. 76 (2006).

preemption analysis, all of the proposed initiatives would likely be preempted by the CSA. As stated above, obstacle preemption occurs when enforcement of the state law would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>176</sup> However, not every state law posing an impediment is preempted. Obstacle preemption only occurs when “a ‘significant conflict’ exists between an identifiable ‘federal policy or interest and the [operation] of state law,’ or the application of state law would ‘frustrate specific objectives.’”<sup>177</sup> Furthermore, the Supreme Court has held that when Congress legislates in a field traditionally occupied by state law, such as the regulation of health and safety, preemption requires a stronger conflict between the federal policy and state law.<sup>178</sup> Marijuana regulation is a field that states have traditionally regulated.<sup>179</sup>

Even under a stricter standard, it is very likely that the U.S. Supreme Court would hold that legalizing marijuana greatly undermines the CSA and its policies. The objectives of the CSA are to conquer recreational drug abuse, prevent the diversion of drugs from legitimate sources into illegal channels, and combat the traffic of illicit drugs.<sup>180</sup> When enacting the CSA, Congress specifically found that the manufacture, local distribution, and possession of controlled substances have a substantial and direct effect upon interstate commerce.<sup>181</sup> They also found that it is not feasible to distinguish between controlled substances manufactured and distributed interstate and intrastate, and that federal control of the intrastate incidents is essential to the effective control of the interstate incidents.<sup>182</sup> When the Supreme Court decided that the federal government could regulate local marijuana activities in *Gonzales v. Raich*, the Court supported federal regulation of intrastate controlled substances and found that “failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.”<sup>183</sup> Any measure permitting the cultivation, sale, possession or use of marijuana for recreational purposes

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176. *San Diego NORML*, 81 Cal. Rptr. 3d at 477-78.

177. *Id.* at 482; *see also* Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988).

178. *City of Garden Grove v. Superior Court*, 81 Cal. Rptr. 3d 656, 675 (Cal. Ct. App. 2007); *San Diego NORML*, 81 Cal. Rptr. 3d at 478-79; Boyle v. United Technologies Corp., 487 U.S. 500, 507-08 (1988).

179. *San Diego NORML*, 81 Cal. Rptr. 3d at 478-79 (holding that criminal sanctions for drug possession is a field historically occupied by states). California has prohibited marijuana since 1913. 1913 Poison Act Amendments, 1913 Cal. Stats. ch. 324, § 8a; *Gonzales v. Raich*, 545 U.S. 1, 5-6 (2005). The federal government first regulated marijuana in 1937 but did not prohibit it until 1970. Marihuana Tax Act of 1937; Controlled Substances Act, 21 U.S.C. § 801 (2009); *Raich*, 545 U.S. at 11-14; *City of Garden Grove*, 68 Cal. Rptr. 3d 669-70. Comprehensive federal drug regulation did not occur until 1970 with the CSA. 21 U.S.C. § 801; *Raich*, 545 U.S. at 10-14.

180. *Raich*, 545 U.S. at 10, 12-13; *Gonzales v. Oregon*, 546 U.S. 243, 272 (2006); *City of Garden Grove*, 68 Cal. Rptr. 3d at 675-76.

181. 21 U.S.C. § 801 (3), (5)-(6).

182. *Id.*

183. *Raich*, 545 U.S. at 22.

would contravene these principles and pose a substantial obstacle to the effective control of interstate marijuana commerce and the elimination of recreational drug use. Given the similarity between wholesale legalization and the Supreme Court's findings regarding medical legalization in *Gonzales v. Raich*, it is likely that if a successful initiative was appealed to the Supreme Court and it conducted an obstacle analysis, the Court would adopt this approach and invalidate the initiative.

If the courts limit the analysis to conflict preemption, as is likely, especially in California, the decision will depend on the actual language of the provisions. A conflict only preempts when compliance with both federal and state laws is a "physical impossibility."<sup>184</sup> If the language of the provision exempts marijuana-related conduct from prosecution under California law, the provision will likely be upheld.<sup>185</sup> In *City of Garden Grove*, the court held that the CUA did not conflict with the CSA because the CUA did not legalize any conduct prohibited under the CSA.<sup>186</sup> Instead, the CUA merely exempted conduct from prosecution under California laws.<sup>187</sup> This, importantly, is more than an issue of semantics. There is no statute or constitutional provision that requires states to prohibit and prosecute all conduct that is illegal under federal law. As a result, an initiative will likely be upheld under a conflict analysis if it merely decriminalizes marijuana.

However, all of the initiatives go beyond decriminalization. They all provide for the legislature to enact laws regulating and taxing marijuana. If these laws and regulations positively conflict with the CSA in a manner in which simultaneous compliance with both laws is impossible, they would be preempted under a conflict analysis.<sup>188</sup> A literal interpretation of this language is that a positive conflict would exist only if one law *requires* conduct that is prohibited by the other.<sup>189</sup> This interpretation has support in *Wyeth v. Levine* and Justice Thomas's dissent in *Gonzales v. Oregon* and is explicitly adopted in

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184. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713; *Boultinghouse v. Hall*, 583 F. Supp. 2d 1145, 1157 (C.D. Cal. 2008); *San Diego NORML*, 81 Cal. Rptr. at 476-77.

185. See *Hyland v. Fukuda*, 580 F.2d 977, 981 (9th Cir. 1975).

186. "Admittedly, there is tension between state and federal drug policy on the issue of medicinal marijuana. It is quite clear California has chosen a policy that is at odds with the federal government's. But the important point for purposes of this case is that state law does not interfere with the federal government's prerogative to criminalize marijuana. As a general rule, it is still illegal to possess marijuana under federal law, and nothing in this opinion should be construed as suggesting otherwise." *City of Garden Grove*, 68 Cal. Rptr. 3d at 678. Although this is a decision from the California Court of Appeal, 4th Circuit, the United States Supreme Court and California Supreme Court have denied review. *Grove v. Superior Court of Ca.*, 2008 U.S. LEXIS 8568 (U.S., Dec. 1, 2008); *Garden Grove, City of v. S.C. (Kha)*, 2008 Cal. LEXIS 3517 (Cal., Mar. 19, 2008).

187. *Id.*

188. *Wyeth v. Levine*, 129 S. Ct. 1187, 1199 (2009); *San Diego NORML*, 81 Cal. Rptr. 3d at 476; *Boultinghouse v. Hall*, 583 F. Supp. 2d 1145, 1157 (C.D. Cal. 2008).

189. *Gonzales v. Oregon*, 546 U.S. at 289-90; *San Diego NORML*, 81 Cal. Rptr. 3d at 476-81.

*San Diego NORML*.<sup>190</sup> If this interpretation is adopted by the court, an initiative legalizing marijuana and its implementing legislation will be upheld unless it requires conduct that violates the CSA.

Alternatively, federal and state court dicta exist supporting an interpretation that a state law can also positively conflict if it provides that compliance with a federal law is not required.<sup>191</sup> If this interpretation is adopted by the court, the initiative and its implementing legislation will be upheld unless it requires conduct that violates the CSA or provides compliance with the CSA is not required.

