

A Breath of Fresh Air: A Constitutional Amendment Legalizing Marijuana Through an Article V Convention of the States

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A Breath of Fresh Air: A Constitutional Amendment Legalizing Marijuana Through an Article V Convention of the States

Ryan C. Griffith, Esq.

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ABSTRACT

Criminal enforcement of anti-marijuana laws by the United States federal government has been non-sensical for more than twenty years. Culminating, ultimately, in an anomaly within American jurisprudence when California legalized marijuana in 1996 in direct violation of federal law, yet the federal government did little to stop it. Since then, a majority of states have followed California and legalized marijuana. Currently, thirty-six states and the District of Columbia have legalized medical marijuana despite federal law.

Every year billions of dollars are spent on the federal enforcement of anti-marijuana laws while states collect billions in tax revenue from marijuana sales. Even more confusing is the fact that both President Obama and President Trump have issued federal directives loosening federal enforcement of laws criminalizing marijuana. Despite all this, marijuana maintains the status of a Schedule I substance, and the violation of federal marijuana law can, technically, result in a death sentence.

The federal government has blundered numerous times on the issue of marijuana. These blunders have cost the country billions of dollars and ruined numerous lives through the unnecessary prosecution of marijuana offenders.

This Article argues that because the states are capable of regulating marijuana, they should band together under the authority granted to them by Article V of the United States Constitution. That article provides an avenue to amend the constitution. If thirty-four states apply for an Article V Convention of the States, the federal government must convene one. An Article V Convention has never been held but has often been discussed. Considering a majority of the states and the District of Columbia have already legalized marijuana to some degree, and the federal government is undecided on marijuana enforcement, conditions are perfect for calling an Article V Convention of the States to ratify a Constitutional Amendment ending the archaic federal treatment of marijuana in this country.

AUTHOR'S NOTE

I have to primarily thank Professor Mike Vitiello from the McGeorge School of Law for creating the cannabis law program at McGeorge, which I am a proud graduate of. This outstanding program helped me build a solid base of knowledge around all aspects of marijuana law. It was a truly groundbreaking program that really ignited my desire to learn again. In addition to the program, Mike spent countless hours guiding me through writing my first law review article. Throughout this process he provided excellent suggestions and feedback. I cannot thank Professor Mike Vitiello and the McGeorge School of Law enough for their support in getting this article off the ground.

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I. INTRODUCTION

For nearly 150 years following the founding of the United States, marijuana use was of little concern to the federal government.¹ However this policy changed in 1937 when Congress passed the Marihuana Tax Act.² This Act was the first step taken by the federal government to regulate marijuana on a national level.³ The Act did not criminalize marijuana outright, but it imposed an extremely burdensome tax, making it virtually impossible to legally participate in the marijuana industry.⁴ Although the federal government dipped its toe into the regulation of marijuana in 1937, it remained the states' prerogative whether to pass and enforce laws criminalizing the use, cultivation, sale, and distribution of marijuana.⁵

The federal government drastically changed its position on marijuana with the enactment of the Controlled Substances Act (“CSA”) in 1970.⁶ The CSA makes various acts illegal with regard to specified drugs and substances, such as the manufacture, distribution, and even simple possession.⁷ Presently, marijuana is listed as a Schedule I drug—the most severe scheduling a substance can receive.⁸

¹ See PAMELA J. SCHRAM & STEPHEN G. TIBBETTS, INTRODUCTION TO CRIMINOLOGY: WHY DO THEY DO IT? 434 (3d ed. 2021) (discussing the general public's perception of marijuana in a time before Harry Anslinger brought it to the forefront of the federal government's attention).

² Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551.

³ See SCHRAM & TIBBETTS, *supra* note 1, at 434.

⁴ *Id.*

⁵ Olivia B. Waxman, *The Surprising Link Between U.S. Marijuana Law and the History of Immigration*, TIME (Apr. 20, 2019, 1:30 PM), <https://time.com/5572691/420-marijuana-mexican-immigration/> [<https://perma.cc/QK38-H7FX>].

⁶ Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 801–90).

⁷ 21 U.S.C. §§ 841–44 (2018).

⁸ “Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers . . . within the specific chemical designation: (10) Marihuana.” *Id.* § 812(c). The Act defines a Schedule I controlled substance as a drug or other substance that “has a high potential for abuse . . . has no currently accepted medical use in treatment in the United States . . . [and] [t]here is a lack of accepted safety for use of the drug or other substance under medical supervision.” *Id.* § 812(b)(1)(A-C).

Under the Federal Death Penalty Act, an individual can even be sentenced to death if found guilty of certain crimes involving marijuana.⁹

Despite the existence of harsh federal penalties, marijuana is the second “most commonly used psychotropic drug in the United States,” behind only alcohol.¹⁰ In fact, as of the November 2020 elections, thirty-five states and the District of Columbia had legalized medical marijuana.¹¹ However, even though a majority of the states have legalized the drug in either a medical or recreational capacity, it remains entirely illegal federally.¹² Having numerous businesses operate in compliance with state law while simultaneously potentially violating federal law is illogical. Uniformity is crucial in the law, and considering that the federal government has previously stated that marijuana enforcement is not a priority, it makes little sense for it to continue to be illegal under federal law.¹³ If the states organized

⁹ Federal Death Penalty Act of 1994, 18 U.S.C. § 3591(b) (2018). An individual could be sentenced to death if

found guilty of manufacturing, importing or distributing a controlled substance if the act was committed as part of a continuing criminal enterprise [involving, among other things,] 60,000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 60,000 or more marijuana plants, or the if the enterprise received more than \$20 million in gross receipts during any 12-month period of its existence.

Federal Laws and Penalties, NORML, <https://norml.org/laws/federal-penalties-2/> [<https://perma.cc/4B4L-N3V7>].

¹⁰ NAT'L INST. ON DRUG ABUSE, MARIJUANA RESEARCH REPORT 4 (July 2020), <https://www.drugabuse.gov/download/1380/marijuana-research-report.pdf> [<https://perma.cc/UF38-X8JV>].

¹¹ Sarah Rense, *Here Are All the States That Have Legalized Weed in the U.S.*, ESQUIRE (Nov. 4, 2020), <https://www.esquire.com/lifestyle/a21719186/all-states-that-legalized-weed-in-us/> [<https://perma.cc/5CNA-WUGZ>].

¹² Controlled Substances Act § 841–43.

¹³ Memorandum from James M. Cole, Deputy Attorney Gen., to all U.S. Attorneys (Aug. 29, 2013) [hereinafter Cole Memorandum] (on file with the UMass Law Review) (explaining that the federal government will enforce the CSA only when activity relates to specific harms, such as distribution to minors; marijuana cultivation on public land; the use of marijuana on federal property; activity of “criminal enterprises, gangs, and cartels”). The Attorney General for the Trump Administration, Jeff Sessions, released a memo in January of 2018 explicitly rescinding the Cole Memo and directed prosecutors to “follow the well-established principles that govern all federal prosecutions.” Memorandum from Jefferson B. Sessions, III, Attorney Gen., U.S. Dept. of Justice, to all U.S.

together to remove the absurd federal laws controlling marijuana, it would be a breath of fresh air for this country.

This Article will explain why a constitutional amendment is necessary to legalize marijuana on a federal level and how such an amendment could be ratified through a Convention of the States as contemplated in Article V of the U.S. Constitution.¹⁴ An Article V Convention of the States has yet to be successful,¹⁵ however, considering that over two-thirds of the states have authorized the use of medical marijuana, legalizing marijuana at the federal level may be the ideal issue for the first successful Convention in U.S. history.¹⁶

Federal legalization of marijuana is a widely discussed topic, and there are favorable economic and social arguments to support it. Economically, the federal government could benefit greatly from legalization by being able to tax marijuana businesses.¹⁷ Through legalization, the government could also reduce the billions of taxpayer dollars spent every year enforcing the laws that criminalize marijuana.¹⁸ These arguments go hand-in-hand with the social benefits that favor legalization. For example, low-level drug offenders would be free of the stigma of a criminal record hampering their job

Attorneys (Jan. 4, 2018) [hereinafter Sessions Memorandum] (on file with the UMass Law Review).

¹⁴ See U.S. CONST. art. V.

¹⁵ *An Article V Convention of States has Never Been Called. How Do We Know What Will Happen?*, CONVENTION OF STATES ACTION (May 31, 2019), <https://conventionofstates.com/news/an-article-v-convention-of-states-has-never-been-called-how-do-we-know-what-will-happen> [<https://perma.cc/R9CH-CGNR>].

¹⁶ See Alex Portal, *What is a Convention of States?*, BLACK HILLS PIONEER (Feb. 2, 2021), https://www.bhpioneer.com/local_news/what-is-a-convention-of-states/article_4ec91068-657c-11eb-8aa8-1ff4dcc96094.html [<https://perma.cc/8A9U-X3XD>] (highlighting public initiative and the feasibility of constitutional amendments).

¹⁷ See Carl Davis, *State and Local Cannabis Tax Revenue Jumps 33%, Surpassing \$1.9 Billion in 2019*, INST. ON TAX'N & ECON. POL'Y: JUST TAXES (Mar. 10, 2020), <https://itep.org/state-and-local-cannabis-tax-revenue-jumps-33-surpassing-1-9-billion-in-2019/> [<https://perma.cc/22NS-Q8A6>] (“Excise and sales taxes on cannabis [in the eight states that have legalized recreational marijuana] raised more than \$1.9 billion in 2019.”).

