

***California's Proposition 19:  
Selective Prohibition and Equal Basic Liberties***

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“Prohibition ... attempts to control a man’s appetite by legislation, and makes a crime out of things that are not crimes. A Prohibition law strikes a blow at the very principles upon which our government was founded.”<sup>1</sup>

“A national conversation has quietly begun about the irrationality of our drug laws.”<sup>2</sup>

“There is no debate, merely theater. Discussing drug policy is like discussing gun control or abortion: facts are irrelevant.”<sup>3</sup>

“Criminal justice generally, and drug policy in particular, has been thoroughly politicized in the United States.... Nonetheless, academic discussion is important to those who aspire to inform their views by reason and principle.”<sup>4</sup>

“The debate is no longer about *whether* marijuana should be legalized, but rather *how* precisely the regulations ought to look if marijuana is legalized.”<sup>5</sup>

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<sup>1</sup> Abraham Lincoln, *Speech to Illinois House of Representatives*, December 18, 1840.

<sup>2</sup> Joe Klein, *It's High Time*, TIME, April 13, 2009, p. 19.

<sup>3</sup> Richard Lawrence Miller, quoted in Stephen J. Dubner, *On the Legalization - or Not - of Marijuana*, NEW YORK TIMES (Freakonomics Blog), October 30, 2007.

<sup>4</sup> Douglas Husak, *Do Marijuana Offenders Deserve Punishment?* In Mitch Earleywine, ed., POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION (2007), p. 189.

<sup>5</sup> Kenneth Falcon, *A Lesson in Legalization: Successes and Failures of California's Proposition 19*, GEO. J. L. & PUB. POL'Y 463, 475 (2011).

## I) Introduction

In the land of earthquakes, Proposition 19 shook the political landscape far and wide. This citizens' initiative, titled "The Regulate, Control and Tax Cannabis Act of 2010" (hereinafter, the RCTCA), appeared on the 2010 California ballot. It would have replaced the State's regime of marijuana<sup>6</sup> prohibition with one of regulation and taxation.<sup>7</sup> While the RCTCA was defeated by a 54% to 46% margin,<sup>8</sup> its effects have been substantial. Beyond pushing the issue to the center of national and international debate<sup>9</sup> and accelerating the growth of the cannabis industry,<sup>10</sup> it forced the hands of both State and federal officials.

At the State level, the prospect of the RCTCA's passage moved the Governor and legislature a month before the election to reduce cannabis possession from a misdemeanor to an infraction.<sup>11</sup> Two weeks later, the Obama Administration backtracked on its 2009

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<sup>6</sup> I shall use this term synonymously with cannabis. As Sec. 11304(d)(i) of the RCTCA provided, "'Marijuana' and 'cannabis' are interchangeable terms that mean all parts of the Genus Cannabis, whether growing or not; the resin extracted from any part of the plant; concentrated cannabis' edible products containing same; and every active compound manufacture, derivative, or preparation of the plant, or resin."

<sup>7</sup> The California Attorney General's Office official summary of the RCTCA is as follows:

"Allows people 21 years old or older to possess, cultivate, or transport marijuana for personal use. Permits local governments to regulate and tax commercial production and sale of marijuana to people 21 years old or older. Prohibits people from possessing marijuana on school grounds, using it in public, smoking it while minors are present, or providing it to anyone under 21 years old. Maintains current prohibitions against driving while impaired. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: Savings of up to several tens of millions of dollars annually to state and local governments on the costs of incarcerating and supervising certain marijuana offenders. Unknown but potentially major tax, fee, and benefit assessment revenues to state and local government related to the production and sale of marijuana products."

<sup>8</sup> See John Hoeffel & Maria L. LaGanga, *Youth Vote Falters; Prop 19 Falls Short*, LOS ANGELES TIMES, November 3, 2010.

<sup>9</sup> "Proposition 19 ... is the most talked-about ballot initiative in the country." John Hoeffel, *Proposition 19: High-Profile Issue, Low-Profile Campaign*, LOS ANGELES TIMES, October 18, 2010. See also *Post-Prop 19*, LOS ANGELES TIMES, November 3, 2010.

<sup>10</sup> See, e.g., Dan Frosch, *Marijuana Industry will be Trade Group's Focus*, NEW YORK TIMES, November 23, 2010, and [www.cannabiscommerce.org](http://www.cannabiscommerce.org).

<sup>11</sup> See CAL HEALTH & SAF. CODE Sec. 11357 (2011) and Jesse McKinley, *California Reduces its Penalty for Marijuana*, New York Times, October 2, 2010, p. A9. It has also lent legitimacy to the legislative reform efforts

claim<sup>12</sup> that it would not interfere with cannabis-related activities in compliance with State laws. Attorney General Holder, that is, announced that if the RCTCA were to pass, federal cannabis prohibition would be strictly enforced.<sup>13</sup> This shift in federal policy direction has alienated many, yet it seems unlikely standing alone to cost Obama the 2012 election. Even if a strong Republican nominee emerges, that is, it is hard to imagine him criticizing the President for being too hard on State cannabis laws.<sup>14</sup>

In any case, the RCTCA's high visibility and controversial nature made it the focus of much editorial and opinion commentary in leading California newspapers in the months before the 2010 election. While none of this commentary disputed the failure of the U.S. drug war, much of it was critical of the RCTCA, urging citizens to vote against the initiative.<sup>15</sup> This critique merits a reply for three reasons: it included some valid concerns,<sup>16</sup> it

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of Assemblyman Tom Ammiano, including support from some Republicans. See Marisa Lagos & Wyatt Buchanan, *Ammiano Finds Unlikely Ally*, SAN FRANCISCO CHRONICLE, June 4, 2011, p. C1.

<sup>12</sup> See David Johnston & Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensers*, NEW YORK TIMES, March 19, 2009.

<sup>13</sup> See Adam Nagourney, *U.S. Will Enforce Marijuana Laws, State Vote Aside*, NEW YORK TIMES, October 15, 2010, *The Feds Say No Way*, LOS ANGELES TIMES, October 20, 2010, and *The Feds Weigh in on Proposition 19*, SAN FRANCISCO CHRONICLE, October 27, 2010, at A15. Most recently, federal prosecutors in California have “announced a campaign ... to shut down scores of marijuana dispensaries, which they described as profit-making criminal enterprises masquerading as suppliers of medicine.” Bob Egelko, *Profitable Pot Stores Facing Closure by U.S.*, SAN FRANCISCO CHRONICLE, October 8, 2011.

<sup>14</sup> I have argued, however, that if reelected, Obama will be inclined, and ought, to call on Congress to reschedule cannabis under the federal Controlled Substances Act, allowing States to go their own way within federal guidelines. See Martin Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303-331 (2011). (**hereinafter, AKRON?**).

<sup>15</sup> See, e.g., Gil Kerlikowske, John Walters, Barry McCaffrey, Lee Brown, Bob Martinez, and William Bennett, *Why California Should Just Say No to Prop. 19*, LOS ANGELES TIMES, August 25, 2010 (hereinafter ‘drug czars,’ as these are all former or sitting directors of the Office of National Drug Control Policy (ONDCP)); *Proposition 19: Vote No*, SAN FRANCISCO CHRONICLE, September 16, 2010, p. A15; *Snuff Out Pot Measure*, LOS ANGELES TIMES, September 24, 2010; Bonnie Dumanis, William Gore, and Alan Lanning, *Prop 19: The Promise is not the Reality*, SAN DIEGO UNION-TRIBUNE, October 3, 2010 (hereinafter ‘Dumanis et al’); George Skelton, *A Dopey Measure on Marijuana*, LOS ANGELES TIMES, October 11, 2010; *If California Goes to Pot, Rest of U.S. gets Dragged in*, USA TODAY, October 20, 2010, p. 8A; *Experimenting with Pot*, LOS ANGELES TIMES, October 30, 2010, and *Post-Prop 19*, LOS ANGELES TIMES, November 3, 2010.

contains a great deal of sophistry,<sup>17</sup> and the debate over cannabis prohibition will continue. Indeed, it will be renewed with vigor as California and other States place revised versions of the RCTCA on the ballot in 2012 and beyond.<sup>18</sup>

The day after the vote, the Los Angeles Times wrote,

“Although Proposition 19 did not prevail at the polls, (it) won the backing of a whopping 64% of voters aged 18 to 34....

Certainly the campaign transformed the public dialogue on drug policy.... But Proposition 19 was a badly drafted mess. Voters were deciding on regulations for Californians to live by, not theoretical principles. If the backers of legalization want to reopen the discussion, they need to work out the kinks that were deal-breakers for many voters, including the measure’s potentially chaotic regulatory scheme and its ludicrous workplace protections for marijuana-smoking employees.

Once that’s done, the debate can get underway in earnest. What would legalization do to the drug cartels? Would it increase the drug’s availability? Is marijuana more harmful than alcohol or not? What would be the effect of legalization on prices? On children? Could legalization be accomplished without provoking a conflict with federal law? What tax revenues really could be captured?

It’s not enough merely to say that the nation’s current drug policy isn’t working. Proponents of legalization must show that they won’t be condoning drug use, that they can raise badly needed revenue, and generally improve the quality of life for the state’s residents.”<sup>19</sup>

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<sup>16</sup> These concerns, we shall see, ranged from the regulatory chaos it was said the new regime would cause to the law’s impact on children, highway safety, workplace conditions, and rates of cannabis use and addiction.

<sup>17</sup> In attacking Proposition 19, that is, the op/ed critics did what those who defend cannabis prohibition have long done, e.g., associate cannabis use with violence, impugn the motives of those who favor ending prohibition, and use vague, imprecise terms like “drugs” rather than cannabis, and “legalization” rather than regulation, thus obscuring distinctions crucial in serious policy, legal and constitutional debate. Such moves undermined their credibility, to be sure, yet again they raised valid policy concerns which merit a reply. As Falcon writes of the No on 19 Campaign, its arguments “are at times meritorious but at others, completely unfounded.” Falcon, *supra* note \_\_\_\_, at 473.