### C. Standing

In order for a court to consider any of these issues, the party challenging the constitutionality of the measure must have standing. In a constitutional challenge, standing requires that the party show that he or she personally suffered some actual or threatened injury as a result of the statute.<sup>192</sup> Due to this high standard, regardless of the merits of a challenge, it is unlikely that most of the provisions would ever be reviewed. Illustrative of this problem, in *San Diego NORML* the court found that the counties of San Bernardino and San Diego only had standing to challenge the identification card provisions of the MMP, since that was the only provision that either imposed obligations or inflicted direct injury on the counties.<sup>193</sup> Similarly, it is likely that parties only would have standing to challenge the provisions of an initiative and its implementing regulations that impose limits or licensing requirements on the cultivation, sale, possession and use of marijuana or the provisions that set penalties for violation because they are the only provisions that could impose obligations or inflict direct injury. The provisions repealing prohibition would be virtually unchallengeable because of lack of standing, since they would not impose obligations or cause direct harm.

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190. *Wyeth*, 129 S. Ct. at 1196-99 (rejecting a conflict preemption argument because petitioner failed to demonstrate the impossibility of complying with both state and federal requirements); *Gonzales*, 546 U.S. at 289-90; *San Diego NORML*, 81 Cal. Rptr. 3d at 476-81.

191. *S. Blasting Servs. Inc. v. Wilkes County, N.C.*, 288 F.3d 584, 591 (4th Cir. 2002) (“Rather, a conflict is more likely to occur when a state or locality provides that compliance with a federal standard is not mandated, or when compliance with federal law actually results in a violation of local law.”); *San Diego NORML*, 81 Cal. Rptr. 3d at 481 (“[T]he applications for the card expressly state the card will not insulate the bearer from federal laws, and the card itself does not imply the holder is immune from prosecution for federal offenses; instead, the card merely identifies those persons California has elected to exempt from California’s sanctions.”).

192. *San Diego NORML*, 81 Cal. Rptr. 3d at 471.

193. *Id.* at 474-75.

#### D. Enforcement?

##### 1. Local Enforcement

If any of the ballot initiatives are passed, local governments must implement those provisions regardless of contradictory federal law unless a court determines that the statute is unconstitutional.<sup>194</sup> Local governments cannot refuse to enforce an initiative based on their own interpretation of the statute's constitutionality.<sup>195</sup> This is true especially in this case since the CSA does not require the state or local governments to help enforce its provisions.<sup>196</sup>

##### 2. Federal Enforcement

While the federal government can prosecute state-authorized medical marijuana activities, it currently does not. After a long history of bipolar enforcement, on October 19, 2009, U.S. Assistant Deputy Attorney General David Ogden issued a memo instructing federal prosecutors not to prosecute marijuana-related activities that conformed to state laws.<sup>197</sup> According to the memo, while marijuana is still a dangerous drug, and the cultivation, distribution, and sale is a serious crime providing significant revenue to criminal enterprises, prosecution of seriously-ill individuals is an inefficient use of resources.<sup>198</sup> As a result, federal prosecutors were instructed to focus instead on trafficking of marijuana, specifically "commercial enterprises that unlawfully market and sell marijuana for a profit."<sup>199</sup>

Given this rationale, it is unlikely that this permissive attitude would continue after legalization. When asked about the federal government's likely response policy, Gil Kerlikowske, Director of the White House Office of National Drug Control Policy, refused to answer the question, stating only that legalization would be a significant issue.<sup>200</sup> Since non-enforcement would

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194. *Id.* at 470-74.

195. *Id.* at 472.

196. *Id.* at 481; *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 659 (Cal. Ct. App. 2007).

197. DAVID W. OGDEN, DEPUTY ATTORNEY GENERAL, MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS, INVESTIGATIONS AND PROSECUTIONS IN THE STATES: AUTHORIZING THE MEDICAL USE OF MARIJUANA, OCT. 19, 2009 (2009). For a discussion of the contradictory behavior of the federal government, see S.J. Res. 14, 2009-10 Reg. Session, June 8, 2009 (statements by U.S. Attorney General Eric Holder and White House Spokesman Nick Shapiro in support of ending raids, including that ending raids on medical marijuana facilities is the "new American policy"); Assemblymember Tom Ammiano, Press Release, Mar. 27, 2009 (explaining that despite a DEA policy against prosecution of medical marijuana offenses, on Mar. 25, 2009, the DEA raided a San Francisco dispensary which was in compliance with local laws and held a permit from the Dept. of Public Health).

198. OGDEN, *supra* note 197, at 2.

199. OGDEN, *supra* note 197.

200. Gil Kerlikowske, Director, White House Office of National Drug Control Policy, Remarks at the 2009 Caleb Foote Symposium: New Directions for American Drug Policy? (Nov.

seriously undermine the enforcement and legitimacy of the CSA and probably generate negative public pressure, it is almost certain that the federal government would continue to enforce the CSA.<sup>201</sup> Furthermore, it is a possibility that the federal government would also enforce the CSA against those who use marijuana for medical purposes either in retaliation or because legalization would eliminate the medical marijuana regime.

High levels of enforcement would seriously undermine legalization and its potential revenue streams. Under the legalization schemes proposed, the marijuana industry would resemble the alcohol industry. Most cultivation would not be for personal use and marijuana would largely be sold by licensed retailers. This industry would be regulated by the state and be much more visible than the current black market industry. This visibility would increase the ease with which the federal government could enforce the CSA. The larger the potential penalties, the less incentive exist for the black market to shift to a legitimate industry. If that shift does not occur, then the state will not be able to generate revenue from licensing and taxing the legitimate industry. The result of high levels of enforcement by the federal government would be in effect a decriminalization under state laws, not legalization.

In addition, the federal government could respond by limiting federal funding in order to enforce the CSA. The federal government has used this method in the past to ensure that states and entities comply with federal policies. For example, the Solomon Amendment permits the federal government to cut federal funding to an educational institution if it has a policy or practice denying the ROTC or military recruiters access to campus.<sup>202</sup> This access was an issue because some schools denied access to all recruiters who discriminated on the basis of sexual orientation. Another example is the 1984 National Minimum Drinking Age Act, which required states to raise their minimum drinking age to twenty-one years old in order to receive federal funding for highways.<sup>203</sup>

#### *E. Summary*

The federal government has the power to regulate and prohibit interstate and intrastate marijuana commerce.<sup>204</sup> Any individual manufacturing, selling, or consuming marijuana can be arrested and prosecuted under the federal CSA. California law, however, currently permits and regulates medical marijuana-related activities under the MMP. California courts have held that the challenged provisions of the MMP are not preempted by the CSA and that local

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13, 2009).

201. For a poll on public opposition to the legalization of marijuana, see SAAD, *supra* note 72, at 1 (finding 54% of Americans oppose the legalization of marijuana).

202. 10 U.S.C. § 983 (2009).

203. 1984 National Minimum Drinking Age Act, 23 U.S.C. § 158.

204. *See supra* Section IV.A.

governments are required to enforce the MMP's provisions.<sup>205</sup> Currently, the federal government respects California's position on medical marijuana and no longer prosecutes medical marijuana use that complies with state laws.