¹⁸ Walt Hickey & Kelly McLaughlin, *Despite Legalizing Simple Possession, Marijuana Arrests Still Inflict Tens of Billions of Dollars in Economic Damage on Americans Annually*, INSIDER (June 25, 2019), <https://www.insider.com/marijuana-arrests-are-costing-the-us-billions-2019-6> [<https://perma.cc/D7W5-ETHR>].

prospects, which could also lead to increased income tax revenue.¹⁹ Finally, legalizing marijuana federally would extend certain national benefits to the industry that are currently unavailable, such as increased economic protection for workers through access to banking resources and financial security.²⁰ These benefits would all be realized in addition to the already well known medical benefits of marijuana.²¹ This Article aims to empower the states to end the federal government's illogical criminalization of marijuana.

Alexander Hamilton and other founders of this nation foresaw that the Constitution would require changes subsequent to its ratification, and they feared that the federal government would refuse to make them.²² For this reason, they fought for states to have the right to amend the Constitution without Congressional support or approval.²³ In the *Federalist Papers*, Hamilton stated, "it has been urged, that the persons delegated to the administration of the national government, will always be disinclined to yield up any portion of the authority of which they were once possessed."²⁴

Later in history, Abraham Lincoln echoed similar sentiments about amending the Constitution through an Article V Convention of the

¹⁹ *Id.*

²⁰ Justin Wingerter, *Cannabis Industry May Finally Move Past Cash as Democrats Look to Loosen Banking Restrictions*, DENVER POST (Feb. 4, 2021, 8:01 AM), <https://www.denverpost.com/2021/02/04/marijuana-banking-colorado-congress-cannabis-restrictions/> [<https://perma.cc/MM9H-URB8>] (explaining how the federal laws on marijuana limit credit unions and banks' ability to work with cannabis companies resulting in a cash-only business); *Cannabis Workers, Unemployment Insurance, and the Small Business Administration: What You Need to Know*, NORML (Mar. 20, 2020), <https://norml.org/blog/2020/03/20/cannabis-workers-unemployment-insurance-and-the-small-business-administration-what-you-need-to-know/> [<https://perma.cc/XF5E-LQZ2>].

²¹ In fact, at the very outset of the federal government's foray into marijuana regulation in 1937, the American Medical Association wrote to Congress stating that, "the prevention of the use of the drug for medical purposes can accomplish no good end whatsoever." William C. Woodward, *American Medical Association Opposes the Marijuana Tax Act of 1937* (July 10, 1937), http://www.marijuanalibrary.org/AMA_opposes_1937.html (publishing a letter from William C. Woodward, Legislative Counsel, American Medical Association, to Pat Harrison, Chairman Committee on Finance, United States Senate).

²² THE FEDERALIST NO. 85 (Alexander Hamilton).

²³ *Id.*

²⁴ *Id.* at 456 (George Carey & James McClellan eds., 2001).

States.²⁵ In his first inaugural address on March 4, 1861, President Lincoln stated, “I will venture to add that to me the convention mode seems preferable, in that it allows amendments to originate with the people themselves.”²⁶

At this time in our nation’s history, there are specific circumstances in which the federal government is flawed and needs correction. There is no clearer example of the federal government’s inability to meet the reasonable expectations of its constituents than its decades-long failed War on Drugs, and in particular, the mishandling of marijuana regulation. This Article will briefly explain the history of marijuana laws in the United States and then explore why a Constitutional Amendment is necessary to finally correct the misguided actions of Congress. The Article concludes by exploring the feasibility of calling a Convention of the States to amend the Constitution.

II. A HISTORY OF MARIJUANA LAW IN THE UNITED STATES

Marijuana did not present any particular issues in early United States history, and certain colonies actually *required* that farmers grow hemp.²⁷ Additionally, the American Medical Association knew of no dangers presented by the plant and even believed it offered medical benefits.²⁸ However, perceptions of marijuana changed with the passage of the Marijuana Tax Act of 1937. Although the Act did not expressly criminalize marijuana, it imposed such a high tax on the crop that selling it legally became impractical.²⁹

²⁵ EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE GREAT REBELLION* 108 (4th ed. 1882).

²⁶ *Id.*

²⁷ The hemp, a variety of the cannabis sativa plant, was cultivated for its strong fibers which were useful for canvas, cloth, and paper. Unlike its sister, marijuana, this plant is not mind-altering. Oscar H. Will, III, *The Forgotten History of Hemp Cultivation in America*, FARM COLLECTOR (Nov. 2004), <https://www.farmcollector.com/farm-life/strategic-fibers> [https://perma.cc/GMK8-Q39S].

²⁸ *Scientific History of Medical Cannabis*, AMS. FOR SAFE ACCESS, https://www.safeaccessnow.org/scientific_history_cannabis [https://perma.cc/D868-E2GD].

²⁹ SCHRAM & TIBBETTS, *supra* note 1, at 434; *see Did You Know . . . Marijuana Was Once a Legal Cross Border Import?*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/about/history/did-you-know/marijuana> [perma.cc/HVC4-V9NJ]. Interestingly there was a push by states to make marijuana illegal long before the federal government’s initiative. For example,

A. Increased Federal Regulation

One of the key individuals behind the Marijuana Tax Act was Harry Anslinger, an extremely influential figure in the alcohol prohibition and the federal regulation of narcotics and other dangerous drugs.³⁰ One of the first positions he held was Assistant Commissioner of the Treasury Department's Bureau of Prohibition.³¹ As Prohibition was coming to an end, he was named the founding Commissioner of the Treasury Department's Bureau of Narcotics.³² Anslinger was a notorious racist, known for his abhorrent slurs and associating race with marijuana use.³³ Anslinger's beliefs had no basis in science or fact, but his statements created a hysteria around marijuana.³⁴ The 1936 movie *Reefer Madness* showcased the bizarre beliefs of the time, which contributed to a slight increase of federal government involvement in marijuana enforcement.³⁵ Yet, despite the rhetoric Anslinger and his ilk tried to engender using a campaign of misinformation, the federal enforcement of marijuana law remained largely a non-issue.³⁶

The general regulation of drugs was increased at the federal level shortly after the release of *Reefer Madness* when the Federal Food Drug and Cosmetic Act ("FDCA") was passed in 1938.³⁷ The FDCA

in 1913, California was surprisingly the first state to outlaw marijuana primarily out of fear towards Mexican immigrants. Kenneth Michael White & Mirya R. Holman, *Marijuana Prohibition in California: Racial Prejudice and Selective-Arrests*, 19 RACE, GENDER & CLASS 75, 75 (2012).

³⁰ *H.J. Anslinger Papers, 1835–1975*, PENN STATE U. LIBR., <https://www.libraries.psu.edu/findingaids/1875.htm> [<https://perma.cc/K2A8-GRCF>].

³¹ *Id.*

³² *Id.*

³³ Laura Smith, *How a Racist Hate-Monger Masterminded America's War on Drugs*, TIMELINE (Feb. 28, 2018), <https://timeline.com/harry-anslinger-racist-war-on-drugs-prison-industrial-complex-fb5cbc281189> [<https://perma.cc/6R6Y-F9QM>] ("Reefer makes darkies think they're as good as white men," is only one of many horrid quotes attributable to Anslinger).

³⁴ *Id.*

³⁵ REEFER MADNESS (George A. Hirliman Productions 1936).

³⁶ *See generally Marijuana Timeline*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> [<https://perma.cc/9MUB-KV62>].

³⁷ Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1040 (codified at 21 U.S.C. §§ 301–99); Sean M. O'Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 AM. U. L. R. 823, 840 (2019).

was motivated in part by the Elixir Sulfanilamide disaster, which caused the death of over one hundred patients.³⁸ The deaths resulted from Elixir Sulfanilamide being prescribed as a medicine, but, unbeknownst to the doctors, it was actually a poison.³⁹ The tragedy hastened Congress' passage of the FDCA, which included provisions regulating medication to prevent the reoccurrence of such a misfortune.⁴⁰

The federal government increased the regulation of marijuana by passing the Boggs Act in 1951.⁴¹ This Act appears to be the first form of federal criminal enforcement of marijuana, as it imposed a minimum sentence of two to five years in prison and a fine of up to \$2,000 for the first offense of importing marijuana into the country.⁴²

Subsequently, in response to a finding that the use of "depressant and stimulant drugs" was endangering public safety on the interstate highways, Congress passed the Drug Abuse Control Amendments ("DCA") in 1965.⁴³ The drugs specifically cited for enforcement in the DCA were barbituric acid, amphetamines, and marijuana.⁴⁴ As a penalty for illegally trafficking any of these substances, a defendant could be fined up to \$5,000 and sentenced to a maximum of two years in prison.⁴⁵

In 1970 the passage of the CSA both accelerated and signaled the impending War on Drugs. The Act set out five schedules of drugs. Schedule I drugs, such as heroin, are deemed to have no medical use, be highly addictive, and handling them results in stiff criminal penalties.⁴⁶ Congress designated marijuana as a Schedule I drug under

³⁸ Carol Ballentine, *Taste of Raspberries, Taste of Death: The 1937 Elixir Sulfanilamide Incident*, FDA CONSUMER, June 1981.

³⁹ Animal testing was not yet required to approve a drug when Elixir Sulfanilamide was released to doctors, and the deaths of their patients was unforeseen. *See id.*

⁴⁰ *Id.*

⁴¹ Boggs Act of 1951, Pub. L. No. 82-255, 65 Stat. 767 (amending 21 U.S.C. § 174 sec. 2(c)).

⁴² *Id.* at 767.

⁴³ Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74, 79 Stat. 226 (amending scattered sections of 21 U.S.C. § 301-99).