<sup>18</sup> Beyond California, refined versions of Proposition 19 are in process in Colorado and Washington. See, e.g., Jesse McKinley, *Backers of Legal Marijuana see Silver Lining in California Loss*, NEW YORK TIMES, November 14, 2010, *Former Seattle U.S. Attorney Pushes Pot Legalization*, SEATTLE POST-INTELLIGENCER, June 21, 2011, and *Pot Backers Get Approval for California Ballot Petitions*, SEATTLE POST-INTELLIGENCER, July 25, 2011.

In passing, it is noteworthy that in Congress, Representatives Barney Frank (D-MA) and Ron Paul (R-TX) recently co-authored a House bill that would remove cannabis from Schedule One of the Controlled Substances Act, 21 U.S.C. Sec. 801-904 (2011), yielding primary control of cannabis policy to the States under their police power within loose federal guidelines. See *Representatives Barney Frank and Ron Paul Want to end Federal Ban on Marijuana, Cede Enforcement to States*, Associated Press, Washington Post, June 23, 2011. Although “the Bill has no chance of passing the Republican controlled House,” *id.*, and indeed will even not be taken up by the House Judiciary Committee, it keeps the issue in the public eye. We shall return to the Frank/Paul bill.

<sup>19</sup> *Post-Prop. 19*, LOS ANGELES TIMES, November 3, 2010.

While I shall try to avoid vague words like “legalization” (rather than “regulation”) and “drugs” (instead of “cannabis,”) I shall try to meet the Times’ challenge. Kenneth Falcon has already gone far in this direction, suggesting specific changes to various provisions of the RCTCA for those redrafting it for placement on State ballots in 2012 and beyond.<sup>20</sup> As a legal counselor, he is engaged in the circumscribed, essentially *empirical* work of advising a client how best to maximize its chances of achieving its goals in light of existing law. My target audience, by contrast, is those with the power to change existing law – the voters (by way of editorial page editors). I am thus speaking from an underlying *normative* constitutional perspective.<sup>21</sup> While this will include a reply to structural concerns over intergovernmental relations, the core of my reply is substantive,<sup>22</sup> as follows.

As harmful as alcohol and tobacco are, Americans have concluded for reasons well and widely understood<sup>23</sup> that the best public policy approach for both these substances is that of *education* and time/place/manner *regulation*. With regard to cannabis, by contrast, federal and most State law still employs criminal *prohibition* for any possession or use, even by adults, even in the home. I shall argue that this stark inconsistency grossly violates the core principle of constitutional democracy – equal basic liberties – particularly as articulated in

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<sup>20</sup> See Falcon, *supra* note \_\_\_\_.

<sup>21</sup> While I agree with the bulk of Falcon’s analysis, thus, I shall depart him in places. In his discussion of the Drug Free Workplace Act, for example, he understandably takes federal cannabis prohibition as given – a fact of life. I share no such assumption, taking the view that such prohibition is flatly unconstitutional under a fair application of leading 14<sup>th</sup> Amendment case law, and so should be resisted by every legal means available. Beyond this, we shall see, Falcon simply accepts as legitimate the interests of the law enforcement and prison industries in maintaining federal cannabis prohibition so that their livelihoods - their economic interests – are not disrupted. I shall argue against this as well, from a Rawlsian perspective.

<sup>22</sup> Organization is a challenge, of course, when replying to a range of critiques of a ballot initiative. On reflection, it seems best to make the substantive case before speaking to structural concerns.

<sup>23</sup> Not only did the U.S. repeal alcohol prohibition as a policy, economic, and constitutional failure, see U.S. CONST, Amend. XXI, but in a free society, adults must presumptively be allowed to decide what will go into their bodies. See generally Daniel Okrent, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (2010).

leading 14<sup>th</sup> Amendment case law.<sup>24</sup> It is from the constitutional perspective of the equal liberty principle, which requires that the law be reasonably fair, rational, and consistent, that I shall respond to the bulk of the opinion/editorial critics' attacks on the RCTCA.

In the passage cited above, the Times refers dismissively to “theoretical principles.” Yet the equal liberty principle ended slavery, Jim Crow, and legal discrimination against women, gays, and the disabled. From private employment to voting rights, from taxation to public benefits, we all rely on this principle. Under the social contract, and particularly the golden rule at its core, citizens are obliged to apply this principle fairly to others. It cannot be dismissed with a label, even by a respected editorial page. I thus conclude, and shall argue, that the critics fail to justify voting against revisions of the RCTCA in 2012 and beyond, particularly if they incorporate refinements like those suggested by Falcon.<sup>25</sup>

## **II) A Constitutional Reply to Opinion/Editorial Criticism of Proposition 19**

### **A) Substance: The Equal Liberty Principle**

The commitments to liberty and equality lie at the core of constitutional democracy. As Aristotle wrote, “liberty is the goal of democracy while equality is its conception of justice.”<sup>26</sup> In Locke’s view, since humans are free and equal in the state of nature, any legitimate, stable government must treat them as essentially free and equal when they come

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<sup>24</sup> This inconsistency is precisely the point of analytical departure in Kimain Paul-Emile, *Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy*, 19 CORNELL J. L. & POLY 691 (2010).

<sup>25</sup> The Times placed the burden of persuasion on those who support ending cannabis prohibition. Yet insofar as that prohibition would be subject to strict scrutiny under relevant 14<sup>th</sup> Amendment case law, see AKRON, *supra* note \_\_\_\_, this is constitutionally unsupportable. As Husak notes, the burden must always be on those defending the status quo “when the status quo involves criminalization.” Husak, *supra* note \_\_\_\_, at 191-192.

<sup>26</sup> Aristotle, THE POLITICS (trans. E. Barker, 1958) Bk. VI, Ch. 2 1317a-b. As Finley observes, democracy is ordered liberty, a “balancing of freedom with safety.” M. Finley, CONSTITUTIONALISM ANCIENT AND MODERN (1985) p. 112.

into civil society under the social contract.<sup>27</sup> Fusing liberty and equality into one principle, Rawls writes that the bedrock norm of a democratic constitution is the principle that “each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme for others.”<sup>28</sup> The equal liberty principle, Rawls argues, is one that rational, self-interested persons would unanimously select behind a veil of ignorance about the details of their own lives to govern their society in perpetuity once they know those details. Under the U.S. Constitution, equal basic liberties are protected in the first instance through structural features like separation of powers, checks and balances, and federalism.<sup>29</sup> In addition, the Bill of Rights and later Amendments have enabled further development of the equal liberty principle as a matter of jurisprudential doctrine.<sup>30</sup>

Three related premises underlie the equal liberty principle. First, society is entitled to band together and, through the State it creates, enforce rules that prevent or punish harm or serious risk of harm to legitimate collective interests.<sup>31</sup> Mill’s harm principle thus forms the core of much U.S. constitutional doctrine.<sup>32</sup> Second, while liberty must be ordered, it is the

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<sup>27</sup> See John Locke, SECOND TREATISE OF GOVERNMENT chs. 2-9 (1689).

<sup>28</sup> John Rawls, A THEORY OF JUSTICE (1971) (hereinafter, *TJ*) p. 53.

<sup>29</sup> See, e.g., James Madison, FEDERALIST #51 (J.R. Pole, ed., 2005) pp. 281-282.

<sup>30</sup> See Carcieri, AKRON, *supra* note \_\_\_, at 309-328 (discussing the Supreme Court’s equal protection and due process case law); the 19<sup>th</sup>, 21<sup>st</sup>, 24<sup>th</sup>, and 26<sup>th</sup> Amendments provide further examples.

<sup>31</sup> As Chief Justice Marshall wrote, “(t)hat the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.” *Marbury v. Madison*, 5 U.S. 137, 176 (1803). See also Thomas Jefferson, et al., THE DECLARATION OF INDEPENDENCE.

<sup>32</sup> As Mill wrote, “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection.... (T)he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” J.S. Mill, ON LIBERTY (G. Himmelfarb, ed., 1974) p. 68. Thus, beyond rules like those of tort law requiring proof of substantial harm for recovery for negligence, the Supreme Court has held that government must show that the harm allegedly posed by speech it seeks to suppress is imminent and serious. See *Brandenburg v. Ohio*,

rule in a democracy, not the exception.<sup>33</sup> Third, liberty must be protected equally, or at least roughly equally. Civil liberty, that is, is necessarily fused with equality.<sup>34</sup> Where the law creates a presumption of liberty, each person has a vital interest in not having his liberty denied while others are allowed an equal or more harmful liberty. This is especially so where the criminal law is used, and emphatically so where the more harmful liberty (e.g., consuming alcohol and tobacco) is allowed for reasons well and widely understood. To the extent that a political regime fails to protect basic liberties like bodily autonomy in substantially equal fashion, then, it is illegitimate and unstable, losing its character as a constitutional democracy.

### 1) Equality: Equal Protection

The Supreme Court has refined this third premise into constitutional doctrine. The central command of the equal protection clause, it has held, is that government may not treat differently those who are similarly situated.<sup>35</sup> Rawls calls this “justice as regularity,”<sup>36</sup> and as the Court wrote in a seminal case, “(w)hen the law lays an uneven hand on those who have committed intrinsically the same quality of offense ... it has made as invidious a discrimination as if it had selected a particular race or nationality for repressive treatment.”<sup>37</sup>

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395 U.S. 444, 447 (1969). As for criminal law, Husak notes, the seriousness of a crime is based on two variables – harm and culpability. See Husak, *supra* note \_\_\_\_, at 189, 195-204.

<sup>33</sup> As Justice Douglas famously asserted in the First Amendment context, “free speech is the rule, not the exception. *Dennis v. U.S.*, 341 U.S. 494, 585 (1951) (Douglas, J., dissenting).

<sup>34</sup> As Professor Tribe has observed in the 14<sup>th</sup> Amendment context, substantive due process “is a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. *It is a single, unfolding tale of equal liberty* ....” Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (emphasis added).

<sup>35</sup> Since perfection, i.e., mathematical precision, is never the standard for human institutions like government, this rule must be understood as forbidding *substantially* dissimilar treatment of those who are *substantially* similarly situated.

<sup>36</sup> See *TJ*, *supra* note \_\_\_\_, at 207-209.