If the current proposals are passed, the courts must consider whether the proposition is preempted by the CSA. In the unlikely circumstance that the courts conduct an obstacle preemption analysis, the provisions will surely fall. However, if the courts find that conflict preemption is required to invalidate the provisions, whether the provisions will be upheld will depend on the language of the provisions. In order for the court to consider any of these arguments, there must be parties who have standing to challenge the provisions. In order to have standing, the law must impose obligations on or cause injury to the party.<sup>206</sup> The regulatory laws, not the decriminalizing provisions, are the only provisions for which any party will likely have standing to challenge. Therefore, it is probable that measures legalizing marijuana will be enforceable within California in the same manner that the MMP is currently enforceable.

If marijuana were legalized, it is expected that the federal government would increase enforcement of the CSA in California for all cultivators, distributors, retailers and users of marijuana, including those who use it for medical purposes. This enforcement would significantly reduce the effectiveness of any legalization proposal and its ability to generate revenue for the state.

#### V. FISCAL IMPLICATIONS OF LEGALIZATION AND THE 2010 BALLOT INITIATIVES

In 2009, California faced a projected \$39.6 billion deficit by the end of the fiscal year, a \$24.2 billion drop in expected revenues, and estimated expenditures of \$106.3 billion.<sup>207</sup> The state had run out of money and was forced to issue "I.O.U.s" known as registered warrants.<sup>208</sup> This budget crisis required the state to make huge budget cuts, including reducing the state's higher education funding by approximately 20% and closing state offices three days every month.<sup>209</sup> The recession and budget crisis highlighted the importance of reliable revenue sources. With this backdrop, it is not surprising that Californians have begun to look for alternative revenue sources.

Marijuana proponents have taken the initiative and proposed legalization of marijuana coupled with taxation. As Allen St. Pierre, NORML's Executive

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205. *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d, 461, 471-75; *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 678 (Cal. Ct. App. 2007).

206. *San Diego NORML*, 81 Cal. Rptr. 3d at 474-75.

207. LEGISLATIVE ANALYST'S OFFICE, 2009-10 BUDGET ANALYSIS SERIES: OVERVIEW OF THE GOVERNOR'S BUDGET (2009); LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S FISCAL OUTLOOK 2008-09 THROUGH 2013-14, at 3 (2009).

208. *California Budget Crisis (2008-09)*, NEW YORK TIMES, Sept. 25, 2009.

209. *Id.* For more details on budget cuts, see *Cuts in California*, NEW YORK TIMES, Jan. 27, 2010 <http://projects.nytimes.com/california-budget/Education> (last visited Mar. 27, 2010).

Director stated, “[we] represent the millions of otherwise law-abiding cannabis consumers who are ready, willing, vocal and able to contribute needed tax revenue to America’s struggling economy. . . . All we ask in exchange for our \$14 billion is that our government respects our decision to use marijuana privately and responsibly.”<sup>210</sup> In fact, one of the stated purposes of the RCTCA is to “[tax] and regulate cannabis to generate billions of dollars for our state and local governments to fund what matters most: jobs, healthcare, schools and libraries, parks, roads, transportation, and more.”<sup>211</sup>

Recent polls suggest that the economic incentive is swaying voters towards the legalization and taxation of marijuana. A 2009 Gallup poll found that 53% of voters in the West support legalization, up from 40% in 2005.<sup>212</sup> The 2009 Field Poll found that 56% of California voters support legalizing and taxing marijuana.<sup>213</sup> The Field Poll also found that the majority of voters generally preferred cutting spending over increasing taxes, but that there was more support for legalizing and taxing marijuana than for making cuts in any area except state prisons.<sup>214</sup>

Given the likelihood that at least part of the support and motivation for legalization is increased financial resources, it is important to evaluate the likely fiscal effects of legalization. With all of the measures, there will be both costs and revenue. Most costs would be associated either with regulating marijuana-related activities or expunging criminal records.<sup>215</sup> Legalization measures would provide additional funding through revenue from taxes and fees and reduce expenditures in the criminal justice system.<sup>216</sup>

Unfortunately, any estimates of costs and revenues are very uncertain at this time. Such estimates are highly dependent on the regulatory framework that is implemented, the actions of the federal government, and changes in price and consumption due to legalization. While the federal government has recently announced that it will no longer prosecute marijuana-related activities that are consistent with that state’s medical marijuana laws, it is still enforcing all non-medical marijuana laws.<sup>217</sup> Whether the federal government would extend this policy to recreational marijuana use that conforms to state laws is unknown. If the federal government chooses to enforce the federal prohibition, this enforcement would severely impede, if not prevent, the legalization, regulation, and revenue-producing nature of these initiatives.

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210. Paul Armentano, *Legalizing Pot Makes Lots of Cents for Our Cash-Starved Government*, ALTERNET, Apr. 14, 2009, <http://www.alternet.org/drugs/136467>.

211. RCTCA § 2(B)(9).

212. SAAD, *supra* note 72.

213. THE FIELD POLL, *supra* note 77 at 2.

214. THE FIELD POLL, *supra* note 77, at 1, 2 tbl. 1, 5 tbl. 4, 7 tbl. 6.

215. *See infra* Section V.A.

216. *See infra* Section V.B.

217. OGDEN, *supra* note 197.

### A. Costs

#### 1. Administrative Costs

The largest cost of legalization is the administrative cost of regulating the marijuana industry.<sup>218</sup> The costs involved would vary greatly depending on the level of regulation enacted. Legalization does not require that there be any regulation of the industry and thus there could be minimal administrative costs. However, all of the measures authorize the creation of regulations to control all aspects of the industry. The TRCCA and CS would likely result in state regulations similar to what exist for the alcohol and beverage industry, including environmental regulations governing cultivation, labeling requirements, seller's licenses and permits, and zoning ordinances. The RCTCA leaves this task to local governments, although it is possible, even likely, that it would be amended to also create statewide quality controls and protections.

Given the likely similarity to the alcohol industry regulatory scheme, the costs involved in regulating that industry can be used as a basis for estimating the cost of regulating a marijuana industry, when adjusted for size. Based on 2006 figures, an estimated 8.6 million pounds of marijuana with a production value of more than \$13.8 billion dollars and a retail value of almost \$24 billion is produced in California.<sup>219</sup> California produces much more marijuana than it consumes, exporting large quantities to other states.<sup>220</sup> California residents consume only an estimated 1 million pounds, with a production value of \$1.6 billion dollars and a retail value of \$2.78 billion.<sup>221</sup> In terms of California retail sales, the alcohol industry is seven times larger than the marijuana industry. More than 817 million gallons of alcohol were sold in California in 2005, equating to \$19.5 billion dollars in sales.<sup>222</sup>

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218. This Article only considers the administrative costs of regulating the cultivation, transportation, sale and use of marijuana. It does not look at the costs involved in regulating any related industries, such as hemp. While these industries may become large, it is unlikely that they would be as large as the marijuana industry.

219. See Jon Gettman, *Marijuana Production in the United States (2006)*, BULLETIN OF CANNABIS REFORM 10-11, Dec. 2006, available at [http://www.drugscience.org/Archive/bcr2/MJCropReport\\_2006.pdf](http://www.drugscience.org/Archive/bcr2/MJCropReport_2006.pdf). This data is based on an estimated production of 8,622,831 pounds, a five-year average producer index of \$1606 per pound, and a 2005 retail index of \$2,783 per pound. *Id.*

220. BOE ANALYSIS: A.B. 390, *supra* note 58, at 6.

221. *Id.*; Dale Gieringer, *CA NORML Analysis Finds Marijuana Legalization Could Yield California \$1.5-\$2.5 Billion Per Year (2009)*, [http://www.canorml.org/background/CA\\_legalization.html](http://www.canorml.org/background/CA_legalization.html). Economic estimates calculated using the price indices from Gettman, *supra* note 219, at 11.

