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Symposium—Regulating Marijuana at Home and Abroad

Introduction

*Michael Vitiello**

Less than six years ago, McGeorge’s law review hosted a symposium entitled “The Road to Legitimizing Marijuana: What Benefit at What Cost?”¹ One might wonder why McGeorge would host yet another symposium on marijuana so soon after its earlier event. In the intervening few years, the pace of change has accelerated.² Almost certainly, we are on the verge of a sea change in the law governing marijuana for recreational use.³ That is so despite recent headlines indicating that the Trump administration may increase enforcement of marijuana laws.⁴

By way of introduction to this symposium, I want to explain why this year’s law review editors were right to make marijuana the topic of the law review’s symposium.⁵ In doing so, I will explore why a national solution allowing states to regulate marijuana remains likely despite recent statements out of the White House.⁶

I. THE MARCH TOWARDS RECREATIONAL POT

A majority of Americans now favor legalization of recreational marijuana use.⁷ Over 70% favor preventing the federal government from enforcing marijuana laws in states that have legalized recreational use of marijuana.⁸ Given that a majority of Americans live in states that have legalized either medical or

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1. Symposium, *The Road to Legitimizing Marijuana: What Benefit at What Cost?*, 43 U. PAC. L. REV. 1 (2012).

2. See, e.g., Alex Tribou & Keith Collins, *This is How Fast America Changes Its Mind*, BLOOMBERG (June 26, 2015), <https://www.bloomberg.com/graphics/2015-pace-of-social-change/> (on file with *The University of the Pacific Law Review*).

3. See, e.g., *id.*

4. See, e.g., *White House May Boost Recreational Marijuana Enforcement: Spokesman*, REUTERS (Feb. 23, 2017, 12:55 PM), <http://www.reuters.com/article/us-usa-trump-marijuana-idUSKBN1622KB> (on file with *The University of the Pacific Law Review*).

5. Symposium, *Regulating Marijuana at Home and Abroad*, 49 U. PAC. L. REV. 1 (2017).

6. See, e.g., *White House May Boost Recreational Marijuana Enforcement: Spokesman*, *supra* note 4.

7. See Nick Gass, *National Poll: Majority Supports Legalizing Marijuana*, POLITICO (June 6, 2016, 6:51 AM), <http://www.politico.com/story/2016/06/do-people-support-legalizing-marijuana-223928> (on file with *The University of the Pacific Law Review*).

8. See Allapundit, *Quinnipiac Poll: 71% Oppose Enforcing Federal Marijuana Laws in States Where The Drug Is Legal*, HOT AIR (Feb. 25, 2017, 4:01 PM), <http://hotair.com/archives/2017/02/25/quinnipiac-poll-71-oppose-enforcing-federal-marijuana-laws-in-states-where-the-drug-is-legal/> (on file with *The University of the Pacific Law Review*).

recreational marijuana, such a result is not surprising. The shift in sentiment is likely to be long-term as well. Support for legalization of marijuana is far greater among young Americans than their parents' and grandparents' generations.⁹

Consider the cultural shift between, say, 1970 and today. As part of a seminar that I taught on Marijuana Law, I showed students the 1936 cult film *Reefer Madness*.¹⁰ The students who watched the film were as amused with its excesses as, no doubt, many of their peers would be. And yet, many in my generation took films like *Reefer Madness*, *Marihuana*,¹¹ and *Assassin of Youth*¹² seriously.¹³ My current students grew up on a steady diet of marijuana films that made light of the stoner lifestyle, a trend dating back to the 1970s when performers like Cheech and Chong came on the scene.¹⁴ Here is a partial list of shows that my students told me they watched in their teen and college years: films like *Harold and Kumar Go to White Castle*,¹⁵ *How High*,¹⁶ *Friday*,¹⁷ and *Pineapple Express*,¹⁸ and TV shows like *Workaholics*,¹⁹ *Weeds*,²⁰ and *That '70s Show*.²¹

Majority sentiment alone cannot predict legislative change. For example, a significant number of Americans favor stricter gun regulations than currently in place.²² And yet, efforts to tighten guns laws fail far more often than they succeed.²³ Legislating preferences takes more than popular sentiment.²⁴ Gun

9. See Tim Marcin, *Marijuana Legalization 2016: Younger Generation More Permissive Toward Pot, Study Finds*, IB TIMES (May 20, 2016, 11:33 AM), <http://www.ibtimes.com/marijuana-legalization-2016-younger-generation-more-permissive-toward-pot-study-finds-2371858> (on file with *The University of the Pacific Law Review*).

10. REEFER MADNESS (Motion Picture Ventures 1936).

11. MARIHUANA (Roadshow Attractions Inc. 1936).

12. ASSASSIN OF YOUTH (BCM Roadshow Productions 1937).

13. See Philip Bump, *The Long-Term Power of the 'War on Drugs,' in Two Graphs*, WASH. POST (Apr. 14, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/04/14/the-long-term-power-of-anti-pot-propaganda-in-two-graphs/?utm_term=.487f116014fe (on file with *The University of the Pacific Law Review*); see also Jane Susskind, *80 Years After Reefer Madness, Grandpa Still Doesn't Want You Smoking Weed*, IVN (Apr. 15, 2015), <https://ivn.us/2015/04/15/80-years-reefer-madness-grandpa-still-hates-marijuana/> (on file with *The University of the Pacific Law Review*).