<sup>37</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); See also *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

More recently, it has observed, “(o)ur cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”<sup>38</sup> This principle, Judge Posner has observed, is a basic element of the economic theory of law: “To count as law, a command ... must treat equally those who are similarly situated in all respects relevant to the command.”<sup>39</sup> Under the equal liberty principle, then, as embodied in the 14<sup>th</sup> Amendment, the law may not treat differently those who are similarly situated to others in terms of the risk of actual harm their exercise of liberty poses to legitimate collective interests.

Cannabis prohibition raises a number of equal protection issues.<sup>40</sup> RCTCA critics raised an important one with their claim that since alcohol and tobacco already cause serious problems, we should not add to those problems by ending cannabis prohibition. As the District Attorney, Sheriff, and a local Police Chief in San Diego wrote for example, “it’s not smart to legalize another mind altering substance, putting more drivers under the influence on our roads.”<sup>41</sup> USA TODAY expressed “concerns about what legalizing another intoxicant

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<sup>38</sup> *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); See also *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986) and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). As Husak writes, the key ideas here are consistency (in the restriction of liberty, especially where the criminal law is used) and proportionality (of offense to criminal punishment), based on the degree of harm or risk of serious harm to legitimate collective interests the offense poses. See Husak in Earleywine, *supra* note \_\_\_, at 195.

<sup>39</sup> Richard Posner, *ECONOMIC ANALYSIS OF LAW* (1972) at 393.

<sup>40</sup> I have suggested elsewhere that the racial disparities in the impact of the drug war alone, particularly the war on cannabis, constitute an equal protection violation. At the very least, I have argued, under a fair reading of the Supreme Court’s 14<sup>th</sup> Amendment case law, cannabis prohibition is subject to strict judicial scrutiny. This is both because it burdens the fundamental right of bodily autonomy and, in effect, uses the suspect classification of race. See Carcieri, *AKRON*, *supra* note \_\_\_, at 311-316, 324-326.

<sup>41</sup> Dumanis et al, *SAN DIEGO UNION-TRIBUNE*, October 3, 2010.

besides alcohol could do to public safety and health,”<sup>42</sup> and as Skelton added, “legalizing “recreational” dope would create yet another problem for the state.”<sup>43</sup>

Such claims are not new.<sup>44</sup> They are alluring in that one of the premises they rely on, as we have seen, is indisputable. Democracy is ordered liberty, and so liberty may, indeed must, be restricted in some ways, even using the blunt instrument of the criminal law in some cases. From a constitutional perspective, the problem is that these writers implicitly move from this premise directly to the conclusion that government may therefore draw the line between criminal and lawful acts *wherever it chooses*. Yet this is seriously mistaken. Our bedrock constitutional principle is not liberty. It is *equal* liberty.

From this perspective, then, we notice immediately that regulation and prohibition are fundamentally distinct legal regimes. The contrast between them is one of kind, not just degree, and so the cannabis user on the one hand and the alcohol drinker or tobacco smoker on the other are unquestionably “differently treated” under our law. They are similarly situated, further, in that the cannabis user poses no greater harm to legitimate state interests than does the drinker or smoker. Indeed, studies have long shown that the former is *far less*

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<sup>42</sup> USA TODAY, October 20, 2010, p. 8A.

<sup>43</sup> Skelton, LOS ANGELES TIMES, October 11, 2010. As Falcon observes, “(p)roponents of prohibition no longer claim that marijuana causes insanity and death ... but simply claim that it is very, very bad for you and therefore should remain illegal.” Falcon, *supra* note \_\_\_, at 469.

<sup>44</sup> As the Coalition for a Drug Free California has written, for example, “alcohol and tobacco cost society a great deal every year in terms of crime, lost productivity, tragedies and death. Why legalize marijuana and add a third drug to the current list of licit threats?” [www.drugfreecalifornia.org](http://www.drugfreecalifornia.org). As Sabet adds, “using (cannabis) frequently ... may contribute to respiratory problems and lung changes consistent with precancerous states .... Marijuana also appears to contribute to other cancers ... and mental illness.... Even a cursory glance at the status of (alcohol and tobacco) shows us that to add a third drug to this list would exacerbate an already difficult public health problem.” Kevin Sabet, *The (Often Unheard) Case for Marijuana Leniency*, in Earleywine, POT POLITICS, *supra* note \_\_\_, at 328, 341. Referring to “drugs” generally, the DEA asks, “how much misery can be attributed to alcoholism and smoking? Is the answer to just add more misery and addiction?” See U.S. Drug Enforcement Administration, *Speaking Out Against Legalization*, [www.dea.gov](http://www.dea.gov) (**hereinafter, DEA?**) at 14.

a threat to those interests, not more so.<sup>45</sup> If consumption of all three substances were treated the same, then - either all regulated or all prohibited – the law would violate equal liberty on that ground alone. Yet under U.S. and most State law, the possession and use of cannabis by adults is punished *more* harshly, subject to prohibition, not mere regulation.<sup>46</sup> The problem is thus not simply that cannabis users are similarly situated to drinkers and smokers, yet differently treated. The law’s imbalance – its disproportionality - is even greater than this, for far from posing *as much* risk to genuine state interests as those who drink and smoke, especially in public, adult cannabis users pose *less*, especially in the home. On a fair application of the equal liberty principle, then, the legal punishment for tobacco or alcohol use, particularly in public, should be greater than that for cannabis, not less. Yet under U.S.

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<sup>45</sup> As one prominent study concluded, “(a)n objective consideration of marijuana shows that it is responsible for less damage to the individual and society than are alcohol and cigarettes.” Twentieth Annual Report of the Research Advisory Panel, California Research Advisory Panel, 1989, <http://norml.org>. According to an article in the Lancet, a leading British medical journal, “The smoking of cannabis, even long term, is not harmful to health .... It would be reasonable to judge cannabis as less of a threat ... than alcohol or tobacco.” *Deglamorising Cannabis*, 346 THE LANCET, November 14, 1995, at 1241. A study recently commissioned by the U.S. government concluded that “users of marijuana are less likely to become dependent on the drug in comparison to alcohol or nicotine.” Janet E. Joy, Stanley J. Watson, Jr., and John A. Benson, Jr., *Marijuana and Medicine: Assessing the Science Base*, DIVISION OF NEUROSCIENCE AND BEHAVIORAL RESEARCH, INSTITUTE OF MEDICINE 98 (1999)(hereinafter, IOM). As Grinspoon and Bakalar summarize,

“(a)fter carefully monitoring the literature for more than two decades, we have concluded that the only well-confirmed deleterious physical effect of marihuana is harm to the pulmonary system.... Marihuana smoke burdens the lungs with three times more tars (insoluble particulates) and five times more carbon monoxide than tobacco smoke. The respiratory system also retains more of the tars, because marihuana smoke is inhaled more deeply and held in the lungs longer. On the other hand, even the heaviest marihuana smokers rarely use as much as the average tobacco smoker does. So far not a single case of lung cancer, emphysema, or other significant pulmonary pathology attributable to cannabis use has been reported in the United States. Lester Grinspoon & James B. Bakalar, *MARIHUANA, THE FORBIDDEN MEDICINE* (1997) at 250.

By contrast, alcohol related deaths total more than 100,000 per year, and tobacco causes more than 400,000 deaths per year. See J.M. McGinnis and W.H. Foege, *Actual Causes of Deaths in the United States*, in 270 JAMA 2207, 2207-12 (1993). Thus, “(t)hough cannabis use is not without harm, especially for adolescents, as a source of danger it is certainly trumped by alcohol, tobacco, reckless driving, criminality, and unsafe sexual behavior.” Robert J. MacCoun & Peter Reuter, *DRUG WAR HERESIES* 345, 358 (2001).

In light of all this, the TIMES seemed to hurt its credibility when it asked, the day after the RCTCA’s defeat, “is marijuana more harmful than alcohol or not?” LOS ANGELES TIMES, November 3, 2010.

<sup>46</sup> See *State by State Laws*, NORML, <http://norml.org/index.cfm>; *State Marijuana Laws*, FINDLAW, <http://law.findlaw.com/state-laws/marijuana>.

law and that of many States, the reverse is true, thus magnifying the degree to which our law violates the principle of equal basic liberties.

Since this point is vital, a further illustration is in order. If it truly did not matter, as critics imply, where government draws the line between legal and criminal acts, then the U.S. could punish alcohol use based on gender or tobacco use based on race with the following official statement on the DEA and ONDCP webpages:

“Alcohol abuse by men imposes great social costs each year in terms of crime, lost productivity, accidents, and death. Why allow women to use alcohol and increase these bad outcomes? Moreover, cigarettes kill hundreds of thousands of whites each year. Why allow blacks to suffer this burden as well?”

Stock claims of the need to protect women and minorities notwithstanding, such a law is plainly irrational and unconstitutional. It is not enough for government to declare that it will allow some bad things but criminalize others.<sup>47</sup> Equal liberty and the rule of law

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<sup>47</sup> In passing, as an illustration of the double standard critics employ regarding cannabis, it is notable that some of them implicitly or explicitly apply criteria for ending cannabis prohibition that would never apply to other drugs, even more dangerous ones. As the drug czars write, for example, “legalized marijuana can’t solve California’s budget crisis,” LOS ANGELES TIMES, August 25, 2010. Taxing alcohol and tobacco do not solve this problem either, and yet the critics do not call for their prohibition on that account.

As another example, the Times declares that those who favor ending cannabis prohibition “must show ... that they can ... generally improve the quality of life for the state’s residents.” LOS ANGELES TIMES, 11/3/2010. Yet if proof of “improving the quality of life for the state’s residents” were truly the criterion for regulating rather than prohibiting a substance’s ingestion, alcohol and tobacco would be prohibited. The 21<sup>st</sup> Amendment was ratified not because anyone proved that alcohol would improve residents’ quality of life, but rather because prohibition was a policy, economic, and constitutional failure.

As a third example, Dumanis et al write that “drug cartels will not be driven out of business by this initiative.” SAN DIEGO TRIBUNE, October 3, 2010. See also Sylvia Longmire, *Legalizing Marijuana Won’t Kill the Mexican Drug Cartels*, New York Times, June 19, 2011. Beyond the fact that such claims are hard to prove or disprove in advance, the cartels are resourceful and survive on much more than the cannabis trade. Even if ending cannabis prohibition would not destroy them, then, (and what reliably would?) this is no reason to maintain cannabis prohibition. In any case, such claims are a diversion. The point is that cannabis prohibition, while far more dangerous drugs are merely regulated for reasons well understood, violates equal liberty.