222. Simon M. Rosen, et. al, Miron Institute, *The Cost of Alcohol in California* (slide presentation) (2008) (powerpoint based on article in 32(11) ALCOHOLISM: CLINICAL AND EXPERIMENTAL RESEARCH 1925 (2008), available at [http://www.freethebowl.com/site/images/stories/media/the\\_cost\\_of\\_alcohol\\_to\\_california\\_final.ppt](http://www.freethebowl.com/site/images/stories/media/the_cost_of_alcohol_to_california_final.ppt)).

In California, the Department of Alcoholic Beverage Control (ABC) has the exclusive power to license and regulate the alcohol industry, including the manufacture, importation, distribution, and sale of alcoholic beverages.<sup>223</sup> For the 2009-10 fiscal year, the ABC's budget is approximately \$53.4 million.<sup>224</sup> Notwithstanding other factors, an agency similar to the ABC regulating an industry 1/7th the size would have an annual budget of approximately \$7.6 million. The estimate assumes that average costs equal marginal costs.<sup>225</sup>

While this figure provides some guidance as to the costs of regulating marijuana, there are many factors that would likely lower the annual regulatory cost of regulating marijuana. First, the regulatory framework may be less complex and contain fewer programs than the current alcohol regulatory framework. Second, if the government does enact a regulatory framework, regulations may be implemented by the ABC. This consolidation would drastically reduce the costs by removing the duplicative costs of maintaining two separate but similar agencies. Lastly, this estimate is based on California retail sales as an indicator of industry size; it does not factor in the regulatory costs associated with manufacturing and exportation. California is a major exporter of alcohol. For instance, California wineries have a 62% market share of the U.S. wine market, by value and volume, and they are regulated by the ABC.<sup>226</sup> Since exportation of marijuana to other states would not be legalized, this aspect of the marijuana industry would not be regulated, only prohibited.

In addition to the annual costs, there would be substantial initial costs involved in establishing the regulatory framework, not just for the ABC (or new regulatory agency), but also for the Board of Equalization. For instance, there would be costs involved in developing the regulations, publications, paperwork, and computer systems.<sup>227</sup> These agencies would also expend resources identifying and notifying affected individuals, training staff, and responding to inquiries from the affected individuals and public.<sup>228</sup> At this time, the BOE has not developed an initial cost estimate.<sup>229</sup>

With the legalization of marijuana, the Medical Marijuana Program (MMP) would likely be eliminated. Under any of these plans, adults twenty-one years and older would no longer need a prescription to legally obtain marijuana.<sup>230</sup> The CS is written in a way that makes it possible that even a

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223. California Budget 2010-11, *2100 Department of Alcoholic Beverage Control*, available at <http://www.ebudget.ca.gov/StateAgencyBudgets/2000/2100/department.html>.

224. *Id.*

225. This is not accurate on small scales or in the short term, but for the purposes of this article, it is an acceptable approximation.

226. Wine Institute, *A Signature California Industry: California Wine Brochure*, 2 (2008), available at <http://www.wineinstitute.org/files/EIR%20Flyer%202008.pdf>.

227. BOE ANALYSIS: A.B. 390, *supra* note 58, at 6.

228. *Id.* at 6.

229. *Id.* at 6.

230. RCTCA, Proposed Initiative Measure 09-0024 (Aug. 4, 2009) § 3-11300; TRCCA, Proposed Initiative Measure 09-0022 (July 15, 2009) § 4-11300(a)-(b); CS, Proposed Initiative

minor would not need a prescription to obtain marijuana.<sup>231</sup> Eliminating the MMP would have no net effect on the administrative costs because all state and local costs for the MMP are funded by fees paid by program participants.<sup>232</sup>

## 2. Expunging Records

The Tax, Regulate, and Control Cannabis Act of 2010 would expunge all criminal records concerning marijuana-related offenses.<sup>233</sup> There is no data on what the exact cost of this might be. According to the Legislative Analyst's Office, the costs of erasing all remaining convictions would likely be minor for the State, but could be potentially significant for local governments.<sup>234</sup>

## 3. Other Costs

There would likely be significant social and indirect economic costs to marijuana legalization. These costs would include substance abuse prevention and treatment programs, drug education costs, health care costs, lost productivity and wages, and loss of quality of life. These costs are often discussed in conjunction with alcohol and would likely exist to some extent as a result of marijuana legalization.<sup>235</sup> However, the focus of this Article is the immediate direct costs to the government.

### B. Revenue Sources

#### 1. Taxes and Fees

If any of the initiatives passes, local and state governments would be able to generate much-needed revenue through various taxes and fees. As with any other legal industry, the marijuana industry would be subject to sale, income, and business taxes. It is likely that the marijuana industry would be treated similarly to the alcohol and tobacco industries and thus face additional taxes and fees, such as excise taxes,<sup>236</sup> licensing and permit fees for the sale of marijuana, and penalties for violations of the proposed law and accompanying regulations.<sup>237</sup> This section will evaluate each of the taxes that may be

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Measure 09-0025 (Aug. 4, 2009) § 3(A).

231. CS, Proposed Initiative Measure 09-0025 (Aug. 4, 2009) § 3(A) (repealing laws prohibiting marijuana use without an exception for minors).

232. California Department of Public Health, *Medical Marijuana Program Fees* (2010), <http://www.cdph.ca.gov/programs/MMP/Pages/MMPFees.aspx>.

233. TRCCA, § 4-11300(e).

234. LAO Analysis: TRCCA, *supra* note 99, at 5.

235. For a discussion of the costs associated with alcohol, see Rosen, *supra* note 222.

236. An excise tax is a tax paid at the time of sale, in addition to the sales tax, on goods like gasoline, cigarettes, and tobacco or activities like gambling. They are usually included in the price. IRS, *Excise Tax* (2010), <http://www.irs.gov/businesses/small/article/0,,id=99517,00.html>.

237. All three provisions provide for taxation above the standard rates, with the CS explicitly instructing the legislature to treat the marijuana industry like the alcohol and tobacco industries.

imposed under the proposals and calculate the likely and/or minimum revenue from those taxes.

The actual revenue derived from these taxes and fees would depend on the extent to which the federal government impedes legalization, the level of consumption and retail value of marijuana, and the actual tax and fee rates. Since the level of enforcement of the federal prohibition is unknown, for the purposes of this Article it is assumed that the federal prohibition will have no effect on the revenue produced through legalization of marijuana. Wherever else there is uncertainty over values, this Article will err on the side of underestimating the likely revenue.