14. *Cheech & Chong Biography*, ALLMUSIC, <http://www.allmusic.com/artist/cheech-chong-mn0000106298/biography> (last visited Mar. 8, 2017) (on file with *The University of the Pacific Law Review*).

15. HAROLD & KUMAR GO TO WHITE CASTLE (New Line Cinema 2004).

16. HOW HIGH (Jersey Films 2001).

17. FRIDAY (New Line Cinema 1995).

18. PINEAPPLE EXPRESS (Colombia Pictures 2008).

19. *Workaholics* (Comedy Central).

20. *Weeds* (Showtime).

21. *That '70s Show* (Fox).

22. See, e.g., Jennifer Agiesta & Tom LoBianco, *Poll: Gun Control Support Spikes After Shooting*, CNN POL. (June 20, 2016, 6:49 PM), <http://www.cnn.com/2016/06/20/politics/cnn-gun-poll/> (on file with *The University of the Pacific Law Review*).

23. See *id.*

24. See Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, THE ATLANTIC (Apr. 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/> (on file with *The University of the Pacific Law Review*).

rights organizations, notably the National Rifle Association, demonstrate that effective lobbying and fundraising can beat majoritarian preferences.²⁵

For several years, even when support for legalization of marijuana exceeded opposition,²⁶ marijuana reformers faced numerous obstacles. Law enforcement agencies routinely opposed such changes in the law.²⁷ Parent groups did as well.²⁸ Many marijuana growers and sellers opposed reform—something that remains true today.²⁹ While the National Organization for the Reform of Marijuana Laws (NORML) has lobbied for reform of marijuana laws since its inception in the 1970s, it has lacked the clout, for example, of the NRA.³⁰

Legalization efforts faced two major hurdles. The first truly substantial hurdle was that any use of marijuana is a violation of federal law, under which even minor possession is an offense.³¹ Since the 1930s, the federal government has pursued aggressive enforcement of marijuana law almost without exception.³² The Controlled Substances Act, enacted in 1970, treats marijuana as a Schedule I drug—one for which there is no recognized medical use.³³ After a period when President Carter signaled a willingness to rethink the aggressive federal enforcement of marijuana laws,³⁴ the Reagan administration vigorously pursued the war on drugs.³⁵ Often working with local law enforcement agencies, federal authorities used a variety of strategies to fight that war. Aerial surveillance, followed by police raids, became common during the 1980s³⁶ and

25. See *US Gun Control: What is the NRA and Why is it so Powerful?*, BBC NEWS (Jan. 8, 2016), <http://www.bbc.com/news/world-us-canada-35261394> (on file with *The University of the Pacific Law Review*); Drutman, *supra* note 24.

26. Abigail Geiger, *Support for Marijuana Legalization Continues to Rise*, PEW RES. CTR. (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/> (on file with *The University of the Pacific Law Review*).

27. See, e.g., Lee Fang, *Police and Prison Guard Groups Fight Marijuana Legalization in California*, THE INTERCEPT (May 18, 2016, 8:21 AM), <https://theintercept.com/2016/05/18/ca-marijuana-measure/> (on file with *The University of the Pacific Law Review*).

28. See, e.g., Patrick McGreevy, *Parents Group Rallies Against Proposition 64, Which Would Legalize Recreational Use of Marijuana*, L.A. TIMES (Oct. 4, 2016, 12:12 PM), <http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-parents-group-rallies-against-1475607380-htmllstory.html> (on file with *The University of the Pacific Law Review*).

29. See, e.g., Rory Carroll, *Some California Marijuana Growers are Against Legalization Over Fears of 'Economic Injustice'*, BUS. INSIDER (Oct. 4, 2016, 9:01 AM), <http://www.businessinsider.com/some-california-marijuana-growers-are-against-legalization-2016-10> (on file with *The University of the Pacific Law Review*).

30. *State Lobbying Campaign*, NORML (Feb. 24, 2003), <http://norml.org/component/zoo/category/state-lobbying-campaign> (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*).

31. Controlled Substances Act, 21 U.S.C. §§ 812, 844 (2017).

32. See *Marijuana Timeline*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*).

33. 21 U.S.C. § 812 (2017).

34. *A Brief History of the Drug War*, DRUG POL'Y ALLIANCE, <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0> (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*).

35. *Id.*

36. See Kenneth B. Nunn, *The Drug War as Race War*, U. DAYTON (2002), 405–406 <http://academic>.

continues today.³⁷ Forfeiture laws further incentivized police agencies, especially where the agencies were able to keep the raid proceeds.³⁸ Beyond that, government agents can elect to merely give notice, say, to landlords who rent to marijuana operations, that the government will seek forfeiture of the landlords' facilities.³⁹ Aggressive enforcement of federal law certainly deterred many business investors from entering the industry.