Finally, critics impugn the motives of RCTCA supporters, particularly Richard Lee (sponsor of the RCTCA and President of Oaksterdam University). See e.g., Skelton. I have two replies.

First, even assuming Lee’s motives are partly financial, since when has the profit motive been suspect, especially from the conservative stance taken by RCTCA critics? Second, if speculation about motives is part of the discussion, then what about the motives of critics, the “vested interests in maintaining prohibition”? Grinspoon and Bakalar, *supra* note \_\_\_, at 266. The critics, we have seen, include drug czars, sheriffs, prosecutors, and corrections officials. Yet “legislators respond largely to interest groups. And there’s a massive lobby out there, pushing the drug war – the police chiefs, sheriffs, prosecutors and their allies in the federal enforcement bureaus.” *Economists Make Case for Decentralizing the War on Drugs*, Duluth News-Tribune, September 29, 2003. As Falcon adds, in reference to the No on Proposition 19 Campaign, “the No Campaign’s

demand that legal classifications be principled. At the very least, they cannot be plainly arbitrary and irrational, especially where the coercion of the criminal law is used.<sup>48</sup>

In sum, the critics' claim that cannabis prohibition must be maintained even while alcohol and tobacco are merely regulated for reasons well understood glosses over, and fails to speak to, the violation of equal basic liberties embodied in this contradiction.<sup>49</sup>

### 1) **Liberty: Due Process**

Yet the critics might seem to have a reply. Some of them suggest that cannabis prohibition is justified because it is not a high law enforcement priority. Skelton, for example, cites police and prison officials for the claim that “relatively little, in fact, is spent nabbing or prosecuting marijuana users.”<sup>50</sup> The drug czars assure us that “law enforcement

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donor list included those who benefit the most from the prohibition of marijuana, most notably the alcohol industry and law enforcement community.” Falcon, *supra* note \_\_\_\_, at 469.

While this is an important point, then, Falcon writes later that “mitigating potential job loss in the law enforcement community is a valid goal ....” *Id.*, at 487. Here I must disagree. From a Rawlsian perspective, this elevates the narrow view of economic agents seeking primarily to ensure their current power and income stream over the broad view they would take as citizens of a democracy. Like those in the alcohol, tobacco, pharmaceutical, and prison industries, law enforcement officers have no legitimate expectation that private adult cannabis use will forever remain a crime simply so that their profits and employment will be maintained. The social contract of a reasonably just society, one worth passing onto their children and grandchildren, would never contain such a provision. For citizens voting on revisions of the RCTCA in upcoming elections, thus, this is not a legitimate concern, any more than maintaining a needlessly complex and confusing tax code is justifiable simply because reform would put many tax lawyers out of business.

<sup>48</sup> As one further illustration, the Court has held that in regulating abortion, the State has a “legitimate interest from the outset of the pregnancy in protecting the life of the fetus that may become a child.” *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992). Nonetheless, a woman has a limited constitutional right to override that interest by exercising her bodily autonomy to expel the fetus from her body. See *id.* In this light, it would be hard to show that an adult who consumes cannabis in private poses more harm to legitimate state interests than a woman who obtains an abortion.

<sup>49</sup> As Joe Klein writes, “there are those who believe – with some good reason – that the accretion of legalized vices is debilitating, that we are a less virtuous society since gambling spilled out from Las Vegas to “riverboats” and state lotteries across the country.” Joe Klein, *High Time*, TIME, April 13, 2009.

Whatever the ethical merits of this claim, it cannot be our guide in determining the proper scope of constitutional rights. It implicitly elevates the good over the right, see Rawls, *TJ*, at 392-396, suggesting that a perfectionist vision of human virtue might actually justify the criminal prohibition of cannabis. Beyond this, Congress and the States have never consistently been concerned with promoting the good. Had they been, then since promoting the good means criminalizing harmful substances, then everything harmful - unhealthy foods as well as alcohol and tobacco – would long have been criminally prohibited.

officers do not currently focus much effort on arresting adults whose only crime is possessing small amounts of marijuana.”<sup>51</sup> As Dumanis et al argue,

“(a)t first blush, Prop. 19 may sound like common sense, promising cost savings through fewer prosecutions. This is a hollow promise because possession of small amounts of marijuana now is a minor offense punishable by a \$100 fine and no time in jail. As prosecutors, we’re not spending a large amount of time or money on these cases because offenders typically just pay the fine.”<sup>52</sup>

To be sure, this claim seems especially persuasive now that adult cannabis possession is merely an infraction in California – a particularly “minor” offense. Yet we must recall that so long as more dangerous substances are merely regulated for reasons well understood, there is no apparent justification for cannabis prohibition, regardless of the criminal punishment imposed. Regulation thus seems the appropriate regime for all the substances.

Beyond this, one must ask *why* police and prosecutors allegedly put so little effort into enforcing cannabis prohibition against adults. Like the California legislators who so easily came together to make cannabis possession an infraction when it seemed the RCTCA might pass, I submit, these officials know that such adults pose no harm to society that justifies time and resources that could be used on actual criminals, like drunken drivers.

Most importantly, the claim that cannabis prohibition is justifiable since it is not consistently enforced rests on a fatally flawed premise. The critics implicitly assume that where a law is such that no one defends its vigorous enforcement, the police can simply be trusted to apply it in an even handed way. As Husak notes, however, “laws that still exist can be enforced occasionally and selectively.”<sup>53</sup> Indeed, the racially disparate impact of the drug

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<sup>50</sup> Skelton, *supra* note \_\_\_\_, at 2.

<sup>51</sup> Drug Czars, *supra* note \_\_\_\_.

<sup>52</sup> Dumanis, et al, *supra* note \_\_\_\_.

<sup>53</sup> Douglas Husak, in Douglas Husak & Peter Demarneffe, *THE LEGALIZATION OF DRUGS: FOR AND AGAINST* (2005) 12-13. As an example of the inconsistency in enforcement of the war on cannabis, a writer

war confirms the discriminatory way in which the war on cannabis is fought.<sup>54</sup> This violates due process,<sup>55</sup> and more broadly, the equal liberty principle. The remedy for any harm from cannabis use is NOT police discretion to apply a law no one thinks should be vigorously enforced. It is to treat cannabis no more harshly than it does more dangerous substances.

Thus far, I have argued that the core constitutional principle of equal basic liberties undermines two of the critics' most common attacks on the RCTCA. With this fundamental principle in full view, let us now take up the critics' other plausible concerns. These divide roughly into (1) harms to self/user – addiction and increased use – and (2) harms to others – effects on children, the workplace, and highway safety. Since Falcon has spoken to aspects of these concerns, the comments that follow are designed to complement his.

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on the cannabis laws in California's Mendocino County, among the most permissive in the country, observes that "(t)he county's liberal guidelines are just that – guidelines tacitly respected by federal officials who still operate elsewhere under U.S. law banning pot of any quantity." Kevin Fagan, *Pot is Burning Issue on Mendocino Ballot*, SAN FRANCISCO CHRONICLE, May 31, 2008.

<sup>54</sup>As a retired Police Chief has written, "the drug war has become a race war, in which nonwhites are arrested and imprisoned at four to five times the rate whites are, even though most drug crimes are committed by whites." Joseph D. McNamara, *The War on Drugs is Lost*, in Mike Gray, ed., *BUSTED: STONE COWBOYS, NARCO-LORDS, AND WASHINGTON'S WAR ON DRUGS* (2002), p. 209. As Cole adds, "the racial profiling studies ... make clear that the war on drugs has largely been a war on minorities." David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 *SUFFOLK L. REV.* 241, 248 (2001). As two authors explain,

"(a) policy pattern suggested by the history of alcohol and narcotics prohibition is that the likelihood of prohibitory drug legislation is increased when the drug is identified with ethnic minorities.... Users of opium were often Chinese; street users of cocaine, and later heroin as well, were often perceived as black or West Indian; intemperate users of alcohol were often Irish, Italian or German; and later we shall see that users of marihuana were often Mexican and users of peyote were often American Indian." Richard H. Bonnie and Charles H. Whitebread, *THE MARIJUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* (1974), at 30. See also Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLRBLINDNESS* (2010).

<sup>55</sup>The Court has held that "arbitrary and discriminatory enforcement" of the law violates due process. *Chicago v. Morales*, 527 U.S. 41, 56 (1999); See also *Kolender v. Lawson*, 461 U.S. 352 (1983). Persons are entitled to fair notice of what is required to avoid trouble with the law, especially the criminal law, and need not simply rely on the discretion/whim of police in deciding whether or not to arrest and charge them with crimes.

## **B) Other Policy Concerns in Equal Liberty Perspective**

### **1) Harms to Self**

At the outset, it is not clear that any harm a person does to himself is, standing alone, a legitimate basis for criminal punishment in a constitutional democracy.<sup>56</sup> This is especially so since we have seen that whatever harms cannabis use causes the user, alcohol and tobacco use cause far greater harms to their users. Yet some of the critics' doubts about the RCTCA were grounded in the addiction justification, and so we begin there.

#### **a) Addiction/Increased Use**

Some addictions, if they can be so called, are good. Eating well and exercising regularly come to mind. Yet without question, human addiction has often led to great harm. Regarding drug addiction, Skelton quotes a psychiatrist and chief executive of a celebrity rehabilitation center as saying "marijuana is clearly addictive."<sup>57</sup> Even assuming this to be true, however, decades of studies<sup>58</sup> have concluded that cannabis is less addictive than

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<sup>56</sup> As Husak writes, "there *is* no general (criminal) offense of causing physical and/or psychological harm to oneself." Husak, in Earleywine, *supra* note \_\_\_\_, at 201 (emphasis in original).

<sup>57</sup> Skelton, LOS ANGELES TIMES, October 11, 2010.

<sup>58</sup> Claims of cannabis' addictiveness are nothing new. They go back to the "reefer madness" days of the 1930's. New York Mayor Fiorello LaGuardia was skeptical of the evidence on which the 1937 Marijuana Tax Act was based. He thus commissioned a study of the medical, sociological, and psychological aspects of marijuana use in New York City by the internationally renowned New York Academy of Medicine. Dr. George B. Wallace, Chairman of the Committee, summarized as follows.