⁴⁴ *Id.* at 227 (this amended section of the Federal Food, Drug, and Cosmetic Act is no longer in force).

⁴⁵ *Id.* at 233 (this amended section of the Federal Food, Drug, and Cosmetic Act is no longer in force).

⁴⁶ Controlled Substances Act, 21 U.S.C. § 812, 841-44 (1970).

the CSA, and that designation remains in force today.⁴⁷ There are a few different reasons explaining the classification of cannabis⁴⁸ as a Schedule I drug. The prominent reason is the United Nations Single Convention on Narcotic Drugs Treaty, which was signed in 1961 by ninety-seven countries—including the U.S.⁴⁹ This treaty was the first piece of jurisprudence to place narcotics into four schedules based on their perceived danger and directly informed the passage of the CSA.⁵⁰

Another reason for the scheduling of drugs was to reduce the mandatory minimum sentences that had been imposed by the Boggs Act and the DCA. The legislature wanted to allow for prosecutorial and judicial discretion in drug cases.⁵¹ Both the Boggs Act and the DCA imposed minimum sentences, but the CSA implemented high maximum sentences. For example, a defendant in possession of a Schedule I drug could be sentenced to a term of imprisonment of *not more* than fifteen years and a fine of *not more* than \$25,000.⁵² The legislature authorized prosecutors and judges to impose heavy penalties on dangerous drug dealers, while avoiding mandatory minimums in low-level offender cases.⁵³ Another reason for initially including marijuana in Schedule I was how easily it allegedly could be rescheduled by the Drug Enforcement Administration (“DEA”) based

⁴⁷ *Id.* § 812; *Drug Scheduling*, U.S. DRUG ENFORCEMENT ADMIN., <https://www.dea.gov/drug-scheduling> [<https://perma.cc/X5DP-BXXS>]. The Drug Enforcement Administration (“DEA”) “is the federal agency primarily responsible for enforcing the CSA’s registration and requirements.” JOANNA LAMPE, CONG. RESEARCH SERV., R45948, *THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 117TH CONGRESS* 16 (2021).

⁴⁸ Throughout this Article the terms ‘marijuana’ and ‘cannabis’ are used interchangeably.

⁴⁹ Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151.

⁵⁰ The application of this treaty to marijuana’s scheduling is discussed in a United States Second Circuit Court decision. *See United States v. Kiffer*, 477 F.2d 349, 351 (2d Cir. 1973).

⁵¹ *United States v. Noland*, 495 F.2d 529, 532–33 (5th Cir. 1974).

⁵² Controlled Substances Act, 21 U.S.C. § 811 (1970). The DEA Resource Guide currently lists that a mandatory minimum of 10 years may be imposed if a defendant possesses more than 1,000 marijuana plants. A second offense carries a minimum of 20 years imprisonment, and a third offense carries a life sentence and up to a 20 million dollar fine. DRUG ENFORCEMENT ADMIN., *DRUGS OF ABUSE: A DEA RESOURCE GUIDE* 31 (2017), https://www.dea.gov/sites/default/files/drug_of_abuse.pdf [<https://perma.cc/7QJZ-3P2Y>].

⁵³ *Noland*, 495 F.2d at 533 n.3 (quoting H. Rep. No. 91-1444, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Admin. News, pp. 4566, 4576).

upon a showing of sufficient medical evidence.⁵⁴ A New York court noted that marijuana could be readily rescheduled by Congress on the information compiled and reported by the administrative agencies responsible for enforcing the CSA.⁵⁵

The passage of the CSA seemed to move through Congress with enthusiasm, and the DCA and United Nations Single Convention on Narcotic Drugs Treaty were used as templates. Despite marijuana receiving Schedule I classification and President Nixon's War on Drugs, Raymond Shafer was appointed to head a federal commission investigating whether marijuana *should* be criminalized.⁵⁶ Shafer's official title in this investigation was 'Chairman of the National Commission of Marihuana and Drug Abuse' and the group was informally known as the Shafer Commission.⁵⁷ The findings of the Shafer Commission were published in a report, *Marihuana, a Signal of Misunderstanding*.⁵⁸ In the report, the commission concluded that certain instances of marijuana possession and use should *not* be criminalized, but President Nixon ignored the very findings he commissioned.⁵⁹

The Shafer Commission was only one of many groups that attempted to reschedule and decriminalize marijuana. One particularly active organization in this fight is the National Organization for Reform of Marijuana Laws ("NORML").⁶⁰ The group works on legal cases advocating for the reclassification of marijuana. However, many of its lawsuits have been unsuccessful because challenges to the CSA are reviewed by courts applying a rational basis analysis, and courts

⁵⁴ Controlled Substances Act § 811.

⁵⁵ See *United States v. La Froscia*, 354 F. Supp. 1338, 1341 (S.D.N.Y. 1973).

⁵⁶ Jason Scott Plume, *Cultivating Reform: Richard Nixon's Illicit Substance Control Legacy, Medical Marijuana Social Movement Organizations, and Venue Shopping* 51 (Dec. 2012) (unpublished Ph.D. dissertation, Syracuse University) (on file with the UMass Law Review).

⁵⁷ *Id.* at 51–52; see also *National Commission on Marijuana and Drug Abuse 1971 Poll*, ROPER CTR. FOR PUB. OPINION RES., <https://ropercenter.cornell.edu/national-commission-marijuana-and-drug-abuse-1971-poll> [<https://perma.cc/CZ7H-9N4Z>].

⁵⁸ Gabriel G. Nahas & Albert Greenwood, *The First Report of the National Commission on Marihuana (1972): Signal of Misunderstanding or Exercise in Ambiguity*, 50 BULL. N.Y. ACAD. MED. 55 (1974).

⁵⁹ See *id.* at 68; Presidential Remarks on the Marihuana Report, 103 Pub. Papers 488, 495 (Mar. 24, 1972).

⁶⁰ *About NORML*, NORML, <https://norml.org/about-norml/> [<https://perma.cc/9VPE-VKST>].

have held that marijuana should not be rescheduled absent legislative action.⁶¹

NORML's lawsuits have not been complete failures, however, as the court in *NORML v. Ingersoll* was heavily critical of the DEA's predecessor agency, the Bureau of Narcotics and Dangerous Drugs, and its approach to marijuana enforcement.⁶² For that reason, the court directed further research be conducted to explain why marijuana should be criminalized.⁶³ After the court remanded *Ingersoll*, the question of marijuana criminalization appeared again in the 1977 case *NORML v. Drug Enforcement Administration*.⁶⁴ In this case, the court renewed its criticism of the DEA's argument that the Director of the DEA, as a delegatee of the Attorney General, had sole discretion to determine a drug's scheduling, writing:

This is a matter that gives us pause. The respondent seems to be saying that even though the treaty does not require more control than Schedule V provides, he can on his own say-so and without any reason insist on schedule I. We doubt that this was the intent of Congress.⁶⁵

The case was remanded because of the DEA's unwillingness to listen to scientific evidence and its arbitrary block of NORML's petition to reschedule marijuana.⁶⁶ Thereafter, in an unpublished decision, the DEA was again criticized by the reviewing court which stated: "[w]e regrettably find it necessary to remind respondents of an agency's obligation on remand not to 'do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case.'"⁶⁷ Once more, this issue was

⁶¹ See *Nat'l Org. for the Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654, 661 (D.C. Cir. 1974); see also *United States v. La Froscia*, 354 F. Supp. 1338, 1341 (S.D.N.Y. 1973) (Although NORML was not a party to this case, the court stated that "Congress has not seen fit to act on the recommendations [for reclassifying marijuana]. Any judicial action at this stage would be an unwarranted intrusion into the legislative province.").

⁶² See *Ingersoll*, 497 F.2d at 660.

⁶³ *Id.* at 660–61.

⁶⁴ *Nat'l Org. for the Reform of Marijuana Laws v. Drug Enf't Admin.*, 559 F.2d 735, 757 (D.C. Cir. 1977).

⁶⁵ *Id.* at 741 (quoting *Ingersoll*, 497 F.2d at 660–61).

⁶⁶ *Id.* at 757.

⁶⁷ *Nat'l Org. for the Reform of Marijuana Laws v. Drug Enf't Admin.*, No. 79-1660, 1980 U.S. App. LEXIS 13099, at *2 (D.C. Cir. Oct. 16, 1980) (quoting *City of Cleveland v. Fed. Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977)).

remanded for further research, and after all of these cases and criticisms, the scheduling of marijuana remains unchanged. In 1992, the DEA published its final decision in the Federal Register that marijuana had no medical purpose and must remain a Schedule I drug.⁶⁸

The NORML litigation shows that the DEA is adamant about continuing to enforce laws which classify marijuana a Schedule I drug. To this day, it appears the DEA is unwilling to listen to scientific evidence on the medical benefits of marijuana. Nor does the DEA follow the procedures outlined in the CSA regarding rescheduling. Instead, the DEA seems willing to fight adamantly to continue the federal criminalization of marijuana.⁶⁹

B. California's Compassionate Use Act

As NORML's lawsuits failed to successfully reschedule marijuana, California jumped to the forefront of state marijuana legalization by passing the Compassionate Use Act ("CUA") in 1996.⁷⁰ The Act granted immunity from state prosecution for those with a medical recommendation to use marijuana from a physician,⁷¹ but it remained illegal federally. Congress never tried voiding the CUA by using the Supremacy Clause, nor could the federal government direct local or state agents to enforce federal laws based on the holding of *Printz v. United States*.⁷² However, it could have directed the DEA to shut down the shops that opened, confiscate all marijuana plants, and arrest anyone in possession of marijuana under federal law but it did not take such a zero-tolerance approach. Instead, for the most part, the federal

⁶⁸ Marijuana Scheduling Petition, 57 Fed. Reg. 10499 (Drug Enf't Admin. Mar. 26, 1992) (petition denied).