The second hurdle that slowed progress towards legalization follows from the last point. Many proponents of legalization analogize the failures of Prohibition and the War on Drugs.⁴⁰ Similarities exist: enforcement of liquor and marijuana laws was erratic and discriminatory, and hardly stemmed demand.⁴¹ Use of both intoxicants by prominent members of society and politicians demonstrated rank hypocrisy.⁴² But the analogy was somewhat flawed as to whether repeal of Prohibition served as a model for repeal of marijuana laws.

The booze, beer, and wine industry prior to Prohibition was big business—the fifth largest industry in the United States prior to the Eighth Amendment.⁴³ Many producers of alcohol went broke during Prohibition, but the most resourceful and well-financed producers found ways to survive.⁴⁴ Several major wineries, including Beaulieu, Louis M. Martini, Concannon, and Beringer, produced “sacramental” wine for the Catholic Church.⁴⁵ Some beer companies survived by producing a variety of products, including brewer's yeast, malt extract, and near-beer, a malt beverage that contained only a small amount of

udayton.edu/race/03justice/crime09.htm (on file with *The University of the Pacific Law Review*).

37. *Id.* at 405–406; and see Nick Wing, *When Misguided Cops Turn The War On Weed Into A War On Growing Things*, HUFFPOST (Oct. 14, 2014), http://www.huffingtonpost.com/2014/10/14/marijuana-plants-police_n_5948122.html (on file with *The University of the Pacific Law Review*) (showing modern techniques).

38. See, e.g., Lucy Steigerwald, *Asset Forfeiture, the Cash Cow of the Drug War*, VICE (July 15, 2013, 9:27 AM), https://www.vice.com/en_us/article/bad-cop-blotter-asset-forfeiture-the-cash-cow-of-the-drug-war (on file with *The University of the Pacific Law Review*).

39. See Hilary Bricken, *Real Property Forfeiture for Marijuana Tenants: Your Marijuana Leasehold is Key*, CANNA L. BLOG (Sept. 15, 2014), <http://www.cannalawblog.com/asset-forfeiture-why-your-marijuana-leasehold-is-key/> (on file with *The University of the Pacific Law Review*).

40. See, e.g., Norm Stamper, *Prohibition: A Parallel to Modern War on Drugs*, SEATTLE TIMES (Sept. 30, 2011, 4:00 PM), <http://www.seattletimes.com/opinion/prohibition-a-parallel-to-modern-war-on-drugs/> (on file with *The University of the Pacific Law Review*).

41. *Against Drug Prohibition*, AM. C.L. UNION, <https://www.aclu.org/other/against-drug-prohibition> (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*).

42. See Robyn Short, *Politicians, Hypocrisy & the War on Drugs*, NEW BOTTOM LINE, <http://thenewbottomline.com/politicians-hypocrisy-the-war-on-drugs/> (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*); David J. Hanson, *Hypocrisy During Prohibition of Alcohol in the U.S.*, ALCOHOL PROBS. AND SOLUTIONS, <https://www.alcoholproblemsandsolutions.org/hypocrisy-prohibition-alcohol-u-s/> (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*).

43. *The Rise and Fall of Prohibition*, NAT'L CONST. CTR., <http://prohibition.constitutioncenter.org/exhibition.html> (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*).

44. Madeline Puckette, *What Really Happened During Prohibition*, WINE FOLLY (July 2, 2014), <http://winefolly.com/update/prohibition-facts/> (on file with *The University of the Pacific Law Review*).

45. *Id.*

malt liquor.⁴⁶ Similarly, some of the liquor barons were able to stay afloat.⁴⁷ When other factors pointed towards exhaustion with Prohibition, established industry leaders had resources to lobby for the repeal of the Eighteenth Amendment.⁴⁸ (As an aside, once Prohibition ended, those producers were able to resume production fairly easily.)⁴⁹

Until recently, marijuana reformers lacked the resources needed to pass legislation in state and federal legislatures. Drug cartels dominated part of the industry and did not invest in reform efforts.⁵⁰ The transformation of California's Emerald Triangle to a pot-growing epicenter was part of the hippie, back-to-nature movement.⁵¹ Many of those producers are deeply anti-establishment.⁵² Often distrustful of government, many of them lived through the worst of the War on Drugs and found ways to stay in business despite aggressive anti-drug strategies.⁵³ Few producers were interested in investing in legalization efforts.⁵⁴

Two developments over the past several years have changed the prospects for legalization. Again, one starting point was federal law enforcement attitudes towards marijuana laws.⁵⁵ For a good part of its twenty-year history, medical marijuana law in California has been chaotic. Proposition 215 in California, passed in 1995 and the first medical marijuana law in the United States, was intentionally open-ended, an effort for *de facto* legalization of marijuana.⁵⁶ Federal and state law enforcement agencies aggressively pursued even medical marijuana producers from the outset, continuing through former President

46. Nick Greene, *How Breweries Kept Busy During Prohibition*, (Feb. 20, 2014) MENTAL FLOSS, <http://mentalfloss.com/article/55157/how-breweries-kept-busy-during-prohibition> (on file with *The University of the Pacific Law Review*).