"Smoking marijuana can be stopped abruptly with no resulting medical or physical distress comparable to that of morphine withdrawal in morphine addicts....

For the study as a whole, it is concluded that marijuana is not a drug of addiction, comparable to morphine and that if tolerance is acquired, it is of a very limited degree. Furthermore, those who have been smoking marijuana for a period of years showed no mental or physical deterioration which may be attributed to the drug." David Solomon, THE MARIHUANA PAPERS (1966) at 355, 358.

More recently, a Stanford medical professor wrote that "(p)hysical dependence is rarely encountered in the usual patterns of social use (of marijuana), despite some degree of tolerance that may develop.... Compared with other licit social drugs, such as alcohol, tobacco, and caffeine, marijuana does not pose greater risks." Leo E. Hollister, *Health Aspects of Marijuana*, PHARM. REV., Vol. 38, No. 1, p. 17 (1986).

More recently yet, the Institute of Medicine concluded that "although few marijuana users develop dependence, some do. But they appear to be less likely to do so than users of other drugs (including alcohol and nicotine) and marijuana dependence appears to be less severe than dependence on other drugs."

alcohol or nicotine, which are merely regulated. Again, the equal liberty principle rejects the harsher punishment of the less harmful substance.

Yet let us assume otherwise. Let us assume that all three substances are equally addictive. Even so, the Supreme Court has held that addiction cannot constitutionally be a crime.<sup>59</sup> Even if it could, further, equal liberty would require all addictions to be punished in roughly the same way, in proportion to their severity. Yet again, tobacco and alcohol are merely regulated while cannabis is prohibited. From the equal liberty perspective, then, any addictive potential of cannabis cannot justify this inconsistency in the law.

The critics might reply that cannabis use would increase if prohibition were ended. As the drug czars wrote, for example, “we can say with near certainty ... that marijuana use would increase if it were legal.”<sup>60</sup> Yet the drug czars’ “near certainty” is undercut by several sources.<sup>61</sup> Even putting this aside, further, the relevant issue is not use,

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IOM, *supra* note \_\_\_\_, at 98.

Most recently, “cannabis appears to have little addictive potential in the opinion of most experts, particularly when compared to other common drugs, including caffeine.” Robert Gore & Mitch Earleywine, *Marijuana’s Perceived Addictiveness: A Survey of Clinicians and Researchers*, in MITCH EARLEYWINE, POT POLITICS, at 176, 185. As two scholars thus conclude, “even though marijuana is by far the most widely used illicit drug, its negative consequences are dwarfed by those of other drugs.” David Bayum and Peter Reuter, *An Analytic Assessment of U.S. Drug Policy*, [www.aei.org/books/bookID812](http://www.aei.org/books/bookID812).

<sup>59</sup> Specifically, the Court held that enforcement of such a law constitutes cruel and unusual punishment. See *Robinson v. California*, 370 U.S. 660, 666-667 (1962). Following suit, California appellate courts have also held that addiction is not a crime. See *People v. Campos*, 47 Cal. App. 4<sup>th</sup> 1366, 1393 (1995) and *Blinder v. Division of Narcotics Enforcement*, 25 Cal. App. 3d 174, 188 (1972).

<sup>60</sup> LOS ANGELES TIMES, August 25, 2010.

<sup>61</sup> Decades ago, to begin, a University of Michigan study found that

“between 1973 and 1978, possession of marijuana was reduced to a misdemeanor in twelve states, but the predicted explosion in cannabis use failed to materialize. The University of Michigan’s annual high school survey ... showed the seniors in these dozen states reported no more marijuana use than their counterparts in other states.” L.D. Johnson et al, *Marijuana Decriminalization: The Impact on Youth 1975-1980* in University of Michigan, Institute for Social Research, *Monitoring the Future*. Occasional Paper #13.

More recently, the IOM found that “there is little evidence that decriminalization of marijuana use necessarily leads to a substantial increase in marijuana use.” IOM, *supra* note \_\_\_\_, at 326. According to a U.S.-sponsored study in 2001, “(e)xisting research seems to indicate there is little apparent relationship between the severity of sanctions prescribed for drug use and prevalence or frequency of use and that perceived legal risk explains very little in the variance of individual drug use.” National Research Council, *Informing America’s Policy on Illegal Drugs: What We Don’t Know Keeps Hurting Us*, National Academy Press 192-193 (2001).

but abuse. The critics seem to assume that cannabis use is abuse by definition. By this logic, however, any alcohol or nicotine use is abuse, and must be prohibited. Yet just as millions of adults can enjoy alcohol in moderation, the studies cited leave no reason to doubt that they can also use a less addictive substance like cannabis in moderation. Even assuming, then, contrary to decades of studies, that cannabis use would increase if its prohibition were ended, this would not justify voting against a revision of the RCTCA.

## 2) Harms to Others

All agree that government may ban or punish acts that directly cause serious harm to others. The RCTCA, accordingly, is clear that it is not intended to affect laws regarding 1) driving under the influence of cannabis, 2) coming to work under the influence of cannabis, or 3) providing cannabis to minors.<sup>62</sup> Yet the critics are legitimately concerned about the law's effect, not its intent. Thus, even conceding that principles of right must prevail over pursuit of the good in a constitutional democracy, the critics can plausibly assert that the good (preventing serious harm to others) is substantial and that the right (to bodily

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At the international level, Schlosser observes, "between 1988 and 1998, British arrests for marijuana nearly quadrupled, reaching almost 100,000 a year. As many as 5600 marijuana offenders were annually imprisoned. And yet British marijuana use during that period continued to rise. *Despite having the most punitive marijuana laws in Europe, Great Britain soon had the highest rate of marijuana use among young people.*" Eric Schlosser, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET (2003) at 69-70 (emphasis added). After the UK decriminalized cannabis in 2004, further, the British Crime Survey confirmed that its use declined. <http://www.homeoffice.gov.uk/rds/bcs1.html>. Beyond this, although cannabis use has essentially been legal in the Netherlands since the 1970's, UN statistics show that the Dutch have a lower rate of cannabis use than does the U.S. [http://www.unodc.org/unodc/en/world\\_drug\\_report.html](http://www.unodc.org/unodc/en/world_drug_report.html) As MacCoun and Reuter write,

"Dutch national rates (of cannabis usage) now are somewhat lower than those in the United States .... The Dutch have significantly reduced the monetary and human costs of incarcerating cannabis offenders with no apparent effect on levels of use.... (T)hroughout two decades of the 1976 policy, Dutch (cannabis) use levels have remained at or below those of the United States." Robert J. MacCoun & Peter Reuter, DRUG WAR HERESIES (2001) at 256, 261, 263.

<sup>62</sup> See RCTCA, Sec 2(C)(2).

autonomy) is trivial. Nonetheless, I shall argue that none of these three concerns justifies voting against revisions of the RCTCA in 2012 and beyond.

**i) Effects on Children**

On this subject, Falcon responds to the No on 19 Campaign's concern over the prospect of school bus drivers driving under the influence.<sup>63</sup> The op/ed critics, however, express broader concerns over minors. The Times, we saw, asked "what would be the effect of legalization ... on children?"<sup>64</sup> Skelton quoted a doctor's claim that "drugs cause tremendous hardships to children and families,"<sup>65</sup> and in USA TODAY's words,

"our deepest concern is what would happen to children. Supporters of legalization underestimate how easy it would be for kids to sneak pot at home if their parents began using it more frequently and openly, and the legalizers fail to reckon with the danger of sending children the message that pot is no big deal. Marijuana is less addictive than harder drugs, but the addiction rate jumps as high as 17% for kids who begin using at an early age, and early use can set back a child's mental development."<sup>66</sup>

Prima facie, of course, concern for children is legitimate, even compelling.<sup>67</sup> Special rules protecting minors are justifiably found throughout our law. The RCTCA was thus quite clear, as the critics concede, that providing cannabis to minors would have remained a crime.<sup>68</sup> Yet even assuming this law would have increased some children's access to cannabis, concern over minors does not justify rejecting revisions of the RCTCA.

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<sup>63</sup> Falcon, *supra* note \_\_\_\_, at 481.

<sup>64</sup> *Post Prop 19*, LOS ANGELES TIMES, November 3, 2010.

<sup>65</sup> Skelton, LOS ANGELES TIMES, October 11, 2010.

<sup>66</sup> USA TODAY, October 20, 2010.

<sup>67</sup> As Husak notes, "(t)his rationale has a tremendous appeal." Husak & de Marneffe, *supra* note \_\_\_\_, at 53.

<sup>68</sup> Indeed, Falcon writes that "the RCTCA went above and beyond to protect California's children." Falcon, *supra* note \_\_\_\_, at 471.

To begin with ends, the Court has held that government may not simply restrict what it pleases, particularly when it burdens basic liberties, in order to make the world safe for children. As Justice Frankfurter famously observed in a free speech case,

“we have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual ... enshrined in the due process clause of the 14<sup>th</sup> Amendment.”<sup>69</sup>

Beyond this, if Congress truly believed that it must protect minors from ingesting substances *in proportion as they pose a risk of actual harm*, it would criminalize the ingestion of all dangerous substances. Since it does not, not only are its means underinclusive given its purported goal, but the protection of minors cannot be taken seriously as an actual goal of national drug policy. USA TODAY expresses concern over the message we would send children by ending cannabis prohibition. Yet if we were really concerned about this message, it seems we would end cannabis prohibition.<sup>70</sup> The message would be that as a society we will finally end the hypocrisy of claiming to protect children while treating the most destructive drugs most leniently.<sup>71</sup>

Yet let us put this aside and agree that minimizing minors’ access to cannabis is a legitimate state interest. The problem remains that minors already have easy access to

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<sup>69</sup> *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

<sup>70</sup> In two writers’ words, “we permit adults to do many activities that we forbid children to do, such as motorcycle riding, skydiving, signing contracts, getting married, drinking alcohol, and smoking tobacco. But we do not condone arresting adults who responsibly engage in these activities in order to dissuade our children from doing so. Nor can we justify arresting adult marijuana smokers at the pace of some 734,000 per year on the grounds of sending a message to children.” Keith Stroup & Paul Armentano, *The Problem is Pot Prohibition*, Washington Post, May 4, 2002, p. A19.