⁶⁹ See, e.g., Answering Brief for the Federal Respondents, *Sisley v. U.S. Drug Enf't Admin.*, No. 20-71433 (9th Cir. Nov. 30, 2020), 2020 WL 7249243; Kyle Jaeger, *DEA Asks Federal Court to Dismiss Marijuana Rescheduling Lawsuit—Again*, MARIJUANA MOMENT (Dec. 2, 2020), <https://www.marijuanamoment.net/dea-asks-federal-court-to-dismiss-marijuana-rescheduling-lawsuit-again/> [<https://perma.cc/N9N9-Z8JL>].

⁷⁰ CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

⁷¹ *Id.* at (b)(1)(A).

⁷² *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress requiring state law enforcement officers to update a federal database on handgun purchasers was unconstitutional because Congress cannot compel state officials to act).

government opted to leave California and other states that subsequently legalized medical marijuana alone.⁷³

As the CUA was the first attempt at legalizing marijuana at a state level while simultaneously violating federal law, many issues arose. One such issue occurred in 2003, when California passed an amendment to the CUA requiring marijuana users to obtain a medical marijuana card and limiting the quantity of marijuana an individual could possess.⁷⁴ However, the restriction would become moot, as the amendment was declared unconstitutional by the California Supreme Court because it limited the CUA without voter approval.⁷⁵

C. The Broad Application of the Commerce Clause

Almost 10 years after its passage, the CUA was analyzed by the U.S. Supreme Court in *Gonzales v. Raich*.⁷⁶ *Raich* was a civil case where the plaintiffs brought an action against the federal government “seeking injunctive and declaratory relief prohibiting the enforcement of the [CSA].”⁷⁷ The original defendants in *Raich* argued that the federal government had no authority to regulate medical marijuana users in California that were growing small amounts of marijuana for personal use.⁷⁸ The Court held that Congress properly passed the CSA under the authority of the Commerce Clause, making it constitutional for the federal government to regulate marijuana in a state where it was legalized.⁷⁹ As a result of this decision, Congress continued to

⁷³ When it did insert itself, the federal agents conducted raids on marijuana facilities, which became a prevalent issue during the 2008 Presidential Campaign. See *2008 Presidential Candidates on Marijuana Raids*, PROCON.ORG (Feb. 2, 2009), <https://medicalmarijuana.procon.org/additional-resources/2008-presidential-candidates-on-marijuana-raids/> [<https://perma.cc/D2AW-U6PL>]. Then-candidate Barack Obama did not have a strong stance against the raids, merely stating they were a poor use of resources. *Id.* Conversely, then-candidate John McCain did not believe medical marijuana should be legal. *Id.* After Obama won the presidency, the federal enforcement of marijuana laws was relaxed. John Nichols, *The Nation: DOJ Backs Off Medical Marijuana*, NPR (Oct. 20, 2009, 7:40 AM), <https://www.npr.org/templates/story/story.php?storyId=113959834> [<https://perma.cc/BF9E-NDS2>].

⁷⁴ CAL. HEALTH & SAFETY CODE § 11362.77(a), I (West 2003), *invalidated by* *People v. Kelly*, 222 P.3d 186, 200 (Cal. 2010).

⁷⁵ *Kelly*, 222 P.3d at 200.

⁷⁶ *Gonzales v. Raich*, 545 U.S. 1, 5–6 (2005).

⁷⁷ *Id.* at 7.

⁷⁸ *Id.* at 7–8.

⁷⁹ See *id.* at 32–33.

hold the authority to enforce the CSA regardless of state-specific legalization.

Serious questions remain regarding whether the Supreme Court made the right decision or if the Court read the Commerce Clause too broadly. Justice Thomas's dissent in *Raich* makes an excellent point that the

[Plaintiffs] use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.⁸⁰

The Commerce Clause grants Congress the power “to regulate Commerce with Foreign Nations, and among the several states, and with Indian Tribes.”⁸¹ Judging by this language, it seems clear the original intent was to give Congress the power to regulate commerce moving *between* states, which was precisely the viewpoint expressed by some Founders, like Alexander Hamilton in the Federalist Papers. The decision in *Raich* represented an expansion in the Court's definition of commerce “among the several states.”⁸²

For most of this nation's history, the Supreme Court employed a very limited definition of interstate commerce, and in 1922 even found that professional baseball was not interstate commerce subject to federal regulation.⁸³ The fact that players travelled across state lines to play games was found to be merely incidental to interstate commerce,

⁸⁰ *Id.* at 57–58 (Thomas, J., dissenting).

⁸¹ U.S. CONST. art. I, § 8, cl. 3.

⁸² In reaction to the majority's approach to the issue of regulating medical marijuana for personal consumption, Justice O'Connor opined:

The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market.

Raich, 545 U.S. at 49 (O'Connor, J., dissenting).

⁸³ *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208–09 (1922).

and therefore unable to be regulated by Congress' commerce power.⁸⁴ It can be argued that the federal government's expansive use of the Commerce Clause and other powers since 1937 has gone too far, and its regulation of minor marijuana possession using the Commerce Clause can be a rallying cry for states to fight back using Article V of the Constitution.

Although the plaintiffs lost in *Raich*, the decision did not overturn California's medical marijuana laws, and the state now allows both medical and recreational marijuana use.⁸⁵ In fact, the California created the Bureau of Cannabis Control ("BCC"), a department dedicated entirely to the oversight of the state's marijuana industry.⁸⁶ Therefore, the decision in *Raich* did very little to limit the growth of the marijuana business in California.

D. Decreased Federal Enforcement During the Obama Administration

After the *Raich* decision, two memorandums were issued by the Obama Administration stating that while marijuana remains illegal federally, the Department of Justice would not prosecute marijuana operations that complied with state laws.⁸⁷ Although the Federal government won a decisive victory in *Raich*, it continued to sparsely enforce marijuana laws, evidenced by these memos which articulated that marijuana enforcement was not a priority.⁸⁸ After *Raich*, many states which had already legalized medical marijuana, went on to approve recreational marijuana, such as Colorado, Washington, California, and Oregon.⁸⁹ As of this Article's writing, fifteen states and the District of Columbia have approved recreational marijuana, and

⁸⁴ *Id.* This is because the games were played in one state, even though the teams traveled interstate. *Id.*

⁸⁵ See CAL. HEALTH & SAFETY CODE §§ 11362.5, 11357 (West 2021).

⁸⁶ *About Us*, CAL. BUREAU CANNABIS CONTROL, https://bcc.ca.gov/about_us/ [<https://perma.cc/UJJ2-X58Y>].

⁸⁷ As long as medical marijuana suppliers complied with state law, environmental regulations, and did not engage in activities such as providing marijuana to minors or using firearms in the distribution of marijuana, the federal government would let marijuana operations run without federal interference. Memorandum from David W. Ogden, Deputy Attorney Gen., to selected U.S. Attorneys (Oct. 19, 2009) [hereinafter Ogden Memorandum] (on file with the UMass Law Review); Cole Memorandum, *supra* note 13.

⁸⁸ See sources cited *supra* note 89 and accompanying text.

⁸⁹ Rense, *supra* note 11.

over twenty states have approved medical marijuana.⁹⁰ While states continue to legalize medical marijuana, the federal government remains resolute to keep marijuana illegal; largely because they are unable to *fund* such prosecution.⁹¹

Efforts to protect medical marijuana patients in the form of comprehensive legislation began in 2001 when Representatives Rohrabacher and Farr introduced the Rohrabacher-Farr Amendment, which would prevent the federal government from criminally prosecuting individuals or companies who are complying with state medical marijuana laws.⁹² The language containing the Representatives' recommended protections was finally adopted in an amendment to the 2014 "omnibus spending bill."⁹³ This appropriations rider was successfully used as a defense in *United States v. McIntosh*, a 2016 federal case in the Ninth Circuit.⁹⁴ In that case, "five codefendants allegedly ran four marijuana stores in the Los Angeles area . . . and nine indoor marijuana grow sites in the San Francisco and Los Angeles areas," in compliance with California's CUA.⁹⁵ The court held that the Rohrabacher-Farr Amendment prevented the Department of Justice from using federal funds to criminally prosecute medical marijuana facility owners, and the defendants were not prosecuted further.⁹⁶

In addition to the *McIntosh* decision, the DEA has authorized more farms to grow medical marijuana for research purposes.⁹⁷ Prior to the release of this policy by the DEA, only the University of Mississippi

⁹⁰ *Id.* Despite the clear movement of states towards legalizing marijuana entirely, the federal government has not rescheduled marijuana.

⁹¹ See Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, § 542, 129 Stat. 2242, 2333 (2015).

⁹² Michael Schroeder, *Medical Cannabis Protection: The Rohrabacher-Farr Amendment*, CANNACON (Jan. 26, 2018), <https://cannacon.org/medical-cannabis-protection-rohrabacher-farr-amendment/> [<https://perma.cc/7WKH-JBAL>].

⁹³ *Id.*

⁹⁴ *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016).

⁹⁵ *Id.* at 1169.

⁹⁶ *Id.* at 1177.