47. *Everything You Ever Wanted to Know About Prohibition*, OXFORD UNIVERSITY PRESS BLOG (Oct. 11, 2011), <https://blog.oup.com/2011/10/prohibition/> (on file with *The University of the Pacific Law Review*).

48. *Id.*

49. Greene, *supra* note 46.

50. Olga Khazan, *How Marijuana Legalization Will Affect Mexico's Cartels*, in *Charts*, WASH. POST (Nov. 9, 2012), https://www.washingtonpost.com/news/worldviews/wp/2012/11/09/how-marijuana-legalization-will-affect-mexicos-cartels-in-charts/?utm_term=.efd886160023 (on file with *The University of the Pacific Law Review*).

51. *See, e.g.*, Emily Brady, *How Humboldt Became America's Marijuana Capital*, SALON (June 30, 2013, 1:30 PM), http://www.salon.com/2013/06/30/how_humboldt_became_americas_marijuana_capital/ (on file with *The University of the Pacific Law Review*).

52. Max Daly, *The Stoners' Paradise of Humboldt County Is Dreading Weed Legalization*, VICE (Feb. 25, 2014, 8:00 AM), <http://www.vice.com/read/the-us-weed-growing-town-dreading-weed-legalisation> (on file with *The University of the Pacific Law Review*).

53. *Id.*; *see also* Benjamin Wallace-Wells, *The Truce on Drugs*, N.Y. MAG. (Nov. 25, 2012), <http://nymag.com/news/features/war-on-drugs-2012-12/> (on file with *The University of the Pacific Law Review*).

54. Daly, *supra* note 52; Wallace-Wells, *supra* note 53.

55. *See* Wing, *supra* note 37 (federal authorities use a variety of techniques to fight the war on drugs).

56. *Medical Marijuana Policy in the United States*, HUNTINGTON'S OUTREACH PROGRAM FOR EDUC. AT STAN. (May 15, 2012), https://web.stanford.edu/group/hopes/cgi-bin/hopes_test/medical-marijuana-policy-in-the-united-states/ (on file with *The University of the Pacific Law Review*).

George W. Bush's administration.⁵⁷ Former President Barack Obama promised a more tolerant approach towards state-authorized medical marijuana facilities during his 2008 Presidential campaign.⁵⁸ In 2009, the Justice Department announced its new policy in what has come to be known as the "Ogden memo," a memorandum explaining the government's position and laying out basic ground rules for "legitimate" medical marijuana providers.⁵⁹ A state's compliance with the terms of the memorandum would implicitly give the state latitude in enforcement of its medical marijuana laws.⁶⁰

Attempting to move one step further, legalization advocates in California managed to get Proposition 19 on the ballot in 2010.⁶¹ Proposition 19 would have legalized recreational use of marijuana.⁶² But in truth, it would have done little else to regulate marijuana in the state.⁶³ Perhaps legalization proponents got lucky when California voters rejected Proposition 19—its lack of strict controls might have invited greater federal intervention that evolved during the Obama administration.⁶⁴

Marijuana proponents in Washington and Colorado learned from the failure of Proposition 19. Both states had legalization initiatives, more carefully drafted than Proposition 19, on the ballot during the 2012 Presidential election.⁶⁵ Not only were those proposals more in line with the Ogden memo than was Proposition 19,⁶⁶ but timing the vote on the initiatives to coincide with a Presidential election meant that more young people would vote than in an off-year election.⁶⁷ The Obama administration's response to the passage of those

57. PETER HECHT, WEED LAND 129–31 (2014).

58. *Id.* at 113–14.

59. *Id.* at 12–13; Memorandum from David W. Ogden, Deputy Attorney General to Selected U.S. Attorneys (Oct. 19, 2009), available at <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> (on file with *The University of the Pacific Law Review*) (hereinafter Ogden).

60. Ogden, *supra* note 59.

61. See *California Proposition 19, the Marijuana Legalization Initiative* (2010), BALLOTEDIA, [https://ballotpedia.org/California_Proposition_19,_the_Marijuana_Legalization_Initiative_\(2010\)](https://ballotpedia.org/California_Proposition_19,_the_Marijuana_Legalization_Initiative_(2010)) (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*).

62. *Id.*

63. See *Text of Proposition 19, the "Regulate, Control and Tax Cannabis Act of 2010" California*, BALLOTEDIA, [https://ballotpedia.org/Text_of_Proposition_19,_the_%22Regulate,_Control_and_Tax_Cannabis_Act_of_2010%22_\(California\)](https://ballotpedia.org/Text_of_Proposition_19,_the_%22Regulate,_Control_and_Tax_Cannabis_Act_of_2010%22_(California)) (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*).

64. *Id.*; Tim Dickinson, *Obama's War on Pot*, ROLLING STONE (Feb. 16, 2012), <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216> (on file with *The University of the Pacific Law Review*).

65. See *Amendment 64: Use and Regulation of Marijuana*, CITY OF FORT COLLINS, available at <http://www.fcgov.com/mmj/pdf/amendment64.pdf> (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*); *Initiative Measure No. 502*, WASH. SECRETARY OF ST. (July 8, 2011), available at https://sos.wa.gov/_assets/elections/initiatives/i502.pdf (on file with *The University of the Pacific Law Review*).