<sup>71</sup> As a psychologist writes, “(o)ur kids notice our self-justifying delusions regarding drug use. Alcohol is a good drug except when you’re driving or if you use too much, when people become violent and-or pathetic. Tobacco is a bad drug. People who smoke cigarettes are ruining their health, but they are allowed to do so because it is a free country. Heroin and cocaine are bad because they are addictive and illegal and sold by bad people. Marijuana is not addictive and Dad and Mom tried it in college, but it is illegal and therefore not really OK. Any wonder why kids just stop listening to “just say no?” John Keefe, *Dispatches from the Drug War*, BANGOR DAILY NEWS, May 11, 2006.

cannabis due to the black market that prohibition of a popular substance always creates and sustains. As a survey by the National Institute on Drug Abuse (NIDA) found, “(m)arijuana appears to be available to almost all high school seniors; 86% reported that they think it would be ‘very easy’ or ‘fairly easy’ for them to get it – almost twice the number who reported ever having used it (46%).”<sup>72</sup> As Judge Gray observes, “our current system is completely unable to keep illicit drugs out of our communities and away from our children .... Ask your local high school or junior college students and they will tell you ... that it is easier for our children and underage adults to get illicit drugs than it is for them to get alcohol.”<sup>73</sup> If anything, then, as with alcohol, cannabis regulation would diminish such access as well as the risks associated with having to obtain a substance illegally.

Even putting ends aside, further, cannabis prohibition is problematic as a means of protecting minors. For one thing, even if we assume with USA TODAY that children of parents who would use cannabis “more frequently and openly” if prohibition ended would have more access to that cannabis as a result, this fails to justify prohibition for millions of childless adults. Cannabis prohibition is thus sharply overinclusive in light of its purported ends. Beyond this, if lockable cabinets work sufficiently well to bar children’s access to their parents’ liquor that we need not resurrect alcohol prohibition, the same technology should be sufficient for securing their cannabis.

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<sup>72</sup> L.D.Johnston, P.M. O’Malley, J.G. Bachman, and J.E. Schulenberg, *Monitoring the Future – National Survey Results on Drug Use, 1975-2004: Volume I: Secondary School Students* (NIH Publication No. 05-5727)(Bethesda, MD: National Institute on Drug Abuse), August, 2005, p. 397.

<sup>73</sup> Judge James P. Gray, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS (2001) at 50-51 See also Anita Hamilton, *This Bud’s For the U.S.*, TIME, August 23, 2004 at 36-37. Most recently, the National Center on Addiction and Substance Abuse found “marijuana more available than ever, with 23% of teens able to get the drug in an hour or less, and 42% of teens able to get it in a day or less. **It reveals a 35% increase over last year in terms of teens who can get the drug in a day or less.**” 2008 National Survey of American Attitudes on Substance Abuse, [www.casacolumbia.org/articlefiles/380-2008](http://www.casacolumbia.org/articlefiles/380-2008) (emphasis added).

In sum, while the welfare of minors is generally a legitimate state concern, it does not justify voting against revisions of the RCTCA in 2012 and beyond.

**ii) Effects on Highway Safety and the Workplace**

As noted, however, the critics raise plausible concerns about highway safety and the workplace. As for highway safety, one op/ed page writes, “The proposition does not affect current laws against driving while impaired by cannabis, but it does allow passengers to smoke in a moving vehicle, proponents acknowledge.”<sup>74</sup> The drug czars assert that “(b)ecause marijuana negatively affects drivers’ judgment, motor skills and reaction time, it stands to reason that legalizing marijuana would lead to more accidents and fatalities involving drivers under its influence.”<sup>75</sup> As Dumanis et al opine, “San Diego’s county roads would become more dangerous with more drivers under the influence and more drug-related accidents. Prop. 19 has no language to prevent drivers from smoking immediately before driving and allows passengers in a vehicle to smoke marijuana.”<sup>76</sup>

Falcon speaks to these concerns. He concedes that “marijuana use and car accidents do sometimes coincide,”<sup>77</sup> and that the RCTCA failed to provide an objective test of cannabis intoxication.<sup>78</sup> Yet he notes that courts and legislatures have developed

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<sup>74</sup> SAN FRANCISCO CHRONICLE, September 16, 2010.

<sup>75</sup> LOS ANGELES TIMES, August 25, 2010.

<sup>76</sup> SAN DIEGO UNION-TRIBUNE, October 3, 2010. This claim seems misleading. Since the RCTCA is clear that it does not affect laws against driving under the influence of cannabis, it is not a reasonable inference that it would allow someone to smoke immediately before driving. USA Today adds that “(y)ou wouldn’t want somebody (under the influence of cannabis) ... coming toward you on the road, and while it would still be illegal to drive under the influence, that would almost certainly happen more often under legalization. Marijuana smokers are three times more likely than sober drivers to crash.” USA TODAY, October 20, 2010. This also seems misleading. While cannabis smokers may be three times more likely than sober drivers to crash, the relevant comparison from the equal liberty perspective is not to sober drivers but to drunken drivers.

<sup>77</sup> Falcon, *supra* note \_\_\_\_, at 480.

reasonably objective standards for such intoxication,<sup>79</sup> he proposes a “hybrid” model of enforcement,<sup>80</sup> and he suggests an exemption from the RCTCA for school bus drivers<sup>81</sup> and perhaps commercial bus and transportation companies.<sup>82</sup> I add just two points.

First, studies show that people drive more cautiously and less recklessly under the influence of cannabis than of alcohol. A University of Maryland study of 2405 drivers hospitalized in auto accidents from 1997 to 2001, for example, concluded that drivers who test positive for marijuana in urine are no more likely to cause accidents than drug-free drivers.<sup>83</sup> Other studies have made similar conclusions, partly due to the higher caution exercised by cannabis-using drivers.<sup>84</sup> Accordingly, since we tolerate the greater risks of drunken driving for reasons well understood, concerns over highway safety do not justify voting against revisions of the RCTCA in 2012 and beyond.

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<sup>78</sup> See *id.*, at 477.

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*, at 488-489. This includes a suggestion that revisions of the RCTCA clarify that it shall be illegal for smoked cannabis material to be present within motor vehicles. See *id.*, at 489.

<sup>81</sup> See *id.*, at 481.

<sup>82</sup> See *id.*, at 481, 488.

<sup>83</sup> See Carl Soderstrom et al, *Crash Culpability Relative to Age and Sex for Injured Drivers Using Alcohol, Marijuana, or Cocaine*, 49<sup>th</sup> Annual Proceedings of the Association for the Advancement of Automotive Medicine, September 13-14, 2005. The study investigated the circumstances of each accident to assess which drivers were at fault or culpable. Drivers testing positive for marijuana were found to have no greater culpability than drug-free drivers. In every age group, alcohol was the drug most strongly associated with crash culpability. Moreover, marijuana using-drivers aged 41 to 60 were statistically less likely to be at fault for accidents than drug free drivers.

<sup>84</sup> See S. R. Lowenstein & J. Koziol-McLain, *Drugs and Traffic Crash Responsibility: A Study of Injured Motorists in Colorado*, *J Trauma* 50(2): 313-330 (2001), K.L.L. Movig et al, *Psychoactive Substance Use and the Risk of Motor Vehicle Accidents [in the Netherlands]*, *Accident Analysis and Prevention* 36: 631-636 (2004) and Anthony Liguori, *Marijuana and Driving: Trends, Design Issues, and Future Recommendations*, in Earleywine, *supra* note \_\_\_, 71, 83-84. As Grinspoon and Bakalar write, “the most careful study of this question indicated that effects of marihuana on actual driving performance were small. Compensatory concentration and effort usually overcame deficiencies caused by THC. Drivers under the influence of marihuana tended to overestimate its effects and compensated by concentrating harder and slowing down. Drivers under the influence of alcohol, on the other hand, underestimated its effects. As a result, marihuana impaired coordination less and judgment far less than alcohol did.” Grinspoon & Bakalar, *supra* note \_\_\_, at 237.

Second, U.S. law has long distinguished the consumption of alcohol from the actions taken thereafter, like driving under its influence. The equal liberty principle requires that we make the same distinction with respect to cannabis. As Husak writes,

“undoubtedly, some recreational drug use in some circumstances – for example substantial alcohol use while driving – would threaten fair terms of cooperation. Rational persons would demand assurance others not subject them to this risk. But a categorical prohibition of alcohol is not needed for this purpose. Fair terms of cooperation are preserved by regulating the time, place, and circumstances under which alcohol may be consumed. Similarly, a categorical prohibition on each of those drugs currently classified as illicit seems equally unnecessary for this purpose.”<sup>85</sup>

Turning to effects on the workplace, one editorial page wrote, the RCTCA

“would put employers in a quandary by creating a protected class of on-the-job smokers, bestowing a legal right to use marijuana at work unless employers could actually prove that it would impair an employee’s job performance. Employers would no longer have the right to screen for marijuana use or discipline a worker for being high. But common sense dictates that a drug-free environment is crucial at too many workplaces to name – schools, hospitals, emergency response and public safety agencies, among others.”<sup>86</sup>

Apart from propaganda like “common sense” and “drug free environment,” this seems to raise a legitimate concern. Just as an employer can rightly expect that he need not tolerate a drunken employee, he need not tolerate one under the influence of cannabis.<sup>87</sup>

As with highway safety, further, the bodily autonomy of adults in the home does not dispose

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<sup>85</sup> Husak II, *supra* note \_\_\_\_, at 55. See generally Rodney Skager, *Revisoning Youth Policy on Marijuana and Other Drug Use: Alternatives to Zero Tolerance*, in Earleywine, *supra* note \_\_\_\_, at 300-321.

<sup>86</sup> LOS ANGELES TIMES, September 24, 2010. Also on this point, see SAN FRANCISCO CHRONICLE, September 16, 2010. The day after Proposition 19 was defeated, the TIMES referred to its “ludicrous protections for marijuana-smoking employees.” Post-Prop 19, LOS ANGELES TIMES, November 3, 2010.