In order to determine the likely consumption level and retail value under legalization, both the current figures and likely effect of legalization must be considered. In 2006, California produced 8.6 million pounds of marijuana.<sup>238</sup> Most of that marijuana was exported to other states, but Californians still consumed an estimated 1 million pounds of marijuana.<sup>239</sup> Based on a 2001-2005 National Survey on Drug Use and Health (NSDUH), the estimated retail value for a pound of marijuana is \$2,783.<sup>240</sup> With a market size of one million pounds, the current retail value of the California's marijuana industry is \$2.783 billion.<sup>241</sup>

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CS, Proposed Initiative Measure 09-0025 (Aug. 4, 2009) § 4; RCTCA, Proposed Initiative Measure 09-0024 (Aug. 4, 2009) § 3-11302; TRCCA, Proposed Initiative Measure 09-0022 (July 15, 2009) § 4-11302.

238. BOE ANALYSIS: A.B. 390, *supra* note 58, at 6; Gieringer, *supra* note 221; RCTCA.

239. BOE ANALYSIS: A.B. 390, *supra* note 58, at 6; Gieringer, *supra* note 221; RCTCA. *But see* Rosalie Liccardo Pacula, RAND Corp., Legalizing Marijuana: Issues to Consider Before Reforming California State Law, Testimony presented before the Cal. State Assembly Public Safety Committee (Oct. 28, 2009), available at [http://www.rand.org/pubs/testimonies/2009/RAN\\_D\\_CT334.pdf](http://www.rand.org/pubs/testimonies/2009/RAN_D_CT334.pdf) [hereinafter RAND Testimony] (“California consumption ranges from 6.2 million to 28.8 million ounces—0.3875 and 1.8 million pounds—with a best estimate of 13.8 million ounces—0.8625 million pounds.”).

240. RCTCA, at § 4-6. Estimates of the value of marijuana vary greatly, depending on the study and will have a large impact on the estimate. For other valuations, see RAND Testimony, *supra* note 239 (low grade marijuana sells for \$300-\$350 per pound and \$75-\$100 per ounce); Gieringer, *supra* note 221 (marijuana produced domestically retails in California for \$280-\$420 per ounce and \$4,480-\$6,720 per pound, depending on quality, resulting in an annual retail value for the California marijuana industry of between \$4.48 billion and \$6.72 billion); Phil Villarreal, *Drug-Seizure values for Pot Vary Widely*, ARIZONA DAILY STAR, July 26, 2009 (prices in Arizona ranging from \$150 per ounce to \$2,581 per ounce, depending on the location, method of valuation, and agency). Some of this variation is likely to be due to different types and quality marijuana and different locales. Other variations are due to methods of valuation, for instance the NSDUH study is an average national price, but the RAND Testimony value is for low grade marijuana in California. In order to achieve the most accurate estimate, erring on the side of underestimating the potential tax revenue, this Article uses the values from the NSDUH study which are on the lower end of the range of average price values.

241. This figure does not include in values of related markets, like the market for smoking implements, i.e., bongs and pipes. Legalization would likely increase demand for this industry as well, producing additional revenue through sales tax. Given the uncertainty of the scope and value of the current incidental markets and the goal of underestimating potential revenue, this Article only considers the direct costs of marijuana itself in valuing the marijuana industry and

There is some agreement about the effect that legalization will have on the consumption and price of marijuana. The analyses of Harvard Senior Lecturer Jeffrey Miron and the BOE are the most current, in-depth, and well-respected and as a result will be used to guide the analysis in this Article.

Miron estimated that legalization will cause a decrease in expenditure of no more than 25%.<sup>242</sup> He began his analysis by assuming that legalization will not cause a change in demand for marijuana, in order to understate potential tax revenue.<sup>243</sup> The rationale for this assumption was that any increase would come from casual users whose use would be modest and that modest increase would likely be offset by a decrease in alcohol and/or tobacco revenue.<sup>244</sup> Based on a comparison to marijuana prices in the Netherlands, he predicted that legalization will cause a decline in price that is unlikely to exceed 50%.<sup>245</sup> He also determined that the price elasticity of demand is between -0.5 and -1, resulting in an increase in consumption of 50% to 100% and a decrease of 0% to 25% in the total expenditure on marijuana in California.<sup>246</sup> In order to understate potential revenue, Miron predicted a 25% decrease in expenditure.<sup>247</sup> Using Miron's expenditure estimate, after legalization, California's marijuana industry would have a \$2.09 billion retail value.

The Board of Equalization (BOE) analyzed Assembly Bill 390's legalization scheme and produced more nuanced estimates. They predict that legalization will result in a 50% decline in retail price, again reducing the retail price index to \$1,391.5 per pound.<sup>248</sup> This decline would increase consumption by 40%.<sup>249</sup> This increased consumption would increase the current estimated usage to 1.4 million pounds a year and raise the annual retail value to \$1.948 billion. However, the BOE then found that a \$50 per ounce tax would reduce consumption by 11%, to 1.246 million pounds per year and \$2.7931 billion retail value.<sup>250</sup>

These calculations and estimates are summarized in Table 1. The current, non-legalized price per pound of marijuana, estimated consumption in California and California's marijuana market retail value are provided in the second column. The three columns on the right represent the estimated price per pound, market size, and retail value after legalization. The figures based on Miron's predictions are in the first of these three columns. The BOE estimates,

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potential tax revenue.

242. Jeffrey A. Miron, *The Budgetary Implications of Marijuana Prohibition*, 14 (2005), <http://www.prohibitioncosts.org/MironReport.pdf>.

243. *Id.* at 12.

244. *Id.*

245. *Id.* at 12-13.

246. *Id.* at 11-14.

247. *Id.* at 14.

248. BOE ANALYSIS: A.B. 390, *supra* note 58, at 7.

249. *Id.*

250. *Id.*

both with and without the \$50 excise tax, are provided in the last two columns.

*Table 1. Summary of Estimated Market Retail Values*

	Current	Miron	BOE without Excise Tax	BOE with Excise Tax
Price per Pound	\$2,783	\$1,391.50	\$1,391.50	\$2,191.50
Market Size*	1.0	1.5	1.4	1.246
Market Retail Values **	\$2.783	\$2.087	\$1.948	\$2.731

\* Amounts given in millions of pounds

\*\* Amounts given in billions of dollars

California currently imposes a statewide sales tax on the retail sale of tangible personal property.<sup>251</sup> Retail sales of marijuana, regardless of the legality of those sales under state or federal law, would be subject to sales tax.<sup>252</sup> The current sales tax rate is 8.25%.<sup>253</sup> That rate is composed of a 6% tax funding the state General Fund, 0.25% tax funding the Fiscal Recovery Fund, and 2% tax funding local government activities.<sup>254</sup> At that rate, a sales tax on marijuana would produce between \$133.039 million dollars and \$172.178 million dollars, depending on whether Miron or BOE estimated retail sales are used and whether there was an excise tax imposed.

Local governments are also permitted to impose up to an additional 1.0% sales tax on sales within their jurisdiction.<sup>255</sup> There is no information available as to the breakdown of consumption by city or county, so at this time it is impossible to determine the revenue this would actually derive for each county. However, if all jurisdictions enacted a 1.0% sales tax, this would generate for local governments between \$17.338 million and \$20.87 million.

Using the estimated market retail values, above, Table 2 breaks down the estimated revenue derived from sales tax by its component tax. The minimum sales tax based on the 8.25% that all jurisdictions impose is totaled, as is the total potential sales tax if all local jurisdictions imposed the optional 1.0% sales tax.