66. See *Amendment 64: Use and Regulation of Marijuana*, *supra* note 65; Ogden, *supra* note 59; *Initiative Measure No. 502*, *supra* note 65.

67. *Voter Turnout*, FAIRVOTE, http://www.fairvote.org/voter_turnout#voter_turnout_101 (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*).

initiatives was a critical moment towards what I see as the eventual change in federal law governing marijuana.

An aggressive law enforcement response to Washington and Colorado's legalization efforts would almost certainly have been a major setback for legalization proponents. Few producers would sign up for licenses, few sellers would comply with a host of regulations, and few investors would risk capital if the federal government might shut them down for violating federal law. That did not happen.

Similar to the Ogden memo, a newly published memorandum, authored by Department of Justice Deputy Attorney General James Cole, laid out guidelines for businesses in states that wanted to legalize recreational use of marijuana.⁶⁸ Some critics pointed out that the memorandum seemed to say very little of substance⁶⁹ and, more to the point, that it did not have the full force of law.⁷⁰ A new administration could end the Obama administration's tolerance of marijuana businesses at the stroke of a pen.

Despite those realities, the Cole memo created a brave new world for marijuana businesses. One commentator suggested that James Cole has had a bigger impact on the marijuana industry than any other individual.⁷¹ His memo was a green light to the industries in Colorado and Washington. With some fits and starts, the marijuana business in those states is now a growth industry, and both states are seeing increasing tax revenue from it.⁷²

Encouraged by the Obama administration's tolerance of the industry, marijuana proponents have pushed through legal reforms in a number of other states, including Alaska, California, Maine, Massachusetts, Nevada, and Oregon.⁷³ Like Colorado and Washington, Oregon, which now has an industry up-and-running, has exceeded its early projections on tax revenues.⁷⁴

68. Memorandum from James M. Cole, Deputy Attorney General to All U.S. Attorneys (Aug. 29, 2013), available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (on file with *The University of the Pacific Law Review*).

69. See James Higdon, *Jeff Sessions' Coming War on Legal Marijuana*, POLITICO (Dec. 5, 2016), <http://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501> (on file with *The University of the Pacific Law Review*).

70. *Id.*

71. John Schroyer, *The Famous Marijuana Memos: Q&A with Former DOJ Deputy Attorney General James Cole*, MARIJUANA BUS. DAILY (July 27, 2016), <http://mjbizdaily.com/the-famous-marijuana-memos-qa-with-former-doj-deputy-attorney-general-james-cole/> (on file with *The University of the Pacific Law Review*).

72. Gavin Ekins & Joseph Henchman, *Marijuana Legalization and Taxes: Federal Revenue Impact*, TAX FOUND. (May 12, 2016), <https://taxfoundation.org/marijuana-tax-legalization-federal-revenue/> (on file with *The University of the Pacific Law Review*).

73. Alicia Wallace, *Where is Weed Legal? Map of U.S. Marijuana Laws by State*, THE CANNABIST (Oct. 14, 2016, 12:59 PM), <http://www.thecannabist.co/2016/10/14/legal-marijuana-laws-by-state-map-united-states/62772/> (on file with *The University of the Pacific Law Review*).

74. Nigel Jaquiss, *Oregon's Recreational Cannabis Tax Revenue for 2016 Exceeded One Original Estimate More than Six-Fold*, Willamette Week (Jan. 21, 2017), <http://www.wweek.com/news/2017/01/21/recreational-marijuana-tax-revenue-for-2016-exceeded-one-original-estimate-more-than-six-fold/> (on file with *The University of the Pacific Law Review*).

Not only did the Obama administration give states room to experiment with recreational use of marijuana, but it invited investment in the industry.⁷⁵ Accurate predictions about the size of the marijuana market are difficult to make, but plenty of mainstream media have published stories about the potential growth of the industry.⁷⁶ Naturally, most advisers warn of the risks inherent in investing in the industry,⁷⁷ but that has not stopped capital from flowing in.⁷⁸ Finding stories about creative efforts to invest in the industry is not difficult; for example, one creative entrepreneur is attempting to create marijuana real estate investment trusts to allow producers to invest their capital in creating the product, while investors share the risks and profits by buying the land for production.⁷⁹

As I mentioned, analogizing the legalization of marijuana to the repeal of the Eighteenth Amendment did not make sense—until now. Investors with fists full of cash want into the industry and, no doubt, want to eliminate the risk associated with aggressive enforcement of federal law.