⁹⁷ 21 C.F.R. § 1301.13 (2020) (outlining the application procedure for marijuana growers intending to supply their crop to researchers).

was allowed to grow and supply marijuana for medical research.⁹⁸ This meant that federally recognized medical research on marijuana could only be performed on marijuana grown by the University of Mississippi. Unsurprisingly, there was rarely enough marijuana to be distributed to the various groups and organizations that wanted to conduct legitimate marijuana research, so the DEA opened the process up to multiple organizations in 2016.⁹⁹ This change seemed to signal further relaxation of the enforcement of federal marijuana laws.¹⁰⁰

E. The Conflicting Signals of the Trump Administration

Despite the *McIntosh* decision and the newly enacted DEA policy, the federal government appeared to reverse its stance on marijuana after a change in administration. In January of 2018, Attorney General, Jeff Sessions, released a memo announcing intentions to strictly prosecute marijuana and rescind the policies within the Ogden and Cole Memos.¹⁰¹ However, Sessions was subsequently replaced as the Attorney General,¹⁰² so it is unclear if his memo had any effect. To make matters even more confusing, on December 20, 2018, President Trump signed the Agricultural Improvement Act of 2018 into law, which declassified hemp as a Schedule I drug if it contained under .03% THC.¹⁰³

While the federal government has sent mixed messages regarding its enforcement of marijuana laws, other groups and communities have shown an increased acceptance of marijuana. Such breakthroughs include the Canadian company, Aurora Cannabis, being publicly

⁹⁸ Sydney Slotkin Dupriest, *Federally Funded Marijuana Turns 50*, OLE MISS NEWS (Dec. 5, 2018), <https://news.olemiss.edu/federally-funded-marijuana-turns-50/> [<https://perma.cc/873D-C4HA>].

⁹⁹ 21 C.F.R. § 1301.13 (2020).

¹⁰⁰ See Press Release, Drug Enf't Admin., DEA Announces Actions Related to Marijuana and Industrial Hemp (Aug. 11, 2016) (on file with the UMass Law Review) (The Drug Enforcement Administration “has approved every application . . . submitted by researchers seeking to use . . . marijuana to conduct research that HHS determined to be scientifically meritorious.”).

¹⁰¹ Sessions Memorandum, *supra* note 13.

¹⁰² Peter Baker et al., *Jeff Sessions is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html> [<https://perma.cc/G87S-7HPA>].

¹⁰³ Agricultural Improvement Act of 2018, Pub. L. No. 115-334 § 12619, 132 Stat. 4490, 5018 (amending 21 U.S.C. § 802(16)).

traded on the New York Stock Exchange;¹⁰⁴ the State of California alone issuing over 10,000 marijuana licenses to further its state initiatives;¹⁰⁵ and the estimated 300,000 full-time jobs existing in the marijuana industry.¹⁰⁶

Based on the above, there are few reasons to continue to list marijuana as a Schedule I drug, particularly considering the sharply reduced appetite for federal enforcement of the CSA as it relates to marijuana. In the current climate, the federal government continuing to keep the antiquated marijuana laws on the books is doing more harm than good.

F. What We Can Learn from Prohibition

The prohibition of alcohol was a colossal failure, but it only lasted thirteen years—from 1920 until 1933.¹⁰⁷ Prohibition did not produce major conflict between federal and state law. Instead, the conflict came from the citizens of the several states who utilized the mechanism of a referendum to challenge their state’s adoption of the Eighteenth Amendment after the Supreme Court determined states could not permit alcohol use in violation of that amendment.¹⁰⁸ Comparatively, the federal prohibition of marijuana has been ongoing for more than sixty-five years.¹⁰⁹ During the latter half of this time period, states have steadily rebuked the federal legislation and passed state-specific

¹⁰⁴ See *Aurora Cannabis Inc.*, MARKETWATCH, <https://www.marketwatch.com/investing/stock/acb> [<https://perma.cc/Y3YG-QQT4>].

¹⁰⁵ *Licensing*, CAL. CANNABIS PORTAL, <https://cannabis.ca.gov/licensing/> [<https://perma.cc/4DMD-LFMC>].

¹⁰⁶ Kevin Murphy, *Cannabis is Becoming a Huge Job Creator*, FORBES (May 20, 2019, 9:00 AM), <https://www.forbes.com/sites/kevinmurphy/2019/05/20/cannabis-is-becoming-a-huge-job-creator/> [<https://perma.cc/LF9V-WFG4>]. There are many more individuals that work off-the-books, such as part-time workers often referred to as “trimmigrants,” who are also impacted by the federal government’s illogical stance on marijuana. Dan Levin & Hilary Swift, *The ‘Green Dimension’: Inside the Lives of California’s Marijuana Trimmers*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/2018/11/29/us/marijuana-trimmers-emerald-triangle.html> [<https://perma.cc/9DRC-MGRW>].

¹⁰⁷ Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INST. (July 17, 1991), <https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure> [<https://perma.cc/FY46-T8QE>].

¹⁰⁸ *Hawke v. Smith*, 253 U.S. 221, 227–28 (1920).

¹⁰⁹ Boggs Act of 1951, Pub. L. No. 82-255, 65 Stat. 767 (amending 21 U.S.C. § 174 sec. 2(c)).

statutes decriminalizing marijuana.¹¹⁰ A constitutional amendment was necessary to start and end the failed experiment of alcohol prohibition.¹¹¹ And while the federal prohibition of marijuana was not effectuated through a constitutional amendment, an Article V Convention of the States resulting in a new amendment could be the perfect mechanism to end the currently failing experiment.

III. WHY A CONSTITUTIONAL AMENDMENT IS NECESSARY AND HOW IT WILL HELP THE COUNTRY

It is clear that federal prosecution of properly licensed marijuana facilities rarely occurs because such prosecutorial efforts are not funded.¹¹² Nevertheless, the retention of marijuana as a Schedule I drug causes numerous problems: banks rarely accept money earned from the sale of marijuana, gaps in protections for the marijuana industry create dangerous work environments, insurance is difficult to obtain, and, amongst other novel issues, the tax implications surrounding marijuana revenues are very complex.¹¹³

There are numerous arguments supporting the legalization of marijuana, and one of the most pressing issues is that the cannabis industry does not have access to banking resources. Since banks are governed and insured by the federal government, they are prohibited from violating federal law, which would result if they (1) held money obtained through the sale, distribution, or production of marijuana, or

¹¹⁰ See Rense, *supra* note 11. As of the November 2020 elections, the number of states that had passed some form of marijuana legislation was 35. *Id.* Since that time, and as of this Article's publication, two more states have joined that number, which demonstrates how quickly the states are joining this cause. *State Medical Marijuana Laws*, National Conference of State Legislatures (Mar. 1, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/HEJ4-ZCH3>].e approved medical marijuana.

¹¹¹ U.S. CONST. amend. XXI.

¹¹² *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016).

¹¹³ RICHARD PHILLIPS, *ISSUES WITH TAXING MARIJUANA AT THE STATE LEVEL* (2015), <https://itep.org/wp-content/uploads/marijuanaissuesreport.pdf> [<https://perma.cc/7LAA-A2UL>]; see, e.g., Glenda Anderson, *Marijuana's 'Trimmigrant' Labor Force Poses Conflicts for Some North Coast Towns*, *Press Democrat* (Nov. 29, 2016), <https://www.pressdemocrat.com/news/6310183-181/marijuanas-trimmigrant-labor-force-poses?sba=AAS> [<https://perma.cc/29CQ-XDLK>].

(2) facilitated financial transactions of the like.¹¹⁴ Therefore, marijuana remains a cash business, thereby creating problems on three fronts. First, large amounts of cash can, and often does, lead to violent crime.¹¹⁵ Second, workers in the marijuana industry experience extreme difficulty using banks, which limits their access to credit and, in turn, hurts them economically.¹¹⁶ Third, the banking industry and the government are missing out on billions of dollars poised to be infused back into the economy.¹¹⁷ As a result these federal marijuana laws—sparsely enforced to begin with—contribute to *increased* criminal activity, *limit* the economic prospects of small business owners, and *cost* the government and the economy billions of dollars.

In addition to the numerous economic and political reasons to stop federal enforcement of marijuana, disparities within state and federal law are beginning to present major issues. Now that thirty-six states and the District of Columbia legalized medical marijuana,¹¹⁸ many cities are left with no choice but to conflict with either federal or state law. For example, a 2019 proposed California statute would have required that for every 15,000 people in a city, at least one retail marijuana license be issued.¹¹⁹ This meant that if a city wanted to comply with federal law by not permitting marijuana, it could hypothetically be subject to a penalty from the state. To avoid the state penalty, a city could issue a license to marijuana entrepreneurs.

¹¹⁴ B.S., *Why Marijuana Retailers Can't Use Banks*, ECONOMIST (Jan. 22, 2018), <https://www.economist.com/the-economist-explains/2018/01/22/why-marijuana-retailers-cant-use-banks> [<https://perma.cc/8ZEH-39PS>].

¹¹⁵ *Id.*; Rick Anderson, *Most Pot Dispensaries are Forced to be Cash-Only. Now They're Prime Targets for Violent Robberies*, L.A. TIMES (July 11, 2016, 3:00 AM), <https://www.latimes.com/nation/la-na-pot-shops-20160711-snap-story.html> [<https://perma.cc/HV2H-28QQ>].

¹¹⁶ Joseph Ditzler, *Loan Denials Common for Pot Workers*, BULLETIN (May 30, 2017), https://www.bendbulletin.com/business/loan-denials-common-for-pot-workers/article_8aa9f12f-6f04-58bf-a900-6e4f68864807.html [<https://perma.cc/98GC-YSJY>].