251. *Id.* at 2.

252. *Id.*; Cal. State Board of Equalization, *Special Notice: Important Information for Sellers of Medical Marijuana* (2007).

253. Cal. State Board of Equalization, Detailed Description of the Sales and Use Tax Rate, <http://www.boe.ca.gov/news/sp111500att.htm> (last visited Mar. 28, 2010).

254. *Id.*

255. Cal. State Board of Equalization, California City & County Sales & Use Tax Rates, <http://www.boe.ca.gov/sutax/pam71.htm> (last visited Mar. 17, 2009).

Table 2. Tax Revenue for Sales Tax\*

	Miron	BOE without Excise Tax	BOE with Excise Tax
Market Retail Value**	\$2,087	\$1,948	\$1,733.8
6.00% State General Fund sales tax	\$125.220	\$116.880	\$104.028
0.25% State Fiscal Recovery Fund sales tax	\$5.218	\$4.870	\$4.335
2.00% Local Government sales tax	\$41.740	\$38.960	\$34.676
<b>Total Minimum Sales Tax of 8.25%</b>	<b>\$172.178</b>	<b>\$160.710</b>	<b>\$133.039</b>
1.00% possible additional local sales tax (statewide)	\$20.870	\$19.480	\$17.338
<b>Total Potential Sales Tax</b>	<b>\$193.048</b>	<b>\$180.190</b>	<b>\$150.337</b>

\* Amounts in millions of dollars

\*\* The market retail value for sales tax purposes is calculated without the cost of the \$50/ounce excise tax because the excise tax would be charged after the sales tax. To do otherwise would tax a tax.

California also imposes an 8.84% tax on corporations and a progressive income tax of up to 9.55%.<sup>256</sup> Without knowing the profit levels and scale of each individual's or corporation's operations, it is impossible to calculate a reliable estimate of the revenue that these would generate. Current profit levels are not comparable because of the differences in the market structure between a legal and illegal industry. Despite this uncertainty, it is not unreasonable to predict that these taxes would generate significant revenue, into the millions of dollars.

There are additional taxes and fees that could be imposed on the marijuana industry. The fees could be based on penalties for violating the act and accompanying regulations and/or from any required licenses and permits required to cultivate, transport, sell or use marijuana.

The various initiatives all include different combinations of taxes and

256. Cal. Franchise Tax Board, *2009 California Tax Rates and Exemptions* (2009), available at [http://www.ftb.ca.gov/forms/2009\\_California\\_Tax\\_Rates\\_and\\_Exemptions.shtml](http://www.ftb.ca.gov/forms/2009_California_Tax_Rates_and_Exemptions.shtml).

fees. For instance, the TRCCA authorizes taxation of cultivation, sale and other marijuana business-related activities at a rate no lower than \$50 an ounce, although marijuana growers could offset the tax with subsidies for environmentally friendly production activities.<sup>257</sup> Since these taxes calculated above would not equal \$50 an ounce, the legislature would have to impose additional taxes and fees, likely in the form of a \$50 excise tax.<sup>258</sup> It also explicitly authorizes the state and local governments to create a system issuing licenses and permits and collecting fees.<sup>259</sup>

The RCTCA has a more complicated taxation scheme. All marijuana-related activities would still be subject to the same sale, income, property and business taxes, fees and fines as any other similarly situated business under state and local laws.<sup>260</sup> However, the local governments would be the ones authorized to impose additional taxes and fees, such as excise taxes, targeted at marijuana-related activities.<sup>261</sup> As a result, taxation levels likely will vary from city to city and county to county. This could result in a \$50 excise tax in some areas, but it could also create competition which would drive down the tax rates.

The CS is the broadest sweeping initiative in its authorization. It permits all levels of government, including federal, to tax the manufacture, sale and use of marijuana.<sup>262</sup> It recommends following the example of the alcohol and tobacco industries, both of which impose excise taxes.<sup>263</sup>

All of these acts authorize regulation of the industry, which would include licenses and permits and the accompanying fees.<sup>264</sup> This potential revenue would likely offset most of the administrative costs involved in regulating the industry, similar to how the MMP fees and alcohol licensing fees offset the cost of those programs.<sup>265</sup> For instance, liquor-licensing fees cover \$51.508 million of the ABC's \$53.395 million budget.<sup>266</sup>

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257. TRCCA § 4-11302(a), (c).

258. The legislature could get more complicated and reduce the excise tax by the amount paid in other taxes (between \$7.17 and \$17.33 per ounce for sales tax) so that the total tax is \$50. Given the variations in the price of marijuana, due to quality and location, it is unlikely that the legislature would take such a complicated approach.

259. TRCCA § 4-11302(b).

260. RCTCA § 3-11302(b). The State government could also do this if the legislature passed an act authorizing it, since § 5 permits amendments.

261. RCTCA § 11302(a).

262. CS, Proposed Initiative Measure 09-0025 (Aug. 4, 2009) § 3(B).

263. *Id.* at §4.

264. *See generally* RCTCA; TRCCA; CS.

265. For information on the MMP, see Cal. Dep't. of Public Health, Medical Marijuana Program Fees, <http://www.cdph.ca.gov/programs/MMP/Pages/MMPFees.aspx> (last visited Mar. 17, 2010). For information on the ABC, see GOVERNOR'S BUDGET 2010-11 (PROPOSED): 2100 DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL 2 (2009).

266. GOVERNOR'S BUDGET 2010-11 (PROPOSED): 2100 DEP'T OF ALCOHOLIC BEVERAGE CONTROL 3 (2009). The Alcohol Beverage Control Fund is the account for all licensing revenue. DEP'T OF FINANCE, STATE OF CALIFORNIA MANUAL OF STATE FUNDS: ALCOHOL BEVERAGE

There would also be revenue derived from fines and penalties for violation of the proposed law and accompanying regulations. This amount would be offset, at least partially, by the elimination of fines imposed under the current marijuana laws.<sup>267</sup>

All of the proposed initiatives and current debate contemplate additional fees in the form of excise taxes. Since this tax rate has not been set, it is impossible to estimate the exact revenue that it would produce. For the purposes of this Article, a \$50 per ounce statewide excise tax is used. This is the amount proposed as a minimum in TRCCA and a maximum in A.B. 390.<sup>268</sup> It will provide a guideline for other rates. The BOE found that an excise tax of \$50 would result in an 11% decrease in consumption.<sup>269</sup> This would generate revenue of \$996.8 million. Miron's estimated values included additional taxes, like a \$50 excise tax, and predict that this excise tax would generate \$1.12 billion in revenue.

Table 3 summarizes the potential tax revenue that legalization could generate for state and local governments. It does not include the revenue from income or business taxes because at this time the profit involved in the industry is unknown. It also does not include the revenue from fees because that revenue in its entirety will fund the regulatory costs of legalization. These totals range from \$160.71 million to \$1.313 billion depending on whether additional sales and excise taxes are imposed.