II. OOPS: ALONG COMES JEFF SESSIONS

No one will confuse Attorney General Jeff Sessions with Attorney General Eric Holder, the head of the Department of Justice when David Ogden and James Cole published their memoranda. Many commentators quoted Sessions' hardline stance on marijuana when President Trump nominated Sessions to be Attorney General.⁸⁰ During a Senate hearing on the Obama administration's relaxed

75. *Id.*

76. *See, e.g.*, Debra Borchart, *Six Predictions For The Marijuana Industry In 2017*, FORBES (Dec. 26, 2016, 11:19 AM), <https://www.forbes.com/sites/debraborchart/2016/12/26/here-are-the-top-2017-predictions-for-the-marijuana-industry/#b3649812ad84> (on file with *The University of the Pacific Law Review*); Keith Speights, *Marijuana Investing in 2017: 5 Numbers Everyone Should Know*, THE MOTLEY FOOL (Dec. 11, 2016, 3:02 PM), <https://www.fool.com/investing/2016/12/11/marijuana-investing-in-2017-5-numbers-everyone-sho.aspx> (on file with *The University of the Pacific Law Review*); Tom Anderson, *Investors Seek High Returns in Marijuana Stocks*, CNBC (Oct. 15, 2016, 9:00 AM), <http://www.cnbc.com/2016/10/14/investors-seek-high-returns-in-marijuana-stocks.html> (on file with *The University of the Pacific Law Review*); Paul Cohn, *The Smartest Way To Invest In Cannabis*, FORBES (June 27, 2016, 6:49 AM), <https://www.forbes.com/sites/quora/2016/06/27/the-smartest-way-to-invest-in-cannabis/#272669dc55da> (on file with *The University of the Pacific Law Review*); Siddhi Bajaj, *4 Top Stocks in the Growing Medical Marijuana Industry*, THE STREET (May 18, 2016, 3:40 PM), <https://www.thestreet.com/story/13575404/1/4-best-stocks-in-the-thriving-medical-marijuana-industry.html> (on file with *The University of the Pacific Law Review*); Michelle Castillo, *How to Legally Invest in Pot Companies*, CNBC (June 22, 2015, 10:10 AM), <http://www.cnbc.com/2015/06/22/how-to-legally-invest-in-pot-companies.html> (on file with *The University of the Pacific Law Review*).

77. Some or most of the ones in the previous note do so.

78. Borchart, *supra* note 76.

79. Justin Ho, *Real Estate Investors Help Grow the Medical-Marijuana Business*, MARKETPLACE (Feb. 28, 2017, 5:41 AM), <https://www.marketplace.org/2017/02/28/business/funding-high-costs-pot-business> (on file with *The University of the Pacific Law Review*); *see also* Kathy Fettke, *A Smokin' Hot Pot REIT*, REAL WEALTH NETWORK (Nov. 1, 2016), <https://www.realwealthnetwork.com/learn/news/smoking-hot-pot-reit/> (on file with *The University of the Pacific Law Review*).

80. Nathan Rott, *Trump's Choice For Top Law Enforcer Has Cannabis Proponents Fearing Future*, NPR (Nov. 20, 2016, 3:46 PM), <http://www.npr.org/2016/11/20/502712513/trumps-choice-for-top-law-enforcer-has>

enforcement of marijuana laws, the then-Senator famously said, “[G]ood people don’t smoke marijuana.”⁸¹

More recently, first White House press secretary Sean Spicer and then Attorney General Sessions have made statements creating enormous confusion about the Trump administration’s position on marijuana enforcement. On February 23, 2017, Spicer said, “I do believe you will see greater enforcement of [federal drug laws]. . . .”⁸² Somewhat bizarrely, he also stated that marijuana use leads to increase opioid use.⁸³ Several days later, Sessions told reporters that he is “not a fan of expanded use of marijuana,”⁸⁴ and also falsely claimed that increased marijuana use has resulted in an increase in violent crime.⁸⁵

Obviously, comments like these have shocked legalization proponents,⁸⁶ who are at odds with how to respond to the threat of renewed vigorous enforcement of marijuana laws.⁸⁷ A lot is at stake. Obviously, investors in existing enterprises in Colorado, Washington, and Oregon, where recreational use rules are already in place, may lose their shirts or worse.⁸⁸ Investors looking for investment

cannabis-proponents-fearing-future (on file with *The University of the Pacific Law Review*).

81. Christopher Ingraham, *Senators Held a Hearing to Remind You That ‘Good People Don’t Smoke Marijuana’ (Yes, Really)*, WASH. POST (Apr. 5, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/04/05/senators-one-sided-marijuana-hearing-is-heavy-on-anecdote-light-on-data> (on file with *The University of the Pacific Law Review*).

82. Kevin Liptak, *White House: Feds Will Step Up Marijuana Law Enforcement*, CNN POL. (Feb. 24, 2017, 9:27 AM), <http://www.cnn.com/2017/02/23/politics/white-house-marijuana-donald-trump-pot/> (on file with *The University of the Pacific Law Review*).

83. Suzannah Weiss, *Sean Spicer Thinks Smoking Weed Leads to Opioid Addiction & That’s a Problem*, REFINERY 29 (Feb. 26, 2017, 11:30 AM), <http://www.refinery29.com/2017/02/142670/sean-spicer-weed-opioid-addiction> (on file with *The University of the Pacific Law Review*). He made that statement at a time when a body of scientific evidence suggests that opioid addicts are able to get pain relief by using marijuana.