<sup>87</sup> To be sure, many report that cannabis enhances the quality of their work. See Grinspoon and Bakalar, *supra* note \_\_\_\_, at 277-282. Yet it can also be counterproductive and even dangerous. As Falcon observes,

“(i)f the RCTCA were broadly construed, ... it is possible that the law could be read to allow those employees who are “high functioning” while stoned to come to work under the influence, or else that an employer would have to prove in court actual performance impairment due to being under the influence. I believe that employers ought to be able to take action against an employee who smokes marijuana immediately before or during the break in between work hours. Employers ought to have the right to decide what an employee does during the hours he is engaged in his chosen occupation. The employer pays for that time, and being able to dictate the conduct of his employees during that time seems inherent in the relationship itself.” Falcon, *supra* note \_\_\_\_, at 482. On this basis, he makes the unobjectionable suggestion that revisions of the RCTCA should include a provision that employers are not required to allow employee cannabis use, possession, or distribution on company hours. See *id.*, at 488.

of this concern, any more than it protects an individual who drinks a quart of scotch in ten minutes at home immediately before driving his car on city streets. In both cases, what matters is the serious risk of real harm that ingestion of a drug directly poses to others.<sup>88</sup> Again, however, alcohol and pharmaceuticals are merely regulated for reasons well understood, and the attendant risks of such a legal regime come with owning and running a business in a free society. Employers must already unavoidably deal with such problems, and so the equal liberty principle requires that we treat the less harmful substance no more harshly than we do the more harmful substance.

Cannabis, we have seen, is less harmful than tobacco or alcohol. A fair application of the equal liberty principle, on which we all rely, thus compels that cannabis not be treated more harshly by the law. As democratic citizens we are obliged to apply this principle in an even handed way in our own political acts, as when voting on ballot initiatives like the RCTCA. If we do not, we have no legitimate expectation that others give our interests due consideration when the law violates equal liberty to our detriment. I conclude the critics' comments regarding highway safety and the workplace provide no basis to reject revisions of the RCTCA in 2012 and beyond.

And yet the critics still seem to have some powerful arrows in their quivers. We thus turn to their critiques not of substance but of structure – the level of government at which jurisdiction over cannabis law is and should be lodged.

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<sup>88</sup> Accordingly, once again, the RCTCA was clear that it was not intended to affect the workplace.

## C) Structure: Intergovernmental Concerns

### 1) Federal v. State Power: Supremacy/Preemption

A common critique of the RCTCA was that it would conflict with federal law, which is supreme. As the Times wrote, for example, under the RCTCA, “marijuana, though legal in California, would remain a prohibited schedule one drug under federal law, setting up an inevitable conflict.”<sup>89</sup> The constitutional principle referenced here is familiar: under the Supremacy Clause,<sup>90</sup> federal law preempts contrary state law. Yet I reply that the mere existence of federal cannabis prohibition is no reason to reject revisions of the RCTCA.

To begin, it is not clear that federal cannabis prohibition under the CSA *would* preempt a revision of the RCTCA. At best, this is an open legal question. For one thing, the Supreme Court has not fully spoken on the constitutionality of federal cannabis prohibition. It has never, that is, squarely tested the CSA as applied to activities that would have been protected by the RCTCA. *U.S. v. Oakland Cannabis Buyers’ Collective* was a statutory ruling<sup>91</sup> and *Gonzales v. Raich* held only that the CSA is generally a permissible exercise of Congress’ commerce power, and that the DEA may thus enforce it.<sup>92</sup> This question is distinct from whether federal cannabis prohibition violates the equal liberty principle as articulated in the Court’s 14<sup>th</sup> Amendment case law. As Husak observes, further,

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<sup>89</sup> LOS ANGELES TIMES, October 30, 2010. See also, e.g., Skelton, *supra* note \_\_\_, SAN FRANCISCO CHRONICLE, September 16, 2010, *supra* note \_\_\_, and LOS ANGELES TIMES, September 24, 2010.

<sup>90</sup> U.S. CONST. Art. VI.

<sup>91</sup> 532 U.S. 483 (2001) (holding that the CSA includes no medical necessity exception).

<sup>92</sup> 545 U.S. 1 (2005). I have argued elsewhere that federal cannabis prohibition under the CSA not only exceeds Congress’ commerce power but also violates the Tenth Amendment. See Martin D. Carcieri, *Gonzales v. Raich: Congressional Tyranny and Irrelevance in the War on Drugs*, 9 U. PA. J. CONST. L. 1131 (2007).

“a right to use drugs is unlikely to be explicitly included in (a) constitution. But this concession does not settle the matter; rights to marry or to use contraceptives are equally improbable candidates for explicit inclusion, (as are) decisions about what foods to eat or what clothes to wear .... Many questions about the scope of constitutional protection afforded to such conduct are unexplored in our legal system, mainly because liberal states have rarely sought to punish them. ***No case law exists about issues that have never been addressed.***”<sup>93</sup>

Beyond this, secondly, we saw that the Frank/Paul bill was recently introduced in the House. While it will not receive a hearing any time soon, it reminds us that federal cannabis prohibition is not necessarily a permanent legal fact. If States vote to end cannabis prohibition under their law, it can only increase pressure on Congress to pass a law like Frank/Paul. Our Constitution allows several avenues for reform, and one of them is that of States sending a message to Washington by protecting liberties the latter seeks to criminalize.

Finally, Professor Mikos recently noted an important distinction. When Congress legalizes an activity that has been banned by state law, he observes, all agree that the latter is unenforceable. By contrast, he argues, when Congress criminalizes a liberty that has been protected by a State, neither the legal status nor the practical import of the state law is clear.<sup>94</sup> This is consistent with the well-established principle that States may, if they wish, protect individual rights under their constitutions at a higher level than does the U.S. Constitution.<sup>95</sup>

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<sup>93</sup> Douglas Husak, *Liberal Neutrality, Autonomy, and Drug Prohibitions*, Philosophy and Public Affairs, Vol. 29, No. 1 (Winter 2000) (emphasis added). See also Dan Riffle, *Prop 19 and Constitutional Law for Dummies (and DEA Administrators)*, [www.mpp.org](http://www.mpp.org), October 13, 2010.

<sup>94</sup> See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 142 (2009). Using the “state of nature” standard, Mikos argues that constraints on Congress’ preemption power by the anti-commandeering rule make it quite appropriate that state medical marijuana statutes are de facto law in those states.

<sup>95</sup> The Supreme Court has referred to a State’s “sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution.” *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). See also, e.g., *California v. Greenwood*, 486 U.S. 35, 43 (1988), *Cooper v. California*, 386 U.S. 58, 62 (1967), *Daffin v. Oklahoma*, 251 P. 3d 741, 747 n. 20 (2011), and *U.S. v. Garner*, 945 F. Supp. 990, 997 (1996) (referring to “the historical principle that the United States Constitution provides a floor to a citizen’s civil rights while the State constitutions provide a ceiling.”)

Again, thus, it is at best an open question whether the mere existence of federal cannabis prohibition renders a contrary right under state law void.

Yet for the sake of argument, let us assume otherwise - that a revised RCTCA would directly conflict with the CSA, triggering preemption. Falcon, advising those revising the RCTCA, must assume this. Yet from the broader perspective of a citizen voting on such measures, to conclude that nothing can or should be done at the state level to oppose federal prohibition assumes that what is, ought to be. Since prohibition is the law, this view holds, we ought simply to accept rather than to oppose it. Had such a view prevailed in the past, of course, there would never have been a 14<sup>th</sup> Amendment, or even a Declaration of Independence. Progress in the law has always necessarily depended on the distinction between what the law is and what it ought to be in light of deeper, enduring principles.<sup>96</sup> The critics' premise that we ignore this distinction is thus indefensible. If there are compelling reasons to oppose a gross inconsistency in the law, especially the criminal law, then it is the right of democratic citizens to resist it. Indeed, it is their duty, especially where the means employed – voting – are lawful. Unlike civil disobedience, militancy, or revolution,<sup>97</sup> in fact, voting is not just legal, it is a fundamental constitutional right.<sup>98</sup>

In this light, USA Today's claim that "legalization is a decision that should be made by the entire country, not just one state,"<sup>99</sup> misunderstands the role of our federalism. As

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<sup>96</sup> Heyman, Levit, Delgado, JURISPRUDENCE: CLASSICAL AND CONTEMPORARY (2002) at 74-80.

<sup>97</sup> See Rawls, *TJ*, 308-341. For Rawls, civil disobedience is justifiable where the law merely violates the fair equality of opportunity principle. A fortiori, where the law violates the more fundamental equal liberty principle, means far less drastic than civil disobedience, like the constitutionally protected power to vote, are easily justifiable.

<sup>98</sup> See *Harper v. Board of Elections*, 383 U.S. 663, 670 (1966).

<sup>99</sup> USA TODAY, October 20, 2010.

Justice Brandeis famously wrote, “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.”<sup>100</sup> This is especially so with a classic police power concern like cannabis regulation. Boychik writes that “though there may be excellent reasons for California to go toe to toe with the federal government over the federalism question, does it really have to about this issue? Right now?”<sup>101</sup> The answer is yes. As with the recent repeal of “Don’t Ask/Don’t Tell,” if it is the right thing to do, it is the right thing to do now. Indeed, Falcon notes, not only is there a “strong argument to be made for the value in varied laws,”<sup>102</sup> but “when legalization comes, it will not start at the federal level.... State action is the only way to legalize marijuana.”<sup>103</sup>

I conclude that the critics’ claim that a revised RCTCA should be opposed because it would be preempted by federal law is unpersuasive. Even assuming the CSA would preempt such a revision, where there are good reasons, rooted in the equal liberty principle, to oppose federal law, voting in state elections is a legitimate means of action.

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<sup>100</sup> *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also K.K. Duviver, *Fast Food Government and Physician Assisted Death: The Role of Direct Democracy in Federalism*, 86 OR. L. REV. 895, 899 (2007) (referring to States as “Brandeis laboratories”). The USA TODAY editors might reply that a law like Proposition 19 does create a “risk to the rest of the country” insofar as it would be “potentially flooding the rest of the nation with cheap supplies.” USA TODAY, October 20, 2010. Yet beyond the fact that it is not clear that cannabis would be so “cheap” if it were taxed, states impact other states in many ways, as with gambling, welfare, and alcohol laws. Again, such interaction among states is a feature of federalism.