*Table 3. Summary of Potential Tax Revenue*

	Miron*	BOE without Excise Tax*	BOE with Excise Tax*
8.25% state sales tax	\$172.178	\$160.710	\$133.039
1% local sales tax (statewide)	\$20.870	\$19.480	\$17.338
Excise tax (\$50/ounce)	\$1,120	N/A	\$996.800
<b>Total Potential Revenue</b>	<b>\$1,313.048</b>	<b>\$180.190</b>	<b>\$1,147.177</b>

\*Amounts in millions of dollars

CONTROL FUND (1998).

267. See LEGISLATIVE ANALYST'S OFFICE, FISCAL IMPACT OF LEGALIZING MARIJUANA (2009).

268. TRCCA § 4-11302(a); Assem. B. 390, 2009-10 Reg. Sess. § 34011 (Cal. 2009).

269. BOE ANALYSIS: A.B. 390, *supra* note 58. Of note, if a different excise tax amount is used, the effect on consumption and thus revenue would increase or decrease accordingly.

All of these estimates assume that marijuana cultivation becomes a commercial activity. Significant black market or personal production (i.e. “homegrowing”) will reduce the revenue streams. The government believes that this activity would be minimal.<sup>270</sup> The rate of taxation compared to the price, however, will have an effect. If taxes are too high, black market sales and homegrowing will increase.<sup>271</sup>

These revenue estimates do not account for any substitution effect. With the legalization and lower prices of marijuana, it is likely there will be increased consumption. Some of these additional marijuana sales will come at the expense of alcohol and cigarette sales—from individuals who choose to purchase marijuana instead of alcohol or cigarettes.<sup>272</sup> As a result, some of the revenue from this analysis is not new, but instead shifted from alcohol and cigarette sales. The likely size of the substitution effect, however, is unknown.

These figures underestimate the true revenue from taxation that legalization would bring. The main reason for this is that the values are based solely on consumption of marijuana. They do not include taxation of any spin-off industries, such as hemp, bakeries, coffee shops and bars, smoking paraphernalia, and tourism. This does not include taxes and fees on other related industries, such as paraphernalia.

It also must be noted that the TRCCA requires that all tax revenue be spent on public education, healthcare, environmental programs, public works, and state parks.<sup>273</sup> This is not as limiting as it might appear at first. The TRCCA does not require that this be spent in addition to the current funding. If the government decides to keep funding for these areas at the current level, the money that is currently allocated there could be used for other purposes.

## 2. Criminal Justice Costs

In addition to taxation and regulatory fees, the legalization of marijuana would generate additional available revenue for state and local government by reducing costs in the criminal justice system. If marijuana is legalized, the state police and judicial system would no longer arrest and prosecute individuals for marijuana cultivation, possession or sale. As a result, individuals would no longer be incarcerated for these activities. This reduction in prison population is in accord with the recent *Coleman v. Schwarzenegger* decision.<sup>274</sup> If marijuana is legalized for only those individuals twenty-one years old and

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270. Miron, *supra* note 242, at 14; BOE ANALYSIS: A.B. 390, *supra* note 58.

271. RAND Testimony, *supra* note 239; Miron, *supra* note 242.

272. BOE ANALYSIS: A.B. 390, *supra* note 58, at 7.

273. TRCCA § 4-11302(d).

274. *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2009 U.S. Dist. LEXIS 118210 (E.D. Cal. Nov. 20, 2009);

*Plata v. Schwarzenegger*, No. C01-1351, 2009 U.S. Dist. LEXIS 23683 (N.D. Cal. Mar. 24, 2009).

older, some of these costs would remain but they would be drastically reduced.

This reduction of expenditures would also likely find much support with voters. According to a 2009 Field Poll, state prisons and correction facilities was one of the two areas in which voters support cuts in state spending.<sup>275</sup> California currently spends \$8.234 billion on corrections and rehabilitation.<sup>276</sup>

This Article follows the methodology devised by Harvard economist Jeffrey Miron in order to estimate the potential criminal justice savings. The percentage of marijuana-related arrests, prosecutions, and prisoners and parolees in relation to total arrests, prosecutions, and prisoners and parolees are estimated and multiplied by the law enforcement, judiciary, and correctional system budgets, respectively.<sup>277</sup> This will result in an estimate of savings from decriminalization.

However, the current proposals do not just decriminalize marijuana. They also legalize marijuana in a framework similar to alcohol. This Article assumes that if alcohol and marijuana were regulated in a similar manner with similar criminal penalties, there would be similar criminal justice costs. In order to determine cost savings, the law enforcement costs of liquor law violations are calculated and subtracted from the law enforcement costs of marijuana-related offenses.<sup>278</sup> Only liquor law violations are used because it is unlikely that there will be marijuana arrests for public intoxication or disorderly conduct and DWI arrests already include arrests for drugs *and* alcohol. The same analysis is not done for the judicial and correctional system because the punishments for liquor law violations are fines and community service.

Due to difficulties finding figures, the base year for this analysis is 2000. Only the figures for adult arrests are used. It is likely that marijuana would still be illegal for minors. If the proposition does not explicitly provide for such a system, like the RCTCA does, the legislature will likely add one when enacting the authorized regulatory legislation.<sup>279</sup> As a result, there will still be criminal justice costs associated with arrests involving minors.

According to the Uniform Crime Reports County Data, in 2000 there were 1,185,236 total arrests in California.<sup>280</sup> Of those arrests, 10,384 were for the

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275. THE FIELD POLL, *supra* note 77, at 5 tbl. 4.

276. Governor's Budget Summary 2010-2011, 37 Figure-SUM-04 (2009).

277. Like administrative costs, this methodology assumes that average costs equal marginal costs. This is not accurate on small scales or in the short term, but for the purposes of this Article, it is an acceptable approximation.

278. Liquor law violations include the violation of state or local laws or ordinance prohibiting the manufacture, sale, purchases, transportation, possession, or use of alcoholic beverages, not including driving under the influence and drunkenness. Included in this classification is the manufacture, sale, transportation, furnishing, and possession, etc. of intoxicating liquor; maintaining unlawful drinking places; bootlegging; operating a still; furnishing liquor to a minor or intemperate person; underage possession; using a vehicle for illegal transportation of liquor; drinking on a train or public conveyance; all attempts to commit any of the aforementioned.

279. RCTCA § 4.

280. University of Virginia Library, Geostate Center, Uniform Crime Reports County Data,

sale or manufacture of marijuana, 35,630 were for marijuana possession, and 21,095 were for liquor law violations.<sup>281</sup> Of those marijuana possession arrests, only approximately 17,815 were for marijuana possession alone.<sup>282</sup> The remaining possession arrests occurred because the individual was arrested for another offense.<sup>283</sup> Since those criminal justice costs remain, those arrests will not be included in this analysis. As a result, there were 28,199 marijuana-related arrests and 21,095 alcohol-related arrests, representing 2.38% and 1.48% of total arrests, respectively. Tables 4 and 5 summarize these figures.

*Table 4: Marijuana Arrests*

Total Arrests	Sale/ Manufacture Arrests	Standalone Possession Arrests	Total Marijuana Arrests	% Total Marijuana Arrests
1,185,236	10,384	17,815	28,199	<b>2.38%</b>

*Table 5: Alcohol Related Arrests*

Total Arrests	Liquor Law Violation Arrests	% Alcohol Arrests
1,428,248	21,095	<b>1.48%</b>

The next step of the analysis is to calculate the percentage of each department's budget that is spent on marijuana and alcohol offenses. In 2000, the law enforcement, judicial, and corrections budgets were \$8,703,000, \$6,255,000, and \$7,170,000, respectively.<sup>284</sup> By multiplying the percentage arrested for marijuana and alcohol-related crimes by the department budgets, it is determined that marijuana and alcohol-related arrests comprise \$207,131 and \$128,804 of the law enforcement budget, respectively.