84. Mark Hensch, *Sessions: I’m ‘Not a Fan’ of Marijuana Expansion*, THE HILL (Feb. 27, 2017, 8:34 PM), <http://thehill.com/homenews/administration/321483-sessions-im-not-a-fan-of-marijuana-expansion> (on file with *The University of the Pacific Law Review*).

85. See, e.g., Shane Dixon Kavanaugh, *Jeff Sessions Peddles Hysteria To Attack Legal Marijuana*, VOCATIV (Feb. 28, 2017, 5:16 PM), <http://www.vocativ.com/406663/jeff-sessions-hysteria-legal-marijuana/> (on file with *The University of the Pacific Law Review*); Debra Borchardt, *Jeff Sessions Cites Increased Violence As He Once Again Threatens The Marijuana Industry*, FORBES (Feb. 28, 2017, 8:59 AM), <https://www.forbes.com/sites/debraborchardt/2017/02/28/sessions-cites-increased-violence-as-he-once-again-threatens-the-marijuana-industry/#68fc33471fe3> (on file with *The University of the Pacific Law Review*).

86. See, e.g., Steve Elliott, *Washington State Vows To Fight Back Against Trump Marijuana Crackdown*, TOKE SIGNALS (Feb. 24, 2017), <https://tokesignals.com/washington-state-vows-to-fight-back-against-trump-marijuana-crackdown/> (on file with *The University of the Pacific Law Review*); Alicia Wallace, *Trump Administration Puts Recreational Marijuana in Crosshairs*, THE CANNABIST (Feb. 23, 2017, 2:14 PM), <http://www.thecannabist.co/2017/02/23/sean-spicer-marijuana-medical-recreational-trump-administration/74255/> (on file with *The University of the Pacific Law Review*).

87. See Patrick McGreevy, *California Officials and the Marijuana Industry Prepare to Fight a Federal Crackdown*, L.A. TIMES (Feb. 25, 2017, 12:05 AM), <http://www.latimes.com/politics/la-la-pol-ca-federal-pot-crackdown-response-20170225-story.html> (on file with *The University of the Pacific Law Review*).

88. See Sean Williams, *Here’s What a Trump Presidency Means for Marijuana*, THE MOTLEY FOOL (Nov. 9, 2016, 3:15 AM), <https://www.fool.com/investing/2016/11/09/heres-what-a-trump-presidency-means-for-marijuana.aspx> (on file with *The University of the Pacific Law Review*).

opportunities must be holding onto their wallets until the Trump administration clarifies its position on enforcement of marijuana laws.

I would certainly not advise someone to invest in the marijuana industry at this point, unless the investor was a serious risk-taker with plenty of spare cash. But I doubt that the Trump administration will derail legalization of marijuana. That is so for a number of reasons. First, Trump himself made numerous statements on the campaign trail that are at odds with Sessions.⁸⁹ There, he indicated that he saw marijuana regulation as within the purview of the states.⁹⁰ Further, some signals out of the White House indicate that the administration will leave states free to administer medical marijuana laws.⁹¹ During his confirmation hearing, even Sessions told Colorado Republican Senator Cory Gardner that enforcing marijuana laws in states where recreational use is legal would not be a Justice Department priority.⁹²

Second, do a quick Google search for stories about statements made by Spicer and Sessions. No longer is it only *High Times* and other pro-marijuana media that are commenting unfavorably on those statements. Far more mainstream media and *pro-business* media have criticized the administration.⁹³ Undoubtedly, mainstream media representatives view the emerging majority of Americans as favoring legalization of recreational marijuana.

Third, as indicated above, more than half of Americans live in states where some form of marijuana is legal.⁹⁴ Albeit, most of the states that have legalized marijuana for recreational use are blue states, which limits the political risk to a Republican administration. But legislators in those states will receive an earful from constituents who voted in favor of recreational marijuana laws.⁹⁵ In addition, while few elected officials in states that passed recreational use laws

89. Compare Chris Nichols, *TRUE: During Campaign, Trump Pledged to Leave Marijuana Legalization Up to States*, POLITIFACT (Feb. 28, 2017, 6:00 AM), <http://www.politifact.com/california/statements/2017/feb/28/gavin-newsom/true-campaign-trump-said-states-should-decide-legal/> (on file with *The University of the Pacific Law Review*), with Ingraham, *supra* note 81.

90. Nichols, *supra* note 89.

91. See Jennifer Kaplan, *Trump Administration Desire to Separate Recreational Weed from Medical is Impractical at Best*, THE CANNABIST (Mar. 3, 2017, 2:49 PM), <http://www.thecannabist.co/2017/03/03/trump-administration-marijuana-policy-recreational-medical/74852/> (on file with *The University of the Pacific Law Review*).

92. Reid Wilson, *Confusion Mounts over Trump Administration's Stance on Marijuana*, THE HILL (Feb. 28, 2017, 4:31 PM), <http://thehill.com/homenews/state-watch/321639-confusion-mounts-over-trump-administrations-stance-on-marijuana> (on file with *The University of the Pacific Law Review*).