The drug czars claim that RCTCA supporters mistakenly rely on the Dutch example, insofar as the Dutch have dramatically reduced the number of coffee shops. LOS ANGELES TIMES, August 25, 2010. Yet it is telling that the remedy to which the Dutch have NOT resorted in dealing with the problem is cannabis prohibition. Rather, they have simply adjusted their regulatory scheme, as they do for other drugs when necessary. The drug czars’ reference thus appears to backfire.

<sup>101</sup> Ben Boychuk, *A Conservative’s Guide to the Propositions*, LOS ANGELES TIMES, October 31, 2010.

<sup>102</sup> Falcon, *supra* note \_\_\_\_, at 483.

<sup>103</sup> *Id.*, at 492.

## 2) State v. Local Power

### a) “Regulatory Chaos”

Yet the critics may still seem to have a reply. Some of them asserted that the RCTCA was poorly drafted and would thus have created “regulatory chaos.” This was because “it would empower the state’s hundreds of city and county governments to set their own regulations for growing, selling, using, and taxing marijuana.”<sup>104</sup> As the Chronicle added, “Proposition 19 allows the 58 counties and hundreds of cities to come up with their own taxation and regulatory schemes. ...”<sup>105</sup> The Times proclaimed that “the proposition is in fact an invitation to chaos. It would permit each of California’s 478 cities and 58 counties to create local regulations regarding the cultivation, possession, and distribution of marijuana.... In Los Angeles County alone it could mean 88 different sets of regulations.”<sup>106</sup>

At first blush, the critics seem to raise a legitimate concern. Yet these statements simply state facts about the RCTCA without showing exactly what the problem is or how it compares to similar problems in other regulatory schemes. Citizens and business owners tolerate local variation in many areas of law, from speed limits to tax rates to alcohol regulations. Moreover, the RCTCA would have allowed cities and counties to opt out of having cannabis dispensaries while immunizing suppliers from criminal prosecution for possession under state law.<sup>107</sup> Falcon casts the “regulatory chaos” issue as whether the state should encourage large or small scale cannabis production. He argues for the latter - for

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<sup>104</sup> USA TODAY, October 20, 2010.

<sup>105</sup> SAN FRANCISCO CHRONICLE, September 16, 2010.

<sup>106</sup> LOS ANGELES TIMES, September 24, 2010; see also LOS ANGELES TIMES, October 30, 2010, and SAN FRANCISCO CHRONICLE, September 16 (“nightmare” created by Proposition 215 has led to dispensary moratoria).

<sup>107</sup> See RCTCA, Sec. 11303. Falcon’s observation that “there is a strong argument to be made for the value in varied laws,” Falcon, *supra* note \_\_\_\_, at 483, is thus relevant here as well.

keeping the industry “mom’n’pop” with state law “regulating to encourage small scale production.”<sup>108</sup> Whether or not RCTCA revisions follow Falcon’s precise counsel on this point, if they place primary regulatory control over cannabis production at the State level, critics cannot credibly denounce such an adjustment as totalitarian central planning. Concentrating substantial power in the State is consistent with a healthy federalism.

### **b) Doubts Regarding Tax Revenue**

Yet the critics may seem to have one last claim justifying cannabis prohibition in the face of alcohol and tobacco regulation. As the Chronicle writes, the RCTCA “does nothing to cure the state’s budget deficit.”<sup>109</sup> Once again, this applies a different criterion to cannabis than to other substances. Liquor and cigarette taxes have not cured the deficit either, yet this has not led us to make their sale and possession a crime. Beyond this, this claim seems misleading. To be sure, any tax revenues under the RCTCA would have gone to local rather than State coffers. Yet they would to that extent have made localities less dependent on State support. In this sense the RCTCA would have done at least done something to help ease the state budget deficit.

The drug czars ask, “why would people volunteer to pay taxes if it were legalized? The answer is that many would not, and the underground market, adapting to undercut any new taxes, would barely diminish at all.”<sup>110</sup> “Many,” of course, is a vague term. Relatively few people who consume fruits and vegetables grow these items for themselves. They are less expensive than cannabis, but as surely as “many” would opt to grow their own

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<sup>108</sup> *Id.*, at 486.

<sup>109</sup> SAN FRANCISCO CHRONICLE, September 16, 2010.

<sup>110</sup> LOS ANGELES TIMES, August 25, 2010.

cannabis, “many” would buy from dispensaries, as they do now for medicinal use. Consumers rationally prefer choosing from a variety of products whose quality is guaranteed rather than taking their chances on the black market. The drug czars’ cheap cynicism and low opinion of cannabis users thus proves nothing. It is just as plausible that, inspired by their government finally ending a century of a destructive, hypocritical policy, a great “many” would be glad, even proud, to pay a tax on cannabis, especially if they know that it is directed to a “sympathetic public cause, such as education or health care.”<sup>111</sup>

The Times, finally, writes that the tax revenue would depend on untried bureaucracies and enforcement agencies.<sup>112</sup> I have three replies.

First, such administrative adjustments are a natural consequence of legislative reform. When the U.S. ended alcohol prohibition or created the Department of Homeland Security, new bureaucracies and law enforcement divisions had to be established, and we did so.<sup>113</sup> This is what one would expect in ending a century of cannabis prohibition.

More to the point, secondly, Mikos argues that states’ ability to tax cannabis as effectively as they do tobacco and alcohol is undermined precisely because of federal prohibition. It creates legal uncertainty and thus the conditions of a quasi-black market in which cannabis suppliers and vendors are forced to operate.<sup>114</sup> In this light, and to this

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<sup>111</sup> Falcon, *supra* note \_\_\_\_, at 490.

<sup>112</sup> See, e.g., LOS ANGELES TIMES, September 24, October 30, and November 3.

<sup>113</sup> As one scholar has written, “states responded with comprehensive regulatory schemes affecting all aspects of the liquor industry.” Vijay Shanker, *Alcohol Direct Shipment, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353 (1999). As another observes, repeal of prohibition ushered in “a series of state-by-state codes, regulations, and enforcement procedures.” Daniel Okrent, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (2010) at 374.

<sup>114</sup> Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL. F. 223.

extent, any doubts regarding the tax revenue that would flow from ending cannabis prohibition cannot be assessed against the merits of a revised RCTCA.

Beyond this, once again, if RCTCA revisions place most regulatory and taxing authority at the State level, this criticism dissolves. There will be few if any “untried bureaucracies and enforcement agencies” at the local level. The critics’ doubts regarding tax revenue thus do not justify voting against revisions of the RCTCA. Voting to send the strongest possible message of opposition to federal prohibition is well justified.

### **III) Conclusion**

The criticism of the RCTCA we have reviewed raised legitimate concerns. As Falcon notes, such critiques are a step forward in the debate over cannabis law reform.<sup>115</sup> From a constitutional perspective, however, I have argued that none of them justifies voting against revisions of the RCTCA in 2012 and beyond. In particular, I have argued that the criminal prohibition of cannabis, while far more harmful drugs like alcohol and nicotine are merely regulated for reasons widely understood, violates the equal liberty principle at the core of the U.S. Constitution, particularly as expressed in the Court’s 14<sup>th</sup> Amendment case law.

This is not lost on President Obama. I have thus argued that if reelected, he should call on Congress to end federal cannabis prohibition, letting States go their own way within loose federal guidelines.<sup>116</sup> As noted, however, in an apparent bid for conservative support in his run for reelection, Obama has recently authorized crackdowns on medical cannabis dispensaries.<sup>117</sup> After all, observe Grinspoon and Bakalar, “culturally conservative people are

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<sup>115</sup> See Falcon, *supra* note \_\_\_\_, at 475.

<sup>116</sup> See AKRON, *supra* note \_\_\_\_.

<sup>117</sup> Bob Egelko, *Profitable Pot Stores Facing Closure by U.S.*, SAN FRANCISCO CHRONICLE, October 8, 2011.

fearful of marijuana.”<sup>118</sup> In this connection, Skager has referenced “the legacy of Anslinger ... implanted in the conservative psyche.”<sup>119</sup> As a Harvard economist recently noted, however, “vigorous opposition to the drug war should be a no-brainer for conservatives.”<sup>120</sup> Indeed, the heroic dissents by Justices O’Connor, Rehnquist and Thomas in *Raich* prove that principled conservatives need not fear liberal social policy.

In this light, the Frank/Paul bill<sup>121</sup> is highly symbolic. Co-authored by two otherwise adverse ideological icons of the House, it embodies a broad consensus among liberals and many conservatives on cannabis prohibition.<sup>122</sup> Even if Obama cannot do so during his first term, then, if reelected he should use his 2013 State of the Union address to urge Congress to pass Frank/Paul. If even one State ends cannabis prohibition by initiative in 2012, the force of the President’s appeal will be strengthened. For this reason as well as those presented above, I conclude that citizens are well justified in voting for revisions of the RCTCA in 2012 and beyond, especially if they incorporate the changes advised by Falcon.

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<sup>118</sup> Lester Grinspoon & James B. Bakalar, *MARIHUANA, THE FORBIDDEN MEDICINE* (1997) p. 267.

<sup>119</sup> Rodney Skager, *Revisioning Youth Policy on Marijuana*, in Earleywine, *supra* note \_\_\_\_, at 307.

<sup>120</sup> J.A. Miron, *Drugs and Conservatives Should go Together*, *LOS ANGELES TIMES*, September 29, 2010.

<sup>121</sup> See *Representatives Barney Frank and Ron Paul Want to end Federal Ban on Marijuana, Cede Enforcement to States*. Associated Press, *Washington Post*, June 23, 2011.

<sup>122</sup> Indeed, the consensus is far broader than Congressional bipartisanship. The Global Commission on Drug Policy recently found that the global anti-drug effort has been a total failure, and recommended that governments replace such policies with more humane and effective ones. See Charles M. Blow, *Drug Bust*, *New York Times*, June 10, 2011, and Jimmy Carter, *Call Off the Global Drug War*, *New York Times*, June 16, 2011.

***California’s Proposition 19:  
Selective Prohibition and Equal Basic Liberties***

Martin D. Carcieri

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