¹¹⁷ Ezekiel Edwards & Rebecca McCray, *Hundreds of Economists: Marijuana Prohibition Costs Billions, Legalization Would Earn Billions*, ACLU (Apr. 26, 2012, 4:29 PM), <https://www.aclu.org/blog/smart-justice/sentencing-reform/hundreds-economists-marijuana-prohibition-costs-billions> [<https://perma.cc/H826-N9HS>].

¹¹⁸ *State Medical Marijuana Laws*, National Conference of State Legislatures (Mar. 1, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/HEJ4-ZCH3>].

¹¹⁹ Assemb. B. 1356, 2019-20 Leg., Reg. Sess. (Cal. 2019).

However, by issuing such a license, the city would be in violation of federal law unless the specific business took the steps required to register and comply with the DEA. Therefore, under this proposed legislation, a city would have been left in the untenable position of complying with California law, which California is actively promoting, or with the federal law, which is sparsely enforced but could result in harsh consequences if violated.¹²⁰ Apart from the tenuous position businesses may be placed in because of our federal system, the present interplay prevents business owners from obtaining proper insurance.¹²¹ Worse still, employees are not likely to be covered by worker protection programs which produces dangerous working environments.¹²²

Another strong argument in support of federal legalization is that millions of Americans use marijuana for legitimate medical purposes.¹²³ Some of these medical purposes include pain relief, Chron's disease management, treatment of epilepsy, cancer, Alzheimer's, and numerous others.¹²⁴ These are serious conditions, and there are countless strains of marijuana that can treat these ailments in different ways, yet federal restrictions prevent consumers from obtaining the 'correct' medicine.¹²⁵ While cannabis treatment is available, the budtender dispensing the marijuana does not need any formal medical training.¹²⁶ This leaves patients at the mercy of a

¹²⁰ The bill, as proposed, was eventually "shelved by its author" after failing to gain support. Felicia Alvarez, *Lawmakers Halt Bill That Could Have Expanded the Number of Dispensaries*, SACRAMENTO BUS. J. (May 31, 2019, 5:10 PM), <https://www.bizjournals.com/sacramento/news/2019/05/31/lawmakers-halt-bill-that-could-have-expanded-the.html> [<https://perma.cc/ZDZ8-BB44>].

¹²¹ *See Insurers Remain Cautious About Marijuana Insurance Market*, INS. J. (Mar. 14, 2019), <https://www.insurancejournal.com/news/national/2019/03/14/520607.htm> [<https://perma.cc/ZX5L-QY8N>].

¹²² *See* Anderson, *supra* note 115.

¹²³ Joseph Gregorio, *Physicians, Medical Marijuana, and the Law*, 16 VIRTUAL MENTOR 732, 732–33 (2014); *Number of Legal Medical Marijuana Patients*, PROCON.ORG (May 17, 2018), <https://medicalmarijuana.procon.org/number-of-legal-medical-marijuana-patients/> [<https://perma.cc/J6LK-UZAW>].

¹²⁴ *Medical Marijuana*, MAYO CLINIC (Nov. 27, 2019), <https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/medical-marijuana/art-20137855> [<https://perma.cc/YY2D-EBHG>].

¹²⁵ *See* Gregorio, *supra* note 123, at 732–33.

¹²⁶ *See* Mike Adams, *Marijuana Industry Needs More Budtenders—Here's How to Get the Job*, FORBES (Apr. 10, 2018, 7:40 PM), <https://www.forbes.com/sites/mikeadams/2018/04/10/marijuana-industry-needs-more-budtenders-heres-how-to->

person who might lack the requisite knowledge to provide proper assistance.¹²⁷ It is not hard to imagine that the wrong type of marijuana strain could be given to someone, which would have a devastating impact on patients who rely on specific strains of medical marijuana. However, this could all be avoided if it were permissible for marijuana to be prescribed by physicians with adequate surveillance by the medical community. Unfortunately, due to marijuana's Schedule I status, doctors are unable to *prescribe* marijuana to their patients and instead can only recommend its use in states with legitimate medical marijuana programs.¹²⁸ It makes little sense not to allow physicians oversight of the industry with respect to medical patients, and by maintaining marijuana as a Schedule 1 drug, Congress is preventing adequate medical supervision of the growing industry.¹²⁹ Although the issue of rescheduling and decriminalizing marijuana has been discussed in Congress as recently as 2019, very little has happened towards its legalization or rescheduling.¹³⁰ The inconsistencies in the federal government's policy taken with all the medical, economic, and social issues implicated, present excellent issues to call the states together at an Article V Convention and let their consensus on this issue be known.¹³¹

IV. A HISTORY OF ARTICLE V, STATE EMPOWERMENT, AND HISTORIC CONVENTIONS IN THE UNITED STATES

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior

get-the-job/#565e66dc1b41 [https://perma.cc/TM7K-HE6V] (highlighting that budtenders should have “[e]xtensive product knowledge” but there is no requirement for specialized medical training).

¹²⁷ *Id.*

¹²⁸ Gregorio, *supra* note 123, at 733.

¹²⁹ *Id.* at 733–34.

¹³⁰ Marijuana Opportunity Reinvestment and Expungement Act of 2019, S. 2227, 116th Cong. (2019).

¹³¹ *Drug Scheduling*, *supra* note 47.

to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.¹³²

The language of Article V authorizes both the federal government and the states to amend the Constitution. The Founders of this country realized that the Constitution was not perfect and Alexander Hamilton posed that amendments would be necessary to ensure the Constitution remained a continuing success.¹³³ Another leader advocating for states to have the ability to amend the Constitution pursuant to Article V was Colonel George Mason. In his notes memorializing the Constitutional Convention, James Madison recounted Mason's position:

Col: Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.¹³⁴

Mason made this assertion during the drafting of the Constitution in response to the proposal that Congress alone would have the power to amend the Constitution.¹³⁵ Mason saw that depriving the people of the right to amend the Constitution was flawed, and sought to empower the people to make necessary amendments.¹³⁶ Therefore, the mechanism of a convention of the states was included in Article V, providing states the authority to amend the Constitution.¹³⁷ Consequently, the people *and* Congress, have the ultimate power to ratify amendments to the Constitution.

Although a Convention of the States has never been held, the power indisputably exists and should be exercised to legalize

¹³² U.S. CONST. art. V.

¹³³ THE FEDERALIST NO. 85 (Alexander Hamilton).

¹³⁴ James Madison, *James Madison's Notes of the Constitutional Convention* (Sept. 15, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 622, 629 (Max Farrand ed., 1911).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ U.S. CONST. art. V.

marijuana.¹³⁸ It is worth noting that despite an Article V convention never occurring, there were numerous conventions in the early history of the United States.¹³⁹ In 1814, at the Hartford Convention, a delegation of the New England states was called to address the War of 1812.¹⁴⁰ There were several other conventions in the 1800s, including the 1861 Washington Conference Convention—the biggest state convention ever held—where states gathered to try and prevent the Civil War.¹⁴¹ The first state convention simulation was held in Williamsburg, Virginia in 2016.¹⁴² However, none of these conventions were technically Article V Conventions due to the fact that no applications were made by states pursuant to Article V.

Numerous Article V applications to amend the Constitution have been sent to Congress¹⁴³ but, there has yet to be an application supported by the requisite thirty-four states.¹⁴⁴ The various applications ask for broad changes to the Constitution.¹⁴⁵ The first state application came from Virginia in 1788.¹⁴⁶ Since then, hundreds of applications have been sent by multiple states, including a recent

¹³⁸ *Id.*; Brenda Erickson, *Amending the U.S. Constitution*, NCSL: LEGISBRIEFS (Aug. 2017), <https://www.ncsl.org/research/about-state-legislatures/amending-the-u-s-constitution.aspx> [perma.cc/C4RR-4LBD].

¹³⁹ ROBERT G. NATELSON, *THE LAW OF ARTICLE V: STATE INITIATION OF CONSTITUTIONAL AMENDMENTS* 18 (2018). There appears to have been “about twenty inter-colonial conventions before [American] Independence and . . . eleven conventions of states from 1776 through 1787.” *Id.*; Erickson, *supra* note 138.

¹⁴⁰ NATELSON, *supra* note 139, at 19–20.

¹⁴¹ *Id.* at 20.

¹⁴² *COS Simulation*, CONVENTION OF STATES ACTION, <https://conventionofstates.com/cos-simulation> [https://perma.cc/5SSD-6CN8]. Christian Gomez, *Convention of States Simulation Fails to Dispel “Runaway Threat”*, 32 *NEW AMERICAN* (Oct. 24, 2016) <https://thenewamerican.com/convention-of-states-simulation-fails-to-dispel-runaway-threat/>.

¹⁴³ *See Interactive State Article V Application Database*, ARTICLE V LIBR., <http://article5library.org/apptable.php?type=Application&sort=Y&order=A> [https://perma.cc/YV8Z-963C]; *see also* Robert G. Natelson, *Counting to Two Thirds: How Close Are We to a Convention for Proposing Amendments to the Constitution?*, 19 *FEDERALIST SOC’Y REV.* 50, 57–59 (2018).

¹⁴⁴ Erickson, *supra* note 138.

¹⁴⁵ *See Interactive State Article V Application Database*, *supra* note 143.