Unfortunately, it is much more difficult to determine the percentage of the judicial and criminal justice budget attributable to marijuana-related crimes. Not all arrests are prosecuted and not all individuals prosecuted are convicted. There are no available numbers on how many prosecutions occur for each offense. Many of those convicted do not go to prison or jail. Of those who do serve time, most of them go to jail, not prison. There is no reliable data concerning these numbers. The best estimate available is that marijuana-related offenses comprise 10.9% of prosecutions and 1% of individuals under

<http://fisher.lib.virginia.edu/collections/stats/crime/> (last visited Aug. 26, 2008).

281. *Id.*

282. *See* Miron, *supra* note 242, at 5-6 (estimating that half of all arrests for marijuana possession offenses are "stand-alone"—arrests in which the reason was the marijuana violation not another crime).

283. *Id.*

284. *Id.* at 22.

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the supervision of the Department of Corrections.<sup>285</sup> This results in marijuana comprising \$681,795 of the judiciary budget and \$71,700 of the correctional departments.

Table 6 and 7 provide a summary of the figures used in calculating the correctional system expenditures for alcohol and marijuana-related offenses. Table 6 lists the total budgets for law enforcement, the judiciary, and corrections, as well as the amount spent on marijuana-related offenses within those budgets. Table 7 summarizes the current expenditures for alcohol and marijuana in each department. It also provides a total projected decrease in criminal justice expenditures of \$1,196,805 if marijuana is decriminalized. The criminal justice costs of regulating marijuana in a manner similar to alcohol would be an estimated \$160,472, leaving a net savings of \$1,036,333. All of these numbers are adjusted for inflation to 2009 values.

Table 6: Expenditures on Marijuana Prohibition

	Law Enforcement Budget		Judiciary Budget		Corrections Budget	
	Total:	Marijuana:	Total:	Marijuana:	Total:	Marijuana:
2000	\$8,703,000	\$207,131	\$6,255,000	\$681,795	\$7,170,000	\$71,700
2009 *	\$10,842,715	<b>\$258,056</b>	\$7,792,851	<b>\$849,421</b>	\$8,932,812	<b>\$89,328</b>

\* 2000 values adjusted for inflation to 2009.

Table 7: Total Projected Criminal Justice Savings and Costs

	Law Enforcement	Judiciary	Corrections	Total
Marijuana	\$258,056	\$849,421	\$89,328	<b>\$1,196,805</b>
Alcohol *	\$160,472	-	-	<b>\$160,472</b>
			<b>Total</b>	<b>+ \$1,036,333</b>

\* 2000 value adjusted for inflation to 2009 value.

These estimates do not include any revenue that would be generated from changes in parole laws. Currently, marijuana-related activities are considered technical violations that will result in revocation of parole and return to prison. If parole laws were changed so that this was not the case, this would save California millions of dollars.<sup>286</sup> However, alcohol use also often constitutes a

285. *Id.* at 7.

286. The annual per capita cost in 2009-10 for prison institutions is \$52,363 and parole is \$7,278. 2009-10 GOVERNOR'S BUDGET (PROPOSED): 5225 DEPARTMENT OF CORRECTIONS AND

technical parole violation even though it is not illegal, so it is unknown whether parole laws would change.

These figures overestimate the savings of legalization. They do not account for the revenue the State derives from seizures of assets from those arrested for marijuana offenses. The proceeds from these assets are used to fund, among other things, state and local law enforcement.<sup>287</sup> In 2008, a total of 4,490 forfeiture cases were completed under California law, disbursing \$25,548,228.<sup>288</sup> However, under California law asset forfeiture can occur for many reasons and it unknown what percentage of that \$25.5 million is from marijuana related cases.<sup>289</sup>

### 3. *Other Revenue Sources*

In addition to taxes and expenditure reductions, legalizing marijuana will generate significant revenue through indirect sources. The legalization of marijuana would create or expand a number of related industries including hemp, marijuana paraphernalia, and tourism. It would also generate additional jobs. This Article does not examine these secondary revenue streams.

#### *C. Fiscal Impact Summary*

The legalization and taxation of marijuana has the potential to generate significant revenue and savings for California. Due to the unavailability of certain statistics and the uncertainty of the true price of marijuana, the proposed tax rates, enforcement level by the federal government, these estimates are exactly that; estimates. The regulation of the marijuana industry will likely cost at most \$7.6 million. The regulatory agency would also collect licensing and permitting fees which would likely offset most, if not all, of these administrative costs. The TRCCA requires criminal records be cleared of any marijuana-related convictions. The cost of this would be minor for the State, but could be significant to local governments. The legalization of marijuana could generate between \$160.71 million and \$1.313 billion depending on whether additional sales and excise taxes are imposed. Decriminalization would provide a total projected decrease in criminal justice expenditures of \$1,196,805 but legalization in a manner similar to alcohol would cause an increase in expenditures of \$1,036,333. There would also be a loss of revenue of no more than \$25.5 million attributable to reduced asset forfeiture. These estimates do not include potential revenue from indirect sources like tourism or

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REHABILITATION, 5 (2009). If even 23 individuals avoided an additional year of jail time this would be over \$1 million dollars in additional revenue.

287. Office of the Attorney General, *Asset Forfeiture: Annual Report 2008*, at 3-4 (2008), available at [http://ag.ca.gov/publications/2008\\_af/intro\\_stats\\_2008.pdf](http://ag.ca.gov/publications/2008_af/intro_stats_2008.pdf).

288. *Id.* at 2.

289. For California statutes governing asset forfeiture, see CAL. HEALTH & SAFETY CODE §§ 11469-11495.

potential social costs like increased substance abuse.

## VII. CONCLUSION

It is likely that any initiative legalizing marijuana and most of its implementing legislation would be upheld and enforceable. Very few substantive provisions of any legalization measure would be challenged due to standing issues. However, the regulatory scheme would likely be challenged because of the standing requirement that the provision cause harm or impose obligations of the petitioner. These challenged provisions are likely to be upheld, except in the unlikely case that the court applies obstacle preemption or if the provision requires conduct that violates or authorizes the violation of the CSA. Since local governments must enforce these provisions unless they are declared invalid by a court, after legalization marijuana would be illegal under federal law but legal under state law. In response to legalization, however, the federal government would likely change its current stance and begin prosecuting marijuana offenses. This would severely undermine the actual implementation of the initiative and the potential revenue.

Assuming that the federal government would permit legalization in the same manner as medical marijuana, these initiatives could generate significant revenue that is greatly needed by both the State and local governments. The total possible revenue depends greatly on the extent to which the federal government impedes legalization, the level of consumption and retail value of marijuana and the actual tax and fee rates, but could be in the ballpark of \$135 million to \$1.29 billion. Notwithstanding the moral, social and legal issues, this revenue would provide important relief to a cash strapped state.