93. See, e.g., Allison Kite, *Some in Marijuana Industry Fear Jeff Sessions Will Hinder—or Reverse—Legalization Trend*, WALL STREET JOURNAL (Nov. 21, 2016, 1:30 PM), <http://blogs.wsj.com/washwire/2016/11/21/marijuana-industry-fears-jeff-sessions-will-hinder-or-reverse-marijuana-legalization/> (on file with *The University of the Pacific Law Review*).

94. Wallace, *supra* note 72.

95. Wilson, *supra* note 92.

backed such legislation, many have recognized the benefits for their states, including significant increased tax revenues.⁹⁶

Fourth, and closely related to the previous point, not only will legislators hear from their constituents, but they will hear from investors, ones with enough capital to be able to lobby for favorable legislation.⁹⁷ Even with recent statements from Spicer and Sessions, the administration has enough wiggle room to adopt policies that will allow the steady march towards legalized marijuana.

Fifth, the most plausible outcome is legislation that gives states that want to legalize recreational use the ability to do so. “Cooperative federalism”⁹⁸ taps into traditional conservative arguments about states’ rights,⁹⁹ giving political cover for many politicians who may otherwise be hesitant to support legislation legalizing marijuana.

III. WHERE DOES THAT LEAVE US?

I return to my opening comments: why is this symposium timely?

When *The University of the Pacific Law Review* last considered the implications of legalizing marijuana, the symposium editors were prescient that legalization was a realistic possibility. Since then, the pace towards legalization increased dramatically. This pace is the result of changes signaled from the Obama administration, and from action in states now authorizing recreational use of marijuana.¹⁰⁰ As a result, policy makers face a new world of challenges.

As I have argued elsewhere, the debate whether to legalize marijuana is now hackneyed, with little new in that argument.¹⁰¹ Now is the time to focus on the kinds of hard choices that policy makers must make to assure that a post-legalization world is the one that limits risks and social costs and can produce on promises made by legalization advocates.¹⁰² Those choices are remarkably complex.

An indication of that complexity is the fact that now at least a dozen law schools around the country offer courses in marijuana law.¹⁰³ One of our

96. *Id.*

97. See *Marijuana Lobby Grows As Legalization Spreads Throughout Country*, ENTREPRENEUR (Feb. 28, 2017), <https://www.entrepreneur.com/article/289831> (on file with *The University of the Pacific Law Review*).

98. See generally Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015).

99. *Id.*

100. See Tribou & Collins, *supra* note 2.

101. Michael Vitiello, *Why The Initiative Process Is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215*, 43 U. PAC. L. REV. 63, 63–64 (2011).

102. See, e.g., Michael Vitiello, *Legalizing Marijuana and Abating Environmental Harm: An Overblown Promise?*, 50 UC DAVIS L. REV. 773 (2016).

103. Karen Sloan, *How’s This for Higher Education?*, NAT’L L. J. (Dec. 22, 2014), <http://www.nationallawjournal.com/id=1202709592444/Law-Schools-Firing-Up-Marijuana-Law-Classes?slreturn=20170211223612#ixzz3MGEPZJCW> (on file with *The University of the Pacific Law Review*).

panelists, Professor Rob Mikos, recently published the first marijuana law casebook with a major legal publisher.¹⁰⁴ Other publishers have projects in the hopper—and not only are scholars aware of the rich field that is developing, but lawyers are now exploring the growing area of practice as well.¹⁰⁵ Indeed, another one of our panelists, Hanspeter Walter, is a shareholder in a law firm that publicly announced its marijuana law division.¹⁰⁶

This symposium explores some of those complex issues. What can policy makers learn from other countries that have legalized marijuana? What are the implications for our relationship, say, with Mexico, as both countries reform their marijuana policies? What are the United States' obligations under international treaties regulating illegal drugs?

What challenges does the current situation present for the marijuana industry? How can entrepreneurs manage business risks and what are those risks? Can one insure her investments?

In the enthusiasm to legalize marijuana, have advocates overstated the benefits and understated the social costs? What about water usage and marijuana production? While California's drought has abated for now, what are long term environmental impacts of legalization? And what are the health costs (and benefits) of marijuana legalization and use?

These are some of the issues explored in this symposium. Read on. I suspect that you will share my view that we face amazing and uncertain challenges, but that we are better off for plying the area, hopefully, to avoid too many unforeseen consequences.

104. See Robert Mikos, *New Textbook on Marijuana Law, Policy, and Authority*, MARIJUANA L., POL'Y & REFORM (Feb. 3, 2017), http://lawprofessors.typepad.com/marijuana_law/current-affairs/ (on file with *The University of the Pacific Law Review*).

105. See, e.g., *National Cannabis Bar Association*, NAT'L CANNABIS B. ASSOCIATION, <http://www.canbar.org/> (last visited Mar. 11, 2017) (on file with *The University of the Pacific Law Review*).

106. *Big Sacramento Law Firm Announces Cannabis Practice*, SACRAMENTO BUS. J. (Oct. 26, 2016, 3:44 PM), <http://www.bizjournals.com/sacramento/news/2016/10/26/bigsacramento-law-firm-announces-cannabis-practice.html> (on file with *The University of the Pacific Law Review*).