¹⁴⁶ Natelson, *supra* note 143 at 58. Submitting the first application for a constitutional convention, Virginia was the first state to advocate for the inclusion of a bill of rights. This paved the way for other states to submit their own applications. 1 *ANNALS OF CONG.* 258–60 (1789) (Joseph Gales ed., 1834).

application from the State of Mississippi on March 27, 2019.¹⁴⁷ Mississippi's application joined other states' applications regarding restraints on congressional spending.¹⁴⁸ Although items such as a balanced budget, term limits, or limiting federal spending are common requests, they are too complex to gain traction. The simplicity of legalizing marijuana seems to showcase why it is an ideal issue for state collaboration and would not require a massive overhaul of the federal government. A constitutional amendment federally legalizing marijuana will simply stop a program that is already half-heartedly enforced. While legalizing marijuana is not the chief social issue facing our country today, it may be a perfect opportunity to bring the U.S. together on a tangible issue, and call an Article V Convention, thereby empowering states as the Founders intended.

V. THE RISE OF FEDERAL POWER: HOW STATES CAN AMEND THE CONSTITUTION, AND REMEDIES FOR A POTENTIAL RUNAWAY CONVENTION

A) A History of Federal Power, From Eighteen Enumerated Powers to Unlimited Power

At the founding of this country, Congress's power was limited to the eighteen enumerated powers found in Article I of the U.S. Constitution.¹⁴⁹ These enumerated powers were originally read strictly,¹⁵⁰ but that changed in 1819 with the Supreme Court case *McCulloch v. Maryland*. In that case, the Court upheld Congress's use of the Necessary and Proper Clause to establish a National Bank.¹⁵¹ After the *McCulloch* decision, the federal government's power

¹⁴⁷ S. Con. Res. 596, 2019 Leg., Reg. Sess. (Miss. 2019). Since Mississippi's application, the states of Utah and Arkansas have also submitted applications joining Mississippi and other states' requests. See *Interactive State Article V Application Database*, *supra* note 143.

¹⁴⁸ Miss. S. Con. Res. 596. (While other states' applications contained language supporting term limits for members of Congress, "[t]he Mississippi delegates [were expressly] instructed not to support term limits for members of Congress.").

¹⁴⁹ U.S. CONST. art. 1, § 8.

¹⁵⁰ Randy E. Barnett & Heather Gerken, *Article I, Sec. 8: Federalism and the Overall Scope of Federal Power*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/section/8712> [<https://perma.cc/2A7J-QARB>].

¹⁵¹ *McCulloch v. Maryland*, 17 U.S. 316, 424 (1819).

increased drastically. This immense power is perfectly demonstrated by the U.S. Supreme Court upholding Congress's power to regulate small amounts of personal marijuana in *Raich*.¹⁵²

Another major expansion of the governmental power occurred during the Civil War, when President Abraham Lincoln imposed the first federal income tax of 3%.¹⁵³ One year later, Congress created a pension system for Civil War veterans wounded or killed in action.¹⁵⁴ In 1890, the Sherman Antitrust Act was passed to break up business monopolies.¹⁵⁵ Thereafter, in the early 1900s, major federal legislation was passed which included the creation of the Food and Drug Administration ("FDA").¹⁵⁶ One of the largest and most impactful expanses of federal power was the ratification of the 16th Amendment in 1913, which authorized the government to collect income and other forms of tax.¹⁵⁷ Two decades later, after winning the presidency in 1932, Franklin D. Roosevelt would use these greatly expanded federal powers to enact his New Deal legislation.¹⁵⁸ The legislation included a number of expansive federal programs, including the creation of the Social Security Administration, the imposition of minimum wage through the Fair Labor Standards Act, and the creation of the Federal Deposit Insurance Corporation ("FDIC"), just to name a few.¹⁵⁹

The New Deal did not go unchallenged, however, and the federal government's exercise of its increased power faced temporary

¹⁵² *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005).

¹⁵³ Revenue Act of 1861, ch. 45, 12 Stat. 292; *see also The Civil War: The Senate's Story*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/civil_war/RevenueAct_FeaturedDoc.htm [perma.cc/QW64-AN6J].

¹⁵⁴ An Act to Grant Pensions, ch. 166, 12 Stat. 566 (1862); Claire Prechtel-Klusgens, *A Reasonable Degree of Promptitude*, 42 PROLOGUE MAG. (2010), <https://www.archives.gov/publications/prologue/2010/spring/civilwarpension.html> [https://perma.cc/JEJ9-9MHP].

¹⁵⁵ Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890).

¹⁵⁶ Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768.

¹⁵⁷ U.S. CONST. amend. XVI; *see also* Joseph R. Fishkin et al., *The Sixteenth Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xvi/interps/139> [https://perma.cc/PZE8-VFL6].

¹⁵⁸ *New Deal: United States History*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/event/New-Deal#accordion-article-history> [https://perma.cc/9N3H-46M4].

¹⁵⁹ *Id.*

resistance. In a period known as the *Lochner* Era,¹⁶⁰ the Supreme Court struck down the President's legislation as a violation of the Commerce Clause on numerous occasions.¹⁶¹ President Roosevelt became so frustrated with his losses at the Supreme Court that he "asked Congress to empower him to appoint" more Supreme Court Justices to the Court to ensure his New Deal legislation would be upheld.¹⁶² Despite the President's enormous popularity, his plan to pack the court drew national debate, and was not considered wise by many legislators.¹⁶³ Nevertheless, the appointment of additional justices was not necessary because in *West Coast Hotel Co. v. Parrish*, Justice Roberts approved a minimum wage for women, which was a shift from his usual rulings *against* government protections.¹⁶⁴ The switch by Justice Roberts essentially ended the *Lochner* Era, leading to an expanded interpretation of Congress's power under the Commerce Clause.¹⁶⁵

Five years later, in the case of *Wickard v. Filburn*, the federal government obtained an almost unlimited license to enact legislation using this Commerce Clause power.¹⁶⁶ *Wickard* analyzed the Agricultural Adjustment Act of 1938, which regulated the production of wheat in an effort to stabilize prices.¹⁶⁷ The defendant, Filburn, was a farmer who grew more wheat than was authorized by the Act, for his own personal use, not commercial sale.¹⁶⁸ Nevertheless, Filburn was fined as a result of violating the Act, which he refused to pay.¹⁶⁹ Filburn argued that since he was not selling the excess wheat, he was not engaged in interstate commerce, so the federal government had no

¹⁶⁰ *Lochner* Era, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/lochner_era [<https://perma.cc/HBL9-5K4Z>].

¹⁶¹ William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), <https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/> [<https://perma.cc/EJ7E-PXLN>]. See, e.g., *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

¹⁶² Leuchtenburg, *supra* note 161.

¹⁶³ *Id.*

¹⁶⁴ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399–400 (1937).

¹⁶⁵ Leuchtenburg, *supra* note 161.

¹⁶⁶ *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942).

¹⁶⁷ *Id.* at 115.

¹⁶⁸ *Id.* at 114–15.

¹⁶⁹ *Id.* at 115.

authority under the Commerce Clause to regulate and fine him.¹⁷⁰ The Supreme Court disagreed and took an expansive reading of the Commerce Clause, stating that the government maintains the authority to regulate personal activities that only impact interstate commerce.¹⁷¹ After *Wickard*, Congress was given apparent free rein to pass any legislation it wanted under the Commerce Clause.¹⁷²

While some of the federal protections enacted using the expanded powers were beneficial, Congress acquired more power than it was ever intended to have, and it is now involved in almost every aspect of individuals' daily lives.¹⁷³ Despite all its power, Congress cannot overcome the fact that the federal regulation of marijuana is illogical and must change.¹⁷⁴

The federal government should not have such expansive power because federal representatives cannot account for the great social, cultural, and economic disparities in the various regions of the country.¹⁷⁵ While a New York stockbroker, Nebraska corn farmer, and California professor are all Americans, their views, needs, and experiences vary greatly. Therefore, their state legislatures can do a better job of ensuring their needs are met than the federal government can. When a distant federal government in Washington, D.C. imposes its will on these three people, oftentimes none of them are happy,

¹⁷⁰ *Id.* at 119.

¹⁷¹ *Id.* at 125.

¹⁷² Antony Davies & James R. Harrigan, *Wickard v. Filburn: The Supreme Court Case That Gave the Federal Government Nearly Unlimited Power*, FOUND. FOR ECON. EDUC. (Feb. 7, 2020), <https://fee.org/articles/wickard-v-filburn-the-supreme-court-case-that-gave-the-federal-government-nearly-unlimited-power/> [https://perma.cc/7CEL-ZFMW].

¹⁷³ Roger Pilon, *Founders Intended Only Limited Powers*, CATO INST. (July 21, 1995), <https://www.cato.org/publications/commentary/founders-intended-only-limited-powers> [https://perma.cc/RC3S-6LBE].

¹⁷⁴ Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RES. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [https://perma.cc/8NWA-DGEB] (“Two-thirds of Americans say the use of marijuana should be legal, reflecting a steady increase over the past decade . . .”).

¹⁷⁵ James W. Fosset et al., *Federalism & Bioethics: States and Moral Pluralism*, 37 HASTINGS CTR. REP. 24, 27–30 (2007) (discussing how state legislatures are better connected to their constituents and therefore better situated to express the true will of the people).

which is why the Constitution only empowered Congress with limited powers.¹⁷⁶

Partisan politics and governmental ineptitude have frustrated most Americans for years. According to a Gallup Poll taken in December 2020, 82% of Americans currently disapprove of Congress, and this disapproval rate is nothing new.¹⁷⁷ Congress has yet to attain a 50% approval rating since June of 2003, and since that time it has steadily declined.¹⁷⁸ It is time for a change and allowing the states to wake the federal government up by changing a federal policy as unsound as its regulation of marijuana would be a warranted breath of fresh air. Legalizing marijuana is an issue that all facets of the political spectrum appear to agree on.¹⁷⁹ Seeing people of across viewpoints agree on a major issue presents a turning point for governance in the United States.

B) How to Make an Article V Convention Happen and Actually Amend the Constitution

With all the reasons for decriminalizing marijuana at the federal level, the question is how can the states proceed with amending the Constitution? Answering this question is not as difficult as expected. In the convention process, Congress acts as an agent for the states only if the requisite two-thirds of states apply for a convention on the same issue.¹⁸⁰ If the majority was satisfied on the single subject of federal decriminalization of marijuana, Congress would be required to call a Convention of the States pursuant to Article V.

The question then becomes: how do the requisite two-thirds of states apply for a Convention? The answer is quite simple because there are no specific requirements detailing what the application must look like.¹⁸¹ As an example, the California Legislature could submit the following in a document to Congress:

¹⁷⁶ See Pilon, *supra* note 173 (explaining that the Founders would be pleased if power were returned to the states and the people because the federal government was intended to be one of limited powers).

¹⁷⁷ *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/G2BW-ME76>].

¹⁷⁸ *Id.*

¹⁷⁹ Daniller, *supra* note 174 (78% of liberal individuals and 55% of conservative individuals support legalization).

¹⁸⁰ Natelson, *supra* note 143, at 51.

¹⁸¹ *Id.* at 52.

**CALIFORNIA’S APPLICATION FOR A STATE
CONVENTION UNDER ARTICLE V OF THE U.S.
CONSTITUTION**

WHEREAS: California legalized Medical marijuana in violation of federal law over 20 years ago.

WHEREAS: Marijuana stores operate freely in California, as well as in thirty-two other states. These stores offer medical assistance and joy to California citizens, as well as to the citizens of the other thirty-two states.

WHEREAS: Federal laws regulating marijuana have been arcane for more than 20 years.

WHEREAS: California and the other states of this Convention direct the Attorney General to issue a final order removing marijuana in any form from all schedules of controlled substances under the Controlled Substances Act.

WHEREAS: California and the other states of this Convention propose an amendment to the United States Constitution that would Eliminate marijuana as: (1) a controlled substance for purposes of the Controlled Substances Import and Export Act or the National Forest System Drug Control Act of 1986; (2) a dangerous drug for purposes of federal criminal code provisions authorizing interception of communication; and (3) a targeted drug for purposes of provisions of the national youth anti-drug media campaign under the Office of the National Drug Control Policy Reauthorization Act of 1997.

WHEREAS: California and the others states of this Convention will prohibit the shipment of marijuana into any state that seeks to continue banning marijuana. Furthermore, California and the other states in favor of this amendment will cooperate with the law enforcement of any state that wishes to continue banning marijuana to prevent the sale, distribution, or production of marijuana within its state borders.

WHEREAS: California and the other states of the Convention grant the Food and Drug Administration the same authorities with respect to marijuana as it has for alcohol. Transfers functions of the Administrator of the DEA relating marijuana enforcement to the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”). Renames: (1) ATF as the Bureau of Alcohol, Tobacco, Marijuana, Firearms and Explosives.

If thirty-three or more states submitted these same paragraphs, Congress would be compelled to call a Convention of the States on the issue of the federal decriminalization of marijuana.

Once its application is submitted, each state would then submit a list of the commissioners that would represent it at the Convention. As

with the application, there is no specific process for appointing a commissioner or explanation of what qualifications a commissioner must have. Article V simply refers to the state legislatures as having the authority to amend the Constitution at a Convention of the States, and there is no specific reference to a commissioner.¹⁸² However, it seems that in order to have a Convention, commissioners from each state would need to meet. There is no set number of commissioners that each state must select—one state could send one commissioner, and another state could send ten commissioners.¹⁸³ Importantly, each state would have the same amount of voting power, regardless of how many commissioners it sent.¹⁸⁴ To appoint commissioners, California could simply submit the following text to Congress:

**CALIFORNIA’S RESOLUTION ELECTING
COMMISSIONERS TO CONVENTION TO PROPOSE AN
AMENDMENT FEDERALLY DECRIMINALIZING
MARIJUANA**

WHEREAS: The legislature of California has applied to Congress under Article V of the U.S. Constitution for a Convention to Amended the Constitution to Federally Decriminalize Marijuana.

WHEREAS: The California legislature has selected the following commissioners to represent it at the Convention, NAME #1, NAME #2, NAME #3.

WHEREAS: Each Commissioners commission shall expire on a date to be named.

Once the Application for a Convention and the list of commissioners are submitted, Congress would then set a date for a Convention. On that date, the commissioners would attend and discuss federal decriminalization of marijuana. At the Convention, three-fourths of the states would have to ratify the Amendment for it to be added to the Constitution.

The question shifts again: what would the specific wording of the Amendment to decriminalize marijuana be? The commissioners would debate this at the Convention, but an example might be: *The substance*

¹⁸² U.S. CONST. art. V.

¹⁸³ NATELSON, *supra* note 139, at 19 (setting out the fact that many of the Framers had also served as commissioners for international “meetings among governments” and the process for Article V conventions was “modeled after these conclaves and was designed to be a convention of the states”).

¹⁸⁴ *Id.*

'marijuana' shall no longer be scheduled under the CSA and the federal government shall cease all activity attendant to enforcing antimarijuana laws. The language should still allow the federal government to tax and regulate marijuana, but the draconian criminal policies that have frustrated and confused Americans for years would end.

C) The Dangers of a Runaway Convention

If an Article V Convention of the States were held, and the Constitution was amended to federally decriminalize marijuana, what potential ramifications might there be? While there seem to be plenty of reasons for a Convention to be held to decriminalize marijuana, the consequences of such a Convention must also be carefully considered.

One of the major concerns regarding a Convention of the States is that it could run away with too much power and deprive individuals or minority states of their rights.¹⁸⁵ An Article V Convention only requires 75% of the states to ratify an Amendment to the Constitution.¹⁸⁶ Therefore, it could be that 25% of the states would be out-voted by the other 75%—which was what Madison warned of:

Complaints are every where heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority.¹⁸⁷

Another concern of an Article V Convention is that once the states are convened, they could decide to rule on a number of issues unrelated to the intended meeting's purpose, or greatly expand on what

¹⁸⁵ Miguel González-Marcos, *The Need for Caution Amidst Calls for a National Constitutional Convention*, SCHOLARS STRATEGY NETWORK (Apr. 4, 2019) <https://scholars.org/contribution/need-caution-amidst-calls-national-constitutional-convention> [<https://perma.cc/5CC4-HR6J>].

¹⁸⁶ NATELSON, *supra* note 139, at 47.

¹⁸⁷ THE FEDERALIST NO. 10, at 42 (James Madison) (George Carey & James McClellan eds., 2001). Although there is a major concern that an Article V Convention could put the present federal protections—and assumed preferred protections of the 25% minority of states—at risk, González-Marcos, *supra* note 185, it is still the preferred outcome in a democracy given that the *majority* of states and citizens agree an amendment is warranted.

the meeting intended to cover.¹⁸⁸ Therefore, it is important to limit the convention to the single subject of federal decriminalization of marijuana.¹⁸⁹ While this task seems simple, it is impossible to know where the discussion on something as seemingly innocuous as decriminalizing marijuana could lead. Could the states demand reimbursement from Congress for resources expended on marijuana enforcement? Or perhaps the states would seek reparations from the Department of Justice for each of their citizens incarcerated in federal prison? The possibilities are endless, and even with something that is ‘simple’, solutions rarely come easy in politics. Nevertheless, while there are risks to holding an Article V Convention of the States, difficult challenges have never stopped Americans in the past, and this is no different.¹⁹⁰

VI. CONCLUSION

The criminalization of marijuana at the federal level has made little sense for decades, and the mixed messages from the federal government on the issue has led to confusion in and among the states. Federally decriminalizing marijuana will not require any effort from Congress; it will simply be one less thing for it to concern itself with. As described, the process to actually amend the Constitution is not a Herculean task, and assuming everyone stays focused at the Convention, a Constitutional amendment decriminalizing marijuana could be accomplished without much controversy. This is especially true considering a majority of states have already legalized medical marijuana.

While it may be true that the federal government has little interest in continuing to enforce criminal marijuana laws, due to the infighting

¹⁸⁸ González-Marcos, *supra* note 185.

¹⁸⁹ Some states, within their respective constitutions, have taken this approach. For example, the Massachusetts Supreme Judicial Court issued an opinion explaining the Commonwealth’s limitation of a Convention to one single issue. *Op. of the Justices*, 60 Mass. (6 Cush.) 573, 575 (1833); *Op. of the Justices to the Senate*, 366 N.E.2d 1226, 1229 (Mass. 1977) (highlighting that “under the Massachusetts Constitution, convention is limited to the subject matter voted on by electorate”). Furthermore, Alexander Hamilton even stated, “every amendment to the Constitution, if once established would be a single proposition, and might be brought forward singly.” *THE FEDERALIST NO. 85*, at 456 (Alexander Hamilton) (George Carey & James McClellan eds., 2001).

¹⁹⁰ Alternatively, if the states simply organized and scheduled a Convention, federal legislators may simply give in and legalize marijuana on the federal level.

and partisan politics currently on display in Washington, D.C., it is unlikely that Congress will ever get around to changing its antiquated marijuana policies. Therefore, it would be a breath of fresh air for the states to take some power back from the federal government by overturning one of its most illogical efforts: the criminalization of marijuana. The extreme step by the states of calling an Article V Constitutional Convention would send an unmistakable signal that not just the states, but the people, have had enough of the so-called War on Drugs and may finally force Congress to capitulate on anti-marijuana legislation.